ADVISORY COMMITTEE
ON
CRIMINAL RULES

Philadelphia, PA
September 24, 2019

AGENDA

Meeting of the Advisory Committee on Criminal Rules
September 24, 2019
Philadelphia, PA

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- Introduction of new members

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ADVISORY COMMITTEE ON CRIMINAL RULES

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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
Donald W. Molloy Chair	D	Montana	Chair:	2015	2019
Brian A. Benczkowski*	DOJ	Washington, DC		----	Open
James C. Dever III	D	North Carolina (Eastern)		2014	2020
Donna Lee Elm	FPD	Florida (Middle)		2017	2020
Gary Feinerman	D	Illinois (Northern)		2014	2020
Michael J. Garcia	JUST	New York		2018	2021
Denise Page Hood	D	Michigan (Eastern)		2015	2021
Lewis A. Kaplan	D	New York (Southern)		2015	2021
Orin S. Kerr	ACAD	Washington, DC		2013	2019
Raymond M. Kethledge	C	Sixth Circuit		2013	2019
Bruce J. McGiverin	M	Puerto Rico		2017	2020
Catherine M. Recker	ESQ	Pennsylvania		2018	2021
Susan M. Robinson	ESQ	West Virginia		2018	2021
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee		2007	Open

Principal Staff: Rebecca Womeldorf 202-502-1820

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RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Judge Frank M. Hull	*(Standing)*
	Judge Pamela Pepper	*(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Judge William J. Kayatta, Jr.	*(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq.	*(Standing)*
	Judge A. Benjamin Goldgar	*(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Judge Jesse M. Furman	*(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Judge Carolyn B. Kuhl	*(Standing)*
	Judge Sara Lioi	*(Civil)*
	Judge James C. Dever III	*(Criminal)*

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Molly T. Johnson, Esq. *(Bankruptcy Rules Committee)* Senior Research Associate	**Dr. Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate
Timothy T. Lau, Esq. *(Evidence Rules Committee)* Research Associate	**Tim Reagan, Esq.** *(Rules of Practice & Procedure)* Senior Research Associate

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ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES (DRAFT)
May 7, 2019 | Alexandria, VA

I. Attendance and Preliminary Matters.

Judge Donald W. Molloy, Chair
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGiverin (by telephone)
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Cathie Struve, Reporter, Standing Committee (by telephone)
Professor Daniel R. Coquillette, Consultant, Standing Committee

And the following persons were present to support the Committee:

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

Judge Molloy called the meeting to order and introduced two new members: Judge Jesse Furman, the new Liaison from the Standing Committee, and Judge Michael Garcia from the New York Court of Appeals (attending in person for the first time). Judge Molloy was pleased to report that when his own term expires this year, Judge Kethledge will be taking over as chair of the Criminal Rules Committee.

The Committee unanimously approved minutes of the October 2018 meeting subject to typographical corrections brought to the reporters' attention.

Ms. Womeldorf reported on the progress of Rules amendments. The Criminal Rules Committee had no action items at the last Standing Committee or Judicial Conference Meetings, and there are no rules out for public comment from this Committee presently. New Rule 16.1 was officially adopted by the Supreme Court and will become law if there is no contrary action by Congress.

II. Cooperators Report.

Judge Molloy asked Judge Kaplan to report on the activities of the Task Force on Protecting Cooperators. Judge Kaplan reminded the Committee that the Task Force delivered its report to Director Duff in two parts. The first was about potential procedural changes within the Bureau of Prisons (BOP), but the meeting to discuss implementation was cancelled because the BOP director resigned. The Department is going forward with the recommendations, and Judge St. Eve says they are moving things along. The second part involved changes to CM/ECF that would make less readily available information from which individuals could infer who was cooperating. There is a real tension between protecting the lives and well-being of cooperators on the one hand and on the other hand ensuring transparency and accountability. Director Duff referred this part of the report to CACM last spring. Unfortunately, it is not as simple to implement as the Task Force had hoped, and a great deal has to be done to CM/ECF system. There is no specific time line now, but it is moving forward.

Mr. Wroblewski said it had been a pleasure working with the Task Force. The Department received the recommendations, and he and Judge St. Eve speak regularly about them. With the Director and the Deputy Attorney General the Department reviewed all of the recommendations to see what we could do. Most are underway. For example, there has been a change in the internal regulations regarding discipline. The Department is now receiving data from the Sentencing Commission, which is creating the data base that was called for. The most difficult recommendation to implement is putting a secure room in every BOP facility where inmates can review documents that would be contraband if possessed individually. The logistical and challenges will require some time. The Judicial Conference Criminal Law Committee created a subcommittee to handle BOP issues, which meets every time the Criminal Law Committee is meeting. Their next meeting is June 5. Judge St. Eve, the Director of BOP, the General Counsel and others will be there. So it is moving ahead.

Professor Beale asked if Rule 49.2 (a rule that would address access to cooperation information through PACER) was still on hold, as CACM had previously requested. Judge Kaplan responded that it is still on hold.

III. Rule 43.

Judge Molloy asked Judge Hood to present the report of the Subcommittee on Rule 43. He noted that he had appointed the Subcommittee in response to a Seventh Circuit decision, and charged it to look into modifying the rules of presence at pleas and sentencing. He praised the reporters for their memo on the topic. After a lengthy phone conference, the Subcommittee concluded there was no need to change the rule. Judge Molloy noted that at a meeting of the Judicial Conference earlier this year, judges in larger districts in border states urged the Committee to change the rule, citing improved technology. There are judges, particularly in Texas, who do not want to travel to take pleas or sentence. Judge Molloy noted that the Subcommittee was consulted about whether there should be another conference call given this new input. The Subcommittee decided not to revisit its decision.

Judge Hood began by thanking the Subcommittee members and pointing out the discussion among Committee members about this topic in the minutes from the last meeting. She reported that the Subcommittee had reviewed the case law on whether the defendant and the judge had to be present at the plea and the sentence, and the Committee's own consideration of this issue in the past. The general consensus was that it was very important for both the defendant and the judge to be present at both the plea and the sentence, and that an amendment was not warranted. When Judge Molloy related the remarks that he had received from judges who praised the technology and said that video conferencing would really help in their districts, we polled the Subcommittee to ask if the members wanted to reconsider. They did not wish to do so. The Subcommittee recommends no change to the current rule.

Professor Beale summarized the reporters' memo, stating that the requirement in Rule 43 that the defendant be present is very clear at the plea stage, though a little less clear at the sentencing stage. Courts have read the sentencing provision narrowly in light of legislative history, so there may be a little better argument that video conferencing is currently allowed at the sentencing stage if the defendant has gone to trial or been present at the plea. But Rule 43 does require physical presence, and the Committee has discussed why physical presence is so important. If you've been in a courtroom, you know the physical presence of both the judge and defendant makes a huge difference. There were discussions at our earlier meeting about how the judge might be able to smell liquor, to see what the defendant's hands were doing, and so forth. Some of the defense lawyers emphasized that anything that separates the defendant from the court is a bad idea. The plea is the big waiver of all constitutional trial-related rights, and sentencing is the most human things that judges do. After discussing all of the policy arguments, the Subcommittee recommended no change in the rule.

The memo also discusses workarounds. Many members thought that Bethea (involving a defendant whose bones would break if he traveled) was a sympathetic case for which there should be a solution. The reporters' memo discusses some workarounds for these exceptional

situations. But the Subcommittee did not think the rules should be changed for a small number of cases because of concerns about the slippery slope and the need to maintain that line as a policy matter. Professor Beale noted that the feedback from the Texas judges who want to use video technology could be seen as an example of the slippery slope concern. If we made an exception from the requirement of physical presence for this one situation, there would be pressure to do it in more and more cases.

The reporters' memo described various ways to deal with the rare compelling case, including reducing the charge down to a misdemeanor, using a DPA, or a Rule 11(c)(1)(C) plea with a certain sentence and an appeal wavier. The memo also includes a discussion of whether the procedure in Bethea was indeed a fatal error, or plain error analysis would have allowed the case to be affirmed.

Professor King agreed and reiterated that there are two main reasons that the Subcommittee is recommending that no action be taken at this time. First, there will be constant pressure on defendants and parties from judges to expand any exception to the requirement of physical presence at plea or sentence. Second, there are many other ways to avoid reversing convictions and sentences as a result of agreed-upon solutions to this problem. So the Subcommittee decided that at this time changes would not be warranted.

Professor Beale noted that the Committee's own records reflect that pressure from judges. Judge Walter renewed his request to sentence remotely, and the judges in one Texas district want to use video conferencing to avoid frequent travel.

Although there will be very, very, seriously ill people in the system, there are other ways to deal with that problem. Judge Hood referred to the pages of the report referring to the workarounds. She observed that there may be some problems with particular solutions in certain cases (such as a defendant who does not wish his case to be transferred). Even so, the workarounds have been effective in some cases when a defendant is too ill to come to court.

Judge Campbell noted his high regard for Judge Lee Rosenthal, who was one of the judges who urged the Committee to reconsider this issue. She has a unique problem, because her district has thousands of § 1326 defendants (charged with illegal reentry) and hundreds of miles between courts. So either the judges must travel, or the marshals have to transport many people to the judges. (Judge Campbell noted his court has some of the same problems in Arizona, but not to the same extent.) The resolutions in those cases are quick and they produce relatively small sentences. So those cases probably present the strongest argument you could make for allowing video conferencing. Judge Campbell's view (and he suspected the view of the Standing Committee as well), is the same as this Committee: we just do not want to open that door. One of the hardest things district judges do is face the defendant and look him in the eye as we sentence him. We should have to do that. It brings a seriousness and a soberness to the process

that is good even though it is hard, and even though some judges have to travel to do it. So Judge Campbell did not see any issues with the Subcommittee's recommendation, and he foresaw no pushback from the Standing Committee. He said he really does think this is a door we want to keep closed because of the benefits of in-person pleas and sentences.

A member noted that the workarounds should be effective, supported the Subcommittee's recommendation, and expressed concern that any change just for border districts would raise equal protection issues.

Another member agreed with the decision not to amend the rule, but raised a mild cautionary note on the workaround of an appellate waiver in the plea agreement. In Chicago, there is an exception for the sentence and the validity of the plea agreement that is not waived. There is some authority that even in cases where the appeal of the sentence is waived, a defendant is not allowed to waive the validity of the plea agreement. So it is conceivable that in some jurisdictions this particular workaround would not be foolproof. That said, he agreed with the comments not to amend the rule. Judge Molloy also noted the Supreme Court's recent opinion in Garza, finding it was a violation of the Sixth Amendment right to effective assistance for counsel not to file an appeal even though there was an appeal waiver.

Judge Molloy asked if anyone on the Committee disagreed with the Subcommittee's recommendation. Receiving no response, he stated that the record will show the matter has been seriously considered and the Committee has elected not to alter the rule. He noted he would get in touch with the judges and let them know of the Committee's decision.

III. Rule 40.

Judge Molloy turned to the suggestion to amend Rule 40, and he asked Judge McGiverin to brief the Committee on the issue.

Judge McGiverin apologized for participating by phone due to his father's health. He noted the reporters' memo provides all the background. Generally, this issue arises when a defendant on pretrial release is supervised in a different district (District B) than the prosecuting district (District A), and is brought before the magistrate judge in District B because the defendant has allegedly violated the conditions of release. There is general consensus among the magistrates consulted and the reporters that the rule is not clear in at least two regards.

First, Rule 40(d) says to apply the procedures in Rule 5 "as applicable." This raises the issue of what parts of Rule 5(c)(3) actually apply. The issue can be resolved by careful analysis, but there are some differences of opinion arising from the lack of clarity.

The other area of possible confusion concerns Rule 40(c), which seems to allow the magistrate judge in the arresting district to alter the release order that was issued by the

magistrate judge in the prosecuting district. There is a possible conflict between that and 18 U.S.C. § 3148(b), which appears to require the defendant to be brought back to the prosecuting district and would also severely limit whatever could be done by the magistrate judge in the arresting district. So the question is what (if anything) does Rule 40(c) apply to, and what does it allow the magistrate judge in the arresting district to do. Does it allow for an order of temporary detention? For release pending final revocation hearing in the prosecuting district?

The final point is that this situation rarely arises. But it does from time to time, and practically every magistrate judge that Judge McGiverin consulted thought the rule is unclear and probably could be clarified pretty easily.

Professor Beale noted the report speaks for itself on the specific issue that Judge Barksdale raised. And as explained in footnote 1, it is not entirely clear what the statute requires. Neither the rule or statute is a model of clarity. So what should be done where? Would it be desirable for the judge in District B to have more authority to do more things? Some judges have read it as allowing for some greater authority. Judge Miller, who served on the Committee that restyled Rule 40, thought that it allowed for a different balance of authority. And in addition to the question how much should be done in District B, the arresting district, there is the issue of whether these technical questions could be answered more clearly in the rule. So there are both technical questions and policy questions which presumably we would consider if we took up Rule 40. The Committee would need to come to its own determination about whether the statute would allow more to be done in District B.

Professor Beale acknowledged that Judge McGiverin was incredibly helpful, and that his advice reflected not only his individual experience, but also input from the many court personnel and other magistrate judges he consulted. There was agreement that this is not a big problem, and it is not urgent. However, people did say the rule was not clear, so each judge has to figure out how to interpret the "as applicable" language. Because these questions arise infrequently, judges end up reinventing the wheel. So even though it is not a big problem, it would be nice to fix.

Judge McGiverin agreed. The situation doesn't arise very often, and Rule 40 really doesn't help that much. In his cases, he provides more process to defendants than the rule requires. There is a difference of opinion as to what the magistrate judge in District B is allowed to do, and he thought it possible that they are allowed to do more than his reading of the statute. Some magistrate judges believe they have the authority to temporarily release the defendant pending the revocation hearing in the prosecution district, for example. Rule 40 could be revised to parallel Rule 32.1, which specifies the procedures for revoking or modifying supervised release rather than providing a cross reference to other rules, so that the magistrate judge could look at one Rule and know what to do.

Judge Molloy asked for views on whether the Committee should take up these issues.

One member said this situation doesn't come up that much, so we do not need to do anything. But the fix might be simple if we chose to do something.

Another member agreed it doesn't come up that much, though the frequency depends on whether there are multiple districts and on the distances between courts. This member often deals with defendants who were prosecuted in a neighboring district that is right next door. If the probation officer asks for an arrest warrant, it will not be months before the defendant goes back to the prosecuting district. He will be there the next day. The member thought the rule and statute are sufficiently clear that when it does come up, it seems straightforward. It is theoretically possible, if an absconder violates, to have a detention hearing in one district where the magistrate orders the person released. If that happened, the AUSA would seek a stay, probably get it, and the next morning that person would be brought to the prosecuting district to have a hearing about compliance. So at the end of the day we don't need to change the rule.

Another member agreed the situation is not common, but thought it was more complicated. One of the questions is what the reference to the detention order is. The member looked up § 3142 referring to detention for appearance, but there is nothing prohibiting the judge in District B to alter or amend. So it is more complicated, but it doesn't come up much.

Several additional members agreed that this is not enough of a problem to address at this time. One suggested that perhaps the conditions of the release order allowing defendants to be supervised in a different district could set forth what happens if they are picked up for a violation. That is perhaps something the courts could do. In practical terms, what happens now is that the defendant appears before a magistrate judge, and then they ship him back where the proceedings occur.

One member expressed a different view, emphasizing that the Committee is being asked to clarify the rule, not change process or policy. This would be an easy fix. When there is a relatively easy fix, and there is a rule with significant ambiguities, the member thought it might be responsible for the Committee to address those.

Professor Coquillette remarked that he agreed with the majority. Fiddling with rules puts a burden on the bar to keep track of what we are doing. Unless there is a real reason to do something, he favored a conservative approach.

Judge Campbell added that every Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules.

Judge Molloy decided there was no need to send this to a subcommittee, and Judge Kethledge agreed.

IV. Rule 16

Judge Kethledge, Chair of the Subcommittee on Rule 16, reported on the mini-conference on the discovery of expert reports and testimony that had been held the day before the Committee's meeting. The Committee had received proposals to amend Rule 16 so that it more closely follows Civil Rule 26 in the disclosures for expert witnesses. The Department of Justice has been adamantly opposed to that suggestion. The Committee had asked the Department at the last meeting to give us a proposal that they could live with. They've had some intervening events that made it hard for them to do that, including the government shutdown and the changeover of the deputy attorney general, so they did not have a proposal at the mini-conference. We had a very strong group present, including six or seven defense practitioners and five or six people from the DOJ. The defense practitioners and most of the Department of Justice people had significant personal experience with these issues and had worked with experts. We broke the discussion down into two parts: (1) what concerns or problems do you see with the current rule, and (2) what suggestions do you have to improve the rule. It was a very candid and vigorous exchange. It was a very impressive group that came and gave us their thoughts.

The defense participants identified two principal problems with the rule. First, Rule 16 has no timing requirement. It says only that a summary must be provided. Some practitioners described receiving summaries a week or even the night before trial if the government decided at the last minute to use a witness. This obviously impairs the ability of the defense to prepare for trial. Second, the government disclosures don't include sufficient detail. One example was a statement that the expert had examined the cell phone, had extracted data, and would opine that the data show the defendant is guilty. The defense participants felt the summaries they were receiving were too conclusory and vague to allow them to prepare to cross examine the witness. The Department of Justice representatives, in contrast, said they have not heard of any problems with the rule, though they talk regularly with defenders. They said these issues are not litigated, and there are not relevant appellate decisions. (As an aside, Judge Kethledge noted that as a court of appeals judge he did not find the absence of appellate decisions indicative of anything relevant here.) The Department's representatives did not sense any problem.

Judge Kethledge noted his impression that there are significant variations among districts. Andrew Goldsmith has done a salutary job of training in the 93 districts and made good progress, but still there is a lot of variation on when an individual AUSA is providing a summary and what that summary says. And people procrastinate. Other things with deadlines are addressed first, and things with no deadline tend to be pushed farther back and produced closer to the time of trial. Notwithstanding good practices in some places, there was variation. He also noted Judge

Campbell had made a helpful comment informally, which was that we have to write rules for the weaker performers. The stronger ones seem to have pretty good practices. But the weaker ones are doing this really conclusory name, rank, and serial number type of summary. There is a sense that we need to reform the rule to bring that performance up to the level to allow defense counsel to prepare adequately for trial

When the discussion turned to suggestions about how to address the problems, we made significant progress. Everyone had different perspectives or concerns, but everyone was working toward the best practice for the interests of justice. We got to the point where there was a willingness and open mindedness to acknowledge fair points on both sides. Judge Kethledge outlined his sense of the common ground. On timing, there are two paths. First, there was interest in saying that the summaries need to be produced within 45 days of trial. That date could be adjusted for good cause by the district court, but the default would be 45 days out to provide the summary. Alternatively, we also talked about a different formulation – "sufficiently ahead of trial to allow defense counsel to adequately prepare"– borrowed from a pending amendment to Rule 404(b). That is more flexible, and there was a sense that it would eliminate many for good cause shown motions that would routinely be filed by the government. There seemed to be some approval of that from both sides.

As to the content of the summaries, Judge Kethledge thought Mr. Goldsmith had said he would be ok with adopting a statement from Rule 26 that the summary must be a "complete statement" of the expert's opinion. Part of the defense complaint was that the experts testify beyond the scope of the summary. For example, one defense attorney described a case where the defense was told a witness would be testifying about the way things happen in the drug trade. But at trial, the witness started talking about the usage of drugs and what drug users do. The topic of usage had not been not disclosed before trial, so the witness was going beyond the scope of what had been disclosed. A complete statement requirement could address that problem. The government could potentially supplement later. Expert testimony is sometimes under development or fluid up until the time of trial. But the statement ought to be complete at least as to the time of production, and if an expert's opinion changes you have to produce the changes sufficiently in advance of trial so the defense counsel can prepare. Some things are not controversial at all: providing the qualifications of the expert and a list of the expert's prior testimony for the previous four years (both of which are in Civil Rule 26). Recalling his days in practice, Judge Kethledge said that when he cross examined experts he found that to be enormously useful. It is a very powerful tool for truth. Some experts will say anything anytime, and if you can reveal that in a cheerful way in front of a jury it gives them a very useful perspective on that expert.

Judge Kethledge said the mini-conference had produced something that the Subcommittee could incorporate into proposed language. His goal is bring a proposed amendment for Rule 16 for expert disclosures to the full Committee for a vote in September.

Mr. Wroblewski said he thought the mini-conference was helpful, and a credit to everyone involved. It was a very civil discussion that shed a lot of light on the issues. The big success for him is that it helped define the problem. The Department came to the mini-conference saying there was no problem because the problem had not been clearly defined. The mini-conference revealed that defense lawyers agree this is not a problem about forensics or expert overstatement. If you broaden discovery you are not going to address overstatement. It is not about knowing the qualifications of the expert. It is not about prior testimony, although you may want to have a list anyway. It also revealed tremendous confusion about the line between lay and expert opinion testimony, but that is not about discovery. The problem defined as he heard it was timing and sufficiency of the notice. It was a major success to come to agreement about a definition of the problem.

The discussion also revealed that, given the practicalities of criminal practice across the wide range of cases that are in federal criminal justice system, the solution cannot be one size fits all. It is tempting to want to put a number of days before trial. But there are cases that live within the 70-day Speedy Trial Act (though not most of them), and our rules must be adapted to fit those cases. If we had a rule requiring notice 45 days before trial, experts would have to be identified immediately for most cases that would eventually end up in guilty pleas, resulting in unnecessary costs. At the same time he agreed with Judge Kethledge that improvements can be made, and the Department will support those improvements. Judge Kaplan's and Professor Capra's suggestion about timing was something he thought the Department will be able to support. Getting rules regarding sufficiency will be hard. When you look at the Civil Rule 26 and the language about opinions and bases, will "complete" opinion make a big difference? He was not sure, and he anticipated that if it were circulated among U.S. Attorneys around the country that there would be significant concern about knowing what that means. It would be very helpful to emphasize that those opinions can be supplemented beyond the initial disclosure.

Mr. Wroblewski anticipated that the Department would have training this year with Andrew Goldsmith and Donna Elm, and it will be required training for every one of the 6000 prosecutors around the country. He said Mr. Goldsmith is committed to doing that. Since 2010 every Justice Department prosecutor has been required to go through 2-4 hours of discovery training every year. Mr. Goldsmith does most of that, and he is committed to working with Ms. Elm to make sure this issue is addressed.

Finally, Mr. Wroblewski noted the very interesting discussion about reciprocity, and that the rule can and should include reciprocity. He noted one of the really candid things that came out at the mini-conference was that a rule change on this point will not matter. Despite the rules that currently require pretrial disclosure to the government of a scientific report that is going to be used by the defense in their case and chief, the defense bar believes that they don't have to disclose that until minutes before the person takes the stand. That is the Department's experience about reciprocity. It is in the rule currently, and as we make changes, it should be left

in. But the candid view of the defense attorneys was it doesn't matter. They are not going to turn over anything any earlier than they absolutely have to.

Judge Molloy credited Judge Campbell with suggesting the mini-conference approach, which has really helped identify the real problems and narrow the scope of what the Rules Committees are being asked to do. There were two proposals provided to the participants, and the one submitted by a former member of this committee might be grounds for starting. DOJ is going to make some effort, given the change in administration, to try and get on board with something acceptable to them. The plan to get it on the agenda for September is good.

Professor Beale added that some of the defense participants explained the special difficulties faced by CJA lawyers who learn belatedly that an expert will be presented, or that an expert's testimony will go into another area. It takes 30 days for a CJA lawyer to get approval to hire an expert. Then they have to find and hire the expert. If it is a short timeline it will be more expensive to hire the expert, and if you are someplace like West Virginia where the experts may not be available locally, that is an even greater problem. So having people from different practice areas was extremely helpful, and going forward we will be able to draw on those folks and others. She also thanked everyone who helped us identify these experts. We absolutely needed them in the room.

Judge Campbell said that as he listened to these stories of last-minute disclosures or very vague disclosures, he was asking himself where are the judges in these cases? But what the defense attorneys then said made sense. If they try to go to the judge for help, there is nothing they can point to in the rule to say this is late, or that they don't have time to respond. So it would be helpful to have something in the rule, even if we don't have a hard date, to have something like the 404(b) language that says it has to be sufficiently ahead of trial to give the defense a fair opportunity to meet the evidence. Then the defense has something in the rule they can go to the judge with. They can say there is no way I have a fair opportunity to meet the evidence because I just got this last week and trial starts next week. It was also pointed out that Rule 16 has some pretty good remedy provisions. But again, if there is nothing in the rule to show a violation you can point to, it is hard for a judge to use those remedies. If there is some requirement for a fair opportunity that has clearly been denied, then the judge can look to Rule 16 and ask should I grant a continuance? Or should I deny the expert? When the potential for such remedies becomes real, then everybody has a better incentive to comply with the rule and maybe some of the weaker players will do better. The training the DOJ is doing is terrific. But we have learned over the years with the rules process that the trickle-down effect takes a while to get to the lawyers that are not going to be attentive to their duties, and if there are real consequences in the rule for that behavior it will help.

A member said he wanted to share the sense of relative optimism from the mini-conference. There seemed to be a lot of consensus as to fact patterns that were bad. Judge

Kethledge had a great comment: it seemed like we were really grappling with what's the best legal rule to respond to this, rather than disagreeing about what was a good situation and what was a bad situation. So this seems to be an issue on which we can make a lot of progress, and he was optimistic that we will.

Another member said he thought this was a tremendously important thing to do. The variety of experts testifying in criminal cases in the last few years is mind boggling: experts on Al-Qaeda; trace DNA when there is more than one contributor to sample; cell site location technology; spoliation of electronically stored information; the genesis through metadata of testimony about authorship of documents; and the economics of college basketball. It is really important to have the material well in advance of trial both to prepare to cross examine and to get their own expert and prepare. Without something in the rule, the defense is really in a pickle. This member's preference is to pick a number of days, and to say unless otherwise ordered. That will give the judge plenty of discretion to alter that obligation, but gives incentive to go to the judge early and get control of the issue. Also, the word "complete" is very important. Civil practitioners know what the report is supposed to look like. If you leave "complete" out you are asking people to do something nobody would dream of doing on the civil side. He also disagreed, based on his experience, with the assertion that nobody on the defense side pays any attention to the reciprocity obligation.

Professor King drew attention to an interesting suggestion by defense participants that if there is going to be reciprocity it should be limited to responsive experts, i.e., experts on topics the government said its experts would address. Reciprocity, they suggested, should not extend to experts on other topics that the defense is keeping in their back pocket depending upon how the trial goes. There was a difference of opinion in the room about whether those experts should be or are disclosed. Also, in many districts, judicial orders did require disclosure of defense experts a certain number of days after the disclosure of government experts.

A member agreed that was an important point. He explained that about 20 years ago in the UK, there was a proposed change that the prosecution had to disclose to the defense anything that could be helpful to the defense and undermine the government's cases. The defense had the option of producing a statement of defense, laying out the defense case, what part is disputed and why. The carrot was the disclosure. Knowing the defense case, the government knew better how to disclose. When it was proposed the defense bar fought it, seeing it as the end of fairness and the right to remain silent. A defense barrister friend told the member that after 16 years he had learned these concerns were completely wrong, and the change had been a great boon to defense practice. By laying it out for the government, they got much better disclosures from the government.

Another member added that there was a real disagreement on whether the rule should require a signed report unless the court orders or parties agree otherwise. He saw the issues as

timing, adequacy, reciprocity, and whether the report should have to be signed. He invited those with thoughts on this to share those thoughts with members of the Subcommittee.

A member noted the mini-conference was helpful and added that Rule 16(c) already allows supplementation/continuing duty to disclose. He had been surprised to hear some of the scenarios laid out by the defense attorneys with vague and inadequate disclosures. The member thought those disclosures would have violated (a)(1)(G) as now written. Perhaps adding the word the "complete" would emphasize that requirement and reduce the frequency of violations of the current rule.

With regard to signing reports, Judge Kethledge noted that he thought the government had agreed that at least in some cases the AUSA could draft the complete statement and have the expert review, approve, and sign it. The DOJ argued that the experts have their own language and standards and code of how they do things, and that no AUSA can do that. But the experts are going to be testifying, and if it is a complete statement, it should be couched in the same terms they are actually going to testify. If you have to do it anyway, why can't the person review and sign. Judge Kethledge recalled that Mr. Goldsmith had said that might make sense. That might be a way to make these less expensive for the government.

Mr. Wroblewski responded that forensics has become a very highly regulated industry, and rightly so because of genuine concern about methodologies. The problem lies in the words used, so the industry is moving to "uniform language." This is reviewed by the analyst and supervisors in the lab and follows certain language and protocols. If that is what is needed, then the report with the precise language has to be turned over already. The concern is that we have to go back and work through the regulatory rules within the lab. They may or may not sign it. This would be a different summary and would have to work through the regulatory process. They would not want to sign a new document.

Professor King added that she heard defense participants explain that they considered the report and the disclosure to be two different things. The report relates "this is what we did." What they need is "what we will say." They are different documents. They cover different things.

Mr. Wroblewski stated that for forensics those reports are all turned over. He was not sure that is true with other experts, such as an expert on Al-Qaeda. The experts are basing their expertise on years of study, knowledge, and books. He was not sure what gets turned over beyond the two paragraph statement: here is the opinion I'm going to give, and here are my qualifications and experience.

Judge Kethledge noted that the signature doesn't have a disclosure function, it is more for impeachment at trial. So it is not important for preparation at trial.

V. Case update relating to amendments previously considered by the Committee.

Judge Molloy asked the reporters to present updates on recent interpretations of Rules 6 and 12.

A. Rule 6. Professor Beale reviewed the Committee's past consideration of a suggestion to amend Rule 6 to address disclosure of historically significant grand jury materials. The suggestion, from Attorney General Holder, proposed that Rule 6(e) be amended to provide a procedure for a district court to order the disclosure of archival grand jury records, upon motion with notice and hearing. The proposed rule defined "archival" records as having exceptional historic importance and involving files that had been closed at least thirty years. It allowed disclosure if the court found no living person would be materially prejudiced by disclosure or prejudice could be prevented by redactions or other reasonable steps, the disclosure would not impede any other investigation, and no other reason existed why the public interest requires continued secrecy. The proposal was prompted by cases in which district courts, in response to requests from historians and others, had granted access to historically significant grand jury records decades after the investigation. For example, requests were made in the Alger Hiss case and the Nixon case. In this Committee, a subcommittee chaired by Judge Keenan recommended that no amendment be made, based on its determination that the courts were doing fine with this issue without a specific provision in the rule. There were very few such cases, and there was authority in some circuits that allowed courts to exercise their discretion to release historical information in exceptional circumstances. The Committee agreed with the subcommittee, and reported its decision not to proceed to the Standing Committee where it ended.

Professor Beale explained that although there is no pending proposal to revisit this, the Committee might be interested in knowing that the situation has changed somewhat. There is now a circuit split on this issue, with two decisions in the past few months, each with dissents. The Eleventh Circuit upheld disclosure of the grand jury records of an investigation of a mass lynching from 1946, citing circuit precedent allowing the court inherent authority. The court's opinion included copies of this Committee's materials as support for the presence of narrowly circumscribed inherent authority outside of Rule 6. In April, the DC Circuit disagreed in a case about a 1957 investigation of the disappearance of a critic of a Puerto Rican official, and ruled there is no such inherent authority, and courts cannot contravene the rule. It affirmed the denial of disclosure. A judge who is now on the Standing Committee dissented. Professor Beale noted this was an update, and not a proposal to consider an amendment. It had been a stable area, but it is no longer.

A member commented that the inherent authority issue appears to be an issue of the substantive federal authority of the courts, rather than a procedural issue that we could clear up if the courts disagree. Professor Beale noted that one argument that has come up in these cases is

whether the rule was intended to occupy the field. The member responded that if it is actually part of the inherent federal judicial power, then the Committee has no authority to limit it.

Judge Campbell commented that when the Civil Rules Committee amended Rule 37(e), concerning spoliation, it intended to eliminate side litigation and included a comment stating the intent of the rule was to occupy the field and eliminate inherent authority. But the first judge to construe the rule held that the rule could not do that, and the court still had inherent authority. So even if we try, we might not be successful.

B. Standard for reviewing untimely claims under Rule 12. Professor King reviewed the Committee's consideration of amendments to Rule 12, eventually ending up in a 2014 amendment to that rule. She noted the amendment made several improvements, but wanted to draw the Committee's attention to one circuit split the amendment had not resolved. Before the amendment, courts disagreed upon the standard of review that applied when a party raised for the first time on appeal an issue that should have been raised before trial under Rule 12. Some courts had held that appellate courts should apply good cause, others held they should apply plain error under Rule 52, others applied both, or either. This difference of opinion persisted after the rule change. She reviewed recent cases in which a court of appeals panel had pointed to the text of the amendment, the committee note, and the minutes of this Committee, claiming the Committee took their respective view.

The current cases serve as a reminder that the documents we create are sometimes used by courts as evidence of meaning, particularly when there is ongoing disagreement. The most recent decisions on Rule 6 and Rule 12 rely on different parts of this Committee's records. A member asked if there was a proposal to amend Rule 12 before the Committee. The reporters clarified there was no proposal, that these decisions regarding Rule 6 and Rule 12 are examples of how the courts are using the work of this Committee.

In response to a member's question how the minutes are created and if there is a recording, the reporters explained that they prepare the minutes of each meeting working from an audio recording. After approval by this Committee, those minutes are posted on the uscourts.gov website. This is part of the legislative history of the Committee's work, so it is very important to correct the minutes if you believe they are not accurate.

Ms. Womeldorf noted that the recordings are for the convenience of the reporters. They are not maintained as part of the historical record. The quality also varies. Sometimes you can make out what is said, and sometimes you can't. The historical record includes everything that ends up in the agenda books, the minutes after they are approved, and anything circulated to a quorum of the membership.

Professor Beale explained that subcommittee memos and the rule drafts the subcommittees consider are not normally part of the formal record. Those are not circulated to a

quorum on the Committee and are not public. But if they are added to the agenda book for the full committee as helpful explanation – which they often are – they become part of the formal record.

Professor Coquillette added that even the committee notes, which we all agree are very important, are not approved by Congress. The text of the rule itself is the ultimate authoritative statement. That is one of the reasons why it is so important that nothing in the notes detract or add to the text of the rule.

Ms. Womeldorf noted that while the committee notes do go to the Supreme Court, the orders of the Court adopting the rules do not include the notes. The Court pays close attention to the notes, and there have been instances where there have been questions back about committee notes. But they are not part of what the Court orders.

After reminding the Committee that the next meeting is in Philadelphia on September 24, 2019, Judge Molloy adjourned the meeting.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 25, 2019 | Washington, DC

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Washington, DC, on June 25, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew D. Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

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

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

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Washington, DC. This meeting is the last for two members, Judge Susan Graber and Judge Amy St. Eve. Judge Campbell thanked Judge Graber for her contributions as a member of the Committee and for her service as liaison to the Advisory Committee on Bankruptcy Rules. Judge Campbell thanked Judge St. Eve for her contributions as a member of the Committee and her leadership on the Task Force on Protecting Cooperators and wished her luck on her new assignment as a member of the Budget Committee. Judge Campbell also noted this would be the last Standing Committee meeting for Judge Donald Molloy, Chair of the Advisory Committee on Criminal Rules, and thanked him for his many years of service to the rules process. Judge Campbell also recognized Scott Myers for twenty years of federal government service, which has included time as a member of the United States Marine Corps, a law clerk, and counsel to the Rules Committees.

Rebecca Womeldorf reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that the rules adopted by the Supreme Court on April 25, 2019 will go into effect on December 1, 2019 provided Congress takes no contrary action.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the January 3, 2019 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules.

Action Items

Final Approval of Proposed Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). Judge Chagares asked the Committee to recommend final approval of proposed amendments to Rules 35 and 40 which will set length limits applicable to a response filed to a petition for en banc review or for panel rehearing. The proposed amendments were published for public comment in August 2018. The one written comment received was supportive and Judge Chagares reported receiving informal favorable comments from colleagues. No revisions were made after publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 35 and Rule 40 for approval by the Judicial Conference**.

Publication of Proposed Amendments to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares asked the Committee for approval to publish for public comment proposed amendments to Rule 3(c) regarding contents of the notice of appeal, along with conforming amendments to Rule 6 and Forms 1 and 2. Judge

Chagares noted by way of background the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act.

Judge Chagares explained that this proposal originated in a 2017 suggestion that pointed to a problem in the caselaw concerning the scope of notices of appeal. Some cases, the suggestion noted, apply an *expressio unius* approach to interpreting the notice of appeal. Under that approach, for example, if the notice of appeal designates a particular interlocutory order in addition to the final judgment, such courts might limit the scope of the appeal to the designated order rather than treating the notice as bringing up for review all interlocutory orders that merged into the judgment. Extensive research revealed confusion on the issue both across and within circuits. Professor Hartnett noted another problematic aspect of the caselaw: numerous decisions treat notices of appeal that designate an order that disposed of all remaining claims in a case as limited to the claims disposed of in the designated order. Judge Chagares noted that the Advisory Committee's goal in proposing amendments to Rule 3(c) is to ensure that the filing of a notice of appeal is a simple, non-substantive act that creates no traps for the unwary.

Professor Hartnett reviewed the rationale behind the Advisory Committee's proposed amendments. Professor Hartnett noted that one source of the problem was Rule 3(c)(1)(B)'s current requirement that a notice of appeal "designate the judgment, order, or part thereof being appealed." Some have read this provision to require designation of any order that the appellant wishes to challenge on appeal, rather than simply designation of the judgment or order that serves as the basis of the court's appellate jurisdiction and from which time limits are calculated.

The Advisory Committee proposed four interrelated changes to Rule 3(c)(1)(B) to address the structure of the rule and to provide greater clarity. First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the terms "judgment" and "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result requires the appellant to designate the judgment – or the appealable order – from which the appeal is taken. To underscore the distinction between an appeal from a judgment and an appeal from an appealable order, Professor Hartnett noted, the proposed conforming amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and a Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court).

Other proposed changes address the merger rule. A new paragraph (4) was added to underscore the merger rule, which provides that when a notice of appeal identifies a judgment or order, this includes all orders that merge into the designated judgment or order for purposes of appeal. The Advisory Committee also added to the Committee Note a paragraph discussing the

merger principle. In addition, the Advisory Committee added a fifth paragraph to the rule addressing two kinds of scenarios where an appellant's designation of an order should be read to encompass the final judgment in a civil case. In one scenario, some pieces of the case are resolved earlier, and others only later; a notice of appeal designating the order that resolves all remaining claims as to all parties should be read as a designation of the final judgment. In the other scenario, a notice of appeal designates the order disposing of a post-judgment motion of a kind that re-started the time to appeal the final judgment; that notice should be read to encompass a designation of the final judgment. In both scenarios, the proposed rule operates whether or not the court has entered judgment on a separate document.

A new sixth paragraph was added providing that "[a]n appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal." The final sentence was added to expressly reject the *expressio unius* approach. The Advisory Committee settled on this approach to avoid the inadvertent loss of appellate rights while empowering litigants to define the scope of their appeal.

Finally, the Advisory Committee recommended conforming changes to Rule 6 to change the reference to "Form 1" to "Forms 1A and 1B," and conforming changes to Form 2 to reflect the deletion of "part thereof" from Rule 3(c)(1)(B). The Advisory Committee consulted with reporters to the Advisory Committee on Bankruptcy Rules regarding the amendments to Rule 6.

A member asked why the Advisory Committee referenced but did not define the merger rule in the rule text. Professor Hartnett explained that the Advisory Committee did not want to limit the merger principle's continuing development by codifying it in the rule. The rule's reference to the merger rule will prompt an inexperienced litigant to review the Committee Note for more information. Judge Campbell observed that an attempt to define the merger rule in the Rule text could change current law by overriding existing nuances. Two judge members expressed concern that the Rule needs to be understandable to pro se litigants and unsophisticated lawyers. One of these members asked why the Rule text could not state in simple terms the outlines of the merger principle – e.g., "an appeal from a final judgment brings up for review any order that can be appealed at that time"? Professor Hartnett responded that the Advisory Committee was concerned that such a formulation in the Rule text might alter current law; he stated that the Advisory Committee wanted to alert litigants to the merger rule in the rule itself and provide additional guidance for litigants in the Committee Note. An attorney member suggested that the proposed draft offered the most elegant solution – using Rule text that serves as a placeholder for the merger doctrine. A judge member expressed agreement with this view.

That judge member next asked why the Advisory Committee proposed to retain, in new subdivision (c)(6), the appellant's ability to designate only part of a judgment or order. Professor Hartnett suggested that a designation of just part of a judgment might serve the interest of repose by assuring other parties that the scope of the appeal was limited. Professor Cooper offered as an example an instance in which the plaintiff's claims against both of two defendants have been dismissed but the plaintiff has no wish to challenge the dismissal as to one of the defendants; a

limited notice of appeal, in such a case, would reassure the defendant whom the plaintiff no longer wishes to pursue.

A judge asked about the potential for over-inclusion in notices of appeal as a result of the proposed amendments, and whether there is a benefit to requiring that parties be specific about what they are appealing. Professor Hartnett responded that the notice is not the place to limit the issues on appeal. A notice is just a simple document transferring jurisdiction from the district court to the appellate court. The scope of the appeal can be clarified in the ensuing briefing.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rules 3 and 6 and Forms 1 and 2.**

Professor Struve congratulated the Advisory Committee and Professor Hartnett for a clever solution to a very tough problem. Professor Hartnett thanked Professor Cooper for his assistance.

Publication of Proposed Amendments to Rule 42(b) (Voluntary Dismissal). Judge Chagares stated that the Advisory Committee sought publication of proposed amendments to Rule 42(b). Rule 42(b) currently provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Prior to the 1998 non-substantive restyling of the Appellate Rules, Rule 42(b) used the word "shall" instead of "may" dismiss. Following the 1998 restyling, some courts have concluded that discretion exists to decline to dismiss. Attorneys cannot advise their clients with confidence that an action will be dismissed upon agreement by the parties. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals.

Judge Chagares explained that the phrase "no mandate or other process may issue without a court order" in current Rule 42(b) has caused confusion as well. Some circuit clerks have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. These issues are avoided – and the purpose of that language served – by deleting the phrase and instead stating directly, in new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them."

A member suggested that language from the proposed Committee Note be moved to the rule itself, creating a new subdivision stating that the Rule does not affect any law that requires court approval of a settlement. Four other members expressed agreement with the idea of putting such a caveat into the Rule text. A motion was made and seconded to amend the proposal to include such a caveat; the motion passed. The Committee discussed how to draft the caveat; it started by considering language that had been used in a prior draft, as follows: "If court approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand to consider whether to approve it." Following a break and extensive discussion of

possible language, including suggestions from the style consultants, Judge Chagares proposed instead to add a new subdivision (c) which would modify both preceding paragraphs of Rule 42 and state as follows: "(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration." The Committee Note was revised to add a cite to "F.R.Civ.P. 23(e) (requiring district court approval)" and to explain that the "amendment replaces old terminology and clarifies that any order beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order." By consensus, this new subdivision (c) was incorporated into the proposed amendments to Rule 42, upon which the Committee proceeded to vote.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 42.**

Information Items

Possible Additional Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares advised that the Advisory Committee continued to study whether amendments were warranted to clarify and codify practices under Rules 35 and 40.

Rule 4 (Appeal as of Right – When Taken). Judge Chagares explained that the Advisory Committee has been considering whether to amend Rule 4(a)(5)(C) (which deals with extensions of time to appeal) in light of the Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). In *Hamer*, the Court distinguished time limits imposed by rule from those imposed by statute, characterizing time limits set only by rules as non-jurisdictional procedural limits. Professor Hartnett noted that the Advisory Committee tabled its consideration of the issue pending the Court's decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). In *Nutraceutical*, the Court held that a mandatory claim-processing rule was not subject to equitable tolling. After reviewing this holding, the Advisory Committee decided not to take action on a possible amendment to Rule 4(a)(5)(C).

Potential Amendment to Rule 36. The Advisory Committee considered an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Consideration was tabled pending the Court's decision in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), addressing whether a federal court may count the vote of a judge who dies before the decision is issued. The Court answered this question in the negative, explaining that "federal judges are appointed for life, not for eternity." Since the Court has resolved the question, the Advisory Committee removed this item from its docket.

Suggestion Regarding the Railroad Retirement Act and Civil Rule 5.2. Judge Chagares noted that the U.S. Railroad Retirement Board's General Counsel submitted a suggestion that cases brought under the Railroad Retirement Act should be among the cases excluded (under Civil Rule 5.2) from certain types of electronic access. Petitions for review of the Railroad Retirement Board's final decisions go directly to the courts of appeals, not the district courts; thus, any change would need to be to the Federal Rules of Appellate Procedure. Judge Chagares has appointed a subcommittee to consider the suggestion and to investigate whether any other

benefit regimes would warrant similar treatment. The subcommittee is consulting with the Committee on Court Administration and Case Management.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules.

Action Items

Judge Dow first addressed proposed amendments to three rules published for comment last August: Rule 2002 (Notices), Rule 2004 (Examination), and Rule 8012 (Corporate Disclosure Statement).

Final Approval of Proposed Amendments to Rule 2002 (Notices). Judge Dow explained that Rule 2002 generally deals with requirements for providing notice in bankruptcy cases, and that the proposed changes affect three subparts of the Rule. The first change involves Rule 2002(f)(7), which currently directs notices to be given of the "entry of an order confirming a chapter 9, 11, or 12 plan." Although it is unclear why the rule does not currently require notice of the entry of a Chapter 13 confirmation order, the Advisory Committee concluded that notice of a confirmation order is appropriate under all bankruptcy chapters. The one comment addressing this change argued that the amendment was not needed because at least one court already serves orders confirming Chapter 13 plans. Because that comment addressed a local practice only, however, the Advisory Committee recommended final approval of the amendment as proposed.

The Committee had no questions and Judge Campbell suggested that the Committee vote separately on the proposed amendments to each of the three relevant subparts of Rule 2002. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(f)(7) for approval by the Judicial Conference**.

The second change pertains to Rule 2002(h) which authorizes the court to direct that certain notices to creditors in chapter 7 cases be sent only to creditors that timely file a proof of claim. The proposed amendment would allow the court to exercise similar discretion in chapter 12 and 13 cases and would also conform time periods in the subdivision to the respective deadlines for filing proofs of claim set out in recently amended Rule 3002(c).

One of the comments on Rule 2002(h), while generally supportive, raised two issues. The first issue concerned whether the clerk's noticing responsibilities in a chapter 13 case should extend 30 days beyond the proof-of-claim deadline to give the debtor or trustee time to file a claim on behalf of a creditor. The Advisory Committee rejected this suggestion because the rule does not currently address such a situation in a chapter 7 case and the purpose of the proposed amendment is simply to extend the rule to chapter 12 and 13 cases. In addition, because the rule is permissive, a court already has authority to continue to provide notices until after the expiration of a debtor or trustee's derivative authority to file a proof of claim on behalf of a creditor.

The second issue raised was whether notice of the proposed use, sale, or lease of property of the estate and the hearing on approval of a compromise or settlement should be given to all

creditors otherwise entitled to service of the noticed motion, even if they have not timely filed a proof of claim. No justification was provided for this suggestion and the Advisory Committee saw no reason to amend the rule in this respect. It recommended that Rule 2002(h) be approved as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(h) for approval by the Judicial Conference**.

The final amendment to Rule 2002 concerned subdivision (k) which addresses providing notices under specified parts of Rule 2002 to the U.S. trustee. The change adds a reference to subdivision (a)(9) of the rule, corresponding to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The change ensures that the U.S. trustee will continue to receive notice of this deadline.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2002(k) for approval by the Judicial Conference**.

Judge Dow next addressed the proposed amendments to Rule 2004. He explained that the rule provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case, and that it includes provisions to compel the attendance of witnesses and the production of documents. The Advisory Committee received a suggestion that the rule be amended to impose a proportionality limitation on the scope of the production of documents and electronically stored information.

The Advisory Committee considered this issue over three meetings. By a close vote, the Committee ultimately decided not to add proportionality language because the rule already allows the court to limit the scope of a document request, and because the change might prompt additional litigation. The Advisory Committee did, however, decide to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

After considering the comments, the Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. Two of the three comments submitted supported the proposal as published. Although a third comment urged inclusion of proportionality language, the Advisory Committee declined to revisit that issue as it had been carefully considered and rejected by the Advisory Committee prior to publication.

Judge Campbell recalled discussion at the Advisory Committee meeting of the fact that debtor examinations in bankruptcy are intended to be broad in scope and of a concern that adding proportionality language might signal an intent to limit those examinations. Judge Dow agreed.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 2004 for approval by the Judicial Conference**.

Final Approval of Proposed Amendments to Rule 8012 (Corporate Disclosure Statement). Current Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a statement that there is no such corporation). It is based on Federal Rule of Appellate Procedure 26.1. Amendments to Rule 26.1 were promulgated by the Supreme Court on April 25, 2019 and are scheduled to go into effect December 1, 2019 absent contrary action by Congress.

The Advisory Committee's proposed amendments to Rule 8012 track the relevant amendments to Appellate Rule 26.1. An amendment to 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors, and a new subsection (b) requires disclosure of debtors' names and requires disclosures about nongovernmental corporate debtors. Publication of the proposed amendments to Rule 8012 elicited three supportive comments and no suggestions for revision.

Judge Dow noted that, during the consideration of the proposed amendments, one member of the Advisory Committee suggested a need for additional amendments that would extend the Rules' disclosure requirements to a broader range of entities. Judge Dow said such an undertaking would require coordination with the other advisory committees and should not delay the current round of amendments, which are designed to conform Rule 8012 to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 8012 for approval by the Judicial Conference**.

Judge Dow then addressed several proposed amendments that the Advisory Committee considered to be technical in nature and appropriate for the Standing Committee's final approval without publication.

Proposed Amendments to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Rule 2005(c), which addresses conditions to ensure attendance and appearance, refers to provisions of the federal criminal code (previously codified at 18 U.S.C. § 3146) that were repealed more than 30 years ago. The Advisory Committee considered the matter and recommended a technical amendment updating the statutory citation in the rule to 18 U.S.C. § 3142, the part of the criminal code that now addresses conditions to ensure attendance or appearance. Judge Dow explained, however, that after the Standing Committee's agenda book was published there was discussion among the reporters about whether such a change would be appropriate without publication.

Professor Struve explained her concerns with a technical amendment. Current Section 3142 contains a number of features that were not present in the old Section 3146. For example, it refers to statutory authorization for the collection of DNA samples. Presumably it is implausible to think that a debtor apprehended under Rule 2005 would be subjected to DNA collection as a condition of release. But, she suggested, such differences between the former and

present statutory provisions provided reason to send the proposed amendment through the ordinary process of notice and comment.

Professor Capra raised the issue of whether statutory citations should be included in the Rules at all given that statutes change. Perhaps it would be better for the Rule to direct the court to consider "the applicable requirement in the criminal code" in considering conditions to compel attendance or appearance. Professor Kimble suggested that a general reference would not help readers. If a particular statute is relevant it should be cited and updated as needed.

A member suggested that there was little risk that inapposite provisions of § 3142 would be applied under Rule 2005(c), and Professor Bartell stated that bankruptcy debtors are not arrestees, so there is not a realistic danger that they would be subjected to DNA collection.

Judge Campbell observed that the Committee must decide whether citation to an updated statutory cross reference was appropriate, or whether the prior statutory language should be inserted into the rule. In addition, even if only a statutory cross reference was appropriate, the Committee also needed to decide the separate issue of whether approval would be appropriate without public comment.

Professor Garner suggested that "applicable" or "relevant" be inserted prior to the Rule's reference to the "provisions and policies of" the statutory provision.

After further discussion Judge Campbell observed that it seemed clear that the Committee did not support amending the rule as a technical matter without publication, and Judge Dow amended the request on behalf of the Advisory Committee to seek the Standing Committee's approval to publish the amendment for public comment, with a slight revision. Instead of a simple change to replace the existing statutory citation with the new statutory citation, the proposed amendment to Rule 2005(c) would state that in determining the conditions that would reasonably ensure attendance the court would be "governed by the **relevant** provisions and policies of title 18 U.S.C. § **3142**." In addition, a new sentence was added to the Committee Note: "Because 18 U.S.C. § 3142 contains provisions bearing on topics not included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the 'relevant' provisions and policies of § 3142."

The Committee approved the proposed amendments to Rule 2005(c) for publication in August 2019.

Judge Dow next discussed proposed technical conforming amendments to Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The amendments would revise these Rules to accord with the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system and would revise Rule 8015 to accord with the pending amendment to Rule 8012.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendments to Rules 8013, 8015, and 8021 for approval by the Judicial Conference without prior publication**.

The final recommended technical change concerned Official Form 122A-1, the first part of a two-part form used to calculate the debtor's disposable income and to determine whether it is appropriate for the debtor to file under Chapter 7 of the Bankruptcy Code. An instruction at the end of Official Form 122A-1 tells the filer not to complete the second part of the form (Official Form 122A-2) if the box at line 14a is checked. Line 14a, in turn, should be checked if the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. The Advisory Committee received a suggestion that the instruction at the bottom of the form is often overlooked, and that it should also be included at the end of line 14a. The Advisory Committee agreed that the suggested amendment would make it more likely that the forms would be completed correctly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the technical amendment to Official Form 122A-1 for approval by the Judicial Conference without prior publication.**

Professor Gibson next reported on three proposed amendments recommended for publication.

Rule 3007 (Objections to Claims). The proposed amendment addresses the narrow issue of how credit unions should be served with objections to their claims. Rule 3007 was amended in 2017 to clarify that objections to claims are generally not required to be served in the manner of a summons and complaint, as provided by Rule 7004, but instead may be served on most claimants by mailing them to the person designated on the proof of claim. Rule 3007 contains two exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." Rule 3007(a)(2)(A)(ii). The purpose of this exception is to comply with a legislative mandate (enacted as part of the Bankruptcy Reform Act of 1994 and set forth in Rule 7004(h)) providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The Advisory Committee concluded that the exception set out in Rule 3007(a)(2)(A)(ii) is too broad because it does not qualify the term "insured depository institution" by the definition set forth in section 3 of the Federal Deposit Insurance Act, as is the case in Rule 7004(h) itself. Rule 7004(h) was added by the Bankruptcy Reform Act of 1994 which required special service requirements for insured depository institutions as defined under the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under Rule 3007(a)(2)(A)(ii). The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 3007.**

Rule 7007.1 governs disclosure statements in the bankruptcy court. Like the amendment to Rule 8012 discussed earlier, the proposed amendment to Rule 7007.1 would conform the rule to the pending amendments to Appellate Rule 26.1.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7007.1.**

The proposed amendment to Rule 9036 would implement a suggestion from the Committee on Court Administration and Case Management that high-volume-paper-notice recipients (initially defined as recipients of more than 100 court-generated paper notices in a calendar month) be required to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 is changed to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Proposed amendments to Rule 2002(g) and Official Form 410 were previously published in 2017. These proposed amendments (like the proposed amendments to Rule 9036) are designed to increase electronic noticing and service. The proposed amendments to Rule 2002 and Form 410 would create an 'opt-in' system at an email address indicated on the proof of claim. The Advisory Committee has not yet submitted those proposed amendments for final approval, however, because the comments recommended a delayed effective date of December 1, 2021 to provide time to make needed implementation changes to the courts' case management and electronic filing system. Because that is the same date the proposed changes to Rule 9036 would be on track to go into effect if published this summer, the recommended changes to Rules 2002(g) and 9036 and Official Form 410 could go into effect at the same time.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 9036.**

Information Items

Professor Bartell reported on two information items, beginning with the ongoing project to restyle the bankruptcy rules. The style consultants provided an initial draft of Part I to the reporters in mid-May, and the reporters have given the consultants comments on that draft. Professor Bartell reported that she and Professor Gibson have been delighted at what the style consultants have done. She thinks the bench and bar will welcome the improvements to the Rules. She praised the style consultants for their work. When the consultants respond to the reporters' comments and produce another draft, the Restyling Subcommittee will consider it. The consultants will also be producing an initial draft of Part II soon, which will be handled in the same way.

The second information item concerns part of a larger project within the judiciary to address the problem of unclaimed funds in the bankruptcy system. The Committee on the Administration of the Bankruptcy System created an "Unclaimed Funds Task Force" to address this issue. Among other things, the Unclaimed Funds Task Force proposed adoption of a Director's Bankruptcy Form (along with proposed instructions and a proposed order) for applications for withdrawal of unclaimed funds in closed bankruptcy cases. The Advisory Committee concluded that standard documentation would be appropriate, made minor modifications to the draft submitted by the task force, and recommended that the Director of the Administrative Office adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

Judge Campbell praised the restyling effort and observed that the Advisory Committee is on track to consider the first batch of restyled rules at its fall 2019 meeting. Judge Campbell noted that the time is ripe to send a letter to the appropriate congressional leaders making sure they know the restyling effort is underway.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates provided the report of the Advisory Committee on Civil Rules, with support from Professors Cooper and Marcus. Judge Bates noted the Advisory Committee had two action items, one for final approval and the second for publication, and several information items.

Action Items

Rule 30(b)(6). The Advisory Committee recommended final approval of an amendment to Rule 30(b)(6), the rule that deals with depositions of an organization. This issue drew intense interest from the bar. After the proposed amendment was published for comment in August 2018, two public hearings were held. The first hearing in Phoenix drew twenty-five witnesses. Fifty-five witnesses testified at the second hearing in Washington, DC. Some 1780 written comments were submitted, although that number overstates the substance of the comments as many of those comments repeated points made in previous comments.

After considering the public comments, the Advisory Committee approved a modified version of the proposed amendment that was published for comment. Compared with the current rule, the central change made by the revised proposal is to require the party taking the deposition and the organization to confer in advance of the deposition about the matters for examination. Many commenters observed that conferring in advance of the deposition reflects best practice; this modest proposed rule change did not cause great concern from commenters and was uniformly supported by the Advisory Committee. The Advisory Committee made several changes to the proposed amendment as compared with the version that went out for comment. It deleted the proposed requirement that the parties confer about the identity of the witnesses that the organization would designate, and it also deleted the requirement that the parties confer about the "number and description of" the matters for examination. Because the conferring-in-advance requirement would be superfluous in connection with a deposition by written questions, the Advisory Committee added to the Committee Note the observation that the duty to confer about the matters for examination does not apply to depositions by written questions under Rule 31(a)(4).

Other proposed changes to Rule 30(b)(6) were the subject of active discussion and debate, although the Advisory Committee ultimately decided not to recommend them. One change considered by the Advisory Committee would have required the organization to identify the designated witness or witnesses at some specified time in advance of the deposition. Another change would have added a 30-day notice requirement for 30(b)(6) depositions. It was agreed that these changes would have likely required re-publication. After a great deal of discussion, the Advisory Committee determined, in a split but clear vote, not to pursue these amendments.

Professor Marcus agreed with the summary of the process of considering changes to Rule 30(b)(6) as related by Judge Bates and noted that the Standing Committee had also engaged in a vigorous discussion of the issues at previous meetings. Judge Bates noted that the Advisory Committee voted to approve the Committee Note language line-by-line, and virtually word-by-word. The ultimate proposal reflects the hard work of a subcommittee chaired by Judge Joan Ericksen.

A member voiced support for changes to a rule both sides of the bar agree is problematic but wondered whether much is accomplished by imposing a requirement to confer without specifying what must be discussed; this member suggested that the proposed amendment had "no meat on the bone." The Committee Note could provide additional guidance, but the current version does not do so. The member noted the difficulty in changing the rule given the differing views on what should be a required disclosure prior to a deposition. A judge member echoed the concern that the modest amendment does not add that much given that Rules 26 and 37 provide a process to handle any objection to a 30(b)(6) notice.

Judge Bates agreed that the amendment is modest and will not lead to a wholesale change in 30(b)(6) deposition practice. The amendment does put existing best practice in the rule itself, which may lead to improvements in some cases. The Advisory Committee ended up with this limited recommendation because it found agreement within the bar on this narrow issue, while in general other suggestions were met with intense disagreement from one side or the other.

A judge member stated that he understood the disagreement and the reasons for it but wondered why the Committee should endorse such a limited change given the presumption that something notable has changed. Judge Campbell responded that often rules are written for the weakest lawyers and gave his view that the modest change would improve practice in some cases. In his experience, the most frequent complaint from one side is that the witness is not adequately prepared while the most frequent complaint by the other is that the notice is not precise enough on what the matters are for examination. These complaints usually come to him from the lawyers who do not talk to each other in advance of the deposition. He has often thought if you could get people to talk in advance of the deposition both sides would have greater understanding going into the deposition and a better-prepared witness. It is a marginal change but one that will help. Judge Bates stated that this was the sentiment of the Advisory Committee.

Responding to the suggestion that Rules 26 and 37 already provide a process to handle disputes over Rule 30(b)(6) depositions, Professor Marcus noted that those rules address the handling of disputes that have already become combative; the proposed amendment to Rule 30(b)(6), by contrast, would require the parties to confer *before* conflict has a chance to arise. A member noted that he viewed the amendment as a warning of sorts not to engage in gamesmanship. If this does not work, this rule will come back to the Committee. Judge Bates noted that this rule comes back to the Advisory Committee every few years. The Federal Magistrate Judges Association, Professor Marcus noted, supported the proposed amendment while also suggesting that further changes might be warranted depending on how this change works in practice.

Professor Beale complimented the Advisory Committee on the consideration of a huge amount of input received from the public. She stated that Professor Marcus's presentation of that input could serve as a model for how to handle a large volume of comments. Judge Bates and Professor Coquillette echoed similar praise for the work of the Advisory Committee and Professor Marcus. Professor Coquillette emphasized that it is not just the result that matters, it is the public perception of the process. The Reporters and the Committee, he observed, had done much to build confidence in that process among members of the bar. Another member emphasized that with this particular rule, most changes proposed by one party were changes thought to alter the negotiating balance vis-à-vis the opposing party. The Advisory Committee's careful and impressive effort had been to improve the Rule without seeming to favor one side or the other.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendments to Rule 30(b)(6) for approval by the Judicial Conference**.

Rule 7.1. Judge Bates introduced the second action item from the Advisory Committee, a proposal to publish for comment amendments to Rule 7.1, the rule concerning disclosure statements. The first proposed amendment conforms Rule 7.1 to pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) so that a disclosure statement is required of a nongovernmental corporation that seeks to intervene. The proposed amendment also deletes the direction to file two copies of the disclosure statement, as that requirement has been rendered superfluous by electronic court dockets.

A second proposed amendment would add a new subsection 7.1(a)(2) requiring parties to disclose the name and citizenship of those whose citizenship is attributable to the party for purposes of determining diversity jurisdiction. A prominent example of the need for this amendment arises in cases where a party is a limited liability company (LLC). Many judges now require the parties to provide detailed information about LLC citizenship. This practice serves to ensure that diversity jurisdiction actually exists, a significant matter, and it protects against the risk that a federal court's substantial investment in a case will be lost by a belated discovery − perhaps even on appeal – that there is no diversity.

Judge Bates observed that a member of the Standing Committee had raised a question about the applicability of 7.1(b)(2), which requires a supplemental filing whenever information changes after the filing of a disclosure statement. Given that diversity is determined at the time of filing, a supplemental filing is irrelevant for diversity purposes. Accordingly, Judge Bates suggested a slight modification of the proposed language to 7.1(a)(2) to state: "at the time of filing." This would remove the obligation to make a supplemental filing when it is not relevant to the diversity determination.

A judge member spoke in favor of the proposal, as modified by the friendly amendment just described. He suggested a conforming change to the Committee Note (at page 232, line 273 of the agenda book).

Judge Campbell pointed to the language "unless the court orders otherwise" in proposed new subdivision (a)(2) as a safety valve for situations in which a party has a privacy concern connected to disclosure. In such an instance, the party could seek court protection from public disclosure of the information but would still need to provide the information bearing on the existence (or not) of diversity jurisdiction.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication in August 2019 the proposed amendments to Rule 7.1.**

Information Items

Consideration of Proposals to Develop MDL Rules. Judge Bates reviewed the continuing examination of proposals to formulate rules for multidistrict litigation (MDL) proceedings, the work on which has been done by the MDL Subcommittee, chaired by Judge Robert Dow. Judge Bates described efforts by the subcommittee to obtain information on this complex set of issues. He noted that the Judicial Panel on Multidistrict Litigation (JPML) has been very helpful and engaged. Judge Bates observed that the consideration of possible MDL rules has generated a great deal of discussion among lawyers and judges, and the MDL process will likely be improved as a result, even if rules are not ultimately proposed.

Judge Bates described the focus of ongoing work, primarily on four subjects: (1) the use of Plaintiff Fact Sheets (PFSs) – and perhaps Defendant Fact Sheets (DFSs) – to organize MDL personal injury litigation, particularly in MDLs with a thousand or more cases, and to "jump start" discovery; (2) the feasibility of providing an additional avenue for interlocutory appellate review of district court orders in MDLs; (3) addressing the court's role in relation to global

settlement of multiple claims in MDLs; and (4) third-party litigation funding (TPLF), which is not unique to the MDL setting.

TPLF. Judge Bates noted that the general topic of TPLF has received a great deal of attention. TPLF is not unique to MDL proceedings, and indeed might be less prevalent in MDLs than other settings. Many courts require disclosure of TPLF information. TPLF is a rapidly evolving area. The TPLF topic remains on the subcommittee's agenda; it is not clear whether the subcommittee will recommend a rules response to this issue.

Judicial Involvement in MDL Settlements. The subcommittee continues to study judicial involvement in review of MDL settlements. Both the plaintiffs' and the defense bar would like to avoid rules that would require more judicial involvement in settlements. Current practice varies a lot by judge; transferee judges are split on it, with some being very active in settlements and others not. The issues are different than in a class action because every individual MDL plaintiff has an attorney.

PFSs/DFSs. Judge Bates stated that most of the subcommittee's attention has focused on PFSs and interlocutory appellate review. PFSs are used in some 80% of the big MDLs, although there is some definitional issue about what counts as a PFS. DFSs are also often used in large MDLs. A more recent proposal concerns something called an initial census of claims, which is similar to a PFS but more streamlined, and would be used early in the litigation to capture exposure and injury, not expert testimony or causation. This proposal has some support from both sides of the bar, which may mean there is no reason to have a rule. One problem with a PFS is the length of time to get those negotiated – sometimes as long as eight months – as well as the time necessary to produce responsive information. Something simpler that could be routinely used might be advantageous. The subcommittee continues to look for ideas that could get support from transferee judges as well as the plaintiffs' and defense bars.

Interlocutory Review. Judge Bates described the subcommittee's ongoing examination of issues concerning interlocutory review in MDL proceedings, a subject on which plaintiff and defense counsel have very different perspectives. One area of dispute is the utility of review under 28 U.S.C. § 1292(b). Different studies have reached different conclusions. The Advisory Committee received one study on the subject compiled by the defense bar. At a recent event in Boston, the plaintiffs' bar presented additional and contrary data in an oral presentation. The Advisory Committee asked the plaintiffs' bar to put their empirical data in writing. The defense bar felt it had not responded fully to the plaintiffs' presentation. The subcommittee is awaiting further information from both sides of the bar.

Professor Marcus noted that the process of considering rulemaking has generated good discussion about best practices that may ultimately be more beneficial than new rules.

A member asked whether the subcommittee had analyzed the grant rate for § 1292(b) applications by circuit. This member has asked an associate to look at this question but the research is not completed yet. The question, this member suggested, is whether the district court should continue to serve as a gatekeeper for these interlocutory appeals. This member noted that Rule 23(f) works well in the class action context and wondered about comparing the grant rate for Rule

23(f) petitions. Judge Bates responded that the bar is providing that data, and sometimes conflicting data. One might also investigate whether the defense bar sometimes opts not to seek review under § 1292(b). Professor Marcus indicated that the data are currently contested.

A judge member asked why the proposal under discussion would expand the availability of interlocutory review only for mass tort MDLs and not other complex litigation. Professor Marcus characterized the current issue as responding to the "squeaky wheel" and pointed to proposed legislation that addresses claims in the MDL setting. Professor Marcus noted that in rulemaking applicable to one type of case, you will always have to define what the rule does not apply to, which can be difficult. An attorney member suggested that expanded interlocutory review should apply to all MDLs, not merely a subset of them. Judge Bates observed that the more one increases the number of MDLs eligible for expanded interlocutory review, the harder it would become to provide expedited treatment for those appeals.

Judge Campbell noted that requiring PFSs in cases over a certain threshold, for example, MDLs over a thousand cases, will raise the issue that MDLs grow over time; by the time a given MDL hits the threshold, it might be late to require a PFS. Professor Marcus noted that because MDL centralization may often occur before a given threshold number of cases is reached, it is difficult to draft an applicable rule. Who monitors this, and how do you write that in a rule? Judge Bates stated this is an example of why transferee judges say they need flexibility.

Another judge member noted that there are two different things going on with regard to PFS proposals. The first is use of the PFS to jump start discovery. The second is use of the PFS to screen out meritless cases. These are two different objectives, which may require different solutions.

Social Security Disability Review. The Social Security Disability Review Subcommittee continues to work toward a determination whether new Civil Rules can improve the handling of actions to review disability decisions under 42 U.S.C. § 405(g). This proposal originated from the Administrative Conference of the United States. Professor Cooper has worked on this effort along with the chair of the subcommittee, Judge Sara Lioi.

The Social Security Administration (SSA) is very enthusiastic about the idea of national rules, even the pared-down discussion draft that the subcommittee has discussed with SSA and other groups most recently. The DOJ is not as enthusiastic but is not voicing an objection. The plaintiffs' bar is coalescing in opposition to national rules, which it views as unnecessary. The subcommittee met on June 20, 2019 with claimants' representatives, the SSA, the DOJ, magistrate judges, and others who are familiar with present practices. The purpose of the meeting was to focus on getting input from the claimants' bar. It was a good meeting with positive input that will lead to changes in the working draft.

Professor Cooper stated the subcommittee hopes to make a recommendation at the Advisory Committee's October meeting on whether to proceed further with a rulemaking proposal on this topic. Such rulemaking, he noted, would be in tension with the important principle of trans-substantivity in the rules. Even so, Professor Cooper cautioned that the subcommittee should not lightly turn away from a proposal that could improve the lives of those

who deal with these cases. Social Security cases, he observed, constitute a large share (8%) of the federal civil docket. Another issue is how to draft a rule that would supersede undesirable local rules while permitting the retention of valuable ones.

Professor Coquillette emphasized the need to exercise caution when departing from the principle of trans-substantivity in rulemaking. As soon as one permits the insertion into the national Rules of substance-specific provisions, one increases the risk of lobbying by special interests. If there is a need for rules on Social Security review cases, one solution might be to create a separate set of rules for that purpose.

Other Information Items. Judge Bates briefly summarized the following additional information items:

(1) Questions have arisen about the meaning of the provisions in Civil Rule 4(c)(3) for service of process by a United States marshal in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S. Marshals Service.

(2) The Civil and Appellate Rules Committees have formed a joint subcommittee to consider whether to amend the rules – perhaps only the Civil Rules – to address the effect (on the final judgment rule) of consolidating initially separate actions. *Hall v. Hall*, 138 S. Ct. 1118 (2018), established a clear rule that actions initially filed as separate actions retain their separate identities for purposes of final judgment appeals, no matter how completely the actions have been consolidated in the trial court. Complete disposition of all claims among all parties to what began as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291. The subcommittee has begun its deliberations with a conference call to discuss initial steps. The opinion in *Hall v. Hall* concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly."

(3) Rule 73(b)(1) was reviewed after the Advisory Committee received reports that the CM/ECF system automatically sends to the district judge assigned to a case individual consents to trial before a magistrate judge. That feature of the system disrupts the operation of the rule that "[a] district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral." No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to defeat the automatic notice feature, but there may be a work-around that would obviate the need for a rule. The Advisory Committee has suspended consideration of possible rule amendments while a system fix is explored.

(4) The Advisory Committee continues to consider the privacy of disability filings under the Railroad Retirement Act. The Appellate Rules Committee is taking the lead because review of those cases goes to the courts of appeals in the first instance.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules. Judge Livingston explained that the Advisory Committee had one action item – the proposed amendment to Rule 404(b) for final approval – and three information items related to Rules 106, 615, and 702.

Proposed Amendment to Rule 404(b) (Character Evidence; Crimes or Other Acts). The Advisory Committee sought final approval of proposed amendments to Rule 404(b). Professor Capra explained that the Advisory Committee had been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. He stated that the Advisory Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law because such amendments would make the rule rigid and more difficult to apply without achieving substantial improvement.

The Advisory Committee determined, however, that it would be useful to amend Rule 404(b) in some respects, especially with regard to the notice requirement in criminal cases. As to that requirement, the Committee determined that the notice should articulate the purpose for which the evidence will be offered and the reasoning supporting the purpose. Professor Capra noted issues that the Committee had observed with the operation of the current Rule. In some cases a party offers evidence for a laundry list of purposes, and the jury receives a corresponding laundry list of limiting instructions. Some courts rule on admissibility without analyzing the non-propensity purpose for which the evidence is offered. And some notices lack adequate specificity.

Professor Capra stated that the proposal to amend Rule 404(b) was published for comment in August 2018. Given how often 404(b) is invoked in criminal cases, Professor Capra expected robust comments, but only a few comments were filed, and they were generally favorable. In response to public comments and discussion before the Standing Committee, the Advisory Committee made two changes to the proposed Rule text as issued for public comment. Most importantly, the Committee changed the term "non-propensity" purpose to "permitted" purpose. Secondly, the Committee changed the notice provision to clarify that the "fair opportunity" requirement applies to notice given at trial after a finding of good cause.

A Committee member suggested replacing the verb "articulate" in the proposed amendment because, he suggested, the term usually refers to a spoken word rather than written material. He noted that the term is not used elsewhere in the Federal Rules. Professor Capra pointed out that the proposed amendment was an effort to get beyond merely stating a purpose. The terms "specify" or "state" were suggested as substitutions for "articulate." Judge Campbell stated that the use of the term "articulate" suggests both identifying the purpose and explaining the reasoning. Professor Capra noted that the word "articulate" is what the Advisory Committee agreed to, and it suggests more rigor. A DOJ representative noted that the language in the proposed amendment was the subject of painstaking negotiation, and that she preferred to retain

the negotiated language to avoid unintended consequences. The Committee determined to retain the term "articulate."

A judge member noted that the Committee Note still used the term "non-propensity" purpose even though that term had been removed from the text of the rule. Professor Capra explained that the use of the term was intentional and resulted from significant discussion at the Advisory Committee's meeting. Judge Campbell added that part of the reason for retaining the language in the Committee Note was to provide guidance to judges in applying the rule. Judge Livingston explained that the term propensity is embedded in caselaw and the Committee Note's use of that term would provide a good signal to readers to focus their caselaw research on that term.

Another judge member asked about the use of the term "relevant" in the Committee Note's statement that "[t]he prosecution must … articulate a non-propensity purpose … and the basis for concluding that the evidence is relevant in light of this purpose." Judge Livingston explained that this passage reflected a complex underlying discussion, and that the Committee was attempting to avoid undue specificity in the Committee Note.

Upon motion by a member, seconded by another, and on a voice vote: **The Committee decided to recommend the amendments to Rule 404(b) for approval by the Judicial Conference**.

Professor Capra thanked the DOJ for all its work on the rule. A DOJ representative noted the sensitivity of Rule 404(b) and thanked Professor Capra, Judge Livingston, and prior chair Judge Sessions for more than five years' work on the rule.

Information Items

Professor Capra summarized the Advisory Committee's ongoing consideration of possible amendments to Rule 106, sometimes known as the rule of completeness. The Advisory Committee is considering two kinds of potential amendments – one that would provide that a completing statement is admissible over a hearsay objection, and another that would provide that the rule covers oral as well as written or recorded statements. In an illustrative scenario, the defendant makes the statement "this is my gun, but I sold it two months ago," and the prosecution offers the first portion of the statement and objects to the admission of the latter portion on hearsay grounds. Some courts admit a completing oral statement into evidence over a hearsay objection, but other courts do not admit the completing statement. The Advisory Committee reached consensus on the desirability of acting to resolve the conflict but is carefully considering how such an amendment should be written and what limitations should govern when such a completing statement should be admitted over a hearsay objection. The Advisory Committee has received information about how completing oral statements are handled in other jurisdictions, including California and New Hampshire.

The next information item concerns Rule 615, the sequestration rule. The Advisory Committee is considering whether to propose an amendment addressing the scope of a Rule 615 order. The Rule text contemplates the exclusion of witnesses from the courtroom; one question is

whether a Rule 615 order can also bar access to trial testimony by witnesses when they are outside the courtroom. Most courts have answered this question in the affirmative, but others apply a more literal reading of the rule. The Advisory Committee is considering an amendment that would specifically allow courts discretion to extend a Rule 615 order beyond the courtroom. The rule would not be mandatory. One potentially challenging issue is how to treat trial counsel's preparation of excluded witnesses.

Professor Capra next reported on the Advisory Committee's ongoing work with regard to Rule 702. In September 2016 the President's Council of Advisors on Science and Technology issued a report which contained a host of recommendations for federal scientific agencies, the DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of possible changes to Rule 702. Judge Livingston appointed a Rule 702 Subcommittee to study what the Advisory Committee might do to address concerns relating to forensic evidence. In fall 2017 the Advisory Committee held a symposium on forensics and *Daubert* at Boston College School of Law.

Following discussion by the Advisory Committee, the main issue the subcommittee is considering concerns how to help courts to deal with overstatements by expert witnesses, including forensic expert witnesses. Professor Capra noted that the DOJ is currently reviewing its practices related to forensic evidence testimony, and some have suggested waiting to see the results of the DOJ's efforts. Judge Livingston stated that one threshold issue is whether the problems should be addressed by rule, or perhaps by judicial education. Judge Livingston thanked the DOJ and Professor Capra for putting together a presentation for the Second Circuit on forensic evidence that is available on video. Professor Capra noted that there will be a miniconference in the fall at Vanderbilt Law School to continue discussion of these issues and *Daubert*.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy presented the report of the Advisory Committee on Criminal Rules, which consisted of four information items.

Judge Molloy first reported on the Advisory Committee's decision not to move forward with suggestions that it amend Rule 43 to permit the court to sentence or take a guilty plea by videoconference. The Advisory Committee has considered suggestions to amend Rule 43 several times in recent years. The first suggestion came from a judge who assists in districts other than his own and who sought to conduct proceedings by videoconference as a matter of efficiency and convenience. The Advisory Committee concluded that an amendment to Rule 43 was not warranted to address that circumstance.

The second suggestion to amend Rule 43 came from the Seventh Circuit's opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), which included the specific statement that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. In *Bethea*, the defendant's many health problems made it extremely difficult for him to come to the courtroom, and given his susceptibility to

broken bones, doing so might have been dangerous for him. After Bethea was permitted to appear by videoconference for his plea and sentencing as requested by his counsel, Bethea appealed and argued that the physical-presence requirement in Rule 43 was not waivable. The Seventh Circuit in *Bethea* concluded that even under the exceptional facts presented "the plain language of Rule 43 requires all parties to be present for a defendant's plea" and "a defendant cannot consent to a plea via videoconference." *Id.* at 867. Advisory Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment.

A subcommittee that was formed to consider the issue and chaired by Judge Denise Page Hood recommended against amending the rule to permit use of videoconferencing for plea and sentencing proceedings. The subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of videoconferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three reasons. First, and most important, the subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where videoconferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Finally, the subcommittee was concerned that there would inevitably be constant pressure from judges to expand any exception to the requirement of physical presence at plea or sentencing. The Advisory Committee unanimously agreed with the subcommittee's recommendation not to amend Rule 43.

Shortly after that determination, the Advisory Committee received a request for reconsideration of that determination. Judges who serve in border states asked for the ability to use videoconferencing for pleas and sentencing. These judges explained that their courts were dealing with thousands of cases brought under 8 U.S.C. § 1326 against defendants charged with illegal reentry. Their districts cover vast distances and, under existing rules, either the judge must travel, or the U.S. Marshals Service must transport defendants. While sympathetic to the issue, the Advisory Committee determined that it would be undesirable to open the door to videoconferencing for these critical procedures. There is a slippery slope and once exceptions are made to the physical presence requirement, exceptions could swallow the rule in the name of efficiency.

Professor King noted that several years ago when the rules were reviewed with an idea of updating them to account for technological advancements, including enhanced audio/visual capabilities, some rules were amended but Rule 43's physical-presence requirement was left unchanged.

Judge Molloy next addressed the Advisory Committee's consideration of a suggestion received from a magistrate judge to amend Rule 40 to clarify the procedures for arrest for violations of conditions of release set in another district. The issue arises from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3). Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily be heard by the judicial officer who ordered the release. After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Advisory Committee decided Rule 40 could benefit from clarification but agreed with an observation by Judge Campbell that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Advisory Committee decided to take no action at this time. Judge Bruce McGiverin greatly assisted the Advisory Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

Judge Molloy next introduced the Advisory Committee's consideration of Rule 16, an issue he noted ties in with the Evidence Rules Advisory Committee's report about expert testimony as well as Civil Rule 26's requirements for expert discovery. Judge Molloy noted that he has served on the Advisory Committee for eleven years and for most of that time Rule 16 has been on the agenda. Judge Kethledge chairs the Rule 16 Subcommittee that has been asked to review suggestions to amend Rule 16 so that it more closely follows Civil Rule 26's provisions for disclosures regarding expert witnesses. Back in the early 1990s, there was a suggestion that discovery rules on experts in criminal cases be made parallel to rules governing civil cases. The Criminal Rules did not change, although changes to Civil Rule 26 went forward.

To address the questions before the subcommittee, Judge Kethledge convened a miniconference to discuss possible amendments to Rule 16. There was a very strong group of participants, from various parts of the country, including six or seven defense practitioners, and five or six representatives from the DOJ. Most had significant personal experience with these issues and had worked with experts.

Judge Kethledge organized discussion at the miniconference into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule. Second, they were asked to provide suggestions to improve the rule.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures with sufficiently detailed information to allow them to prepare to cross examine the witness. In contrast, the DOJ representatives stated that they were unaware of problems with the rule and expressed opposition to making criminal discovery more akin to Rule 26.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, participants made significant progress in identifying some common ground. The DOJ representatives said that framing the problems in terms of timing and sufficiency of the

notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the DOJ personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The subcommittee came away from the miniconference with concrete suggestions for language that would address timing and completeness of expert discovery.

Judge Molloy stated that the subcommittee plans to present a proposal to amend Rule 16 at the Advisory Committee's September meeting.

A DOJ representative noted that the Department views this less as a need for a rule change and more as a need to train lawyers so that prosecutors and defense counsel alike understand what the rules are. Prosecutors need to understand what the concerns are and the Department needs to conduct training to ensure this understanding. The DOJ has worked with Federal Public Defender Donna Elm to highlight the problematic issues; a training course presented by the DOJ's National Advocacy Center will be shown to all prosecutors. Even if a rule change were to go forward, it would take years. Collaboration on training means that the Department can begin to address problems now.

Judge Molloy provided a brief update on progress in implementing the recommendations of the Task Force on Protecting Cooperators. Task Force member Judge St. Eve reported on the status of efforts by the Bureau of Prisons to implement certain recommendations. One recommendation is to adopt provisions for disciplining inmates who pressure other inmates to "show their papers."

Judge Campbell thanked the advisory committee chairs and reporters for all the work that goes into the consideration of every suggestion. He noted that even a five-minute report on a given issue may be the result of long and painstaking effort.

OTHER COMMITTEE BUSINESS

Proposal to Revise Electronic Filing Deadline. Judge Chagares explained his suggestion that the Advisory Committees study whether the rules should be amended to move the current midnight electronic-filing deadline to earlier in the day, such as when the clerk's office closes in the respective court's time zone. The Supreme Court of Delaware has adopted such a practice. Judge Campbell delegated to Judge Chagares the task of forming a subcommittee to study the issue and provide an initial report at the January meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019, and she described several bills that have been introduced or reintroduced that are of interest to the rules process or the courts generally. There has been no legislative activity to move these bills forward. Ms. Wilson reviewed several pieces of legislation of general interest to the courts. Scott Myers provided an overview of H.R. 3304, a bipartisan bill introduced the week before the Committee meeting that would extend for an additional four years the existing exemption from the means test for chapter seven filers who are certain National Guard reservists. The bill is expected to pass; absent passage, an amendment to the

Bankruptcy Rules would be required. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Judge Campbell discussed the Judiciary's strategic planning process and the Committee's involvement in that process. He solicited comments on the Committee's identified strategic initiatives and the extent to which those initiatives have achieved their desired outcomes. Judge Campbell also invited input on the proposed approach for the update of the *Strategic Plan for the Federal Judiciary* that is to take place in 2020. Judge Campbell will correspond with the Judiciary's planning coordinator regarding these matters.

Procedure for Handling Public Input Outside the Established Public Comment Period. Judge Campbell summarized prior discussions by the Committee concerning how public submissions received outside the formal public comment period should be handled, including submissions addressed directly to the Standing Committee. Professor Struve explained the revised draft principles concerning public input during the Rules Enabling Act process and welcomed additional comments on the draft. These procedures are proposed to be posted on the website for the Judiciary. *See* Revised Draft Principles Concerning Public Input During the Rules Enabling Act Process (agenda book, p. 495).

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the principles concerning public input.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Phoenix, Arizona on January 28, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
September 2019

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3

2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 6-10

3. Approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 13-15

4. Approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 20-21

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 25, 2019. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; and Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and discussed four information items.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term "answer" in Rule 40(a)(3) to the term "response," making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that "it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology." The Advisory Committee sought final approval for the proposed amendments as published.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure

and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 3, 6, and 42, and Forms 1 and 2, with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3 (Appeal as of Right – How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendments address the effect on the scope of an appeal of designating a specific interlocutory order in a notice of appeal. The initial suggestion pointed to a line of cases in one circuit applying an expressio unius rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order rather than treating a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment. Research conducted after receiving the suggestion revealed that the problem is not confined to a single circuit, but that there is substantial confusion both across and within circuits.

Rule 3(c)(1)(B) currently requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. However, some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal – the one

serving as the basis of the court's appellate jurisdiction and from which time limits are calculated – and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Advisory Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment and the less-common case in which an appeal is taken from some other order, the term "judgment" and the term "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem. The result would require the appellant to designate the judgment – or the appealable order – from which the appeal is taken. Additional new subsections of Rule 3(c) would call attention to the merger principle.

The proposed amendments to Form 1 would create a Form 1A (Notice of Appeal to a Court of Appeals From a Judgment of a District Court) and Form 1B (Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court). Having different suggested forms for appeals from final judgments and appeals from other orders clarifies what should be designated in a notice of appeal. In addition, the Advisory Committee recommended conforming amendments to Rule 6 to change the reference to "Form 1" to "Forms 1A and 1B," and to Form 2 to reflect the deletion of "part thereof" from Rule 3(c)(1)(B).

Rule 42 (Voluntary Dismissal)

Current Rule 42(b) provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." Prior to the 1998 restyling of the rules, Rule 42(b) used the word "shall" instead of "may" dismiss. Although the 1998 amendment to Rule 42 was intended to be stylistic only, some courts have concluded that there is now discretion to decline to dismiss. To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals.

In addition, current Rule 42(b) provides that "no mandate or other process may issue without a court order." This language has created some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court.

The issues with the language "no mandate or other process may issue without a court order" are avoided – and the purpose of that language served – by deleting it and instead stating directly in new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Information Items

The Advisory Committee on Appellate Rules met on April 5, 2019. Discussion items included undertaking a comprehensive review of Rules 35 and 40, as well as a suggestion to

limit remote access to electronic files in actions for benefits under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v.

Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

As detailed above, the proposed amendments to Rules 35 and 40 published for public comment in August 2018 create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider discrepancies between Rules 35 and 40. The discrepancies are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could "suggest" rehearing en banc. The Advisory Committee determined not to make the rules more parallel but continues to consider possible ways to clarify practice under the two rules.

Privacy in Railroad Retirement Act Benefit Cases

The Advisory Committee was forwarded a suggestion directed to the Advisory Committee on Civil Rules. The suggestion requested that Civil Rule 5.2(c), the rule that limits remote access to electronic files in certain types of cases, be amended to include actions for benefits under the Railroad Retirement Act because of the similarities between actions under the Act and the types of cases included in Civil Rule 5.2(c). But review of Railroad Retirement Act decisions lies in the courts of appeals. For this reason, the Advisory Committee on Appellate Rules will take the lead in considering the suggestion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021, and Official Form 122A-1, with a recommendation that they be approved and transmitted to the Judicial Conference. Three of the

rules were published for comment in August 2018 and are recommended for final approval after consideration of the comments. The proposed amendments to the remaining three rules and the official form are technical or conforming in nature and are recommended for final approval without publication.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

The published amendment to Rule 2002: (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six comments were submitted. Four of the comments included brief statements of support for the amendment. Another comment suggested extending the clerk's noticing duties 30 days beyond the creditor proof of claim deadline because a case trustee or the debtor can still file a claim on behalf of a creditor for 30 days after the deadline. Because the creditor would receive notice of the claim filed on its behalf, the Advisory Committee saw no need for further amendment to the rule. The comment also argued that certain notices should be sent to creditors irrespective of whether they file a proof of claim, but the Advisory Committee disagreed with carving out certain notices. Another comment opposed the change that would require notice of entry of the confirmation order because some courts already have a local practice of sending the confirmation order itself to creditors. The Advisory Committee rejected this suggestion because not all courts send out confirmation orders.

After considering the comments, the Advisory Committee voted unanimously to approve the amendment to Rule 2002 as published.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c), the attendance of a witness and the production of documents may be compelled by means of a subpoena. The proposed amendment would add explicit authorization to compel production of electronically stored information (ESI). The proposed amendment further provides that a subpoena for a Rule 2004 examination is properly issued from the court where the bankruptcy case is pending by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Three comments were submitted. Two of the comments were generally supportive of the proposed amendments as published, while one comment from the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan urged that the rule should state that the bankruptcy judge has discretion to consider proportionality in ruling on a request for production of documents and ESI. Prior to publishing proposed Rule 2004, the Advisory Committee carefully considered whether to reference proportionality explicitly in the rule and declined to do so, in part because debtor examinations under Rule 2004 are intended to be broad-ranging. It instead proposed an amendment that would refer specifically to ESI and would harmonize Rule 2004(c)'s subpoena provisions with the subpoena provisions of Civil Rule 45. After consideration of the comments, the Advisory Committee unanimously approved the amendment to Rule 2004(c) as published.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock (or file a

statement that there is no such corporation). It is modeled on Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019).

At its spring 2018 meeting, the Advisory Committee considered and approved for publication an amendment to Rule 8012 to track the pending amendment to Appellate Rule 26.1 that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019. The amendment to Rule 8012(a) adds a disclosure requirement for nongovernmental corporate intervenors. New Rule 8012(b) requires disclosure of debtors' names and requires disclosures by nongovernmental corporate debtors. Three comments were submitted, all of which were supportive. The amendment was approved as published.

Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)

An amendment to Appellate Rule 25(d) that was adopted by the Supreme Court and transmitted to Congress on April 25, 2019, will eliminate the requirement of proof of service for documents served through the court's electronic-filing system. Corresponding amendments to Appellate Rules 5, 21, 26, 32, and 39 will reflect this change by either eliminating or qualifying references to "proof of service" so as not to suggest that such a document is always required. Because the provisions in Part VIII of the Bankruptcy Rules in large part track the language of their Appellate Rules counterparts, the Advisory Committee recommended conforming technical changes to Bankruptcy Rules 8013(a)(1), 8015(g), and 8021(d). The recommendation was approved.

Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income)

The Advisory Committee received a suggestion from an attorney who assists pro se debtors in the Bankruptcy Court of the Central District of California. He noted that Official Form 122A-1 contains an instruction at the end of the form, after the debtor's signature line, explaining that the debtor should *not* complete and file a second form (Official Form 122A-2) if

the debtor's current monthly income, multiplied by 12, is less than or equal to the applicable median family income. He suggested that the instruction not to file also be added at the end of line 14a of Form 122A-1, where the debtor's current monthly income is calculated. The Advisory Committee agreed that repeating the instruction as suggested would add clarity to the form and recommended the change. The Standing Committee approved the change.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revision of Official Bankruptcy Form 122A-1 and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 2004, 8012, 8013, 8015, and 8021 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve effective December 1, 2019, Official Form 122A-1 for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036 with a request that they be published for public comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

Judge Brian Fenimore of the Western District of Missouri noted that Rule 2005(c) – a provision that deals with conditions to assure attendance or appearance – refers to now-repealed provisions of the Criminal Code. The Advisory Committee agreed that the current reference to 18 U.S.C. § 3146 is no longer accurate and recommended replacing it with a reference to 18 U.S.C. § 3142, where the topic of conditions is now located. Because 18 U.S.C. § 3142 also

addresses matters beyond conditions to assure attendance or appearance, the proposed rule amendment will state that only "relevant" provisions and policies of the statute should be considered.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007 clarifies that only an insurance depository institution as defined by section 3 of the Federal Deposit Insurance Act (FDIA) is entitled to heightened service of a claim objection, and that an objection to a claim filed by a credit union may be served on the person designated on the proof of claim.

Rule 3007 provides, in general, that a claim objection is not required to be served in the manner provided by Rule 7004, but instead can be served by mailing it to the person designated on a creditor's proof of claim. The rule includes exceptions to this general procedure, one of which is that "if the objection is to the claim of an insured depository institution [service must be] in the manner provided by Rule 7004(h)." The purpose of this exception is to comply with a legislative mandate in the Bankruptcy Reform Act of 1994, set forth in Rule 7004(h), providing that an "insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)" is entitled to a heightened level of service in adversary proceedings and contested matters.

The current language in Rule 3007(a)(2)(A)(ii) is arguably too broad in that it does not qualify the term "insured depository institution" as being defined by the FDIA. Because the more expansive Bankruptcy Code definition of "insured depository institution" set forth in 11 U.S.C. § 101(35) specifically includes credit unions, such entities also seem to be entitled to heightened service under the rule. The proposed amendment to Rule 3007(a)(2)(A)(ii) would limit its applicability to an insured depository institution as defined by section 3 of the FDIA (consistent with the legislative intent of the Bankruptcy Reform Act of 1994, as set forth in

Rule 7004(h)), thereby clarifying that an objection to a claim filed by a credit union may be served, like most claim objections, on the person designated on the proof of claim.

Rule 7007.1 (Corporate Ownership Statement)

Continuing the advisory committees' efforts to conform the various disclosure statement rules to the pending amendment to Appellate Rule 26.1, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1.

Rule 9036 (Notice by Electronic Transmission)

The proposed amendment would implement a suggestion from the Committee on Court Administration and Case Management requiring high-volume-paper-notice recipients to sign up for electronic service, subject to exceptions required by statute.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. However, only courts may serve or give notice to an entity at an electronic address registered with the Bankruptcy Noticing Center as part of the Electronic Bankruptcy Noticing program.

Finally, the title of Rule 9036 will change to "Notice and Service by Electronic Transmission" to better reflect its applicability to both electronic noticing and service. The rule does not preclude noticing and service by other means authorized by the court or rules.

Information Items

The Advisory Committee met on April 4, 2019. The agenda for that meeting included a report on the work of the Restyling Subcommittee on the process of restyling the Bankruptcy Rules. The Advisory Committee anticipates this project will take several years to complete.

The Advisory Committee also reviewed a proposed draft Director's Bankruptcy Form for an application for withdrawal of unclaimed funds in closed bankruptcy cases, along with proposed instructions and proposed orders. The initial draft was the product of the Unclaimed Funds Task Force of the Committee on the Administration of the Bankruptcy System. The Advisory Committee supported the idea of a nationally available form to aid in processing unclaimed funds, made minor modifications, and recommended that the Director adopt the form effective December 1, 2019. The form, instructions, and proposed orders are available on the pending bankruptcy forms page of uscourts.gov and will be relocated to the list of Official and Director's Bankruptcy Forms on December 1, 2019.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 30(b)(6), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, appears regularly on the Advisory Committee's agenda. Counsel for both plaintiffs and defendants complain about problematic practices of opposing counsel under the current rule, but judges report that they are rarely asked to intervene in these disputes. In the past, the Advisory Committee studied the issue extensively but identified no rule amendment that would effectively address the identified problems. The Advisory Committee added the issue to its agenda once again in 2016 and has concluded, through the exhaustive efforts of its Rule 30(b)(6) Subcommittee, that discrete rule changes could address certain of the problems identified by practitioners.

In assessing the utility of rule amendments, the subcommittee began its work by drafting more than a dozen possible amendments and then narrowing down that list. In the summer of 2017, the subcommittee invited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;

2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;

3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;

4. Forbidding contention questions in Rule 30(b)(6) depositions;

5. Adding a provision to Rule 30(b)(6) for objections; and

6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

More than 100 comments were received. The focus eventually narrowed to imposing a duty on the parties to confer. The Advisory Committee agreed that such a requirement was the most promising way to improve practice under the rule.

The proposed amendment that was published for public comment required that the parties confer about the number and description of matters for examination and the identity of each witness the organization will designate to testify. As published, the duty to confer requirement was meant to be iterative and included language that the conferral must "continu[e] as necessary."

During the comment period, the Advisory Committee received approximately 1,780 written comments and heard testimony from 80 witnesses at two public hearings. There was

strong opposition to the proposed requirement that the parties confer about the identity of each witness, as well as to the directive that the parties confer about the "number and description of" the matters for examination. However, many commenters supported a requirement that the parties confer about the matters for examination.

After carefully reviewing the comments and testimony, as well as the subcommittee's report, the Advisory Committee modified the proposed amendment by: (1) deleting the requirement to confer about the identity of the witness; (2) deleting the "continuing as necessary" language; (3) deleting the "number and description of" language; and (4) adding to the committee note a paragraph explaining that the duty to confer does not apply to a deposition under Rule 31(a)(4) (Questions Directed to an Organization). The proposed amendment approved by the Advisory Committee therefore retains a requirement that the parties confer about the matters for examination. The duty adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and preparation of the witness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 30(b)(6) as set forth in Appendix C and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 7.1, the rule that addresses disclosure statements, with a request that it be published for comment in August 2019. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7.1 would do two things. First, it would require a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to proposed amendments to Appellate Rule 26.1 (adopted by the Supreme Court and transmitted to Congress on April 25, 2019) and Bankruptcy Rule 8012 (to be considered by the Conference at its September 2019 session). Second, the proposal would amend the rule to require a party in a diversity case to disclose the citizenship of every individual or entity whose citizenship is attributed to that party.

The latter change aims to facilitate the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of an individual or entity attributed to a party. For example, a limited liability company takes on the citizenship of each of its owners. If one of the owners is a limited liability company, the citizenships of all the owners of that limited liability company pass through to the limited liability company that is a party in the action. Requiring disclosure of "every individual or entity whose citizenship is attributed" to a party will ensure early determination that jurisdiction is proper.

Information Items

The Advisory Committee met on April 2-3, 2019. Among the topics for discussion was the work of two subcommittees tasked with long-term projects, and the creation of a joint Appellate-Civil subcommittee.

Multidistrict Litigation Subcommittee

As previously reported, since November 2017, this subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC.

Subcommittee members have also participated in several conferences hosted by different constituencies, including MDL transferee judges.

At the Advisory Committee's April 2019 meeting, there was extensive discussion of the various issues on which the subcommittee has determined to focus its work. The Advisory Committee agreed with the subcommittee's inclination to focus primarily on four issues: (1) use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery; (2) providing an additional avenue for interlocutory appellate review of some district court orders in MDL proceedings; (3) addressing the court's role in relation to global settlement of multiple claims; and (4) third-party litigation funding. It is still too early to know whether this work will result in any recommendation for amendments to the Civil Rules.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The subcommittee developed a preliminary draft rule for discussion purposes, including for discussion at the Advisory Committee's April 2019 meeting. On June 20, 2019, the subcommittee convened a meeting to obtain feedback on its draft rule. Invited participants included claimants' representatives, a magistrate judge, as well as representatives of ACUS, the Social Security Administration, and the DOJ. One of the authors of the study that forms the basis of the ACUS suggestion also attended. Each participant provided his or her perspective on the draft rule, followed by a roundtable discussion.

The subcommittee will continue to gather feedback on the draft rule, including from magistrate judges. The subcommittee hopes to come to a decision as to whether pursuit of a rule is advisable in time for the Advisory Committee's October 2019 meeting.

Subcommittee on Final Judgment in Consolidated Cases

The Civil and Appellate Rules Advisory Committees have formed a joint subcommittee to consider whether either rule set should be amended to address the effect on the "final judgment rule" of consolidating initially separate cases.

The impetus for this project is *Hall v. Hall,* 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. If so, the subcommittee will determine the value of any rules amendments to address those problems.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on May 7, 2019. The bulk of the meeting focused on work of the Rule 16 Subcommittee, formed to consider suggestions from two district judges that

pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the robust expert disclosure requirements in Civil Rule 26. The Advisory Committee charged the subcommittee with studying the issue, including the threshold desirability of an amendment, as well as the features any recommended amendment should contain.

Early on, the subcommittee determined that it would be useful to hold a mini-conference to explore the contours of the issue with all stakeholders. At its October 2018 meeting (in anticipation of the mini-conference), the Advisory Committee heard a presentation by the DOJ on its development and implementation of policies governing disclosure of forensic and non-forensic evidence.

Participants in the May 6, 2019 mini-conference included defense attorneys, as well as prosecutors and representatives from the DOJ, each of whom has extensive personal experience with pretrial disclosures and the use of experts in criminal cases. The discussion proceeded in two parts. First, participants were asked to identify any concerns or problems with the current rule. Second, they were asked to provide suggestions on how to improve the rule.

The defense attorneys identified two problems with Rule 16 in its current form: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Defense practitioners reported they sometimes receive summaries of expert testimony a week or the night before trial, which significantly impairs their ability to prepare for trial. They also reported that they often do not receive sufficiently detailed disclosures to allow them to prepare to cross examine the expert witness. In stark contrast, the DOJ representatives reported no problems with the current rule.

As to the subcommittee's second inquiry concerning ways to improve the rule, participants discussed possible solutions on the issues of timing and completeness of expert

discovery. Significant progress was made in identifying common ground; the discussion produced concrete suggestions for language that would address the timing and sufficiency issues identified by defense practitioners. The subcommittee plans to present its report and a proposed amendment to Rule 16 at the Advisory Committee's September 2019 meeting.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted considering the prosecution's expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term "non-propensity purpose" to "permitted purpose."

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendment and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 404 as set forth in Appendix D and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on May 3, 2019. The agenda included discussion of possible amendments to Rules 106, 615, and 702. The Advisory Committee also continues to monitor the development of the law following the decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

Possible Amendments to Rule 702 (Testimony by Expert Witnesses)

A subcommittee on Rule 702 has been considering questions that arise in the application of the rule, including treatment of forensic expert evidence. The subcommittee, after extensive discussion, made three recommendations with which the Advisory Committee agreed: (1) it would be difficult to draft a freestanding rule on forensic expert testimony because any such amendment would have an inevitable and problematic overlap with Rule 702; (2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note

because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and (3) it would not be advisable to publish a "best practices manual" for forensic evidence.

The subcommittee expressed interest in considering an amendment to Rule 702 that would focus on the important problem of overstating results in forensic and other expert testimony. One example: an expert stating an opinion as having a "zero error rate" where that conclusion is not supportable by the methodology. The Advisory Committee has heard extensively from the DOJ on its efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Advisory Committee is considering other ways to aid courts and litigants in meeting the challenges of forensic evidence, including assisting the FJC in judicial education. In this regard, the Advisory Committee is holding a mini-conference on October 25, 2019 at Vanderbilt Law School. The goal of the mini-conference is to determine "best practices" for managing *Daubert* issues. A transcript of the mini-conference will be published in the *Fordham Law Review*.

Possible Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)

The Advisory Committee continues to consider whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. A suggestion from a district judge noted two possible amendments: (1) to provide that a completing statement is admissible over a hearsay objection; and (2) to provide that the rule covers oral as well as written or recorded statements.

Several alternatives for an amendment to Rule 106 are under consideration. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

Possible Amendments to Rule 615 (Excluding Witnesses)

The Advisory Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order and whether it applies only to exclude witnesses from the courtroom (as stated in the text of the rule) or if it can extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony. Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Advisory Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Advisory Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the scope of the order is desirable. The investigation of this problem is consistent with the Advisory Committee's ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given increasing witness access to information about testimony through news, social media, or daily transcripts.

At its May 2019 meeting, the Advisory Committee resolved that any amendment to Rule 615 should allow, but not mandate, orders that extend beyond the courtroom. One issue that the Advisory Committee must work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

OTHER ITEMS

The Standing Committee's agenda included four information items. First, the Committee discussed a suggestion from the Chair of the Advisory Committee on Appellate Rules that a study be conducted to determine whether the Appellate, Bankruptcy, Civil, and Criminal Rules should be amended to change the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone.

The Chair authorized the creation of a joint subcommittee comprised of representatives of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, and delegated to Judge Chagares the task of coordinating the subcommittee's work. The subcommittee plans to present its report to the Committee at its January 2020 meeting.

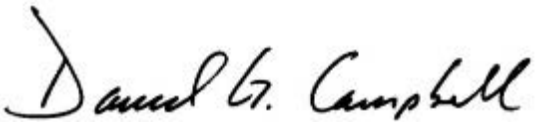
Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, based on feedback received at the Committee's January 2019 meeting, the Reporter to the Committee drafted revised proposed procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. The Committee discussed and approved those procedures.

Fourth, at the request of the Judiciary Planning Coordinator, Committee members discussed the extent to which the Committee's current strategic initiatives have achieved their desired outcomes and the proposed approach for the 2020 update to the *Strategic Plan for the*

Federal Judiciary, and authorized Judge Campbell to convey the Committee's views to the Judiciary Planning Coordinator.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Form (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

Appendix D – Federal Rules of Evidence (proposed amendment and supporting report excerpt)

TAB C.3

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Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the "three day rule."	
AP 29	An exception added to Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using "bond or other security."	CV 62, 65.1
BK 8002(a)(5)	Adds a provison to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	Amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	Adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorized the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	Authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 23	Amendments (1) require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond"; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	Amendments to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised August 2019

Effective December 1, 2018 REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019

Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019)

REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Published in 2016-17. Eliminates unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Unpublished. Technical amendments to remove the term "proof of service."	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Proposed subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	

Revised August 2019

Effective (no earlier than) December 1, 2019 Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019) REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by the relevant advisory committee (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised August 2019

Effective (no earlier than) December 1, 2020 Current Step in REA Process: approved by the Standing Committee (June 2019) REA History: approved by the relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 2005	Unpublished. Replaces updates references to the Criminal Code that have been repealed.	
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifiies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised August 2019

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. The phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3) with "[a] court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised August 2019

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised August 2019

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	· 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	· 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	· 2/13/19: Introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsor:* Durbin (D-IL)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	· 5/8/19: Introduced in the Senate; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	· 5/9/19: Introduced in the Senate; referred to Judiciary Committee

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	· 5/15/19: Introduced in the Senate; referred to Judiciary Committee
HAVEN Act (Honoring American Veterans in Extreme Need Act of 2019)	**H.R. 2938** *Sponsor:* McBath (D-GA-6) *Co-Sponsors:* 38 (D-35, R-3) **S. 679** *Sponsor:* Baldwin (D-WI) *Co-Sponsors:* 41 (D-19, R-21, I-1)	Official Forms 122A-1, 122B, and 122C-1 lines 9 & 10.	**Bill Text:** https://www.congress.gov/bill/116th-congress/house-bill/2938/all-actions?loclr=cga-bill **Summary:** Not posted. The bill introduction states: "**A BILL** To exempt from the calculation of monthly income certain benefits paid by the Department of Veterans Affairs and the Department of Defense." **Report:** None.	· 8/26/19: became P.L. No. 116-52 · 7/23/19: Passed/agreed to in House. · 3/06/19: Introduced into the Senate, referred to the Committee on the Judiciary.

Small Business Reorganization Act of 2019	**H.R. 3311** *Sponsor:* Cline (R-VA) *Co-Sponsors:* 3 (D-2, R-1) **S 1091** *Sponsor:* Baldwin (D-WI) *Co-Sponsors:* 41 (D-19, R-21, I-1)	Rules 1020, 2007.1, 2009, 2012, 2015, Official Form 201.	**Bill Text:** https://www.congress.gov/bill/116th-congress/house-bill/3311/all-actions?loclr=cga-bill **Summary:** Not posted. The bill introduction states: "**A BILL** To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes." **Report:** None.	· 8/26/19: Became P.L. No. 116-54. · 7/23/19: Passed/agreed to in House. · 6/16/19: Introduced in House · 4/09/19: Introduced into the Senate, referred to the Committee on the Judiciary.
National Guard and Reservists Debt Relief Extension Act of 2019	**H.R. 3304** *Sponsor:* Cohen (D-TN) *Co-Sponsors:* 3 (D-1, R-2)	None. However, Official Form 122A-1Supp. Line 3 will need to be amended if the legislation does not pass by 12/18/19.	**Bill Text:** https://www.congress.gov/116/bills/hr3304/BILLS-116hr3304rh.pdf **Summary:** Not posted. The bill introduction states: "A bill to exempt for an additional 4-year period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days." **Report:** None.	· Became P.L. No. 116-53 · 7/23/19: Passed/agreed to in House. · 6/18/19: Introduced in House
N/A	N/A	CV 26	N/A	· 9/26/19: House Judiciary Committee hearing on the topics of PACER, cameras in the courtroom, and sealing court filings

TAB 2

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 16 (Pretrial Disclosure Concerning Expert Witnesses) (17-CR-B; 17-CR-D; and 18-CR-F)

DATE: September 4, 2019

The Rule 16 Subcommittee, chaired by Judge Kethledge, unanimously recommends that the Committee approve and recommend for publication the proposed amendments to Rule 16 that accompany this report. The Subcommittee's proposal responds to the two core problems that were of greatest concern to practitioners: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure.

A clean draft of the amended rule and committee note, as well as redlined versions, are included at Tab B.

This memorandum begins with a brief description of the origins of the proposal and the process the Subcommittee used to develop it, before turning to a description of the Subcommittee's proposal.

A. Background

1. The origins of the proposal

The Committee has received three suggestions that it consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* 17-CR-B (Judge Jed Rakoff); 19-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). The suggestions are included at Tab C.

Judge Jed Rakoff, co-chairman of the National Commission on Forensic Science, wrote suggesting that the Committee consider amending Rule 16(a)(1)(G) to parallel Civil Rule 26(a)(2)(B) governing pretrial disclosure of the testimony to be given by expert witnesses.

Judge Rakoff explained that the provisions of Rule 16 are couched in much more general language than the parallel provisions of Civil Rule 26, and as a result (as the caselaw and everyday experience both attest) pretrial expert disclosures in federal criminal cases are frequently more minimal than the comparable expert disclosures in civil cases. This poses a

serious problem: counsel are frequently blindsided by expert testimony given in criminal cases. Judge Rakoff also noted that research has tied inaccurate expert testimony to wrongful convictions, including those later exposed by DNA testing. These concerns led the National Commission on Forensic Science to recommend that for forensic experts, the Department of Justice voluntarily agree to disclose in federal criminal cases the same information that Civil Rule 26 mandates in civil cases.

Although the Department accepted many of the Commission's recommendations and issued a memorandum to federal prosecutors regarding forensic science experts, Judge Rakoff emphasized that memorandum lacks the force of law, and he predicted that disclosures would vary widely from district to district and even among individual AUSAs. Seeing no reason why pretrial disclosure of expert testimony should be any more restricted in criminal than civil cases, he recommended amending Rule 16 to parallel Civil Rule 26(a)(2)(B).

Judge Rakoff's suggestion would also affect all government experts, not just the forensic experts addressed by the National Commission and the Department's new guidance to prosecutors. Judge Rakoff did not address government discovery of defense expert information.

Judge Paul Grimm (17-CR-D) provided the Committee with a short article proposing that Rule 16 be amended to parallel more closely Civil Rule 26(a)(2)'s requirements for pretrial discovery of expert testimony. He identified the challenges district judges face in making expert admissibility rulings in criminal cases: the pressure of the speedy trial requirements, the breadth of expert testimony introduced in criminal cases, the pressure on defendants to plead guilty quickly, and difficulty in obtaining defense experts. The final factor, in Judge Grimm's view, is the "[i]nsufficiently detailed disclosure of expert witnesses under the criminal procedure rules." Suggestion 17-CR-D at 11. After comparing Rule 16(a)(1)(G) with Civil Rule 26(a)(2)(A) and (B), he concluded that "the expert disclosures required by the rules of civil procedure are far more robust, detailed and helpful to the recipient than those required by the criminal procedure rules." *Id.* at 13.

In practice, Judge Grimm concluded, expert discovery in criminal cases is inadequate from the perspective of both the defense and the court:

> In contrast to the comprehensive disclosures in civil cases, in criminal cases, most of the expert disclosures I have seen (and remember that the trial judge does not see the disclosure unless there is a challenge, because the disclosure only is served on the defense attorney, not docketed on the court record) were cursory as well as conclusory, and not particularly useful for cross-examining the expert or challenging her testimony. And they certainly were insufficient to be of much help to me in making a ruling on admissibility of the expert's opinions.

Id. at 13-14. Like Judge Rakoff, Judge Grimm noted that the DOJ Guidance is helpful but not sufficient, because its effectiveness will be muted by its narrow application to forensic evidence and expert reports, excluding the many other types of expert testimony in criminal prosecutions. Accordingly, Judge Grimm recommended "that the Criminal Rules Advisory Committee consider amending Rule 16 to enhance the Rule 16(a)(1)(G) and (b)(1)(C) expert disclosures,"

making the Criminal Rule "more closely resemble the disclosures required in civil cases by Fed. R. Civ. P. 26(a)(2)." *Id.* at 21.

> At a minimum, Rule 16 disclosures should include: (1) a complete statement of each opinion the expert will testify to, as well as the basis and reasons supporting them; (2) a summary of the facts or data considered (not just relied on) by the witness in forming his or her opinions; and (3) a description of the witness's qualifications. In addition, while less important, it would also bolster Rule 16 if the disclosures included a list of cases in the past 4 years where the witness had testified (allowing counsel to read the prior testimony), and a copy of any exhibits that will be used by the expert in support of his or her testimony.

Id.

Finally, Carter B. Harrison (18-CR-F), a CJA attorney from New Mexico, wrote to urge the Committee to amend Rule 16's expert disclosure provisions. His concerns about the insufficiency of the current pretrial disclosure rules are similar to those raised by Judges Rakoff and Grimm. In addition, Mr. Harrison's submission included several points not addressed in the other submissions, including: (1) adding a requirement that the witness (not the prosecutor) sign the summary; (2) tailoring the reciprocity requirement; and (3) adding an option for reciprocal depositions for retained experts.

2. Evaluating the proposals and the need for an amendment

After initial discussion at the spring 2018 meeting of the Rules Committee, Judge Molloy referred the Rakoff and Grimm proposals (and later the Harrison proposal) to the Rule 16 Subcommittee[1] chaired by Judge Kethledge.[2] In order to assist the Committee in evaluating the proposals, two informational sessions were arranged.

At the Committee's fall 2018 meeting in Nashville, the Department of Justice provided several speakers[3] whose presentations covered the Department's development and implementation of new policies governing disclosure of forensic evidence, its efforts to improve the quality of its forensic analysis, and its practices in cases involving forensic and non-forensic expert evidence. The presentations also provided an opportunity to compare discovery in

[1] The Harrison proposal, received after the April meeting, was later referred to the Subcommittee.

[2] The Subcommittee's members are Judge Dever, Ms. Elm, Judge Feinerman, Professor Kerr, Ms. Robinson, and Mr. Wroblewski. Judge Molloy has participated ex officio.

[3] The speakers were Andrew Goldsmith, National Criminal Discovery Coordinator; Zachary Hafer, Chief of the Criminal Division, District of Massachusetts; Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General; Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory; and Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York.

criminal cases with the discovery provided under Civil Rule 26(a). The agenda book for that meeting also included a report by Ms. Elm of issues noted by Federal Defenders.

In April 2019 the Subcommittee hosted a one-day miniconference to learn more about the experiences of practitioners. The miniconference participants, experienced practitioners selected to provide perspectives from different districts and different kinds of cases, were:

- Marilyn Bernardski, private practice, CDCA (by telephone)
- Marlo Cadeddu, private practice, NDTX
- Michael Donohoe, Deputy Federal Defender, DMT
- Andrew Goldsmith, Associate Deputy AG & National Discovery Coordinator
- John Ellis, CJA, SDCA
- Zachary Hafer, Criminal Chief, U.S. Attorney's Office, DMA
- Robert Hur, U.S. Attorney, DMD
- Tracy McCormick, U.S. Attorney's Office, EDVA
- Mark Schamel, private practice, Washington, DC
- Elizabeth Shapiro, DOJ Representative to the Committee on Practice and Procedure and the Evidence Rules Committee
- John Siffert, private practice, SDNY
- Douglas Squires, Special Litigation Counsel, U.S. Attorney's Office, SDOH
- Lori Ulrich, Chief Trial Unit, Federal Defender, MDPA

Professor Dan Capra, Reporter to the Evidence Rules Committee, also attended.

The participants were invited to discuss several issues: (1) what problems (if any) they had encountered with pretrial disclosure of forensic evidence before trial; (2) what problems (if any) they had encountered with pretrial disclosure of non-forensic evidence before trial; (3) what changes or practices would prevent the problems they had identified; and (4) whether the requirements should be the same, or different, for government and defense disclosure.

Although the Department's representatives generally described the pretrial disclosure practices of government attorneys as thorough and timely, the defense participants described very serious problems with both the content and timing of disclosures they had received.

Participants described common problems with the content of disclosures. Some disclosures were so brief they provided little help in trial preparation. In other cases, expert witnesses testified about subjects not included in the disclosure, and the defense was not prepared to respond effectively.

In numerous cases, the problem was timing. In the most extreme examples, disclosures were made on a Friday afternoon before a Monday trial, or the day before a trial. Members queried whether the court granted relief in such cases. The participants responded that since Rule 16 does not include any provision on timing, it was difficult to persuade the court that a violation of any sort had occurred. Participants also described the special timing issues confronting CJA attorneys, who cannot realistically respond to last minute disclosures

concerning government expert witnesses. When a CJA attorney learns of a government expert witness, the attorney cannot retain an opposing expert until the court has approved that expense. And in situations where there are no suitable local experts, the identification of a suitable expert may result in additional delay.

The defense participants agreed that the problems they had encountered were not limited to or predominantly associated with forensic experts.

Participants were divided on the question whether the same rules should govern both government and defense discovery. Some defense participants expressed concern with expanding the defendant's current pretrial disclosure obligations. But participants also noted that Rule 16 currently requires reciprocal discovery (if initiated by the defendant). The Department's representatives expressed strong support for keeping the reciprocity in any expansion of pretrial disclosure obligations.

3. Subcommittee deliberations

Subcommittee members found the miniconference extremely useful in helping to identify the problems that were of greatest concern to practitioners, and the reporters were tasked with developing discussion drafts addressing these issues.

The Subcommittee met by phone in July to consider initial drafts prepared by the reporters. A thorough discussion included the structure of the amendment, its substantive provisions, including a provision exempting information already disclosed and the need for supplementation, and terminology to replace the term "summary." The reporters prepared a revised draft, which the Subcommittee reviewed in a telephone conference in August. The Subcommittee's consensus at that call required only a few revisions, and the final version with the committee note was approved by each member of the Subcommittee, including the Department of Justice, via email. A few members indicated with their approval that they may continue to advocate for small changes to the rule or the note at the Committee's fall meeting.

B. The Subcommittee's proposal

The Subcommittee concluded that the two core problems of greatest concern to practitioners were the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. The amendments address these issues. Because the Subcommittee concluded that these problems were not limited to forensic experts, the proposed amendments address all expert testimony. The Subcommittee also concluded that the new provisions should be reciprocal. Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) mirror one another.

1. Specificity regarding the information that must be disclosed

The proposed amendment is intended to signal that the cursory disclosures being made in some cases are not sufficient. The current rule requires the disclosure of only a "written summary" of the expert's testimony. To ensure that parties receive adequate information about the content of the witness's testimony as well as information essential to test the reliability of the expert's testimony, subsections (G)(i) and (iii) – and the parallel provisions in (C)(i) and (iii) – delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past ten years), and a list of other cases in which the witness has testified in the past four years. These requirements were drawn from Civil Rule 26.

The proposed amendment departs, however, in some respects from Civil Rule 26. Like current Rule 16, it does not distinguish between different types of experts, or require more complete disclosures from only one class of expert witnesses. And, unlike Civil Rule 26(a)(2)(B), it does not require the witness to prepare and sign the disclosure. The Subcommittee concluded that in some circumstances it may be appropriate for the prosecutor to draft the disclosure. Disclosures drafted by the prosecutor must, however, accurately portray the witness's testimony. Accordingly, the proposal requires the disclosure to be "approved and signed" by the expert. The Subcommittee also recognized that some experts are not under the control of the party who will present the evidence. Examples include a member of a local police department, a treating physician, or an accountant who was employed by a defendant. Although these individuals can be subpoenaed to testify, it may not always be possible for the party who will introduce their testimony to obtain the witness's signature on the pretrial disclosure. The proposal deals with this possibility; it requires the disclosure to be approved and signed by the witness unless the party who will call the witness is "unable to obtain" the witness's signature. In such cases, however, all of the other requirements concerning the contents of the disclosure must be met.

The proposal recognizes that in some situations required information may already have been provided in a report of an examination or test under (a)(1)(F) or (b)(1)(B) or supporting materials that accompany that report. To avoid a costly duplication of effort, it provides that information already provided need not be provided again in the expert disclosure. This may be particularly important when the reports and disclosures are provided by forensic experts whose professional standards would require time consuming procedures to be repeated.

To deal with the possibility that a party may decide to have the expert testify on additional, different, or fewer issues than those covered in the first disclosure, subsections (G)(v) and (C)(v) require that a party promptly supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that if there is any modification, expansion, or contraction of a party's expert testimony after the initial disclosure, the other party receives prompt notice of that correction or modification.

2. Specificity regarding timing of disclosures

At the May meeting of the Committee, and again in Subcommittee discussions, members agreed that the amendment should include specific and enforceable provisions on the timing of disclosure. There was disagreement, however, on whether the amendment should set a default deadline for disclosure, such as 45 days before trial for the prosecution's disclosures. Although many defense members and some judges supported a default requirement, noting that it could be adjusted in particular cases as needed, the Department and other members disagreed. In their view, the enormous variation in the caseloads of different districts, as well as the circumstances in individual cases, meant that such a default would inevitably generate a large number of requests for extensions of time, burdening both the parties and the courts. The reporters' efforts to develop specific timing requirements for both the prosecution and the defense, while taking into account the Speedy Trial Act, revealed the complexity of the problem.

The Subcommittee's draft seeks to ensure enforceable deadlines that the prior provisions lacked by requiring that either the court or a local rule must set a specific time for each party to make its disclosure of expert testimony to the other party. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amended rule does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Under new Rule 16.1 (which will go into effect on December 1, 2019 absent action by Congress), the parties must "confer and try to agree on a timetable" for pretrial disclosures, and the court in setting times for expert disclosures in individual cases should consider the parties' recommendations.

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TAB 2B

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DISCUSSION DRAFT AMENDMENT TO
RULE 16(a)(1)(G) – ROUND 3 8-21-19

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * *

(G) Expert witnesses. –

(i) Duty to Disclose. At the defendant's request, the government must ~~give~~ disclose to the defendant, in writing, the information required by (G)(iii) for ~~a written summary of~~ any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (G)(iii) for ~~a written summary~~

~~of~~ the testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court or a local rule must set a time for the government to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure ~~summary provided under this paragraph~~ must contain

- a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the government will elicit from the witness in its case-in-chief;
- the bases and reasons for those opinions; ~~and~~

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

If the government previously provided a report under (F) that contained any information required by this subparagraph (G), that information need not be repeated in the expert witness disclosure.

(iv) Signature on the Disclosure. The witness must approve and sign the disclosure, unless the government states in the disclosure that it could not obtain the witness's signature.

(v) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure [for the defendant] in accordance with (c).

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DISCUSSION DRAFT AMENDMENT TO RULE 16(b)(1)(C) – round 3 8-21-19

Rule 16. Discovery and Inspection

* * *

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * *

(C) Expert witnesses. –

(i) Duty to Disclose. At the government's request, ~~T~~the defendant must~~, at the government's request,~~ disclose ~~give~~ to the government, in writing, the information required by subparagraph (C)(iii) for ~~a written summary of~~ any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if :

~~(i)~~ • the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

~~(ii)~~ • the defendant has given notice under Rule

12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court or a local rule must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. ~~This~~The ~~summary~~ disclosure must contain

- a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the defendant will elicit from the witness on direct examination;
- the bases and reasons for those opinions; ~~and~~
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and

- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

If the defendant previously provided a report under (B) that contained any information required by this subparagraph (C), that information need not be repeated in the expert witness disclosure.

(iv) Signature on the Disclosure. The witness must approve and sign the disclosure, unless the defense states in the disclosure that it could not obtain the witness's signature.

(v) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

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PROPOSED AMENDMENT TO RULE 16(a)(1)(G)

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * *

(G) Expert witnesses. –

(i) Duty to Disclose. At the defendant's request, the government must disclose to the defendant, in writing, the information required by (G)(iii) for any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (G)(iii) for the testimony that the government intends to use under Rules 702, 703, or

705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court or a local rule must set a time for the government to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure must contain

- a complete statement of all opinions that the government will elicit from the witness in its case-in-chief;
- the bases and reasons for those opinions;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and

- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

If the government previously provided a report under (F) that contained any information required by this subparagraph (G), that information need not be repeated in the expert witness disclosure.

(iv) Signature on the Disclosure. The witness must approve and sign the disclosure, unless the government states in the disclosure that it could not obtain the witness's signature.

(v) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure [for the defendant] in accordance with (c).

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PROPOSED AMENDMENT TO RULE 16(b)(1)(C)

Rule 16. Discovery and Inspection

*** * ***

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * *

(C) Expert witnesses. –

(i) Duty to Disclose. At the government's request, the defendant must disclose to the government, in writing, the information required by subparagraph (C)(iii) for any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if :

~~**(i)**~~ • the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

~~**(ii)**~~ • the defendant has given notice under Rule

12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court or a local rule must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. The disclosure must contain

- a complete statement of all opinions that the defendant will elicit from the witness on direct examination;
- the bases and reasons for those opinions;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and

- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

If the defendant previously provided a report under (B) that contained any information required by this subparagraph (C), that information need not be repeated in the expert witness disclosure.

(iv) Signature on the Disclosure. The witness must approve and sign the disclosure, unless the defense states in the disclosure that it could not obtain the witness's signature.

(v) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

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Committee Note

The amendment addresses two shortcomings of the prior provisions: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) mirror one another.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subsections (G)(i) and (iii)—and the parallel provisions in (C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

Subparagraphs (G)(iii) and (C)(iii) also recognize that in some situations required information may already have been provided in a report of an examination or test under (a)(1)(F) or (b)(1)(B) or supporting materials that accompany that report. That information need not be provided again in the expert disclosure.

To ensure enforceable deadlines that the prior provisions lacked, subparagraphs (G)(ii) and (C)(ii) provide that the court or a local rule must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amended Rule does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The Rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Under Rule 16.1, the parties must "confer and try to agree on a timetable" for pretrial disclosures, and the court in setting times for expert disclosures in individual cases should consider the parties' recommendations.

Subparagraphs (G)(iv) and (C)(iv) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize the possibility that a party may not be able to obtain a witness's approval and signature. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but the inability to procure a witness's approval and signature following a request is sufficient explanation for an unsigned disclosure.

Subsections (G)(v) and (C)(v) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that if there is any modification, expansion, or contraction of a party's expert testimony after the initial disclosure, the other party receives prompt notice of that correction or modification.

TAB 2C

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From: Jed_S_Rakoff [redacted]
Sent: Sunday, July 23, 2017 9:01 PM
To: John Siffert
Subject: Pre-Trial Expert Discovery

Dear John,

Following up on our conversation of the other evening, and writing to you in your capacity as a member of the federal criminal rules committee, I would like to suggest that Rule 16 of the federal criminal rules be amended so that experts are required by Rule 16 to make the same sort of detailed pre-trial reports and disclosures as are required in federal civil cases by Rule 26 of the Federal Rules of Civil Procedure. As it stands now, the expert discovery provisions of Rule 16 of the criminal; rules are couched in much vaguer language than the parallel provisions of Rule 26 of the civil rules, and the result is (as the caselaw and everyday experience both attest) that the pre-trial expert disclosures in federal criminal cases are frequently much more minimal than the comparable expert disclosures in civil cases. Since it is obvious that one cannot meaningfully challenge an expert's testimony without substantial pre-trial discovery, the result is that counsel are frequently blindsided by expert testimony given in criminal cases. This may be part of the reason why, according to the Innocence Project, inaccurate expert testimony was a factor in over half of the wrongful convictions later reversed by DNA testing done by the Innocence Project. And, according to the National Registry of Exonerations maintained by the University of Michigan, of the more than 2,000 criminal convictions reversed since 1989 on the basis of post-conviction factual exoneration, the single largest factor common to the wrongful convictions was inaccurate expert testimony.

In June of 2016, the National Commission on Forensic Science overwhelmingly approved a recommendation to the Department of Justice that the Department, notwithstanding the vague language of Rule 16, voluntarily agree to make the same kind of disclosures in federal criminal cases as Rule 26 of the federal civil rules mandates in civil cases. The NCFS recommendation is attached below. In response, the Department issued a Memorandum in January of this year largely agreeing with that recommendation and, indeed, reminding federal prosecutors of prior DOJ memos suggesting much the same. That memo is also attached below. None of this, however, has the force of law, and high-level Department officials have admitted to me that, in fact, there has been very wide variance among U.S. Attorney's Offices, and even among individual AUSAs, as to how much or little has to be disclosed before an expert witness is called to testify in a federal criminal case. Even where very little was disclosed, moreover, the vagueness of Rule 16 has resulted in few defense counsel challenging even the most bare-bones expert disclosures and, in those few cases where such challenges have been made, they have very, very rarely succeeded: -- hence the need to revise Rule 16. At the same time, the Department's positive attitude, as reflected in its memo attached below, suggests that it would not strenuously oppose the suggested revision of Rule 16 (except perhaps to claim it was "unnecessary"). And, frankly, I cannot think of a single reason why the policy considerations that led the framers of Rule 26 to draft specific requirements for expert disclosures do not apply with the same or even greater force in the criminal context. Accordingly, the two rules should be made more or less identical.

Thank you for considering this proposal.

Jed Rakoff

NATIONAL COMMISSION ON FORENSIC SCIENCE

NIST National Institute of Standards and Technology U.S. Department of Commerce

Recommendations to the Attorney General
Pretrial Discovery

Subcommittee
Reporting and Testimony
Status
Adopted by the Commission

Date of Current Version	08/05/16
Approved by Subcommittee	11/05/16
Approved by Commission	21/06/16
Action by Attorney General	[*dd/mm/yy*] 05/01/17

Commission Action
On June 21, 2016, the Commission voted to adopt this Recommendation by a more than two-thirds majority affirmative vote (78% yes, 18% no, 3% abstain)

Recommendations
The National Commission on Forensic Science recommends that the Attorney General take the following actions:

- **Recommendation #1: The Attorney General should direct federal prosecutors, when they intend to offer expert testimony on forensic science test results and conclusions, to provide to the court and defense counsel, reasonably in advance of trial, a report prepared by this expert that contains:**
  - **(i) a statement of all opinions the witness will express and the basis and reasons for them;**
  - **(ii) the facts or data considered by the witness in forming them;**
  - **(iii) any exhibits that will be used to summarize or support them;**
  - **(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
  - **(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
  - **(vi) a statement of the compensation to be paid the witness.**

With three modifications, this Recommendation tracks Federal Rule of Civil Procedure 26(a)(2)(B). Because of speedy trial and case management concerns, "reasonably in advance of trial" has been substituted for the 90-days-before-trial disclosure requirement of the Civil Rule, but the Commission expects that "reasonably in advance of trial" will usually mean at least a few weeks before trial and with sufficient time for the defense to consult with and/or secure expert assistance. Also, although the Civil Rule requires "a *complete* statement of all opinions," the Recommendation excises the word "complete" in the belief that it is at best confusing and at worst

unnecessarily burdensome. Finally, the Commission intends that the listing requirement of (v) take effect prospectively, as not all forensic experts may have kept such lists in the past.

- **Recommendation #2: The Attorney General should direct federal prosecutors to allow the defendant full access to the expert's case record.**

As depositions of an adversary's expert witnesses are not permitted in federal criminal cases, access to the expert's underlying case record is proposed to mitigate the absence of discovery depositions and to allow the adversary party to examine the underlying data on which the expert's opinions are based (subject to any judicial protective order).

- **Recommendation #3: To the extent the aforementioned disclosures exceed what is presently required by federal law, the Attorney General should authorize federal prosecutors to condition such additional disclosures on the defense's agreeing to provide the same broad disclosures if the defense intends to offer forensic expert testimony.**

Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant who intends to offer expert testimony to give the government the same kind of disclosure that the government is required to give the defendant under 16(a)(1)(G). But because the discovery proposed by the Commission's recommendations would go beyond what is required by 16(a)(1)(G), it seems only fair for the government, if it chooses, to condition such additional disclosure on the defendant's agreement that it will make the same broad disclosures if it intends to offer forensic expert testimony of its own (subject to any claim of privilege upheld by the court).

Commentary

The need for pretrial discovery of forensic evidence in criminal cases is critical—for both the prosecution and defense—because "it is difficult to test expert testimony at trial without advance notice and preparation."[1] Indeed, in a number of the cases in which convicted defendants were subsequently exonerated by DNA testing, the failure to disclose exculpatory forensic evidence played a role in the wrongful convictions.[2] There are many other advantages to comprehensive discovery as well. Even in the case of DNA, according to President Bush's DNA Initiative[3], "[e]arly disclosure can have the following benefits: [1] Avoiding surprise and unnecessary delay. [2] Identifying the need for defense expert services. [3] Facilitating exoneration of the innocent and encouraging plea negotiations if DNA evidence confirms guilt." These benefits likewise apply to other forensic evidence. Providing forensic science test results, opinions, and conclusions reasonably in advance of trial is also critical to facilitating a comprehensive and scientific review of the data. Such disclosures will allow opposing experts to sufficiently review the scientific findings to provide appropriate guidance to counsel and help form their own opinions.

Nevertheless, notwithstanding the great need for pretrial disclosure, discovery regarding forensic evidence intended to be offered in criminal cases is not required to be nearly as

[1] Fed. R. Crim. P. 16 (1975), advisory committee's note.
[2] *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 108 (2011).
[3] National Institute of Justice, President's DNA Initiative: Principles of Forensic DNA for Officers of the Court (2005).

expansive or as timely as in civil litigation. Ironically, this is despite the fact that, under federal law, experts can be deposed in civil cases but not in criminal cases, so that the need for substantial pretrial written disclosure would seem to be even greater in criminal cases than in civil cases if trial by ambush is to be avoided. Historically, this disparity has been justified on three grounds: substantial pretrial discovery in criminal actions will (1) encourage perjury, (2) lead to the intimidation of witnesses, and (3) be a one-way street because of the Fifth Amendment privilege against self-incrimination.[4] With forensic evidence, however, these traditional arguments against criminal discovery lose whatever force they might otherwise have. The first argument fails because "it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure."[5] Also, there is no evidence that the intimidation of experts is a major problem, both because in federal practice, the expert is often a government employee, and because the evidence can often be reexamined, if necessary, by another expert.[6] Finally, the Self-incrimination Clause, as presently interpreted by the Supreme Court, is not an impediment to the prosecution's obtaining pretrial discovery regarding forensic science that the defendant intends to offer.[7]

Although Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government, on defendant's request, to provide a summary of a forensic expert's "opinions, the bases and reasons for those opinions, and the witness's qualifications," this provision, perhaps because of the aforementioned history, has often been narrowly interpreted by the government and the courts. By contrast, Federal Rule of Civil Procedure 26(a)(2) not only sets forth in much greater detail what disclosures regarding expert testimony must be made prior to trial but also provides that such disclosure, absent court order, must be made well in advance of trial. The need for meaningful and timely discovery in relation to expert testimony is particularly acute in the case of forensic science, where questionable forensic science has often gone unchallenged. The Commission is therefore of the view that the Attorney General, both as a matter of fairness and also to promote the accurate determination of the truth, should require her assistants to make pretrial disclosure of forensic science more in keeping with what the federal civil rules presently require than the more minimal requirements of the federal criminal rules. *See* Recommendation #1, above. Further, in the absence of depositions, the defendant should have access to the expert's case record. *See* Recommendation #2, above. Finally, to the extent permitted by law, the defense should also be reciprocally required to make these enhanced disclosures. *See* Recommendation #3, above.

It should be noted that the foregoing recommendations, designed to achieve the purposes summarized above, are a direct application to the particularities of *federal* practice of the Views Document on Discovery adopted by this Commission on August 11, 2015. Application to *state* practice might require different modifications.

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[4] *See* 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 252, at 36-37 (2d ed. 1982).

[5] Commentary, ABA Standards for Criminal Justice, Discovery and Procedure Before Trial 67 (Approved Draft 1970).

[6] 2 Wayne LaFave & Jerod Israel, Criminal Procedure § 19.3, at 490 (1984) ("Once the report is prepared, the scientific expert's position is not readily influenced, and therefore disclosure presents little danger of prompting perjury or intimidation.").

[7] *See* Williams v. Florida, 399 U.S. 78, 85 (1970) ("At most, the [discovery] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."); United States v. Nobles, 422 U.S. 225, 234 (1975) (compelled production of defense investigator's notes does not violate the Fifth Amendment because it involved no compulsion of the defendant).

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 5, 2017

MEMORANDUM FOR DEPARTMENT PROSECUTORS
DEPARTMENT FORENSIC SCIENCE PERSONNEL

FROM: Sally Q. Yates
Deputy Attorney General

SUBJECT: Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts

Forensic evidence is an essential tool in helping prosecutors ensure public safety and obtain justice for victims of crime. When introduced at trial, such evidence can be among the most powerful and persuasive evidence used to prove the government's case. Yet it is precisely for these reasons that prosecutors must exercise special care in how and when forensic evidence is used. Among other things, prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them.

In January 2010, then-Deputy Attorney General David Ogden issued a memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* (the "Ogden Memo"), which provided general guidance on gathering, reviewing, and disclosing information to defendants.[1] Given that most prosecutors lack formal training in technical or scientific fields, the Department has since determined that it would be helpful to issue supplemental guidance that clarifies what a prosecutor is expected to disclose to defendants regarding forensic evidence or experts. Over the past year, a team of United States Attorneys, Department prosecutors, law enforcement personnel, and forensic scientists worked together to develop the below guidance, which serves as an addendum to the Ogden Memo.

All Department prosecutors should review this guidance before handling a case involving forensic evidence. In addition, any individuals involved in the practice of forensic science at the Department, especially those working at our law enforcement laboratories, should familiarize themselves with this guidance so that they can assist prosecutors when the government receives a request for discoverable material in a case. Thank you for your attention to this issue and for the work you do every day to further the proud mission of this Department.

[1] Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, January 4, 2010, available at http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf.

SUPPLEMENTAL GUIDANCE FOR PROSECUTORS REGARDING CRIMINAL DISCOVERY INVOLVING FORENSIC EVIDENCE AND EXPERTS[1]

Forensic science covers a variety of fields, including such specialties as DNA testing, chemistry, and ballistics and impression analysis, among others. As a general guiding rule, and allowing for the facts and circumstances of individual cases, prosecutors should provide broad discovery relating to forensic science evidence as outlined here. Disclosure of information relating to forensic science evidence in discovery does not mean that the Department concedes the admissibility of that information, which may be litigated simultaneously with or subsequent to disclosure.

The Duty to Disclose, Generally

The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act (18 U.S.C. §3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, §9-5.001 of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material.

Rule 16 of the Federal Rules of Criminal Procedure establishes three disclosure responsibilities for prosecutors that may be relevant to forensic evidence. First, under Fed. R. Crim. P. 16(a)(1)(F), the government must, upon request of the defense, turn over the results or reports of any scientific test or experiment (i) in the government's possession, custody or control, (ii) that an attorney for the government knows or through due diligence could know, and (iii) that would be material to preparing the defense or that the government intends to use at trial. Second, under Fed. R. Crim. P. 16(a)(1)(G), if requested by the defense, the government must provide a written summary of any expert testimony the government intends to use at trial. At a minimum, this summary must include the witness's opinions, the bases and reasons for those opinions, and the expert's qualifications. Third, under Fed. R. Crim. P. 16(a)(1)(E), if requested by the defense, the government must produce documents and items material to preparing the defense that are in the possession, custody, or control of the government. This may extend to records documenting the tests performed, the maintenance and reliability of tools used to perform those tests, and/or the methodologies employed in those tests.

Both the Jencks Act and *Brady/Giglio* may also come into play in relation to forensic evidence. For example, a written statement (report, email, memo) by a testifying forensic witness may be subject to disclosure under the Jencks Act if it relates to the subject matter of his or her testimony. Information providing the defense with an avenue for challenging test results may be *Brady/Giglio* information that must be disclosed. And, for forensic witnesses employed by the government, *Giglio* information must be gathered from the employing agency and reviewed for possible disclosure.

These are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds.

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[1] This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

The Duty to Disclose in Cases with Forensic Evidence and Experts

The Department's policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence. Rule 16's disclosure requirements – disclosing the results of scientific tests (16(a)(1)F)), the witness' written summary (16(a)(1)(G)), and documents and items material to preparing the defense (16(a)(1)(E)) – are often jointly satisfied when presenting expert forensic testimony, since disclosure of the test results, the bases for those results, and the expert's qualifications will often provide all the necessary information material to preparation of the defense. But, depending on the complexity of the forensic evidence, or where multiple forensic tests have been performed, the process can be complicated because it may require the prosecutor to work in tandem with various forensic scientists to identify and prepare additional relevant information for disclosure. Although prosecutors generally should consult with forensic experts to understand the tests or experiments conducted, responsibility for disclosure ultimately rests with the prosecutor assigned to the case.

In meeting obligations under Rule 16(a)(1)(E), (F), and (G), the Jencks Act, and *Brady/Giglio*, and to comply with the Department's policies of broad disclosure, the prosecutor should be attuned to the following four steps:

1. First, the prosecutor should obtain the forensic expert's laboratory report, which is a document that describes the scope of work assigned, the evidence tested, the method of examination or analysis used, and the conclusions drawn from the analyses conducted. Depending on the laboratory, the report may be in written or electronic format; the laboratory may routinely route the report to the prosecutor, or the prosecutor may need to affirmatively seek the report from the forensic expert or his or her laboratory. In most cases the best practice is to turn over the forensic expert's report to the defense if requested. This is so regardless of whether the government intends to use it at trial or whether the report is perceived to be material to the preparation of the defense. If the report contains personal information about a victim or witness, or other sensitive information, redaction may be appropriate and necessary. This may require court authorization if the forensic expert will testify, as the report likely will be considered a Jencks Act statement. (See the Additional Considerations section below.)

2. Second, the prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached. Although the written summary will vary in length depending on the number and complexity of the tests conducted, it should be sufficient to explain the basis and reasons for the expert's expected testimony. Oftentimes, an expert will provide this information in an "executive summary" or "synopsis" section at the beginning of a report or a "conclusion" section at the end. Prosecutors should be mindful to ensure that any separate summary provided pursuant to Rule 16(a) should be consistent with these sections of the report. Further, any changes to an expert's opinion that are made subsequent to the initial disclosure to the defense ordinarily should be made in writing and disclosed to the defense.

3. Third, if requested by the defense, the prosecutor should provide the defense with a copy of, or access to, the laboratory or forensic expert's "case file," either in electronic or hard-copy form. This information, which may be kept in an actual file or may be compiled by the forensic expert, normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted.

   In some circumstances, the defense may seek laboratory policies and protocols. To the extent that a laboratory provides this information online, the prosecutor may simply share the web address with the defense. Otherwise, determinations regarding disclosure of this information should be made on a case-by-case basis in consultation with the forensic analysts involved, taking into account the particularity of the defense's request and how relevant the request appears to be to the anticipated defenses.

4. Fourth, the prosecutor should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition. The prosecutor should gather potential *Giglio* information from the government agency that employs the forensic expert. If using an independent retained forensic expert, the prosecutor should disclose the level of compensation as potential *Giglio* information; the format of this disclosure is left to the discretion of the individual prosecuting office.

Disclosure should be made according to local rules but at least as soon as is reasonably practical and, of course, reasonably in advance of trial. It is important that the prosecutor leave sufficient time to obtain documents and prepare information ahead of disclosure. When requesting supporting documents from a laboratory's file regarding a forensic examination, the prosecutor should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for them to process and deliver the materials to the prosecutor. Further, if multiple forensic teams have worked on a case, the prosecutor should build in sufficient time to consult with, and obtain relevant materials from, each relevant office or forensic expert.

Additional Considerations

Certain situations call for special attention. These may include cases with classified information or when forensic reports reveal the identities of cooperating witnesses or undercover officers, or disclose pending covert investigations. In such cases, when redaction or a protective order may be necessary, prosecutors should ordinarily consult with supervisors.

Laboratory case files may include written communications, including electronic communication such as emails, between forensic experts or between forensic experts and prosecutors. Prosecutors should review this information themselves to determine which communications, if any, are protected and which information should be disclosed under *Brady/Giglio*, Jencks, or Rule 16. If the circumstances warrant (for example, where review of a case file indicates that tests in another case or communications outside the case file may be relevant), prosecutors should request to review additional materials outside the case file. At the outset of a case, prosecutors should ensure that they and all forensic analysts involved are familiar with and follow the Deputy Attorney General's memorandum entitled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases": http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/dag_ecom.pdf.

Finally, when faced with questions about disclosure, prosecutors should consult with a supervisor, as the precise documents to disclose tend to evolve, based especially upon the practice of particular laboratories, the type and manner of documentation at the laboratory, and current rulings from the courts.

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From: [redacted]
Sent: Friday, December 1, 2017 2:39 PM
To: [redacted]
Cc: [redacted]
Subject: Proposed revision to Fed. R. Crim. P. 16 regarding expert disclosures

Dear Judge Molloy (Don) and Professor Beale:

As you may be aware, recently the Evidence Rules Advisory Committee held a symposium focusing on admissibility of forensic evidence, and the effectiveness of Daubert/Rule 702. I was privileged to have been invited to speak about challenges to effective application of the Daubert/702 test in criminal cases. I also was asked to contribute a short article on this topic to the Fordham Law Review, which is publishing articles related to the symposium.

With the permission of Professor Dan Capra (copied on this email) I am attaching my short article. It sets out my views regarding the challenges facing judges in applying Daubert/702 in criminal cases, and offers some modest suggestions how things might be improved. One improvement that would go a long way would be to amend Fed. R. Crim P. 16(a)(1)(G) & (b)(1)(C) to more closely parallel the far more robust expert disclosures required by the Federal Rules of Civil Procedure (Rule 26(a)(2)).

Thank you in advance for considering this issue, and please feel free to contact me if you have any questions.

Kind regards,

Paul Grimm

Challenges Facing Judges Regarding Expert Evidence in Criminal Cases

Paul W. Grimm[1]

Introduction

Ever since the Supreme Court decided the *Daubert* case,[2] the role of the trial judge in determining admissibility of expert testimony has become familiar. We are to be the "gatekeepers" standing between the parties (who naturally offer the most impressive experts whom they can find or afford, who are willing to advance their theory of the case) and the jury, who must come to grips with scientific, technical or other specialized information that usually is completely unfamiliar to them. This role is imposed by Fed. R. Evid. 104(a), which provides, in essence, that the trial judge must decide preliminary issues about the admissibility of evidence, the qualification of witnesses, and the existence of any privileges. When applying this rule with respect to experts, we further are informed by Fed. R. Evid. 702. As amended in 2000, to implement *Daubert*, it instructs that when scientific, technical or specialized knowledge would assist the finder of fact in understanding the evidence or making a fact determination, a witness qualified by virtue of knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise, provided (1) the testimony is sufficiently based on facts or data (2) any opinions expressed are the result of reliable principles or methodology, and (3) the witness reliably has applied the principles or methodology to the facts of the case. With regard to the reliability factors, *Daubert* and its progeny[3]identify a number of sub-

[1] United States District Judge, District of Maryland. The opinions in this article are mine alone.
[2] *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993).
[3] *General Electric v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

factors that a court may need to consider: whether the methodology has been tested; its error rate; whether it has been subject to peer review; whether it is generally accepted as reliable among practitioners of the relevant field of science or technology, and whether (if they exist) standard testing protocols have been followed.[4]

This sounds pretty straightforward until you take a minute to consider exactly what is involved. First, the acceptable subjects for expert testimony encompass science, technology, and any other type of specialized knowledge beyond the understanding of the typical jury. That covers a lot of territory. And if admissibility of expert testimony is conditioned on the notion that the jury needs help in understanding evidence beyond their familiarity, then why should it be assumed that the trial judge has any greater understanding than the jury? After all, most judges are generalists, and, if similar to me, do not regard themselves as specialists in science or technology, let alone the limitless types of "specialized" knowledge that may be relevant to a case (economics, accounting, business, finance, engineering, construction—the list is endless).

[4] The *Daubert* factors are: (1) whether the expert's technique or theory has been or can be tested; (2) whether the technique or theory has been peer reviewed; (3) whether there is a known or potential error rate associated with the application of the technique or theory; (4) whether there are established standards and controls governing the technique or theory that have been complied with; and (5) whether the technique or theory has been generally accepted as reliable in the relevant scientific or technical community. Advisory Committee Notes to 2000 Amendments to Fed. R. Evid. 702. The Advisory Committee Notes also recognize additional factors that a court may want to consider, such as: (1) whether the expert proposes to testify about facts derived from research independent of the litigation, as opposed to expressing opinions developed expressly for the litigation; (2) whether the expert unjustifiably extrapolated from an accepted to an unfounded conclusion; (3) whether the expert accounted for obvious alternative explanations; (4) whether the expert is being as careful in reaching his opinions as he would be when doing his regular professional work outside of the litigation context; and (5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert intends to offer at trial. *Id.*

Second, to do our jobs as required by Rule 702, we must find that the expert had sufficient facts or data on which to base her opinions, employed reliable principles or methodology, and then reliably applied the principles or methodology to the particular facts of the case. Well enough, but consider that trial judges are privy to very few of the underlying facts of a case (whether civil or criminal) before the trial. Indictments and civil pleadings are pretty sparse when it comes to factual particularity—that's what discovery is supposed to provide. But discovery requests and responses are not filed with the court, so by the time the case is ready for trial, all we know about the case is what we can glean from the filings that have been made before trial. These tend to focus on specific legal issues, rather than a panoramic view of the whole case. So how are we, the least informed about the underlying facts when compared to the knowledge of the parties, counsel and experts, to determine whether an expert considered sufficient facts or data?

And even if we were omniscient about the facts, what qualifies us to determine whether the principles or methodology employed by an expert (whose field we do know) is reliable, and reliably applied to the facts? When it comes to admissibility of expert evidence, many trial judges feel like they are in a battle of wits, unarmed.

The skeptical reader will scoff and say: "Stop feeling sorry for yourself; the information you need to determine admissibility of expert evidence is provided to you in the form of discovery disclosures required by Fed. R. Civ. P. 26(a)(2) and Fed. R. Crim. P. 16(a)(1)(G) and (b)(1)(C), and in motions *in limine* filed before trial challenging admissibility (or seeking advance rulings of admissibility) of expert testimony!" That's true, but only to a certain extent. First, the parties must have properly made their expert disclosures, and any judge will tell you that frequently they do not. Second, the issue of

expert admissibility must be raised sufficiently far in advance of trial for the judge to digest the information, hold a hearing, if needed, and make a considered ruling. That does not always happen, and it is not unusual to be confronted with an objection to expert testimony on the eve of trial, or during it.

Finally, with regard to criminal cases, the focus of this article, judges face significant challenges in ruling on admissibility of expert testimony that do not occur in most civil cases. I will start by describing these challenges, and then offer some suggestions about what can be done to address them.

Challenges to Making Good Expert Admissibility Rulings in Criminal Cases

1. The Right to a Speedy Trial

The Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." This right is implemented by the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* It provides, relevantly:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer . . . whichever date last occurs.

18 U.S.C. § 3161(c)(1). Now, there are lots of statutory exceptions to this seventy-day requirement,[5] and most criminal cases do not, in fact, get tried within seventy days, but the right to a speedy trial animates the entire pretrial process in a criminal case in ways that do not occur in civil cases. The clock is always ticking, and the judge is expected to expedite the proceedings. This means that everything that must be done, including

[5] Exceptions include, for example, delays resulting from competency examinations, interlocutory appeals, filing (and resolution) of pretrial motions, transfer of the defendant from one district to another, and consideration by the court of a proposed guilty plea. 18 U.S.C. § 3161(h).

making expert witness disclosures, must take place at an accelerated pace. And when the many pretrial proceedings of a criminal case are accomplished within a compressed time frame, this puts pressure on both counsel and the court to get it all done correctly within the available time. When we are in a hurry, we are not always as careful, complete or deliberate as we are when time is not an issue, and this can (and often does) apply to when, and how detailed, expert disclosures are. Every trial judge is familiar with expert disclosures that are pro forma, incomplete, and conclusory, and those that are do not provide the detail needed for the judge to conduct Rule 702 analysis properly.

2. The breadth of expert testimony introduced in criminal cases.

Everyone who has watched any of the myriad CSI shows on TV is familiar with the type of forensic evidence that can be offered into evidence in criminal cases: fingerprint analysis, ballistics and tool mark evidence; DNA testing, footprint and tire track evidence, hair and fiber analysis, bite mark evidence, and handwriting evidence, to name a few. But a recent informal poll I took of lawyers in the offices of the United States Attorney and Federal Public Defender in my district revealed the following types of expert evidence introduced in recent criminal cases: mental health (competency and sanity issues); other medical conditions; coded language used by drug dealers; characteristics of gang activity; terrorist activities; characteristics of sex trafficking, reliability (or unreliability) of eye-witness identification; linguistic analytics; bitcoin and other digital currencies; computer forensics; characteristics and operation of firearms and explosives; counterfeit currency; controlled substance analysis; the difference between personal use and distribution quantities of drugs; vulnerability of sex trafficking victims;

field sobriety testing in drunk driving cases; and operation of cell towers and other methods of locating individuals through tracking devices.

Think about all these types of potential experts in criminal cases. While doctors and psychologists may have standard methodology that they apply in reaching their decisions, what about gang experts, or sex trafficking experts, or coded language experts? Not likely that their methodology has been subject to peer review, or that there are handy error rates to consider, so how is the judge to assess the reliability of their methodology? Further, many experts who testify in criminal cases are from law enforcement agencies—government crime labs or criminal investigation agencies. How does the judge evaluate potential bias that may affect the reliability of law enforcement experts? The prevalence of "specialized" as opposed to "scientific" expert witness testimony in criminal cases presents unique challenges to a judge in determining admissibility.

3. The pressure on the defendant to plead, and plead quickly

There is tremendous pressure on a criminal defendant in federal court to plead guilty, and do so quickly. This comes from the influence exerted on sentencing by the Sentencing Guidelines of the United States Sentencing Commission. Even though, in the absence of a statutory requirement to impose a particular type of sentence in a criminal case (so called "mandatory minimum" cases), the Sentencing Guidelines are just that—guidelines, not mandatory rules—the judge is required to properly calculate the guidelines in each case, and consider them in imposing a particular sentence. And while the judge can depart (up or down) within the recommended guidelines sentence, or vary (up or down) to impose a sentence outside the guidelines range, it is reversible error not

to begin the sentencing with correctly calculating the guidelines range that applies.[6] For those not familiar with the esoterica of the Sentencing Guidelines, the ultimate guidelines range is a function of two factors: the numerical offense level applicable to the crime(s) that the defendant pled to or was convicted of; and the numerical calculation applicable to the defendant's criminal history. Offense levels range from 1 to 43, and criminal history levels from I to VI. The higher the combined offense and criminal history scores, the greater the recommended range of the sentence. And a two or three level reduction in offense level can make a huge difference in the recommended sentence, particularly at the high end of the guidelines scale.[7]

Defendants who plead guilty, thereby accepting responsibility, receive a two point reduction in offense level. U.S.S.G. § 3E1.1(a). If the unadjusted offense level is 16 or greater, and the defendant pleads guilty (thereby earning the two point reduction), he or she can earn a one point additional reduction in offense level (for a grand total of 3 points), if the government makes a motion at the time of sentencing, stating that "the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to plead guilty," which relieves the government from having to prepare for trial. U.S.S.G. § 3E1.1(b). So, the

[6] *United States v. McManus*, 734 F.3d 315, 318 (4th Cir. 2013) ("Although the sentencing guidelines are only advisory, improper calculation of a guideline range constitutes significant procedural error, making the sentence procedurally unreasonable and subject to being vacated." (quoting *United States v. Hargrove*, 701 F.3d 156, 161 (4th Cir. 2012)).

[7] For example, if a defendant has a guidelines score of offense level 33 and a criminal history score of III, his recommended sentence is 168-210 months. Drop the offense level by two points to 31, and the range is 135-168. Drop the offense level by three points, to 30, and the range is 121-151. These differences are significant, especially for the defendant who will be serving the sentence.

pressure on a defendant charged with a federal offense to plead guilty before the government has to invest a lot of time responding to pretrial motions and preparing for trial is intense, given the stakes at sentencing if the defendant goes to trial and is convicted, thereby becoming ineligible for any § 3E1.1 reduction.

This pressure plays out in the decision that a defense attorney has to make in providing effective representation to the defendant. Do you demand that the government make full disclosure of all the information relating to its expert witnesses, then challenge any that seem vulnerable by filing a motion to exclude their testimony (thereby jeopardizing the § 3E 1.1(b) reduction)? Or do you forego doing so to preserve the additional reduction in offense level and plead guilty promptly, thereby giving up in the process any chance of excluding expert testimony that may be critical to the government's ability to prove a charge? This is a tough position for a defense attorney and defendant to be in—guessing wrong can have serious consequences.

Since the vast majority of criminal cases in federal court are disposed of by plea, rather than trial (well above 90%, by most accounts[8]), the frequency with which the government's experts are challenged (thereby subjecting the sufficiency of their methodology and opinions to scrutiny by the court) is low. When experts grow accustomed to not being challenged, their perception of the need to fully document and justify their methodology and opinions can diminish. Similarly, when prosecutors are not often obliged to make timely, complete expert disclosures (and verifying before doing so that their experts have met the requirements of Rule 702), they too can become less

[8] *See* Emily Yoffe, Innocence is Irrelevant, *The Atlantic* (Sept. 2017), *available at* https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("Some 97 percent of federal felony convictions are the result of plea bargains").

vigilant in monitoring what their potential experts have done in a particular case to ensure that they base their opinions on sufficient facts, and employ reliable principles or methodology. And, when defense counsel infrequently demand full disclosure of information related to the government's experts (and even less frequently challenge admissibility), they undermine their ability to recognize deficient expert opinions, and their skill to challenge them effectively. And if any (or all) of these circumstances occur, then when the time comes that a challenge is made and the judge must hold a hearing, the underlying premise of *Daubert*[9] —that effective examination of the government expert by the defense attorney will help the trial judge properly exercise her gatekeeping responsibility by exposing shortcomings in the witnesses' opinions—may be compromised by insufficiently detailed information to assess reliability, and insufficient skill by counsel to develop the facts and arguments to clarify the issues that the judge must decide.

4. *Difficulties faced by defense counsel in obtaining defense experts to challenge government experts*

In the vast majority of federal criminal cases, defendants are represented by either federal public defenders or private counsel appointed pursuant to the Criminal Justice Act ("CJA").[10] While public defenders may have resources to locate and hire experts in criminal cases without the approval or assistance of the court, few CJA attorneys have the financial ability to hire defense experts without requesting advance approval from the

[9] In *Daubert*, the court noted that "[v]igouous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596 (quoting *Rock v. Arkansas*, 483 U.S. 44, 66 (1987)). Inexperienced counsel lacking access to qualified defense experts are not well suited to "vigorously" cross examining government experts.

[10] 18 U.S.C. § 3006A.

presiding trial judge (without which CJA funds are not available to pay the expert). That means that in many criminal cases, the defense attorney must file a motion with the court to request authorization to hire an expert witness, and justify the need to do so—something the government is never obligated to do.

Further, as already noted, many of the experts called by the government in a criminal case are involved in the investigation of criminal cases, or work for government crime labs. That means that prosecutors frequently work with their experts throughout the investigation of the case, becoming familiar with what they have done long before charges ever are filed. In contrast, once their clients has been indicted, and the speedy-trial clock has begun, defense counsel have much less time to decide whether to seek a defense expert. And they cannot even begin to make that decision until after they request, and receive, expert disclosures from the government. Unlike Fed. R. Civ. P. 26(a)(2), which requires that in civil cases any party that intends to introduce expert testimony must make proper disclosure of the opinions (and supporting basis) their experts will make "at least 90 days before the date set for trial or for the case to be ready for trial [unless otherwise ordered by the court]," Fed. R. Crim. P. 16(a)(1)(G) does not require mandatory disclosure of the government's experts and their opinions; the defense must request it. And if the defense does request it, Rule 16 does not impose a deadline by which the government must make its disclosure. So, unless the trial judge sets a date for expert disclosures (and not all do), the defense must make its request and wait for the prosecution to make its disclosure. Not all prosecutors do so promptly upon request, and it is not an infrequent occurrence for defense counsel to receive government expert

disclosures so close to the trial date that it poses real problems for the defendant to have enough time to locate (and get court approval for) a defense expert.

Compounding this difficulty, when defense attorneys do decide to retain a defense expert, they may have difficulty finding one because many of the experts needed in criminal cases come from law enforcement. Unless the defense attorney can find a retired or former government investigator, they are not going to be able to locate one from the ranks of currently employed law enforcement investigators. As noted in the Federal Judicial Center's *Reference Manual on Scientific Evidence*, "adversarial testing [of expert testimony in criminal cases] presupposes advance notice of the content of the expert's testimony and access to comparable expertise to evaluate that testimony."[11] Just how effectively can the defendant in a criminal case challenge the government's expert testimony without access to a comparable defense expert to review the work done by the government's expert and critique any factual insufficiencies or methodological shortcomings? And without informed and skilled challenge by the defense, how is the trial judge to perform his gatekeeping duty and make the findings required by Rule 702 and *Daubert* when deciding objections to government experts?

5. Insufficiently detailed disclosure of expert opinions under the criminal procedure rules

[11] Reference Manual on Scientific Evidence 124 (3d ed. Fed. Judicial Ctr. 2011); *see also* Advisory Committee Note to Fed. R. Crim. 16 (1993 Amendment) ("[Rule 16's expert disclosure provision] is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.").

As noted, Fed. R. Crim. P. 16(a)(1)(G) imposes an obligation on the government[12] to disclose expert testimony it intends to introduce at trial. It states:

> At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial . . . . The summary provided under this subparagraph must describe the witness's opinions and the bases and reasons for those opinions, and the witness's qualifications.

At first glance, this seems pretty reasonable. But contrast the disclosure requirement in Rule 16(a)(1)(G) with its counterpart in the Rules of Civil Procedure, Rule 26(a)(2)(A) and (B):

> [A] party must disclose to the other parties the identify of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705 . . . . Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

Which disclosure would you rather have if you had to prepare to challenge the testimony of an adversary's expert? The answer is obvious. The disclosure requirement in the civil rules is significantly more robust. It requires that the expert *sign* a written report. This prevents an expert from distancing herself from vagueness, incompleteness or inaccuracy in the report by attributing its contents to an attorney who drafted it (as usually is the case for most discovery disclosures and responses in civil and criminal

[12] A reciprocal obligation is imposed on the defense. Fed. R. Crim. P. 16(b)(1)(C).

cases), rather than the expert. It must contain a *complete* statement of *all* opinions that will be given at trial, and the *basis* and *reasons* for them. This allows the cross-examining attorney to prevent the expert from adding at trial opinions or supporting facts not found in the written report, the abusive practice of "testifying beyond the report." It also prevents the expert from offering conclusions only—without the supporting reasons and bases underlying them. The report also must contain the facts or data *considered* by the expert (not just the facts that the expert intends to rely upon), as well as any exhibits that will be used to summarize or support the expert's trial testimony. This prevents an expert from "cherry-picking" favorable facts to support his opinions without disclosing unfavorable ones which, when known, can show that the opinion is not well founded.

To even a casual observer, the expert disclosures required by the rules of civil procedure are far more robust, detailed and helpful to the recipient than those required by the criminal procedure rules. Further, in civil cases, the parties also can take the deposition of an opposing expert (and usually do), which affords the opportunity to further flesh out the expert's opinions, methodology and supporting factual basis. If lawyers in civil cases then challenge admissibility of an expert's opinion, they have substantially more information to support their challenge than criminal lawyers do, because depositions of experts are unavailable in criminal cases. In contrast to the comprehensive disclosures in civil cases, in criminal cases, most of the expert disclosures I have seen (and remember that the trial judge does not see the disclosure unless there is a challenge, because the disclosure only is served on the defense attorney, not docketed on the court record) were cursory as well as conclusory, and not particularly useful for cross-

examining the expert or challenging her testimony. And they certainly were insufficient to be of much help to me in making a ruling on admissibility of the expert's opinions.

Recently, the Department of Justice has provided supplemental guidance to prosecutors regarding the disclosure of forensic evidence and experts.[13] Commendably, it emphasizes that "prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them."[14] And, it clarifies that there are three distinct disclosure obligations that the criminal rules impose on prosecutors that relate to forensic evidence: (1) Rule 16(a)(1)(F) (the duty to turn over the results or reports of any scientific test or experiment); (2) Rule 16(a)(1)(G) (the duty to provide a written summary of expert testimony the government intends to use at trial); and (3) Rule 16(a)(1)(E) (more broadly requiring production of documents and items material to preparing the defense).[15] Helpfully, the DOJ Supplemental Guidance stresses that these disclosure obligations (augmented by others that may be required by the Jencks Act,[16] or the *Brady*[17]and *Giglio*[18] decisions) "are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds."[19]

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[13] Memorandum from Sally Q. Yates, Deputy Attorney General, to Department Prosecutors, *Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts*, January 5, 2017, available at justice.gov/archives/ncfs/page/file/93o411/download (hereinafter "DOJ Supplemental Guidance").
[14] DOJ Supplemental Guidance 1.
[15] *Id.*
[16] 18 U.S.C. § 3500.
[17] *Brady v. Maryland*, 373 U.S. 83 (1963).
[18] *Giglio v. United States*, 405 U.S. 150 (1972).
[19] *Id.*

In addition, the DOJ Supplemental Guidance recommends that DOJ prosecutors obtain the forensic examiner's laboratory report and turn it over to the defense if requested; that the written summary required by Rule 16(a)(1)(G) should "summarize the analyses performed by the forensic expert and describe any conclusions reached" and should "be sufficient to explain the basis and reasons for the expert's expected testimony."[20] Further, prosecutors are encouraged to provide the defense with " a copy of, or access to, the laboratory of forensic expert's 'case file,'" which "normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report.[21]"

The DOJ Supplemental Guidance, if it continues as DOJ policy, and to the extent that line prosecutors adhere to it, will go a long way to bolster the anemic disclosure requirements currently found in Rule 16(a)(1)(G). But the effectiveness of the DOJ Supplemental Guidance is muted by its narrow application to forensic evidence and expert reports, as opposed to the many other types of expert testimony (referenced above) that are common to criminal prosecutions.

Suggestions for Trial Judges

So, what's a trial judge to do to overcome the challenges discussed above when called on to make rulings regarding the admissibility of expert testimony in criminal cases? The starting point is to have firmly in mind the two things that a judge must have in order to make proper rulings: (1) the underlying facts related to the challenged evidence; and (2) sufficient time to digest the facts, and make a principled ruling.

[20] *Id.* at 2.
[21] *Id.* at 3.

Fortunately, judges have the inherent authority to ensure that they get what they need to do the job.

1. Address disclosure of expert opinions early in the case

Fed. R. Crim. P. 17.1 states: "On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any maters agreed to during the conference." This rule allows a judge to schedule a preliminary pretrial conference early—right after the defendant has been arraigned. At that time, the court can discuss the case in general, get details from the attorneys about the status of discovery, set deadlines for getting discovery done, and inquire about likely expert testimony. While the government might take the position that it is too early to have made firm decisions about trial experts, a judge must be prepared to take this with a grain of salt. After all, the prosecutor has supervised the investigation and charging of the defendant, and that includes presenting witnesses to the grand jury. It takes an inexperienced (or disingenuous) prosecutor to claim that he has no idea during the early stage of a case about what kind of expert testimony may be offered. The goal is not to lock them in too early, but to raise the issue so that the court can set a reasonable schedule for when expert disclosures will be made, motions *in limine* challenging experts filed, and a hearing (if needed) scheduled sufficiently far in advance of trial so that the judge has adequate time to make a thoughtful ruling.

2. Make your expectations about expert disclosures clearly know at the outset

Judges should feel free to let counsel for the government and defendant know at the start of the case that they will insist on compliance with both the letter and spirit of

what Rule 16 requires for expert disclosures. While the shortcomings of Rule 16 itself have been discussed above, the judge can get valuable assistance from the advisory committee notes that supplement the rule. For example, the advisory committee notes to the 1993 amendments to Rule 16 are especially helpful. The following are a sampling of the useful guidance they afford:

a. *The amendment [to Rule 16] is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances and provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.*

When combined with the language of Rule 17.1, this supports the judge's ability to build into the pretrial schedule reasonable deadlines (reached after consulting with counsel) for making expert disclosures, filing motions *in limine*, and scheduling an evidentiary hearing if needed. It further underscores the ability of a judge to advise the lawyers for both the government and the defendant that it will insist that the exert disclosures be detailed, meaningful, complete, and not boilerplate or conclusory. Otherwise, they will be useless to minimize the risk of surprise and continuance requests. And boilerplate expert disclosures do not provide a fair opportunity to test the expert's opinions or effectively cross-examine.

b. *With the increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. . . . This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702.*

This advisory note language is important because so many experts in criminal trials testify to non-scientific matters (fingerprint analysis, bite mark analysis, tool mark evidence, ballistic evidence). The Rule 16 disclosures need to be detailed enough so that

these kinds of non-scientific opinion testimony (for which there may not be peer review literature, known testing procedures, established error rates, or standard testing protocols) can be explored by counsel and brought to the attention of the court when ruling on any challenge to the evidence.

c. *[T]he requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.*

It is clear that in order for the Rule 16 disclosure to fulfill this purpose, it must be detailed, not boilerplate, and set forth each discrete opinion the expert is expected to give, as well as the factual basis supporting it. The judge should make it clear to counsel that this level of detail is required. This can be enforced by ordering that expert disclosures also be filed with the court by a specific date, and then holding a status conference (in person or by telephone) once they have been provided to discuss whether the disclosures are sufficiently detailed. If not, the court can order that they be supplemented.

d. [Rule 16] requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under federal Rule of Evidence 703, including opinions of other experts.

Once again, this advisory note language underscores the obligation to include detailed information, not conclusory boilerplate, in expert disclosures. Judges who make sure the attorneys know this early in the case are more likely to see substantive disclosures, which will fulfill the purpose of the disclosure rule, and make it easier for the judge to make admissibility rulings.

3. Know where to look for helpful information to give you the background needed to rule on admissibility of expert testimony.

If the Rule 16 expert disclosures and the briefing by counsel on a motion to exclude (or admit) expert testimony in a criminal trial do not provide the judge with enough information to fulfill her gatekeeping role under *Daubert* and Rule 702, where can the judge turn to find publicly available information to feel better prepared to rule? Fortunately, there are many reference materials that are available. I will highlight three.

One of the best is the Reference Manual on Scientific Evidence (Third Edition) prepared by the Federal Judicial Center and the National Research Council.[22] It contains an excellent discussion of the legal standards for admissibility of expert testimony, a discussion of how science works, as well as reference guides on: forensic identification; DNA identification evidence; statistics; multiple regression, survey research, estimation of economic damages, epidemiology, toxicology, medical testimony, neuroscience, mental health evidence, and engineering. Each reference guide is written to be understandable to lay readers, comprehensive enough to give the reader a real feel for the issues associated with the discipline discussed, and yet not so long that they cannot be read in a reasonably short period of time. Each contains references to other helpful materials that may be consulted for more information.

Because forensic evidence is prevalent in criminal cases, two reports on this subject may be very helpful. The most recent is the September, 2016 Report to the President from the President's Council of Advisors on Science and Technology ("PCAST") titled "*Forensic Science in Criminal Courts: Ensuring Scientific Validity of*

[22] Reference Manual on Scientific Evidence (3d ed., Fed. Judicial Ctr. & Nat'l Research Council 2011).

Feature-Comparison Methods."[23] The PCAST Forensic Evidence Report contains thorough discussions regarding the following forensic feature-comparison methodologies: DNA analysis (single source samples, simple-mixture source samples, and complex-mixture source samples); bitemark analysis; latent fingerprint analysis; firearms analysis; footwear analysis; and hair analysis.

The second is the National Research Council's February, 2009 Report titled *"Strengthening Forensic Science in the United States, A Path Forward."*[24] In addition to a useful discussion about what forensic science is and the legal standards for admitting forensic evidence in court cases, it contains helpfully detailed discussions about the following forensic science disciplines: biological evidence; analysis of controlled substances; friction ridge analysis; shoeprint and tire track analysis; toolmark and firearms identification; hair evidence analysis; fiber evidence analysis's questioned document examination; paint and coatings analysis; explosives and fire debris evidence; forensic odontology; bloodstain pattern analysis; and digital and multimedia analysis.

These three references are especially helpful to judges faced with ruling on admissibility of expert evidence in criminal trials. They provide sufficient background information to allow a judge to understand the critical evidentiary issues with various types of recurring expert evidence in criminal cases. When combined with research on court decisions discussing admissibility of expert evidence in criminal cases, a judge can feel well prepared to make a ruling, even if the Rule 16 disclosures and filings of the parties are insufficient in themselves to enable the judge to rule.

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[23] Available at https://obamawhitehousearchives.gov/sites/default/files/microsites/ostp/pcast/pcast_forensic_science_report_final.pdf.

[24] Available at https://www.ncjrs.gov/pdffiles1/nj/grants/228091.pdf.

4. Recommended Amendment to Fed. R. Crim. P. 16

The final suggestion as to what could make life easier for trial judges and counsel alike, is a recommendation that the Criminal Rules Advisory Committee consider amending Rule 16 to enhance the Rule 16(a)(1)(G) and (b)(1)(C) expert disclosures. Specifically, the Committee should consider whether they should be made to more closely resemble the disclosures required in civil cases by Fed. R. Civ. P. 26(a)(2). At a minimum, Rule 16 disclosures should include: (1) a complete statement of each opinion the expert will testify to, as well as the basis and reasons supporting them; (2) a summary of the facts or data considered (not just relied on) by the witness in forming his or her opinions; and (3) a description of the witness's qualifications. In addition, while less important, it would also bolster Rule 16 if the disclosures included a list of cases in the past 4 years where the witness had testified (allowing counsel to read the prior testimony), and a copy of any exhibits that will be used by the expert in support of his or her testimony.

Conclusion

Determining the admissibility of expert testimony can be a challenge to trial judges under the best of circumstances. But in criminal cases, there are additional challenges the judge faces in doing so. Understanding what these challenges are and how best to meet them can make life much easier for the judge. In addition, fortifying Fed. R. Crim. P. 16's expert disclosure requirements to make them more like the more helpful ones found at Fed. R. Civ. P. 26(a)(2) would also greatly improve things.

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August 30, 2018

VIA EMAIL ONLY: donna_elm@fd.org

Advisory Committee on Criminal Rules
Attn: Donna Lee Elm
400 North Tampa Street, Suite 2700
Tampa, FL 33602

Re: Proposal to Change the Expert-Disclosure Provisions of Fed. R. Crim. P. 16

Dear Ms. Elm and the Committee:

I am a CJA attorney in the District of New Mexico who also does a substantial amount of federal civil work. I am excited to hear that the Committee is considering adopting more civil-style expert disclosure rules, and I wanted to share my thoughts on the matter briefly.

I. Complaints About the Current System

In my opinion, the criminal system for handling expert witnesses – in which opponents of an expert get neither a detailed expert report nor a deposition – is inferior to its civil analogue in virtually every way. Even cost/efficiency, which I believe to be the real justification for many of the comparatively minimal discovery rights afforded in criminal cases, suffers here, because the Court often ends up in the position of having to sit and watch an expert deposition – which in criminal cases is called a "*Daubert* hearing" (not to be confused with the "*Daubert* hearings" in civil cases, in which the Court hears primarily legal arguments and whatever minimal testimony still needs to be developed after the successive issue refinement provided by the expert report and deposition) – unfold live in open court.

In my experience, the way the expert disclosure process often plays out in criminal cases in federal court is that the proponent of the expert will file a two-to-three-page (double-spaced) summary either of the opinions that the proponent *hopes* the expert will say or of the broad topics (barely narrower than the "subject matter") that the expert *can* testify on. Here, the simple requirement (which exists in Civil Rule 26(a)(2)(B) but not in Criminal Rule 16) that the report be "signed by the witness" is huge. Many summaries from the Government are (1) written by an AUSA and not even *seen* by the expert prior to the *Daubert* hearing; and (2) written before the

expert has formed his actual opinions. The experts that are particularly susceptible to this are those that repeatedly testify to more or less the same opinions in multiple cases, often by stating general principles of their field of expertise and leaving it to the jury to apply those principles to the case at hand.

For example, there might be an out-of-state child psychology expert who has testified for the Government in numerous Districts in sex trafficking cases, and this expert might have become one of the word-of-mouth go-to experts for AUSAs nationwide facing sex trafficking cases that appear to be headed to trial. An AUSA in a case set for trial in a month and a half might contact this expert and 'sign them up' with the understanding that the expert will not be expected to know much about the facts of the case, but rather will be called to testify, 'seminar-style,' about general principles of the child psychology of sex trafficking. The AUSA might then copy and paste the Rule 16(a)(1)(G) summary of the expert's testimony in his or her most recent case, perhaps modifying the summary to tie principles that *the AUSA* believes apply to the instant case to the facts (the AUSA is especially likely to do this if, in the prior case, the expert *did* tie principles to facts). At that point, defense counsel is handed a "summary" that is effectively a prior publication excerpt – *i.e.*, a statement by an expert not made in connection with the instant case – that lacks the reliability attendant to actual publication (both the carefulness of the author and the review of the expert's peers), and that is augmented by the (non-)expert opinion of the AUSA.

There is no built-in penalty for the AUSA for doing this, provided that he or she drafted an over-inclusive summary (*i.e.*, one containing opinions that the expert will not ultimately testify to) rather than an under-inclusive one, as the penalty of having extraneous opinions struck is no penalty at all if the expert was never going to testify to them anyway, and the defense cannot even impeach the expert with the summary because the expert did not write it.[1] The defense counsel might then file a *Daubert* motion that is directed to opinions that the expert does not even have, and the Court will then set a hearing. Cross-examination at criminal *Daubert* hearings, in my view, tends to try to serve the role of both deposition (with open questions for the purpose of discovery) and hearing (with leading questions for the purpose of persuasion), and does neither well.

II. Proposal for Reciprocal Expert-Report Discovery

At a minimum, I believe the Committee should require an *expert signed* disclosure for all retained experts (a term I will use to refer to those experts required to provide a report under Civil Rule 26(a)(2)(B)).[2] I also see little downside to requiring that this report fulfill all the detailedness requirements of a civil expert report.

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[1] Judges seem to vary regarding whether an opponent technically *can* impeach an expert with the summary – *i.e.*, whether reading from the document to contradict the expert is allowed (I always say that the summary is attributable as a prior statement by the expert under FRE 801(d)(2)) – but it certainly is not *effective* impeachment when the expert can honestly explain that he or she neither wrote nor approved the summary.

[2] I will discuss this more below, *see* Park III, *infra*, but please do ensure, if your rule recognizes a (sensible) distinction in disclosure obligations between retained/'party-controlled' experts on the one hand and unretained/independent experts on the other, that case agents who testify in a dual role as both fact and expert

How to handle reciprocity is an interesting issue. My sense is that heightening the current Rule 16(a)(1)(G)/(b)(1)(C) requirements by adding an expert report obligation for retained experts will benefit defendants more than the Government, simply because the Government uses more experts. That said, the current paltry expert disclosure regime of the Criminal Rules incentivizes defendants in some cases – at their selection – to forego *any* reciprocal expert disclosure, and those cases, although somewhat rare, can when they arise put the defendant in a much better situation than the Government, given the ability to effectively circumvent the pretrial *Daubert* motion process. (This might occur if, for example, the defense anticipates that the Government will either not put on expert testimony or will only put on expert testimony in which disclosure will be minimally helpful to the defense – such as chemical identification of drugs testimony, which is obviously *Daubert*-satisfying and where the defense knows what is going to be said – and the defense intends to put on expert testimony either from a less than reputable expert or field of study, or that will be difficult for the Government to anticipate the contours of, such as battered spouse testimony in support of a self-defense claim.) In short, I think the increase from no disclosure to reciprocal "summary" disclosure benefits the Government more than the defense, while the increase from reciprocal "summary" disclosure to reciprocal "report" disclosure benefits the defense more than the Government.

Given that reality, I would retain the obligations imparted by Rule 16(a)(1)(G) and (b)(1)(C) as they currently exist and simply add an *additional* ground of reciprocal discovery that obligates the production of a signed expert report for retained expert witnesses (this would then excuse the obligation of providing a summary for those experts). Here is a proposed redline of the relevant portions of Rule 16, with additions underlined and deletions stricken; where text taken from Civil Rule 26(a)(2)(B) is modified, I have noted it in red:

> **(G) Expert ~~witnesses~~ Summaries.** At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the

witnesses fall on the party-controlled/higher disclosure side of the divide. This is one area where there is a major difference in context and expectations between the criminal and civil rules and practice. In civil cases, when a judge or attorney thinks of a "dual role" expert who has both facts and expert opinions to testify about, they are probably thinking of a 'treating physician,' and the judge's major concern is probably *encouraging* their use by not weighing down proponents with unrealistic obligations that the proponent then has to pass onto the physician, who may have no particular desire to participate in the case; in short, such witnesses are seen as desirable and trustworthy, and the rules are written and interpreted with that in mind. In criminal cases, dual role experts are usually law enforcement officers who want to explain why their factual observations point to the defendant's guilt by way of 'expert' testimony that (1) may have been developed during the instant case's investigation (*e.g.*, meanings of code words); (2) may be more suspicion, speculation, or intuition than real expertise; (3) may veer into 'profile' evidence of the defendant, which may be unreliable and may violate character-evidence rules; and (4) may invade on the decisionmaking province of the jury. These experts are widely viewed as suspect, and the courts have largely struggled in curtailing the dangers of their use. *See, e.g.*, *United States v. Rodriguez*, 125 F. Supp. 3d 1216, 1248-53 (D.N.M. 2015) (outlining six dangers of law-enforcement expert testimony).

government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(H) Expert Reports. At the defendant's request, the government must give to the defendant a written report – prepared and signed by the witness – for each witness from whom the government intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the government need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

. . . .

(C) Expert ~~witnesses~~ Summaries. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(D) Expert Reports. If a defendant requests disclosure under Rule 16(a)(1)(H) and the government complies, then the defendant must give to the government a written report – prepared and signed by the witness – for each witness from whom the defendant intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the defendant need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

I fully admit that the addition of an entirely separate subdivision for reports (versus summaries) is not the most elegant draftsmanship, but the Rule already breaks out "reports of examinations and tests" from "documents and objects" and "expert witnesses," and I think attempting to jam extensive new material into subdivision (a)(1)(G)/(b)(1)(C) will render those subdivisions difficult to read.

III. Proposal for Reciprocal Depositions of Retained Experts

This is probably asking for too much (and too big of a break from the longstanding federal criminal tradition opposing depositions), but I also genuinely believe that providing an additional option for the reciprocal deposition of retained experts would increase both the quality of the truth-seeking function of discovery and the efficiency of the proceedings. The benefits of expert depositions are obvious, and efficiency could be additionally improved by (1) time-limiting the depositions to less than the civil standard of seven hours (I have found that 4 hour depositions work well); (2) reversing or loosening the civil case norm that the deposition taker has primary authority for selecting the date and time of the deposition, and providing a late deadline by which the expert's proponent must make the expert available for deposition – I would think that 7-14 days before the *Daubert*-motions deadline would be sufficient – so that the number of depositions taken in cases that ultimately plead out is minimized; and (3) tying the taking of an expert deposition to a requirement (either explicit in the rule or recognized by convention, although I recommend the former given the strong inertia of convention among the criminal bar) that any *Daubert* motion contain citations to the transcript sufficient for the Court to rule on the motion without a hearing. My state's state court system gives criminal litigants a right to interview *all* of the other side's witnesses – not just experts – and the world has not come to an end; the procedure is widely popular among the bar and believed to produce superior results to a 'blind' system (and the pretrial interview system to which I am referring is, in many ways, *much* more onerous on the prosecution than the reciprocal-at-the-defense's-option system of expert depositions that I am proposing here).

If the Committee were interested, I think such a change could be made by simply adding a new subdivision to the bottom of Rule 16(a)(1), "Depositions of Retained Experts," and adding a couple words long disclaimer somewhere in Rule 15 effectively subjecting expert depositions to the procedural provisions of Rule 15, but not its availability provisions. I would recommend making a condition of the defendant's invocation of the reciprocal deposition option that he waives the right to appear personally at the depositions (either the government's depositions of his experts or his depositions of the government's); Rule 15(c) currently grants the defendant a right to be present at depositions.

Aside from the obvious benefits, an additional plus to implementing this idea is that it will provide some deterrent/drawback to designating fact witnesses aligned with a party (usually case agents) as dual-role expert witnesses, as doing so would expose them to a deposition that they would otherwise not have to go through. *See supra* note 2. I think that this result is entirely appropriate not just as a matter of 'rough justice,' but also because such expert testimony is among the most in need of close examination under Rules 702-705 (and probably really 701); if the Government wants to put on "expert" testimony in the venerable scientific field of "why my client is guilty," then it should at least have to demonstrate how that expertise was developed through *actual* experience *outside* of the instant case – a time-consuming vein of cross-examination that is among the least appropriate things to ask an expert about in front of a jury (which is the current method of handling the task).

Thank you for taking the time to review my concerns. I think this is an important topic where there is significant room for meaningful improvement in the Rules. Best of luck with your changes.

Very truly yours,

Carter B. Harrison IV

CBH/ml

cc: Rebecca A. Womeldorf
(RulesCommittee_Secretary@ao.uscourts.gov)

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Time for Ruling on Habeas Motions**
Suggestion from Gary E. Peel (18-CR-D)

DATE: **August 20, 2019**

At its fall meeting in 2018, the Committee discussed Mr. Gary Peel's proposal for "new federal civil and/or criminal court rules (or the mandating of local court rules)" requiring "district court judges to issue decisions/opinions on pending motions within a specified number of days [he suggests 60 or 90 days] absent exigent circumstances." He stated that the failure of judges to rule on motions in Section 2254 and 2255 cases, in particular, is a "systemic problem," and that it is not uncommon for Section 2254 and 2255 motions to remaining "pending" or "under consideration" for a year or more. He added that efforts to remedy this situation have been ineffective.

Although members expressed concern about the significant delays in habeas cases, they generally agreed that the Committee did not have the authority to address the problem. Discussion then focused on one factor that may contribute to delays: the exemption of habeas cases from the list of pending motions that must be reported as pending for more than six months under the Civil Justice Reform Act (CJRA). Multiple speakers acknowledged that exclusion may lead judges to give other reportable motions priority. They also noted that the Committee on Court Administration and Case Management (the CACM Committee) has previously recommended changes to the CJRA reporting requirements in order to encourage timely disposition of certain classes of cases. There was support for referring this issue to the CACM Committee for further consideration in light of the statistics showing lengthy delays, and the concern that the exclusion from reporting may be contributing to the problem. Judge Molloy informed the Committee that he would write to the CACM Committee to raise the issue for their consideration, but he would not state a position on how the issue should be resolved.

In June 2019, the chair of the CACM Committee, Judge Audrey Fleissig, responded to Judge Molloy. She wrote that after a lengthy discussion, the CACM Committee agreed unanimously "that the current approach, which treats these filings as civil cases, but not civil motions, is appropriate given the unique procedural and substantive issues associated with section 2254 petitions and 2255 motions." The remainder of her letter (included *infra*) provides a fuller explanation.

This is presented as an information item.

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COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

June 13, 2019

Honorable Donald W. Molloy
United States District Court
Post Office Box 7309
Missoula, MT 59807-7309

Dear Judge Molloy:

As chair of the Court Administration and Case Management (CACM) Committee, I am writing to report on the CACM Committee's consideration of an issue that the Advisory Committee on Criminal Rules referred to us concerning the treatment of section 2254 petitions and 2255 motions under section 476 of the Civil Justice Reform Act (CJRA). As you noted in your October 15, 2018 letter, under the current CJRA reporting requirements, these filings are excluded from the civil pending motions report (except to the extent secondary motions are filed in section 2254 cases), but must be included on the pending civil cases report if pending for more than three years. Although your Committee took no position on the issue, it suggested that the CACM Committee may wish to review the reasoning behind the historical exclusion of section 2254 petitions and section 2255 motions from the civil pending motions report, as including them on that report, which requires all motions pending for more than six months to be listed, has been suggested as a way to encourage judges to attend to these matters more expeditiously.

At its June 2019 meeting, the CACM Committee considered the issue, including your October 15 letter and the materials that were part of Criminal Rules Agenda Item 18-CR-D. After a lengthy discussion, the Committee unanimously agreed that the current approach, which treats these filings like civil cases, but not civil motions, is appropriate given the unique procedural and substantive issues associated with section 2254 petitions and section 2255 motions. For example, the Committee noted that because these matters are often filed by unrepresented litigants who are in custody, the cases frequently require review by pro se law

clerks and supplemental filings. It is also not uncommon for a judge to receive requests for and grant lengthy extensions of filing deadlines to allow the petitioner sufficient time to prepare filings. In the same vein, the state court record or transcript can take a significant amount of time to transmit or produce. These and similar issues make it very difficult to fix any common time frame for when a case would typically be ripe for handling. Similarly, in section 2254 cases, a petitioner may be exhausting a claim in state court, which requires a stay of the proceeding. Some petitioners also file a 2255 motion, but request that the court defer ruling on it because of a potential change in the law. While this list is not exhaustive, these factors illustrate the complexities often attendant to section 2254 petitions and section 2255 motions that differentiate them from a typical civil motion or other filings such as bankruptcy and social security appeals, and support excluding them from the civil pending motions report.

The Committee was also concerned that imposing a more aggressive reporting deadline may unintentionally constrain judges' discretion in managing these cases. Most notably, the Committee cautioned that judges may be less inclined to grant extensions or stays they would otherwise grant to avoid running up against the reporting deadline. Further, even if judges could include a code on the report explaining why a section 2254 petition or section 2255 motion is pending, the optics of reporting a case could compel judges to adhere to a more rigorous briefing schedule, which would likely pose challenges to unrepresented litigants.

While the Committee declined to recommend any changes to the long-established CJRA reporting requirements for section 2554 petitions and 2255 motions, it recognized the importance of ensuring that judges are resolving these matters as expeditiously as possible. To this end, the Committee asked its case management subcommittee to consider whether there are other steps the Committee could take to alert judges to aging section 2254 and 2255 cases and whether there are additional resources, including additional staffing, that can be made available to courts with high numbers of pending section 2254 petitions and 2255 motions. The case management subcommittee plans to consider these issues in the coming months.

I hope this information addresses your Committee's request. If I can answer any questions about this issue, or if the CACM Committee can be of any further assistance, please do not hesitate to call me.

Sincerely,

Audrey G. Fleissig

cc: Mark Miskovsky
Rebecca Wolmeldorf

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18-CV-V
18-CR-D

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, Il 62208

July 9, 2018

Sen. Chuck Grasley –	Chairman of the U.S. Senate Committee on the Judiciary 135 Hart Senate Building, Washington, D.C. 20510
Sen. Dianne Feinstein -	Ranking member of the U.S. Senate Committee on the Judiciary 331 Hart Senate Building, Washington, D.C. 20510
Rep. Bob Goodlatte -	Chairman of the House Committee on the Judiciary 2309 Rayburn HOB, Washington, D.C. 20515
Rep. Jerrold Nadler -	Ranking member of the House Committee on the Judiciary 2109 Rayburn HOB, Washington, D.C. 20515
Sen. Richard J. Durbin -	711 Hart Senate Building, Washington, D.C. 20510
Administrative Office of the U.S. Courts, Standing Advisory Committee on the Federal Rules of Criminal Procedure (F.R. Crim. P)	One Columbus Circle, NE, Washington, DC 20544
Hon. Michael J. Reagan,	Chief Judge of the U.S. District Court for the Southern District of Illinois 750 Missouri Ave., East. St. Louis, IL 62201 * * (for adoption of local rules only) * *

Re: Proposed Amendment to the Federal Rules of Civil and Criminal Procedure

To whom it may concern:

I am NOT seeking any intervention, by you, in my legal matter; however, by way of example ,I am enclosing a copy of my **Fifth** Motion for Court Ruling This motion highlights a systemic problem within the federal civil and criminal court systems that I believe warrants your attention by way of one or more rule changes.

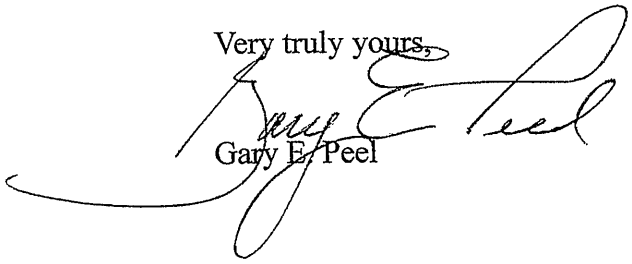
The issue is this: many criminal and civil court motions, particularly those filed by *pro se* litigants pursuant to 28 U.S.C. §§ 2254 and 2255, do not receive *prompt* rulings by U.S. District Court Judges. It is not uncommon for 28 U.S.C. §§ 2254 and 2255 motions to remain "pending" and "under consideration" for a year or more. Efforts to remedy the situation at the District Court level are usually met with orders suggesting that the matter is under advisement; yet, persistent efforts to obtain rulings are to no avail. Additionally, any Motion for Writ of Mandamus filed in the Appellate Court requires payment of filing fees which most criminal defendants do not have. A Mandamus action, to compel the issuance of a ruling, is seldom successful, leaving the defendant with less funds and no remedy. District and appellate court resources are wasted in addressing this recurring problem

I am suggesting new federal civil and/or criminal court rules (or the mandating of local court rules) that mandate district court judges issue decisions/opinions on pending motions within a specified number of days, absent exigent circumstances (such as the death or incapacity of the judge, a pending appellate or Supreme Court case that may control the pending decision, or a pending briefing schedule applicable to the parties).

Mandating decisions within "a reasonable time" or "in due course" will not solve the problem as district court judges routinely use these generic excuses to delay issuing substantive rulings. A specific number of days (60-90?) needs to be mandated (subject only to identifiable exigent circumstances).

Thank you for your attention and consideration.

Very truly yours,



Gary E. Peel

Encl: (1)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY E. PEEL	)	
	)	
Petitioner	)	
	)	
vs	)	Case No. 3:17-cv-01045-SMY
	)	
JOHN M. KOECHNER	)	
	)	
(Chief United States Probation Officer for the Southern District of Illinois)	)	Hon. Staci M. Yandle
	)	
Defendant	)	

FIFTH Motion for Court Ruling

Comes now the Petitioner, Gary E. Peel, *pro se*, and, for the **FIFTH time**, moves this Court to take action and render a ruling on Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE," and as grounds therefor states as follows:

1. ***Petitioner is not seeking a "status" regarding this matter.*** Clearly, the matter is "pending," or "under advisement." Instead, the Petitioner is seeking a *dispositive decision/order* on the pending motion for reconsideration.
2. The "Petition for Writ of habeas Corpus" (Doc. #1) was filed on 9-29-17, over nine (9) months ago. A Memorandum and Order (Doc #11) and a "Judgment in a Civil Case" (Doc. #12) were *promptly* entered by this Court on 11-16-17 (only 48 days later).
3. Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE" (Doc. #13) was then filed on 12-8-17, presenting two primary bases for reconsideration, i.e.
    a. This Court applied the wrong standard in determining what constitutes "newly discovered evidence," (regarding Count 1 of the Indictment), and
    b. This Court turned a blind eye to controlling Supreme Court and Seventh Circuit precedent (regarding Counts 3 & 4 of the Indictment).
4. On March 9, 2018 petitioner filed a "Motion for Court Ruling," (Doc. #14) informing this Court that the motion to reconsider (filed 12-8-17) had been pending for more than ninety

(**90**) days without a decision. This Court, on the same day of March 9, 2018, construed the motion as a request for status, terminated the motion, as moot, and indicated that the Court ***"will issue rulings in due course."*** (See Doc. #15.)

5. On April 9, 2018 petitioner filed a "Second Motion for Court Ruling," (Doc. #16) informing this Court that the motion to reconsider had been pending for more than one-hundred twenty (**120**) days without a decision. This Court merely denied the motion on 4-13-18 (Doc.#17) noting that the Court is aware of the pending motion [to reconsider] and ***"will issue a ruling in due course."***
6. ***However, the "standard" established by Rule 4 is NOT one of "due course." It is one of "promptness."*** Rule 4 specifically requires that the Court "**promptly examine**" the Petition. Whatever logic exists for requiring the *prompt* examination of an *initial* habeas filing surely applies as well to motions to reconsider same. As stated by British Prime Minister William E. Gladstone in 1868, "Justice delayed is justice denied."
7. On 5-9-18 petitioner filed a "**Third** Motion for Court Ruling," (Doc. #18) informing this Court that the motion to reconsider had been pending for more than one-hundred fifty (**150**) days (40% of a year) without a decision. This Court has not yet decided that "**Third** Motion for Court Ruling."
8. On 6-8-18 petitioner filed a "**Fourth** Motion for Court Ruling," (Doc. #19) informing this Court that more than one hundred eighty (182) days (half of a year) had then elapsed without a ruling on the motion to reconsider. Similarly, this Court has not decided that "**Fourth** Motion for Court Ruling."
9. An additional month has now elapsed without a ruling on the motion to reconsider. This makes a total of more than **two hundred ten (210)** days (approximating 57% of a year) without a ruling on the motion to reconsider.
10. Three (3) persons associated with Petitioner's bankruptcy and criminal cases have now died. These are Bankruptcy Judge Kenneth Myers, District Judge William Stiehl, and attorney Donald W. Urban (bankruptcy attorney for Petitioner's first wife, Deborah J. Peel). Hopefully, this Court's delay in rendering a decision is not indicative of any desire that the Petitioner join this list so as to render his habeas motion "moot."
11. Petitioner is constitutionally entitled to the following:

a. due process [guaranteed by the Fifth & Fourteenth Amendments], and

b. access to the courts [guaranteed by the First, Fifth & Fourteenth Amendments].

Both constitutional rights are denied when a District Court Judge refuses to render a timely substantive order/decision upon one or more pending motions.

12. An indefinite delay, as here, benefits only the prosecution. It is not this Court's responsibility to assume or promote the role of Petitioner's adversary. Likewise, this Court's delay in rendering a substantive decision should not be incentivized by any retaliatory motivation to deter Petitioner's insistence on securing a prompt decision.. Petitioner hopes that this Court's delayed ruling is neither

    a. indicative of a judicial bias favoring the petitioner's adversary, nor

    b. a punitive act to deter petitioner's efforts to secure a prompt ruling.

13. Petitioner is entitled to either a) an evidentiary hearing on his habeas petition or b) the right to appeal any adverse ruling denying him that evidentiary hearing. This Court's refusal to issue a ruling precludes both avenues of recourse, thereby denying the petitioner both due process and access to the courts.

14. Petitioner seeks a ruling on the merits, not one that is tainted by this Court's assumption of an adversarial role adverse to the Petitioner or this Court's retaliation for Petitioner's multiple efforts to secure a prompt decision.

Wherefore Petitioner moves this Court, for a **FIFTH** time, to act and render a *prompt* dispositive ruling/decision, on Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE."

July 9, 2018

Gary E. Peel, *pro se*
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208
Cell Phone: 618-304-6187

cc: While Petitioner seeks NO intervention in this matter from the following, a copy of this motion is nevertheless being provided to the following to encourage the adoption of a change in the federal rules of civil and/or criminal procedure for the following purposes; to wit,

a) to compel timely decisions on pending district court motions, and
b) to reduce the waste of judicial resources committed to addressing delayed district court rulings.

Sen. Chuck Grasley -	Chairman of the U.S. Senate Committee on the Judiciary 135 Hart Senate Building, Washington, D.C. 20510
Sen. Dianne Feinstein -	Ranking member of the U.S. Senate Committee on the Judiciary 331 Hart Senate Building, Washington, D.C. 20510
Rep. Bob Goodlatte -	Chairman of the House Committee on the Judiciary 2309 Rayburn HOB, Washington, D.C. 20515
Rep. Jerrold Nadler -	Ranking member of the House Committee on the Judiciary 2109 Rayburn HOB, Washington, D.C. 20515
Sen. Richard J. Durbin -	Illinois State Senator, 711 Hart Senate Building, Washington, D.C. 20510
Administrative Office of the U.S. Courts, Standing Advisory Committee on the Federal Rules of Criminal Procedure (F.R. Crim. P)-	One Columbus Circle, NE, Washington, DC 20544
Hon. Michael J. Reagan, Chief Judge of the U.S. District Court for the Southern District of Illinois-	750 Missouri Ave., East. St. Louis, IL 62201 *** (for purposes of adopting local rules only) ***

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Standards for IFP and CJA Status
Suggestion from Sai (19-CR-A)

DATE: August 20, 2019

Sai[1] has written to the Civil, Appellate, and Criminal Rules Committees identifying four "major problems with the current civil, criminal, and appellate IPF rules and forms." In a footnote, Sai states that for the purposes of the Criminal Rules, IFP is used "synonymously" with CJA.

Each of the relevant advisory committees has been asked to consider Sai's letter as a discussion item at the fall meetings. This initial discussion will help the chairs and reporters determine whether to delve further into the proposals either individually or working through a joint subcommittee. This memo provides some background information for the Committee's discussion.

Sai seeks rulemaking "under the Rules Enabling Act and the APA to cure" four problems. Sai contends that the current rules and forms (1) do not define the financial standard necessary to qualify for IFP status, (2) do not clearly state when an IFP litigant needs to update the court about changes, (3) do not provide clear definitions of key terms, and (4) ask for information outside the legitimate scope of the statute defining eligibility for IFP status.

Recent scholarship provides some support for Sai's critique of the current IFP regime. A 2019 article surveying the practice in all federal districts concludes that the determination of IFP status in the federal courts is "inconsistent across districts," and the "the wide variety of information elicited by the courts and the lack of standards against which to interpret that information combine to create an irrational in forma pauperis regime."[2] There is also evidence that the current practices are inefficient for judges and unduly invasive for litigants. *Id.* at 1500-05.

Nonetheless, Sai's proposals raise a number of difficult issues, including the threshold question whether the changes proposed fall within the scope of the Rules Enabling Act, or are

[1] Sai is the author's full name.

[2] Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1496-97 (2019).

instead substantive, serving in effect as interpretations of the statute governing IFP status, 28 U.S.C. § 1915.[3] There are also problems with Sai's specific proposals, such as tying IFP status to standards for indigence that were developed for other purposes.

Whatever the merits of Sai's concerns regarding the Civil and Appellate Rules, Sai's proposals rest on a fundamental misunderstanding in equating IFP status with eligibility for counsel under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. The statute governing IFP status, 28 U.S.C. § 1915, does not determine eligibility for representation under the CJA, and there are critical differences in the function and application of the two statutory schemes. The CJA implements the Sixth Amendment right to counsel in criminal cases, and accordingly defendants are presumed to get financial relief (counsel) unless the court finds they are not indigent.[4] Moreover, Sai's advocacy of clear standards for IFP status presumes the existence of a uniform standard (or a baseline standard that could and should be adjusted according to cost of living or some other factor(s) in different geographic areas). But eligibility for CJA representation is determined on relative, a case-specific basis, comparing the expected costs of the defense with the defendant's resources. If the case is highly complex and resource-draining (*e.g.*, complex white collar or capital cases), defendants who are not indigent in some general sense may nonetheless be found eligible for representation. CJA status thus presents very different issues than those discussed in Sai's letter.

Finally, although the CJA does not itself specify how indigency is decided, the Model Plan for Implementation and Administration of the Criminal Justice Act (Model CJA Plan), approved by the Judicial Conference, provides significant guidance, setting out factors guiding judges in CJA appointment determinations.[5] The Model CJA Plan was developed by the Judicial Conference Committee on Defender Services (not the Criminal Rules Committee). To the extent the issues of concern to Sai are relevant to the determination of CJA status, it may be appropriate for them to be addressed – at least in the first instance – by the AO's Defender Services Office (and perhaps also the Committee on Defender Services). More generally, we note that in recent years the Judicial Conference has focused on the question how best to oversee representation under the CJA.[6]

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[3] That problem could potentially be sidestepped, however, by amending only the AO forms used to determine eligibility, rather than the rules. *See* 128 YALE L.J. at 1523-25.

[4] *See infra* note 5 for a brief description of how the Model CJA Plan deals with this issue. CJA counsel are routinely appointed (albeit provisionally) to meet with defendants before their initial appearance and initiate representation. If the court subsequently finds at the initial appearance that the defendant is not indigent, it will not appoint CJA counsel.

[5] The Model CJA Plan provides that the judge should consider not only the financial state of the defendant, but also the cost of providing for the defendant's dependents; the cost of securing pretrial release; his or her asset encumbrance; and the cost of securing counsel. Model CAJ Plan, § IV.B.2. The Plan also mandates that questionable eligibility should be resolved in favor of appointment. *Id.* § IV.B.2.e.

[6] *See, e.g.*, the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (revised 2018).

The issues Sai raises would, however, have much greater relevance to actions brought under 28 U.S.C. §§ 2254 and 2241, as well as appeals in these cases.[7] The filing fee for a case brought under § 2254 is presently $5.00. *See* 28 U.S.C.A. § 1914 ("on application for a writ of habeas corpus the filing fee shall be $5."). These petitioners are also affected by IFP practices in the courts of appeals. In contrast, because proceedings under § 2255 are formally motions rather than new cases, no filing fee is required.[8]

As a matter of practice, the procedural rules for actions under § 2254, though technically civil, fall within the Criminal Rules Committee's jurisdiction. Thus, even if the Criminal Rules Committee decides not to undertake further study of the issues raised by Sai, if the Civil Rules Committee or the Appellate Rules Committee opts to pursue Sai's proposals, the Criminal Rules Committee may decide to coordinate efforts.

Sai's proposals are presented as a discussion item.

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[7] Rule 3(a)(2) of the Rules Governing Section 2254 Cases requires "a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of 8 the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution."

A study of every capital § 2254 case filed during 2000, 2001, and 2002 in the thirteen federal districts with the highest volume of capital habeas petitions found that 86% included an IFP motion, and 89% of these were granted. The study noted that in these capital habeas cases, "IFP motion practice varied considerably between districts. In CA-C, 12 of 13 cases had no IFP motions docketed; in OK-W, 14 of 18 IFP motions were denied. The percentage of motions granted elsewhere ranged from 56% (FL-M) to 85% (AZ, NV)." N. KING, F. CHEESMAN, & B. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 22-23 (2007).

The same study examined a random sample of § 2254 cases in non-capital cases filed nationwide during 2003 and 2004 and found that "56.1% included an IFP motion; only 62% of these were granted. In 2.4% cases, an IFP motion was granted by the court of appeals." *Id.*

IFP status may excuse costs as well as the filing fee, and this may be regulated by local rule. *See, e.g.*, District of New Hampshire Local Rule 45.2(b)(i) ("In in forma pauperis cases brought pursuant to 28 U.S.C. §§ 2254 and 2255, and in indigent criminal cases, witness fees, service fees, and expenses for the subpoena of all witnesses shall be paid for by the Marshal."); *see also* Middle District of Florida Local Rule 4.14 (b) ("In proceedings instituted in forma pauperis under 28 U.S.C. Sections 2254 and 42 U.S.C. Section 1983 by persons in custody, the Court may order, as a condition to allowing the case to proceed, that the Clerk's and Marshal's fees be paid by the petitioner if it appears that he has $25.00 or more to his credit (in Section 2254 cases), or $120.00 or more to his credit (in Section 1983 cases), in any account maintained for him by custodial authorities.").

[8] *See* Rule 3 of the Rules Governing Section 2255 Proceedings, 1976 Comm. Note ("There is no filing fee required of a movant under these rules. This is a change from the practice of charging $15 and is done to recognize specifically the nature of a § 2255 motions as being a continuation of the criminal case whose judgment is under attack.").

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19-AP-C
19-CR-A
19-CV-Q

Dear AOUSC Committees on Civil, Criminal, and Appellate Rules —

There are four major problems with the current civil, criminal, and appellate IFP[1] rules and forms:

1. There is no publicly known definition of what financial standards qualify a person for IFP status.
2. There is no clear rule as to when an IFP litigant needs to update the court about a change in their financial conditions.
3. The IFP forms use ambiguous terms, for which the courts have not given clear definitions.
4. The IFP forms ask for information outside the legitimate scope of 28 U.S.C. § 1915.

All poor litigants deserve to know the rules for IFP qualification, definitions of terms used in forms, and when they must update a court about a change in their financial circumstances; to have uniformity in IFP determinations, know, and to be free of invasive questions that are unnecessary to making IFP determinations. Third parties also have rights to not have their information disclosed without consent; making an IFP application does not convey any right to violate others' privacy.

Pursuant to the Rules Enabling Act and APA, I hereby petition the Committees for rulemaking to cure each of the above, as detailed below. I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[2]
legal@s.ai
+1 510 394 4724

[1] For the purposes of the criminal rules, I use "IFP" synonymously with "CJA".
[2] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

1. **Financial qualification rules for IFP status**

Not one court in the country has given a clear statement of the rules for IFP qualification, such as an objective standard of counted assets or income, qualifying thresholds, or discretionary elements.

This is despite the fact that two appellate courts — the Third Circuit[3] and Fifth Circuit[4] — permit *clerks* to grant IFP applications (and in the Fifth, to *deny* them as well). Since clerks have no Article III authority, and it would be improper for them to be vested to exercise discretion, we can infer that both courts have a policy dictating the qualifying standards. Neither court has published it.[5]

Certainly, courts have a duty to guard the public purse from improper claims of poverty. That duty extends to IFP applicants as well, to not *make* an IFP claim unless it is justified — but with no clear standard, it is impossible for potential IFP applicants to make an informed decision.

Contrast the Legal Services Corporation regulations, 45 C.F.R. Part 1611, which implement an identical duty and for an identical purpose. The LSC is a Federal 501(c)(3) corporation, which grants Federal funds to pay for legal aid for millions of poor people throughout the United States. It has promulgated regulations to determine financial eligibility including multiple discretionary factors, excluded assets, etc. It delegates to local LSC organizations determinations such as asset thresholds, costs of living, and assistance programs (e.g. SSI, SNAP, TANF, or Medicaid) whose recipients automatically qualify. *See* e.g. Utah Legal Services' Financial Eligibility Guidelines.[6]

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[3] 3rd Cir. standing order of January 22, 1987
[4] 5th Cir. R. 27.1.17
[5] Courts must publish all "rules for the conduct of the business", "order[s] relating to practice and procedure", and "operating procedures". 28 U.S. Code §§ 332(d)(1), 2071(b), & 2077(a). *See In re Sai*, No. 19-5039 (1st Cir. *filed* May 15, 2019).
[6] https://www.utahlegalservices.org/sites/utahlegalservices.org/files/Financial%20Eligibility%20Guidelines%202.19.pdf

The LSC's regulations for financial qualification for government-funded free legal services are reasonable, well-tested, regularly updated[7], and Congressionally approved. They set out clear asset and income thresholds, asset carve-outs for e.g. work supplies and homes, etc. They were thoroughly debated with low-income legal aid advocates, and were promulgated through notice and comment rulemaking.[8] They therefore make for a very easy and clear reference by which the judiciary can craft a fair and uncontroversial rule, already well familiar to the judiciary, which needs little to no further elaboration: "if you qualify for LSC, you qualify for IFP".

Adopting these standards would protect IFP litigants' privacy, while simultaneously making decisions more transparent than they are now. Court orders granting IFP status could simply say "[litigant] has demonstrated IFP qualification under the standards set forth in 45 C.F.R. § 1611.3(c)(1) + (d)(1)". No further detail of the applicant's finances is needed, and this names a clear standard.

I therefore petition that the Rules Committees promulgate rules stating that a § 1915 IFP applicant shows sufficient[9] basis for qualification if they meet any of the Legal Services Corporation's standards[10] of financial qualification, 45 C.F.R. Part 1611, as elaborated by the applicant's local[11] LSC recipient(s) per § 1611.3(a).

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[7] https://www.federalregister.gov/documents/2019/02/04/2019-00889/income-level-for-individuals-eligible-for-assistance (84 FR 1408 (2019), adjusting for 2019 federal poverty guidelines)

[8] https://www.federalregister.gov/documents/2005/08/08/05-15553/financial-eligibility (70 FR 45545 (2005), revising 45 C.F.R. Part 1611 in entirety)

[9] This is deliberately phrased as "sufficient" — not "necessary". Courts would retain discretion to grant IFP status under circumstances not covered by LSC's standards — so long as they state the standard that they have applied with enough clarity to enable IFP litigants to comply with their obligation to update the court (*see* below).

[10] Part 1611 has *multiple* distinct standards: (1611.3(c)(1) or 1611.5(a)(1–4)) plus (1611.3(d)(1) or (d)(2)); or 1611.4(c).

[11] For applicants living outside the United States, the court should substitute the LSC recipient in the court's jurisdiction with a population most socioeconomically analogous to the applicant's.

2. Requirements to update the courts on change in circumstances

It is neither feasible, nor desirable to anyone, that IFP litigants update courts of *every* change in financial status. Nobody cares if an IFP litigant receives a Christmas gift of $100, or if their expenses in a given month vary a bit from what they set out in their IFP application. Filing updates about minor changes would risk sanctions for "multipl[ying] the proceedings in any case", 28 U.S.C. § 1927, burden courts with immaterial filings, and expose litigants to unnecessary invasion of privacy..

Yet if an IFP applicant were to unexpectedly win a million dollars one month after they receive IFP status, they surely must update the court, withdraw from IFP status, and pay the fee. Failure to do so would subject the previously-IFP litigant to the severe sanction of dismissal "at any time" if "the allegation of poverty is untrue", 28 U.S.C. § 1915(e)(2).

Somewhere between these two extremes lies a threshold triggering obligation. The obvious place for this trigger is at the qualifying threshold. This is the rule used by the LSC, 45 C.F.R. § 1611.8.

I therefore petition that the Rules Committees promulgate rules stating that a person with IFP status

A. need not update the court so long as they remain within the standard under which they qualified, but
B. must update the court when they become aware that they no longer meet that standard.[12]

[12] This does not mean automatic disqualification — the litigant may still qualify under a different standard, e.g. one which requires a discretionary exemption, under 45 C.F.R. § 1611.5(a)(4) — but it does create a clear point at which the court should reëxamine financial qualification.

This necessarily also implies that a court granting IFP status must *clearly state* the standard under which it granted IFP status. It is impossible for a litigant to comply with their obligation to update about a change that might alter their qualification unless they know the standard that was applied.

3. Ambiguous terminology in IFP forms

The courts have given no precise definition of the specific terms in the standard IFP affidavits..

Certainly the terms in the IFP affidavits, such as "income", *can* have clear, specific meanings.

The problem is that they don't have any specified meanings in *this* context — and they are amenable to multiple reasonable interpretations.[13] In fact, many of them *do* have specific meanings in other contexts, such as under IRS or Social Security regulations — and those meanings differ between agencies, proving that they are facially vague.

IFP applicants have a due process right to know the precise meaning of terms to which they are expected to swear under penalty of perjury. They risk an unjust accusation of perjury — and dismissal — if their interpretation differs from a court's (thus far secret) interpretation. Without clarification, the IFP forms are unconstitutionally vague.

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[13] For example: Is an unmarried, unregistered partner a "spouse" or "family"? What about common-law spouses (and by which jurisdiction's definition)? Do Patreon donations constitute "self-employment income"? Does Bitcoin constitute "cash" or "other financial instrument", and how does one treat its appreciation or depreciation? Is a Bitcoin exchange, or PayPal, a "financial institution"? Are outgoing donations "support paid to others"? Are domain names, software, inventions, etc. "assets"? Is "value" the original price, currently obtainable resale price, cost to re-acquire, depreciated value by some formula, hypothetical market value, velc.? Is PACER research "expenses … in conjunction with this lawsuit"? Are art, disability-related modifications, musical instruments, appliances, printers, etc. "ordinary household furnishings"? Is an expense occurring once every few years, such as purchase or repair of a computer, a "regular" expense? Does a UOCAVA "voting residence" count as a "legal residence"? Are sales taxes, VAT, or the NHS healthcare surcharge "taxes"? Are visa costs "expenses"? What of joint property? Are litigation settlements or fee/cost awards "income"? What is a large enough change to be "major"?

All of the above are actual questions that I personally must know the answer to in order to correctly fill out FRAP Form 4, but for which there is no available answer in the context of an IFP application.

This clarification can be very readily provided, by simply adopting the definitions of dedicated regulatory bodies as defining the terms used in IFP forms.

The LSC defines "assets" and "income", 45 C.F.R. 1611.2. Crucially, both are limited to what is "currently and actually available to the applicant". This rule was adopted in preference to making a distinction between "liquid" and "non-liquid" assets, and focus on the practical requirements that apply to poor people seeking legal aid. 70 FR 45545, 45547 (2005).

The IRS defines virtually all other financial terms that could be relevant to an IFP application, including e.g. "household" (26 C.F.R. § 1.2-2), "self-employment" (26 C.F.R. § 1.1402(a)-1), "spouse" (26 C.F.R. § 301.7701-18), "gifts" (26 C.F.R. § 25.2503-1), etc. It has also issued guidance for evolving issues such as Bitcoin (IRS Notice 2014-21).[14]

I therefore petition that the Rules Committees:

A. promulgate rules stating that every term used in FRAP Form 4, AO 239, AO 240, and CJA 23 is defined to be identical to those terms' definitions in regulations that the Committees identify;
B. give preference to LSC and then IRS regulations; and
C. amend FRAP Form 4, AO 239, AO 240, and CJA 23 to add an appendix listing the regulatory definition for each term used, by citation.

[14] https://www.irs.gov/pub/irs-drop/n-14-21.pdf

4. Courts' IFP forms request information not authorized by 28 U.S.C. § 1915.

The IFP statute contemplates that courts will assess a prisoner's assets and income, and all IFP affiants' general poverty. However, the IFP forms go much further than the statute permits. *See*[15] e.g.:

A. spouse's income, assets, or debts (unless the affiant has a legal right to expend them for litigation, e.g. if jointly owned), or employment history
B. identities of third parties (spouse, debtor, creditor, financial institution, credit card company, department store, supporter or supportee, etc.)
C. employment & employment history (rather than just current income)
D. sources that can't be used to pay litigation costs (e.g. non-fungible/unavailable[16] or exempt[17])
E. expense breakdowns more detailed than broad categories (e.g. "mandatory costs", "costs of living / working", "exempt", or "discretionary / luxury")
F. make, model, year, and registration # of vehicles
G. legal residence (except as relevant to cost of living & poverty guidelines[18])
H. phone number
I. age
J. years of schooling

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[15] *See also* FRAP Form 4 question re SSN last 4 digits, removed pursuant to my proposal to AOUSC, suggestion 15-AP-E, and promulgated by Supreme Court order of April 26, 2018.
[16] 45 C.F.R. § 1611.2(d): ""Assets" means cash or other resources of the applicant or members of the applicant's household that are *readily convertible to cash*, which are *currently and actually available to the applicant*." (emphasis added)
[17] § 1611.2(i): "… [Income] do[es] not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute."
[18] Only Alaska & Hawaii are distinguished. https://aspe.hhs.gov/poverty-guidelines

These questions are not limited to assessing the affiant's actual, current poverty. Many serve only to pass judgment on the affiant's lifestyle, assess the affiant's ability to earn money (which is not the standard), or otherwise exercise a paternalistic inquiry into the affiant's finances. These are not authorized objectives under 28 U.S.C. § 1915.

By requiring such questions of IFP applicants, courts violate applicants' privacy and dissuade qualified litigants from filing for IFP status.

Furthermore, it is often illegal to answer questions identifying third parties, let alone stating anything about their finances.[19] As a US citizen residing in the UK, obligated to obey UK and EU law, I am subject to very strict legal restrictions under the EU GDPR and UK Data Protection Act 2018. Courts must not demand information that is illegal to give. Here, there is no valid statutory basis for requesting third-party information at all. § 1915 only talks about the *applicant's* poverty; it says nothing about their spouse, creditors, debtors, supporters, etc.

I therefore petition that the Rules Committees amend FRAP Form 4, AO 239, AO 240, and CJA 23 to remove or amend all questions requesting information listed above.

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[19] Under 12 U.S.C. § 3403 (Right to Financial Privacy Act), 5 U.S.C. § 552a(g) (Privacy Act), 18 U.S.C. § 1030(g) (Computer Fraud and Abuse Act), 15 U.S.C. § 1681b *et seq* (Fair Credit Reporting Act), 15 U.S.C. § 1692c *et seq* (Fair Debt Collection Practices Act), and 47 U.S.C. § 227(b)(3) (Telephone Consumer Protection Act), disclosure of such information without consent is unlawful.

Third parties' information disclosed on an IFP affidavit, as with affiant's spouse, creditors, and debtors, also implicate independent privacy rights. *See Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990). An IFP affiant publicly disclosing creditor or debtor information may violate the FDCPA, §§ 1692b, 1692c, & 1692k. This information is also a "consumer credit report", for which public disclosure would likely be actionable under the FCRA. *See* 15 U.S.C. §§ 1681b, 1681n, & 16810.

TAB 5

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TAB 5A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 45 (Court Calculation and Notice of All Deadlines)
Suggestion from Sai (19-CR-B)

DATE: August 18, 2019

Sai[1] has written to the Appellate, Bankruptcy, Civil, and Criminal Rules Committees urging that the rules for calculating time be amended.

For "every applicable date or time specified" not yet completed or adjudicated, the court would be required "to give immediate notice" to all filers of (1) the applicable date and time (including time zone), (2) whether and how that time might be modified, and (3) whether the event would be optional or required.

Sai proposes that this obligation be cumulative, and that filers be entitled to rely on the court's computed times.

Judge David Campbell, the chair of the Standing Committee, has requested that each of the committees have an initial discussion of this proposal at their fall meeting.

In initial discussion, the reporters for the various committees recognized that despite the revision of Rule 45 (and its sister rules) to simplify time computation, determining the applicable deadlines continues to pose difficulties for many litigants, especially pro se litigants. Although courts and court clerks may have a significant advantage over litigants in making the necessary determination, due to their familiarity with the relevant provisions, Sai's proposal would impose a significant new burden on them. Moreover, the proposal that litigants be able to rely on the court's calculations would pose additional problems, particularly in the case of jurisdictional (or statutory) deadlines.

This items in on the agenda for initial discussion at the September meeting.

[1] Sai is the author's full name.

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TAB 5B

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Dear AOUSC —

Frequently, parties run into difficulties with filing deadlines. This can be due to inattention; failure to consider applicable holidays; lack of clarity as to the triggering event (such as what constitutes a "judgment"); misinformation by a clerk; etc.[1] This is especially true for *pro se* parties, who are held strictly to deadlines that are often confusing even to lawyers.[2] The consequences can be fatal[3].

The current rules require every party to personally calculate all applicable times anew every time. This is a waste of energy for all parties, clerks, and judges.[4] It is also totally avoidable. The court knows what the times are, has the authority to define them conclusively. The court could keep a single regularly updated document listing all deadlines by computed time, noticed to all parties upon any update — including optional events such as appeals or motions to extend.[5]

Clerks already have to calculate deadlines regularly, in order to enter "set/reset deadlines" entries in CM/ECF. Many (but not all) versions of CM/ECF itself provide such calculations as part of docket entries. Clerks sometimes make errors, however, and courts have ruled that parties may not rely on a clerk's erroneous docket entry or advice by phone — even if done entirely in good faith. Deadline calculations should therefore be issued as a simple clerk's order.

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[1] *See e.g.* W. Kelly Stewart & Jeffrey L. Mills (Jones Day), *E-Filing or E-Failure: New Risks Every Litigator Should Know*, For The Defense p. 28 (June 2011)

[2] *See e.g. Woodford v. Ngo*, 548 US 81, 103 (2006) (5-3; "prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines").

[3] *See e.g. Jackson v. Crosby*, 375 F. 3d 1291 (11th Cir. 2004) (denying appeal of capital murder case as untimely; majority of panel, C.JJ. Black and Carnes, concurring specially that result is compelled but unjust).

[4] Time computation arises not just when there are disputes about timeliness, but also for drafting opinions & orders, determining timeliness of an appeal, and everyday matters like calendaring.

[5] Rather than ordering e.g. "the deadline for an opposition is extended by 7 days", a court could — with only trivial extra upfront effort — add "the opposition is now due January 1, 2020, at 11:59 pm EST; the reply is now due January 8, 2020 at 11:59 EST; and both deadlines may be modified by motion under [rule] before the deadline (requiring conferral with opposing counsel), or by *post hoc* motion under [rule]."

Therefore, I hereby petition for rulemaking to add the following rule at the end of each rule on computing time, i.e. at FRCP 6(e), FRCrP 45(d), FRBP 9006(h), FRAP 26(d), and Sup. Ct. R. 30(5):

1. For every applicable date or time specified under these Rules, or in any order, the court shall give immediate notice, by order, to all appeared filers, of
    a. the calculated time[6] certain, including time zone, of every[7] event not completed or adjudicated;
    b. whether and how the time may be modified[8], and any conditions for such a modification under all applicable rules and orders[9]; and
    c. whether the event is optional[10] or expired.
2. All filers[11] shall be entitled to rely on the court's computed times.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[12]
legal@s.ai / +1 510 394 4724

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[6] This includes deadlines expressed in days, e.g. to explicitly differentiate filings due by the close of court from those due by midnight.

[7] This is deliberately cumulative. The most recent calculation order should be the full calendar of a case, listing all available, pending, or missed events, and their respective deadlines. This includes expiration dates of court orders, deadlines to request or correct transcripts, deadlines under internal operating procedures (such as *en banc* calls), etc. This would also serve as a comprehensive list of all events pending adjudication, and all missed deadlines.
Generally, the clerk should be able to copy the previous calculation order, add new or amended deadlines, mark expired deadlines, and delete completed or adjudicated deadlines — resulting in the new and complete calculation order.

[8] Modification includes, e.g., extension, acceptance out of time, or *nunc pro tunc* motion.

[9] Applicable orders include, e.g., any standing orders of the court or judge, or any standing orders in a given case. Conditions include, e.g., a requirement to confer with opposing counsel or with chambers, a deadline for filing for extension that is earlier than the deadline of the filing, or the required showing for an extension to be granted.

[10] Optional events include, e.g., a response or appeal. By implication, such orders shall give notice of whether an appeal may be taken (or requested) — either under the final judgment rule or as a collateral appeal, e.g. under *Cohen*.

[11] Filers includes not just current parties, but also e.g. amici who have not yet filed an appearance,

[12] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

TAB 6

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TAB 6A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: E-filing Deadline Subcommittee; Criminal Rule 45
Suggestion from Hon. Michael A. Chagares (19-CR-C)

DATE: August 21, 2019

In response to a suggestion from Judge Michael A. Chagares, Chair of the Appellate Rules Committee, the Standing Committee has created a subcommittee to study whether the electronic filing deadlines in the federal rules should be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the respective court's time zone.

As described in greater detail in Judge Chagares's memorandum, the virtual courthouse is generally open each day until midnight under the current rules. Attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents, which may negatively impact the quality of life for many people, taking them away from their families and friends as well as from valuable non-legal pursuits. The subcommittee will consider the possible advantages and disadvantages of rolling back the filing deadlines, some of which are sketched out in Judge Chagares's memo.

The subcommittee, chaired by Judge Chagares, includes all of the reporters, as well as the following representatives from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees:

- Hon. Stuart Bernstein, U.S.B.C., S.D.N.Y. (Bankruptcy Rules Committee)
- Hon. Joan Ericksen, U.S.D.C., D. Minn. (Civil Rules Committee)
- Hon. Stephen Murphy, U.S.D.C., E.D. Mich. (Appellate Rules Committee)
- Catherine Recker, Esq. (Criminal Rules Committee)
- Jeremy Retherford, Esq. (Bankruptcy Rules Committee)
- Virginia Seitz, Esq. (Civil Rules Committee)

The Subcommittee will also be assisted by Trish Dodszuweit, the Third Circuit Clerk of Court.

The Federal Judicial Center has agreed to gather information to assist the subcommittee on matters including the following:

- Which courts (federal or state) have a rule, standing order, or District ECF guideline setting a time other than midnight for electronic filing?
- What are the statistics on the volume of after-hours electronic filing (perhaps by hour) versus filing while the clerk's office is open? What is the identity of the late-filer (i.e., large law firm, etc.)?
- What times do federal clerks' offices close and are late hard copy filings accepted, for instance through a late box?
- Where are pro se litigants permitted to use electronic filing? What percentage of pro se litigants use electronic filing? What percentage of federal cases in each court have a pro se litigant?

This is presented as an information item at the September meeting.

TAB 6B

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19-AP-E
19-BK-H
19-CR-C
19-CV-U

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.