(Rev. 2/22/11)

Agenda E-19 (Summary)
Rules
March 2011

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:

Approve the proposed *Second Report of the Judicial Conference of the United States on the Adequacy of P* *nt Act of 2002* for transmission to Congress. . . . . pp. 8-9

Approved by the Executive Committee.

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

Agenda E-19
Rules
March 2011

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 (the "Committee") met on January 6–7, 2011. All members attended, except Dean Colson, Esq., Dean David F. Levi, and *ex officio* member Deputy Attorney General James M. Cole. Elizabeth Shapiro, Esq., and Karyn Temple Claggett, Esq., attended on behalf of the Department of Justice.

Representing the advisory rules committees were: Judge Jeffrey S. Sutton, Chair, and Professor Catherine T. Struve, Reporter, of the Advisory Committee on Appellate Rules; Judge Eugene R. Wedoff, Chair, and Professor S. Elizabeth Gibson, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Sidney A. Fitzwater, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Committee; John K. Rabiej, attorney in the Administrative Office's Rules Committee Support Office; James N.

Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office; Judge Barbara Rothstein, Director, and Dr. Emery G. Lee and Meghan A. Dunn of the Federal Judicial Center; and Andrea Kuperman, Esq., Rules Law Clerk to Judge Rosenthal.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 13, 14, and 24, with a request that they be published for comment. The proposed amendments to Rules 13 and 14 address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). The proposed amendment to Rule 24 more accurately reflects the status of the Tax Court as a court. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

At its spring 2011 meeting, the advisory committee expects to discuss a proposal to amend Rule 4(a)(4), adjusting the time to appeal after the disposition of a tolling motion. A joint subcommittee of members from the advisory committee and the Civil Rules Advisory Committee is working on this issue as well as other issues of mutual concern, including whether parties can "manufacture finality" necessary to appeal by voluntarily dismissing without prejudice unresolved peripheral claims when the district court has ruled on the main claims in the case.

The advisory committee is examining several other issues, including a proposal to treat federally recognized Native American tribes the same as "states" for the purpose of amicus filings; potential modification of Rule 28(a)(6)'s requirement that briefs contain a separate statement of the case; possible rulemaking responses to the decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege

ruling did not qualify for immediate appeal under the collateral order doctrine; appellate costs under Rule 39; and case law interpreting Rule 4(a)(2) on premature notices of appeal in civil cases.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no items for the Committee's action.

Informational Items

Proposed amendments to Rules 3001, 7054, and 7056, proposed amendments to Official Forms 10 and 25A, and three proposed new Official Forms were published for public comment in August 2010. The deadline for submitting comments is February 16, 2011. A hearing on the proposed amendments is scheduled for February 4, 2011, in Washington, D.C.

The advisory committee is continuing work on a comprehensive revision of Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to adopt a clearer and simpler style, to align the Part VIII rules more closely with the Federal Rules of Appellate Procedure, and to make the rules reflect the fact that most records in bankruptcy cases are filed, maintained, and transmitted in electronic format. The advisory committee will likely seek to have the proposed Part VIII revisions published for public comment in August 2012.

In light of recent Supreme Court rulings, the advisory committee is considering possible amendments to Official Form 6, Schedule C (Property Claimed as Exempt) and Official Form 22C (the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income). The advisory committee may seek approval of amendments for publication in August 2011.

The advisory committee is revising and modernizing the bankruptcy forms. It will likely seek the Committee's approval for publication of the revised forms in August 2012.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no items for the Committee's action.

Informational Items

The advisory committee is considering possible amendments to Rule 45, which governs discovery and trial subpoenas, to address several problems. Specific topics include improved notice to all parties before serving document-production subpoenas, transfer of motions to compel or quash such subpoenas to the court presiding over the underlying action, compelling a party to appear as a trial witness, and simplifying the rule.

The advisory committee is continuing to examine the standards that apply to motions to dismiss for failure to state a claim upon which relief can be granted in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The advisory committee continues to study and monitor the lower courts' application of the Supreme Court decisions and the effect of those decisions on rates of filing of motions to dismiss and rates of grants or denials in different kinds of cases. The advisory committee has requested that the Federal Judicial Center conduct an empirical analysis of experience with Rule 12(b)(6) motions to dismiss for failure to state a claim. That project will examine motions to dismiss filed in periods shortly before the *Twombly* decision and after the *Iqbal* decision, including the rates of filing motions to dismiss, rates of granting motions, and the frequency of granting leave to amend.

The advisory committee is also continuing to examine Rule 26(c), which addresses protective orders in discovery. The advisory committee has concluded that the present state of

the case law does not show a problem needing major rule revisions. The committee will continue to carefully monitor the case law.

A subcommittee has been formed to implement and oversee further work on ideas resulting from the 2010 Conference on Civil Litigation held at Duke University School of Law (the "2010 Conference"). The ideas generated by the 2010 Conference largely fall into four categories: (1) those that do not require rule changes but focus on fostering best practices through better lawyer and judicial education and development of supporting materials; (2) those that provide a foundation for pilot projects; (3) those that provide a starting point for further empirical research; and (4) those that may prompt revisions to the Civil Rules.

A second subcommittee is examining the recommendation made by a panel at the 2010 Conference that the Civil Rules Committee amend the rules to provide better guidance to lawyers, litigants, and judges on preservation obligations and spoliation sanctions, particularly for electronically stored information. The issues include: (1) what triggers an obligation to preserve; (2) the scope and duration of the obligation; and (3) the appropriate sanctions for different types of failure to preserve.

A panel consisting of Gregory Joseph, Esq. (moderator), Judge Barbara Rothstein, Daniel Girard, Esq., Judge Paul Grimm, Thomas Allman, Esq., and John Barkett, Esq., discussed issues related to preservation obligations and sanctions for spoliation, with emphasis on the impact of electronic discovery. The panel discussed a variety of possible approaches to addressing concerns about the scope of preservation obligations and sanctions for failure to preserve evidence, including rulemaking responses, lawyer education, and coordination with states.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 11, with a request that it be published for comment. The proposed amendment would expand the colloquy under that rule to advise a defendant of possible immigration consequences when the judge accepts a guilty plea. The amendment was made in light of the recent Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Committee approved the advisory committee's recommendation to publish the proposed amendment to Rule 11 for public comment.

Informational Items

The advisory committee continues to consider proposals to codify or expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). The advisory committee received a presentation on the preliminary results of a survey conducted by the Federal Judicial Center on discovery concerns among defense attorneys, the Department of Justice, and judges. The preliminary results revealed that 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department of Justice opposes any amendment. The advisory committee is also considering recommending to the Federal Judicial Center changes to the Judges' Benchbook to improve supervision of prosecutors' compliance with disclosure obligations. Such changes might serve either as a supplement or an alternative to a rule amendment. The Federal Judicial Center is also considering publishing a guide to the "best practices" in criminal discovery.

The advisory committee is considering revisions to Rule 12 on motions that must be made before trial, and it is reconsidering a proposed amendment to Rule 15 that would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Informational Items

The advisory committee is considering whether to amend Rule 803(10) in light of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), in which the Court held that certificates reporting the results of certain forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), making admission of such certificates in lieu of in-court testimony a violation of the accused's right to confrontation. The advisory committee is also continuing to monitor the case law after *Crawford*.

The advisory committee is considering whether to propose amendments to Rules 803(6)-(8) (the hearsay exceptions for business records, absence of business records, and public records) to resolve an ambiguity revealed during the restyling project as to which party has the burden of showing trustworthiness or untrustworthiness.

The advisory committee has resumed work on a project to publish a pamphlet describing the federal common law on evidentiary privileges. This project had been put on hold during the restyling work on the Evidence Rules.

REPORT TO CONGRESS ON THE ADEQUACY OF THE PRIVACY RULES

The Committee's privacy subcommittee submitted a report on how the federal privacy rules, which took effect in 2007, are working. The report was based on varied sources of data, including discussions at a mini-conference held on April 13, 2010, at the Fordham University School of Law, a review of local rules governing redaction of private information in court filings, and surveys sent to randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The subcommittee determined that there are no general problems with the privacy rules' operation and implementation and that no new or amended rules are needed at this time. The subcommittee recommended continued work with the Court Administration and Case Management Committee to monitor privacy issues. The Committee approved the subcommittee's report for consideration by the Judicial Conference.

Under the E-Government Act of 2002, Pub. L. 107-347, § 205(c)(3)(C), the Judicial Conference is required to report to Congress every two years on the effectiveness of the privacy rules. The privacy subcommittee's report will satisfy that requirement. A proposed *Second Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002* (the "*Second Privacy Report*"), which includes the privacy subcommittee's report, is attached as an appendix. The attachments to the privacy subcommittee's report, which contain background materials, are not included due to their length, but they can be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2011-01_Vol_II.pdf#pagemode=bookmarks.

Recommendation: That the Judicial Conference —

Approve the proposed *Second Report of the Judicial Conference of the United States on the Adequacy* [illegible] *nent Act of 2002* for transmission to Congress.

Approved by the Executive Committee.

The Judicial Conference's Secretary sent a letter to Congress in December 2010 advising of the privacy subcommittee's work and explaining that the full Judicial Conference report would be submitted after the Committee and the Judicial Conference considered the privacy subcommittee's report. In light of the statutory deadline for the report to Congress, the Committee intends to seek the Judicial Conference Executive Committee's approval to transmit the *Second Privacy Report* to Congress.

CONFERENCE-APPROVED LEGISLATIVE PROPOSALS

At its September 2010 meeting, the Judicial Conference approved proposed amendments to Federal Rules of Appellate Procedure 4 and 40, clarifying the time to appeal or to seek rehearing in a case in which a United States officer or employee is a party. The Judicial Conference also approved the Committee's recommendation to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4. The Committee is still actively pursuing that legislation.

LONG-RANGE PLANNING

The Committee reviewed the Judicial Conference-approved *Strategic Plan for the Federal Judiciary* (JCUS-SEP 10, pp. 5-6), identified strategic initiatives it is pursuing, and suggested priorities for the next two years.

Respectfully submitted,

Lee H. Rosenthal, Chair

James M. Cole	Wallace Jefferson
Dean C. Colson	David F. Levi
Douglas R. Cox	William J. Maledon
Roy Englert	Reena Raggi
Neil M. Gorsuch	Patrick J. Schiltz
Marilyn L. Huff	James A. Teilborg
	Diane P. Wood

Appendix A – Second Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

Second Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES

February 2011

SECOND REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

February 2011

This report is transmitted in accordance with the E-Government Act of 2002 (Pub. L. No. 107-347). Section 205(c)(3)(C) of the Act directs the Judicial Conference (the "Conference") periodically to report to Congress on the "adequacy" of rules prescribed by the Supreme Court to protect the privacy and security of certain kinds of information in electronic filings. The Judicial Conference transmitted its first report to Congress in April 2009. This is the second report.

In accordance with the E-Government Act, the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure were amended effective December 1, 2007,[1] to prevent dissemination of personal identifier information in documents filed in federal courts. The amended rules were proposed after years of study under the Rules Enabling Act rulemaking process, including open committee meetings and public hearings. The amended rules generally require that federal court filings be available electronically to the same extent they are available at the courthouse, provided that certain personal identifier information, including social security numbers, is redacted from those filings by the attorney or the party making the filing. Certain categories of filings are not publicly accessible by remote electronic means because these filings generally have extensive personal information, including identifiers. For good cause in specific cases, the court may order more extensive redaction or restrict internet access to designated confidential or sensitive information.

The Judicial Conference's April 2009 report on the 2007 rules noted the emergence of new issues requiring a careful balance of privacy interests with the public interest in continued access to court filings. The report explained that two issues, in particular, warranted attention—court filings that did not have social security numbers redacted as required and, in criminal cases, plea agreements with cooperation provisions retrieved from the electronic case filings and posted on the internet. The April 2009 report also noted that the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") had established a privacy subcommittee, composed of a representative from each of the advisory rules committees and representatives from the Conference's Committee on Court Administration and Case Management. The privacy subcommittee developed and proposed the 2007 rules implementing the E-Government Act. Since then, the privacy subcommittee has made a comprehensive assessment of the operation of those rules.

As explained in the privacy subcommittee's attached report, the subcommittee examined four general subjects, including the two issues raised in the April 2009 report. The four general subjects included: (1) the effectiveness of the implementation of the privacy rules; (2) privacy concerns in criminal cases; (3) electronic access to court transcripts; and (4) possible amendments to the privacy rules. The subcommittee examined whether rule changes were needed to improve the protection of

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[1] FED. R. APP. P. 25(a)(5); FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

social security numbers in electronic case filings from disclosure, whether procedures should be adopted to prevent the disclosure of highly sensitive information contained in plea agreements, and whether there should be remote public access to court filings in immigration cases. The privacy subcommittee convened a major conference on April 13, 2010 at the Fordham University School of Law to examine these and related questions. This conference brought together civil and criminal lawyers, prosecutors and defense attorneys, academics, judges, members of the media, and various staff who serve the courts, all with experience in the privacy issues raised by electronic court filings. The subcommittee also gathered information from a variety of other sources, including a report submitted by PublicResource.org on unredacted social security numbers in court filings; a survey conducted by the Federal Judicial Center of unredacted social security numbers; local rules governing redaction of private information in court filings; and surveys sent to randomly selected district judges, clerks of court, and attorneys with electronic filing experience.

In examining the issue of unredacted social security numbers appearing in electronic filings, the privacy subcommittee reviewed extensive surveys conducted by the Administrative Office and the Federal Judicial Center. These surveys found only a small number of instances in which unredacted social security numbers were accessible online and that such mistakes were rare. The privacy subcommittee concluded that no new amendments to the rules are necessary. The subcommittee recommended that education and monitoring continue, to ensure that information subject to redaction is properly removed from court filings and that the number of mistakes is reduced even more.

The privacy subcommittee also recommended against proposing a single uniform national rule limiting public access to plea agreements. The arguments for limiting public access are based on concerns about revealing cooperation provisions in plea agreements. District courts around the country are using different methods to address these concerns. A single best practice that would form the basis for a uniform national rule and meet the needs of all the districts has not yet emerged. The subcommittee's report recommends that district courts be encouraged to continue discussions about the relative benefits of various practices and to work toward developing a consensus on a best practice that might provide a basis for a national rule.

With respect to privacy concerns raised by electronic filing of transcripts, the privacy subcommittee concluded that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and being effectively applied. The report recommends continued monitoring of the policies and practices on the electronic filing of transcripts as well as continued efforts to educate attorneys and court reporters about privacy issues and redaction obligations.

The report also recommends retaining the rule provision that exempts immigration cases from the redaction requirements in the privacy rules. The provision is based on the large amount of sensitive information that can be in immigration case files, the burden of redacting that information, and the large volume of such cases. The report states that this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of

redacting. The report suggests that such review also consider whether the exemption might be narrowed to particular types of immigration cases.

The Judicial Conference's Standing Rules Committee and Rules Advisory Committees have taken steps to address the small number of unredacted social security numbers appearing in electronic filings. The Rules Committees will continue to monitor the courts' experiences with providing the public access to electronic court filings, particularly with respect to plea and cooperation agreements in criminal cases, with a view to identifying any potential new problems and determining whether additional measures should be taken to address them.

Attachment

[For purposes of the March 2011 meeting of the Judicial Conference of the United States, the attachments to this report have been omitted due to their length. They can be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2011-01_Vol_II.pdf#pagemode=bookmarks.]

Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

I. Introduction

A. The 2007 Adoption of the Privacy Rules

The E-Government Act of 2002 required the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal courts.[1] In response to this mandate, the Judicial Conference Committee on the Rules of Practice and Procedure (the "Standing Committee") established a Privacy Subcommittee, composed of a representative from each of the Advisory Rules Committees and representatives from the Committee on Court Administration and Case Management (CACM), to make rule recommendations. That Subcommittee's proposals for amendments to the Federal Rules of Civil Procedure,[2] Criminal Procedure,[3] Bankruptcy Procedure[4] and Appellate Procedure[5] (referred to collectively hereafter as "the "Privacy Rules") were adopted by the Standing Committee and went into effect on December 1, 2007. The Standing Committee recognized a likely need to review the operation of the Privacy Rules in the near future given the challenges of implementation, rapid technological advances, and ongoing concerns about the proper balance between public access to court proceedings and various claims to privacy.

B. Request for a Status Report on the Operation of the Privacy Rules

Since the Privacy Rules took effect, members of all three branches of government and of the public have raised questions about implementation and operation. Meanwhile, courts and litigants have gained practical experience in using the Privacy Rules in the context of expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when in 2009, the Executive Committee of the Judicial Conference directed the Standing

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[1] Pub. L. 107-347, § 205(c)(3).

[2] Fed.R. Civ. P. 5.2.

[3] Fed.R. Crim. P. 49.1.

[4] Fed.R. Bankr. P. 9037.

[5] Fed.R. App. P. 25(a)(5).

Committee to report on the operation of the Privacy Rules, the Standing Committee revived its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory Committee designated a member to serve on the Privacy Subcommittee, with the Advisory Committee Reporters serving as consultants. CACM also designated four members to serve on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-at-large.

C. Principles Controlling Review

In undertaking its review, the Privacy Subcommittee recognized that its task was discrete. It was not charged with developing new policy, but only with assessing how the Privacy Rules operate consistent with existing policy established by the Judicial Conference (largely on the basis of extensive research and consideration by CACM). This policy generally favors making the same information that is available to the public at the courthouse available to the public electronically.[6]

In urging this "public is public" policy, CACM was mindful of an irony: that a system of public access that required a trip to the courthouse to see court filings, while outdated, may have afforded litigants, witnesses, and jurors more privacy – "practical obscurity" – than a system of easy electronic access. CACM further recognized that some persons availing themselves of electronic access might have illegitimate motives: identity theft, harassment, and even obstruction of justice. Nevertheless, CACM concluded that the judiciary's access policy should generally draw no distinction between materials available at the courthouse and online. This policy not only promotes long-standing principles of judicial transparency; it ensures against profiteering in information available only at the courthouse by entrepreneurs who could gather such information and market it over the Internet. CACM determined that privacy interests in electronically available information could be protected sufficiently by imposing redaction obligations on parties filing documents containing private information, specifically, social-security numbers, financial-account numbers, dates of birth, names of minor children, and, in criminal cases, home addresses.

The Standing Committee implemented these policy determinations in drafting the Privacy Rules. The Privacy Subcommittee's review of the operation of these rules is

[6] The Judicial Conference's privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

informed by the judiciary's continued adherence to the stated policy.[7]

II. Organization and Work of the Privacy Subcommittee

A. Subjects Addressed By Working Groups

The Privacy Subcommittee quickly identified four general subjects for consideration and constituted itself into corresponding working groups to address each matter.

1. Implementation of the Privacy Rules

Members of Congress and of the public have questioned how effectively the courts have implemented the Privacy Rules, with particular concern for the appearance of unredacted social-security numbers in some court filings. The Privacy Subcommittee has reviewed this matter. It has further reviewed the efforts of individual courts and the Administrative Office to educate attorneys about their redaction responsibilities. The Subcommittee has reviewed local court rules addressing privacy concerns to determine their compliance with the national Privacy Rules. Finally, the Subcommittee has considered other procedures that might be implemented better to protect private information in court files.

2. Privacy Concerns in Criminal Cases

In criminal cases, a particular privacy concern has arisen with respect to electronic access to plea and cooperation agreements, aggravated by the emergence of various websites publicizing such information, of which *whosarat.com* is simply one example. In response to a Department of Justice request for a judicial policy denying any electronic access to plea agreements, CACM issued a March 2008 report to the Judicial Conference recommending against such a policy because it would deny public access to all plea agreements, including those that did not disclose cooperation.[8] In so reporting, CACM noted that the district courts vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy Subcommittee has reviewed and evaluated these approaches with a view toward facilitating any future consideration of a uniform policy or rule.

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[7] The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

[8] *See* Report of CACM to Judicial Conference, March 2008 at 9.

3. Electronic Access to Court Transcripts

Consistent with the E-Government Act, clerks of court are responsible for placing transcripts of court proceedings on PACER. The Judicial Conference has made clear that it is the parties, not the clerks, who are responsible for making necessary redactions from such transcripts. The Privacy Subcommittee has considered the operation of this division of labor in practice as well as the efforts made by courts and parties to minimize references to private information in records that will eventually be transcribed. Special attention has been given to *voir dire* transcripts containing private information about jurors.

4. Possible Amendments to the Privacy Rules

The Privacy Subcommittee was asked to consider whether the redaction requirements of the existing Privacy Rules needed to be expanded to include more information, such as alien registration numbers, driver's license numbers, mental health matters, etc. At the same time, the Subcommittee was asked to consider whether the Privacy Rules should be contracted to eliminate or modify two exceptions to the basic "public is public" policy for social security and certain immigration cases.

B. Information Obtained by the Privacy Subcommittee

In conducting its review, the Privacy Subcommittee made extensive efforts to obtain information about how the Privacy Rules were working and how they might be improved. In addition to considering existing sources of information, the Subcommittee conducted its own surveys of court filings and of persons experienced with the operation of the Privacy Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty persons – judges, court personnel, attorneys, legal scholars, and media representatives – who expressed diverse views on the issues of public access to court filings and the need to protect private information. The results of the Subcommittee's efforts, which should assist in the future development of policies and rules regulating access to private information in court filings, are detailed in multiple attachments to this report. The Subcommittee here briefly describes its research efforts.

1. Review of Existing Report on Court Filings by PublicResource.org

A report published at PublicResource.org indicates that social-security numbers remain unredacted in a number of publicly available court files. With the assistance of Henry Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth analysis of the data contained in the PublicResource.org report. That analysis is attached to this Report. As the attachment indicates, very few cases (relative to the large number of

court filings) in fact revealed unredacted social-security numbers. Most of the disclosures cited by PublicResource.org related to filings made before the Privacy Rules were enacted, while others reflected a common disclosure made multiple times in the same case.

2. Survey of Court Filings for Unredacted Social-Security Numbers

At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its own survey of court filings from a two-month period in 2010 to determine the frequency with which unredacted social-security numbers appear in court filings. The FJC found roughly 2400 documents — out of 10 million documents searched — with unredacted social-security numbers that did not appear to be subject to the exceptions to redaction provided by the Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the number of unredacted documents should not be ignored, it was proportionally minimal and did not indicate a widespread failure in the implementation of the Privacy Rules.[9]

3. Review of Local Rules

With the assistance of Heather Williams of the Administrative Office, the Privacy Subcommittee collected and reviewed all local rules governing redaction of private information in court filings. The Subcommittee determined that most local rules are intended to educate attorneys about their redaction obligations consistent with the Privacy Rules. The Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally by requiring more redactions than the national rules. Such conflicts are easily addressed by an appropriate communication from the Standing Committee to the district chief judge.

4. Survey of Practical Experience with Privacy Rules

The Subcommittee early determined a need to know how those who regularly work with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

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[9] Joe Cecil provides the following illustration:

> If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The survey sought experiential information and invited opinions on the need for any rules changes. The results of this survey – including a description of methodology — are attached to this report. The survey data indicates that the Privacy Rules are generally working well and do not require amendment, but that continuing education efforts are necessary to ensure compliance.

5. Fordham Conference

The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to identify persons with diverse views on the four areas of identified interest and to secure their participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to Professor Capra's efforts and Fordham's hospitality, the Subcommittee heard panel discussions on

- the broad question of transparency and privacy relating to court filings by a judge and various legal scholars;

- the exemption of immigration cases from electronic filing by private and public attorneys, a legal scholar, a member of the media, and a court representative;

- the present implementation of the Privacy Rules by a judge, a legal scholar, a member of the media, an AO representative, and a clerk of court;

- electronic access to plea and cooperation agreements and the need for a uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal scholar, and a Bureau of Prisons official;

- the same subject by judges from districts affording different degrees of public access to such information; and

- electronic access to transcripts, including *voir dire* transcripts by a judge, two United States Attorneys, a First Amendment lawyer, and a jury clerk.

A transcript of these proceedings is attached to this report and will be published in the Fordham Law Review. Insights gained at the Fordham Conference inform all aspects of the findings and recommendations contained in this Subcommittee report.

III. Findings

A. Implementation of the Privacy Rules

1. Overview

The Privacy Subcommittee was charged with reviewing and reporting on the operation of the existing Privacy Rules throughout the federal courts, with particular attention to protection of the specified private identifier information in electronic filings available on PACER. The Subcommittee reports considerable success in the implementation of these Rules. At the same time, the Subcommittee identifies a continuing need for education efforts, monitoring, and study to ensure continued effective implementation.

2. Specific Findings

a. Administrative Office Efforts

The Privacy Subcommittee reports that the Administrative Office has made significant and effective efforts to implement the Privacy Rules' redaction requirements, while still providing the public with remote electronic access to court filings. For example:

- In 2003, the AO modified CM/ECF so that only the last four digits of a social security-number can be seen on the docket report in PACER. In the same vein, in May 2007 the AO's Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information. The Working Group identified only six forms that required personal identifier information, and those forms were revised or modified to delete those fields.

- In August 2009, the AO asked the courts to implement a new release of CM/ECF specifically designed to heighten a filer's awareness of redaction requirements. The CM/ECF log-in screen now contains a banner notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging their obligation to comply with the Privacy Rules redaction requirements in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.

- The Judicial Conference approval of a pilot project providing PACER access to audio files of court hearings raised concerns about audio disclosure of personal information. The eight courts participating in the pilot project employ various means

to discourage attorneys and litigants from introducing personal identifier information except where absolutely necessary. Lawyers and litigants are also warned that they could and should request that recorded proceedings containing information covered by the Privacy Rules or other sensitive matters not be posted, with the final decision made by the presiding judge. The AO has endeavored to ensure that courts and litigants are mindful of their redaction obligations as they participate in this project.

b. Efforts by the Courts

(1) Generally

All aspects of the Subcommittee's review confirm that federal courts throughout the country are undertaking vigorous and highly effective efforts to ensure compliance with the Privacy Rules generally and with the requirement that personal identifier information be redacted from or never included in court filings in particular. These efforts include:

- ECF training programs for both lawyers and non-attorney staff at law firms. The extension of training to staff is important because experience indicates that redaction failures, while infrequent, are frequently the result of filings made by staff who are unaware of the Rules requirements.

- ECF newsletters containing reminders about the redaction requirements.

- Making counsel aware of the Privacy Rules at the initial court conference and at evidentiary hearings, and also specifically advising counsel against unnecessary use of personal identifiers.

- Discouraging counsel from asking questions that would elicit testimony that would disclose private identifier information.

- Requiring redaction of exhibits containing personal identifier information as a condition of admissibility.

- Providing notices at counsel's table that describe the Rules' redaction requirements and that caution counsel not to put unredacted personal identifier information into the record.

- Reading a prepared statement to witnesses cautioning against disclosure of private identifier information.

- Assisting *pro se* filers, especially in bankruptcy cases, in redacting personal identifier information.

- Remedial action by clerks and courts when unredacted private identifiers are found, including consultation with filers who are repeat violators.[10]

(2) Social-Security Numbers in Court Filings

As discussed in an earlier section of this Report, surveys conducted by the AO and the FJC found only a small number of instances in which unredacted social-security numbers have been accessible online in violation of the Privacy Rules. Of the 10 million recently filed documents that the FJC researchers reviewed, less than .03 percent were found to contain unredacted social-security numbers. And of those, 17 percent appeared to be subject to some exception to redaction, such as waiver by the filing party.

The results indicate that such redaction failures as do occur are generally inadvertent. Some lawyers and staff remain unaware of the redaction policy. The results also indicate that the number of redaction failures is decreasing with time as courts continue and expand education efforts. The Privacy Subcommittee concludes that no redaction system can be error-free; nevertheless, continued education efforts should ensure that mistakes are rare and that almost all information subject to redaction is in fact removed from court filings.

(3) Implementation Challenges in Bankruptcy Cases

The Subcommittee's research indicates that most identified Privacy Rules violations occurred in bankruptcy cases. That is not surprising given the high number of first-time bankruptcy filers, the need for disclosure of substantial personal information in bankruptcy filings, and the probability that exhibits and proofs of claim will contain private identifiers. The Privacy Subcommittee reports that while the number of disclosures of unredacted personal identifiers is proportionately higher in bankruptcy cases, the actual number of

[10] The Privacy Subcommittee unanimously agrees with the basic premise of the Privacy Rules — that the redaction obligation is on the parties, not clerks or judges. Nonetheless, the Subcommittee notes and applauds the efforts of clerks and courts in taking remedial action when a failure to redact has been discovered.

disclosures remains small.[11] This is a tribute to the court efforts described generally in the preceding subsection, which include efforts by the bankruptcy courts.[12] The Subcommittee is, therefore, confident that, as educational efforts continue and other initiatives are pursued, the instances of errors in filing unredacted personal identifier information in bankruptcy cases will be reduced even further.

(4) Use of Local Rules

The Privacy Subcommittee conducted a comprehensive review of local court rules intended to implement the national Privacy Rules. The Subcommittee recognizes that local rules can have some value in educating filers about their redaction obligations. But local rules cannot impose obligations inconsistent with national rules. *See, e.g.,* Fed.R.Civ.P. 83(a). The Privacy Subcommittee has identified a few local rules inconsistent with the national Privacy Rules, notably, local rules demanding the redaction of *more* information than required by the national rules. National rules are a product of a carefully considered policy that calibrates the balance between the judiciary's commitment to public access and its protection of personal privacy. Local rules requiring more information to be redacted alter that balance.

An attached report identifies local rules that the Privacy Subcommittee finds inconsistent with the Privacy Rules. It recommends that the procedure employed in the last local rules project be employed here: the Standing Committee should inform the chief judge of a district with an inconsistent rule, and the Standing Committee should work together with the chief judge to remedy the situation.

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[11] Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner's social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. See, e.g., Bankruptcy Rule 1007(f), which requires an individual debtor to "submit" to the clerk, rather than "file" a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

[12] A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

3. Possible Future Initiatives

Given inevitable advances in technology, the Subcommittee suggests that future attention be given to two possible developments.

- Current technology permits detection of unredacted social-security numbers in court filings, as the Federal Judicial Center did in the attached report. Current technology does not permit a comparable search for other unredacted personal identifiers, such as names of minor children. Nevertheless, at the Fordham Conference, Professor Edward Felten predicted that future technological developments might well provide such capacity. The Privacy Subcommittee recommends that the AO continue to monitor the state of search technology.

- Technology might also make it easier for a filing party to search for material to redact in a transcript or in a document that the party is going to file. For example, a pdf document is obviously easier to search if it is in searchable format. More broadly, as stated above, software might be developed in the future that would make it easier to search exhibits, immigration records, or indeed any document. While it is not the obligation of the courts to redact filings for litigants, to the extent the courts are already engaged in extensive and highly effective educational efforts, they might be encouraged to include relevant technological advances in the information conveyed.

While such future initiatives should be pursued, the Privacy Subcommittee concludes that the most important means of ensuring effective implementation of the Privacy Rules is to continue the current efforts to educate filers and other court participants about the need (a) to redact private identifiers from documents that must be filed, and (b) to avoid disclosure of private identifiers except when absolutely necessary.

Finally, the Subcommittee suggests continued monitoring of the implementation of the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers, such as that conducted by the Federal Judicial Center for this report, should be conducted on a regular basis, possibly every other year.

B. Criminal Cases: Affording Electronic Access to Plea and Cooperation Agreements

1. Overview

The Privacy Subcommittee quickly identified electronic public access to plea and

cooperation agreements in criminal cases as an area warranting careful review. Survey information and the Fordham Conference indicate that easy electronic access to such information, coupled with Internet sites committed to its collection and dissemination, have heightened concerns about retaliation against cooperators and prosecutors' ability to secure cooperation.

The Privacy Subcommittee views the recruitment and protection of cooperators as matters generally committed to the executive branch. At the same time, it recognizes judicial responsibility to minimize opportunities for obstruction of justice. How to do so without compromising public access to court proceedings – especially proceedings that may be of particular public interest, including the treatment of defendants who cooperate with the prosecution – admits no easy answer.

The Subcommittee has identified varied approaches by the district courts to the public posting of plea and cooperation agreements and general court resistance to a uniform national rule. To the extent the Department of Justice, some defense attorneys, and legal scholars support a national rule, the Subcommittee has identified no consensus on what that rule should be. Nor can it presently identify a "best practice."

The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference about the relative advantages of various practices in order to determine if a consensus emerges in favor of a particular practice or rule. It further suggests that courts might consider methods, where appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by providing for such orders to expire at a fixed time subject to extension by the court upon further review.

2. Specific Findings

a. Existing District Court Practices for Posting Plea and Cooperation Agreements

The Privacy Subcommittee identified various approaches by the district courts in publicly posting plea and cooperation agreements,[13] which are summarized here in

[13] A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

descending order of accessibility:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.[14]

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.

b. Concerns with the Identified District Court Practices

At the Fordham Conference, prosecutors, defense counsel, and legal scholars expressed concerns about the various district court approaches. Again, working from the least to most restrictive approach, these concerns are summarized as follows:

- Full remote access to plea agreements with sealing of cooperation information in individual cases means a sealing order effectively raises a red flag signaling cooperation.

- Prohibiting electronic access to plea and cooperation agreements but allowing courthouse access to such documents encourages the development of cottage industries to acquire and post such information (often for sale), the very concern that prompted the Judicial Conference to adopt the "public is public" policy.

- Posting plea agreements that say nothing about any cooperation, or posting documents that use the same boilerplate language whether a party is cooperating or not, result in misleading court documents and preclude public scrutiny of how the judicial system treats cooperating defendants.

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[14] This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- Not posting plea or cooperation agreements at all hampers public scrutiny not only of the treatment of cooperators but of the process by which guilty pleas are obtained.

Some Conference participants also raised a general concern: that as defendants from different districts found themselves housed together in the federal prison system, some might misconstrue records from districts with which they were not familiar. For example, a prisoner from a district where individual sealing signaled likely cooperation might mistakenly infer that every prisoner with a sealed record entry was a cooperator without realizing that some districts made a sealed entry in every case to ensure no difference between the dockets of cooperators and non-cooperators.

c. Support for a Uniform Rule

While prosecutors, most defense attorneys, and legal scholars urged a uniform rule for posting plea and cooperation agreements, they did not agree as to the content of that rule. Some urged few, if any, limits on public access to such agreements, while others supported strict limitations.[15]

The Subcommittee has considered the uniform rule proposal recommended by Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating Defendant: Towards a new Role for Internet Access to Court Records,* 62 Vand. L. Rev. 921 (2009), a copy of which is attached to this Report. Professor Myers, a former federal prosecutor, urges a rule that would (1) generally deny public access to individual plea and cooperation agreements except where ordered by the court on a case-by-case basis; and (2) provide public access to plea and cooperation information in the aggregate, without identifying individual defendants. As Professor Myers explained at the Fordham Conference, she thinks that in most cooperation cases, the risk to a defendant from public disclosure of the defendant's cooperation far outweighs any public interest in knowing that the defendant decided to cooperate. To the extent there is a public interest in knowing what kinds of deals the government is making with cooperators and what kinds of benefits they are receiving from the courts, Professor Myers submits that information can be provided anonymously or in the aggregate.

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[15] Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

Some participants at the Fordham Conference questioned the sweep of Professor Myers's proposal, which would severely limit public access to plea and cooperation agreements in individual cases. They also questioned the effectiveness of such a rule in protecting cooperators, given the ability to infer cooperation from delayed or adjourned sentences or from the sealing of sentencing minutes, in whole or in part.

d. Judicial Opposition to a Uniform National Rule

At the Fordham Conference, the Subcommittee also heard the views of judges drawn from districts pursuing each of the identified approaches. Their thoughtful responses to the concerns and suggestions of lawyers and legal scholars and their explanations for how and why their courts employed various approaches to posting plea and cooperation agreements were particularly informative. This discussion revealed that the various practices employed by courts with respect to plea and cooperation agreements were not casually developed. Rather, district courts have carefully considered the question of public access to such agreements, with individual courts soliciting the views of attorneys and other interested parties and engaging in substantial internal discussion before settling on an approach. The discussion further revealed that each district is strongly committed to its chosen approach, convinced that the approach satisfactorily balances the twin concerns of public access and cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would differ from its own practice).

e. Subcommittee Conclusions

The Subcommittee concludes that no best practice has yet emerged supporting a uniform national rule with respect to granting public access to plea and cooperation agreements. The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference as to the relative benefits of various practices, with a view toward determining if a consensus emerges in the coming years as to a best practice that might provide a basis for a uniform national rule.

At the same time, the Subcommittee is of the view that the rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.

C. Redacting Electronic Transcripts

1. Overview

Judicial Conference policy requires that court transcripts be posted on PACER within 90 days of delivery to the court clerk.[16] The Privacy Subcommittee has considered the judiciary's ability to comply with this policy while ensuring the redaction of personal identifier information as required by the Privacy Rules. The Subcommittee reports that the redaction of private information from transcripts on PACER is still a work in progress. Nevertheless, that work appears to be going well. Because the process relies on the vigilance and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure these persons' awareness of the need to minimize record references to private identifier information and to redact such information when it appears in transcripts.

The Privacy Subcommittee has separately considered the privacy issues implicated by the electronic posting of *voir dire* transcripts, which may reveal personal information about potential jurors not required to be redacted by the Privacy Rules. Such information could be used to retaliate against jurors and could compromise the identification of prospective jurors able to serve without fear or favor. Because the Judicial Conference has recently provided the courts with guidance as to how to balance the competing interests in public access to *voir dire* and juror privacy, the Subcommittee suggests that the Standing Committee request CACM to monitor the operation of these guidelines to determine the need for any further policy action.

2. Specific Findings

a. The Redaction of Electronically Posted Transcripts

(1) Judicial Conference Policy for Electronic Filing

Consistent with the mandate of the E-Government Act to create a complete electronic file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated above, adopted a policy requiring courts electronically to post transcripts of court proceedings within 90 days of their receipt by the clerk of court. In the 90-day period preceding electronic filing, each party's attorney (or each *pro se* party) must work with the

[16] See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

court reporter according to a prescribed schedule to ensure that any electronically filed transcript is properly redacted of personal identifier information consistent with the requirements of the Privacy Rules.

(2) Survey Results Indicate General Compliance with Transcript Policy

The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but a few district courts are posting trial transcripts on PACER, though most courts do not routinely post deposition transcripts. A majority of the surveyed courts have established local rules or policies to address privacy concerns arising from the electronic posting of trial transcripts. The number of clerks and judges who reported complaints about personal identifier information appearing in electronically filed transcripts is small.

The survey further revealed that clerks of court, judges, and lawyers are actively engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a significant number of clerks reported that their courts require that transcripts be filed as text-searchable PDFs to facilitate redactions. Other clerks reported using software programs specifically developed to identify personal identifier information. Still more clerks expressed interest in the development of such programs.

The survey revealed that judges employ various means to educate counsel about their redaction obligations with respect to electronically filed transcripts. A common practice is to provide counsel with a card urging that personal identifier information not be elicited on the record and that any such information that appears in transcripts be redacted. Similar guidance is provided to counsel at the initial case conference, in formal written orders, and through communication with chambers staff. Judges also intervene to cut off a line of questions that appears to be eliciting personal identifier information. Judges report that they also rely on chambers staff and docket clerks to alert them to the appearance of personal identifier information in a transcript that will require redaction.

The survey confirms general attorney awareness of the Privacy Rules' redaction requirements. Two-thirds of attorneys responding reported that they redacted personal identifier information before transcripts were electronically filed. Half of attorneys surveyed reported that they actively sought to avoid eliciting personal identifier information on the record. Nevertheless, because 17% of responding attorneys reported that they made no effort to redact transcript before electronic filing, there is plainly a need for continuing education and monitoring in this area.

(3) The Fordham Conference

Participants at the Fordham Conference reinforced the conclusions drawn from the survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying information on the record, and (b) that the redaction procedure for electronic transcripts adopted by the Judicial Conference is generally working as intended.

Two United States Attorneys stated that although the redaction requirements were initially met with some displeasure by their Assistants, experience had shown that the required procedures were workable and not unduly burdensome. One of the United States Attorneys reported developing a standard form to facilitate the specification of pages and line numbers where personal identifier information needed to be redacted.

Both government and private attorneys stated that they generally sought to avoid eliciting personal identifier information in proceedings that could be transcribed. They agreed that there was rarely a need for such information, and that attorneys could usually avoid personal information coming into the record by applying some forethought to questions asked and documents introduced into evidence. The lawyers discussed the value of reaching advance agreements with opposing counsel to minimize the introduction of personal identifier information.

Some Conference participants identified concern that parties in civil cases were urging court reporters to redact from transcripts confidential information – such as proprietary information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a) require a court order pursuant to Rule 5.2 (e) and its counterparts.

b. The Electronic Filing of *Voir Dire* Transcripts

(1) Concerns Attending *Voir Dire* Transcripts

Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal, sensitive, or embarrassing information from a juror that need not be redacted under the Privacy Rules. The possibility of such information making its way from PACER access to broad disclosure on the Internet poses real risks for juror harassment or even retaliation. Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed. With such awareness, courts may find it more difficult to identify potential jurors able to serve without fear or favor.

Because it is the court that summons persons for jury service, the judiciary's responsibility to safeguard jurors is arguably stronger than its responsibility to safeguard persons who enter into cooperation agreements with the executive branch. Nevertheless, some circuit precedent holds that *voir dire* proceedings should generally be open to public scrutiny. Further, if the transcript of an open *voir dire* proceeding is available at the courthouse, the judiciary's "public is public" policy suggests that it should also be electronically accessible.

(2) Judicial Conference Guidance for *Voir Dire*

Mindful of these competing concerns, the Judicial Conference, at its March 2009 session, provided courts with guidance on how to balance the public nature of jury selection with the protection of juror privacy.[17] Under the policy, Judges should inform jurors that they may approach the bench to share personal information in an on-the-record *in camera* conference with the attorneys, and should make efforts to limit references on the record to potential jurors' names by, for example, referring to them by their juror number. The policy further states that in deciding whether to release a *voir dire* transcript, a judge should balance the public's right of access with the jurors' right to privacy – consistent with applicable circuit precedent – and, only if appropriate, seal the transcript.[18]

Such guidance necessarily informs the Subcommittee's review of how courts and parties treat *voir dire* transcripts and juror privacy.

(3) Survey Results Respecting *Voir Dire* Transcripts

Courts presently vary widely in their policies on posting *voir dire* transcripts. Sixty percent of courts surveyed indicated that they did not place *voir dire* transcripts on PACER. Thirty-two percent indicated that they posted such transcripts in both civil and criminal cases.

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[17] JCUS-MAR 09, pp. 11-12.

[18] In the event the court seals the entire *voir dire* proceeding, the policy provides that the transcript should be docketed separately from the rest of the trial transcript. In the event the court seals only bench conferences with potential jurors, that part of the transcript should be docketed separately from the rest of the *voir dire* transcript. The parties should be required to seek permission of the court to use the *voir dire* transcript in any other proceeding.

Only a handful of clerks and judges reported problems or complaints about the proper redaction of personal identifier information in *voir dire* transcripts. The reason why few problems arise appears to be judicial vigilance. Over 70 percent of district and magistrate judges reported using one or more procedures to protect juror privacy during *voir dire* proceedings and in resulting transcripts. The most frequent procedure used is *in camera* conferences pursuant to the Judicial Conference policy. Judges also report the following procedures designed to protect juror privacy:

- sealing juror questionnaires or *voir dire* transcripts,
- referring to jurors by numbers rather than names,
- reminding court reporters that *voir dire* proceedings are to be transcribed only if the appropriate section of the transcript request form is completed, and
- limiting transcript accessibility to the courthouse.

Significantly, most judges reported that they considered the measures available to them adequate to protect juror privacy.

(4) The Fordham Conference

Participants at the Fordham Conference expressed some concern that posting *voir dire* transcripts could make it more difficult to select juries. They discussed various efforts to protect juror privacy, which generally tracked the methods reported by judges in the survey results, described above. Some additional procedures suggested included:

- using juror questionnaires to reduce courtroom questioning,
- providing for the automatic redaction of juror personal identification information from *voir dire* transcript by the court reporters,
- providing the names of persons selected for jury pools only upon request, with such a request denied if the court determines that the interests of justice require confidentiality, and
- withholding the names of jurors until the conclusion of trial and releasing them only on order of the court.

c. Subcommittee Conclusions

The Privacy Subcommittee concludes that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and, on the whole, being effectively applied by litigants and the courts. The Subcommittee suggests that CACM regularly review these policies and practices in light of constant technological advances. The Subcommittee also suggests continuing and expanding education efforts by the courts to raise attorneys' awareness of their redaction obligations with respect to electronically filed transcripts. Attorneys and court reporters also need to be made aware that the redaction of material not specified in subsection (a) of the Privacy Rules requires a court order.

With respect to *voir dire* transcripts, the Judicial Conference has recently provided guidance for courts in balancing the right of public access – including electronic access – to such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing Committee request CACM to monitor whether this guidance is adequate to ensure the selection of fair and impartial jurors from a broad pool of persons and to safeguard against retaliation and harassment.

D. The Need For Rule Changes

1. Overview

Upon careful review of the survey data and the information provided at the Fordham Conference, the Privacy Subcommittee reports that, with the possible exception of the rules' treatment of immigration cases, there is no significant call by the bench or bar for changes to the Privacy Rules. Users of the rules generally agree that existing redaction requirements are manageable and provide necessary protection against identity theft and other threats to privacy presented by remote public access. Such complaints or suggestions as were heard derive from the necessary learning curve involved in recent implementation of the Privacy Rules. The Subcommittee thus concludes that the data collected do not support either expansion or contraction of the types of information subject to redaction requirements.

2. Areas Specifically Considered for Changes to the Rules

a. Alien Registration Numbers

In considering possible amendments to the Privacy Rules, the Subcommittee gave

particular attention to the need to redact alien registration numbers insofar as they might be analogized to social-security numbers. After extensive discussion and debate, including consideration at the Fordham Conference, the Subcommittee concludes that redaction of alien registration numbers is not warranted at this time.

Disclosure of an alien registration number, unlike a social-security number, poses no significant risk of identity theft. Moreover, the Subcommittee heard from a number of court clerks and Department of Justice officials, all of whom stressed that redacting alien registration numbers would make it extremely difficult for the courts to distinguish among large numbers of aliens with similar or identical names and to ensure that rulings were being entered with respect to the correct person. Redaction would create a particularly acute problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given the lack of any expressed support for the redaction of alien registration numbers, the Privacy Subcommittee sees no reason to add them to the list of information subject to redaction under subdivision (a) of the Privacy Rules.

b. The Exemption for Social Security Cases

The Privacy Subcommittee considered the continued need for exempting Social Security cases from the redaction requirements of the Privacy Rules. The Subcommittee reports no call for a change to that exemption. Further, the reason for the exemption identified in 2007 pertains equally today: Social Security cases are rife with private information, individual cases hold little public interest, and redaction would impose unusually heavy burdens on filing parties.

c. The Exemption for Immigration Cases

The Privacy Subcommittee also considered the continued need for exempting immigration cases from the redaction requirements of the Privacy Rules.[19] Participants at the Fordham Conference vigorously argued both sides of the question. The argument for abrogating the exemption and affording remote public access to immigration case files was that the current system gives "elite access" to those with resources to go to a courthouse that,

[19] It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

especially in transfer cases, might be hundreds of miles away from a party interested in the information. It was argued that limiting access to the courthouse was particularly burdensome for members of the media. Under the current rule, the media must often depend on the parties to get information about habeas petitions and complaints in an immigration matter. It was also suggested that the exemption is ineffectual in that certain information in immigration cases *is* available over PACER — including the docket, identity of the litigants, and the orders and decisions, which will frequently contain sensitive information about asylum applicants. Thus, the media argues that the current system of access impairs First Amendment interests without providing much privacy protection.

On the other hand, the Privacy Subcommittee also heard forceful arguments from DOJ and court personnel in favor of the current system of limiting remote public access to immigration cases. They note the explosion of immigration cases since 2002, particularly in the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases, are replete with private information on a par with or greater than Social Security cases. That personal and private information is necessary to the court's disposition, so there is no way to keep it out of the record. Moreover, it is woven throughout the record, precluding easy redaction.[20] Further, the burden of redaction would inevitably fall on the government because many petitioners are unrepresented, and imposing redaction requirements on *pro bono* counsel could discourage such representation. DOJ represents that there is no simple technological means presently available to redact all personal information in all the immigration cases. It urges that any change to current limitations on remote public access be deferred until technological advances facilitate redaction.

A compromise solution emerged at the Fordham Conference: maintaining existing limitations on remote public access for immigration cases most likely to include sensitive information, such as cases seeking asylum or relief under Convention Against Torture, but removing the exemption for immigration cases involving transfer, detention, or deportation. The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration cases from remote public access warrants further consideration. One area for investigation is the plausibility of segregating cases by subject. For example, removal cases often present claims for asylum. Another factor to be considered is a possible decline in the volume of immigration cases, or types of immigration cases, which could lessen the burdens of redaction. A third factor — referred to earlier in other sections of this Report – is the possibility that advances in technology will ease the burdens of redaction.

The Privacy Subcommittee urges further research and consultation with interested

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[20] A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

parties before any decision is made to abrogate the exemption for immigration cases. But, mindful of the significant public interest in open access generally, and in immigration policy in particular, the Subcommittee suggests that the current approach to immigration cases be subject to future review and possible modification.

III. Summary of Findings and Recommendations

The Privacy Subcommittee summarizes its findings and recommendations as follows:

1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.

2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.

3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.

4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal identifier information.

5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

December, 2010

Judicial Conference Standing Committee on the Federal Rules
Subcommittee on Privacy

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Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)

Hon. John G. Koeltl (Chair of Working Group on Transcripts)

Hon. Ronald B. Leighton (Chair of Working Group on Implementation)

Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)

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