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

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

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

DATE: December 14, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on September 28, 2015, in Seattle, Washington. This report discusses briefly the following information items:

(1) the Committee's continuing consideration of Rule 49, governing filing and service, including electronic filing;

(2) the Committee's decision to study further suggested amendments to several rules:

- Rule 12.4(a)(2) (government disclosure of organizational victims);
- Rule 15(d) (deposition expenses); and
- Rule 32.1 (procedural rules for revocation and supervised release);

(3) the Committee's decision not to pursue suggested amendments to Rules 6 and 23 of the Federal Rules of Criminal Procedure.

II. Rule 49: Electronic Filing, Service, and Notice

The Committee's attention to Rule 49 is part of an inter-committee project to develop rules mandating electronic filing, service, and notice, with appropriate exceptions. Coordination between the Civil and Criminal Rules Committees has been especially critical because Criminal Rule 49 (b) and (d) now provide that service and filing are to be made the "manner provided for [in] a civil action."[1] Thus changes in the Civil Rules will govern filing and service in criminal cases as well. Additionally, the Rules Governing Section 2254 and 2255 Cases provide that filing and service in these actions are governed by the Rules of Civil Procedure. The Criminal Rules Committee has traditionally had the responsibility for the Rules Governing Section 2254 and 2255 Cases.

It became clear last spring that the Civil and Criminal Rules Committees were not in agreement regarding the optimal default rule regarding electronic filing by pro se parties. The Civil Rules Committee favored a rule requiring all parties to file and serve electronically unless exempted for good cause or by local rule. The Criminal Rules Committee disagreed, concluding unanimously that the default rule for pro se defendants in criminal cases and pro se prisoners filing actions under §§ 2254 and 2255 should be filing and service outside the CM/ECF system. Members noted that the local rules in most districts do not now allow pro se defendants and prisoners to file electronically, and they identified many serious problems that would occur if pro se defendants and prisoners were expected to file, serve, and be served electronically in criminal cases and actions under §§ 2254 and 2255. These problems were described in the Committee's May report to the Standing Committee. I will not repeat that discussion here, but the pertinent portion of the May report is included, *infra,* as an appendix to this report. The Criminal Rules Committee recognized that districts could opt out of a national rule by adopting local rules exempting pro se criminal defendants from electronic filing, but the Committee opposed a national rule that almost all districts would need to modify by local rule.

The Civil Rules Committee displayed admirable flexibility, accommodating the concerns of the Criminal Rules Committee by altering its working draft in April to limit the default rule requiring electronic service and filing to represented parties. But the discussion of these issues and the process of inter-committee negotiation led the Criminal Rules Committee to consider a foundational question: whether the same rules should continue to govern filing and service in civil and criminal cases.

Discussions in the Civil and Criminal Rules Committees revealed that the optimal default rules for electronic filing and service in civil proceedings might be different from the optimal rules for filing and service in criminal prosecutions and actions brought by prisoners under §§ 2254 and 2255. There are critical differences between these proceedings that bear directly on

[1] Rule 49(b) refers to "the manner provided for a civil action," and (d) refers to "a manner provided for in a civil action."

the rules governing filing and service. Accordingly, the Committee recognized that there would be advantages to severing the linkage between the Civil and Criminal Rules, and providing stand-alone rules for filing, service, and notice in the Rules of Criminal Procedure and the Rules Governing Actions Under Sections 2254 and 2255. Severing the automatic linkage would allow the rules governing criminal prosecutions and habeas actions to be tailored to the distinctive nature of those proceedings. It would also free the Civil Rules from the constraints imposed by the need to accommodate concerns specific to criminal proceedings. Finally, a stand-alone Criminal Rule would allow federal prosecutors and defenders to consult the Rules of Criminal Procedure to determine the requirements for filing, service, and notice, rather than requiring them to consult two sets of rules. Accordingly, the Rule 49 Subcommittee was given the task of exploring the feasibility of drafting a stand-alone version of Rule 49.

At the Committee's September meeting, the Rule 49 Subcommittee reported its tentative conclusion in favor of severing the link to the Civil Rules governing filing and service and revising Rule 49 to serve as a stand-alone rule governing filing, service, and notice. The Subcommittee provided a discussion draft and solicited comments on various drafting issues that would need to be resolved in a stand-alone rule. The Committee agreed that the Subcommittee should draft a stand-alone version of Rule 49 and provided input on various drafting issues. Following the September meeting, the Rule 49 Subcommittee held two teleconferences.

Although the Rule 49 Subcommittee is considering a long list of technical issues, one illustrates how differences between civil and criminal litigation may warrant different rules for filing and service. Only the government and the defendant(s) are parties to a criminal case, but the reporters developed a list of nonparties that may be permitted or required to file certain motions or other pleadings in a criminal prosecution.[2] The Subcommittee is considering whether Rule 49 should address such nonparties,[3] and, if so, what the default rule should be for filing and service. The Subcommittee anticipated that the default rule might treat nonparties like parties in criminal cases, requiring electronic filing by those who are represented, absent a showing of good cause or local rule permitting paper filing. However, as our clerk of court liaison has explained, the architecture of CM/ECF system treats civil and criminal cases–and third parties in such cases–very differently. The CM/ECF system is hardwired to allow only two parties in a criminal case: the United States and the defendant(s). Anyone with a CM/ECF login and password can, in theory, file in any civil or criminal case. But the architecture of the system

[2] This includes, for example, victims who may present victim impact statements or assert other rights, material witnesses who seek to be deposed and released, third parties claiming an interest in property the government is seeking to forfeit, and news media seeking access to documents or proceedings.

[3] The current Rule 49(a) addresses only parties. During restyling, the effort to convert Rule 49(a) from a passive construction to the active voice deleted language that previously required all parties to be served with any motions or similar pleadings. A revision of Rule 49 to address electronic filing will also allow the Committee to reverse this unintended substantive change.

allows options in civil cases that are not available in criminal cases. In a civil case, a registered user can add a party (e.g., an intervener) to the case. A criminal case does not provide a registered user the ability to add a party. So even a registered user (such as a lawyer representing a victim or a news media organization) with a CM/ECF login cannot file in a criminal case unless he lists himself as an attorney for either the government or the defendant(s).

If Rule 49 is amended to delete the provisions incorporating the civil rules on filing and service, the new stand-alone Criminal Rule will likely diverge in several respects from Civil Rule 5. The Committee is keenly aware that inter-committee consultation is essential throughout the drafting process. Professor Ed Cooper (the reporter for the Civil Rules Committee) and members of that Committee have been participating in the Rule 49 Subcommittee Conference calls; they have also provided extensive feedback and advice to the reporters. This close consultation, followed by the publication process and the receipt of public comments, should help to identify any unanticipated problems that might arise from new language or changes in the organization of the Criminal Rule. The Subcommittee's intensive focus on Rule 49 has also had an unanticipated benefit, highlighting possible improvements in language that Professor Cooper thinks may be incorporated in the parallel drafts of the filing and service rules under consideration by the other advisory committees.

Although this issue cannot be fully debated and decided until the Rule 49 Subcommittee concludes its work and presents a final proposal, the Committee may wish to request the Standing Committee's approval to publish two alternatives: a stand-alone version of Rule 49, amended to omit references to the Civil Rules, and a revision of Rule 49 that would continue to require that filing and service comply with the Civil Rules, specifying exceptions as needed.

III. Suggested Amendments Under Consideration

The Committee had an initial discussion of several suggested amendments that were referred to Subcommittees for further discussion or placed on the Committee's study agenda to await further developments.

A. Rule 12.4(a)(2)

Rule 12.4(a)(2), which governs the prosecution's disclosure obligations to the court, provides:

> **(2)** ***Organizational Victim***. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

The Department of Justice presented two reasons for reconsideration of the notice requirement regarding organizational victims. First, the Code of Judicial Conduct was significantly amended in 2009, and it no longer treats all victims entitled to restitution as parties. Since the purpose of the rules was to require the disclosure of information necessary to assist judges in making recusal decisions, a change in the recusal requirements may warrant a parallel change in Rule 12.4. Second, there are some cases in which it is difficult or impossible for the government to provide the notification required by the current rule. For example, in some antitrust cases there may be hundreds or thousands of corporate victims. Providing the notification required for each of them, even if possible, would be extremely burdensome.

After initial discussion, there was agreement that a subcommittee should be appointed to study a possible amendment to address these problems. Because the Appellate Rules Committee has discussed whether it should amend its own rules to adopt a provision parallel to Rule 12.4(b)(2), consideration of this proposal should be done in consultation with the Appellate Rules Committee.

B. Rule 15(d)

Rule 15(d) designates the party responsible for deposition expenses. The Department of Justice brought to the Committee's attention an inconsistency between the text of the rule and the committee note. This inconsistency, the Committee learned, had been noted in the minutes of Committee meeting on at least one previous occasion, but no action taken at that time. Action may be warranted at this time, however because defendants in recent cases have urged courts to follow the committee note rather than the text. The Department is concerned that the inconsistency may now be affecting the outcome of cases.

Discussion focused on several points. First, the Committee was reminded that committee notes cannot be amended unless the text of a rule is amended. Second, there is some interplay with statutory provisions, including the Criminal Justice Act and 18 U.S.C. § 4285. There are also financial implications for different branches of government.

A subcommittee was appointed to study the issues and make a recommendation to the Committee at its April meeting.

C. Rule 32.1

Judge Susan Graber wrote to the Committee suggesting that it consider an amendment to Rule 32.1, which governs the procedures for revoking or modifying probation or supervised

release. Her letter brought to the Committee's attention two cases[4] from the Ninth Circuit in which the court imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. She suggested that the Committee consider whether it would be desirable to address these issues in the text of Rule 32.1.

Rule 32.1 reflects the development of a body of law regarding the procedural rights of parolees, probationers, and prisoners on supervised release. The Rule was created in 1979 to implement several decisions of the Supreme Court holding that due process required a hearing, and it was amended in 2002 and 2005 to include additional procedural rights in response to decisions in the lower courts. However, Rule 32.1 does not address all of the issues that are covered in Rule 32, which specifies the procedures for sentencing and judgment. In some cases in which the defendant was being sentenced for violating the terms of his supervised release the Ninth Circuit has drew upon Rule 32 to address these gaps.

In *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), the court of appeals vacated the consecutive sentence the district court had imposed and remanded the case because the district court had not allowed the government an opportunity to address the court on the sentence to be imposed upon revocation. The court began by comparing Rules 32 and 32.1. In contrast to Rule 32(i)(4)(A)(iii), which provides that "[b]efore imposing sentence, the court must . . . provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney," Rule 32.1 grants a defendant the right to make a statement but is silent as to whether the government must also be given an opportunity to do so. Id. at 1112. The court concluded that "[w]hen Rule 32.1 is silent with respect to the matters that must be considered by a district court in imposing a sentence for violating the terms of supervised release, Rule 32 may be used to 'fill in the gap' in Rule 32.1*." Id.* at 1113.

The *Urrutia-Contreras* court then considered whether the rationale for allowing the government to make a statement at sentencing was applicable in proceedings under Rule 32.1. It concluded that "like the defendant's right to allocute and the probation officer's recommendation, the government's position with respect to the sentence to be imposed for violating the conditions of supervised release is an important factor for the sentencing court to consider and include in its reasoning." *United States v. Booker*, 543 U.S. 220 (2005), requires the district court to consider and discuss the sentencing factors contained in the Sentencing Guidelines and 18 U.S.C. § 3553(a) when imposing a sentence, and this requirement "cannot be

[4] Judge Graber wrote about *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), and *United States v. Whitlock*, 639 F.3d 935, 940 (9th Cir. 2011). This report (and the Committee's discussion) focuses on *Urrutia-Contreras*, which appears to present the more significant issue. The issue in *Whitlock* was whether the district court erred when it prohibited the probation officer from disclosing that officer's sentencing recommendation to the defendant. The court held that the district court could prohibit disclosure, adapting the rule of Rule 32(e)(3). If the Committee refers Rule 32.1 to a subcommittee, this issue can be addressed as well.

met if the district court fails to solicit the government's position, whether at a post-conviction sentencing or at a revocation proceeding." *Urrutia-Contreras*. 782 F.2d at 1113.

Members expressed interest in the issue raised in *Urrutia-Contreras*, but concluded that it might be premature to take up the issue now. The decision was quite recent and is the only case to address the issue. Members thought there might be further developments in the Ninth Circuit or elsewhere that would be relevant. Additionally, they noted that the procedural posture of *Urrutia-Contreras* was somewhat unusual: the defendant, not the government, raised the issue of the court's failure to allow the government to speak to the proper sentence. The government did not appeal this issue. To the contrary, it argued that Rule 32.1 did not require the court to allow the government to speak.[5]

Accordingly, the Committee decided to place the specific issue in *Urrutia-Contreras*–and the more general issue whether the procedures in Rule 32.1 should be further specified–on its study agenda, requesting that the reporters stay abreast of further developments.

IV. Final Actions on Other Suggestions

The Committee also discussed and decided not to pursue at this time two other suggested amendments.

A. Rule 23

Rule 23(a) now states that the trial must be by jury unless the defendant "waives a jury trial in writing," and Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors. Judge Susan Graber wrote suggesting that the Committee consider revising the rule in light of cases holding that an oral waiver is sufficient if it is made knowingly and intelligently. She noted that several cases have held that the failure to make the waiver in writing was harmless error.

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[5] The court did not discuss the argument made in the government's appellate brief "that Rules 32.1 and 32 serve different purposes":

> When a defendant is sentenced at a sentencing hearing, he or she is sentenced for a crime against the United States. In that situation, it is clear why Congress would require that the court hear from the government. As the representative of the people, the government should be heard by the court in regards to a sentence being issued to a defendant who has violated the laws of the United States. When a defendant is sentenced at a revocation hearing, however, he or she is sentenced for a breach of the district court's trust. *See United States v. Reyes-Solosa*, 761 F.3d 972, 975 (9th Cir. 2014). Supervised release is about the district court's supervision of a convicted defendant, not a violation of the laws of the United States. This distinction explains why Congress intentionally left out the district court's requirement to allow the government an opportunity to make a statement regarding the violator's sentence in a revocation hearing in Rule 32.1.

The Committee considered this suggestion in the context of other waiver requirements in the Rules of Criminal Procedure. At least twelve Criminal Rules require a party (usually the defendant) who waives a right or consents to a certain procedure must do so in writing, and other rules require that approvals, stipulations and the like be in writing.[6] These rules draw the party's attention to the importance of the decision being made, help avoid misunderstanding or ambiguity, and by providing a record of the waiver, consent, or other action, also assist in the adjudication of later claims challenging the existence, validity, scope, or nature of the waiver.

Allowing an oral, on-the-record waiver of the right to trial by jury, so long as it is knowing and intelligent, would provide for greater procedural flexibility. On the other hand, there are several reasons to hesitate to amend Rule 23's writing requirement. Rule 23's requirement of a written waiver now provides a clear, bright line rule that emphasizes to the defendant the importance of the decision and provides a reliable record should the existence or validity of the waiver be challenged. Moreover, among the many procedural rights for which the Rules now require a written waiver, the Sixth Amendment right to trial by jury is arguably the most important.[7]

The Committee concluded that, at least for the present, no change is warranted in the requirement of a written waiver. The effort required to obtain a written waiver is not particularly burdensome for trial courts, and the Committee has received no expressions of concern about this requirement from defendants, prosecutors, or trial judges. The Committee recognized that there have been occasional cases in which a written waiver was not obtained. Judge Graber identified several cases in which appellate courts used the harmless error rule to uphold a criminal judgment despite the absence of a valid written waiver, when other evidence indicated

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[6] In addition to Rule 23, the following Federal Rules of Criminal Procedure require a written waiver or consent: Rule 10(b) (defendant's written waiver of appearance); Rule 11(a) (allowing entry of conditional guilty or nolo plea that reserves in writing defendant's appellate review of a specified pretrial motion); Rule 15(c)(1) (defendant's waiver of right to be present at a deposition); Rule 17.1 (written waiver by defendant and counsel of right to exclude statements made at pretrial conference); Rule 20(a) (defendant's written waiver consent to transfer and disposition of case in transferee district and approval of transfer in writing by the U.S. Attorneys in both districts); Rule 20(d) (juvenile's written consent to the transfer of case and written approval of transfer by the U.S. Attorneys in both districts); Rule 32(e) (defendant's written consent to submission of presentence report before the defendant has been found guilty or pleaded guilty or nolo contendere); Rule 32.2 (defendant's written consent to transfer of forfeited property to a third party before appeal becomes final); Rule 43(b)(2) (defendant's consent in certain low level misdemeanor cases to participate in arraignment, plea, trial, and sentencing by video teleconferencing or for procedures top take place in defendant's absence); Rule 58(b)(3)(A) (defendant's consent to trial before a magistrate judge and waiver of trial before district judge); Rule 58(c)(2)(a) (defendant's waiver of venue and consent to disposition of the case another district by guilty or nolo contendere plea).

[7] Indeed, noting the importance of the right to jury, a majority of circuits have endorsed, in *addition* to the written waiver required by rule, some form of colloquy between the defendant and the district judge in order to ensure that the waiver is knowing and voluntary. *See, e.g.*, *United States v. Lilly*, 536 F.3d 190, 197-98 (3d Cir. 2008) (joining and listing authority from First, Second, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits).

that the defendant's jury waiver was knowing and intelligent. By providing a mechanism to affirm convictions and sentences despite occasional violations of the requirement of a written waiver, the harmless error rule provides beneficial flexibility, reducing the pressure that might otherwise exist to modify the Rule itself.

B. Rule 6

Finally, the Committee received a request to consider several amendments to Rule 6, which governs grand jury procedures. The suggestion requested consideration of four aspects of grand jury procedure: providing for direct citizen submissions to the grand jury, providing certain instructions to the grand jury, modifying the requirements of grand jury secrecy, and providing for grand jury presentments. The suggestion did not identify any particular cases or developments that might justify these changes and did not include any supporting materials. Additionally, one aspect of the suggestion (grand jury instructions) is not covered by the Rules of Criminal Procedure.

The Committee voted to take no further action on this suggestion.

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APPENDIX
CRIMINAL RULES COMMITTEE REPORT TO STANDING COMMITTEE
MAY 2015

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A. CM/ECF Proposals Regarding Electronic Filing

1. Discussion at the spring meeting

At the time of the Criminal Rules meeting, a proposed amendment to the Civil Rules would have mandated electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments. The proposed Civil amendment was of particular concern to the Advisory Committee on Criminal Rules because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Advisory Committee on Criminal Rules has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 Cases, and these rules also incorporate Civil Rules.

Committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically unless they could show individual good cause not to do so, or the local district had exempted them from the national requirement.

The Committee's Clerk of Court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rulemaking to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners, the Advisory Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Advisory Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Advisory Committee that the proposed national rule should not be adopted if it will require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers has already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project should also include the Rules Governing 2254 and 2255 cases, for which the Advisory Committee has responsibility.

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
September 28, 2015, Seattle, Washington

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in the Federal Courthouse in Seattle, Washington, on September 28, 2015. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Morrison C. England, Jr.
Judge Gary Feinerman
James N. Hatten, Esq.
Chief Justice David E. Gilbertson
Judge Raymond M. Kethledge
Judge Terence Peter Kemp
Professor Orin S. Kerr (by telephone, for morning session)
Judge David M. Lawson
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Judge Reena Raggi, Outgoing Advisory Committee Chair
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:
Rebecca Womeldorf, Esq.
Laural L. Hooper, Esq.
Julie Wilson, Esq. (by telephone)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy thanked Judge Richard Tallman for welcoming the Committee in Seattle and attending. He acknowledged the Committee's outgoing members: Judges David Lawson, Morrison England, and Timothy Rice for their years of dedicated service and noted they will be deeply missed. He expressed special gratitude to Judge Raggi, the Committee's outgoing Chair, for her remarkable leadership.

Judge Raggi expressed her respect and affection for the members of the Committee and praised the Committee for its collaborative, thoughtful, and determined work with some very difficult issues. She noted the importance of the Committee's decisions declining to change rules

as well as its work in crafting changes. Judge Lawson stated that his service with the Committee has been a privilege, and he was grateful for the opportunity to work with great minds so motivated to get to the right place. Judge England echoed these sentiments and spoke with special admiration for the work of the Committee, its Reporters, and Judge Raggi on the multi-year effort to amend Rule 12.

Judges Sutton and Tallman spoke of their high regard for the work of Judge Raggi and the Committee's talented members to reach common ground and creative solutions. Professor Beale followed with particular thanks to Judges Raggi, Lawson, England, and Rice for their energy, humor, and skill, and all of the effort they put in "behind the scenes" chairing the Committee or its Subcommittees.

B. Review and Approval of Minutes of March 2015 Meeting

Professor Beale brought to the Committee's attention that the draft minutes of the March 2015 meeting include Item F, p. 38, which had been left out of the version of the draft minutes provided earlier to the Standing Committee. A motion to approve the minutes having been moved and seconded:

The Committee unanimously approved the March 2015 meeting minutes by voice vote.

C. Status of Pending Amendments.

Ms. Womeldorf reported on the status of the Rules amendments. The amendments to Rules 4 and 41 went to the Judicial Conference on the consent calendar and were approved. Judge Sutton commented on the process, indicated that the proposed amendments would advance to the Supreme Court in time for review by December, and thanked the Committee for its work.

III. Criminal Rules Actions

A. Amendments to Rule 49

Judge Lawson, Chair of the Rule 49 Subcommittee, presented the Subcommittee's work on Rule 49. Rule 49 presently mandates that papers must be filed and served "in the manner provided for a civil action." As the Reporter's Memorandum explained, the Committee had decided at its March 2015 meeting to ask the Subcommittee to draft a "stand-alone" rule for filing and service in criminal cases, as an alternative to continuing to work with the Civil Rules Committee on a change to Civil Rule 5. The Subcommittee now seeks feedback on that effort.

Judge Lawson first explained the Subcommittee's decision to propose a "delinked" or "stand-alone" criminal rule. He noted that following the March meeting the Civil Rules Committee had agreed to modify Rule 5 to accommodate the Committee's strong concern that the access to paper filing by pro se defendants and filers under Section 2255 must not require a

showing of good cause or local rule. Nonetheless, the Subcommittee had decided to continue with the effort to draft a stand-alone rule. There are different interests and policies at stake in civil and criminal litigation, which involve heightened due process concerns, and the Subcommittee thought it would be desirable to do a comprehensive review and decide affirmatively what the Criminal Rules should include, rather than having to react to a series of future changes in the Civil Rules.

Professor Beale added that one advantage of having everything in the Criminal Rules is that criminal practitioners won't have to toggle back and forth between two rule books. Also, because parts of the civil rule may not apply in criminal cases, a stand-alone rule would allow the Committee to ensure that the criminal rule governing filing and service is tailored to fit criminal cases. On the other hand, there have been some suggestions that a short, targeted amendment to Rule 49 would be better than rewriting this whole rule, and the Subcommittee wanted to hear from Committee members on whether they agreed that the reasons for a more comprehensive stand-alone revision are sufficiently compelling.

Judge Lawson queried whether there would negative repercussions if the Committee pursued a stand-alone rule after those drafting the proposed civil revision had agreed to accommodate the Criminal Rules Committee's concern. Professor Beale stated her understanding that the Civil Rules Committee will not be offended if we go in this direction. To the contrary, the Reporters from the Civil Committee had expressed support for the Subcommittee's approach, which would free them from the necessity to compromise, and permit them to return to what they saw as the optimal Civil Rules proposal. Professor King added that the other rules committees are watching some of the changes we are considering and may find some aspects of those changes attractive for their own rules.

Several committee members commented favorably on the decision to pursue a stand-alone rule, including Mr.Wroblewski, who noted the Department's support of the approach, and two others who noted that they had been initially skeptical of delinking or tinkering with things that should be left alone, but had been persuaded by the reasons stated by Judge Lawson and in the Reporters' Memo. One member noted that although those working on the Civil Rules came around this time to our way of seeing things, there might be times in the future when they would not do so. Thus for efficiency's sake it is best to take our own path.

Judge Raggi noted the benefits of uniformity across the rules, but emphasized that service and filing in criminal cases have constitutional implications different than in civil cases. Weighing the potential that uniform rules well suited to civil cases would be inappropriate for criminal cases against the cost of drafting a comprehensive revision that would be a more complex undertaking, she said had been persuaded the latter option was worth pursuing.

Judge Sutton stated he was glad the Committee was exploring the pros and cons of a separate rule and looked forward to hearing about it at the January Standing Committee Meeting. He noted that the Standing Committee and the Judicial Conference will be looking closely at any

negative inferences that a new Rule 49 might produce. Adopting Rule 49 language that is different from another set of Rules may not be a problem for the Criminal Rules Committee, but the choice to add, delete, or change language may affect the meaning of the Civil Rules. There are also big picture policy issues affected by the choice to stay linked to the Civil Rules, to delink, or to preserve linking while adding exceptions. He noted that one advantage of retaining the present linkage to the Civil Rules is that the Rules Committees must speak to each other before proposals to amend these rules reach the Standing Committee.

Professor Beale noted that there are other devices for unifying the rules and addressing coordination, such as the cross-committee group studying electronic filing.

Judge Sutton agreed, noting again that there can never be complete delinkage because slight differences in language may carry implications. He said he was looking forward to seeing what the Committee recommends.

Judge Lawson then moved that the Committee vote on whether it supports the Subcommittee's recommendation to compose amendments to Rule 49 to add language that governs filing and service in criminal cases, eliminating the link to the Civil Rules.

One member asked if new rule would continue to refer to the Civil Rules at all so that future dialogue between committees would be compelled. Judge Lawson replied that the Subcommittee's discussion draft did not refer specifically to Civil Rule 5, but was intended to preserve as much uniformity as possible.

Judge Sutton reiterated that because the criminal rule now refers to the civil rule, the committees have to speak with each other about proposed changes. If there was an independent rule, then the committees would no longer be required to speak to each other unless the Conference or the Court or the Standing Committee required that. He said it would not be that big a deal if the new criminal rule just lifts the exact same language already in the civil rule, because it would be incorporating all of the interpretations of the Rule 5 language that have been made over the past years. The further you get away from that, using different words, leaving out words, the more that is changed, every single one of those changes is going to be a potential complication.

Professor Beale noted that the Criminal Rules contain many provisions that use language that is identical or nearly identical to language in other rules (e.g., the rules governing indicative rulings and time computation), and we already have to be vigilant about those concerns. The Committee Notes to these rules typically explain that there is no intent to change the meaning from prior language or language from another set of rules.

A member agreed that so long as there is a continuing cross pollination between the Committees, concerns about delinkage are not an obstacle.

Judge Raggi added that at every Standing Committee meeting the reporters from the various committees have a lunch to discuss matters of cross-committee interest. What the Subcommittee has to consider is whether the situation is so different in the criminal as opposed to civil sphere that a different rule is warranted and what differences with civil cases warrant differences in language.

Professor Beale emphasized that the Committee should be careful about changing any of the language from the civil rule provisions unless we have a good reason or it is causing some problem. She noted that the draft of any comprehensive revision of Rule 49 would go back to all of the other Committees. At that point there may be choices by other Committees that allow all of us to make the same changes.

A member stated that the one book approach makes sense and that hopefully the Committees will be encouraged to work out any concerns before they get to the Standing Committee.

Judge Lawson restated his motion for an expression of the sense of the Committee in support of drafting Rule 49 as stand-alone rule governing filing and service in criminal cases, rather than depending upon the Civil Rules governing filing and service. After being seconded,

The Committee the unanimously approved the motion, expressing its sense that a stand-alone Rule 49 be pursued.

Judge Lawson then proceeded to some of the issues raised by the Subcommittee's discussion draft.

First, he sought feedback from the Committee on the Subcommittee's recommendation that the Committee not change Rule 49(a)'s description of what must be served (lines 3-5 of the discussion draft) because the existing language had caused no confusion or difficulty.

Discussion focused initially on whether 49(a) addressed presentence reports/probation reports, which are filed electronically, and pretrial service or probation reports that prompt a revocation. Judge Lawson responded that the Subcommittee had not considered these reports, because it was focusing on documents that propel the lawsuit, not pretrial release reports handled at first appearance, or probation reports covered by Rule 32. In response, a member stated that because these filings trigger hearings, it is important to get the rules for service right.

Judge Lawson noted that Rule 49 covers the conduct of the parties, and these documents are different, generated by the Court, or an officer who works for the Court. Professor Beale pointed out that under existing Rule 49, there appears to be no problems associated with filing and serving these reports.

Another member noted that Rule 32.1 governs these reports, and that any internal recommendation of the probation officer is not within the rubric of Rule 49. A member observed that Rule 32.1 does not cover pretrial services.

Mr. Wroblewski added that in many district those types of documents prompting revocation or modification are not served on all on the parties, just provided to the judge. The government may or may not be involved.

A member noted that districts handle these very differently, and that the Committee would need to know more about what the different districts do before we come up with a top-down rule governing such reports.

Professors King and Beale suggested that the Committee could revisit this when discussing the Subcommittee's proposed approach to filings and service by non-parties.

Judge Lawson noted that Rule 49(a) speaks to service on parties and suggested caution about extending the rule to documents that have often not been served on the parties.

Judge Molloy asked for objections to the Subcommittee's decision to leave the language in (a)(1) unchanged, noting that continued voting on sense of the Committee will help direct the activities of the Subcommittee. ***Raising no objections to the suggested approach to (a)(1), the Committee indicated its approval of that approach.***

Judge Lawson then presented the Subcommittee's suggestion that the Committee preserve the existing language in Rule 49(a)(2), lines 7-9 of the discussion draft, regarding serving an attorney when the party is represented. A member asked why the language in Rule 49 differed from that in Civil Rule 5. Professor Beale suggested that it may have been changed during restyling, and clarified that the Subcommittee's discussion draft retains the existing language of criminal rule even though it is different than civil language. To change the criminal language would have its own set of negative implications.

Hearing no objection to retaining the language in 49(a)(2), Judge Molloy asked Judge Lawson to continue.

Judge Lawson then turned to lines 11-13 of the discussion draft and the description of how service occurs through electronic filing. He noted that the proposed language saying that the party sends it through the court's electronic "transmission system" is misleading. The Court does not transmit the paper, instead the court system generates an electronic notification of filing, then the parties log on to access the paper. He wanted to know if the Committee had concerns about revising the language to read : "A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic case filing system . . ." That language best reflects what actually happens.

Professor Beale clarified that the language about 'transmission" comes from the proposed civil revision, and if the Civil Rules Committee ultimately agrees that this language is better, it may decide to change its proposal to conform to our suggested change.

After discussion clarifying that the term "registered user" includes pro hac vice and expressions of concern that the rules take into account the large proportion of filers who are not using ECF, Judge Lawson queried whether members thought the Rule should address the idea that some things filed need not be served, such as documents filed under seal. Professor Beale suggested that would not be necessary. The Rule does not say what must be served, it says how to serve. She noted that the Reporters would take new language back to the Reporters for the Civil Rules Committee so they can consider it as well.

The vote on the sense of committee was unanimously in favor of the suggested language for lines 11 through 13.

Judge Lawson next turned to the Subcommittee's suggestions for lines 14 through 16 of the discussion draft and the question of whether consent to other forms of electronic service must be in writing.

Professor Beale clarified that the question about whether consent to being served by email must be in writing was raised by the language proposed as part of the revision of the Civil Rule.

A member asked whether an email itself would constitute a writing. Professor King pointed out that the "in writing" language now appears in Civil Rule 5, and that one advantage of keeping it in is that whatever law there is about that language would carry over to Rule 49.

Professor Beale noted that another issue this provision raises is the bigger question whether it is a good idea to list other acceptable forms of electronic service, i.e., service by fax or email.

Mr. Wroblewski reported that he looked into whether the government ever consents to email service by pro se litigants. He explained that this never comes up. When a pro se person files a document, the clerk files it using ECF, and the government receives an electronic notice. So there is no need to consent to any other form of service.

Another member agreed, noting she could not remember ever being served by email by anybody. However, a third member noted that he is regularly served by email in criminal cases, with subpoenas, other motions, adjournments, and letters to the court. He stated these documents are often filed with the court, but there are things that the government serves but does not file, such as discovery. If there is a dispute whether something was delivered, there is a notice.

Two members agreed that it was a good idea to have consent in writing to fax or email, particularly if you are not a registered user, because otherwise there will be disagreements about whether the person ever consented.

When asked about the meaning of “person” Judge Lawson stated that it should be “person to be served.”

Another member expressed support for keeping the writing requirement, but noted the difficulty of getting consent from people in prison, and skepticism that prisoners could be served by any means other than mail.

A different member liked the "in writing" requirement, too, but noted that as drafted, the consent requirement did not address pro se people. Didn’t the Subcommittee want their consent “in writing” too?

Professor King responded that there is a later provision in the discussion draft for written consent to delivery by other means and that the Subcommittee’s choice to limit other electronic means (email and fax) only to represented parties was deliberate choice. Even if a prisoner consents to such service one day, he may not be able to receive that email or fax if moved between institutions, or if the computer at the facility’s library is down, or the mailbox is full, or other problems. Professor Beale added that the Subcommittee thought these access problems were so significant that permitting this kind of service would be a bad idea. She urged the Committee to consider that policy question.

A member asked why the Rule did not address service on other people other than parties. Professor Beale responded that Rule 49 presently just deals with service on parties, and that even proposed (d) in the discussion draft for filing and service by nonparties doesn’t deal with service on nonparties, and that the person language seems to come from the Civil Rule draft, so that may have to be changed to “party.”

Professor King noted that the word “person” is in Civil Rule 5, and Judge Raggi suggested that the word “person” must refer to the lawyer, so if “party” were substituted, it would have to include the lawyer.

When asked to vote on whether its sense was that the Subcommittee should add person "to be served" and to retain the requirement that consent be "in writing," the Committee unanimously agreed that it was.

Judge Lawson proceeded to line 15 of the discussion draft, indicating that service is not effective when the serving party did not reach the person to be served. A member raised a question about the meaning of this when service is by email (with consent). Professor King stated that this language was from the latest draft for revising the Civil Rule, which was lifted

from current Civil Rule 5, so that any uncertainty about the meaning is already raised by existing Rule 5.

Professor Beale noted that the policy question is whether to have this safeguard for the electronic filing/service system, in addition to the use of email, which could bounce back. If the Committee wants to keep this safeguard, then we can think about how to say it.

After members discussed when various sorts of service should be considered effective, discussion turned to whether email service by consent was an option that should be preserved. A member said he valued being served by email, because it provides notice to a sender if the email is rejected. That makes it better than ECF.

Mr. Hatten added that if there is a bounce back from ECF, there is a staff member in his office that would call the person and let them know. Other members agreed that if there is a bounce back on ECF, the Court knows that.

Judge Lawson commented that the other means are a good alternative and are not mandatory.

A member suggested the Subcommittee consider inserting language that indicates parties can email papers that don't have to be filed.

Judge Sutton urged the Committee to focus on the conceptual difference for the criminal process and leave the details for later.

Professor Beale offered that it is very helpful for the Subcommittee and the reporters to hear from the Committee members what procedures they follow and what their experiences are, and noted that this was actually the first time the Committee has had the chance to discuss these particular issues. That information is needed in order to hammer out the language in lines 11 through 18 of the discussion draft, which was drawn from the inter-committee proposal for amending the Civil Rule.

Judge Lawson summed up what he thought the sense of the Committee was on the conceptual ideas for 49(a)(3) so that the Subcommittee could work on the language: (1) that a represented party (or a pro se party with permission) may achieve service on a registered user by filing in ECF; (2) a represented party may achieve service on represented or unrepresented persons by other electronic means (e-mail) only with consent; and (3) if, using ECF or email, the filing or notice did not reach the intended recipient, then with that actual knowledge another attempt has to be made.

Judge Molloy asked for any disagreement with these ideas conceptually. Judge Lawson confirmed a member's understanding that ECF use by or service on unrepresented parties should require a court order. Judge Molloy noted that the Committee's input will help the Subcommittee

continue its work, and he stated his intention to add two more members to the Subcommittee to replace members whose terms of service had ended..

After asking for and receiving no objections to Judge Lawson's summary of the sense of the Committee regarding (a)(3) of the discussion draft, Judge Molloy suggested the Committee move on to the next section of the discussion draft, addressing whether there are conceptual issues other means of service.

Judge Lawson turned to lines 19 through 32 of the discussion draft, addressing traditional service techniques. He noted that the Subcommittee decided to flip the order of the civil rule, putting ECF before traditional means, because e-service is now the dominant means of service. The description of other means in the draft attempts to replicate language of the civil rule. He asked if the Committee agreed these methods should be retained. Judge Lawson stated the Subcommittee requested serious consideration of deleting (d), regarding leaving the paper at a person's office or home. Another option would be to look at whether (e) would provide a sufficient catch all.

Professor Beale stated that one reason for retention was to prevent negative inferences from changes or deletions. Professor King noted there are dozens of cases interpreting these provisions and that changing or dropping this language would mean dropping reliance on that case law as well.

Discussion also addressed the advantages of restricting (3) to ECF only, and moving the "other electronic means" language to (4), along with the restriction that it is not effective if the sender learns it did not reach the person to be served.

Judge Raggi questioned whether giving a document to a process server or putting in a FedEx box could ever be enough for service in a criminal case. Doesn't it have to reach the lawyer or the defendant? The Reporters responded that the Rule could specify an authorized means, but if in a particular case no notice is actually received, the defendant could raise a due process claim. Similarly, the proposed amendments to Rule 4 governing service on corporations outside the U.S. are supplemented by constitutional requirements. Judge Raggi said that may suffice.

She then asked about the purpose of specifying when the service is complete. Is this related to deadlines for service? She suggested that the Subcommittee ask the Civil Rules Committee what this requirement achieves and determine whether there is an analogy for criminal proceedings.

Judge Molloy solicited the Committee members' agreement that their sense was that the Subcommittee should retain the civil rule language describing other means of service on lines 19 to 32 of the discussion draft.

Judge Molloy then asked Judge Lawson to turn to section (b) addressing filing. The discussion turned to documents that are served but not filed. Mention was made of alibi notices under Rule 12.1, which some members noted are served but not filed, as well as documents such as coconspirator lists and discovery, which are provided to the other side but not filed. Some are not filed because it would be highly prejudicial if they were public.

Judge Lawson noted that in some districts alibi or insanity notices are docketed, but the Rule 12.1 does not require filing of such notices, yet Rule 49(b)(1) in combination with (a)(1) suggests they must be. Professor Beale commented that the existing language or Rule 49 already creates this tension, Rule 49(a) stating that notices need to be served on parties, but that there doesn't seem to be any problem with the current practice. Professor Beale suggested that one approach would be to add specific exceptions to filing to the Rule.

Judge Raggi warned that it is one thing to leave the language as is because even if parties are not always abiding by the present rule, it is not creating a problem. It is another thing to change the rule because certain districts are not abiding. That would require fuller discussion.

Members discussed why discovery was not filed. Rule 16 mandates disclosure, but does not require filing or service. Also, judges don't want it cluttering up the docket. Members questioned why alibi notices would not be filed.

Professor King asked if there were other documents, other than discovery and notices under Rules 12.1, 12.2, and 12.3 that that are served but not filed. Was there anything else the Subcommittee should think about exempting from Rule 49? Each member noted his or her experience, which varied among districts and from judge to judge. Most stated discovery was not filed unless it became the subject of a motion, nor were notices of alibi. Mr. Wroblewski stated that ex parte filings and filings under seal are already covered by Rule 49.

Both Judges Raggi and Tallman expressed their views that generally all documents in criminal cases should be filed, and noted the costs in transparency and for the appellate process when they are not filed or are sealed.

The Reporters indicated that the discussion would be very helpful for the Subcommittee.

Following the lunch break, Judge Lawson drew the Committee's attention to the material in (b)(2)(A) of the discussion draft, concerning the signature block (lines 41-47), as well as the phrase designating the attorney's user name and password as the attorney's signature. He explained that the information in the signature block is needed by readers of a paper in order to identify who signed it, because the user name and password does not appear on the filing. If a paper is filed outside ECF, he noted, you can look at the signature. In the electronic filing world, there may be no signature.

Professor Beale noted that the style consultant and the other reporters were opposed to the detailed listing of information.

Members asked why it is necessary now to spell out this level of detail if the civil rule didn't have it before, whether the absence of detail has created any problems, and whether there is a reason to require this information in criminal but not civil cases. Judge Lawson explained that Civil Rule 11 requires that (1) every paper must be signed by at least one attorney of record or by a party personally if the party is unrepresented, and (2) the paper must state the signer's address, e-mail address, and telephone number. The criminal rules do not have a counterpart to Civil Rule 11. Presently, by incorporating service and filing "in the manner" of the civil rules, current Rule 49 arguably incorporates Civil Rule 11. A new stand-alone rule with no cross reference to the Civil Rules would not. Also, he argued, it is a bad idea to allow people to file documents that have nothing on the last page to show who filed, and there should be certain features of identity that are mandatory for documents filed in our system.

Professor Beale noted that, as drafted, the proposed rule would not mandate this information be included on paper filings, only on papers filed electronically.

Members noted several reasons not to include these details in Rule 49. Some preferred that details of this nature be left to local rules. There was also a suggestion that these details do not belong in a rule about the manner of filing, and it would be more appropriate to adopt a new criminal rule about signing, something like Civil Rule 11.

Judge Raggi stated that the Civil Rules Committee also ought to be concerned about substituting electronic login and passwords for signatures since any registered user can file in any case.

Professor Beale noted that the past concern in the Bankruptcy Rules Committee about requiring wet signatures was different; they had focused on the need to establish the author of fraudulent filings.

When asked if members had experienced any difficulty with missing signatures or information in criminal cases in the past, the only member who recalled a problem said it had been in a civil case.

Judge Lawson noted that the Subcommittee could look at the language proposed for the civil rule, which has a lesser level of detail.

Judge Molloy asked for a voice vote on whether the Subcommittee should retain the material on lines 41-47, there were more nays then yays. ***The sense of the Committee was to remove the detailed language concerning what must be included in the signature block.***

Moving to non-electronic filing, lines 50-55 of the discussion draft, Judge Lawson explained that it would be useful if the Committee expressed its view on the desirability of retaining the option of filing by handing a paper to the judge. No objections were raised. ***The sense of the Committee was that allowing delivery to the judge should be retained***.

Professor Beale noted that there had been a suggestion at an earlier meeting that the provisions on nonelectronic filing might include a reference to the filing of an object, such as a disk or a bloody shirt. Discussion of whether something like "paper or item" should be used throughout the rule ended with a consensus. ***Objects would normally be filed along with or as exhibits to documents, and the Subcommittee should strike the word "item" in brackets.***

Judge Lawson presented the two alternative options for describing the presumption of ECF filing by represented parties. Option 1 was shorter. Option 2 was the language proposed by the latest consensus draft going forward in the Civil Rules Committee, and was preferred by the reporters and the style consultant. Professor Beale also noted that Option 1 does not emphasize the point that paper filings must be allowed for other reasons or local rule quite as strongly as Option 2. ***Judge Molloy noted that the discussion indicated that the Committee preferred Option 2.***

Judge Lawson explained that the language limiting use of ECF by unrepresented parties (lines 63-65 of the discussion draft) emphasized the strong sense from the spring Committee meeting that the Committee strongly opposes any rule that would *require* pro se defendants and 2255 filers to use electronic filing unless they can show good cause or the district has a local rule. Committee discussion of this section focused on concerns about the fragility and unreliability of the electronic system, and whether there is any guarantee that electronic files would be available and readable decades from now. Members noted outages in ECF and the burdens they had caused. Judge Raggi preferred there be at least one paper copy filed until there was greater assurance of permanent accessibility. Judge Sutton suggested that it might be useful to have Judge Thomas Hardiman, who chairs the Committee on Technology, come and talk to the Criminal Rules or the Standing Committee about these concerns.

On the section (lines 66-68 of the discussion draft) that prohibits a clerk from refusing a filing as lacking the proper form, Judge Lawson noted that this language was drawn from Civil Rule 5. The Civil Rule reflects a policy determination that a judge, rather than the clerk of court, should make the decision whether to reject a filing. Professor Beale added that the Subcommittee had considered whether this aspect of Rule 5 was part of "the manner" of filing provided by the Civil Rule—and thus currently incorporated by Criminal Rule 49(d)—and concluded that it probably was. Discussion of this provision noted that the language is needed because of Section 2255 cases. Mr. Hatten noted that, as a clerk, he appreciated not having this responsibility. ***The sense of the Committee was to include in Rule 49 the language forbidding the clerk from rejecting filings because of form.***

The discussion advanced to subsection (c) concerning notice of an order or judgment provided by the clerk of court. Professor Beale explained that what the clerk must do here wouldn't normally differ between civil and criminal cases. However, to complete the severance from the civil rules on filing and service, Rule 49 might incorporate the relevant provisions from Civil Rule 77. ***The sense of the Committee was that the Subcommittee should consider incorporating the language of Rule 77 in the proposed Rule 49.***

Judge Lawson explained that the tentative provision for nonparties who file and serve, on lines 82-83 of the discussion draft, was there to fill the absence of any guidance for nonparty filers. The Subcommittee's first take was that on those uncommon occasions when nonparties file in a criminal case they should follow the same rules as parties. If they are represented, they should file electronically; if not, they should file by delivering a paper to the clerk. Professor Beale explained that the Subcommittee wanted to make sure that any new language about nonparty filing wasn't granting any new rights to file, which is why it limited this to nonparties permitted or required by law to file. ***The Committee members had no objection to this approach to nonparty filing and serving.***

Professor Beale drew the Committee's attention to one last issue on lines 35-37 of the discussion draft: whether to include the "within a reasonable time after service" language. Civil Rule 5 says anything required to be served must be filed within a reasonable time after service. The Subcommittee thought the Criminal Rule could drop that phrase. Because late filing had not been a problem in criminal cases, this provision was not necessary. But the Reporters from the other committees were quite concerned about leaving this out, and Committee input would be useful.

Members noted points cutting both ways. Including the language would promote uniformity and avoid negative inferences. But no one could ever remember a filing too late after service, which seemed to be a problem that predated ECF. Now when a pro se defendant or prisoner files something on paper, notice is provided automatically through the ECF system when the clerk files it electronically. Service to unrepresented persons is accomplished by mail. ***The Committee agreed that the Subcommittee should keep the "reasonable time" language in brackets and continue to consider it.***

Professor King explained that there may be other specific omissions from the civil rule that may need review by the full Committee. The Subcommittee will go back through Civil Rule 5 and affirm that there is a good reason for each deletion and change.

Judge Molloy thanked Judge Lawson for his hard work on the Rule, and thanked Judge Feinerman for taking over Judge Lawson's duties as Chair of the Subcommittee.

B. Rule 12.4(a)(2)

Professor Beale introduced the proposal to amend Rule 12.4, explaining that the request came from the Justice Department. The rule of judicial conduct regarding disclosure of interest in organizational victims that was the basis for the Rule had changed, and literal compliance with the current rule was difficult for prosecutors in certain cases.

Mr. Wroblewski stated that the Department decided to ask the Committee to consider an amendment when the Appellate Rules Committee began looking into a rule about disclosure paralleling Rule 12.4(a)(2). Although existing Criminal Rule 12.4(a)(2) requires disclosure of *all* corporate victims, the Code of Judicial Conduct has been amended to require recusal only if there will be a substantial impact. The hope is that both committees could adopt the same standard.

Professor Beale stated that the Department has explained that there are cases in which there are scores or hundreds of corporate victims with minor damages, it is not feasible to provide notice about each of these entities, and it would be desirable to limit mandatory disclosure to cases in which there was a substantial impact.

Judge Sutton agreed that the Criminal and Appellate Rules need to be coordinated, but noted that not all judges take the position that recusal is needed only when it is required. Some may believe recusal to be appropriate even if not required. Mr. Wroblewski responded that the Department hopes the Committees will be able to find an acceptable middle ground between the extremes of disclosing every single entity that has been a victim when the damages are trivial and disclosing only when absolutely required. The language "may be substantial" is one example, and there may be other options.

Judge Molloy appointed a new Rule 12.4 Subcommittee to consider the issue and come up with a recommendation for the Committee's April Meeting. Judge Kethledge will serve as Chair, with Mr. Wroblewski, Mr. Hatten, Mr. Siffert, Mr. Fillip, and Judge Hood serving as members.

B. Rule 15(d)

Professor Beale introduced the second proposal by the Department, to address an inconsistency between text of Rule 15(d) and its Committee Note. This inconsistency was identified in 2004, but it could not be fixed because there is no procedure to change the Committee Note without changing the text. Now the language of the Committee Note is starting to cause some problems for the Department. That Note states that the Department must pay for certain deposition expenses, but the text of the rule does not. In addition, other statutory provisions about witness fees may bear on this, as well as Rule 17(b).

Mr. Wroblewski explained that in a handful cases a defendant wants to depose numerous witnesses overseas. If the government were required to pay all of those expenses it, the cost would threaten the prosecution. The question of who is going to pay can be debated, but the rule and text say different things. It doesn't come up very often, but when it does it is very difficult. In one case the defendant asked to depose 20 witnesses in Bosnia. The Criminal Division didn't have the funds, and the potential imposition of those costs threatened its ability to bring the prosecution. In some cases now there is negotiation about how much each side pays. The Department does not want to prevent defense depositions, but it wants clear guidance about who is responsible for what.

A member noted that the government is arguing that it shouldn't have to pay for depositions it did not request, and the member is not sure that should be the rule. Something should be done to fix Rule 15 and clarify the obligations. Also there is some uncertainty about is the interaction of Rule 15 with other statutes and rules, including the Criminal Justice Act, Rule 17 (the subpoena rule), and 18 U.S.C. § 4285 (the marshal's transportation rule).

Discussion noted the origin of the inconsistency seemed to be a mischaracterization of the Rule in the Note during restyling. Members discussed the pros and cons of amending a rule because of an inconsistency in the note. Professor Beale observed that once the Committee decides the correct substantive position about who pays, it can then decide how to say that and write a note that is consistent.

Judge Sutton suggested that if the Committee decides to take no action because it has no authority to amend the Committee Note without a rule text change, the minutes can reflect that conclusion. The Note is not the Rule, the Court does not approve the Committee Note, and there is no procedure for changing problematic Committee Notes.

One member voiced opposition to gearing up this process if the Rule is right and the Note is wrong, but Professor Beale pointed out that not everyone at the table agrees that the text of the Rule is right. Plus the Rule does not speak to what happens when the request is from a codefendant. A subcommittee may be useful to review these issues and determine whether the text of the rule is still correct or should be modified. It might also be something that could be addressed in the Benchbook.

Another member questioned whether it was part of this Committee's job to determine who bears the burden of deposition costs. Judge Sutton noted that although generally cost-shifting is governed by statute, this is not the only place in the rules where such issues arise. Judge Raggi questioned whether there might be some concern raised if the Committee were to say that the costs of a defendant's requested deposition must come out of the Department's budget instead of the CJA. Judge Tallman noted that he understood this Committee has no budgetary authority or right to recommend spending. Other Judicial Conference Committees have that responsibility.

Judge Molloy asked if a subcommittee could add anything to this discussion.

Mr. Wroblewski answered yes, noting that it would not be requiring the Committee to take up a new issue, the Rule addresses this now. The Subcommittee might recommend that no action be taken, but just a few conversations exploring it would not hurt. A member expressed doubt that any rule a subcommittee would come up with would be better for the defense than the existing text of the Rule. Judge Raggi stated that if the Subcommittee and the Committee decide that the text is right and the Note is wrong, that could go into the Committee's report to the Standing Committee, creating a public record that this has been considered.

Judge Molloy appointed a new Rule 15 Subcommittee, with Judge Dever as chair, and Judge Kemp, Justice Gilbertson, Ms. Brook, and Mr. Wroblewski, as members.

C. Rule 6 (15-CR-B)

Professor Beale introduced a proposal from a citizen who urged a series of reforms to increase the independence of the grand jury, including direct citizen submissions, new instructions to the grand jury, changes in grand jury secrecy, and the authority to issue presentments. The suggestion was not accompanied by any supporting materials. Professor Beale explained that although some states have adopted some of these proposals, each would be a change in practice in the federal courts. As to the charge to the grand jury, there is a model charge in the Benchbook, but this would be new territory for the Rules. Grand jury secrecy is carefully regulated by Rule 6. The matter of presentment is not regulated by the Rules, but it would be a change in practice to allow presentment without the signature of the prosecutor.

Judge Molloy asked if anyone had any questions or comments.

A motion to take no further action on the proposal was seconded and passed unanimously.

D. Rule 23 (15-CR-C)

Professor Beale explained that this proposal to amend Rule 23 to drop the requirement that a jury waiver be in writing was one of two proposals submitted by Judge Susan Graber of the Ninth Circuit. Rule 23(a) allows waiver of a jury if the waiver is in writing. Judge Graber asked the Committee to consider eliminating the writing requirement, noting that failure to make the waiver in writing is considered harmless error.

The Reporters' Memorandum on this proposal states that many Rules require something be done in writing. Allowing oral waivers of trial by jury would be more flexible, is a practice followed in many states, and would raise no constitutional concern. However, the writing makes a clear record in case there is a later dispute about the existence of or agreement to a waiver, and suggests the importance of the waiver to the defendant. Other far less important waivers require

writing. It is also not clear that the writing requirement is posing a problem for litigants or courts, as the harmless error rulings suggest.

Each member commented on the proposal. Without exception, each agreed that the reasons noted in the Reporters' Memo for leaving the writing requirement were compelling. One said that there are only three decisions clients make on their own: jury or bench trial, whether to plead guilty, and whether to testify. All are fundamental and should be in writing.

A motion to take no further action on the proposal was made, seconded, and passed unanimously.

E. Rule 32.1

Judge Molloy introduced this item, which was the second of two suggestions made by Judge Graber. Judge Graber suggested that Rule 32.1 be amended to require that the government be given the opportunity to address the court regarding the sentence to be imposed for a violation of the terms of supervised release. Her suggestion was prompted by a case in which the judge failed to ask the government to speak at a revocation proceeding, and the defendant successfully challenged his sentence on appeal. Professor Beale noted that Judge Graber's letter also raised a second related issue: whether the text of 32.1 ought to prohibit the disclosure of the sentencing recommendation to the defendant. More broadly, it raised the question how much Rule 32.1 should include--everything that Rule 32 includes?

A member focused on the nature of the revocation proceeding. The sentence has already been imposed, and this proceeding is about how the sentence is being executed. The attorney for the government does not ordinarily initiate revocation proceedings. The defendant is brought back for the court to address a problem that arose while the defendant was under the court's supervision. The government is making a courtesy appearance. It doesn't really have a dog in that fight, because the sentence has already been imposed. Requiring the court to allow the government to address it in supervised release revocation proceedings would change the character of the proceeding and recast the role of the government attorney.

Mr. Wroblewski stated that was precisely the litigating position the Department of Justice took in the Ninth Circuit. Around the country there is a lot of experimentation going on about reentry courts, and there are other very different practices concerning supervision. The Department is hoping to evaluate these experiments and identify the best practices. There may not be a full-fledged resentencing or sentencing type process for revocations. The probation officer may recommend a small modification, it is all done in chambers, and that may actually be a very good practice. The Department is not in a position to say that the practice should be much more formal with more process.

One member indicated that she was in complete agreement with the Department, and wanted that point to appear in the minutes.

Judge Molloy asked members whether they ask the government to offer its views when they do revocations. Members responded yes, although sometimes the government has nothing to say. One member found it unbelievable that a judge would not want to know what the government has to say if the government wants to speak on a supervised release matter.

Judge Raggi stated that there ought to be flexibility for the judge to approve a modification or a minor tweak without involving the government.

Another member suggested that the Ninth Circuit's recent case may be unique, and thus not a sufficient basis for a rules change. Judge Sutton suggested that it might be desirable to hold on to the issue for a year or two and see how the Ninth Circuit decision percolates in the other circuits.

After being made and seconded, a ***motion to retain Judge Graber's proposal on the Committee's study agenda, to be examined later to see if there are further developments that warrant going forward, passed unanimously.***

IV. Status Report on Legislation

Ms. Womeldorf reported on the document in the agenda book from the Department of Justice regarding access of the Inspector General to records over which the Department has control. A Departmental statement of policy that the Inspector General does not get access to grand jury records unless one of the exceptions in Rule 6 applies has led to a series of legislative proposals. There has been no action since the hearing discussed in the document in the Agenda Book.

Mr. Wroblewski explained that there is ongoing discussion about Inspector General access to grand jury records. The Department of Justice Office of Legal Counsel concluded that there are records to which the Inspector General is not entitled to have access, and Congress has held a number of hearings on proposed legislation. Because this might implicate the rules, it has been brought to the Committee's attention.

After brief discussion of why the Inspector General might want access to grand jury materials and the dangers of eroding grand jury secrecy, Ms. Womeldorf indicated she would keep the Committee apprised of developments.

V. Information Items.

Judge Molloy asked Judge St Eve to discuss developments in the Court Administration and Court Management (CACM) Committee. She reported that CACM has been working on a policy involving cooperators, in order to prevent violent attacks of prisoners based on suspicion

that the prisoner has cooperated with the government. These suspicions have been based in part on docket entries and documents available on PACER. Prisoners are also demanding that other prisoners produce sealed documents to prove they are not cooperating. It is an issue that has been around for many years. Judge Hodges, the Chair of CACM, agreed that it was a good idea to tell the Rules Committee that CACM had taken this up. Since he could not attend the Criminal Rules meeting, he asked Judge St. Eve to inform the Committee. CACM has not decided anything yet, is not sure what it will recommend, or the best way to coordinate going forward on this. Ms. Hooper stated that she understood that the research CACM is using is confidential. Judge St. Eve noted that CACM has traditionally looked at privacy policy and related issues.

A member noted that defenders have been fighting the increasing closure of criminal records, because it makes access to information and defending clients much more difficult. The situation is not as dire as it is suggested in this member's district, and people know who the cooperators are long before the presentence report.

Judge Raggi hoped that CACM had examined the published proceedings of a national conference held on this problem, that she co-chaired, at which everyone with a stake in this had a chance to express views on the problem – not just defense and prosecution, but also the press, researchers, the Bureau of Prisons, and more. The proceedings were published in the Fordham Law Review. The conference revealed many different local policies, all carefully thought out. One problem with these varying practices is that inmates are not aware of the variation. For example, although some districts seal certain documents in all cases, others do not, and inmates may incorrectly assume any inmate whose document was sealed must have been a cooperator. The Rules Committee should be at the table when changes are discussed. That people are being beaten and worse in prison is certainly a Bureau of Prisons problem. It may or may not be a rules problem, but the Criminal Rules Committee should be involved in the discussions.

Mr. Wroblewski stated that the BOP has taken several steps, but the problem goes beyond just the prisons. It also affects people outside of prison.

Judge Tallman said that he understood some courts are barring a defendant's access to his own presentence report so that he cannot be expected to produce his own presentence report in prison. He noted that the Ninth Circuit broadcasts arguments live on the internet, and it is receiving more and more requests to seal those proceedings. But this could be a problem if sealing an individual argument is taken as a signal that the person is a cooperator.

Judge St Eve suggested that CACM is looking to provide a recommendation to the Judicial Conference in March. When Professor Beale observed that the Criminal Rules Committee would have difficulty providing input before then, Judge Sutton inquired what a rules-related response might be. Professor King offered that the Committee might, for example, change access of the defendant to the presentence report in Rule 32 so that the defendant reviewed and returned a hard copy. Or it might amend Rule 11 concerning what is said on the record. There might be changes in the appellate rules concerning what must be filed. Judge

Sutton stated that the Standing Committee might decide to ask CACM to wait for this Committee's input, depending upon what CACM decides to do.

Judge Molloy noted that the Committee's next meeting was scheduled for April 18 and 19th in Washington D.C., and he urged members to make it a priority to attend. He hopes to find a week in October 2016 that will work for everyone, sufficiently in advance that there would be no reason for Committee members not to attend. With a final thank you to Judges Raggi, Lawson, England, and Rice, the meeting was adjourned.