



U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

February 15, 2006

05-CV- 031

05-CR- 018

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

The Department of Justice appreciates this opportunity to comment on the proposed rules to implement the E-Government Act of 2002. The proposed rules are the result of a comprehensive and intensive effort over a period of several years, and we are grateful for the hard work that has gone into developing them. We offer a few suggestions below for your consideration.

The Department of Justice supports proposed Civil Rule 5.2, which represents a careful and thoughtful analysis of the best means of implementing the E-Government Act of 2002. In particular, the Department notes that subsections (d) through (g) provide the parties and the court with flexibility to protect the confidentiality of information not specifically addressed by the Rule. As the Department has stated in the past, we believe that the Committee should continue to monitor developments in this area to determine whether the Rule, in practice, strikes the appropriate balance between public access and privacy, or whether further amendments would provide the most effective means of ensuring the confidentiality of particular types of sensitive information, such as medical records or confidential business plans, that are not specifically addressed.

Monitoring the operation of the new Rule is also important in order to determine whether the redaction requirements of the Rule create an unexpected or undue burden on any particular type of litigation. For example, the Rule has the potential to create a significant burden in money laundering cases in which the government must trace proceeds through a complex chain of transactions involving multiple financial accounts. Based on that real-world experience, additional exemptions from the redaction requirement might be called for in the future.

The government also notes that trial exhibits not filed in the district court – and therefore not subject to the redaction requirement of Rule 5.2(a) – are with some frequency included as a

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part of a joint appendix in an appellate court, where they may then be subject to a redaction requirement, depending on whether Rule 5.2(b)(4) treats those exhibits as part of the "record [that] was not subject to Rule 5.2(a) " when used in the district court. Although it would be consistent with the approach of paragraphs 5.2(b)(2), (3), and (4) for unredacted trial exhibits that are not filed in district court to be exempt from redaction when included in the appendix to the briefs filed in the court of appeals, the committee note states that redaction of such material when filed in an appellate appendix is required. The Rule should be made clear as to the treatment of such materials. Further, differing redaction requirements at two levels of court review have the potential to cause confusion and mistake. We suggest that monitoring the operation of the Rule will be important to determine if there is an unwarranted or unexpected burden, mistake, or confusion that arises in connection with the redaction, upon inclusion in an appellate appendix, of trial exhibits that were not redacted because they were not filed in the district court. In the meantime, the Rule confers upon courts the authority to address and alleviate the burdens stemming from redaction discussed above, if they arise, on a case-by-case basis.

The Department recommends two changes with respect to the forfeiture exemption from the redaction requirement in the rules. First, we recommend making a clarification to the exemption language in Civil Rule 5.2 and Criminal Rule 49.1. Civil Rule 5.2(b)(1) states that the redaction requirement of Rule 5.2(a) does not apply to the following: "in a forfeiture proceeding, a financial account number that identifies the property alleged to be subject to forfeiture." Similarly, Criminal Rule 49.1(b)(1) states that the redaction requirement of Rule 49.1(a) does not apply to the following: "in a forfeiture proceeding, a financial account number or real property address that identifies the property alleged to be subject to forfeiture." For both Rules, the Department suggests moving the clause "in a forfeiture proceeding" to the end of each sentence. These corresponding changes will clarify that parties may, without a redaction requirement, raise issues bearing on particular identified assets subject to forfeiture not only in forfeiture proceedings, but also in related cases that may implicate the identified assets. In addition, the changes would clarify that the exemptions apply to forfeiture seizure warrant applications and warrants, which often are used to take forfeitable property into custody before the commencement of any "forfeiture proceeding." Moreover, the revised criminal wording also would clarify that the exemption applies when a real property address is necessary to identify property seized from that address in a forfeiture notice.

Second, the Department recommends adding a forfeiture exemption to proposed Bankruptcy Rule 9037. Subject to various exceptions, proposed Bankruptcy Rule 9037 requires redaction of social security numbers, tax identification numbers, and other sensitive information. Unlike proposed Civil Rule 5.2 and proposed Criminal Rule 49.1, however, proposed Bankruptcy Rule 9037 presently contains no forfeiture exemption. Accordingly, the Department suggests that proposed Bankruptcy Rule 9037(b) incorporate a new subsection providing that the redaction requirements do not apply to the following:

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- (1) a financial account number that identifies property alleged to be subject to forfeiture in a forfeiture proceeding.

In many instances, the Department must present and explain forfeiture proceedings to the bankruptcy courts. When there are contests over whether particular assets will be forfeited or included in the bankruptcy estate, the bankruptcy rules should permit specific identification of property alleged to be forfeitable. Finally, such a bankruptcy forfeiture exemption would comport with the civil and criminal exemptions.

The Department appreciates this opportunity to comment on the Style Forms, and has no formal comments. The draft forms represent a careful and thoughtful analysis of the existing forms, and are the product of an intensive and comprehensive effort to update the forms. In our judgment, the revisions should help simplify and clarify the forms, so that they may continue to be useful in civil litigation. As the Committee is aware, the Criminal Rules and the Appellate Rules have experienced a similar restyling process, and the Federal Rules of Civil Procedure are at the final stages of such a restyling. From consultation with attorneys who have practiced under the restyled Criminal and Appellate Rules both before and after their restyling, we understand that the style changes have been positive and beneficial. The Department strongly supports the current initiative to restyle the civil forms and believes that Committee has done valuable work.

We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,



Peter D. Keisler
Assistant Attorney General