COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Boston, MA
June 15-16, 2005
Volume III

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 15-16, 2005

Volume III

10. Report of the Criminal Rules Committee

    A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58
    B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 11, 32, 35, 45, and new Rule 49.1
    C. Minutes and other informational items, including preliminary draft of proposed amendments to Rule 29

11. Report of the Evidence Rules Committee

    A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 404, 408, 606, and 609
    B. Minutes and other informational items

12. Report of the Technology Subcommittee (Oral report)

13. Long-Range Planning Report

14. Next Meeting: January

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

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To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

Date: **May 17, 2005**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure met on April 4-5, 2005 in Charleston, South Carolina and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are included at Appendix P.

This report addresses a number of action items: approval of published Rules 5, 32.1, 40, 41, and 58 for transmission to the Judicial Conference; approval of technical and conforming amendments to Rule 6 for transmission to the Judicial Conference; and approval for publication and comment on proposed amendments to Rules 11, 32, 35, 45, and 49.1. In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, most notably draft amendments to Rules 16 and 29.

II. Action Items – Overview

First, the Committee considered two public comments to the following rules:

- Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

- Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

As noted in the following discussion, the Advisory Committee proposes that those amendments be approved by the Committee and forwarded to the Judicial Conference without being published for comment.

Second, the Committee considered technical and conforming amendments to the following rule:

- Rule 6, The Grand Jury.

As noted in the following discussion, the Advisory Committee proposes that this amendment be forwarded to the Judicial Conference.

Third, the Committee considered and recommended amendments to the following rules, as well as one new rule, as follows:

- Rule 11, Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

- Rule 32(d)(2)(F), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

- Rule 32(h), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

- Rule 32(k), Sentencing and Judgment; Proposed Amendment Regarding Use of Judgment Form Prescribed by Judicial Conference.

- Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

- Rule 45, Computing and Extending Time; Proposed Amendment Regarding

Computation of Additional Time for Service.

- Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

The Advisory Committee recommends that these rules be published for public comment.

III. Action Items–Recommendations to Forward Amendments to the Judicial Conference

At its June 2004 meeting, the Standing Committee approved the publication of proposed amendments to Rules 5, 32.1, 40, 41, and 58. The comment period for the proposed amendments was closed on February 15, 2005. The Advisory Committee received two comments on the proposed amendments, and several suggestions from the Style Committee. The Committee made only minor changes as proposed by the Style Committee, and it recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmitted to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM–Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

The amendment to Rule 5 is intended to permit the magistrate judge to accept a warrant by reliable electronic means. At present, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. The amendment reflects the availability of improved technology, which makes the use of electronic media as reliable and efficient as using a facsimile. The term "electronic" is used to provide some flexibility, allowing for further technological advances in transmitting data. If electronic means are used, the rule requires that the means be "reliable," and leaves the definition of that term to a court or magistrate judge at the local level. The Advisory Committee received two comments on the published amendment. Federal Public Defender Frank Dunham wrote that the rule should make clear that "non-certified electronic copies" are not reliable electronic means. The Federal Magistrate Judges Association expressed its support for the rule as drafted.

Following consideration of the comments, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix A.

Recommendation–The Advisory Committee recommends that the amendment to Rule 5 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

This amendment to Rule 32.1 permits the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. It parallels similar changes to Rule 5, reflecting the same enhancements in technology. As in Rule 5, what constitutes "reliable" electronic means is left to a court or magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee). A copy of the rule is at Appendix B.

Recommendation–The Advisory Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

This amendment to Rule 40 is intended to fill a perceived gap in the rule related to persons who are arrested for violating the conditions of release in another district. It authorizes the magistrate judge in the district where the arrest takes place to set conditions of release. The amendment makes it clear that the judge has this authority not only in cases where the arrest takes place because of failure to appear in another district, but also for violation of any other condition of release. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee). A copy of the rule is at Appendix C.

Recommendation–The Advisory Committee recommends that the amendment to Rule 40 be approved and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

This amendment to Rule 41 authorizes magistrate judges to use reliable electronic means to issue warrants. This parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i), allowing the use of improved technology, and leaving what constitutes "reliable" electronic means to a court or magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix D.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

Rule 58(b)(2) governs the advice to be given to defendants at an initial appearance on a misdemeanor charge. The amendment eliminates a conflict with Rule 5.1(a) concerning a defendant's entitlement to a preliminary hearing. Instead of attempting to define in this rule when a misdemeanor defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix E.

Recommendation–The Advisory Committee recommends that the amendment to Rule 58 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM–Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

An amendment to Rule 41 which would provide procedures for tracking device warrants was recommended, published for public comment, reviewed by the Advisory Committee, and approved by the Standing Committee at its June 2003 meeting for submission to the Judicial Conference.

However, subsequent to that meeting the Department of Justice requested additional time to review the proposal. At the April 2005 meeting of the Advisory Committee, Ms. Rhodes stated that the Department had completed its review of the amendment and had no further recommendations for changes to it. In light of the clarification of the Department's position, there is no longer any need to defer submission to the Judicial Conference.

Appendix F contains the rule and committee note as approved by the Standing Committee at its June 2003 meeting, including changes proposed by the Style Committee.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM–Rule 6. The Grand Jury; Technical and Conforming Amendments.

This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

The Advisory Committee unanimously approved the proposal as a technical and conforming amendment, for which no publication and comment period would be necessary. The Rule and Committee Note are at Appendix G.

Recommendation–The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be approved and forwarded to the Judicial Conference.

IV. Action Items–Recommendations to Publish Amendments to the Rules

A. Summary and Recommendations

The Advisory Committee has considered amendments to a number of rules as well as a new rule to implement the E-Government Act, and it recommends that they be published for public comment. The rules are as follows:

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With these provisions excised, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 125 S.Ct. at 756. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere. The Committee approved this amendment by a unanimous vote. The rule and the accompanying Committee Note are at Appendix H.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be published for public comment.

2. ACTION ITEM–Rule 32(d)(2)(F), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

This amendment adapts the rule governing presentence reports to *United States v. Booker*, 125 S.Ct. 738 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). In light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included when required by the court. The Committee approved the amendment by a vote of 9 to 1. The rule and the accompanying Committee Note are at Appendix I.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(d)(2)(F) be published for public comment.

3. ACTION ITEM–Rule 32(h), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

This amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the guidelines on the basis of factors not identified in the presentence report or pleadings. The

proposed amendment provides that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or pleadings. The amendment refers to departures and "non-guidelines" sentences. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have constituted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory (including the terms "'non-Guidelines' sentence" and "variance"). As stated in the Committee Note, the amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court. After considerable discussion regarding the variations in terminology and the desirability of highlighting the distinction between departures and other non-Guidelines sentences, the Committee approved the amendment by a vote of 8 to 2. The rule and the accompanying Committee Note are at Appendix J.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(h) be published for public comment.

4. ACTION ITEM–Rule 32(k), Sentencing and Judgment; Proposed Amendment Regarding Use of Judgment Form Prescribed by Judicial Conference.

This amendment, which requires the court to enter judgment using the form prescribed by the Judicial Conference, is also a part of the package of rules responding to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). The Committee was advised that a proliferation of local forms is impeding the Sentencing Commission's efforts to collect accurate sentencing data and to assist Congress in understanding how the courts are responding to the *Booker* decision. The Judicial Conference Criminal Law Committee is presently developing a new judgment form that will facilitate the collection of useful and accurate sentencing data, and the adoption of this amendment would ensure that all courts use the prescribed form. The Committee approved the amendment by a unanimous vote. The rule and the accompanying Committee Note are at Appendix K.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(k) be published for public comment.

5. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), holding that the guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the guidelines do not currently include provisions governing the correction of sentences under Rule 35, the amendment removes the rule's language that seems, on its face, to be inconsistent with the ruling in *Booker*. The Committee approved the amendment by a vote of 9 to 1. The rule and the accompanying Committee Note are at Appendix L.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 35 be published for public comment.

6. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D). The amendment of the Civil Rule has been approved by the Judicial Conference and is pending before the Supreme Court. The proposed amendment to Rule 45 tracks the language of the civil rule. The Committee approved the amendment by a unanimous vote. The rule and the accompanying Committee Note are at Appendix M.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be published for public comment.

7. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes a provision regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1

because they are governed by procedural rules recently restyled by the Criminal Rules Committee. Rule 49.1 exempts actions under §§ 2254, 2255, and 2241 from the redaction requirements because, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. The Committee approved the new rule by a unanimous vote. The rule and the accompanying Committee Note are at Appendix N.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be published for public comment.

V. Information Items

Three subjects discussed at the April 2005 meeting will be on the agenda of the Advisory Committee's October 2005 meeting, with a view towards bringing proposals to the Standing Committee in 2006.

1. Information Item–Consideration of an Amendment to Rule 29, Concerning Deferral of Rulings on Motions for Judgment of Acquittal.

This subject has a rather long history which this report will review very briefly before turning to recent developments. The Department of Justice supports an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information demonstrated the frequency of preverdict acquittals, and selected case studies showed the serious impact that erroneous and unreviewable preverdict acquittals have had on the administration of justice. Deputy Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a

rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

On the basis of this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that it would be necessary to substantially redraft several provisions, and expressed concern that there was little time before the Standing Committee meeting to perfect the language. There was a consensus that if a final version of the proposed rule was not yet available, a draft rule would be presented to the Standing Committee at its June 2005 meeting for informational purposes.

Appendix O contains a draft rule that takes account of the discussion at the April meeting of the Advisory Committee. The Department of Justice and other members of the Advisory Committee have not yet had a chance to comment on this version. The draft will be further refined by the subcommittee and presented at the Advisory Committee's October 2005 meeting.

2. Information Item–Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

In October 2003, the American College of Trial Lawyers submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The issue has been under consideration by the Advisory Committee since that time. It has been the subject of review at the subcommittee level and extensive discussions at meetings of the full committee. Additionally, the Department of Justice and the Federal Judicial Center prepared materials to assist the Committee. At the Advisory Committee's April 2005 meeting, the discussion culminated in a vote of 8 to 3 in favor of proceeding with an amendment to Rule 16. The Department of Justice opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. Addressing this concern, proponents of the proposal noted that the Jencks Act, 18 U.S.C. § 3500 will continue to govern prior statements by prosecution witnesses, deferring disclosure until

the witness has testified. It is anticipated that a draft amendment to Rule 16 will be presented at the Advisory Committee's October 2005 meeting.

3. Information Item–Consideration of Rules Affected by Crime Victims' Rights Act

In October 2004, Congress passed and the President signed into law the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, 118 Stat. 2261 (codified as 18 U.S.C. § 3771). The CVRA guarantees crime victims notice of court hearings, the right to attend those hearings, and the opportunity to be heard at appropriate points in the process. After the passage of the CVRA, the amendment to Rule 32 that extended allocution rights to victims was withdrawn. A subcommittee has been appointed to begin the process of drafting amendments to the rules to implement the CVRA. The subcommittee will be aided in its work by a draft law review article by Judge Paul Cassell, which proposes specific amendments to the rules. The subcommittee will report to the Advisory Committee at its October meeting.

APPENDIX A

RULE 5. Initial Appearance

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

*New material is underlined; matter to be omitted is lined through.

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, ~~a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

Subdivisions (c)(3)(C) and (D). The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

SUMMARY OF PUBLIC COMMENTS ON RULE 5.

The committee received only two written comments on Rule 5. One supported the amendment. The other stated that the rule should make clear that non-certified photocopies are not reliable electronic means.

Mr. Frank W. Dunham, Esq. (04-CR-001)
Federal Public Defender
Alexandria, VA
November 29, 2004

Mr. Dunham believes that the rule should make it clear that non-certified photocopies are not reliable electronic means.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in the courts, and agrees that the term "reliable electronic form" includes facsimilies, which no longer need to be referred to in the rule.

GAP REPORT—Rule 5

The Committee made no changes in the Rule and Committee Note as published. It considered and rejected the suggestion that the rule should refer specifically to non-certified

photocopies, believing it preferable to allow the definition of reliability to be resolved at the local level. The Committee Note provides examples of the factors that would bear on reliability.

APPENDIX B
Rule 32.1. Revoking or Modifying Probation or Supervised Release

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

*New material is underlined; matter to be omitted is lined through.

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, ~~a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

Subdivisions (c)(3)(C) and (D). The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

SUMMARY OF PUBLIC COMMENTS ON RULE 5.

The committee received only two written comments on Rule 5. One supported the amendment. The other stated that the rule should make clear that non-certified photocopies are not reliable electronic means.

Mr. Frank W. Dunham, Esq. (04-CR-001)
Federal Public Defender
Alexandria, VA
November 29, 2004

Mr. Dunham believes that the rule should make it clear that non-certified photocopies are not reliable electronic means.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in the courts, and agrees that the term "reliable electronic form" includes facsimilies, which no longer need to be referred to in the rule.

GAP REPORT—Rule 5

The Committee made no changes in the Rule and Committee Note as published. It considered and rejected the suggestion that the rule should refer specifically to non-certified

photocopies, believing it preferable to allow the definition of reliability to be resolved at the local level. The Committee Note provides examples of the factors that would bear on reliability.

APPENDIX C

Rule 40. Arrest for Failing to Appear in Another District

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena, the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that

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*New material is underlined; matter to be omitted is lined through.

person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Subdivision (a). Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g.*, *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

SUMMARY OF PUBLIC COMMENTS ON RULE 40

The committee received only one written comment on Rule 40, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in terms of the acceptance of electronic filings.

GAP REPORT—Rule 40

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

APPENDIX D

Rule 41. Search and Seizure

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means. ~~appropriate means, including facsimile transmission.~~

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

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*New material is underlined; matter to be omitted is lined through.

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

* * * * *

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and

must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~ magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modifications.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to

modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

(D) Signing the ~~Original Warrant and the Duplicate Original~~ Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

* * * * *

COMMITTEE NOTE

Subsections (d) and (e). Rule 41(e) has been amended to permit magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to

require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

SUMMARY OF PUBLIC COMMENTS ON RULE 41

The committee received only one written comment on Rule 41, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology when it comes to the reliability of electronic transmission of information. This rule clarifies procedures and avoids unnecessary effort on the part of magistrate judges, who must, for example, currently enter the contents of a proposed duplicate original which has been read to them over the telephone.

GAP REPORT—Rule 41

The Committee made no changes in the Rule and Committee Note as published for comment.

APPENDIX E

Rule 58. Petty Offenses and Other Misdemeanors

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(G). Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

SUMMARY OF PUBLIC COMMENTS ON RULE 58

The committee received only one written comment on Rule 58, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment.

GAP REPORT—Rule 58

The Committee no changes to the Rule or Committee note after publication.

APPENDIX F

Rule 41. Search and Seizure

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) Definitions. The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is

issued but might move or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ with authority in any district in which activities related to the terrorism may have occurred, ~~may~~ has authority to issue a warrant for a person or property within or outside that district.; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ***~~Probable Cause~~ In General.*** After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record—must issue the warrant if

there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~ the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution

at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause

expressly authorizes installation at another time; and

(iii) return the warrant to the ~~magistrate~~ judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.***

* * * * *

(not modified - should not be underlined)

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on ~~its face~~ it the exact date and time it is was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in

the presence of at least one other credible person.

~~(3)~~(C) *Receipt.* The officer executing the warrant must: ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ leave a copy of the warrant and receipt at the place where the officer took the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it—together with the copy of the inventory —to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the date and time the device was

exact

installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the ~~magistrate~~ judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the ~~magistrate~~

judge may delay notice as provided in 41(f)(3).

(3) ***Delayed Notice.*** Upon request ~~of the government~~, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's

home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into a area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g. United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate must issue the warrant. And the warrant is only needed if the device is installed (for example in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate designated in the warrant, within 10 calendar days after use of

the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to

delay any notice required in conjunction with the issuance of any search warrants.

SUMMARY OF PUBLIC COMMENTS ON RULE 41.

The Committee received seven written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
Atlanta, Georgia
December 2, 2002

Judge Feldman suggests that the Committee consider further amendments to Rule 41 regarding warrants used to obtain electronic records from providers of electronic communications services. He attaches a written inquiry from one of colleagues pointing out a number of questions that are likely to arise in such cases.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judge's Association generally supports the proposed amendments to Rule 41. But the Association believes that either the rule itself or the committee note should be changed to clarify whether a separate warrant is needed to enter constitutionally protected property to install the device. The Association states that the current rule and note are not clear on that point, and believe that as written, unnecessary litigation will result.

Mr. Kent S. Hofmeister (02-CR-014)
President, Federal Bar Association
Dallas, Texas
February 14, 2003

The Federal Bar Association approves of the amendments to Rule 41, noting that they fill a void.

Mr. Saul Bercovitch (02-CR-015)
Staff Attorney
State Bar of California's Committee on Federal Courts
December 14, 2003

The Committee on Federal Courts for the State Bar of California generally approves of the proposed amendments to Rule 41. But it raises two points that it believes should be addressed. First, the amendments do not clarify what the probable cause finding must be made upon, or whether a showing less than probable cause will suffice.

Second, the rule does not address the consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Jaso, on behalf of the Department of Justice, offers several suggested changes to the proposed amendments to Rule 41. First, the Department is concerned that the language in Rule 41(d) might be read to require that a warrant is required anytime a tracking-device is installed; he suggests alternative language. Second, he states that some members of the Appellate Chiefs Working Group recommend deletion of the requirement that the installation occur during daylight hours. And third, he recommends a change to Rule 41(f)(2)(C), which permits delayed notification following execution of a tracking device; he believes that it would be better to delete the "good cause shown" language, and simply cross reference Rule 41(f)(3), which is the general provision dealing with delayed notice.

Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in (b)(4) are ambiguous. Third, NADCL also suggests

that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

GAP REPORT--RULE 41

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note

delay any notice required in conjunction with the issuance of any search warrants.

SUMMARY OF PUBLIC COMMENTS ON RULE 41.

The Committee received seven written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
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December 2, 2002

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Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
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February 14, 2003

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Second, the rule does not address the consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
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Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

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that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

GAP REPORT–RULE 41

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APPENDIX G

Rule 6. The Grand Jury

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) Exceptions.

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the

government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal ~~Federal~~, state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties

subject to any limitations on the unauthorized disclosure of such information. Any state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information ~~only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue information~~ only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

* * * * *

(7) ***Contempt.*** A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence

~~pursuant to~~ under Rule 6, may be punished as a contempt of court.

COMMITTEE NOTE

Subdivision (e)(3) and (7). This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change in intended.

APPENDIX H

Rule 11. Pleas

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing guideline range ~~apply the~~

*New material is underlined; matter to be omitted is lined through.

~~Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

COMMITTEE NOTE

The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

APPENDIX I

Rule 32. Sentence and Judgment

APPENDIX I

Rule 32(d)(2)(F). Sentencing and Judgment

PROPOSED AMENDMENTS FOR THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) Applying the Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

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*New material is underlined; matter to be omitted is lined through.

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

COMMITTEE NOTE

The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act

"makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Amended subsection (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

APPENDIX J

Rule 32(h). Sentencing and Judgement

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 32. Sentencing and Judgment

* * * * *

(h) Notice of Intent to Consider Other Sentencing Factors. Before the court may ~~depart from the applicable sentencing range~~ rely on a ground not identified ~~for departure~~ either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence ~~such a departure~~. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence.

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*New material is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a "non-guideline" sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. *Compare United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to "non-Guidelines" sentence), *with United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term "variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

APPENDIX K

Rule 32(k). Sentencing and Judgement

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 32. Sentencing and Judgment

* * * * *

(k) Judgment.

(1) In General. The court must use the judgment form prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence, including the statement of reasons required by 18 U.S.C. § 3553(c). If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

COMMITTEE NOTE

The amendment is intended to standardize the collection of data on federal sentences by requiring all courts to enter their judgments, including the statement of reasons, on the forms prescribed by the

*New material is underlined; matter to be omitted is lined through.

Judicial Conference of the United States. The collection of standardized data will assist the United States Sentencing Commission and Congress in their evaluation of sentencing patterns following the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The *Booker* opinion cast no doubt on the continuing validity of 18 U.S.C. § 3553(c), which requires the sentencing court to provide "the court's statement of reasons, together with the order of judgment and commitment" to the Sentencing Commission.

APPENDIX L

Rule 35. Correcting or Reducing a Sentence.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 35. Correcting or Reducing a Sentence.

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

* * * * *

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. ~~:~~

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

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*New material is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Subsection (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

APPENDIX M

Rule 45. Computing and Extending Time

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may ~~to~~ act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~.

COMMITTEE NOTE

Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate

*New material is underlined; matter to be omitted is lined through.

Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added – Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

APPENDIX N

Rule 49.1 Privacy Protection For Filings Made with the Court

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 49.1 Privacy Protection For Filings Made with the Court

(a) **Redacted Filings.** Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, a financial account number or the home address of a person may include only

(1) the last four digits of the social-security number and tax-identification number;

(2) the minor's initials;

(3) the year of birth;

(4) the last four digits of the financial account number, and

*New material is underlined; matter to be omitted is lined through.

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement of Rule 49.1 (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, a financial-account number or real property address that identifies the property alleged to be subject to forfeiture;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to (a) when originally filed;

(5) a filing covered by (c)of this rule;

(6) a filing made in an action brought under 28 U.S.C. §§ 2254 or 2255;

(7) a filing made in an action brought under 28 U.S.C. § 2241 that does not relate to the petitioner's immigration rights;

(8) a filing in any court in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case;

(9) an arrest or search warrant;

(10) a charging document and an affidavit filed in support of any charging document.

(c) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(d) Protective Orders. If necessary to protect private or sensitive information that is not otherwise protected under subdivision (a), a court may by order in a case (1)

require redaction of additional information, or (2) limit or prohibit remote access by nonparties to a document filed with the court.

(e) Option for Additional Unredacted Filing Under Seal. A party making a redacted filing under (a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for Filing a Reference List. A filing that contains information redacted under (a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.

(g) **Waiver of Protection of Identifiers.** A party waives the protection of (a) as to the party's own information to the extent that the party files such information not under seal and without redaction.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (e) provides that the court can order in a particular case require more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived

from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (g) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the

courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation).

The privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d).

APPENDIX O

Rule 29. Motion for Judgment of Acquittal

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 29. Motion for a Judgment of Acquittal

(a) Motion Made Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense. ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.~~ If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision.

(1) In General. Except as provided in Rule 29(b)(2).

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*New material is underlined; matter to be omitted is lined through.

and (c)(2), the court must proceed with the trial, submit the case to the jury, and reserve its decision on the motion until after the jury returns a verdict. ~~The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.~~ If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.

(2) ***Granting Motion Before Verdict.*** The court may grant the motion with regard to some or all

charges—or with regard to some or the defendants—before the jury returns a verdict, if:

(A) the court places the defendant under oath and informs the defendant personally in open court that a pre-verdict ruling granting the motion would normally deprive the government of the right to appeal that ruling on Double Jeopardy grounds, but that the defendant may waive that constitutional protection; and

(B) after being so informed, the defendant waives his Double Jeopardy rights--for this purpose only--on the record and in writing.

(c) Motions Made After Jury Verdict or Discharge.

(1) Time for a Motion. Within 7 days after a guilty verdict, or after the court discharges a jury because it cannot agree on a verdict, a defendant

may move for a judgment of acquittal, or renew such a motion, or the court may on its own motion consider a judgment of acquittal. ~~A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.~~

(2) Ruling on the Motion.

After the jury has returned a guilty verdict, the court must set aside the verdict and enter an acquittal, if the evidence is insufficient to sustain the guilty verdict. If the jury has been discharged because it cannot agree on a verdict with regard to some or all of the charges—or to some or all of the defendants--the court may enter an acquittal as to

some or all defendants or charges if the evidence is insufficient to sustain a conviction and:

(A) the court places the defendant under oath, and informs the defendant personally in open court that a ruling granting the motion after the jury has been unable to reach a verdict would normally deprive the government of the right to appeal that ruling on Double Jeopardy grounds, but that the defendant may nonetheless waive that constitutional protection; and

(B) after being so apprised, the defendant waives his Double Jeopardy rights—for this purpose only--on the record and in writing. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a

verdict, the court may enter a judgment of acquittal.

(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

COMMITTEE NOTE

Rule 29 provides that a court may acquit a criminal defendant on its own or on defendant's motion either before the jury returns a verdict, after a hung jury, or after the jury returns a guilty verdict. Although the government may appeal a Rule 29 acquittal in the latter case, it cannot appeal from a Rule 29 acquittal in the first two situations. *United States v. Ball*, 163 U.S. 662, 672 (1896); *Fong Foo v. United States*, 369 U.S. 141 (1962); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). The Double Jeopardy Clause prohibits such appeals because, unlike the case where a jury has returned a verdict and an acquittal is then granted by the court, a pre-verdict acquittal does not provide a readily available verdict to reinstate if the acquittal is overturned on appeal. Without this verdict, a defendant would have to stand trial once again. *See* Richard Sauber and Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewable Ability of Directed Judgments of Acquittal,* 44 AM.U.L.REV. 433, 451 (1994); 18 U.S.C. § 3731.

As originally drafted, Rule 29 permitted an anomaly: orders disposing of entire prosecutions or counts without any possibility of appellate review. *See* Sauber & Waldman, *supra.* This anomaly arose because the Government had no statutory authority to appeal a judgment of acquittal--whether rendered before or after a guilty verdict—when Rule 29 was promulgated. *See United States v. Sisson*, 399 U.S. 267 (1970). In 1971, however, Congress enacted a new Criminal Appeals Act permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; *see United States v. Martin Linen Supply Co., supra*. 430 U.S. at 568. In enacting § 3731, "Congress intended to remove all statutory barriers to Government

appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson,* 420 U.S. 332, 337-38 (1978). Although "Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal," id., Rule 29 acted as a non-constitutional bar to Government appeals by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal.

This anomaly was partially remedied by the 1994 amendment to Rule 29, which permitted the court to reserve until after the guilty verdict its decision on a motion for judgment of acquittal, thus rendering its decision appealable. The current amendment completes the process begun by the 1994 amendment and makes the permitted practice the required practice.

Allowing for appeal of Rule 29 preverdict acquittals serves a number of important functions. It assists the search for the truth by allowing the correction of errors, helps assure uniformity, and strengthens the public perception that the system is fair and accountable. *See* Sauber and Waldman, *supra*, at 452-53. Moreover, the ability to appeal serves the public's interest in fully prosecuting persons who have committed crimes and may prevent the release of persons who pose a danger to the public. *See* Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND.L.REV. 353, 370-71 (1998).

Rule 29(b). Originally, the Committee considered an amendment to Rule 29 that would have required the trial court to reserve ruling on the motion until after the verdict, in order to provide the government with the ability to appeal in all cases. That proposal, however, presented competing concerns. Granting a pre-

verdict acquittal would permit the court to relieve the defendant of unnecessary adjudication, including the burden and possible self-incrimination from presenting a defense, and yet provide a check on the government's power to bring unwarranted charges against a defendant. *See generally* Sauber and Waldman, *supra* at 458-60.

Rule 29(b)(1). That proposal, however, failed to address two key issues: (1) the appropriate procedure where there is a hung jury and the court determines an acquittal is proper and (2) the appropriate procedure where there are multiple defendants and/or counts and the court determines that certain of those defendants and/or counts should be eliminated.

The amendment attempts to resolve those issues using a "waiver." The amendment permits the court to rule on the motion before a verdict is returned, if the defendant, after being advised of the options, waives Double Jeopardy protections, as spelled out in Rule 29(b)(2) and Rule 29(c)(2).

Rule 29(b)(2). Under amended Rule 29(b)(2) the court may rule on the motion before the verdict with regard to some or all of the charges, or with regard to some or all of the defendants, if the defendant is first placed under oath and after being apprised in open court of the protections of the Double Jeopardy Clause, waives those protections on the record and in writing.

Rule 29(c)(2). Similarly, under amended Rule 29(c)(2), after a jury has returned a verdict of guilty, the court must enter a judgment of acquittal if the evidence is insufficient to support the verdict. If, however, the jury has not been able to reach a verdict as to some counts or some defendants, the court may enter a judgment of acquittal if the defendant is first placed under oath, and after being apprised in open court of his Double Jeopardy

rights, waives those rights on the record and in writing as to the charges in question.

Constitutional rights, including Double Jeopardy objections, can be waived by an accused. *United States v. Bascaro,* 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of Double Jeopardy defense). Although there are few cases on the question of expressly waiving Double Jeopardy protections, one case, *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986); *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988), is instructive. In *Kington I and II*, the defendants made a motion to suppress, but the court did not consider the motion until after the jury had been empaneled and sworn. *Kington II,* 835 F.2d at 107. The court granted the motion, but only after the defendants agreed to waive Double Jeopardy so that the government would be allowed to appeal. *Kington I,* 801 F.2d at 735-36. The government appealed the decision, and the Fifth Circuit found jurisdiction to review the appeal under § 3731 because defendants had waived their Double Jeopardy objections. Id. The court further stated that the hearing regarding the motion to suppress had been conducted without the jury in attendance and that the judge, not the government, had proposed that defendants waive their rights. Id. The Fifth Circuit reversed the district court judge's determination on the motion to suppress, and the defendants challenged the sufficiency of their waiver of Double Jeopardy rights in a second case. *Kington II,* 835 F.2d at 107. The court reviewed the trial transcript where the defendants had agreed to waive their rights, found the waiver to be effective, and rejected the defendants' contention that the terms of the waiver were not broad enough to authorize the retrial of the case. Id. at 108-09.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United*

States v. Morgan, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences."). Therefore, while there are cases holding that defendant's action or inaction can waive Double Jeopardy, the Committee believes that it was appropriate to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (where consent order did not specifically state waiver of Double Jeopardy rights, no such waiver existed); *Morgan*, 51 F.3d at 1110 (civil settlement with the government not waiver of claim of Double Jeopardy defense where settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation of his actions).

The Committee believes that placing the defendant under oath, conducting a colloquy in open court, and then reducing the defendant's waiver to writing will help ensure that the defendant will appreciate the significance of the waiver, and also provide a reviewing court with an evidentiary basis in the case of any later challenge to the waiver. Rules 11(b) and 23(a) served as models for the waiver procedures. Rule 11(b) provides that before accepting a plea of guilty, the court may place the defendant under oath and must conduct, in open court, a plea colloquy that is intended to ensure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights. Rule 23(a) requires that a defendant who wishes to waive the right to trial by jury must do so in writing. In addition, there is general agreement that the better practice to ensure that the defendant understands the implications of the waiver of a jury trial is to conduct an oral on-the-record colloquy. *See generally* 25 MOORE'S FEDERAL PRACTICE, §623.04[c][3] (3d ed. 1997); 2 CHARLES ALAN WRIGHT, NANCY KING, & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE, § 372 (3d ed. 2004).

[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 4 & 5, 2005
Charleston, South Carolina

The Advisory Committee on the Federal Rules of Criminal Procedure met at Charleston, South Carolina on April 4 and 5, 2005. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Bucklew, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 4, 2005. The following persons were present for all or a part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Robert H. Edmunds, Jr.
Prof. Nancy J. King
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee, Mr. Christopher Wray, Assistant Attorney General of the Department of Justice; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Sara Sun Beale, Duke University School of Law, Consultant to the Committee and Reporter Designate; Mr. Bob McCallum, Department of Justice; and Ms. Laurel Hooper, Federal Judicial Center. Professor Dan Capra, Reporter to the Evidence Rules Committee, participated for a portion of the meeting by telephone.

Judge Bucklew welcomed a new member, Judge Edmunds, an Associate Justice of the Supreme Court of North Carolina, who replaced Judge Reta Struhbar. Judge Bucklew also noted that this would be the last official meeting for Judge Friedman, Mr. Campbell, who had completed six years of valuable service to the Committee. She also announced that the Reporter, Dave Schlueter, was completing 17 years of service and that his replacement would be Professor Sara Sun Beale.

II. APPROVAL OF MINUTES

Judge Trager moved that the minutes of the Committee's meeting in Santa Fe, New Mexico in October 2005, be approved. The motion was seconded by Judge Battaglia and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES PENDING BEFORE THE SUPREME COURT

A. Report on Rules Amendments from Chief, Rules Committee Support Office.

Mr. Rabiej informed the Committee that as part of the on-going consideration of proposed rules to the various rules of procedure, there was a growing concern from the practicing bar about possible inconsistencies between those rules, concerning various timing provisions. To that end, Judge Levi had appointed a committee, chaired by Judge Kravitz, to consider amending the rules to simplify timing requirements and make them as consistent as possible. He noted that Mr. Robert Fiske, a member of the Criminal Rules Committee, had been asked to be a member of Judge Kravitz's committee.

He also reported that the Appellate, Bankruptcy, and Civil Rules Committee were reviewing the comments from the bench and the bar on the proposed amendments to those rules that would permit courts to require electronic filings. He stated that several commentators had recommended including exceptions for pro se filings. He expected those committees to make their report to the Standing Committee at its June 2005 meeting. The Criminal Rules Committee had decided at its Fall 2004 meeting not to propose any amendments to the Criminal Rules, and instead rely upon the incorporation provision in Criminal Rule 49(d).

B. Rule Amendments Effective December 1, 2004.

The Reporter informed the Committee that the package of amendments approved by the Supreme Court in May 2004, (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35), had become effective on December 1, 2004, without any changes by Congress.

C. Proposed Amendments Pending Before the Supreme Court.

The Reporter also mentioned that the following rules were currently pending before the Supreme Court:

1. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.

2. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court On Motions to Extend Time for Filing Motions Under Those Rules.

3. Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.

4 Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

5. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

D. Proposed Amendments to Rules Which Have Been Published for Public Comment.

Judge Bucklew and Professor Beale informed the Committee that the following rules had been published for comment, that the comment period had ended on February 15, 2005, and that a few comments had been received on the proposed changes.

1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means.

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means.

3. Rule 40. Arrest for Failing to Appear in Another District. Proposed Amendment to provide authority to set conditions for release where the person was arrested for violating conditions set in another district.

4. Rule 41. Search and Seizure. Proposed amendment permits transmission of search warrant documents by reliable electronic means.

5. Rule 58. Petty Offenses and Other Misdemeanors. Amendment to make it clear that Rule 5.1 governs when a defendant is entitled to a preliminary hearing.

The Committee briefly discussed a comment received from Mr. Frank Dunham, a Federal Public Defender, concerning the fact that the proposed amendment to Rule 5 would permit a magistrate judge to accept a non-certified electronic copy of a warrant. In his view, the rule should state that such copies are not "reliable electronic means." The Committee decided to make no further changes to Rule 5.

Following additional brief discussion on several style changes proposed by the Standing Committee's Style Subcommittee, Judge Jones moved that all of the published rules be forwarded to the Standing Committee with a recommendation that they be forwarded to the Judicial Conference. Judge Bartle seconded the motion, which carried with a unanimous vote.

IV. REPORTS OF SUBCOMMITTEES[1]

A. Rules 11, 32, and 35; *Booker-FanFan* Package of Rules.

Judge Bucklew reported that following the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005) (holding that Sentencing Guidelines are advisory and not mandatory), she had asked Judge Friedman to chair a subcommittee to study the question of whether that case required any amendments to the Criminal Rules. Also serving on that Subcommittee were Judge Trager, Mr. Campbell, Professor King, and Ms. Rhodes.

Judge Friedman stated that Professors Beale and King had reviewed all of the Criminal Rules and had compiled a list of rules that they believed should probably be amended. The Subcommittee, in a series of telephone conference calls had reviewed the list and based upon those discussions, Professor Beale had drafted proposed amending language to Rules 11, 32, and 35, along with proposed language for accompanying Committee Notes. The Subcommittee, he added, believed that strong arguments existed for amending those three rules at this time.

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[1] Although several items on the agenda were discussed in an order different from that indicated in the published agenda — in order to accommodate the scheduled of several of the participants — they are reported here in the order in which they appeared on that agenda.

1. Rule 11(b)(1)(M) (advice to defendant regarding application of sentencing guidelines).

Professor Beale explained the purpose of the proposed amendment to Rule 11, which included a provision recognizing that the court is to "calculate" the sentence under the Sentencing Guidelines and also specifically referenced 18 USC § 3553(a). In the discussion on the amendment, several members questioned whether the word "calculate" was appropriate, noting that some judges may not believe that they are required to calculate any sentences following the Court's decision in *Booker*. Other members stated that for now, the rules should recognize two separate steps in determining a sentence. There was also a brief discussion on whether it was necessary to specifically include a reference to § 3553. Following additional brief discussion, Judge Bartle moved that the amendment be approved, as drafted. Judge Friedman seconded the motion which carried by a unanimous vote. Following the vote, Judge Friedman informed the committee that he and Professor Beale would consider using terms other than "calculate."

2. Rule 32(d)(2)F). Additional Information in Presentence Report.

Judge Friedman explained that the Subcommittee had recommended a change to Rule 32(h) to provide that the presentence report must also contain anything relevant to the factors listed in § 3553(a). During the brief discussion on this proposed amendment, Mr, Campbell expressed the concern that probation officers might be reluctant to include any additional information in the presentence report if the court does not explicitly require its inclusion. Judge Friedman moved that the amendment be approved and that it be published for comment. Judge Trager seconded the motion, which carried by a vote of 9 to 1.

3. Rule 32(h). Notice of Possible Departure from Sentencing Guidelines.

Judge Friedman explained that the Subcommittee had discussed whether it might be advisable to delete Rule 32(h) in its entirety but had ultimately decided to leave it in, at least for now. He added that the *Booker* decision should not really make any difference in the notice requirement. Judge Friedman explained that the Subcommittee had proposed two alternatives: The first version would make a distinction between "variances" and "departures." The second version would make no distinction. Professor Beale observed that some courts had used the term "variance" but that the Criminal Law Committee had rejected that term. During the following discussion, the Committee decided to use the first alternative, with some minor changes, which included using the term "non-guideline sentence" instead of the term "variance."

Judge Friedman moved that the amendment be approved with a recommendation that it be published for comment. Professor King seconded the motion, which carried by an 8 to 2 vote.

4. Rule 32(k). Judgment.

Judge Friedman explained that the Subcommittee believed it was appropriate to amend Rule 32(k) to provide that when entering a judgment, the court should use whatever forms had been approved by the Judicial Conference. The purpose of the amendment is to standardize the collection of data on federal sentences. Following a brief discussion, Judge Friedman moved that the amendment be approved and published for comment. Professor King seconded the motion, which carried by a unanimous vote.

5. Rule 35(b). Reducing a Sentence for Substantial Assistance.

Judge Friedman and Professor Beale explained that the proposed amendment to Rule 35, which would delete (b)(1)(A) and (B) because those provisions assume that the sentencing guidelines are mandatory — a principle rejected by the Supreme Court in *Booker*. Judge Friedman moved that the amendment be approved and published for comment. Judge Trager seconded the motion, which carried by a vote of 10 to 1.

B. Rules 11 and 16; Proposed Amendment Regarding Disclosure of Brady Information;

Mr. Goldberg, chair of the Rule 16 Subcommittee, reported that the Subcommittee had continued its study of the proposal from the American College of Trial Lawyers, to the effect that Rule 16 should be amended to require the government to disclose to the defense evidence that could be favorable to the defendant. The issue had been initially discussed at the Committee's May 2004 meeting and then again at the Committee's October 2004 meeting. As a result of those discussions, the Subcommittee had continued its study of the proposal and had considered a study conducted by the Federal Judicial Center and a report from the Rules Committee Support Staff, which detailed the various local rules that already addressed the issue. He reported that following additional discussion, the Subcommittee had decided to delete the "materiality" requirement from any proposed rule. He added that Ms. Rhodes had provided a memo detailing the Department of Justice's opposition to an amendment to Rule 16.

He emphasized that the amendment would not codify *Brady* and that the proposed amendment would not address the issue in *Ruiz*, regarding disclosure of information before entering a guilty plea.

A majority of the Subcommittee, he said, supported some sort of amendment to Rule 16. He noted that the Subcommittee had decided not to propose a 14-day requirement in the amendment.

Professor Beale commented that the Committee was faced with a policy decision — whether more evidence should be disclosed pre-trial. Mr. Fiske stated that because prior inconsistent statements and other impeachment evidence could be important, it was critical to have that information soon enough in the process to use it effectively.

Judge Edmunds noted that people have been taken off of death row because prosecutors failed to disclose evidence and that the issue before the Committee was an important one.

Ms. Rhodes expressed two key concerns about the proposal; timing and materiality. She pointed out that on multiple occasions the Committee had considered amendments to Rule 16, and that each time the Committee had considered reciprocal discovery provisions. She also stated that the Committee had considered the so-called Brady proposal on several previous occasions and had decided, for a variety of reasons, not to tackle the problem through a rule amendment. She pointed out that it is often difficult to distinguish between inculpatory and exculpatory evidence and that Rule 16 already provides adequate discovery in several significant respects, for example, with regard to documents and test results. She also raised concerns about the potential impact of the proposed amendment on the Jencks Act requirements.

Mr. Fiske agreed that if there is a conflict between disclosure of favorable information and the Jencks Act that the latter controls.

Ms. Rhodes explained that currently the Department has not reached any decision about whether to address this problem in the U.S. Attorneys' Manual and that any amendment to Rule 16 should contain a materiality requirement.

Professor Schlueter pointed out that the Committee had consider the topic in the past, but that it had never really studied the issue to the extent it had been studied in this instance. He also observed that although there were instances of reciprocal discovery in Rule 16, that was not part of a long-range plan and that it had occurred on a case by case basis. In some instances, he noted, the Department had agreed to a change in Rule 16 if the defense was also required to disclose information.

There was also some discussion about whether an amendment to Rule 16 would require the government to shoulder the burden of proof on appeal if the defendant alleged a violation of the discovery requirement. Judge Friedman observed that the Subcommittee had apparently addressed the three main issues — Jencks, timing, and materiality.

Following additional brief discussion about the particular language of an amendment to Rule 16, Mr. Goldberg moved that the Committee proceed with the amendment to Rule 16. Mr. Fiske seconded the motion, which carried by a vote of 8 to 3.

C. Proposed New Criminal Rule 49.1 to Implement E-Government Act.

Judge Bucklew reported that the Rule 49.1 Subcommittee, chaired by Judge Bartle, had reviewed the proposed template for what would be new Rule 49.1 and had considered a number of issues raised during the Committee's discussion of that rule at the Fall 2004 meeting. Judge Bartle stated that the Subcommittee had considered the proposed changes to the template and generally approved of those changes.

Professor Capra (participating by telephone) pointed out that the provision in Rule 49.1(a)(5) concerning redaction of the city and state of the home addresses would be unique to the criminal version of the rule. Professor King questioned whether the redaction requirement should also extend to specific street addresses as well, at least in some cases. Ms. Rhodes responded that it would be difficult to limit such disclosure in some cases and not others.

There was also some discussion on the need in Rule 49.1(b)(1) regarding an exception to the redaction requirement, in criminal or civil forfeiture proceedings, for information about the address for real property.

Members of the Committee also focused on Rule 49.1(b)(6) concerning information relating to § 2254 and § 2255 proceedings and the provision in Rule 49.1(b)(7) regarding § 2241 proceedings not relating to immigration cases. The Committee decided to amend the Committee Note to expressly state that disclosure in immigration cases would be covered in the civil rules version of the rule.

As a result of additional discussion, the Committee decided to delete any reference in the rule to "criminal case cover sheets."

Judge Bartle moved that the revised Rule 49.1 be approved and published for public comment. Mr. Campbell seconded the motion, which carried by a unanimous vote.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Rules 4 Arrest Warrant or Summons on a Complaint; Proposal to Amend Rules.

Judge Bucklew stated that the Committee had received materials from Professor Malone at William and Mary University School of Law. She had proposed that the Committee amend Rules 4 and 5 to implement the requirements of the Vienna Convention on Consular Relations, which requires that foreign citizens are to be advised of their right to contact their country's consulate when they are served with an arrest warrant or are arraigned. Professor Beale noted that the issue is currently before the Supreme Court. Following brief discussion, Professor King moved that the proposal be

tabled until the Committee's next meeting. Judge Battaglia seconded the motion, which carried by a unanimous vote.

B. Rule 6. Grand Jury; Technical Amendments

Judge Bucklew informed the Committee that as a result of congressional action on Rule 6, the question had been raised whether those amendments should be restyled to conform to the Committee's earlier proposed amendments to the same rule. Mr. Rabiej explained that the proposed amendments were strictly technical and conforming in nature that it would normally not be necessary to publish the proposed changes for public comment. Following brief discussion, Judge Battaglia moved that the amendments be made and forwarded to the Standing Committee with a recommendation that they be sent to the Judicial Conference, without being published for comment. Professor King seconded the motion, which carried by a unanimous vote.

C. Rule 10. Arraignment; Proposal to Amend Rule to Permit Defendant to Waive Arraignment.

Judge Bucklew informed the Committee that Judge James McClure had written to the Committee, recommending an amendment to Rule 10 that would permit the defendant to waive the arraignment. Several members noted that during the recent restyling project the Committee had considered a similar proposal but had decided not to permit a waiver of the arraignment itself, because several rules make the arraignment a triggering event. Following a brief discussion, Professor King moved that the proposal be tabled until the next meeting. Judge Battaglia seconded the motion, which carried by a unanimous vote.

D. Rule 16. Discovery and Inspection and Rule 32. Sentencing; Proposal to Amend.

Judge Bucklew informed the Committee that Mr. James Felman had proposed that Rules 16 and 32 be amended. Specifically, he recommended that Rule 32 be amended to require that a party providing information to the court regarding sentencing, should be required to provide the opposing party with the same information. With regard to Rule 16, he recommended that the rule require the government and defendant to produce all documents, tangible materials, etc. that it intends to use at sentencing. During the ensuing discussion, there was a consensus that no amendments should be made to Rule 16 and that there are already adequate discovery mechanisms and requirements in Rule 32. The Committee decided not to pursue the proposals any further.

E. Rule 29. Motion for Judgment of Acquittal; Proposal to Amend Rule to Require Deferment of Ruling.

Judge Bucklew provided an overview of the status of a proposal from the Department of Justice to amend Rule 29, to require that in all cases, that court would be required to defer a ruling on a motion for a judgment of acquittal until after verdict. She explained that the Committee at its meeting in Fall 2003 had approved the amendment in concept, but at the Spring 2004 meeting had decided not to pursue the amendment; at that time the information available to the Committee seemed to indicate that there was no compelling need for an amendment. As a result, the Committee had not had an opportunity at that meeting to consider a possible compromise amendment that would have permitted the court to defer those rulings, if the defendant first waived his or her double jeopardy protections.

At the Standing Committee's January 2005 meeting, the Department renewed its concerns about the need for an amendment to Rule 29, and presented additional information to that Committee. Following discussion, the Standing Committee asked the Criminal Rules Committee to again consider any appropriate amendments to Rule 29 and to present those amendments to the Standing Committee with a recommendation to publish, or not publish, the amendments.

She noted that Professor Schlueter had prepared a rough draft of proposed amendments to Rule 29, which would incorporate the waiver concept first proposed by Judge Levi, chair of the Standing Committee, in Spring 2004. Professor Schlueter stated that he included a requirement for an in-court colloquy between the court and the defendant concerning the possible implications of the Double Jeopardy Clause; he added that the draft Committee Note drew heavily from a detailed memo prepared by Ms. Brooke Coleman, a judicial clerk for Judge Levi.

Mr. Christopher Wray thanked the Committee for its consideration of the rule and expressed how important the rule was to the Department, and in particular to the United States Attorneys who had initially proposed the rule change. He pointed out the additional new information available to the Committee, which he believed, further demonstrated the need for an amendment. In his view, the amendment would be a modest remedy for a major problem. He cited several cases where the judge had clearly made an erroneous ruling in granting the defense motion for acquittal, without leaving any possibility for a government appeal. He pointed out that in 1994, the Committee had amended Rule 29 to encourage judges to defer ruling on such motions, until after verdict and that this amendment would simply require what that amendment had encouraged.

Mr. Wray cited a number of statistics to support the argument that it would be safely assumed that in many of the cases in which a court had granted the motion pre-verdict, that had there been an appeal, the appellate courts would have reversed the decision in a significant number of cases. He noted that the Department was open to suggestions for addressing those problems.

Mr. Goldberg stated that he was concerned that an amendment might unnecessarily burden defendants who should be entitled to a judgment of acquittal. And

Judge Bucklew noted that originally the Committee had been concerned about any amendment which would jeopardize the ability to manage the case. Judge Jones raised a jurisdictional question in the context of a case where the defendant agrees to a pre-verdict ruling on some counts, the courts grants the motions on those counts but the case proceeds on the remaining counts. He questioned whether an appellate court have jurisdiction to consider a government appeal on the counts on which the trial court had ruled. Judge Friedman responded that the Committee Note could reflect the view that the trial could continue with regard to the remaining counts. Mr. Wray noted that most criminal trials only last a matter of days so that it would not be likely that Judge Jones' scenario would be a common one.

Mr. Campbell stated that he was still opposed to any amendment and expressed doubt about the statistical information relied upon by the Department, regarding the projected reversal rate in un-appealable Rule 29 cases. He added that there are other non-appealable, dispositive motions, that a court may grant, in which the government is also not entitled to appeal. He also noted that if the rule contained a waiver provision, the defendant would still be exposed to the possibility of a second trial.

Judge Bucklew questioned whether any amendment could adequately address the issue of a hung jury. Judge Trager generally agreed and raised the issue of what would be the best practice concerning hung jury situations. In his view, if the jury cannot reach a verdict, the judge should dismiss the indictment.

Following additional discussion, Judge Friedman suggested that perhaps the best approach would be to require that the judge defer ruling in all cases in which a substantial number of counts or defendants would be affected. Judge Jones agreed with that approach, but Mr. Wray stated that that proposal would raise a number of different problems. Professor Schlueter questioned how the rule might address the definition of "substantial."

Judge Bucklew stated that it might be helpful to conduct a straw poll on where the Committee stood on the proposals. Eight members favored some change to Rule 29, while three members opposed any change.

Concerning the proposal to include a waiver provision in the amendment, nine members favored that approach and two members opposed that approach.

During the following discussion about the draft proposal, it was generally decided that the defendant's waiver of his Double Jeopardy rights would not need to be in writing. Additional suggested changes in the language were proposed. Professors Schlueter and Beale stated that based upon those suggestions, another draft would be prepared.

Judge Kravitz stated that he did not believe that the Standing Committee was necessarily expecting a final draft at the June 2005 meeting, if the Criminal Rules

Committee believed it would be important to have additional time to consider the amendments to the draft.

Judge Bucklew responded that if more time was in fact needed to refine the amendment and the Committee Note, the Criminal Rules Committee could nonetheless present a draft amendment as an information item for the Standing Committee's June meeting.

F. Rule 41. Search and Seizure; Status of Amendments Concerning Tracking Device Warrants.

Judge Bucklew provided brief background information on the amendment to Rule 41, which would provide procedures for tracking-device warrants: The rule had been recommended, published for public comment in 2002, reviewed by the Criminal Rules Committee at its Spring 2003 meeting and also approved by the Standing Committee at its June 2003 meeting. Following that meeting, however, the Department of Justice had asked for, and received, additional time to review the proposal. Since then, however, no further action or report had been submitted by the Department.

Ms. Rhodes stated that the Department had completed its review of the amendment and that it had no further recommended changes to the rule. She noted that the originally the Department had been concerned that the amendment would require warrants in all cases, but that upon further review of the amendment and the accompanying note, was satisfied that the rule did not so require.

Judge Bucklew responded that she would include that information in her report to the Standing Committee along with a recommendation to forward the Rule 41 amendment to the Judicial Conference.

G. Rule 45. Computing and Extending Time; Amendment to Provide for Extending Time for Filing.

Judge Bucklew explained that Judge Carnes, former chair of the Committee, had recommended that the Committee consider amending Rule 45 to parallel a recent amendment to Civil Rule 6, to make it clear that the three-day extension provided in the rule, is to be added after the prescribed period for filing stated in the rules. Professor Beale stated that the proposed amendment to Rule 45 closely tracked the civil rule. She added that a similar provision had been included in the Appellate Rules as well. Following brief discussion, Professor King moved that the amendment be approved with a recommendation that it be published for public comment. Judge Battaglia seconded the motion, which carried with a unanimous vote.

H. Rules Affected by Victims' Rights Act.

Judge Bucklew informed the Committee that Judge Cassell (Dist. Utah) had provided extensive materials on proposed amendments to a number of criminal rules, which he believe were required by the recent Victims' Rights Act. She reminded the Committee that it had approved an amendment to Rule 32 extending victim allocution rights, but that it had been withdrawn once the Act was passed. During the discussion which followed, she stated that she would appoint a subcommittee to consider the effect of the Act on the criminal rules.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew stated that the Committee would be meeting in the San Francisco area on October 24 and 25, 2005.

The meeting adjourned at 10:30 a.m. on Tuesday, April 5, 2005

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

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

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 16, 2005**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 28, 2005, in Phoenix, Arizona. At the meeting the Committee approved proposed amendments to Evidence Rules 404(a), 606(b) and 609; subsequently the Committee conducted an electronic vote and approved an amendment to Evidence Rule 408. The Evidence Rules Committee recommends that the Standing Committee approve each of the proposed amendments and forward them to the Judicial Conference. Part II of this Report summarizes the Committee's approval of the four proposed amendments. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for each of the proposed amendments to the Evidence Rules.

Part III of this Report provides a summary of the Committee's long-term project on the privileges. A complete discussion of all current Committee matters can be found in the draft minutes of the April 2005 meeting, attached to this Report.

II. Action Items

1. Recommendation To Forward the Proposed Amendment to Evidence Rule 404(a) to the Judicial Conference

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule Rule 404(a). This amendment is made necessary because of a long-standing conflict in the circuits over whether character evidence can be offered to prove conduct in civil cases. This circuit split has caused disruption and disuniform results in the federal courts. The question of the admissibility of character evidence to prove conduct arises frequently in cases brought under 42 U.S.C § 1983, so an amendment to the Rule will have a helpful impact on a fairly large number of cases.

After careful consideration over a number of years, the Evidence Rules Committee has concluded that character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide. Moreover, an amendment prohibiting the circumstantial use of character evidence in civil cases is in accord with the original intent of Rule 404, which was to permit character evidence circumstantially only when offered in the first instance by the "accused." The reference is clearly to a criminal defendant, indicating an original intent to prohibit the circumstantial use of character evidence in civil cases.

Only a few public comments were received on the proposed amendment. Most were positive, and the ones that were critical mistook the proposal as one that would affect character evidence when offered to prove a character trait that is actually in dispute in the case (e.g., in a case brought for defamation of character). Rule 404(a) by its terms does not apply when character is "in issue", and the proposed amendment does not change that fact. Another comment argued that the amendment might create the inference was no longer applicable to civil cases. While Committee members did not believe such an inference could fairly be derived from the amendment, the Committee resolved to add a sentence to the Committee Note to express the point that nothing in the amendment was intend to affect the admissibility of evidence under Rule 404(b). The Committee unanimously determined that no changes to the text of the proposed amendment were warranted by the public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a) be approved and forwarded to the Judicial Conference.

2. Recommendation To Forward the Proposed Amendment to Evidence Rule 408 to the Judicial Conference

Federal courts have long been divided on three important questions concerning the scope of Rule 408, the rule prohibiting admissibility of statements and offers during compromise negotiations when offered to prove the validity or amount of the claim:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

Over a number of meetings, the Committee unanimously agreed that Rule 408 should be amended to 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The reason for the former amendment is that a broader impeachment exception is likely to chill settlement negotiations, as the parties may fear that anything they say could somehow be found inconsistent with a later statement at trial. The reason for the latter amendment is that a rule permitting a party to admit its own statements and offers in compromise could result in the strategic manufacturing of evidence, and also could lead to attorneys having to testify about just what statements and offers were made in alleged compromise.

The remaining issue–whether compromise evidence should be admissible in criminal cases–has been the subject of extensive discussion at Evidence Rules Committee meetings over a number of years. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence

needed in a criminal case to prove that the defendant had committed a crime. But other Committee members argued that any rule permitting compromise evidence to be admitted in a criminal case would deter the settlement of civil cases.

Eventually a compromise was reached that distinguished between statements made in settlement negotiations (admissible in a subsequent criminal case) and the offer or acceptance of the settlement itself (inadmissible in a subsequent criminal case if offered to prove the validity or amount of the claim). It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. In such cases the settlement itself should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities. At the April 2004 meeting, a majority of the Committee voted to release a proposed amendment to Rule 408 that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

The public comment on the proposed amendment to Rule 408 was negative. Criticisms included: 1) the rule would deter settlement discussions; 2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case; 3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations; 4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and 5) it would raise a problematic distinction between protected offers and unprotected statements and conduct—a distinction that was rejected as unworkable when Rule 408 was originally enacted. The public comment supported a rule providing that statements as well as offers and acceptances made during compromise negotiations are never admissible in a subsequent criminal case when offered to prove the validity or amount of the claim.

At the April 2005 meeting, most of the Evidence Rules Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the comment was misguided. He made the following points: 1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; 2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; 3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case—the primary example being a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; 4) the rule preferred by the public comment would allow

a defendant to make a statement in compromise and later testify in a criminal case inconsistently with that statement, free from impeachment.

Extensive discussion ensued in response to the DOJ representative's presentation in favor of the proposed amendment as issued for public comment. Several committee members were sympathetic to the government's position that statements of fault made to government regulators would provide critical evidence of guilt in a subsequent criminal prosecution. They noted, however, that the government's concerns did not apply to statements made in compromise between private parties. The practicing lawyers on the Committee noted that it was often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred to the government and used as an admission of guilt, it is highly likely that such an apology would never be made, and many cases could not be settled. In light of this concern, a compromise provision was proposed that would permit statements in compromise to be admitted as evidence of guilt, *but only when made in an action brought by a government regulatory agency.*

Committee members recognized that the proposed compromise would require some work on the language of the proposal, as well as work on the Committee Note. The Committee therefore resolved to allow the Reporter to prepare language that would permit statements of compromise to be admitted in criminal cases only when made in an action brought by a government regulatory agency. That language would be reviewed by the Chair and if the Chair approved, the proposal could be sent out for an electronic vote by the Committee members. On May 9, 2005 a proposed amendment to Rule 408 was sent electronically to all Committee members. That proposal would permit statements of compromise to be admitted in criminal cases only if made in cases brought by a government regulatory agency. An e-mail vote was taken and the proposed amendment was approved by a 5-2 vote.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 408, as modified after public comment, be approved and forwarded to the Judicial Conference.

3. Recommendation To Forward the Proposed Amendment to Evidence Rule 606(b) to the Judicial Conference

Evidence Rule 606(b) generally prohibits parties from introducing testimony or affidavits from jurors in an attempt to impeach the jury verdict. Federal courts have established an exception to the rule that permits juror proof on certain errors in rendering the verdict, even though there is no language permitting such an exception in the text of the Rule. But the circuits have long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by

the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

The Evidence Rules Committee has determined that an amendment to Rule 606(b) is necessary in order to bring the case law on the rule into conformance with the text of the Rule, and, more importantly, to clarify the breadth of the exception for mistakes in entering the verdict.

The proposed amendment to Rule 606(b) that was released for public comment in 2004 added an exception permitting juror testimony or affidavit when offered to prove that "the verdict reported is the result of a clerical mistake." The Committee determined that a broader exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broader exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

Only a few public comments were received on the proposed amendment to Rule 606(b). The comments were largely positive; but one comment contended that the term "clerical mistake" was vague and could be interpreted to provide an exception for juror proof that was broader than that intended by the Committee, as the Committee intended to provide an exception only in those limited cases in which the jury's decision was inaccurately entered onto the verdict form.

For the April 2005 meeting, the Committee considered language for the amendment to Rule 606(b) that was drafted by the Reporter in response to the public comment. This language was intended to sharpen and narrow the "clerical mistake" exception that was released for public comment. The language permitted juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form." Committee members unanimously agreed that this language was an improvement on the language of the amendment that was released for public comment. The Committee approved the amendment to Rule 606(b), as modified, with one member dissenting.

The Committee Note to the proposed amendment emphasizes that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 606(b), as modified after public comment, be approved and forwarded to the Judicial Conference.

4. Recommendation To Forward the Proposed Amendment to Evidence Rule 609 to the Judicial Conference

Evidence Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 609(a)(2) for release for public comment. The amendment was intended to resolve the long-standing conflict in the courts over how to determine whether a conviction involves dishonesty or false statement within the meaning of that Rule. The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

One possible way to amend the rule is to provide a definition of crimes involving dishonesty or false statement by looking only to the elements of the conviction. This is the rule favored by most commentators—and initially by most members of the Evidence Rules Committee—on the ground that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts. Finally, if a crime not involving false statement as an element (e.g., murder or drug dealing) is found inadmissible under Rule 609(a)(2), it is still likely to be admitted under the balancing test of Rule 609(a)(1). Thus, the costs of an "elements" approach would appear to be low–all that is lost is automatic admissibility.

The Department of Justice, while agreeing that Rule 609 should be amended, has opposed a strict "elements" test. The Department has emphasized that it is not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

After extensive discussion over several meetings, the Committee as a whole determined that there was no real conflict within the Committee about the basic goals of an amendment to Rule 609. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness. Therefore, a compromise was thought appropriate.

The proposal released for public comment provided for automatic impeachment with any conviction "that readily can be determined to have been a crime of dishonesty or false statement." The public comment on the proposed amendment was largely negative. Public commentators generally favored a strict "elements" test. They contended that anything broader would lead to difficulties of application and the very kind of mini-trial into the facts of a conviction that the Committee sought to avoid. Public comments also noted that the term "crime of dishonesty or false statement" was undefined, and that this would lead to disputes in the courts over its meaning.

At the April 2005 meeting Committee members considered the public comment. The Department of Justice remained opposed to a strict "elements" test for Rule 609(a)(2). The DOJ representative did not disagree, however, with Committee members' comments that the term "crime of dishonesty or false statement" should be clarified to provide courts and counsel with a better indication of when it is permissible to go behind the elements of the conviction. After extensive discussion, the Committee agreed that the language of the proposed amendment be changed to provide for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." This language would permit some limited inquiry behind the conviction, but would provide for automatic admissibility only where it is clear that the jury had to find, or the defendant had to admit, that an act of dishonesty or false statement occurred that was material to the conviction. The language had the additional benefit of specifically encompassing convictions that resulted from guilty pleas.

The Committee discussed this alternative and all members agreed that it better captured what the Committee had agreed was necessary for an amendment to Rule 609(a)(2)—to limit enquiry behind the judgment to those cases where it can be determined easily and efficiently that an act of dishonesty or false statement was essential to the conviction. All members of the Committee — including the DOJ representative — were in favor of this change to the proposal issued for public comment. The Committee unanimously approved the proposed amendment as modified after public comment.

Recommendation — The Evidence Rules Committee unanimously recommends that the proposed amendment to Evidence Rule 609, as modified after public comment, be approved and forwarded to the Judicial Conference.

III. Information Item

Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee and the Reporter.

The Committee is also considering whether to propose a statute to cover the problem of unintentional waiver of privileged information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. The Committee is considering whether a proposed statute can be drafted to permit parties under certain circumstances to produce documents in discovery without risking subject matter waiver.

IV. Minutes of the April 2005 Meeting

The Reporter's draft of the minutes of the Committee's April 2005 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendments to Evidence Rules 404(a), 408, 606(b) and 609.
Draft minutes of April 2005 Evidence Rules Committee meeting

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations imposed by Rule

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*New matter is underlined and matter to be omitted is lined through.

412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

* * * * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which

was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of

evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused", the "prosecution" and a "criminal case", it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made to the text of the proposed amendment as released for public comment. A paragraph was added to the Committee Note to state that the amendment does not affect the use of Rule 404(b) in civil cases.

SUMMARY OF PUBLIC COMMENTS

Jack E. Horsley, Esq., (04-EV-001) states that the "thrust" of the proposed amendment is "well supported." He questions, however, whether the rule should be "enlarged" by stating that "an exception exists if the case involves the element of the person's character."

Professor Thomas J. Reed (04-EV-003) declares that the proposed change to Rule 404(a) would "do more harm than good" and if picked up by the states could result in the unintentional creation of a "rule that bars character evidence in civil actions where character evidence is routinely admitted, e.g., child custody cases."

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment to Rule 404(a), noting that it "reinforces the original intent of the Rule to prohibit the

circumstantial use of character evidence in civil cases" and "clarifies that Fed.R.Evid. 404(a)(2) is subject to the more stringent limitations of Fed.R.Evid. 412 regarding the use of character evidence of a victim."

Professor Peter Nicolas, (04-EV-010) contends that the amendment "might result in some confusion" as it might be construed to mean that Rule 404(b) applies only in criminal cases.

The State Bar of California's Committee on Federal Courts (04-EV-012) supports the proposed amendment to Rule 404(a), observing that "the use of character evidence carries serious risks of prejudice, confusion and delay" and therefore that "the exceptions applicable to the use of character evidence in criminal cases should not be extended to civil cases."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) is in favor of the proposed amendment.

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish, —or ~~(2)~~ accepting or offering or promising to accept, —a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim, except when made in compromise of a claim by a government regulatory agency and offered in a subsequent criminal case.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Permitted uses.—This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose,~~ ~~such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ; ~~negativing~~ negating a contention of undue delay~~,~~ ~~;or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read and apply. First, the amendment provides that Rule 408 does not prohibit the government from introducing statements or conduct of an accused made during compromise negotiations of a prior civil dispute between the accused and a government regulatory agency. *See, e.g.*, *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). When an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case

should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator, or even in certain circumstances with an attorney for the government under Rule 410.

Statements made in compromise negotiations of a government enforcement action may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered as an admission of the validity or amount of that claim. Where private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government regulator, has admitted the validity and amount of the civil claim, and that this admission has

sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity," "invalidity," or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.,* 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.,* 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). So for example, Rule 408 is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by

definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be admissible in subsequent criminal litigation only when made during settlement discussions of a claim brought by

a government regulatory agency. Stylistic changes were made in accordance with suggestions from the Style Subcommittee of the Standing Committee. The Committee Note was altered to accord with the change in the text, and also to clarify that fraudulent statements made during settlement negotiations are not protected by the Rule.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) is "dubious about allowing any conduct or statement made in compromise negotiations to be used in criminal cases." Judge Weinstein notes that a party will often be unsupervised by counsel "and may make statements for a variety of reasons that throw doubt on reliability."

Frank W. Dunham, Jr., Esq., (04-EV-004), a Federal Public Defender, states that it should be made clear within the Rule "that statements made by a representative or agent of a party in an attempt to settle a claim are never admissible against the party in any context, civil or criminal."

Professor Lynn McClain (04-EV-006) is opposed to the "compromise" taken in the proposed amendment as it was released for public comment, that would have prohibited settlements from admissibility in criminal cases, but would have permitted statements made during the settlement to be admissible in such cases. He states that "the compromise in the proposed Rule, by having a foot in each court, achieves neither full encouragement of settlement nor full-out prosecutions."

The Federal Magistrate Judges Association (04-EV-007) "does not support the proposed amendment which would bar for use *only in civil cases* the conduct or statements of a party made in compromise negotiations." The Association states that "there is nothing in the

materials provided that demonstrates" that exclusion of settlement statements from a criminal trial "is a serious problem in connection with the Justice Department's efforts to ferret out crime." The Association also notes that the amendment as it was released for public comment would have hampered "the efforts of civil litigants' legal counsel and those serving as mediators to successfully resolve civil disputes during the course of settlement negotiations."

The Law Firm of Cunningham, Bounds, Yance, Crowder and Brown, L.L.C., (04-EV-008) opposed the proposed amendment to Rule 408 as it was released for public comment, insofar as it would have permitted statements made in settlement negotiations to be admitted in subsequent criminal cases. The Firm noted that it is "hard to draw a line" between offers of compromise, which would not be admissible in criminal cases, and statements made during settlement negotiations, which would have been admissible under the proposed amendment as released for public comment. The Firm also noted that "[i]f a plaintiff or a defendant might be subject to criminal prosecution for anything he or she says or does during settlement negotiations, this new rule would have a tendency both to prevent such negotiations from taking place at all and to minimize their usefulness if they do occur."

Daniel E. Monnat, Esq., (04-EV-009) applauds the "wise decision" to limit the exception for impeachment evidence and to provide that compromises or offers to compromise are not admissible in criminal cases. But Mr. Monnat was opposed to the provision in the amendment as released for public comment that would have allowed all statements made in compromise negotiations to be admissible in a subsequent criminal case. Mr. Monnat argued that "[t]he same reasons that weigh in favor of this prohibition in civil cases weigh equally if not more strongly in favor of extending the prohibition to criminal cases." Mr. Monnat contended that statements

admitting criminal conduct, made during civil settlement negotiations, are questionable as evidence because "they may be made merely to encourage settlement, or may be demanded as a condition of settlement." He also was concerned that a "civil lawyer may not fully understand the criminal consequences of statements made during settlement negotiations" and that the proposed amendment as released for public comment placed "an additional burden on civil lawyers to anticipate and understand how their representation in a civil matter might leave their clients vulnerable to future criminal prosecution."

Professor David Leonard and 25 Signatory Law Professors (04-EV-011) opposed the amendment to Rule 408 as released for public comment, but only insofar as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. They noted that in this respect the proposed amendment would have had "a substantial chilling effect in certain types of disputes that often lead to criminal prosecution." The professors stated that under the amendment as released for public comment, even the statements of an attorney made during a settlement negotiation would have been admissible, as agency-admissions against the client in a subsequent criminal case. "The possibility that lawyer statements may be admissible against clients in subsequent criminal cases may chill lawyers in their civil representation, make civil case lawyers witnesses against their clients in criminal proceedings, and result in their inability to continue to represent their clients in any proceedings."

On other aspects of the proposed amendment, the professors state that "the Advisory Committee has made an appropriate choice in proposing to exclude compromise evidence when offered to impeach by contradiction or by prior inconsistent statement" and that "the Advisory Committee has most likely reached the most appropriate

conclusion in proposing to make clear that Rule 408 bars a party from offering evidence of its own settlement activity as well as that of its adversary." Finally, the professors support the deletion of the sentence referring to discoverable material, as that sentence is "unnecessary," and also support the other proposed stylistic changes to the Rule.

The Committee on Federal Courts of the State Bar of California (04-EV-012) supports the proposed amendment to Rule 408 as it was released for public comment. The Committee states that the amendment "would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized." The Committee believes that "the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements."

Professor Jeffrey S. Parker (04-EV-014) opposed the amendment to Rule 408 insofar as it would have permitted all statements made in settlement negotiations to be used in subsequent criminal cases. He stated that "[a]ttaching potential criminal liability to unguarded statements in settlement discussions discourages settlement even more than attaching civil liability, given the harshness of the criminal sanction." He also contended that "[t]he opportunities for ripping even hypothetical statements out of context, and then arguing inferences in the highly charged atmosphere of a criminal trial, are legion, and they will lead to abuses." Professor Parker argued that the amendment as released for public comment would have provided a trap for the unwary, as "unsophisticated parties will be entrapped by a staged atmosphere of amicability and conciliation."

Phil R. Richards, Esq., (04-EV-015) was "very concerned" with the proposed amendment to Rule 408 as it was released for public

comment, because that amendment would have authorized "the use of statements of fault made during settlement negotiations as evidence in a subsequent criminal case." He stated that "[d]uring settlement conferences and mediations, the candor of the parties is routinely encouraged through assurances that anything they say cannot be used outside of the settlement proceeding for any purpose. To then use statements made under such circumstances to establish the guilt of the party in a criminal proceeding is fundamentally unfair, and deprives them of the protections that are built in to the criminal justice system to insure that such admissions are not unwittingly made."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers ((04-EV-017) opposed the amendment to Rule 408 as released for public comment, insofar as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. The Committee contended that such an amendment would "reduce, not encourage compromise." The Committee questioned "whether conduct or a statement during settlement negotiations is any more reliable or probative of a criminal defendant's guilt than evidence of an offer or acceptance of settlement." It predicted that the result of such an amendment would be "a reversion to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid." The Committee also opined that the proposed amendment would have been inconsistent with other federal law that favors confidentiality of communications during settlement negotiations, such as the Alternative Dispute Resolution Act of 1998, and local rules governing court-sponsored mediation. The Committee is in favor of the other amendments to Rule 408, as they "further the larger purpose of the Rule which is to encourage compromise."

Professor James Duane (04-EV-018) was opposed to the proposed amendment to Rule 408 as it was released for public comment, as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. He argued that "the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations." He also contended that the amendment would have created problems in determining whether a party even made a certain statement during a settlement negotiation. Therefore, "cautious lawyers representing the defendant in any civil case — even in state court — will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal criminal charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argued that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

Rule 606. Competency of Juror as Witness

* * * * *

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror

~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in

capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.,* 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.,* 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the exception established by the amendment is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed.

1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Based on public comment, the exception established in the amendment was changed from one permitting proof of a "clerical mistake" to one permitting proof that the verdict resulted from a mistake in entering the verdict onto the verdict form. The Committee Note was modified to accord with the change in the text.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment. It notes that the amendment "addresses the incongruity between the Rule and case law" and that by limiting the exception to clerical error, it "preserves the sanctity of jury deliberations and the finality of jury verdicts." The Association notes that the proposed amendment does not prevent the court "from polling the jury and taking steps to remedy any obvious errors evidence from that poll."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 606(b) as it was released for public comment. The College agrees that the Rule should be amended to resolve a conflict in the case law over the scope of an exception for mistaken jury verdicts. But it argues that "the new rule's exception for 'clerical mistakes' is unclear, and even if that term's meaning can be divined by reference to the case law cited by the Advisory Committee, that meaning is not adequately clarified or justified." The College suggests that the term "inadvertence, oversight or mistake" should be substituted for "clerical mistake" in the proposed amendment as it was issued for public comment.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted, regardless of the punishment, if it readily can be determined that the elements of the crime, as

proved or admitted, required an act of dishonesty or false statement by the witness.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible

under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the*

Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125. S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant,

or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The language of the proposed amendment was changed to provide that convictions are automatically admitted only if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) opposes the amendment to Rule 609(a) as it was released for public comment. Judge Weinstein questions the fairness of expanding a conviction "beyond its operative elements." He contends that the amendment as originally proposed would "seriously disadvantage defendants in some cases."

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment to Rule 609(a). It notes that the intent of the amendment "is to clearly limit the Rule to the admission of convictions that only involve an act of dishonesty or false statement."

Professor Peter Nicolas (04-EV-010) contends that "notwithstanding the concerns expressed by the Justice Department," the Committee's "initial impulse — to draft an amendment that focused on the elements of the conviction — was a sounder approach than that followed in the proposed amendment" as it was issued for public comment. Professor Nicholas contends that "courts will no doubt differ on the meaning of the phrase 'readily can be determined,' leading to inconsistent application of the rule." He also argues that even under the stricter "elements" test, the cost is ordinarily not exclusion, "but merely the benefit of automatic admissibility." He concludes that if a crime somehow involved an act of dishonesty or false statement (but not an element), it is very likely to be admissible under the balancing test of Rule 609(a)(1).

Professor Jeffrey Parker (04-EV-014) states that the proposed amendment to Rule 609(a) as released for public comment was "unwise and unjustified" and "is likely to create satellite disputes over the reliability of the *crimen falsi* classification."

Professor Myrna Raeder and Twenty Signatory Law Professors (04-EV-016) oppose the amendment to Rule 609(a) as it was released for public comment, noting that "[w]hile the Committee Notes indicate that a mini-trial is not contemplated" to determine whether the crime is one of dishonesty or false statement, "any procedure that is not limited to statutory elements is likely to result in wide variation among trial courts." Professor Raeder argues that "issues of fairness and ease of administration" justify the need to

"confine proof of 609(a)(2) crimes to statutory elements." Finally, as to "the Justice Department's concern that some obstructions of justice may involve deceit, in a specific case this argument would likely be successful when made to the judge under 609(a)(1) test balancing whether the conviction's probative value outweighs its prejudicial effect to the accused. What 609(a)(2) provides is an automatic admit, which should be reserved for convictions where the statutory elements provide the necessary proof."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the proposed amendment to Rule 609(a)(2) as it was released for public comment. The Committee argues that the automatic admissibility mandated by Rule 609(a)(2) "should be interpreted narrowly and viewed with caution." It notes that the choice "is not between categorically admitted prior convictions under (a)(2) and excluding them entirely" because the court "retains broad discretion under Rule 609(a)(1) to admit virtually all prior felony convictions that are less than ten years old." The Committee "objects only to enlarging the cases in which the trial judge has no choice but to admit" a conviction. The Committee also expresses concern about the difficulty of learning the facts of the prior conviction and the "efficient use of judicial time." It notes that an "advantage of relying only on statutory criteria is that they can be quickly, easily, and objectively determined simply by referring to widely available reference sources."

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 28th, 2005

Phoenix, Arizona

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 28th 2005 in Phoenix, Arizona, with a subsequent electronic vote on a proposed amendment taken during the week of May 9-13.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Acting Chair
Hon. Andrew D. Hurwitz
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Thomas B. Russell, Liaison from the Civil Rules Committee
Robert Fisk, Esq., Liaison from the Criminal Rules Committee
Hon. Jeffrey L. Amestoy, former member of the Evidence Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

Opening Business

Judge Hinkle served as Acting Chair at the request of Judge Smith, who could not attend due to a death in the family. Judge Hinkle asked for approval of the minutes of the January 2005 Committee meeting. The minutes were approved.

Proposed Amendments to the Evidence Rules That Have Been Issued for Public Comment

The Standing Committee issued for public comment four proposed amendments to the Evidence Rules—Rules 404(a), 408, 606(b), and 609. At the April 2005 meeting, the Committee reviewed the public comments and considered whether the proposals should be approved as issued for public comment, approved as amended, or deferred.

1. Rule 404(a)

Over the course of several meetings the Committee tentatively agreed to propose an amendment to Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits have long been split over whether character evidence can be offered to prove conduct in a civil case. The question of the admissibility of character evidence to prove conduct arises frequently in cases brought under 42 U.S.C. § 1983, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it can lead to a trial of personality and can cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

At the Spring 2004 meeting, the Committee approved an amendment to Rule 404(a) to be released for public comment, and the Standing Committee released that proposal. Only a few public comments were received. Most were positive, and the ones that were critical mistook the proposal as one that would affect character evidence when offered to prove a character trait that is actually in dispute in the case (e.g., in a case brought for defamation of character). Rule 404(a) by its terms does not apply when character is "in issue", and the proposed amendment does not change that fact. Another comment argued that the amendment might create the inference was no longer applicable to civil cases. While Committee members did not believe such an inference could fairly be derived from the amendment, they resolved to add a sentence to the Committee Note to express the point that nothing in the amendment was intend to affect the admissibility of evidence under Rule 404(b).

A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be approved and sent to the Judicial Conference. The motion was approved by a unanimous vote. The proposed amendment is set forth in an appendix to these minutes.

2. Rule 408

Over the course of several meetings, Committee members determined that the courts have been long-divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the 2003 meetings, at the Spring 2004 meeting, and finally at the meetings of January and April 2005. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed a crime. The DOJ contended that if Rule 408 were amended to exclude such statements in criminal cases, then this probative and important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition

of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were essentially limited to statements of fault made in compromise negotiations; such direct statements of criminality might be relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. At the April 2004 meeting, a majority of the Committee voted to release a proposed amendment to Rule 408 that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

The public comment on the proposed amendment to Rule 408 was uniformly negative. Criticisms included: 1) the rule would deter settlement discussions; 2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case; 3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations; 4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and 5) it would raise a problematic distinction between protected offers and unprotected statements and conduct—a distinction that was rejected as unworkable when Rule 408 was originally enacted. The public comment supported a rule providing that both statements and offers made during compromise negotiations are never admissible in a subsequent criminal case when offered to prove the validity or amount of the claim.

At the April 2005 meeting, most of the Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the comment was misguided. He made the following points: 1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; 2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; 3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case—the primary example being a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; 4) the rule preferred by the public comment would allow a defendant to make a statement in compromise and later testify in a criminal case inconsistently with that statement, free from impeachment.

Extensive discussion ensued in response to the DOJ representative's presentation in favor of the proposed amendment as issued for public comment. Several committee members were

sympathetic to the government's position that statements of fault made to government regulators would provide critical evidence of guilt in a subsequent criminal prosecution. They noted, however, that the government's concerns did not apply to statements made in compromise between private parties. The practicing lawyers on the Committee noted that it was often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred to the government and used as an admission of guilt, it is highly likely that such an apology would never be made, and many cases could not be settled. In light of this concern, a Committee member proposed a compromise provision that would permit statements in compromise to be admitted as evidence of guilt, *but only when made in a civil action brought by a government regulatory agency.*

Committee members recognized that the proposed compromise would require some work on the language of the proposal, and moreover that it would be inappropriate to vote as a final matter on the compromise in the absence of the Chair. The Committee therefore resolved to allow the Reporter to prepare language that would permit statements of compromise to be admitted in criminal cases only when made in an action brought by a government regulatory agency. That language would be reviewed by the Chair and if the Chair approved, the proposal could be sent out for an electronic vote by the Committee members.

On May 9, 2005 the Committee Chair issued to the Committee for consideration a proposed amendment to Rule 408 that would permit statements of compromise to be admitted in criminal cases only if made in cases brought by a government regulatory agency. A motion to approve the amendment for consideration by the Standing Committee, with the recommendation that it be approved by that Committee and referred to the Judicial Conference, was made and seconded by e-mail. An e-mail vote was taken and the proposed amendment was approved by a 5-2 vote. The proposed amendment and Committee note are set forth in an appendix to these minutes.

3. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee, for release for public in 2004.

Committee members recognized the need for an amendment to Rule 606(b) because 1) all courts have found an exception to the Rule permitting juror testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule, and 2) the circuits have long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported

is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

The proposed amendment to Rule 606(b) that was released for public comment in 2004 added an exception permitting juror proof that "the verdict reported is the result of a clerical mistake." The Committee determined that a broader exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broad exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did. The Committee note to the proposed amendment emphasized that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled.

Only a few public comments were received on the proposed amendment to Rule 606(b). The comments were largely positive; but one comment contended that the term "clerical mistake" was vague and could be interpreted to provide an exception for juror proof that was broader than that intended by the Committee

For the April 2005 meeting, the Reporter prepared language for the amendment to Rule 606(b) in response to the public comment. This language was intended to sharpen and narrow the "clerical mistake" exception that was released for public comment. The language would permit juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form." Committee members unanimously agreed that this language was an improvement on the language of the amendment that was released for public comment.

A motion was made and seconded to approve an amendment to Evidence Rule 606(b) permitting juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form," together with the Committee Note. The motion was to recommend to the Standing Committee that the proposed amendment be approved and sent to the Judicial Conference. The motion was approved with one dissenting vote. The proposed amendment to Rule 606(b)is set forth in an appendix to these minutes.

4. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for

impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 609(a)(2) that was intended to resolve the long-standing conflict in the courts over how to determine whether a conviction involves dishonesty or false statement within the meaning of that Rule. The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

Throughout the Committee's consideration of Rule 609(a)(2), most Committee members have favored an "elements" definition of crimes involving dishonesty or false statement. These Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts. Finally, if a crime not involving false statement as an element (e.g., murder or drug dealing) is found inadmissible under Rule 609(a)(2), it is still likely to be admitted under the balancing test of Rule 609(a)(1). Thus, the costs of an "elements" approach would appear to be low–all that is lost is automatic admissibility.

The Department of Justice, however, has opposed a strict "elements" test. The DOJ representative on the Committee emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

The Department recognized that Rule 609(a)(2) is not the only avenue for admitting a conviction committed through deceit even though the elements do not require proof of receipt. Such a conviction could be offered under the Rule 609(a)(1) balancing test. But the Department's response was that Rule 609(a)(1) would not apply if the conviction is a misdemeanor; and moreover the balancing test of Rule 609(a)(1) might lead to a judge excluding the conviction even though it should really have been admitted under Rule 609(a)(2) (though there is little support for this latter argument

in the cases). The Department also recognized that the deceitful conduct could itself be admissible as a bad act under Rule 608(b). But the Department's response was that Rule 608(b) would not permit extrinsic evidence if the witness denied the deceitful conduct.

After extensive discussion over several meetings, the Committee as a whole determined that there was no real conflict within the Committee about the basic goals of an amendment to Rule 609. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The proposal released for public comment provided for automatic impeachment with any conviction "that readily can be determined to have been a crime of dishonesty or false statement." The public comment on the proposed amendment was largely negative. Public commentators generally favored a strict "elements" test. They contended that anything broader would lead to difficulties of application, and the very kind of mini-trial into the facts of a conviction that the Committee sought to avoid. Public comments also noted that the term "crime of dishonesty or false statement" was undefined, and that this would lead to disputes in the courts over its meaning.

At the April 2005 meeting Committee members considered the public comment. The Department of Justice remained opposed to a strict "elements" test for Rule 609(a)(2). The DOJ representative did not disagree, however, with Committee members' comments that the term "crime of dishonesty or false statement" should be clarified to provide courts and counsel with a better indication of when it is permissible to go behind the elements of the conviction. After extensive discussion, one Committee member agreed that more precise language was necessary to define and limit the potential scope of Rule 609(a)(2). A Committee member proposed that the language be changed to provide for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." This language would permit some limited inquiry behind the conviction, but would provide for automatic admissibility only where it is clear that the jury had to find, or the defendant had to admit, that an act of dishonesty or false statement occurred that was material to the conviction. The language had the additional benefit of specifically encompassing convictions that resulted from guilty pleas.

The Committee discussed this alternative and all members agreed that it better captured what the Committee had agreed was necessary for an amendment to Rule 609(a)(2)—to limit enquiry behind the judgment to those cases where it can be determined easily and efficiently that an act of dishonesty or false statement was essential to the conviction. All members of the Committee — including the DOJ representative — were in favor of this change to the proposal issued for public comment.

A motion was made and seconded to approve an amendment to Evidence Rule 609 (together with the Committee note) that would provide among other things for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." The motion was to recommend to the Standing Committee that the proposed amendment be approved and sent to the Judicial Conference. The motion was approved unanimously. The proposed amendment to Rule 609 is set forth in an appendix to these minutes.

Privileges

Professor Ken Broun, the consultant to the Evidence Rules Committee on the privileges project, reported on the status of the project. The goal of the privileges project is to prepare a document for publication. There is no intent to propose the codification of the federal law of privilege. For each privilege, the project will draft 1) a survey rule, equivalent to a restatement of the federal law of privilege; 2) commentary on the federal case law bearing on the respective privilege; and 3) a section addressing future developments and special issues such as circuit splits. The Committee has already reviewed the project's work on the medical privilege, which has been completed. The attorney/client privilege section of the report is virtually completed. Professor Broun presented for the Committee's review new material on the crime-fraud exception.

At previous meetings, Committee members noted a number of problems with the current law governing the waiver of privilege. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. Members observed that if there was a way to produce documents in discovery without risking subject matter waiver, the discovery process could be streamlined.

At the April 2005 Committee meeting, Professor Broun presented for the Committee's consideration a draft statute that would treat the question of inadvertent disclosure of privileged material. The Committee agreed to review the draft statute at the next meeting and consider whether to take action on the subject of waiver of attorney-client privilege. Judge Hinkle expressed his thanks to Professor Broun for all of his hard work on the privilege project.

Respectfully submitted,

Daniel J. Capra
Reporter

Judicial Conference Committee Chairs Long-Range Planning Meeting

March 14, 2005

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
MARCH 2005 LONG-RANGE PLANNING MEETING

The March 14, 2005 long-range planning meeting was held in Washington, D.C. It was facilitated by Chief Judge Michael Boudin, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by the chair and members of the Executive Committee, and chairs of 12 Judicial Conference committees. Also in attendance were: Administrative Office Associate Director Clarence A. Lee, Jr.; Deputy Associate Director Cathy A. McCarthy and Long-Range Planning Officer William M. Lucianovic, who provide principal staff support for the long-range planning process; and other Administrative Office staff. A list of participants is included as Appendix A.

Budget Outlook and Rent Relief

Judge Julia Smith Gibbons, chair of the Committee on the Budget, described the current outlook for the judiciary's budget request pending in Congress as very difficult. For FY 2006, the President's budget request provides only a 2.1 percent increase in overall discretionary spending, and a 0.6 percent decrease in non-homeland security, non-defense discretionary spending (the judiciary falls into this category). The judiciary's FY 2006 requested increase is 9.7 percent. The Budget Committee's view is that it is important that the budget request fully reflect the needs of the judiciary, even if it is likely that the eventual appropriation level will fall short of that request. For 2007-2010, the President has proposed a freeze in discretionary spending in order to meet deficit-reduction goals. Even if Congress does not adopt the President's plan, there is little doubt that the judiciary will continue to face difficulties in obtaining its requested funding levels.

Judge Gibbons showed a series of charts that examined different funding scenarios and their potential impact on the judiciary (see Appendix B). The charts indicate that, despite current cost-containment efforts that have reduced the judiciary's requirements, shortfalls will occur under reasonable funding scenarios. For example, Chart 1 shows that if the judiciary receives only a 3 percent increase in FY 2006, the potential shortfall in the Salaries and Expenses account will be slightly over $200 million (note: the increase in FY 2005 was 4.3 percent). If the judiciary received 3 percent annual funding increases thereafter, the gap between requirements and funding would grow to $489 million by FY 2009. Even if the judiciary were to receive 5 percent annual increases, there would be a sizeable gap (over $100 million per year) between estimated requirements and funding. Chart 2 depicts estimated staffing projections under various funding scenarios, which show shortfalls in the thousands between full-formula staffing requirements and the

staffing levels that could be funded. Judge Gibbons stressed that under any likely scenario, cost containment will continue to be very important.

Judge Gibbons stressed the need to continue to educate members of Congress and their staff on how the judiciary operates and inform them on the current budget crisis. To lead this effort, the Budget Committee created a Congressional Outreach Subcommittee in January 2005. Membership of the subcommittee aligns closely with the membership of the newly-reorganized congressional subcommittees. The subcommittee will work with Director Leonidas Ralph Mecham to build a judiciary-wide effort to secure additional resources from Congress.

Director Mecham noted the success of the judiciary's efforts to obtain sorely needed courthouse facilities over the last 20 years. Major renovations of aging and cramped courthouses and the construction of new courthouses have been top priorities for the judiciary. The rent bills for the new space are now choking us, however, because of the cutbacks in appropriations. He reported on efforts to reduce the judiciary's rent charges, which this year are $923 million. He illustrated the judiciary's situation with several charts (see Appendix C). Executive branch departments on average pay well under 1 percent of their budgets to the General Services Administration (GSA) for rent, and Congress pays only 0.56 percent, but the judiciary currently pays 22 percent of the Salaries and Expenses account to GSA for rent. This percentage will rise in the future as costs go up faster than the funds available. No other federal department or agency has been forced to make staffing reductions as drastic as the federal courts. Director Mecham described an effort by judiciary leaders to exempt the judiciary from the portion of rental payments dealing with capital-cost amortization (about $483 million), since all courthouses built since 1990 were funded with direct appropriations and not from the Federal Buildings Fund administered by GSA. To date, these efforts have not met with any success, but they are not finished.

Chief Judge Carolyn Dineen King, chair of the Executive Committee, noted that, while the short-term strategy is to convince GSA or OMB (or possibly Congress) to relax the capital-cost amortization component of rent charges, a long-term strategic goal (which would require careful study) might be for the judiciary to acquire administrative authority for the judiciary's building program.

Cost Containment

Judge Robert C. Broomfield, chair of the Budget Committee's Economy Subcommittee, said that a primary focus of the Economy Subcommittee is to coordinate the implementation of the cost-containment strategy developed by the Executive

Committee and approved by the Judicial Conference.[1] He observed that the committees are working hard on cost containment, and the subcommittee will continue to work with the chairs to assist in developing means by which the judiciary's work can be accomplished for less money.

Associate Director Clarence A. Lee, Jr. reported that there are 52 initiatives underway to implement the cost-containment strategy. A status report was distributed (Appendix D). He also spoke of the extraordinary effort to inform and involve the courts through advisory groups and other processes. Mr. Lee also noted that the cost-containment effort is demonstrating to Congress that the judiciary is working to save money.

Deputy Associate Director Cathy A. McCarthy described the extensive staff effort in the AO to support cost-containment initiatives. An implementation steering group of senior managers meets every two weeks to ensure coordination. A J-Net site is under development to make available judiciary-wide information on major initiatives, and to seek input and suggestions.

Future Impact of Technology

Chief Judge Michael Boudin facilitated a panel discussion about the future impact of technology in the courts. Judge James Robertson, chair of the Information Technology Committee; Chief Judge John W. Lungstrum, chair of the Court Administration and Case Management Committee; and Judge Marjorie O. Rendell, chair of the Bankruptcy Committee comprised the panel. Prior to the meeting, participants received discussion questions and an article by Judge Richard L. Nygaard (Third Circuit) describing a futuristic scenario about the federal courts in the year 2020 (Appendix E).

Noting that the panel discussion could not be more timely, Judge Robertson said the Information Technology Committee is working to enhance the long-range information technology plan that the judiciary sends to Congress each year. The objective is to make the plan more future-oriented and strategic in nature. Judge Robertson likened technology to a utility that supports the mission of an organization but does not have a mission of its own. He posed three questions about the future impact of technology for the judiciary:

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[1] *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond* was approved by the Judicial Conference on September 21, 2004.

- How remote, or virtual, do we want to be?
  Technology has made the courts more accessible and "user friendly" to litigants and the public. However, using technology to make the courts more transparent, consistent, and efficient must be balanced with the need to preserve the individual judge's discretion and the institutional dignity that is integral to the judicial system. In many cases, technology is rendering the distance between the court, litigants, and taxpayer irrelevant. Technology is fundamentally changing human interaction, and it is critical to preserve the "human face" of the courts in some fashion.

- Who's going to do the work?
  The impact of technology on daily life and the workplace can not be overstated. The service-based economy is rapidly becoming a self-service economy. The use of technology creates productivity gains in some areas – such as clerks' offices – but may shift the workload to others, such as attorneys or chambers.

- How uniform do we want to be?
  The judiciary's national information technology program delivers infrastructure and systems to the courts covering the mission-critical business areas, such as case management, finance, and communications. Information technology staff address specific needs at the local level. The key to success is achieving balance between the economies of scale and standardization with the need to allow for local variations in process and procedure.

Judge Lungstrum discussed the importance of considering how each technology can and will change how judges work. He noted three themes – productivity, efficiency, and responsibility – regarding the application of technology to judicial functions. He described how technology now allows him to be fully productive from home on days when there is no need to travel to the courthouse. He noted the importance of using the experiences of judges in looking for effective ways to use technology.

Judge Rendell also discussed the role of judges in adapting to technology and identifying future requirements. As judges have begun to work with technology, they have become leading forces for change. When CM/ECF was first installed in the bankruptcy courts, the initial focus was on ensuring that it performed clerks' functions. Because it would take several years before the system could be enhanced to incorporate new functions, judges have led local efforts to add calendaring functions, order signing, and other features to the base system that help judges do their work. Judge Rendell noted

that "judges showing other judges" was a potent device for spreading the use of technology. She suggested that judges need to play a more active role in planning and developing technological applications that will help them do their work more efficiently. Judge Rendell mentioned that she had contacted Judge Nygaard before the meeting, and he advised that "We can either react to events or reach out aggressively and guide them. I suggest using any technology that will assist us in our mission without compromising our goals."

The three panelists suggested that future technology efforts should be directed toward addressing judicial work. Melvin Bryson, Assistant Director for Information Technology, noted that when CM/ECF was first developed, although judges were involved, there were very few judges who were familiar with technology. Now that the basic case management systems have been installed, more judges can see what the systems can and cannot do. Now it is easier for judges to provide input on additional features they would find useful.

Other chairs added their perspectives. Judge Patti B. Saris, chair of the Defender Services Committee, noted that the issues of greatest concern regarding the use of technology in defender services are in discovery. The Defender Services Committee has been supporting efforts to seek the cooperation of the Department of Justice in providing electronic discovery materials to panel attorneys and federal defenders in a format that does not result in the unnecessary duplication of costs. Discovery volume and associated costs have risen, and panel attorneys and federal defenders have had to hire experts to review discovery materials in the formats provided. Judge Saris also urged that the judiciary protect privacy and safety in its use of technology.

Chief Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure, noted that his committee is addressing the redaction of personal identifier information, but one problem is that transcripts are handled differently in different courts. The Rules Committees have been addressing rule changes to accommodate technological change, but the speed of technological changes presents a challenge to the deliberative rulemaking process. He said that a concern is that technology may have facilitated discovery to such a great extent that in many cases there is so much information available that it is difficult to discern what is important.

Asked by Judge Boudin about the next major application of technology in the judiciary, Judge Robertson described the emerging field of knowledge management, which promises to give people the ability to do their work with ready access to related information. Many fields that employ "knowledge workers," including law firms, make extensive use of knowledge management techniques and tools.

Judge Boudin concluded that this discussion has planted seeds. Each committee should be contributing ideas about how technology can enhance judicial administration and promote efficiency.

Next Meeting

The next long-range planning meeting of committee chairs is scheduled for September 19, 2005.

Appendix A: Participants in the March 2005 Long-Range Planning Meeting

Committee Representatives	**Administrative Office Staff**
Planning Coordinator, Executive Committee	
Hon. Michael Boudin	Clarence A. Lee, Jr. Cathy A. McCarthy William M. Lucianovic Brian Lynch
Executive Committee	
Hon. Carolyn Dineen King, Chair Hon. Joel M. Flaum Hon. J. Owen Forrester Hon. Thomas F. Hogan Hon. David L. Russell Hon. John M. Walker, Jr. Leonidas Ralph Mecham, Director of the Administrative Office	Jeffrey A. Hennemuth Helen G. Bornstein
Committee on the Administrative Office	
Hon. Robert B. Kugler, Chair	Cathy A. McCarthy
Committee on the Administration of the Bankruptcy System	
Hon. Marjorie O. Rendell, Chair	Francis F. Szczebak Ralph Avery Kevin Gallagher Richard Goodier
Committee on the Budget	
Hon. Julia Smith Gibbons, Chair Hon. Robert C. Broomfield	George H. Schafer James R. Baugher Joseph (Sam) Shellenberger Michael V. (Mickey) Bork
Committee on Court Administration and Case Management	
Hon. John W. Lungstrum, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky
Committee on Criminal Law	
Hon. Sim Lake, Chair	John M. Hughes Kim M. Whatley

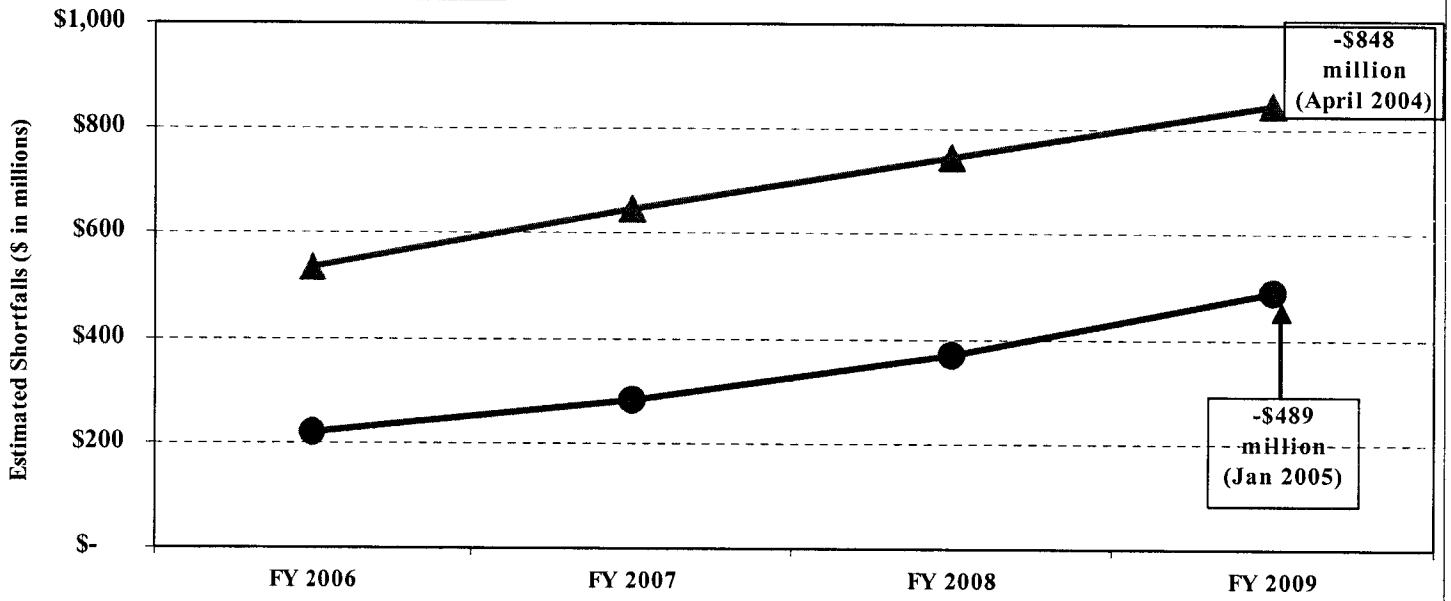
Committee on Defender Services Hon. Patti B. Saris, Chair	Theodore A. Lidz Steven G. Asin Richard A. Wolff Carole Cheatham
Committee on Federal-State Jurisdiction Hon. Howard D. McKibben, Chair	Karen M. Kremer
Committee on Information Technology Hon. James Robertson, Chair	Melvin J. Bryson Terry A. Cain Michel Ishakian
Committee on the Judicial Branch Hon. Deanell R. Tacha, Chair	Steven Tevlowitz
Committee on Judicial Resources Hon. W. Royal Furgeson, Jr., Chair	Charlotte G. Peddicord H. Allen Brown Beverly Bone
Committee on the Administration of the Magistrate Judges System Hon. Nina Gershon, Chair	Thomas C. Hnatowski Charles E. Six Kathryn Marrone
Committee on Rules of Practice and Procedure Hon. David F. Levi, Chair	Peter G. McCabe
Committee on Security and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman Melanie F. Gilbert Elizabeth A. McGrath Sandra J. Reese Linda Holz

Other Administrative Office staff in attendance:

Huddy Haller	Glen K. Palman
Peggy Irving	Mary M. Stickney
Barbara Kimble	Patrick J. Walker
Robert Lowney	Leeann R. Yufanyi
Lisa G. Marks	

The estimated shortfalls shown in the graph below exclude Judicial Conference-approved (but not yet authorized by Congress) Article III and bankruptcy judgeships. They include estimated GSA rental costs associated with 21 courthouse construction projects that add $102 million in rental payments by FY 2015. The projected fiscal year 2009 shortfalls would grow by $78 million if Congress authorizes the additional judgeships requested by the Judicial Conference.

Salaries and Expenses Account Estimated Shortfalls, FY 2006-FY 2009



Original estimated shortfalls (April 2004), pre-cost containment, assuming hard freeze in FY 2005, and 3% annual increases in FY 2006-2009

Revised estimated shortfalls, reflecting updated requirements, FY 2006 JCUS request and cost-containment actions, applying the final appropriation increase (4.3%) for FY 2005, and assuming 3% annual increases in FY 2006-2015.

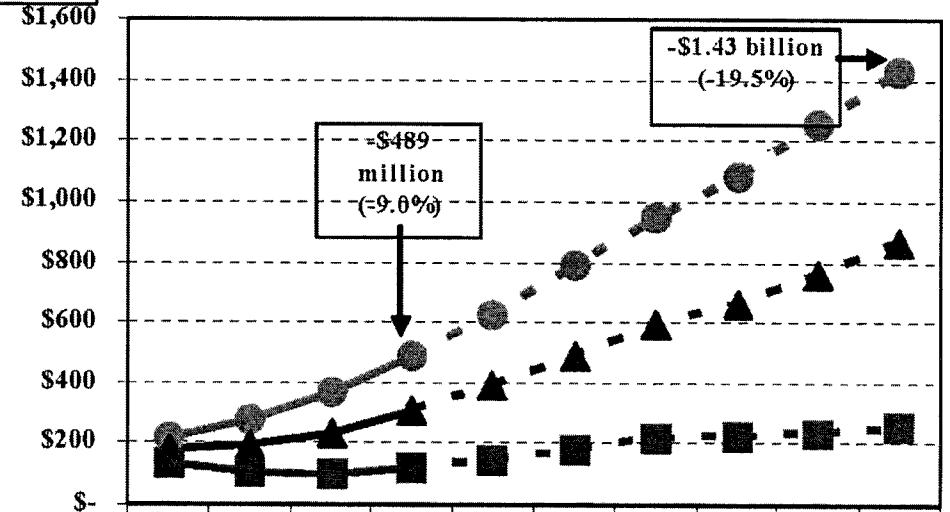
Chart 2

The estimated shortfalls shown in the graph below do not include Judicial Conference-approved (but not yet authorized by Congress) Article III and bankruptcy judgeships and courthouse construction projects. The projected fiscal year 2009 shortfalls would grow by $78 million if Congress authorizes these items.

Salaries and Expenses Account Estimated Shortfalls, FY 2006-FY 2015 Alternative Funding Scenarios

Estimated Shortfalls ($ in millions) (assuming no additional savings from cost-containment initiatives)

Note: FY 2005 shortfall was $252 (5.3%) million below full requirements.

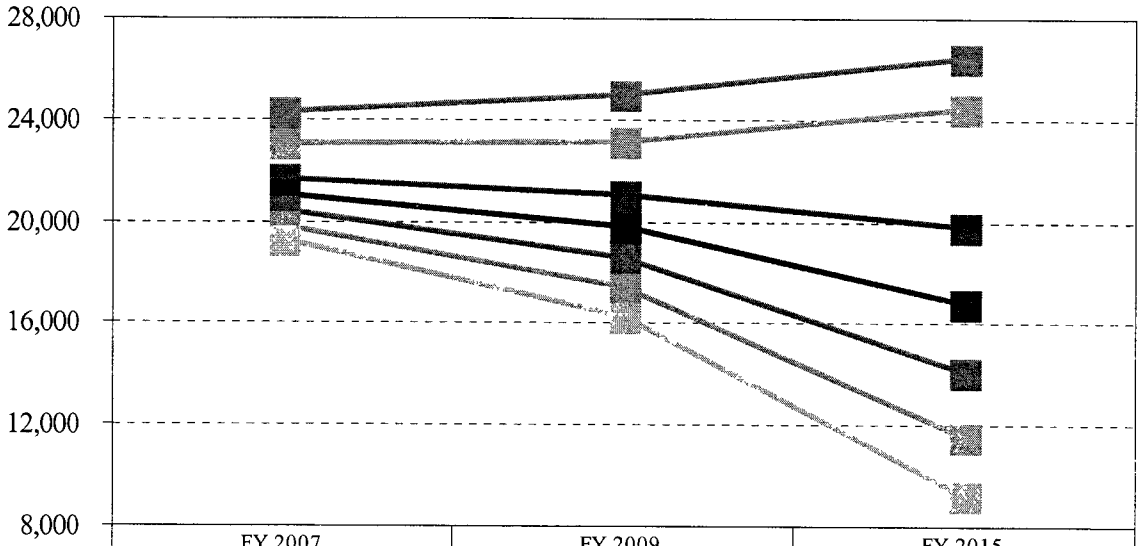


	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Uses updated requirements and assumes 3% annual increases in FY 2006-2015	$219	$280	$368	$489	$625	$786	$949	$1,082	$1,251	$1,430
Uses updated requirements and assumes 4% annual increases in FY 2006-2015	$177	$195	$235	$306	$389	$491	$594	$661	$762	$867
Uses updated requirements and assumes 5% annual increases in FY 2006-2015	$136	$109	$100	$117	$142	$183	$218	$222	$233	$253

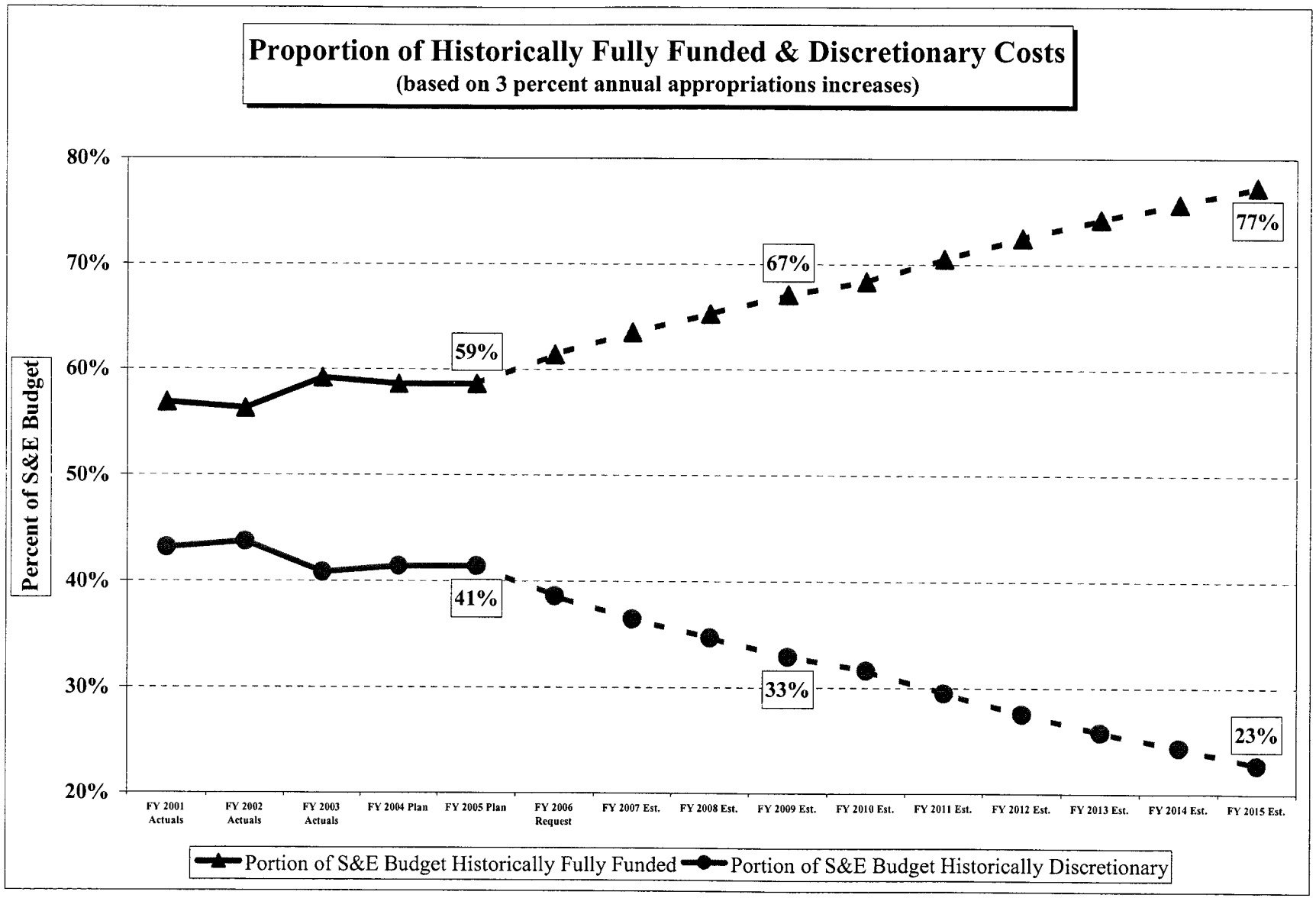
Projected Court Support Staffing

Alternative Funding Assumptions

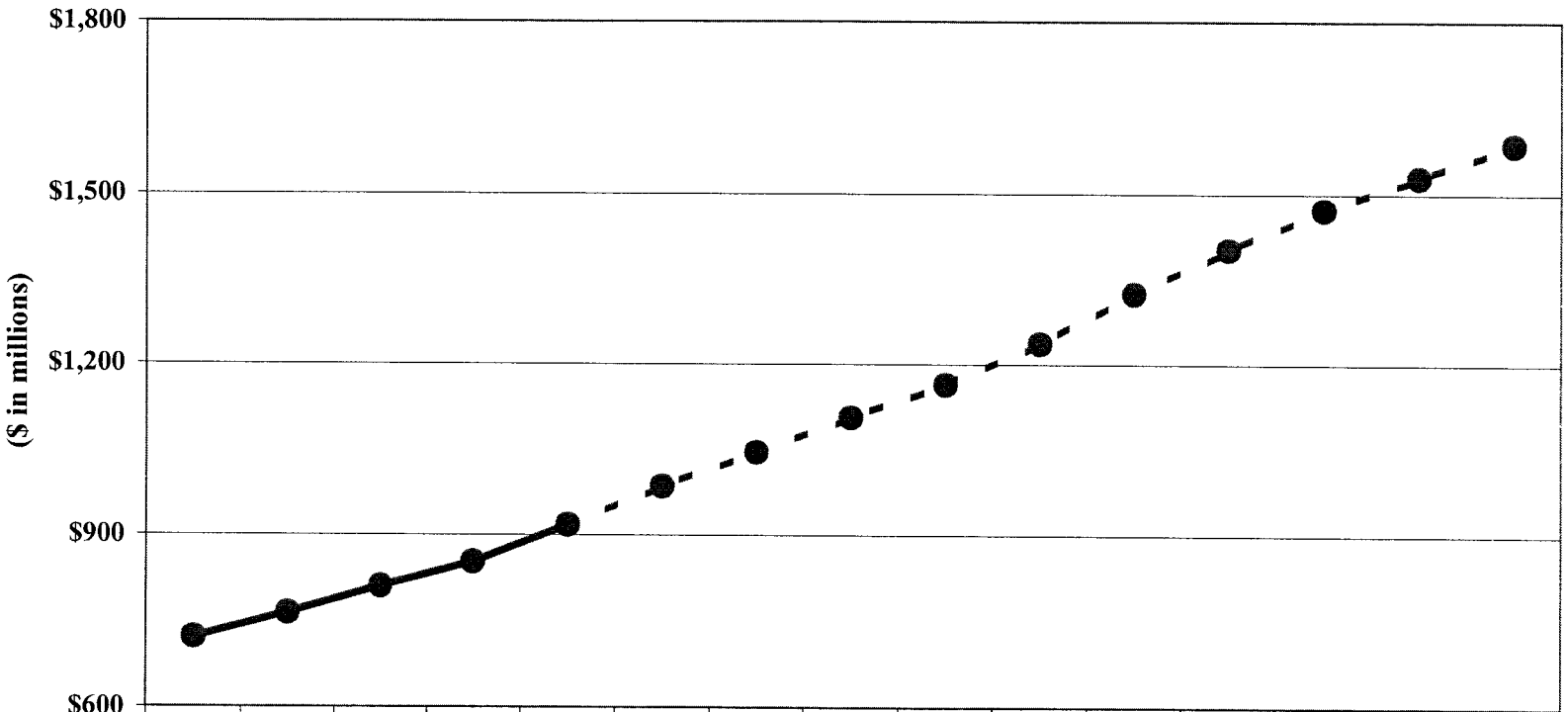
FY 2005 Funded Level is approximately 21,200



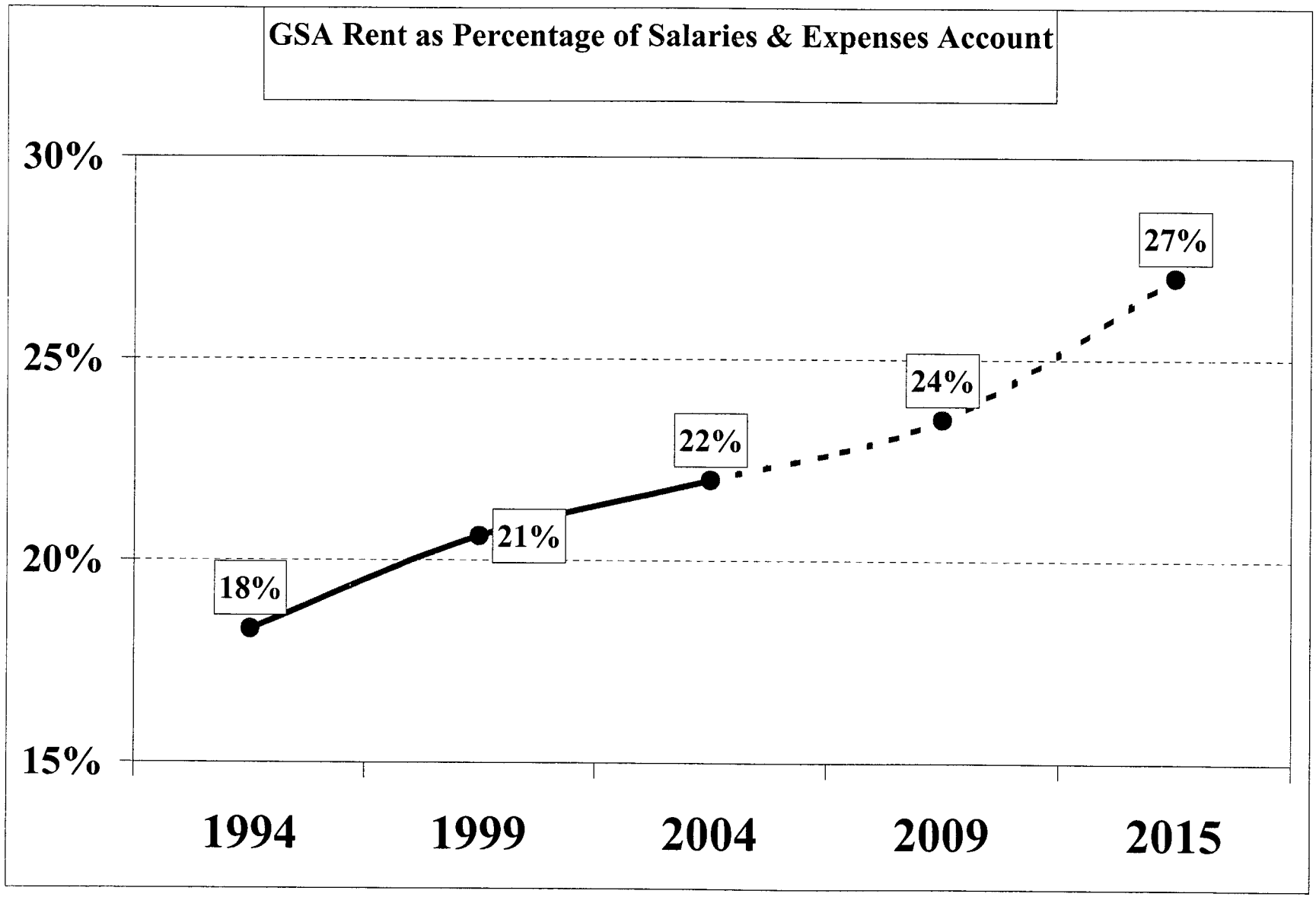
	FY 2007	FY 2009	FY 2015
Authorized by Original Formula (100%)	24,261	24,992	26,459
Authorized by Revised Formula (2% productivity assumption)	23,034	23,158	24,485
Funded (based on 4% appropriation increase)	21,645	21,073	19,849
Funded (based on 3% appropriation increase)	21,035	19,824	16,840
Funded (based on 2% appropriation increase)	20,432	18,611	14,082
Funded (based on 1% appropriation increase)	19,835	17,434	11,557
Funded (based on 0% appropriation increase)	19,243	16,291	9,247


Proportion of Historically Fully Funded & Discretionary Costs
(based on 3 percent annual appropriations increases)
Percent of S&E Budget
80%
70%
60%
50%
40%
30%
20%
59%
41%
67%
33%
77%
23%
FY 2001 Actuals
FY 2002 Actuals
FY 2003 Actuals
FY 2004 Plan
FY 2005 Plan
FY 2006 Request
FY 2007 Est.
FY 2008 Est.
FY 2009 Est.
FY 2010 Est.
FY 2011 Est.
FY 2012 Est.
FY 2013 Est.
FY 2014 Est.
FY 2015 Est.
Portion of S&E Budget Historically Fully Funded
Portion of S&E Budget Historically Discretionary

GSA Rent
FY 2001 - FY 2015



FY 2001 Actuals	FY 2002 Actuals	FY 2003 Actuals	FY 2004 Actual	FY 2005 Plan	FY 2006 Est.	FY 2007 Est.	FY 2008 Est.	FY 2009 Est.	FY 2010 Est.	FY 2011 Est.	FY 2012 Est.	FY 2013 Est.	FY 2014 Est.	FY 2015 Est.
$722	$764	$810	$853	$917	$985	$1,044	$1,105	$1,164	$1,236	$1,324	$1,402	$1,472	$1,528	$1,584


GSA Rent as Percentage of Salaries & Expenses Account
30%
25%
20%
15%
18%
21%
22%
24%
27%
1994
1999
2004
2009
2015

Appendix C: GSA Rent Cost Comparisons

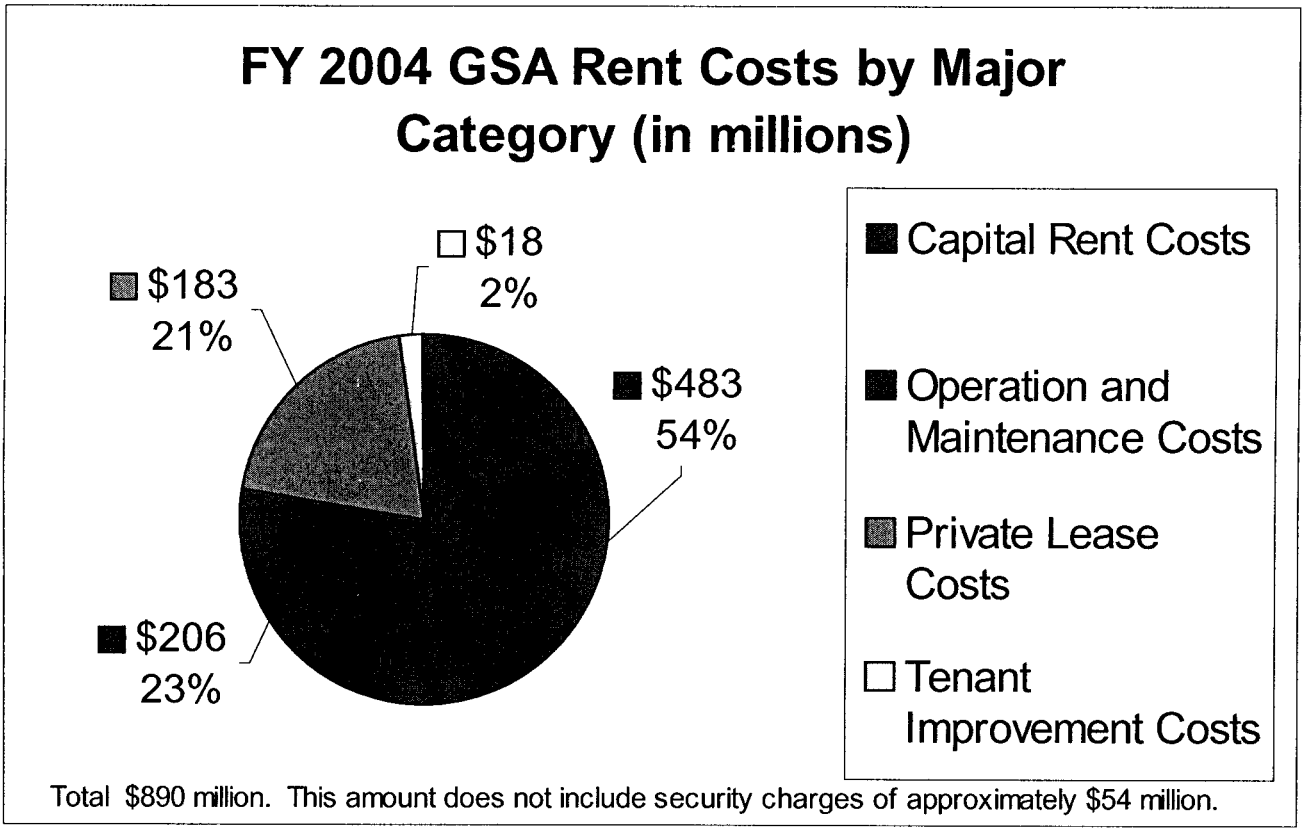
FY 2004 GSA Rent Cost Comparison (in millions)

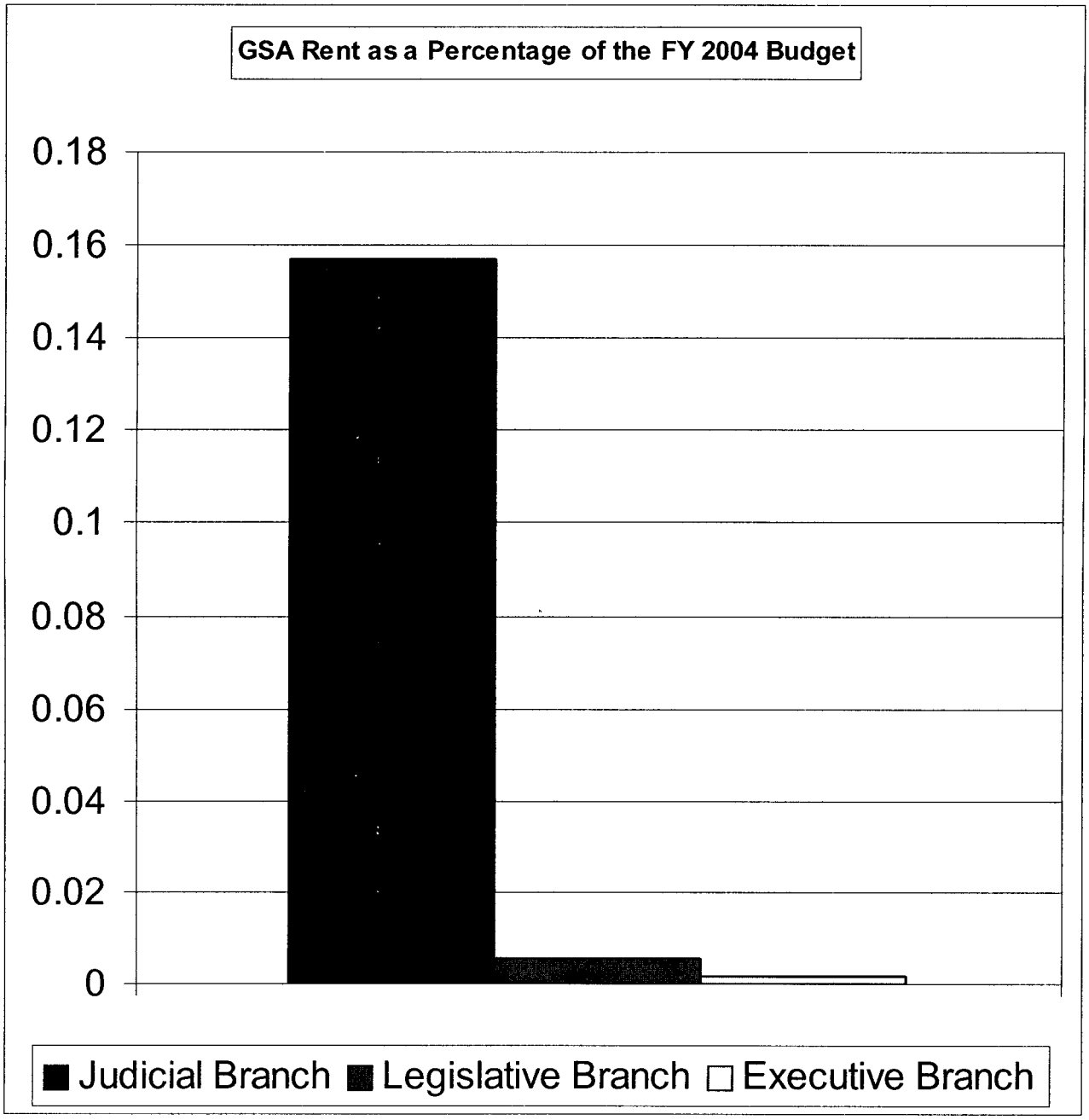
Branch	FY 2004 Actual GSA Rent Obligations[1]	FY 2004 Agency Gross Obligations[2]	GSA Rent as Percentage of Budget
Judicial Branch	$ 944	$ 6,015	15.69%
Legislative Branch	$ 27	$ 4,850	0.56%
Executive Branch	$ 6,231	$ 3,282,091	0.19%
Total	**$ 7,202**	**$ 3,292,956**	**0.22%**

GSA Rent as a Percentage of the Judiciary's Salaries and Expenses Account		
FY 2004	FY 2009	FY 2015
22%	24%	27%

FY 2004 GSA Rent Cost Comparison for Selected Executive Branch Agencies (in millions)

Agency	FY 2004 Actual GSA Rent Obligations[1]	FY 2004 Agency Gross Obligations[2]	GSA Rent as Percentage of Budget
Department of Justice	$ 1,049	$ 34,208	3.07%
Department of Homeland Security	$ 758	$ 44,214	1.71%
Department of Treasury	$ 754	$ 398,694	0.19%
Social Security Administration	$ 494	$ 560,717	0.09%
Department of Health and Human Services	$ 324	$ 701,752	0.05%
Department of Defense	$ 285	$ 611,799	0.05%
Department of Interior	$ 271	$ 19,943	1.36%
Environmental Protection Agency	$ 212	$ 10,157	2.09%
Department of Commerce	$ 211	$ 8,787	2.40%
Department of Agriculture	$ 191	$ 100,655	0.19%
Department of Transportation	$ 170	$ 71,304	0.24%
Department of State	$ 166	$ 15,566	1.07%
Department of Labor	$ 146	$ 67,956	0.21%
Department of Veterans Affairs	$ 137	$ 69,974	0.20%
Department of Housing and Urban Development	$ 108	$ 49,117	0.22%
Department of Energy	$ 92	$ 32,488	0.28%
General Services Administration	$ 83	$ 22,494	0.37%
Department of Education	$ 57	$ 77,548	0.07%
Small Business Administration	$ 43	$ 4,628	0.93%


FY 2004 GSA Rent Costs by Major Category (in millions)
$18
2%
$183
21%
$483
54%
$206
23%
Capital Rent Costs
Operation and Maintenance Costs
Private Lease Costs
Tenant Improvement Costs
Total $890 million. This amount does not include security charges of approximately $54 million.


GSA Rent as a Percentage of the FY 2004 Budget
0.18
0.16
0.14
0.12
0.1
0.08
0.06
0.04
0.02
0
Judicial Branch
Legislative Branch
Executive Branch

Federal Judiciary Cost-Containment Initiatives: Current Status

Initiatives in Progress to Implement
Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond
(Developed by the Executive Committee and Approved by the
Judicial Conference of the United States on September 21, 2004)

Administrative Office of the United States Courts
March 14, 2005

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
	SPACE AND FACILITIES COST CONTROL		
SF1	**Moratorium.** Implement the 24-month moratorium on the planning, authorizing, and budgeting for courthouse construction projects and new prospectus-level repair and alteration projects, and implement the moratorium as appropriate for courthouse projects on the Five-Year Courthouse Project Plan.	The moratorium was communicated to the courts in an October 8, 2004 memorandum to all chief judges, "Actions of the September 2004 Judicial Conference on Space Issues." The AO and the Security and Facilities Committee received requests for exceptions from four courts. The Committee recommended that the AO Director approve the four requests, and the Director has asked the Budget Committee to consider them as well.	Security and Facilities
SF2	***U.S. Courts Design Guide* Review.** Conduct a comprehensive review of the *U.S. Courts Design Guide* with a view toward cost control.	Recommendations and comments for cost savings and technical and policy changes for the *Design Guide* were solicited and recorded from the judiciary, GSA, and private industry. Groups of committee members, liaison judges from seven other Judicial Conference committees, advisory council members, court unit executives, and AO experts were formed to study issues relating to these suggestions. The groups met in November 2004 and have conferred regularly since then. The Policy Discussion Group met on February 28-March 1, 2005 and will meet again March 21-22, 2005. An exposure draft summarizing all proposed changes to the *Design Guide* will be posted to the J-Net in April 2005.	Security and Facilities
SF3	**Re-evaluation of Long-Range Planning Process.** Re-evaluate the long-range facilities planning process.	A review is underway of the policies and assumptions that guide long-range facilities planning, the methods and procedures that are used, and the project scoring assumptions. Staff have received and are reviewing draft reports on caseload, personnel, and space trends for use with long-range plans of each district. Revision has also begun on the automated program used to provide a court's housing needs to GSA. It is anticipated that the revised planning process and scoring methodology will be recommended for Judicial Conference approval in September 2006.	Security and Facilities

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
SF4	**Establishing Budget Caps.** Institute a budget control process, including possible caps or limits on the amount of space to be acquired on an annual basis.	This initiative is progressing in two phases: Phase 1 is addressing non-prospectus level space, while Phase 2 will address prospectus-level space. Work was completed on an initial analysis of future budgets for space. The Security and Facilities Committee is recommending to the March 15, 2005 Judicial Conference an extension of its moratorium on non-prospectus-level space projects until March 2006.	Security and Facilities
SF5	**Reducing the Judiciary's Rent Payments.** Seek to reduce the judiciary's rent payments.	The AO has discussed concerns about rental rates with the Executive, Budget, and Security and Facilities Committees. On December 3, 2004, the Chair of the Executive Committee, the Chair of the Security and Facilities Committee, and the AO Director wrote the GSA Administrator to discuss the rent problem and request an exemption from a significant portion of the judiciary's rent. The GSA Administrator has since rejected this request (February 25, 2005). On January 26, 2005, the AO sent rent bills, which are customarily paid centrally, to court executives for their review. Further discussions with GSA and the Office of Management and Budget are planned.	Security and Facilities
SF6	**Releasing Space.** Request all circuit judicial councils to identify opportunities for releasing space, including canceling active non-prospectus GSA space requests and closing court facilities without a resident judge.	The Security and Facilities Committee has recommended to the March 15, 2005 Judicial Conference that it approve the release of space and the closure of the non-resident court facility in Dubuque, Iowa, and the release of space in Houma, Louisiana. The Committee also considered input from other committees and plans to revisit the assessment criteria used for the closure of non-resident facilities, and consider the assignment of numerical values, and the establishment of a numerical cutoff to be adopted by the Conference to determine which facilities should be closed. The Committee also plans to consider whether the same criteria developed for the closure of non-resident facilities be used in determining the need for closure of facilities with a single resident judge, based on geographical distance from another facility, workload, and other criteria used for non-resident facilities. Draft criteria will be presented to the Committee at subsequent meetings.	Security and Facilities

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
	WORKFORCE EFFICIENCY		
WE1	**Process Redesign and Methods Analysis Programs.** Implement process redesign and methods analysis programs to identify and implement more efficient procedures. Consider new staffing formulas for appellate, district and bankruptcy courts, circuit units, and probation and pretrial services offices that reflect efficient practices. **Reduce Future Staffing Requirements in District, Bankruptcy, and Appellate Courts.** In anticipation of the productivity gains to be achieved through the process redesign and methods analysis programs, implement a two percent productivity adjustment into staffing formulas.	The Judicial Resources Committee approved a project plan for the process redesign program. Thirteen of 21 planned site visits to district and bankruptcy courts have been completed; in each of the visits 10-15 specific business processes are re-engineered, and staff are trained on process redesign techniques. In a variation on this approach, representatives from all types of court units are participating in workshops to learn the principles and tools of process redesign. For the methods analysis program, working groups have been established for district and bankruptcy courts and these groups have identified and will continue to develop better practices in specific areas which will be shared with all court units. The two percent productivity adjustment was incorporated in the FY 2006 budget request and the judiciary's long-range budget estimates through FY 2009. Data collection to measure redesigned processes and update workload measurement formulas will begin soon.	Judicial Resources
WE2	**Reduce Probation/Pretrial Work Requirements.** Reduce work requirements in probation and pretrial services offices, including: reduce the number or scope of pretrial services investigation reports, reduce the number of defendants under pretrial supervision, reduce the number or scope of presentence investigation reports, and reduce the number of offenders under post-conviction supervision.	Work requirements have been reduced through policy changes that limit certain work while emphasizing mission-critical functions and public safety. Related reductions in staffing credit were incorporated in the budget formulation and execution processes and may reduce staffing needs by 470 positions by 2009. To codify these changes, the Criminal Law Committee is recommending that the Judicial Conference in March 2005 approve policy revisions contained in Monograph 112 (pretrial services investigations and reports), Publication 107 (presentence investigation reports), and Monograph 109 (post-conviction supervision). Monograph 109 also codifies steps previously taken by the Criminal Law Committee to refine policies regarding the early termination of offenders. From 2002-2004, the number of offenders terminated early has doubled to over 7,000.	Criminal Law

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
WE3	**Administrative Services Study.** Study and recommend cost-effective alternatives for the delivery of administrative services in the courts.	Site visits by the project's contractor have been completed, and a survey to all court units on administrative services staffing was completed in January, 2005. A final report is due in May 2005. Courts will have an opportunity to review a draft. Several Judicial Conference committees will review the report's findings, and CACM will make recommendations to the Judicial Conference in September 2005.	Court Administration and Case Management (CACM)
WE4	**Chapter 7 Bankruptcy Case Processing.** Conduct a study considering the feasibility, costs and benefits of processing no-asset Chapter 7 bankruptcy cases in state-wide service centers, through other more centralized means, or take steps to further improve efficiency associated with no-asset Chapter 7 processing.	A project plan was presented to the Bankruptcy Committee. The Committee's initial view of the proposal was that centralization of chapter 7 processing is not likely to produce significant savings. The passage of bankruptcy reform legislation would impact this area substantially. The Bankruptcy Committee's subcommittee on long-range planning and budget plans to further study procedural cost-containment ideas after obtaining input from judges, clerks, and others who might be affected.	Bankruptcy
WE5	**Magistrate Judge Vacancies.** Implement review process to determine whether vacant magistrate judge positions should be filled.	The Magistrate Judges Committee and its Chair approved requests from six district courts to fill magistrate judge position vacancies using an enhanced review process. The Committee also voted to recommend to the Judicial Conference in March 2005 that the magistrate judge position at Anchorage not be filled when it becomes vacant in May 2005. The Committee will reconsider the court's request to fill the vacancy at its December 2005 meeting.	Magistrate Judges
WE6	**Judiciary Telework.** Expedite telework within the judiciary.	Court units and federal defender organizations are reporting the number of employees currently deemed to be eligible for and participating in telecommuting programs. Quarterly reports to Congress are required. From 2003-2004, the percentage of judiciary employees who teleworked rose from 4.3% to 5.9%. An on-line telework implementation tool kit was made available on the J-Net.	Judicial Resources

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
WE7	**Probation and Pretrial Space Alternatives.** Increase the use of telecommuting in probation and pretrial services offices and develop alternative space arrangements (hoteling, office sharing).	Probation and pretrial services offices continue to have the highest numbers of teleworkers. A liaison from the Criminal Law Committee has been named to work with the Security and Facilities Committee, which is considering a number of specific proposals to the *U.S. Courts Design Guide* that would reduce future space needs and further increase telecommuting, including alternative designs that provide for more communal work areas, office sharing, and shared areas for interviews, training, and case conferences.	Criminal Law
WE8	**Inter- and Intra-circuit Assignments.** Analyze the costs and benefits of inter- and intra-circuit assignments.	At the request of the Judicial Resources Committee and the Intercircuit Assignments Committee, information on visiting judge assignments is being collected from courts.	Intercircuit Assignments/ Judicial Resources
WE9	**Moving Bankruptcy Judgeships.** Study whether costs can be reduced by moving bankruptcy judgeships between districts according to workload demands.	The Bankruptcy Committee's subcommittee on long-range planning and budget plans to study this and other cost-containment ideas after obtaining input from judges, clerks, and others who might be affected. Staff is preparing a paper for consideration by the subcommittee.	Bankruptcy
WE10	**Bankruptcy Judge Recall.** Examine the costs and benefits of the bankruptcy judge recall program.	The Bankruptcy Committee has reported that bankruptcy judge recall is a less expensive alternative to new judgeships. The Committee's subcommittee on long-range planning and budget plans to further study the costs and benefits of this program. Staff has collected preliminary data needed for the analysis and is drafting a paper for consideration by the subcommittee.	Bankruptcy
WE11	**Magistrate Judge Recall.** Examine the costs and benefits of the magistrate judge recall program.	The Magistrate Judges Committee considered an agenda item that detailed the costs of the magistrate judge recall program. The Committee also reviewed the workload of recalled magistrate judges, and discussed the benefits of the program. After assessing the effectiveness of regulation changes approved by the Judicial Conference in September 2004, and some additional changes proposed for clarity and consistency, the Committee will consider possible further changes to the recall regulations at its December 2005 meeting. The Committee will also continue to review the recall program in detail at each meeting, and staff will prepare an additional analysis of its costs and benefits.	Magistrate Judges

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
WE12	**Alternative Court Reporting Methods.** Study the relative effectiveness of alternative court reporting methods, and savings that could be achieved.	The CACM Committee has recommended in March 2005 that the Judicial Conference remove its current funding limitations for courts seeking procurement of digital recording systems. No other activity is ongoing.	Court Administration and Case Management (CACM)
WE13	**Sharing Court Reporting Resources.** Share court reporting resources in district courts.	At its December 2004 meeting, the CACM Committee noted the current Judicial Conference policy on court reporters -- i.e., that they are employed by the court *en banc* -- and suggested that this policy addresses the idea of the initiative (that court reporting staff resources be fully utilized). Pursuant to this policy, the Committee believes that, while court reporters may be assigned primarily to one judge, they should be reassigned to other judges when not in court for the primary assignment.	Court Administration and Case Management (CACM)

COMPENSATION REVIEW

CR1	**Compensation Study.** Conduct a study of compensation policy with an emphasis on cost containment.	The Judicial Resources Committee approved a project plan for the study, which will be completed in 18 months. A contract was issued to a firm with expertise in compensation. A working group composed of a cross-section of members from advisory councils and representing each type of court unit and various categories of employees met on February 2, 2005 to provide advice and input to committee members, project staff, and compensation experts. A follow-up teleconference was held on March 9, 2005. Compensation-related data are being analyzed.	Judicial Resources
CR2	**Leave Program Alternatives.** Conduct a study to examine less-costly alternatives to the current employee leave program.	The Judicial Resources Committee's view is that the process redesign and compensation studies should be given a higher priority. The Committee will consider a study plan for this initiative in the future.	Judicial Resources

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
	EFFECTIVE USE OF TECHNOLOGY		
IT1	**IT Service Delivery Alternatives.** Identify and implement more cost-effective service-delivery models for national applications. While studying the current service-delivery model, defer normal cyclical replacement of servers.	The Office of Information Technology and PACTS^{ECM} project staff are working with 14 volunteer probation and pretrial services offices to set up a demonstration aggregated services support model. A kick-off meeting was held in San Antonio for the ten primary and four alternate districts that will participate in the proof-of-concept demonstration. The first milestone--issuance of an RFP soliciting vendors to assist in this effort--was reached on January 21, 2005. The technical evaluation of proposals received has begun, with anticipated contract award in May 2005. Once a contractor has been selected, the prototype will be set up and tested for six months. If this proof-of-concept is validated, the aggregated services support model will be implemented nationwide. For FAS$_4$T, a contractor is conducting a cost analysis to help determine the most economical method of providing the financial accounting application to the courts. The "as is" portion of the analysis is complete. A report due in April 2005 will identify four potential service delivery models to determine the best fit with FAS$_4$T. Current plans are to transition this application to a new service delivery model by the end of 2006. Lotus Notes project staff have developed a revised architectural design to further aggregate servers while providing appropriate service levels to the courts. The PACTS^{ECM} contract may be used for this effort. It is anticipated that transition to a new architecture will begin in October 2005. Information gained from these early efforts will be used to evaluate potential service model changes for other national products such as CM/ECF, JMS, and ILS.	Information Technology

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Status of Cost-Containment Initiatives
organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
IT2	**IT Development and Operation Model.** Consider changes to the current information technology development and operation model for national information technology products.	Project staffs are reviewing current development schedules and operational models to see if there are ways to be more efficient in moving these projects to new versions. In addition, as part of the budget formulation process, projects are required to break out costs for versions and releases. This will enable the AO to track and plan for these costs more readily.	Information Technology
IT3	**Cyclical Replacement Schedule.** Consider changes to the cyclical replacement schedule for information technology equipment.	Cyclical replacement schedules have been changed from 3 to 4 years for desktop units and all cyclical replacement for national product servers has been put on hold, except in those cases where replacement is necessary.	Information Technology
IT4	**Version Control Replacement Schedule.** Consider changes to the version control and replacement schedule for program software.	Project staffs have been asked to review their version control processes and review how projects might become more efficient in the planning and scheduling of new versions.	Information Technology
IT5	**IT Training Distance Learning.** Consider opportunities for increasing distance learning in the information technology training program.	The IT Committee has formed a subcommittee to assess the training areas that might lend themselves to distance learning. The subcommittee is also looking at alternative methods of training judges and others on the national systems.	Information Technology
IT6	**Review of All Policies.** Review all policies within the Information Technology Committee's jurisdiction to ensure an efficient and effective IT program.	The Office of Information Technology (OIT) is reviewing all policies and procedures on an ongoing basis to see where efficiencies might be found. It employs a zero-based budgeting process to ensure that all areas of the IT program are reviewed on a yearly basis and that policy-change recommendations are forwarded to decision-makers as appropriate. As one example, national services contracts can be a more efficient means of providing courts with the services they need. OIT is updating many of its blanket purchase agreements to ensure that goods and services such as desktop computers are easily available to the courts at the best possible price. Other goods and services such as electronic courtroom support and equipment are available from national contracts to take advantage of the power of bulk purchasing. OIT is also considering additional national software licenses, where there may be some economies.	Information Technology

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
IT7	**Electronic Case Filing Rules.** Amend rules regarding electronic case filing.	Proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure that authorize the courts to "require" the use of electronic filing but incorporate appropriate exceptions have been published, and the comment period closed on February 15, 2005. The appropriate advisory rules committees will consider these comments at their March and April meetings, and provide a recommendation to the standing Committee on Rules of Practice and Procedure, which will meet on June 16-17, 2005. Rule changes will be considered by the Judicial Conference on September 20, 2005 and go into effect by December 1, 2006.	Rules

PROGRAM CHANGES: DEFENDER SERVICES

DS1	**FDO Case Weights.** Develop case weights for evaluating and projecting federal defender organization (FDO) workload and resource requirements.	After presenting preliminary findings to an advisory group and the Committee's long-range planning subcommittee, preliminary draft case weights were revised and presented at the Federal Defender Conference and to the Defender Services Committee. The Committee approved the project plan for the initiative. This phase of the case weights effort will be completed in August 2005. The initiative will be re-evaluated then to determine further activities.	Defender Services
DS2	**FDO Staffing and Funding Assumptions.** Examine the assumptions by which FDO staff and funding requirements are determined.	Budget and FTE data have been collected and are being analyzed. A questionnaire is being developed to evaluate offices with relatively high and low staffing and funding levels. The Defender Services Committee approved the project plan for the initiative, which is scheduled to conclude in March 2006.	Defender Services
DS3	**Case Budgeting Assistance.** Develop mechanisms to provide case-budgeting advice to judges, in order to limit costs of CJA representations in capital cases and large mega-cases.	The Defender Services Committee approved the project plan for this initiative, including the use of Defender Services funds for an AO reimbursable position to support case budgeting and, pending Congressional approval of (and hiring to fill) the position, also endorsed contracting for such support. The Office of Defender Services is developing the contract initiative.	Defender Services

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
DS4	**Study of Whether Defender Services Should be Outside the Judiciary.** Study whether the Defender Services program should be a separate program outside the judiciary.	The Office of Defender Services discussed the initiative with constituent groups and developed methods of soliciting input. The Defender Services Committee approved the project plan for this initiative, which is scheduled to conclude in December 2005.	Defender Services
DS5	**Provision of Discovery Materials from DOJ.** Seek to require the Department of Justice to provide discovery materials to panel attorneys and federal defenders in a format that does not result in an unnecessary duplication of costs.	This issue was included in discussions at: 1) the September 20, 2004 meeting of the Judicial Conference Executive Committee and the U.S. Attorney General; and 2) the September 13, 2004 meeting of the AO/DOJ Joint Working Group on Electronic Technology. On October 22, 2004, Director Mecham sent a follow-up letter to Attorney General John Ashcroft.	Defender Services
DS6	**Scheduling to Reduce Panel Attorney Costs.** Encourage courts to consider scheduling adjustments that would reduce panel attorney in-court waiting time.	The Office of Defender Services is considering appropriate methods for communicating this idea to judges.	Defender Services
DS7	**Second Counsel in Death Eligible Prosecutions.** Consider whether, in federal death eligible prosecutions, courts should be explicitly discouraged from continuing second counsel and higher rates after the Attorney General has decided not to seek the death penalty.	The Defender Services Committee recommended seeking Judicial Conference approval of revisions to pertinent Judicial Conference guidelines.	Defender Services
DS8	**Defender Services Distance Learning.** Make more use of distance learning.	The Office of Defender Services is researching the use of distance learning.	Defender Services
DS9	**Death Penalty Authorization Procedures.** Request that DOJ amend the death penalty authorization procedures to require within 45 days of indictment on a capital charge a decision: 1) that the government will not seek the death penalty; or 2) that the government needs to pursue the full authorization process.	This issue was included in the discussion at the September 20, 2004 meeting of the Judicial Conference Executive Committee and the U.S. Attorney General. On October 22, 2004, Director Mecham sent a follow-up letter to Attorney General John Ashcroft.	Defender Services
DS10	**FDO Personnel Costs.** Examine personnel costs in federal defender organizations.	FDO personnel costs are being analyzed as part of the examination of FDO staffing and funding assumptions (DS2). The Office of Defender Services is monitoring the compensation study underway for court employees, to inform its own future study of federal defender organization personnel costs.	Defender Services

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
DS11	**Moving FDOs Out of Courthouses.** Move FDOs out of courthouse facilities and consider seeking legislation to remove FPDOs from GSA coverage.	There have been ongoing discussions about this issue among AO staff.	Defender Services
DS12	**Electronic FDO Law Libraries.** Make all FDO law libraries electronic.	No major activity. FDOs are reviewing the need for and eliminating some non-electronic resources.	Defender Services
DS13	**Digital FDO Filing Systems.** Digitize FDO filing systems.	No major activity.	Defender Services
DS14	**Videoconferencing.** Explore a policy of greatly expanding the use of videoconferencing.	No major activity. This is a medium priority initiative identified by the Defender Services Committee's budget subcommittee. Possibilities will be explored for client interviews where consistent with quality representation and maintaining confidential attorney-client relationships.	Defender Services
DS15	**Use of Evidence Software.** Explore use of the evidence software in use by the U.S. Attorney's Office, find a way to obtain the software at low cost, and start using it at the beginning of the case.	No major activity. This is a medium priority initiative identified by the Defender Services Committee's budget subcommittee.	Defender Services

PROGRAM CHANGES: COURT SECURITY

CS1	**CSO Staffing Formula.** Review the Court Security Officer staffing formula.	Staff has compiled information on CSO duties and staffing. The Security and Facilities Committee instructed staff to draft a statement of work and cost estimate for an expert to review the CSO staffing formulas developed by the USMS and the two contracted studies since 2001 that recommended changes to the formula that would likely result in significant increases in CSO positions. The expert may present findings at the June 2005 Committee meeting.	Security and Facilities
CS2	**FPS Contract Guards.** Explore possible savings regarding Federal Protective Service contract guards.	The Chair of the Security and Facilities Committee wrote to all chief judges on January 4, 2005, explaining the need for FPS cost reductions, and requested a district-wide review of FPS contract guard services to ascertain whether any reductions or eliminations could be made. All districts responded, but the reductions that have been identified are not sufficient to close an anticipated shortfall of $21 million for FY 2005.	Security and Facilities

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
	PROGRAM CHANGES: LAW ENFORCEMENT		
LE1	**Substance Abuse Testing and Treatment Policy Changes.** Make changes in policy to contain costs relating to substance abuse testing and treatment.	The Criminal Law Committee forwarded recommendations to the Judicial Conference in March 2005 to approve a number of policy changes intended to increase the use of less costly drug testing methods, refer low risk offenders to free services, and reduce the number of offenders sentenced with a special condition requiring drug treatment.	Criminal Law
LE2	**Co-Payments.** Seek legislation authorizing co-payments for services by defendants and offenders for deposit into the judiciary's account.	The Criminal Law Committee will consider this initiative via mail ballot prior to its next meeting.	Criminal Law
LE3	**Measuring Substance Abuse Treatment Service Outcomes.** Improve data collection on program results, including substance-abuse treatment services, in order to conduct cost-benefit analyses.	The Office of Probation and Pretrial Services is working to improve data deficiencies, including adding critical data elements to PACTS^{ECM}, defining additional data needed for meaningful cost-benefit analysis, and improving data quality and reliability. Version 3.2 of PACTS^{ECM}, which allows for the capture of cost-containment information, was released in January 2005.	Criminal Law
LE4	**Consolidation of Probation and Pretrial Services Offices.** Study the consolidation of probation and pretrial offices.	The Criminal Law Committee has recommended to the Judicial Conference in March 2005 that it maintain its current policy of deferring to individual district courts and their respective circuit judicial councils to determine the form of organization for providing pretrial services, but also recommended that districts with separate offices that have not considered consolidation should do so where it may serve as a means to achieve additional economies and efficiencies without compromising the mission of pretrial services, and when a chief is scheduled to retire or transfer.	Criminal Law
LE5	**Transfer of Law Enforcement Responsibilities.** Study whether law enforcement responsibilities, including pretrial supervision and supervised release, should be transferred to agencies outside the judiciary.	The Criminal Law Committee considered a report on the history of the probation and pretrial services system, data on staffing and workload, and a report on the placement of community supervision in other jurisdictions. The Committee has asked for additional information for its June 2005 meeting.	Criminal Law

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Status of Cost-Containment Initiatives

organized by the broad categories from *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond*

ID	Initiative	Current Status	Lead Committee
	PROGRAM CHANGES: OTHER		
OTH1	**Lawbook Expenditures.** Continue to seek reductions in lawbook expenditures.	The CACM and Budget Committees reduced the FY 2006 budget request for lawbooks to a level below FY 2005. At the CACM Committee's recommendation, the Judicial Conference also adopted revised lists of lawbooks available to newly-appointed judges which will reduce future funding requirements.	Court Administration and Case Management (CACM)
	FEE ADJUSTMENTS		
F1	**Fee Review.** Implement a more regularized and frequent review cycle for fees.	Upon the recommendation of the CACM Committee, the Judicial Conference endorsed fee increases in September 2004 that will result in an estimated $80 million in additional annual income for the judiciary. CACM created a subcommittee to re-examine its fee principles and to implement a three-year schedule for reviewing and amending fees. The Bankruptcy Committee also adopted a policy of reviewing bankruptcy fees on the same three-year cycle, and created a subcommittee on fees to review existing fees and explore the possibility of further revenue enhancement. The Committee will provide its input to CACM.	Court Administration and Case Management (CACM)

Appendix E: Materials for Panel Discussion on the Future Impact of Technology

Discussion Questions for Future Impact of Technology on the Courts

How is technology already changing things?

- What is changing regarding how judges do their work? Chambers staff? Other court staff? Litigants?
- What have been the greatest changes and what changes are in progress?

Can technology substantially change how courts will function in the future?

- With the ability to file electronically and perform work from anywhere, to what extent will geography matter?
- Where will work be done? How often will judges and others need to be in a courthouse at all?
- To what extent can there be a "virtual" courthouse? A virtual clerk's office?
- Will districts and circuits eventually be outmoded concepts?
- With remote access, can the number of proceedings handled by visiting judges be increased substantially?
- Can the distribution of workload in the judiciary be altered?
- How will technology change the adjudication process itself? How will it affect case management and what occurs within the courtroom?
- Will courthouses serve the same purposes in the future? What will be the primary functions occurring within court facilities, and what are the design implications?
- How will security needs change? For people? For buildings? For information?
- With digital storage of, and ready access to, case materials and legal research, to what extent will paper be eliminated?
- How will improved accessibility to information affect efficiency? Privacy? Litigation practices?
- How will technological developments affect rules of practice and procedure?

To what extent can and should we plan for changing technology?

- What are the practical things we can do?
- Are we doing what we can to invest in and promote useful technologies? What else can the individual committees do?
- How can we factor future technological changes into our planning and budgeting processes?

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Judges on Judging

*525 2020--A CYBERCOURT ODYSSEY: A LOOK AT THE U.S. COURTS IN THE 21ST CENTURY

Hon. Richard L. Nygaard [FNa]

What follows is a letter that I wrote in response to the 1995 Long Range Plan for the Federal Courts. [FN1] Although I recognize that a planning committee must spend many hours and put into any plan much painstaking work, I did not feel that this plan adequately reflected what a long-range plan should be--long-range in my view means after I am gone. Conventional thinking would call for a planner who is a pragmatist and has both feet planted firmly on the ground, but whose head is slightly in the clouds. I take a different perspective.

First, I view long-range plans much the same way as I do budgets--they are simply projections of where we want to be or believe we will be, and are written to provide some guidance for those in the pits who must prepare for the future but are not in on the policymaking that gets them there. Second, I believe that because the future, bound-up as it is in the progress of automation, thrusts planners and dreamers, as it must, into the realm of the theoretically-plausible and hopefully-possible, it requires that any long- range plan have an air or touch of science fiction about it. Hence, for me the ideal planner is a futurist--one whose head is planted firmly in the clouds and whose feet, while not on the ground, do nonetheless dangle fairly close to it.

This letter, revised and somewhat edited, was to reflect some of my thoughts on what and where judges and judging will be in the 21st century. It was written tongue-in-cheek to a beloved colleague, who is devoted to, and deeply involved in planning for the federal courts. But humor, after all, is a form of aggression. So, it was meant to be a critical message--but kindly and gently delivered.

Dear Friend and Colleague:

I have finished reading your Long Range Plan for the Federal Courts. [FN2] There is much in it to be praised, but I fear, a measure in it to be criticized as well. Concentrating first, as I prefer to do, on the positive, let me say that some of the alternatives you propose are truly prophetic. I know it represents a great deal of time and effort on your part, for which I thank you. Nonetheless, on a recent flight from California, bored as I always am on long flights, I came up ***526** with the following alternative to the futuristic scenarios which your committee describes regarding judging in the year 2020. [FN3]

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The year is 2020. Federal case loads, which grew rapidly until approximately the turn of the century, leveled off and have now diminished considerably. The federal budget remains in crisis. The seemingly "permanent" budget deficit exists notwithstanding the fact that Republicans, who gained control of Congress just before the turn of the century, and Democrats, who caved into public pressure for "smaller government," have eliminated much federal spending and many programs that were not patently successful. Indeed, instead of engaging in a principled attempt to balance the federal budget, Congress continued to exhibit a lack of political will to balance pragmatism with need and to raise taxes sufficiently to cover even necessary services. Moreover, Congress, believing that large savings could be accomplished without high political costs, began to curtail spending for new courthouse space and judicial support staff. In response, the federal judiciary swiftly reasserted its role as a co-equal branch of the government and undertook an eminently successful and drastic systems overhaul under its own auspices. The central feature of the "reconstruction" of the judicial system involved the adoption of any and every computer and automation program that would assist it in reaching its end product--just decisions.

The linchpin of the reform of the federal judiciary was the Federal Judiciary Act of 2000 ("FJA-2000"). The FJA-2000 was the result of a long-range plan prepared by the courts. The Act eliminated the old and obsolete federal district court trial and circuitwide appellate system that had been in effect for more than 100 years. The FJA-2000 also removed all distinctions between federal district court and court of appeals judges. In place of the old system, the FJA-2000 created an unified federal court system called the United States Court. Under the new system, all federal judges of the "inferior courts" described in Article III of the Constitution sat on trial duty for approximately nine months out of the year; on review duty for one month; and received two months for training, sabbatical, catch-up, and vacation time. In addition, the total number of federal judges was capped at 1000 under the Act.

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Judge Leia Skywalker, a recently appointed federal judge, arrives at her computer station, a quiet, comfortable cubicle in a federal courthouse. Although judges are still entitled to modest chambers, she has opted for none, preferring the freedom of working from any place where she can plug into the "FedJurNet." This morning Judge Skywalker plans to consult the latest United States Court decisions to determine the applicable law for a series of cases she ***527** has been assigned during her one month annual assignment to the United States Court of Review. [FN4] During this assignment, her panel will review appeals from decisions of the Court of Fact [FN5] to determine if those decisions are consistent with the law and prior United States Court decisions, and that they comport with the fundamental considerations of fairness judges have more rigorously enforced since the adversary system of trial was modified to more closely exemplify a search for truth and to de-emphasize the concept of justice by trial combat.

She logs onto the FedJurNet through her Individualized Electronic Chambers System ("IECS"), which, with a handful of CD-ROMs, contains all the files and information she needs to address the issues and cases on review and to prepare for her upcoming trial duties. While she unconsciously runs through the coded security maze to gain access to the system, she reflects upon how the federal judiciary had changed since her days as a law student in the late 1990s.

Automation, which had begun in earnest just before the beginning of the 21st century, all but eliminated the need for actual physical chambers for the judges. Judges worked with what were originally called laptop computers, but are now known as IECSs. She would use her IECS to log onto the FedJurNet, a network reserved solely for the federal judiciary where all information, records, and files pertaining to the United States Court were electronically stored. Most judges worked at home or in their modest chambers, unless they were actually in trial. Skywalker preferred a cubicle provided at the federal courthouse, or one of the "quiet rooms" which most communities now provided for computer use, much in the same way as libraries had earlier provided reading rooms. These rooms were open, spacious and comfortable, and contained computer terminals at each chair or table. Indeed, most companies had such rooms for their office staff--replacing the old and outmoded notion of the individual office and appended secretarial station. Actually, judges could do most of their work any place they wished. Their IECSs transmitted to the FedJurNet from anywhere in the world and the messages were encrypted by the judge's voice. One no longer even needed access to a telephone line. Significantly, judges did not need to be physically present at a court facility unless actually involved in courtroom activity.

Automation, in an accelerated plan conceived by the judges to meet exigent needs, had become the rule of the day in every area of the system. All filings were now done electronically, and "paperwork" flowed through electronic waves rather than the mails. The filing clerks of twenty-five years ago had all but disappeared, replaced now by a professional staff of computer specialists ***528** who made sure that the Individual Case Program contained all the necessary information for a trial of the issue. The same Program tracked the cause after trial through any appeals and indeed through to execution of the court's mandate.

The court system still had libraries, but the individual judges did not: They all had access to a central library which was updated continuously and/or used CD-ROMs when necessary. Indeed, it was so difficult for hard copy

publishers to keep up with law changes and cases, and so few judges depended upon books for research, that most reporter systems and technical and research publishers had simply converted to computer technology. Books were mostly for archival purposes. Then too, what used to be called "opinions" were different now and treated differently as well. They were succinct, rather dry, technical and formulaic reports on the court's decision. But more on that later.

Most trials, Judge Skywalker mused thankfully, were still done personally, although after the O.J. Simpson trials in Los Angeles, and as a result of the tremendous time, money, and case pressures on both litigants and the bar, and, more importantly, as a result of constitutional amendments, significant changes were made to the right of trial by jury and the jury system itself. Now most cases were tried without a jury. Indeed, just the evening before, she and her husband had rented the movie Twelve Angry Men from the video chip rental store. She had watched that classic movie dozens of times and could not get over how times had changed. "Angry men," she mused, "perhaps that had been part of the problem."

Although she was authorized one secretary, Judge Skywalker no longer used one. All filings and aspects of case management were now centralized and handled by Computer Programming Clerks, who staffed the central office for the United States Court. Moreover, since most mail and case correspondence was filed and stored electronically on the FedJurNet, she, like most other judges, simply had no need for clerical help.

Nor did she or any of her colleagues have use for individual law clerks any longer. All new decisions were automatically and instantaneously entered on the FedJurNet and checked for jurisprudential consistency with prior United States Court case law. If a judge needed help with legal research, one could use the FedJurNet to interface with a legal research specialist employed by the United States Court or affiliated with a law school or legal center. But this contract research was now becoming commensurately more rare as the technical skills of the judges improved. In addition, if a judge wished to discuss the nuances and intricacies of a particular legal issue, the judge could access one of the chat rooms on the FedJurNet and engage in an interactive conversation with other judges from across the country. In general, however, although HAL was nowhere to be found, the need for judges to seek outside help with their legal ***529** research and reasoning was growing more seldom as the technical skills of the judges improved and as the FedJurNet itself assimilated, processed, and sorted more data from the various decisions around the globe, making research by the judges themselves quick and easy. The elbow law clerks were now long gone and "judging" had come full-circle, back to the days when all work was done by the judges themselves.

As she sat pondering the caseload for the upcoming argument session, Judge Skywalker saw with some excitement that the panel would be considering an appeal from a diversity suit. Jurisdiction based upon diversity of state citizenship had all but disappeared after the Federal Judiciary Act of 2015 ("FJA-2015"). The FJA-2015 had declared corporations to be citizens of any state in which they did business. In addition, because insurance companies were defined to be parties in interest under the Act, very few cases whose jurisdiction was based upon diversity of state citizenship found their way into the federal court system, because few were truly diverse. She thought also about the other systemic and substantive changes in the federal judiciary and the types of cases heard that had occurred over the last twenty years:

1. Most countries had ratified commercial law and criminal law treaties, and the International Courts of Justice ("ICJ") of the United Nations now had jurisdiction over crimes that had a "significant impact" on international commercial law (tracking, of course, American jurisprudence with respect to the manner in which the U.S. Supreme Court had expanded federal jurisdiction under the Commerce Clause of the U.S. Constitution [FN6]). The ICJ also had international diversity jurisdiction over civil disputes in which the parties' national citizenship was diverse, or which involved commerce among citizens of different subscribing countries. Its jurisdiction also extended both to the international airways and to the reaches of outer space. Because most commercial goods fell within these parameters, the federal courts heard few commercial cases. The ICJ's Criminal Division and international criminal jurisdiction also covered most drug cases, because they involved international traffic and any other crime that transcended national boundaries. Like the United States Court of Review, the ICJ had no

permanently assigned judges; judges from all the subscribing countries sat from time-to-time on panels of the ICJ.

2. There were other reasons why the federal judiciary seldom heard a criminal case now. As a result of research shortly after the turn of the century, medical and behavioral scientists had uncovered causes, and were developing cures for almost all compulsive disorders and chemical addictions. Discoveries in behavioral genetic data had also helped make it possible to identify persons who were predisposed to antisocial behavior that would lead to crime and ***530** violence. In addition, progress was finally a reality in what had once been labeled a "war" against drugs, when the U.S. government embarked on a comprehensive program to control both the supply and demand sides of the drug problem. On the supply side, the government used its influence to implement an international economic boycott whereby aid and trade were withheld from those countries that refused to commit to serious action against the drug trade in their own countries. Also, imported goods now received more than a wink and a nod for a drug inspection. On the demand side, the government embarked upon an unprecedented campaign to eradicate the nation's desire for drugs by committing extensive resources for treatment and educational purposes. As a result of this two-pronged attack, the drug crisis was stemmed and consequently, drug crimes were substantially reduced.

3. Education was now heavily into ethics and morality, which had become as fundamental as the "three Rs" once had been. Indeed, America, shortly after the turn of the century, concluded that police simply could not be law enforcement officers, and had determined that the real culprit was a deteriorating base morality. All states launched massive ethics and morality programs built around the common core values that underlie all social rules and criminal laws. In addition, since Welfare Reform Acts had eliminated virtually everything of the old system, except for a "safety net" which was usually temporary, governments now routinely guaranteed full employment.

4. Violence had become almost a thing of the past, after the criminal justice delivery system (as it was now called) discovered and accepted the fact that more than morals were implicated in behavioral misdeeds, and began to treat offenders holistically with massive no-nonsense punishment, counseling, and therapy, all designed to prepare them for the civic responsibility required of all citizens. Indeed, the entire criminal justice system had been overhauled and now followed Cicero's formula, salus populi suprema lex esto (the safety of the public shall be the first law). Now all offenders were sentenced to a program which gave them the necessary plan and tools to correct their deviant behavior. Those who would not cooperate or were incorrigible were securely and humanely contained.

5. A cashless economy had all but eliminated bank robbery, embezzlement, and many of the other economic acts that once were federal crimes. The vast recording system, now made possible by computer automation, had virtually eliminated the temptation for any form of fraud. Economic flow analysis was so easily accomplished that the profits from, and economic incentive to commit, crime, were greatly diminished.

6. Guns were now seldom used to facilitate crimes. First, the federal government and most states had passed laws setting firearm registration and licencing fees sufficient to cover the social cost of gun ownership and use. This ***531** action had made handguns, automatic, assault-style weapons, and indeed, most nonsporting firearms simply too expensive to own. Second, federal and most state laws forbade carrying any concealed weapon. And third, rigid and tightly controlled licensing of firearms dealers made the casual sale of firearms impractical and the purchase of firearms difficult. Hence, firearms had become very hard to find for those who once would have used them to facilitate their crimes.

7. When sentencing was completely restructured in the year 2005, all guidelines and mandatory minimum sentences were eliminated and the federal courts returned to a humanitarian version of the old discretionary, indeterminate sentencing system, wherein the judge and a team of experts developed an Individual Action Plan ("IAP") for each person who was convicted of a crime. The team, or panel of experts, which usually included ethicists, psychologists, psychiatrists, geneticists, educators, and Rabbis and Ministers, all worked together with the offender to determine an IAP. The IAP was actually a contract, complete with consequences if any party failed to perform as agreed, between the government, the offender, and often the victim and the families of both the victim and offender. The same team then provided general oversight for the correctional process and the

individual's progress, and accounted to the criminal justice delivery system, the other panels, the general public, the victim (if any), and the offender himself. The full accountability virtually assured eventual success.

8. Judge Skywalker thought wistfully back to the days of criminal trials. Most people who committed a crime now merely opted for a plea and an IAP. Appeals were almost nonexistent and recidivism rates were down to nearly zero under the IAP contract-sentencing system. Indeed, only the truly innocent or pathologically criminal went through a trial these days. Consequently, most trials resulted in outright acquittals or old-fashioned commitment to prison. Prisons were now, in fact, reserved for the pathologically antisocial and incorrigible criminals. Treatment of offenders in prison was, however, humane and supervised by the criminal's IAP panel. As a consequence, prisoner suits had virtually dried up. Judge Skywalker had never actually seen a prisoner suit, although she had heard of them. "How strange," she thought, "that we were once so ignorant as to punish everyone who erred, no matter the etiology of the crime."

9. She also never saw agency review cases anymore. A series of cases following Chevron v. National Resources Defense Council [FN7] had "deferred away" any meaningful court review of them anyway. So, no one had much motivation to come to court for relief from adverse agency rulings.

***532** 10. Lawsuits were simply not as numerous as twenty-five years ago. Legislatures, responding to a public outcry over attorney arrogance and the high costs of litigation, amended many laws and created alternate levels of dispute resolution that had simply obviated the need for many lawyers.

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Judge Skywalker's thoughts returned quickly to the present when her two colleagues logged onto the FedJurNet with her to create an "Appeal Report." Only the U.S. Supreme Court issued actual opinions now. Courts in the United States Court system merely issued official "Reports," which were entered and filed on the FedJurNet. The Reports were all per curiam, [FN8] standardized in form, and announced the court's decisions on each issue with a brief explanation giving reasons for each ruling or interpretation of the law.

Judge Skywalker knew that the decision they would make today was of great interest to attorneys, and that the argument would be watched by many (all arguments were now publicly accessible to anyone with a computer), so she quickly checked to make sure nothing personal or private was visible on her screen. The argument went quickly and when it concluded, she and her colleagues, all working simultaneously on the same Appeals Report, quickly reached a consensus on each issue and created their concise report reversing the Court of Fact.

For several reasons, reversals were now rare. First, there no longer existed a "them" and "us" mentality between trial and appellate courts. Second, without separate circuits, circuit splits became a relic of the past. Unity was also promoted because different editions of "Reporters" for trial and courts of appeal no longer even existed. Further, the temptations for fact finding by the Courts of Review, and other forms of fudging the standards of review that were once employed by frustrated trial judges who sat upon courts of appeal, were gone because all judges were equal in judicial authority and stature. And, for a host of other reasons, not the least of which was a tremendous esprit de corps among the 1000 federal judges, all of whom now considered themselves the legal elite, the goals of the courts had become far less divided or divisive among the judges.

The Appeal Report just created by Judge Skywalker and her colleagues established new standards under which the Court of First Instance (occupied by judges who were once called Magistrate-Judges) could issue Certificates of Probable Cause to Sue ("CPCS"). Accordingly, they wanted to fine-tune the wording of their Appeal Report with great care. Under the new United States Court system, the American rule of fee-shifting had been modified so that an ***533** attorney and/or party who filed a cause of action without first petitioning for, and receiving, a CPCS indicating whether a triable cause of action existed, faced the prospect of paying both the defendant's attorney's fees and the costs incurred by the United States Court system if that party did not prevail at trial.

This Appeal Report was tagged as "precedential" because it decided a novel issue. Few reports were thus

tagged, but when so denominated they became law until a later panel challenged the precedent. In that event, the possible conflict of opinion was noted on the FedJurNet and a group of seven other judges was randomly selected and automatically impaneled to review and report on the issue anew. The decision of this "Review Panel" then became law unless reversed by the Supreme Court. Reversal by the Supreme Court, however, was rare since about all the Court reviewed now were constitutional issues. Indeed, the Supreme Court was known among the profession as simply a "Constitutional Court of Review." Members of the Court, however, were still affectionately referred to as "The Nine Old Women."

The Appeal Report now reflected the thoughts of all three judges, so Judge Skywalker punched in her encrypted "signature," which was actually a voice command, a series of digits, and placed her hand on the scanning pad in order to verify her identity. Completion of these security measures signaled Judge Skywalker's permission for the report to be entered and filed on the FedJurNet. The automated system then asked the judges a few questions in order to set the issue in standardized form. That completed, each judge on the panel again completed the security measures and signaled approval. The computer then asked a few more linguistic questions as it translated the opinion into Interlingua, the vocabulary for international business, government, and law, and prepared the report for international dissemination. With the questions answered and the Appeal Report filed, Judge Skywalker signed off from her panel meeting.

It was nearly time for the other reports of the day to be published, so she logged onto the Report Bulletin Board to see what had been decided in the past twenty-four hours by both the United States Courts and the ICJ.

After reviewing the reports, she next logged onto the Direct Response Bulletin Board, an interactive area of the FedJurNet where public citizens could discuss with participating judges their responses to particular reports or decisions reached by the United States Courts or the ICJ. Indeed, since the public could now watch oral arguments and had unlimited access to certain "read only" areas of the FedJurNet, including immediate access to filed reports, Judge Skywalker was able to gauge first-hand the impact on the public of certain issues decided by the federal courts. Although at first she had reservations about judges discussing legal principles and issues with the public, as Judge Skywalker had become more secure in her position, she had come to believe that interactive dialogue provided great benefits for the law, both conceptually and practically. Indeed, now that citizens were afforded the opportunity to participate in legal debates, their opinions about the law and the role of judges in interpreting and applying the law had begun to change. The public no longer considered the law to be a mysterious and foreign entity, fully divorced from the realities of their own lives. Rather, they began to develop a greater respect and appreciation for the necessary role of the courts and the importance of the rule of law in society.

So too had public opinions about judges shifted. Through interaction with judges over the FedJurNet, citizens had come to better understand that judges were human beings who brought particular values, beliefs, and life experiences with them to the bench. As such, people were generally less quick to criticize judges and seemed to recognize that judges were often asked to make very difficult decisions concerning fundamental moral and ethical questions. The importance of these shifts in public opinion, Judge Skywalker noted, was that public confidence in the judicial system had never been higher. This marked a significant difference from the way the nation felt about the judicial system during the last decade of the 20th century when it had become the object of scorn for some legislators and executives who knew better, and a general public that did not.

She then logged off her computer; and, because I have rattled on far too long, so will I.

FNa. Judge, U.S. Court of Appeals for the Third Circuit. I wish to thank John B. "Sean" Heasley and Roger Schwartz, (two truly weird individuals who have for several months been passing themselves off as law clerks), who have made many helpful suggestions.

FN1. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995).

FN2. See Id.

FN3. See id. at 18-20.

FN4. The new appellate level of the United States Court system.

FN5. The new trial level of the United States Court system.

FN6. U.S. Const. art. 1, § 8.

FN7. 467 U.S. 837 (1984).

FN8. This tradition began following the suggestion in an essay contained in the 1994-95 edition of The Scribes Journal of Legal Writing. See Richard Lowell Nygaard, 5 THE SCRIBES JOURNAL OF LEGAL WRITING 41, 51 (1994-95).

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