ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 24, 2017, Chicago, Illinois

I. ATTENDANCE

The Criminal Rules Advisory Committee ("Committee") met in Chicago, Illinois, on October 24, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Judge James C. Dever III
Donna Lee Elm, Esq.
Judge Gary Feinerman
Mark Filip, Esq.
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Justice Joan L. Larsen
Judge Bruce McGivern
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Judge David G. Campbell, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Daniel Coquillette, Standing Committee Reporter (by telephone)
Professor Catherine T. Struve, Associate Reporter, Standing Committee (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Chief Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Federal Judicial Center
Julie Wilson, Esq., Rules Committee Staff
Patrick Tighe, Esq., Law Clerk, Standing Committee
Shelly Cox, Rules Committee Staff
Frances F. Skillman, Rules Committee Staff

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy thanked the staff for the arrangements for the meeting, then welcomed Judge David Campbell, the Chair of the Standing Committee, and two new members of the committee: Federal Defender Donna Lee Elm and Magistrate Judge Bruce McGivern.

Judge Molloy also recognized two guests who were asked to introduce themselves: Catherine M. Recker, representing the American College of Trial Lawyers, and Professor Daniel S. McConkie, who had submitted a written statement on the proposed amendment creating Rule 16.1.

B. Approval of Draft Minutes

Discussion identified several typographical errors in the minutes of the Committee's Spring meeting. The Committee voted to approve the draft minutes with the proviso that the reporters would correct any errors noted by members or identified by the reporters.

C. Status of Rules Amendments and Pending Legislation

Ms. Womeldorf reported on status of the proposed amendments to Rules 12.4, 49, and 45. The Judicial Conference met in September and approved those Rules, which have been transmitted to the Supreme Court. If transmitted by the Court to Congress by May 1, 2018, the Rules would become effective in December 1, 2018, absent Congressional action.

Ms. Wilson discussed the chart at Tab 1D, which included pending legislation that would directly amend the Federal Rules. She said there had been no further action on the proposals to repeal the amendments to Rule 41 and also mentioned the "Back the Blue Act," which would amend Rule 11 of the 2254 Rules. This legislation is being monitored.

The chart also included legislation that would not directly amend the rules but would require some clarification after passage. The Safe at Home Act, which involves programs by states providing a designated address for use instead of the person's actual physical address, would require courts to accept the designated addresses for litigation, mail, and service. The "Article I Amicus and Intervention Act" would potentially limit or deny the House of Representative's ability to appear as an amicus or intervene in pending cases. Although there is no intent to circumvent the Rules Enabling Act, the bill raises drafting issues that could potentially work to enlarge the appeal time. The Administrative Office is communicating with staffers on the Hill, and will continue to monitor all of this legislation.

Discussion focused on the bills to repeal the amendments to Rule 41. The chart in the agenda book lists bill numbers and sponsors. In response to questions about the Department's experience in using the new provisions, Mr. Wroblewski noted that Rule 41(b)(6)(B) had been employed in a case involving a large botnet, and that the use of the new authority under the

amended rule is becoming fairly routine. To his knowledge, the new provisions have not yet been challenged in court.

II. COOPERATORS SUBCOMMITTEE REPORT

A. Background

Judge Molloy reminded the Committee of its charge from the Standing Committee: (1) to draft the Rules necessary to implement the changes recommended by CACM, and (2) to advise the Standing Committee whether those Rules should be adopted. Judge Campbell agreed and commented on the schedule going forward. The Committee's final recommendations are not needed until the Standing Committee's June meeting. It would, however, be very useful to provide the Standing Committee with a sense of the Committee's thinking at the January meeting, and allow the Standing Committee to provide feedback. After thanking the reporters and the members of the Cooperators Subcommittee for their work, Judge Molloy turned the discussion over to the Cooperators Subcommittee Chair Judge Lewis Kaplan, who is also chairing the Cooperator Task Force (TF).

Judge Kaplan stated that the Subcommittee had completed its work on drafting a slate of draft amendments that would be necessary to implement the CACM Guidance. The Subcommittee has also been working on a proposal to limit remote access; this proposal is not yet in final form, but the Subcommittee is seeking input from the Committee at this meeting. He noted the limited remote access approach is not a CACM proposal.

Judge Kaplan noted that the TF is not as far along as the Subcommittee, which has a much narrower focus. The TF has a Bureau of Prisons (BOP)/Marshal's Service working group (chaired by Judge St. Eve). This working group has made terrific progress, and it expects to make final recommendations to the TF for changes at the BOP. He noted that the proposed changes to BOP procedures and practices, by themselves, would be a major step forward, because the most serious manifestations of the problem occur in BOP facilities. The TF also has a CMECF working group (chaired by Judge Philip Martinez), which is working to identify options for changing the CMECF system to make an individual's cooperation less readily apparent than it is now in many districts on CMECF. The CMECF working group has tentatively identified for more careful consideration one option that overlaps in part with an approach the Subcommittee has been considering for some time.

Turning to the work of the Subcommittee, Judge Kaplan praised the reporters for their outstanding work, as well as the members of the Subcommittee, all of whom worked very hard on this problem. He reported that the Subcommittee began by comparing drafts of three different rules-based approaches to the cooperator problem. The first approach responded to the Standing Committee's charge to draft rules that would implement the CACM Guidance. The second option was to route most of the documents concerning cooperation to the presentence report (PSR), taking advantage of the traditional privacy accorded PSR to respond to First Amendment issues and other concerns that might be raised by the CACM approach. After receiving input from the TF, the Subcommittee decided not to move forward with that option. It would have

significantly changed the character of the PSR, put the Probation Officers in an uncomfortable role, and required the insertion of materials created long after the preparation of the PSR. That option is off the table. The remaining option (discussed later) is limiting remote access.

B. Discussion of Rules implementing the CACM Guidance

Judge Kaplan then turned the Committee's attention to the amendments implementing the CACM Guidance. He noted the Subcommittee unanimously agreed that its draft amendments to Rules 11(c)(2) and (3), 11(g), 32(g), 32(i), and 35(b) would fully implement the CACM Guidance. Additionally, the Subcommittee developed other options, which are shown in Appendix A, Tab 2A. The first column shows the draft amendments implementing the CACM Guidance, and the other columns show variations on what CACM proposed. The Subcommittee also identified other documents and events not covered by CACM's Guidance that could reveal information concerning cooperation, and it drafted additional amendments that would plug these holes in the approach CACM is advocating. Those amendments are in Tab 2B.

After a great deal of deliberation, the Subcommittee concluded, without dissent, that it was not prepared to recommend the adoption of any of these rules changes. The reasons for that recommendation, Judge Kaplan explained, are well stated in the reporters' memoranda in the agenda book, especially the memorandum at Tab 2B. He mentioned a few highlights.

Judge Kaplan explained that the Subcommittee was quite negative on the CACM proposal that would have changed plea and sentencing procedures in the courtroom, requiring bench conferences in every case. The TF generally had the same view on this point. He noted a series of objections. First, these bench conferences would not prevent observers in the courtroom—whom no one is proposing to exclude—from determining who is and is not cooperating. The parties' body language would be different and the bench conferences would be longer when there was a discussion of actual cooperation, as compared to a brief statement there was no cooperation in this case. A second concern was that the defendant's right to be present at sentencing would create security issues for these bench conferences. Some members also took the view that especially at sentencing, channeling all discussion of cooperation to a bench conference would impair the defense, breaking up and interrupting the presentation counsel would otherwise make. There was also a concern that these conferences would be unnecessarily time consuming and burdensome. And what about the public's right of access and the First Amendment? For all of these reasons, the Subcommittee rejected this approach without exception.

Judge Kaplan then turned to the third approach considered by the Subcommittee: limiting remote access. The Subcommittee's draft of a proposed Rule 49.2, p. 157 of the Agenda Book, is a work in progress. The concept is to limit remote access but allow anyone who visits the courthouse and shows identification to see any unsealed portion of the file in a criminal case. This approach is being followed now in at least two districts. The Subcommittee's working draft allows the parties and their attorneys to have remote electronic access to any part of the file that is not sealed or restricted as to that party. There is bracketed language about codefendants. The Subcommittee has wrestled with the proper approach to access by other attorneys. This draft

(which the Subcommittee has not adopted), allows any attorney with ECF registration to have remote access to any part of the file that is not sealed or restricted, and it gives the public remote access to the indictment, docket, and judicial orders, paralleling Civil Rule 5.2(c)(2).

Judge Kaplan noted that the Subcommittee had not resolved which attorneys should get full remote access. Should it be only the attorney for the party, all attorneys who appear in the case, all attorneys who are counsel of record in some criminal cases, all attorneys who have CMECF registration, or all attorneys period? This is a very difficult problem. It raises the issue how far we can trust attorneys not to give cooperation information to their clients.

At its last meeting, the Subcommittee ultimately decided to put Rule 49.2 on the back burner because the TF's CMECF working group is developing an option with common elements. The lead option under consideration by the CMECF working group is something called the plea and sentencing folder (PSF) approach, which resembles the procedure used in the District of Arizona. Judge Kaplan described the current form of that proposal. There would be a PSF on the docket in every criminal case. The existence of the folder would show up on PACER, but its contents would not be listed or available on PACER. Admitted attorneys, including attorneys not involved in the case in question, could see the contents of the folder. Further, an individual judge or a district by local rule could require that particular documents or categories of documents in the folder be sealed or otherwise restricted so that an attorney without access to that restricted or sealed document could not discern its existence or open it. It is technically feasible to create a PSF, because the District of Arizona is now doing something similar, but we do not yet know whether the rest of the mechanics are within the current capabilities of the CMECF system.

Judge Kaplan noted that the variation permitted in CMECF working group's current proposal—allowing each district or each judge to make its own decision about which documents to seal, and which attorneys would get access—meant there would be no uniform national procedure. In contrast, Rule 49.2, if adopted, would create a uniform national approach.

Judge Kaplan said the TF working group had not yet focused on access by the press. Although procedures define the press for purposes of access to the Supreme Court and other proceedings, in the contemporary world any rules governing press access would have to consider how to treat not only traditional press outlets, but also individual bloggers.

Judge Kaplan concluded by stating several questions on which he hoped there would be discussion. First, does the Committee agree that the draft amendments would implement the CACM recommendation? Second, does the Committee endorse the Subcommittee's recommendation not to support any of the amendments that would implement the CACM guidance? Finally, what are the Committee's thoughts about limiting remote public access?

At Judge Molloy's request, Professors Beale and King walked the Committee through the alternative approaches. The amendments implementing the CACM Guidance appear first on pages 153-55, and then again in the first column of the comparison chart beginning on page 199. These rules are the final version of the Subcommittee's best effort to implement exactly what CACM recommended. The second column, beginning on page 199, omits the courtroom rules

requiring bench conferences in every case at the plea and sentencing phase. The third column substitutes sealing of the whole document instead of dividing them into two different documents. The fourth column follows the practice in some districts, including the Southern District of New York, of tendering these documents to the court but not filing them. Judge Kaplan explained that in the Southern District those documents are retained by the U.S. Attorney's office as exhibits. The reporters noted that all of these rules say sealing is indefinite, implementing CACM's policy of overriding local rules that say sealed documents must be unsealed after a certain period of time.

Rule 11(c). Professor Beale noted that although the CACM Guidance did not explicitly state that all plea agreements should be filed, the Subcommittee assumed that such a national policy was implicit in the Guidance, and it is reflected in the proposed amendment to Rule 11 in columns 1, 2, and 3. Column 4 shows the no filing approach, and does not include this proposed provision.

Rule 11(g). Judge Campbell noted that column 3 should reference the whole plea proceeding because there is no bench conference. The reporters agreed with this correction.

Members discussed the question whether the provision on permanent sealing would conflict with Circuit rules. For example, when a case goes to the Ninth Circuit, the record is unsealed unless there is a showing of good cause that it should remain sealed. Members noted variations in other circuits. Judge Campbell commented that if the Committee were to go forward with rules requiring permanent sealing, the Appellate Rules Committee should consider whether any changes would be needed to avoid a conflict.

A member who stated that he was generally against sealing observed that draft rules would at least require the courts of appeals to do a case-by-case analysis on the question whether something should remain sealed. The reporters responded that CACM's approach would reverse the current presumption: the parties would have to make the showing to unseal.

Rule 32. Rule 32(i) in column one implements the CACM requirement of a bench conference in every sentencing proceeding, and 32(g)(2) requires all sentencing memoranda to have a public part and a sealed supplement. The third column seals entire memorandum, and in the fourth column the sentencing memorandum is submitted directly to the judge and is not filed.

Rule 35. The amendment in column one seals all Rule 35 motions. For the no filing option, Rule 49, which governs motions, would be amended. On page 206, language is added to Rule 49 requiring any motion for sentencing reduction under Rule 35, 18 U.S.C. § 3553(e), or U.S.S.G.5K1.1 to be submitted directly to the judge and not be filed.

Taken together, these amendments reflect CACM Guidance precisely.

Any additional changes that go beyond CACM's Guidance to implement CACM's general approach and goals are covered in the "CACM plus" rules, Appendix B, pp. 209-16. Judge Molloy noted that the CACM plus rules add provisions that would implement CACM's goal of making sure there were no gaps revealing cooperation. Judge Kaplan stressed that the

CACM plus rules are important. They demonstrate the efforts of the Committee and the Subcommittee to give the fullest consideration to CACM's goal of protecting cooperators and the means that might accomplish it. We all share the same goal here, which is to do whatever we reasonably can to protect cooperators.

Rule 11(c)(2)(B) CACM plus, p. 209. In addition to saying that there must be a bench conference, this states explicitly that any reference to cooperation must take place at the conference and not in open court. CACM's Guidance is not explicit, and to be clear that extra language might be helpful.

Rule 11(c)(2)(D) CACM plus, p. 210. Subcommittee members had observed that written memoranda regarding plea agreements are filed in some cases, and they may refer to cooperation. To parallel the requirement that sentencing memoranda have a sealed supplement, this amendment does the same with memoranda regarding the plea agreement, plugging this gap. For example, submissions may be made when there is some disagreement about a term in the agreement, or a concern the plea agreement might be rejected. This amendment also addresses victim submissions, which are not covered by the CACM Guidance; they would also have to include a sealed supplement containing any information regarding cooperation.

Rule 11(g) CACM plus, p. 211. Since the practice in some districts might be to file a recording of the plea proceedings rather than a transcript, this adds a provision seal those recordings.

Rule 32(g) CACM plus, p. 212. Nothing in Rule 32 now requires the PSR to be filed, and according to the outstanding study prepared by the Rules office, many (perhaps most) districts do not file PSRs. Because it was clear that the CACM Guidance assumed the PSR would be filed under seal, we added a provision giving two alternatives: filing the PSR under seal, or not filing it. Either would protect the information about cooperation, but to fulfill the CACM approach it would be beneficial to have one amendment or the other.

Rule 32(i) CACM plus, p. 213. The amendment supplements the requirement of a bench conference at which cooperation may be discussed, adding an explicit bar on references to cooperation in open court, similar to the bar added under Rule 11.

Rule 32(l) CACM plus, p. 214. This provision would limit what the parties and victim could do with written information mentioning cooperation, applying CACM's approach of requiring both a public part and a sealed supplement, so that all cases would look alike. Additionally, if the judge gives notice under Rule 32(h) about an intended departure, those notices if filed must include a public part and a sealed supplement.

Rule 35(b)(3) CACM plus, p. 215. The proposed amendment extends the requirement of permanent sealing to orders and any related documents, in addition to the motions themselves that are covered by the CACM guidance.

Rule 47, CACM plus, p. 216. Like Rule 35 motions, the amendment requires motions for sentence reductions made under 18 U.S.C. § 3353(e) and Sentencing Guideline 5K1.1 to be filed under seal.

The reporters explained that taken together, the CACM plus amendments try to fill what the Subcommittee identified as the gaps in CACM's recommendations. Gaps are also relevant when considering the potential efficacy of the CACM Guidance rules we are considering to safeguard cooperator information. If there are significant gaps in the CACM Guidance, the rules implementing the Guidance will probably be less effective. CACM's recommendation for sealing Rule 35 motions is a good example. It did not address similar motions for sentencing reductions under 18 U.S.C § 3553 and U.S.S.G. 5K1.1. The CACM plus rules seek to fill the remaining gaps, though it is not possible to prevent all disclosures of cooperation. For example, a cooperating defendant may have to testify in open court. You can never do everything, but this tries to buttress the protection. In doing so, it creates more secrecy, moving more information out of the public domain in order to achieve the objectives of the CACM recommendations.

Members discussed whether as drafted Rule 32(l)(1) would be in tension with the Victims' Rights Act. Does the victim have right to know about cooperation? Would the amendment affect victims' substantive rights? The Act does not address documents or filings. Professor King read the Act aloud, noting that it provides the right to be informed in a timely manner of any plea bargain. Members questioned whether the victim has a right to be informed of all of the terms of the plea bargain, which may include cooperation.

Judge Molloy then asked each member to give his or her view of the amendments drafted by the Subcommittee.

A judicial member expressed a variety of concerns about the CACM rules. The problem with the required bench conferences is that anyone in the courtroom can see that there is a long conversation going on for some defendants and not for others. None of the amendments addresses the situation where a person pleads guilty earlier than everyone else, and that defendant's absence at subsequent proceedings may be seen as an indication of cooperation. This member also raised concerns about transparency and the public's right to know what is happening. It is not clear whether any of the sealing procedures apply once a cooperating witness testifies. In the member's district, sentencing memoranda are not filed in many cooperation cases. They are given to probation, the judge, and the other side; they are kept in the judge's file, but are not public records. The court may also seal the record at sentencing, but there is the potential for everything to come out at some point. No option seems to balance this perfectly. If the Committee makes no recommendation, there will be variation in how sealing and in-court procedures will be handled. In addition, the dangers for people in prison arise not only from their other codefendants but also from people who think cooperators should be penalized or ostracized.

Another judicial member premised his remarks by saying everyone takes this problem very seriously. There seem to be some concrete things the BOP can do to address this problem. But the only solution that can come from the courts is secrecy, which is not something the courts

can offer. Constitutionally, it is just not the way we do business, but it would really be the only contribution we could offer. Accordingly, the member favored recommending that the CACM amendments not be adopted. This is not a problem that we can fix by amending the Criminal Rules.

Mr. Wroblewski emphasized that the Department of Justice is very much concerned about the dangers to cooperators. The FJC report was a huge contribution to the discussion. The Department is not, however, certain that rules amendments are the best approach. It is very hopeful that the TF and especially the BOP and CMECF working groups can offer solutions that will make a dramatic contribution and significantly reduce the problem. The Department is not seeking increased secrecy, because secrecy is already present. The parties routinely do not file documents concerning cooperation. For example, another member noted that defense lawyers often redact sentencing memoranda, do not file them, or seal them. But the current efforts to use secrecy to protect cooperators are very haphazard, and can be circumvented by people interested in doing harm. The Department hopes that the CMECF architecture can be revised to bring the current redactions and secrecy into a form that will eliminate or greatly reduce the ability to circumvent the current rules and do harm to cooperators. The Department hopes the BOP and CMECF working groups can address these problems in a non-rules way and make a significant contribution. BOP has been involved with that working group for many months and has been as cooperative as it possibly can be. He expected the TF recommendations will be very helpful and will be largely adopted by the BOP over time. There are some issues with union rules and the BOP's ability to adopt recommendations, but once the TF comes out with its recommendations that process will begin and we are hopeful that we can actually implement most of those. For those reasons, the Department abstained from the votes on all of these rules at the subcommittee level. We hope that these problems will be addressed in other ways that will be successful.

After complimenting the reporters on their work, another member said that in order to fully implement CACM's recommendations and goals it would be necessary to adopt something like the CACM plus rules. These procedures would be draconian, creating second sets of books and secret proceedings. He strongly opposed that approach. He objected to calling the current approach haphazard. The Supreme Court requires a case-by-case approach to sealing records. The current system relies on judges in individual cases to weigh the need for secrecy and sealing against the public's right to know. He endorsed that approach. We need judges to do what is right in an individual case, rather than a legislative type solution. The CACM rules attempt to change rights, substantive rights. The member added that it would be better to revise the union rules within BOP than to amend the Rules of Criminal Procedure. The concern about misuse of the PSRs should focus on access in the prisons and what the BOP and the marshals can do to protect cooperators. The member appreciated the candor of the FJC report, which stated that it is impossible to identify the empirical effect of any policy individually, or in combination with other policies, on the amount of reported harm to cooperators. The CACM proposals are not data-driven. They propose secrecy in the courts based on fear not data. At an earlier meeting, another member said that even one death of a cooperator is too many, but that is not a reason to sacrifice the core values of the system. We should not alter the requirement that individual

judges must make the decision to seal in individual cases, and we should not seek to change the constitutionally based procedures required by the Supreme Court. This is a serious problem. There are things that can and should be done, and they are primarily the responsibility of the executive branch. The member was pleased to hear from Mr. Wroblewski that the executive branch is undertaking that. The member expressed concern that the TF does not have representation from the defense bar, and wondered why that was so. He hoped the TF would take proper action, and once those changes had been implemented we can see how successful they have been in accomplishing the goals.

Judge St. Eve, the Standing Committee liaison, expressed the view that the proposed rules closely adhere to the CACM recommendations, and complimented the reporters for their work. After spending a lot of time with the TF and talking to people at the BOP, she believed cooperators are being targeted to some extent because of their cooperation status, especially in the high security facilities. She did not, however, support the proposed CACM rules because they go too far. With regard to Rule 11, she noted that the Seventh Circuit disfavors any kind of sealing, and was unlikely to accept the bench conference procedure and limitations on what is available on the docket. She drew a distinction between changing procedures in the courtroom and making changes in the docket. She stated that the PSR approach was unworkable, and strongly opposed by Probation Officers, who did not want to be custodians of these significant documents. Keeping documents in the PSR rather than the court record could cause all sorts of issues later in certain cases.

Another judicial member echoed the praise of others for the work of the reporters, and Judge Kaplan for his leadership on the Subcommittee's work. The rules drafted by the Subcommittee do track what CACM called for, which would be a dramatic sea change in the Rules of Criminal Procedure. Agreeing with other speakers, the member said that the CACM rules raise tremendous transparency problems. The member was glad to hear that the CMECF working group had focused on some of the issues concerning remote access. For this member, the desirability of moving forward with the remote access approach was an open question, in large measure because of the uncertainty about its effectiveness and the absence of empirical information. At most, it seems likely the changes would improve things at the margins. It is not possible to eliminate danger to cooperators, who can be identified in many other ways (such as the disclosures required by *Brady* and by *Giglio* when someone testifies). In addition, there is no way to control disinformation, such as the belief that anyone who has made bail must be cooperating. These proposed rules show us what the CACM Guidance would require, and it is not something that we should support as a Committee. The member was opposed to adopting any of these proposed CACM rules.

The next member to speak, a practitioner, echoed the thanks to all the people who worked on the very helpful materials. This is a real issue and the system has a moral duty to try to protect cooperators, broadly speaking, without abridging anyone's rights. Being a cooperator is a very vulnerable position. Just as prison officials owe duties to someone in a captive setting, this is sort of that squared. Without cooperators it would be very difficult to successfully prosecute many senior people who engage in sociopathic conduct. That's why prisoners are working so

assiduously to try to stop cooperators. This is a very difficult problem because we are working at the margins, and the main risk factors seem very difficult to address through this sort of system. Although he agreed that one death is too many in this setting, the proposed approach doesn't seem to move the ball forward. He hoped other avenues would lead to some concrete proposals. Individual judges are not reluctant to deal with this issue, but giving hundreds of district judges only general instructions to "do your best" without some structure and some uniformity won't work. He hoped that some tools could be made available at least presumptively to produce a more coherent landscape, rather than leaving everything up to the discretion of each individual district judge. The member said the bottom line is that the CACM approach does not move the ball forward enough and has multiple problems. At a minimum, we should table it and see what the future holds in other areas to make things better.

The Committee's clerk of court liaison said he was focused on how the proposed rules would be implemented. He agreed that it would be a sea change in how the courts do business, going from the default of transparency to a default of concealment. The culture of the courts, the training for the clerks' offices, and the system we use for our records are not designed for that new default. They are designed for transparency. Denying rather than granting access involves work. There are many steps to sealing a document. Once a judge says seal a document, somebody has to identify the document, place it under seal, define an access user group, and maintain that user group. When you are dealing with sealing as an exception this is not a big problem. But if we require every one of these various things to be sealed, that will create an opportunity for many mistakes. It would also be a change of mindset. When electronic filing was implemented, there was a huge amount of training. The CACM rules would require at least parallel training. It is important to keep in mind that the universe of users on CMECF is much broader than just attorneys. The overwhelming majority of those doing the filing are paralegals and staff. The responsibility for sealing would not be borne, generally, by attorneys, but by all of the staff members with whom registered attorney users have shared their login IDs and passwords. The clerks have no way to identify those people because the login and password remain the same.

The clerk of court liaison also commented on the need to distinguish between access on PACER, and a court's CMECF system. The parties could think that references to remote electronic access refer to CMECF access rather than the broader access in PACER. If a defendant complains he does not have access, clerks do not want to have to explain to him the difference between CMECF and PACER access. Down the road as we move toward more universal electronic filing, this problem will increase because more people who are not attorneys will have accounts.

From the implementer's perspective, this is an architectural issue. The current CMECF system is not designed to do what everybody is trying to facilitate, and trying to adapt it through human intervention is a recipe for disaster. He dreaded the idea that somebody else would have control of his court's records. He had always believed he was the custodian of the court's records. The no filing idea of farming records out to probation or not filing things is frightening. He had always thought that if you go to the archives you get a case file. Everything is there, but

that would not be the case with some of these suggestions (the PSR and no file options). From an implementer's perspective, it would take a tremendous human effort to implement these procedures.

A judicial member stated that the Subcommittee's draft rules properly and faithfully implement the CACM guidance. He urged that to the extent we can, we should amend the rules to make it more difficult for bad people to identify cooperators and harm them. The fact that any rules-based approach won't solve the problem entirely should not be a reason to take no action. If we can save 15 of the 30 cooperators who might be killed, those 15 will be very happy. If we are unable to solve the problem completely, we should at least work to solve it incrementally. There are First Amendment and transparency concerns that we need to take very seriously. It may be that the CACM Guidance would cut into the muscle and the bone of the First Amendment, and is not something that we want to do. There must be some measure that we can take, perhaps less drastic than what CACM has proposed, that will move the ship in the right direction. The First Amendment it not a suicide pact, and it is also not a homicide facilitation pact. The First Amendment should not get in the way of modest common-sense improvements to help protect the cooperators that are so essential to the operation of the criminal justice system. We should see what the TF and BOP come up with. They should be the first movers, and then we should take stock and evaluate whether we can add anything through rules amendments.

A judicial member commented that it might make a great deal of sense to see what the TF and BOP come up with before imposing rules amendments. The member's state courts are just bringing electronic filing on line, so they have no experience with these issues. They would benefit from the Committee's discussions. For the matters on the table now, the proposal to defer action and then make modest rather than dramatic changes makes a great deal of sense.

Another member endorsed the idea of careful and modest changes rather than dramatic ones given the difficulty of knowing what might work, the First Amendment issues, and the great difficulties and cost of implementing any proposal. The best approach is treading carefully and looking for modest solutions, rather than overarching ones.

The next judicial member began by thanking the reporters, stating that the memoranda are extraordinarily helpful and he was persuaded that the Committee should not recommend the CACM rules changes. The member presides over many change of plea proceedings. Doing a private bench conference in each would be difficult, and the plusses would not outweigh the minuses in that situation. By local rule the member's district does include a sealed supplement to every plea agreement. He noted that there was a question whether that would withstand a constitutional challenge, noting it has never been challenged in the district. In the district's experience, it has been successful and practical, but he could not say whether there is (or ever could be) any data-driven proof that it actually prevented anyone from being hurt or having their cooperation revealed. The member agreed with prior comments that there are serious problems in the prisons that should be addressed, but that is only part of the problem in the member's district, Puerto Rico. In the past 10 years, people were murdered on two occasions on the same corner near the courthouse. Both were defendants who were out on bail, had just met with a

probation officer, then walked out of the courthouse. The member did not know, but presumed they were cooperating, and the bad guys were there waiting for them. There are also threats to families of people who are presumed to be cooperators, and lots of bad stuff goes on in prison. So, at least in Puerto Rico, attacks occur on the street as well. This certainly affects cooperators, but it also has a negative effect on the criminal justice system and other defendants as a whole. People who would cooperate and might get a lower sentence do not do so because they are afraid of what is going to happen to them and their families if they cooperate. In Puerto Rico, the problem extends beyond cooperation to the safety valve. Many people in the district decline to use the safety valve, which quite often is not onerous. You sit down with an agent and you say what it is you may or may not know, and you may get two points off your sentence. Yet many defendants decline to do so because they see that as cooperating. Judges would like to use the safety valve to go below the mandatory minimums, but these individuals are afraid to use the safety valve and will not do so.

A practitioner member stated that the CACM proposal is seriously problematic for all the reasons that had been discussed. The member highlighted just a few problems. One is the required bench conference where the parties would inform the court whether there had been cooperation or not. The materials noted that it might be necessary to extend the bench conference when there has been no cooperation so that would not be obvious to observers. The member expressed concern that this would go beyond being secretive to the court being deceitful, which is very problematic. Second, it would be awkward to require defense counsel at sentencing to tell the judge that the defendant did *not* cooperate. A defense attorney would not normally tell the court what the defendant had not done that might be beneficial to the community, because it would cast the defendant in a negative light. Counsel should not be thrust into that role. Many of the problems do arise in the prisons, and BOP can and should address them. The member's district includes a large prison complex, including one entire prison devoted to cooperators. That does not prevent prisoners from killing each other there. The other problem BOP has to deal with is that prisoners in protective custody do not have access to the full range of programming, which is problematic for people serving long sentences. The reporters' memos were terrific, and the draft rules are faithful to what CACM wanted. The member was not in favor of the CACM proposal, but noted if it were adopted it should be CACM plus, which addresses some problems CACM didn't identify.

Judge Kaplan noted that his responsibility as TF chair is to attempt, if possible, to reach an appropriate and mutually acceptable ground between CACM and the Committee. For that reason, he had abstained in the Subcommittee and said he would do so again at this stage.

Judge Campbell said he found the members' comments, the work of the reporters, and the work of the subcommittee very valuable. He agreed that the draft rules are faithful to CACM's proposal, and they do a great job of illustrating what would have to happen in the Rules of Criminal Procedure if CACM's Guidance were implemented. CACM plus is particularly helpful in showing that if you really want to accomplish what CACM says, there has to be a very extensive change in the way in which the rules are currently structured.

Responding to the question how it would be appropriate for the Committee to proceed, Judge Campbell said it would be entirely appropriate for the Committee to say to Standing, "We've done what you asked, and we fleshed out different rules drafts that would accomplish CACM. Here they are. We don't recommend that any of them be adopted." It will be very helpful to have all of those drafts in hand to understand what it would really require to carry out CACM's recommendations. Judge Campbell said that he did not disagree with the comments identifying problems with the procedures recommended by CACM. When they were considered in his district, a committee of district judges, magistrate judges, defense attorneys and prosecutors concluded that it was not possible to make the courtroom part of CACM's recommendations work, for all of the reasons that have already been discussed. His district routinely seals cooperation related documents, which could raise a First Amendment issue. They put all cooperation-related documents in one place in the docket, and when looking at the docket you cannot distinguish between cooperators and noncooperators. But his district concluded that the full CACM package would not work.

Judge Campbell thought it was well worth considering Rule 49.2 and trying to help in some degree by limiting remote access. If the CMECF working group comes up with a means of configuring the dockets so that cooperators would not be identifiable, he suggested it might make sense to have the Rules Committee attempt to draft a rule amendment to implement that system. The Rules approach would have several advantages. First, this Committee would be terrific body from which to get input. He was not sure the CMECF working group has the same broad representation. Second, a rule amendment would have the great benefit of publication, public comment, and review by the Standing Committee, the Judicial Conference, the Supreme Court, and finally Congress. So you get much broader input. He was not sure if there would be a jurisdictional issue. CACM may take the view that that CMECF is their territory, and they ought to be the ones to make any tweaks to make the dockets uniform. This would have to be discussed with the CACM chair. But it was an open question in his mind about whether this Committee should consider and at least give input on any proposed solution to change the docket to eliminate clues to cooperation. In his district, they accomplish this with a master sealed event included on every docket sheet. Anything related to cooperation is filed there in the docket, and sealed as it would be in its own place. But someone looking at the docket sheets can't identify cooperators. All of the docket sheets look the same. CMECF is considering something similar and whether there is a more automated way to do it. Judge Campbell expressed some concern about leaving that decision entirely to the CMECF working group and losing the input of this Committee and as well as public comment.

Judges Kaplan and St. Eve discussed the interplay between the TF working groups and the proposed rules changes. Judge St. Eve said the CMECF working group was looking at possible changes in the CMECF system, and its ultimate recommendation would go to the TF. Because this is a TF working group (not a CACM committee), it could come back to this Committee. Judge Kaplan commented that it was fair to say that the Rules Subcommittee has simply put the Rule 49.2 draft on hold pending developments in the TF. It is wide open for the issue to come back here.

Judge St. Eve was asked to comment on activity at BOP. She said that it has not yet done anything. Everyone at BOP has been completely cooperative with working group members over a period of several months, and the TF working group has come up with a lengthy list of recommendations for BOP. This includes making all cooperation documents contraband at BOP facilities; at present only PSRs are contraband. At its meeting this summer, the TF discussed and approved about a dozen recommendations to BOP. BOP has not yet taken any action. It is waiting for the TF's final recommendation before starting to implement any of the recommendations. BOP supports our recommendations, but many of them require action by the BOP union. They think it is better to come to the union with a complete slate of recommendations, rather than taking them up on a piecemeal basis, and they are more likely to get union approval if they come with the blessing of the TF and the Judicial Conference. Then they could say these recommendations have been blessed, we are seeking to implement them, and now we need the union to sign on. Nothing has happened yet, but BOP is aware of and supports the recommendations. This will go back to the TF meeting again in January. Judge St. Eve was not sure whether the TF would take any final action at that point.

Judge Kaplan briefly reviewed the highlights of the TF recommendations concerning BOP:

1. Limit transmission to BOP inmates of certain case documents including plea agreements, sentencing memoranda, docket sheets, 5K motions and transcripts.

2. Preclude possession of court documents in BOP facilities outside of an area designated by the warden.

3. Encourage the BOP to punish inmates who are pressuring other inmates for papers.

4. Require that probation officers transmit case docs to BOP inmates consistent with the above guidance. [That really means sending to the warden who would make them available in the secure location]

5. Require that court reporters transmit transcripts to inmates in the same way

6. Consider use of various electronic means of limiting access from within the institutions

7. Impose limits on pretrial detainees' continued possession of case documents once they are designated

8. Collect data on harm to cooperators.

. . . there are recommendations with regard to designations . . .

11. Modify and enter contracts with private prisons consistent with BOP procedure

Judge Molloy expressed concern that there was no empirical basis for making the connection between cooperation and harm. The FJC survey is not the equivalent of empirical data. When he and Judge St. Eve visited with the BOP, they consistently pointed out that cooperation is of two kinds: cooperation before you are sent to prison and cooperation while you

are in prison. The latter is unconnected to anything that would be filed in a court or show up on the docket sheet.

Judge Campbell responded to the comments about the lack of empirical data. He agreed that we do not have case-specific data that on whether certain individuals were attacked or threatened because they were cooperators. The problem of lack of empirical data affects all of the rules committees. When changes are proposed, there is seldom empirical data to support them, and generally we cannot get it. Collecting truly reliable empirical data in the judicial system is a very difficult undertaking, and the Federal Judicial Center has limited resources for this purpose. In his view, the Rules Enabling Act was designed to operate on the collective wisdom of people like the committee members who are on the ground working with these kinds of issues, plus the public comment process—not on the basis of hard empirical data. He also noted that the anecdotal information from the FJC survey and the information from BOP, taken together, provide a pretty strong indication that there is a link between judicial procedures and threats to cooperators. We are not likely to have a stronger link. There are other good reasons to say the CACM proposal is problematic, but he resisted the idea of basing a decision not to move forward on the absence of empirical data.

Judge Molloy responded that on the day an assault occurs the BOP has a great deal of information about the institution and about the level or degree of the assault, but nothing that would tie the fact that the person is a cooperator with the assault. We also know that if an inmate is in a penitentiary or a high security facility there is a much greater likelihood of injury or death than if they are in a camp or moderate to low level prison. Perhaps part of the solution might be for BOP, as a matter of practice, to investigate whether persons who have been assaulted in prison had cooperatoed before, or after, they reached the prison.

A judicial member asked for clarification of the word "table." Did the suggestion of tabling envision a distinction between a motion to oppose adoption of the CACM rules at this time and a motion to table?

The member who suggested tabling said he did see a distinction. If the motion opposing adoption meant the CACM rules are dead and buried, there is a distinction. And if opposed means not now, but maybe we'll come back to it, he would prefer to table. The substance of what he would support is to put this aside and then come back to it after the group on prisons tells us what it is going to do.

A member commented that he would like to oppose the CACM recommendations and table the Rule 49.2 issue.

Judge Molloy stated that the issue is whether the Committee was going to adopt the recommendation of the Subcommittee to tell the Standing Committee here is the package of the rules implementing the CACM Guidance and we think none of them should be adopted.

Judge Kaplan suggested that we should first have a motion to adopt the Subcommittee's recommendation, and then if someone moved to table that would be voted on. He noted his opposition to tabling, because we already know what the BOP is going to do.

A judicial member said that consistent with the spirit of the Committee's discussions it should reject the CACM rules, making it clear that this Committee does not (as we understand them now) remain open to adopting them after the BOP or the TF does something later. To the contrary, we think these particular proposals are a bad idea, but we remain open to other means that we could explore after action by the task force or other bodies.

A judicial member moved to oppose adoption of the CACM rules, and to defer final action on any alternative approach that would limit remote electronic access in order to reduce the likelihood that judicial records would be misused to identify and harm cooperators. The motion was seconded.

Another judicial member agreed with the proposal to put aside 49.2, but suggested deferring action on the CACM proposals. He agreed that he could not imagine a situation in which the Committee would accept all aspects of CACM's recommendations. But after BOP makes its final determination there may be certain aspects of the CACM proposal that we might think are good incremental measures. So he moved to put aside any up or down vote on the CACM rules, which could be revisited in light of the BOP's final actions on the TF's recommendations.

Judge Kaplan said that if there was a second to the motion to table, it should be voted on.

A member asked if there was any appetite in the group to consider the CACM rules one by one, noting that he had more problems with some than others. When asked if he could identify some that were beneficial, he responded yes, though he was not certain that they would be constitutional.

There was a suggestion of a friendly amendment, that we reject the CACM rules but defer action on the remote access or any other potential rule amendment, for example rules implementing changes in CMECF, rather than limiting ourselves to the just the remote public access.

After the motion to table was seconded, members asked for clarification. Was it expressing agnosticism about the CACM rules?

A member supporting the motion responded that it was not agnosticism in the sense of no view about any of the CACM proposals. It was, instead, a more modest step than saying we are not prepared to adopt any of this. If nothing comes to bear fruit in the future, there may be pieces of this that merit further consideration as a possible alternative, perhaps tweaked. The motion to table would not signal that the entire project should be thrown into the trash heap unless there is something completely different. He supported that approach, which is more modest and flexible than complete rejection. He honestly did not know how many other alternatives people can come up with that are unrelated to CACM's proposals. There is only so much space in which to operate.

Judge Kaplan expressed his opposition to the motion to table. The Subcommittee has considered each and every part of the CACM recommendation, including each and every thing

that we could imagine ought to have been included in it, but wasn't. The Subcommittee then concluded, without dissent, that it was not prepared to recommend adoption of the package or any of the variations. Action by the Rules Committee with respect to that proposal is a very important input for the TF, which has been waiting for this recommendation, one way or the other, for a very long time. This is not a criticism, but the process has taken time. To table it now lays the ground work for an argument that the TF should wait with respect to various alternatives, to see whether there are rules solutions. We have spent well over a year looking for rules solutions. The Subcommittee's view is that there is no rules solution to be found on the landscape that we are now familiar with. Of course, given time it is possible someone may have a brand new idea, or CACM could return and say given where we are now, let's do these one or two things. We are always open to consider that again. He advocated trying to play the hand of cards we've been dealt.

A judicial member observed that some members seemed to be worried about a preclusive effect. It is hard for a new member to understand how much of a preclusive effect our voting this package down would have on something in the future, What if the BOP comes up with something, implements it, and there are still many cooperators dying?

Judge Molloy responded that if there are suggestions for rules changes the Committee has an obligation to consider them. If this Committee adopted the Subcommittee recommendation to reject the entire package it has worked on for over a year, someone can come along later (either a member of CACM or some other individual or interest group) and suggest a similar change, perhaps to Rule 11. He thought there would be no preclusive effect other than the matters that our Subcommittee has considered.

Judge Campbell agreed. Other committees have decided not to act or rejected a proposal, and then revisited it a couple of years later. However, in his experience most committees do not come back too quickly after they have put a lot of effort into something. Perhaps in light of this vote we should not reopen the same issues at the next meeting, but there is no bar on a member of this Committee asking to reopen and revisit at the next meeting.

Professor Coquillette agreed that there is no preclusive effect. Anybody on the Committee can raise this again. Professor King observed that this Committee has considered the same rule multiple times. It can come back in the various ways that have already been discussed. That said, Professor Beale expressed the hope that the Committee would not repeat the discussion of the very same thing at the very next meeting.

Mr. Wroblewski noted that DOJ is not waiting for BOP to act; BOP is part of the DOJ. DOJ is waiting for the CMECF proposals, which it thinks have a chance of addressing many of the relevant concerns in a non-rules way. DOJ would abstain. It wants to see what CMECF and the BOP recommendations come out of the TF, and we believe those are significant steps for addressing a genuine problem.

Judge Kaplan observed that there was a broad consensus at the TF about the BOP recommendations, and he asked Mr. Wroblewski for his sense of how these recommendations

are going to come out. Mr. Wroblewski responded that he was focused on a second element, changing the architecture of the CMECF, perhaps along the lines of what is going on in Arizona. DOJ thinks that the BOP and the CMECF approaches, in combination, could be the solution for now, for the foreseeable future. It would reserve the right to come back, if the CMECF does not make any changes, or if we think those are not sufficient.

The motion to table any final recommendation on the CACM rules failed on a voice vote.

The Committee then turned back to the motion to oppose the CACM rules as well as the variations drafted by the Subcommittee, and to defer final action on the alternative approach of limiting remote access. A member moved to sever the two portions of the motion, and the motion to sever was seconded and passed by a voice vote.

The motion to adopt the Subcommittee's recommendation to oppose the CACM rules proposals in all forms passed with two no votes. Judge Kaplan and Mr. Wroblewski abstained.

The motion to hold in abeyance any final recommendation regarding Rule 49.2 passed unanimously.

B. Discussion of draft Rule 49.2

At Judge Molloy's request, Professor King explained the Rule 49.2 proposal. The most recent version is on p. 157 of the agenda book. This approach avoids the First Amendment problems that arise from limiting all access to plea and sentencing documents, allowing the same access that was available before the internet. Before online access, anyone who wanted to see a document had to go to the courthouse. The proposed rule was modeled on Civil Rule 5.2, which limits remote access in order to protect confidential information such as social security numbers. The proposal is premised on the idea that if it is acceptable to limit remote access in the Civil Rule, it should be equally acceptable under the First Amendment to limit remote access to protect cooperators in criminal cases. The first part of the rule designates who has access to an electronic file. Subsection (b) provides for access by the parties and their attorneys, and subsection (d) access by the public. The Subcommittee reviewed the options for defining and distinguishing the press from the public and decided not to draft special provisions for press access.

In general, parties and their attorneys can have remote electronic access to anything that is not under seal or otherwise restricted in a way that bars access by the person seeking access. We added a reference to other restrictions because we were informed by our clerk liaison and others that sealing is not the only way that electronic access is restricted under the CMECF system. For example, if something is filed ex parte, the party that files it has access, but the other parties do not. Whenever a party files a document, the party has the option of restricting access to certain individuals or groups. We wanted to make sure that the rule reflected not only sealing, but also any other restriction placed on access. Attorneys can have access to any of it as well, under subsection (c). That was a policy choice by the Subcommittee. Under (d) the public can have electronic access only to the indictment, the docket, and an order of the judge. If the public or a non-attorney seeks access to another part of the case file, that person must go to the

courthouse and provide the clerk with identification in order to get that access. The Subcommittee has not completed its work on Rule 49.2.

Judge Molloy noted that although the Committee has tabled a decision on 49.2, it would be helpful to get comments to guide the Subcommittee.

A member expressed opposition to the proposal because it affects the poor and those unable to travel to the courthouse and without surrogates who can travel for them. He compared their plight to his own ready access through Law360, which can be set to provide him with updates on anything filed in selected cases. Since subscribers to such services could have full access, the only people who would be hurt are poor people who lack this access.

Professor Beale noted that if the proposed rule were adopted, it would no longer permit remote access by services such as Law360. The Subcommittee's assumption is that the press and subscription services would not go to the courthouse every day to see what is filed in every case.

Professor King commented that when the Subcommittee discussed giving all attorneys access it recognized that most organizations, media or otherwise, will have legal counsel. So simply by using counsel's login, any organization (whether it is Whosarat, or Fox News, or CNN, or NPR) could use the attorney-access clause to set up any kind of trolling device they can manage. That is something to consider if we get to the point of crafting a policy on who has remote access. If it is limited to attorneys, it is not limiting very much if organizations all have attorneys.

Judge Campbell raised a question about Rule 49.2(d)(2)(i), which allows the general public to have remote access to "the docket maintained by the court." He understood that one of the main reasons for limiting remote access was that prisoners would have family members or gang members on the outside go on PACER and look at dockets to determine whether individuals were cooperators. Even if documents revealing cooperation were sealed, the sealing itself served as a red flag indicating cooperation. So how well would 49.2 protect cooperators if (d)(2)(i) allows remote access to the docket?

Professor King responded that the Subcommittee was concerned about a decision of the Eleventh Circuit holding that it was unconstitutional to have part of the docket that is not public. The subcommittee also assumed (at least some members did) that the TF working group on CMECF would be handling docket creation issues, so that whatever docket was produced after the TF was done would be the docket the public could access.

Judge Campbell reiterated that his concern was whether (d)(2) undercut the purpose served by limiting remote access and requiring members of the public who might be seeking information about cooperation to visit to the courthouse under (d)(1).

Professor Beale responded that the Subcommittee used Civil Rule 5.2 as a model, and it allows electronic access to the docket, although other materials are private. However, it is not perfectly analogous because of the red flag problem in the criminal context. Probably that should have been in brackets too because we were already waiting on the CMECF working

group. Is there some solution that could come from that? If not, then this would mean that some things available online would have the red flag problem.

Professor King commented that in addition to basing (d)(2)(i) on Civil Rule 5.2, there was at least some discussion of what the public expects it should be able to see. The docket sheet is critical because it shows what going on in the case: how far along is it, whether there has there been a decision, etc. Access to the docket is not only an important part of Rule 5.2, it is also an important part of transparency.

Judge Campbell expressed concern that if the TF does not devise a system that cloaks cooperation material on the docket, then it would serve little purpose to adopt Rule 49.2 if it included (d)(2)(i). If we are not accomplishing the goal or protecting people by limiting the ability to scan the dockets on PACER, why limit remote access at all? If we are going to accomplish that, we ought to drop (d)(2), and say go to the courthouse. On the other hand, if the CMECF working group comes up with a uniform docket that does not give those clues, we may not need to limit remote access. People going on PACER would not be able to tell by scanning the docket who is cooperating. So, either changes to CMECF will solve the problem, or limiting remote access could do so, but only if we delete (d)(2).

In response to the question whether he thought it would be necessary to drop all of (d)(2), or just (d)(2)(i), Judge Campbell said it would be necessary to consult clerks and others. But certainly at least access to the docket.

The Committee's clerk of court liaison explained that there are subscription services that data mine CMECF and report out almost instantly when documents are filed. He predicted these services would strongly oppose Rule 49.2 because it would totally undermine their business model. They no longer come to the courthouse because they have the electronic access. He agreed that under (d)(2), the filings are enumerated so you would know if anything is missing, and you are seeing everything that goes on. Moreover, he thought it may cause confusion to talk about PACER in (b) and about the court's electronic filing system in (c). He could imagine sa member of the public coming in under (b) and demanding a login in and password to get electronic access. They would not understand that only PACER access is contemplated under (b), and be confused. It might be necessary to add something in the Note or otherwise to refer to (b) as PACER access in contrast to (c), which provides for registered users of the court's electronic filing system.

A member observed that under the Rules Enabling Act, 28 U.S.C. § 2072, a rule cannot abridge substantive rights, which could include economic rights of business organized to assimilate court filings for the public and the bar. Another member responded that he doubted that there is a substantive right to any business model a service adopts out of self interest.

A member drew attention again to lines 7, 8, and 9, saying they were at the heart of the issue: who should get largely unrestricted access to court filings in criminal cases? That issue is before both this Committee and the CMECF working group. How narrowly or broadly should

access be defined? Because if you make it very wide, that greatly reduces the benefit of limiting remote access. But if you make it too narrow, you have other serious problems.

Another member agreed that for purposes of the Rules Enabling Act that there is no right to any particular business model. He asked if he was correct in understanding that some districts are now restricting online access and making people come to court and present identification. Professor King said two districts have this procedure in place now. The member then observed that limiting remote access seems a practical step, noting it was hard to believe that the Constitution that allowed this system in the 1990s prohibits it now. The issue is finding the balance between letting people have access without making it too readily available. It is essential to keep in mind that there are attacks on people who are cooperating. We need to find a balance.

Another member observed that this seems like the kind of problem where individual districts are trying different approaches, and the Committee should draw on their experience, determining what works and what does not work before considering a one-size-fits-all answer under the Rules. It seems to be a classic empirical question as to what actually stops people, and what is too much of a burden to stop this harmful conduct.

The reporters explained that three districts now restrict remote access. The Eastern District of North Carolina has a policy about sealing and restricting remote access to plea and sentencing documents. If you come to the courthouse, you can have access to those. Additionally, criminal defense lawyers can certify they need remote access for representation in a criminal case. Two districts in Texas also limit remote access, but the reporters thought this was not limited exclusively to plea and sentencing agreements. One option would be to designate a category of documents that have restricted access and lift that particular restriction for in-person activity. In contrast, Rule 49.2 does not break up categories, but says this is what you get online and everything else you have to come for in person.

Judge Campbell related the approach in the District of Arizona. Every criminal docket has as the third or fourth docket entry a master sealed event. All criminal dockets look the same in this respect. Cooperation addenda to plea agreements, 5K1.1 motions, sentencing memoranda that discuss cooperation, and anything related to cooperation goes into the master sealed event. The dockets in every case look the same because they all have a master sealed event. That practice was adopted to eliminate the red flags from the docket itself. The master sealed event is sealed under CMECF like any sealed document. The Arizona district courts have not focused on the First Amendment issue yet. If there is a First Amendment problem, the docket could still be structured the same way but with judges making individual decisions on whether it should be sealed and, if so, what would go in there. If CMECF were to come up with something like that, there would be no need to limit remote access, because there would be no clues on the docket and no public access to sealed documents.

Professor Coquillette commented that the FJC could assist in analyzing the experience in the courts that have restricted remote access. He likened this to the pilot projects on initial disclosure and accelerated dockets.

Professor Beale provided some additional information on the districts that limit remote access and require you to come into the courthouse. In addition to the Eastern District of North Carolina (already discussed), as noted on p. 248 of the agenda book the Western District of Texas, El Paso Division, implemented this system recently. The reporters spoke to representatives of that court by telephone, and they said it is working well but they have very few people who want to come in and see anything. And the Northern District of Texas responded to a TF survey saying it limited remote access. So those three districts we identified as using practical obscurity. There are several relevant questions. One question is whether you have to show identification if you come to the courthouse to view case files. Another is whether it would be possible to track what individuals viewed at the courthouse. Judge St. Eve said it would be so useful to learn what parts of the file people wanted to see. If you do have to show ID to see a file and later it is possible to track what files you viewed, it might be possible for the government to connect the dots if someone whose file you had viewed was subsequently attacked. This also depends on what else is available remotely to anybody online, as Judge Campbell had noted. So, all of those are in play in trying to design something under Rule 49.2.

The Committee's clerk liaison expressed a concern about the language of Rule 49(b)(2) which states parties and their attorneys "may have remote electronic access." Professor King said she understood his concern to be that this language (which is now present in Civil Rule 5.2), might carry with it the connotation that not only must the court not block electronic access, but that the court must take affirmative steps to provide electronic access. Although this argument seems not to have arisen under Civil Rule 5.2, it might be possible to revise the language to make this clearer. Clarifying language might, however, generate opposition at the Standing Committee, because it would diverge from Civil Rule 5.2 and might even suggest a negative inference about Rule 5.2. However, if this is a potential problem, the Civil Rule could be amended as well. In his experience, those who are most interested in having remote access will focus on this and view it as a right to remote access.

Professor Beale reminded the Committee that it had recently had a discussion about what "may" meant in the context of Rule 5 of the 2254 and 2255 Rules, and the style consultants were very clear about what "may" means throughout the rules. So that would be one of the things to watch out for, it is not just Rule 5.2 of the Civil Rules, but throughout the rules "may" has a certain meaning. We should be cognizant of not creating contrary implications. That is definitely something to keep our eye on.

A member raised one more technical point about the relationship between (b) and (c); (b) says a party's attorney can access any part of the case file, and (c) says any attorney who is registered can access any part of the case file. It would seem unnecessary to have the reference to the party's attorney in (b), because by definition they are going to be in the larger group in (c). If you had this content, (b) could be the parties, and (c) could be all attorneys. The reporters agreed that the overlap could be eliminated if all registered attorneys are given full access.

III. Disclosure of the PSR to the Defendant; Rule 32(e)(2) (17-CR-C)

Judge Molloy noted the issue whether the Probation Officer must give the PSR directly to a defendant had been raised in his district, and he asked the reporters to provide background. The reporters provided information on the development of Rule 32(e)(2) in the Agenda book, beginning on p. 257. A process of gradual evolution began in 1983. Initially, the PSR was an internal court document that defendants and their counsel were not allowed to see. In 1983, the rule was amended to allow the defendant and counsel to read the document, but they could not have their own copy. The next step was to provide them with a right to receive copies that they had to return. Eventually the Rule provided a right to receive the PSR with no further restrictions.

The Committee deliberately granted individual defendants (as well as counsel) the right to receive the PSR. In 1983, when Rule 32 was amended to permit the defense to read the report, the Committee emphasized that the PSR should go to both the defendant and his counsel, in order increase the likelihood that erroneous information would be noted and corrected. Because defendants often know more about the information that goes into the PSR than counsel, they need to be able to review the PSR themselves to identify any errors.

The Committee also recognized the possibility that a defendant's possession of his PSR may sometimes be dangerous, and this issue is mentioned in the Committee Notes. In 1989 when Rule 32 was revised to give the defense the right to receive copies of the PSR and to eliminate the requirement that these copies be returned, this danger was mentioned in the Committee Note. The Note stated that when retention of the report in a local detention facility might pose a danger, the district court could direct that the defendant not personally retain a copy in that facility. Despite the Committee's recognition of the potential for problems if PSRs made it into the detention facility, the Rule itself required that the PSR be provided to the defendant. Thus, the Rule balanced the danger against the need for defendants to review the draft PSR to get ready to consult with counsel. Another Committee Note recognized that access to PSRs within these institutions would fall beyond the Committee's rulemaking powers.

Judge St. Eve's discussions with BOP had highlighted the tension between the need for defendants awaiting sentencing to review sentencing documents such as the PSR to insure the accuracy of that process, and the danger that sentencing documents may be misused and cooperators threatened. There may be technological fixes that were not available when the rule was drafted and revised. BOP is exploring options such as having kiosks where defendants would be able to look at their own information but not print it, show it to others, or post it.

Since 1989, when the defense got access to the PSR, it has been the Committee's view that it is important for both the defendant and his counsel to have a right to that document. The question now is whether now the situation has changed enough because of threats that the Rule should be amended. For example, the Rule could provide that the PSR should go to counsel and be discussed with the defendant. Should a subcommittee be tasked with an in-depth review of this issue?

A member asked if the reporters had any further insight into why the rule was amended to eliminate the requirement that the defense return the copies of the PSR. The reporters did not. They had reviewed the relevant Committee Notes, but deferred further review of the minutes and other records until after the Committee determined whether it wished to take this matter up.

Discussion turned to the question of the practice under the rule. One judge commented that in his district the practice is to send it only to the attorney. Then under Rule 32(i)(1)(A) the court has to confirm at sentencing that the defendant and counsel conferred, and the court makes sure that the defendant saw the PSR. The reporters noted they had made some initial enquiries, and could learn more if the issue were referred to a subcommittee for in-depth review. Do defense lawyers always share documents that are served on them with their clients? If this is viewed as part of counsel's duty in representing clients, that might provide the foundation for a rule that the PSR should be provided to counsel, who would then share it with the defendant.

A practitioner member noted that there are pro se defendants in the system, and the member had thought that was why the rule referred to sending the PSR to the defendant. Then if you are housed in CCA, a federal BOP facility, you are not allowed to have your PSR, and you will have to have that kiosk or the law library or somewhere you could check out and look at those documents. The member also noted that there is new ABA standard for the defense that is much more particularized and calls for talking to your client about what is in the PSR.

Two practitioner members said they was unaware of any case in which the PSR had been sent directly to their clients. When a lawyer represents a client, he serves as the client's agent and can receive service on his behalf. All of the practitioner members agreed that this is how the system now works. It does not require direct service on represented defendants.

Professor Beale noted that there might still be a need to revise the rule, so that it conforms to the practice. Judge Molloy agreed, noting that there are now "jailhouse lawyers" demanding that the Probation Service provide PSRs directly to individual defendants, and this practice may spread. Professor Beale agreed that when you serve a represented party you generally serve the lawyer. However, she did not think that is what was envisioned by Rule 32(e)(2), which directed that copies go both the lawyer and the client. A judicial member commented that when he was a practicing defense attorney he would always receive two copies of the report. Until this discussion, he had never known why he got two copies of the report.

Judge Molloy concluded the discussion, saying that he would refer this matter to the Cooperators Subcommittee because it might fit hand and glove with the issues they are dealing with.

IV. Complex Criminal Litigation Manual

After our mini conference on how to deal with complex criminal matters, there was a suggestion that it would be useful to have a manual for complex criminal cases, similar to the Manual for Complex Civil Litigation prepared by the Federal Judicial Center (FJC). This issue was referred to Judge Kethledge's Rule 16.1 Subcommittee.

Judge Kethledge stated that the FJC said they think they would happy to assist, but they asked that we make suggestions for topics that might be included in such a manual. The Subcommittee had a telephone conference to consider topics, and the list it came up with is reflected on p. 271 of the materials. We also learned then that the FJC now generally contracts this sort of work out to private lawyers and academics, rather than preparing it in house. The FJC is also moving toward putting materials online rather than providing hard copies. Judge Kethledge noted that after consideration and discussion with the reporters he did not think there was much more for the Committee to do on this proposal. Given its small size and composition, the Subcommittee would not be well suited to guiding this project.

Professor Beale expressed enthusiasm for some of the changes being made by the FJC, such as putting materials directly online so that they will be readily accessible and can be updated frequently. The materials are also being reorganized and presented in a more user-friendly fashion. If the Committee feels this would be a useful project, the FJC would be willing to take the next steps, such as getting input on the most important topics from a broader group. She then invited Ms. Hooper to add her thoughts.

Ms. Hooper explained that the FJC will develop a special topics webpage focusing exclusively on complex criminal litigation. At the outset, it will be posting some of the publications it has done on national terrorism cases, its resource guide for managing death penalty litigation, and the manual on recurring problems in criminal trials. In addition, the FJC will review material that has been distributed at the magistrate and district judge workshops over the past few years, and may post those as well. The FJC will also be looking for guidance on new topics that could be developed and posted on the website.

Ms. Hooper said that it was not yet clear whether all of these materials would be available to the public as well as judges. At some of these workshops, judges participate with the understanding that the material will only be available to other judges; broader access to those materials is something that the FJC will have to work out.

Judge Campbell suggested that Judge Molloy's innovative procedures in the WR Grace prosecution should be considered for the website. This was a complex criminal case, and Judge Molloy used some innovative techniques, such as requiring the government to make certain pretrial disclosures at certain times, a ruling affirmed by the Ninth Circuit. Judge Campbell stated this technique has been invaluable in the Ninth Circuit to move criminal trials along and prevent surprise.

Another member stated that adequate funding for complex cases involving indigent defendants was an important topic. If there are a large number of codefendants, there will usually be CJA lawyers as well as federal defenders. In preparing the ESI protocol, they put CJA funding in as the first issue. These are really big and expensive, so the courts have to find ways to fund them adequately.

V. OTHER RULES SUGGESTIONS

A. Sentencing by Videoconference (17-CR-A)

Judge Donald E. Walter wrote the Committee suggesting an amendment to allow the option of sentencing by videoconference, where the judge would be at a remote location but defendant and all counsel would be in the courtroom.

Professor Beale introduced the proposal, noting that Rule 43 now specifies when a defendant must be present; Judge Walter's proposal is that unless the defendant objects and shows good cause, the court would have the option of sentencing by videoconference. The proposal raises the question whether it would be a good idea to allow sentencing by videoconference and, if so, under what circumstances. The reporters' memorandum recounted the Committee's prior consideration of videoconferencing. Under Rule 43(b)(2), if an offense is punishable by a fine and a sentence of no more than one year, defendants have the option of having the arraignment, plea, trial and sentence done in absentia. In 2011, when the Committee was considering technology changes, it agreed also to allow sentencing by videoconferencing in these misdemeanor cases. The Committee concluded it would be desirable to allow a defendant who might otherwise choose to be sentenced in absentia to have the option of being sentenced by videoconferencing. But there was no support for further extending video sentencing. She noted that the memorandum describes some of the reasons why courts have concluded that videoconferencing is not the equivalent of in-person presence and may raise significant constitutional issues. The question for the Committee is whether to refer the proposal to a Subcommittee for more in-depth study.

In response to Judge Molloy's request for comments, multiple judicial members explained why they opposed an extension of sentencing by videoconference. There is a significant difference between proceedings conducted by videoconference and those done in person. One member noted that a judge who is in the same courtroom with the defendant can better determine whether the defendant understands the proceedings, and whether the defendant has been forced or threatened. Another noted that both the parties and the judge should be in the courtroom because there are such grave consequences for the individual defendant. A judicial member agreed, because "sentencing is the most human thing" that judges do. It is valuable to be in the same room as the defendant, because that allows the judge to understand the defendant in a way that would not be possible in a videoconference.

Members noted that the rules currently provide some flexibility, allowing judges and lawyers to work things out in unusual cases. Rule 43(c)(1)(B) now states that a defendant may be "voluntarily absent" at sentencing. There may be times when a defendant prefers not to come to court for sentencing. For example, a practitioner member described a case in which a defendant cooperated with the government and was out on bail when he was sentenced to time served by a video link to his home in Japan. Unlike the current rule, which anticipates that a defendant could be "voluntarily absent," Judge Walter's provision would allow the judge to elect to conduct the sentencing by videoconference unless the defendant objects and can show good cause.

Judge Campbell observed that current Rule 43(c) contemplates waiver only by behavior, rather than other forms of waiver. He wondered if the rule needed to be more explicit. Professor Beale responded that there had been no indication of a need for revision or clarification of Rule 43(c). Professor King noted that one may forfeit a right to be present claim by not raising it, adding that a written waiver requirement might make it more difficult to waive. She also noted that although most of the Federal Rules do not include specific waiver provisions, you can waive the rights provided by the rules or stipulate that they won't apply, with the court's permission.

At the conclusion of the discussion, Judge Molloy stated that he would write to Judge Walter informing him that the Committee had considered his suggestion, reviewed the history of Rule 43, and concluded that no change in the rule is warranted.

B. Pretrial Disclosure of Expert Witness Testimony (17-CR-B)

Judge Molloy asked Mr. Wroblewski to comment on Judge Jed Rakoff's proposal for more pretrial disclosure of the testimony of expert witnesses. Over the last year, Wroblewski had worked closely with Judge Rakoff and the National Commission on Forensic Science, a federal advisory commission with authority only to advise the attorney general. The Commission recommended that the attorney general change the Department's discovery practices, and its recommendations were adopted by then Deputy Attorney General Sally Yates. The new DOJ procedures are very similar to the civil rule. Both have different disclosure requirements, one a summary and the other more detailed, depending on the type of expert the party is hiring. If the party hires an expert for a particular case, a more detailed summary is required. Given the new DOJ policy, Wroblewski thought that amending the Criminal Rules to parallel the civil discovery rules would not make much difference in most cases. Wroblewski disagreed with the suggestion that without a rule prosecutors would not follow that guidance. Federal prosecutors get discovery training every year. This year there is discovery training on expert witness testimony for all 6,000 criminal prosecutors.

Mr. Wroblewski informed the Committee that within a few days the Evidence Rules Committee would be holding a discovery conference and considering issues relevant to expert forensic evidence in criminal cases. Since the rules of admissibility might be amended, and the Department has adopted the recommended procedure and is training its prosecutors on the practice, he suggested that the Committee should defer action on Judge Rakoff's proposal.

A motion to table Judge Rakoff's suggestion was made, seconded, and approved by a voice vote.

VI. Discussion of Rule 16.1, Pretrial Discovery Conference

Judge Molloy introduced Professor Daniel McConkie, who had requested an opportunity to testify after the hearing had been cancelled. McConkie's written comments were not received in time for inclusion in the agenda book, but had been distributed to members. Judge Kethledge, chair of the Rule 16.1 Subcommittee, and Judge Molloy welcomed Professor McConkie and invited him to make a few comments.

Professor McConkie said he regretted not providing his comments before the Committee completed its work on the draft published for public comment, but he expressed the hope that they would still be useful. In summary, an amendment is warranted and the Committee's draft goes in the right direction, taking criminal discovery closer to civil discovery. Requiring the parties to confer about discovery would help them to regulate themselves. This requirement would help prosecutors, who generally want to comply with their discovery obligations but may find it hard to do so when they are not sufficiently familiar with the defense case. In his experience as an Assistant United States Attorney, Professor McConkie found it easier to comply with his discovery obligations if he spoke directly to defense counsel, and just had a conversation. It was not generally necessary to have a very long conversation.

Although Professor McConkie favored the adoption of the proposed rule, he also suggested a few "tweaks" for the Committee's consideration.

The first change Professor McConkie suggested was requiring that the conference be conducted in "good faith." He recognized that the Committee had discussed whether to include this language and decided not to do so. But he was concerned the Rule as written seems to be completely "voluntary," and it provides no remedy if one of the parties just goes through the motions of conferring. A good faith requirement would be helpful.

Professor McConkie also suggested going beyond the Committee's proposed "bare-bones rule," moving closer to the Civil Rule by requiring the parties to have a more structured discussion about what, when, and how discovery needs to be turned over. Finally, the parties should be required to submit a proposed order for the court. It is good practice to have a discovery order. It helps prosecutors fulfill their duties, and it helps the district court to enforce discovery obligations that are already in the rules and required by the Constitution.

In response to a question how his proposal would affect existing local rules and standing orders, some of which have a great deal of detail, Professor McConkie stated that it would change the practice if the local rules required less than the proposed national rule, but would not preclude local rules that now require more. He noted that the Committee has previously recognized that Rule 16 is not the only authority a judge has to regulate discovery, and accordingly his proposal would not defeat any local initiatives to regulate discovery in creative ways.

A practitioner member noted that as published the Committee Notes to Rule 16.1 reference the ESI protocol, which includes a report back to the court. Since the protocol already covers the report, it may not be necessary for the rule to require it. Also, the member noted, a report may be necessary only in the large discovery cases that need management.

Professor Beale observed that the Committee Note says that parties should be looking at best practices, giving the ESI protocol as an example. This builds in flexibility. The best practices could be a more or less detailed list or a report back to the judge. The proposed rule does not otherwise tie the hands of individual districts or judges. The Committee had concluded there was no need for a good faith requirement, but Professor McConkie had suggested this

would be a more serious signal to the parties. Professor Beale asked whether members had experience with counsel not fulfilling their obligations in good faith, and if this is indeed an issue.

A practitioner member noted he had initially favored adding the phrase "good faith," largely because it is in the Civil Rules, but he had been persuaded it was not necessary. The conversation reminded him, however, of the importance of requiring counsel to talk in real time to each other, which adds some gravitas to the meet and confer. He regretted the Standing Committee's decision to delete the requirement for an in-person meeting from the Rules Committee's proposed draft, and to allow conferences by telephone or Skype. Not explicitly requiring "good faith" is acceptable, but would be more satisfactory if the two parties always talked to each other in person. Deleting the requirement of a face-to-face meeting makes the conference a less meaningful event.

Professor King noted the requirements of "good faith" and meeting in person are related in another way. The Committee omitted the term "good faith" despite the fact that it created an inconsistency with Civil Rule 26. Later the Standing Committee deleted the requirement that the conference be in person, allowing it to be by telephone, in part to be consistent with the Civil Rule. Following that logic, she noted, would support adding "good faith" to the Criminal Rule.

Responding to a question about the effect of including "good faith," Professor McConkie said he had not done empirical work to see if the inclusion of the phrase had an effect on civil proceedings. A practitioner member doubted that it was necessary to include the words "good faith" in the Criminal Rule, noting that experience of practitioners during the discovery stage is now better in criminal than in civil cases, despite the inclusion of the words "good faith" in the Civil Rules. Moreover, in both civil and criminal cases he agreed the experience is better when counsel are speaking to one another.

Professor Beale noted that this discussion would be very helpful to the Rule 16.1 Subcommittee when it reviewed any other comments received during the notice and comment period.

VII. NEXT MEETING

Judge Molloy concluded the meeting with a reminder that the Standing Committee was meeting in January and the Rules Committee would be meeting in Washington, D.C. on April 24, 2018. He also thanked the reporters and the rules staff.