05-AP- 007 05-BK- 015 05-CV- 034

05-CR- 012

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON, 02210

WILLIAM G. YOUNG
DISTRICT JUDGE

FEB 14 10 50 AM '06

February 6, 2006

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Peter:

As directed in the notice of the Standing Committee on Rules of Practice and Procedure, I am sending my comments to you with copies to other individuals who play a role in the process. I'll try to be brief. I've arranged my comments by proposed rule.

The gravamen of my remarks points out that the proposed privacy rules - - adopted in response to the E-Government Act which seeks greater transparency in government - - ironically remove from the public domain significant data in which the public has important, indeed constitutional, interests.

1. Residential Street Addresses: Proposed criminal rule 49.1 requires redaction of this information but proposed civil rule 5.2 does not. This data ought be eliminated in all cases unless the presiding judge otherwise orders.

It is unwise to introduce this variance between civil and criminal rules. First, it will cause confusion on the part of court personnel and the bar who have to administer the rules. Second, the division is arbitrary. What about habeas cases? Technically, they're civil. As written, residential street addresses will be redacted from the criminal record, only to appear in the habeas record. Third, we're sending a false and dangerous signal with this dichotomy. If we fear identity theft, residential street addresses ought never appear in the electronic record in either civil or criminal cases. Do we really wish to be admitting that we fear violence against witnesses and jurors in criminal cases? Far better routinely to redact this data in every case than to single out criminal cases for special treatment.

RECOMMENDATION: Amend proposed civil rule 5.2 to require redaction of residential street addresses.

2. Trial exhibits: The first sentence of the proposed Advisory Committee Note to both

Civil Rule 5.2 and Criminal Rule 49.1 reads: "Trial Exhibits are subject to the redaction requirements of the [the particular] Rule [ ] to the extent they are filed with the court."

There is the potential for a great deal of mischief here. In this Court - - in both civil and criminal cases - - exhibits introduced (and many times to be introduced) in evidence are delivered to the courtroom deputy clerk who marks them properly and maintains them (save for weapons and contraband) in her custody for the duration of the trial, available only to the jury, judge, and law clerks not to the public or the press. After trial, the exhibits are returned to the parties. Trial exhibits are never docketed and only the list of exhibits appear in the district court records. Under these procedures are trial exhibits "filed with the court"?

Respectfully, the language needs to be clarified. If it is the intent of the committee to require redaction in the scenario set out above, the trial process will be needlessly slowed and an element of confusion introduced to jury deliberations. Surely the lawyers are uninterested in fiddling with actual trial exhibits and will avoid like the plague suggesting to the jury that "another [redacted] version" exists. Who, then, will do the redaction? For what purpose? To what audience? It is unwise to suggest, as this language does, that the public - - as opposed to their representative, the jury - - has some sort of entitlement to every trial exhibit. I'm a trial judge; I express no opinion on the filing of the appellate record (the subject of the second sentence of this paragraph of the note).

RECOMMENDATION: Amend the sentence quoted above by deleting the words "to the extent they are filed with the court" and substituting "whenever docketed as part of the court record."

3. Option for Additional Unredacted Filing Under Seal: I recognize that proposed civil rules 5.2 (f) and 49.1(e) came *in haec verba* out of the E-Government Act and are mandated by that statute. I also understand that the Department of Justice insisted on this language in the Act, supposedly to smooth their filings in white collar criminal cases. Nevertheless, we must work to have the Act amended as this "option" is a disaster for the courts. Here's why:

Both the government and many private parties today frequently wish to litigate free from public scrutiny and confidentiality orders are sought routinely, often to the considerable detriment of the public. The confidential settlements that deprived the public for months from receiving the information that Bridgestone/Firestone was paying substantial sums to settle claims of tire defects and SUV rollovers is but one recent example. Litigants seek confidentiality in virtually every case.

It is the most supreme irony that the E-Government Act gives it to them. All a litigant need do is include some scrap of redactable information in a filing and it can exercise the "option" to make its entire filing under seal. Don't think for a moment that attorneys won't bolt for this loophole (of course filing a "redacted" copy that is, in fact, bowlderized to omit anything

that attorney can claim is "confidential," i.e. virtually everything).

As a result, the "paperless" court is rendered a meaningless aspiration, necessary file space will burgeon, our staffing needs to file all this paper will grow exponentially, and - - as the court is forbidden directly to regulate such filings - - a vast array of data will disappear from the public record even as our budget requirements grow apace.

Absent a statutory amendment, I'm not sure how to address this issue. I am confident, however, that this "option" is going to cause us no end of trouble. The best I can come up with is a requirement that, unless the court enters its own confidentiality order, it need not consult any unredacted paper document until there is on file in the court public electronic record a full counterpart document omitting only the data required to be redacted by civil rule 5.2(a) or criminal rule 49.1(a).

RECOMMENDATION: Add this (or comparable) language to civil rules 5.2 (f) and 49.1(e):

Unless the court shall adopt some other procedure, it need not consult any unredacted paper document filed pursuant to this subsection until there is on file in the court's public record a full counterpart document omitting only the data required to be redacted by this rule.

4. Proposed criminal rule 32(k)(1) adds this first sentence: "The court must use the judgment form prescripted by the Judicial Conference of the United States."

This is the most objectionable aspect of these proposed rules. I fully recognize that - - to the surprise of so many of my colleagues who provide to the Sentencing Commission extensive and nuanced reasons for the imposition of criminal sentences, either by written opinions or transcripts - - that the Commission ignores the stated reasons and collects its data only from the judgment form itself. Thus, I agree that there ought be a single judgment form in use throughout the federal courts. The proposed form - - while extremely complex and subject to internal error - - is perhaps the best we can do.

My initial problem arises from the fact that, if adopted, the Standing Committee will have delegated its powers under the Rules Enabling Act to the Judicial Conference who then will be able to revise the judgment form wholesale without any further reference to the Standing Committee, the Supreme Court, or the Congress. As the judgment in a criminal case is perhaps the most important form in all our civil and criminal procedures, one wonders whether this is a lawful delegation.

Second, the form presently proposed by the Judicial Conference states on the top of the last four pages devoted to the Statement of Reasons, "Not For Public Disclosure." While this is in accordance with Judicial Conference policy, it runs counter to the policy of the District of Massachusetts which is that, unless the presiding judge seals the Statement of Reasons, the

entire judgment form is a public document. This case specific approach has occasioned no problem and indeed, has garnered much praise from the press in this area.

Now, without any public debate, we propose to **require** secrecy with respect to the document that, better than any other source, spells out in simple terms both the reasons for the sentence and how that sentence compares to the Sentencing Guidelines. These are matters of significant public debate. Is it likely such an imposed secrecy requirement can evade Congressional scrutiny when these proposed rules come up for review? This seem to me unlikely as the press here is already onto this issue. (We had a state judge driven from the bench for speech and conduct during and post-sentencing).

RECOMMENDATION: I express no opinion on the delegation issue. That is a policy judgment for the Standing Committee, charged as it is with the central responsibility for effectuating the Rules Enabling Act.

I strongly recommend that the words "Not for Public Disclosure" be omitted from the Statement of Reasons form in the criminal judgment. This leaves Judicial Conference policy intact but permits us here in Massachusetts to continue our wayward, "public" ways.

5. Some general reflections:

A word about **jury lists** (which contain residential addresses). In this court, such lists are not routinely made part of the court record. The data, however, may be vital to counsel in jury selection, especially in major urban areas. On occasion, the press will demand the jury list. See In re Globe Newspaper Co., 920 F. 2d 88 (1st Cir. 1990) for the law in the First Circuit. Apparently, proposed Rule 49.1 will require redaction of residential street addresses before compliance. Does this implicate any constitutional concerns?

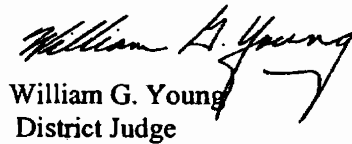
More important, who will do this redaction? We no longer have the personnel to do individual redactions upon request. Indeed, those courts who have reduced docket clerk staff in compliance with the request of the Information Technology Committee, see In re Relafen Antitrust Litigation, 231 F.R.D. 52, 90 n. 30 (D. Mass. 2005), are finding it surpassingly difficult to monitor and correct attorney electronic filings that do not comply with what are today "guidelines" but will (apparently) soon become rules. We ought not be promulgating rules we know we're not going to enforce.

Likewise, the redaction guidelines promulgated by CACM for **transcript preparation** are so labrynthine that they either will be universally ignored or they will so delay transcript preparation as to utterly bog down the courts of appeals. Naturally, these unworkable guidelines will be routinely ignored, probably in favor of waiver rules or standing orders that instruct counsel not to inquire into matters which must be redacted. I do both already and find that the following approach works well: My standing order for trials tells lawyers not to inquire into redactable data without the prior permission of the court. This takes care of most problems.

Where a residential street address (a search, for example) or a minor's name (loss of consortium, for example) is relevant, counsel (so far) have waived the privacy protections. Thought ought be given by CACM, if not by this Committee, to revisiting the unworkable transcript redaction rules.

Should the Committee wish, I'd be happy to be heard on any aspect of these matters or to respond to any inquiry.

Respectfully,



William G. Young
District Judge

WGY/mlb

cc: Hon. David F. Levi
Chair Standing Committee

Hon. Paul Cassell
Chair, Criminal Law Committee

Hon. Julia Gibbons
Chair, Budget Committee

Hon. Thomas Hogan
Chair, Executive Committee

Hon. James Robertson
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