

**2022 Report of the Judicial Conference of the United States
on the Adequacy of Privacy Rules Prescribed
Under the E-Government Act of 2002**

**PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES
JUDICIAL CONFERENCE OF THE UNITED STATES**

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The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, “to protect privacy and security concerns relating to electronic filing of documents and the public availability ... of documents filed electronically.” Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the “privacy rules” – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007.

Subject to specified exemptions, the privacy rules require that filers redact from documents filed with the court (1) all but the last four digits of an individual’s social-security number (“SSN”) or taxpayer-identification number; (2) the month and day of an individual’s birth; (3) all but the initial letters of a known minor’s name; (4) all but the last four digits of a financial-account number; and (5) in criminal cases, all but the city and state of an individual’s home address. In recognition of the pervasive presence of sensitive personal information in filings in actions for benefits under the Social Security Act, and in proceedings relating to an order of removal, to relief from removal, or to immigration benefits or detention, the privacy rules exempt filings in those matters from the redaction requirement but also limit remote electronic access to those filings.

Section 205(c)(3)(C) of the E-Government Act directs that, every two years, “the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security.” Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. This third report covers the period from 2011 to date.¹

The report proceeds in four parts. Part I discusses amendments, relevant to the privacy rules, that have been adopted since 2011. Part II notes pertinent topics currently pending on the rules committees’ dockets. Part III recounts deliberations in which the rules committees considered whether additional rule amendments were necessary, but decided that question in the negative. Part III.A focuses on access to cooperation-related documents in criminal cases. Part III.B discusses the existing privacy rules’ redaction requirements. Part III.C notes other privacy-related proposals considered but not adopted by the rules committees. Part IV concludes.

I. Privacy-Related Rule and Form Amendments Adopted Since 2011

Since 2011, the Rules Committees have considered a number of rule and form amendments that are relevant to privacy issues. This subpart discusses the instances in which those deliberations resulted in amendments: to then-Bankruptcy Forms 9 and 21 in 2012; to Appellate Form 4 in 2013 and 2018; to Bankruptcy Rule 9037 in 2019; and to Appellate Rule 25(a)(5) (this amendment is on track to take effect in 2022 absent contrary action by Congress). The amendments to the Bankruptcy Forms – discussed in Part I.A – implemented, rather than altered, the privacy policies set by the Bankruptcy Rules. The amendments to Appellate Form 4 – discussed in Part I.B – did not alter the privacy policies set by Appellate Rule 25(a)(5), but narrowed the scope of sensitive personal information that Form 4 requires an applicant to provide in the first place. The

¹ Future reports will be made in 2024 and every two years thereafter.

amendments to Bankruptcy Rule 9037 and Appellate Rule 25(a)(5) – discussed in Parts I.C and I.D, respectively – represent modest changes to those privacy rules. Part I.E discusses how privacy concerns shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which are on track to take effect in 2022 absent contrary action by Congress).

A. 2012 Amendments to then-Bankruptcy Forms 9 and 21

In 2012 the Bankruptcy Rules Committee considered a suggestion by the Judicial Conference’s Committee on Court Administration and Case Management (“CACM”) for additional Rule and Form amendments to protect the privacy of debtors’ social security numbers. Specifically, CACM proposed that Bankruptcy Rule 2002(a)(1) be amended to remove the requirement that the debtor’s full SSN be included in the notice to creditors.

The Bankruptcy Rules Committee considered this suggestion but concluded – based on studies performed by the Administrative Office of the U.S. Courts (“AO”) – that creditors needed access to debtors’ SSNs and thus that it was not advisable to amend Rule 2002 as suggested by CACM. However, the Committee decided that warnings should be added to two forms: Form 9, which at the time was the form for the notice of meeting of creditors, and Form 21, which at the time was the form for the debtor’s “Statement of Social-Security Number(s).” The amendment to Form 9 warned creditors not to file Form 9 with their proofs of claim. The amendment to Form 21 warned the debtor not to file Form 21 in the public case file, and stated that the form had to be submitted separately and not included in the court’s public electronic records. Those amendments were adopted without publication (because they simply reflected existing policy) and took effect December 1, 2012.

Effective December 1, 2015, Forms 21 and 9 were superseded by Forms 121 (“Statement About Your Social Security Numbers”) and 309 (notice to creditors), which contain similar warnings.

B. 2013 and 2018 Amendments to Appellate Form 4

Appellate Rule 24 requires a party seeking to proceed in forma pauperis (“IFP”) in the court of appeals to provide an affidavit that, inter alia, “shows in the detail prescribed by Form 4 ... the party’s inability to pay or to give security for fees and costs.” (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. See Supreme Court Rule 39.1.) Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) had previously been amended in 2010 so that it requested only the last four digits of the applicant’s SSN.

In 2013, Form 4 was amended to respond to criticisms that two of its questions sought information (about payments for attorney and non-attorney services) that were unnecessary to the IFP determination. The amendment replaced the two questions at issue with a new, more streamlined question that asked about money spent for expenses or attorney fees in connection with the lawsuit. In 2018 the Form was further amended so that it no longer requests any portion of the applicant’s SSN.

C. 2019 Adoption of New Bankruptcy Rule 9037(h)

At the request of CACM, the Bankruptcy Rules Committee studied how to handle documents that were previously filed with a bankruptcy court without first redacting personal information as required by Bankruptcy Rule 9037. The Bankruptcy Rules Committee developed what would ultimately become new Bankruptcy Rule 9037(h), which sets a procedure for seeking redaction of documents after they have been filed. Knowing that there is a value to uniformity across the sets of privacy rules, the other advisory committees considered whether to propose similar amendments to the other privacy rules. They concluded, however, that while there was a need for the proposed new rule in bankruptcy cases, there was no similar need for such a provision in other types of cases. Accordingly, the other advisory committees decided not to propose similar amendments to the other privacy rules. New Bankruptcy Rule 9037(h) became effective in 2019.

D. 2022 Amendment to Appellate Rule 25(a)(5)

In 2018 the General Counsel of the U.S. Railroad Retirement Board proposed that actions for benefits under the Railroad Retirement Act be treated the same, under the privacy rules, as actions for benefits under the Social Security Act. Because benefits actions under the Railroad Retirement Act are filed directly in the federal courts of appeals, the Appellate Rules Committee took up this suggestion. Noting the close parallels between the Social Security and Railroad Retirement systems, the Appellate Rules Committee decided to propose amending Appellate Rule 25(a)(5) to provide that the Civil Rule 5.2(c) provisions limiting remote electronic access to Social Security benefits actions also apply to Railroad Retirement Act benefits review proceedings. That amendment has been reported to Congress and, absent contrary action by Congress, will take effect on December 1, 2022.

E. 2022 Adoption of Rule 2 of the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g)

Also on track to take effect on December 1, 2022, if Congress takes no contrary action, is the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g). The Supplemental Rules set a simplified procedure for actions seeking review of benefits decisions by the Commissioner of Social Security. Rule 2(b)(1)(B) requires the complaint in such an action to state “the name and the county of residence of the person for whom benefits are claimed,” while Rule 2(b)(1)(C) requires the same information about “the person on whose wage record benefits are claimed.” As published for public comment, these rules had also required the complaint to state the last four digits of the SSN of the relevant person(s). Due to privacy concerns expressed during the public comment period, the latter requirement was deleted, and instead a requirement was added to Rule 2(b)(1)(A) that the complaint include “any identifying designation provided by the Commissioner with the final decision.” The identifying-designation requirement will accommodate the Social Security Administration (“SSA”)’s upcoming implementation of the practice of using unique alphanumeric identifiers for each notice it sends, and will enable the SSA to identify the administrative proceeding to which the complaint refers without the necessity of including a portion of the SSN in the complaint.

II. Potential Privacy-Related Rules Amendments Currently Under Consideration

Currently pending on the rules committees' dockets are three topics for possible amendments that relate to the balance between privacy and public access to information filed with the court. Two of those topics concern financial information filed by litigants, though one topic – addressed in Part II.A – concerns the treatment of such information after it is filed and the other topic – addressed in Part II.B – concerns the scope of the information required to be provided in the first place. Part II.A discusses the Criminal Rules Committee's study of Criminal Rule 49.1 and financial affidavits filed by criminal defendants seeking representation pursuant to the Criminal Justice Act ("CJA"). Part II.B discusses ongoing deliberations concerning applications to proceed IFP in civil cases. Part II.C notes proposals to adopt a rule addressing the sealing and/or redaction of court filings.

A. Potential Amendment to Criminal Rule 49.1

The Criminal Rules Committee has begun to evaluate whether any change to Criminal Rule 49.1 is needed to address a reference – in the 2007 Committee Note to that Rule – to CACM's March 2004 "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." The Committee is evaluating whether the guidance, as outlined in the Note, is consistent with caselaw concerning rights of public access to information contained in criminal defendants' CJA applications. The Committee's work on this matter is very preliminary at present. If the Criminal Rules Committee were to conclude that an amendment to Criminal Rule 49.1 is warranted, the other advisory committees would then consider whether parallel amendments to the other privacy rules would be appropriate.

B. Potential Amendments Concerning Applications to Proceed In Forma Pauperis ("IFP")

The Appellate Rules Committee is considering suggestions to revise Appellate Form 4 (concerning applications to proceed IFP). The basic suggestion is that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status. The Appellate Rules Committee is developing possible amendments to Form 4 but is not yet ready to seek permission to publish them for public comment. The Civil Rules Committee is closely following the Appellate Rules Committee's work on this topic. The Civil Rules do not themselves currently include a Rule or Form that addresses IFP applications, and the Civil Rules Committee is also exploring whether other entities, such as CACM, might usefully address the topic instead.

C. Proposals to Adopt a Rule on Sealing of Court Filings

The Civil Rules Committee has before it proposals to adopt a rule setting standards and procedures governing the sealing and/or redaction of court filings. The Committee has referred these proposals to its Discovery Subcommittee for initial evaluation. In the course of its initial consideration, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and

Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council. In light of this effort, the subcommittee determined that further consideration of suggestions for a new rule should be deferred to await the result of the AO's work.

III. Potential Privacy-Related Rules Amendments Considered But Not Adopted

The rules committees have considered a number of other potential rule amendments that relate to the balance between privacy and public access. This part summarizes instances in which the rules committees considered potential amendments but, after study, concluded that no rule amendment was warranted. Part III.A discusses work on issues relating to cooperation- and plea-related documents in criminal cases. Part III.B notes the committees' periodic study of compliance with the existing privacy rules and the adequacy of those rules. Part III.C briefly notes other topics considered for rulemaking but ultimately not pursued.

A. Cooperation-Related Documents

For a number of years, the Standing Committee, the Criminal Rules Committee, and other bodies within the federal judiciary worked with other interested parties to consider the problem of the risk of harm to cooperating defendants from disclosure of certain materials and whether procedural protections might alleviate this problem. The Judicial Conference's 2011 privacy rules report highlighted the issue of electronic public access to plea and cooperation agreements as a topic warranting careful study by district courts. A 2016 study by the Federal Judicial Center ("FJC")² found that survey respondents reported a significant number of instances of harm or threats of harm to government cooperators, as well as that court documents (such as plea agreements) and inferences from docket features (such as gaps in the docket or sealed documents) were reported as sources of information about cooperation.

Over the ensuing years, the Criminal Rules Committee and the Standing Committee were closely involved in discussions aimed at balancing the interest in protecting cooperators against retaliation, on one hand, and rights of access to court records, on the other. Relevant access rights that were considered included those of the public and the press as well as those of criminal defense counsel who need information on defendants' cooperation in other cases in order to assess the fairness of a proffered plea deal.

Based in part on the FJC study, CACM recommended in 2016 that the rules committees consider amendments to the Criminal Rules that would address concerns about the availability of cooperation-related information. The Standing Committee referred CACM's suggestion to the Criminal Rules Committee, which appointed a Cooperator Subcommittee and tasked it with studying the FJC's findings and the recommendations by CACM. Meanwhile, the Director of the AO formed a Task Force on Protecting Cooperators to consider changes that could be made apart from amending the Criminal Rules. Those participating in the Task Force's work included members of CACM, the Criminal Rules Committee, and the Standing Committee, representatives from the Bureau of Prisons ("BOP") and the Department of Justice, and a federal defender.

² See Margaret S. Williams et al., Survey of Harm to Cooperators: Final Report Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States (FJC 2016).

The Criminal Rules Committee's Cooperator Subcommittee took up the Standing Committee's charge of drafting potential amendments to the Criminal Rules that would implement CACM's suggestions, and formulated such a set of possible amendments to Criminal Rules 11, 32, 35, 47, and 49. The Cooperator Subcommittee also drafted a possible new Criminal Rule 49.2 that would have limited remote electronic access to criminal case files. After thorough discussion, however, the Cooperator Subcommittee, and in turn the Criminal Rules Committee and the Standing Committee, decided not to propose these rule amendments for adoption. All participants shared the serious concern over the need to address the threat of harm to cooperators. However, the rules committees determined that rule amendments were not the best way to do so. Some participants expressed concern that the potential rule amendments would decrease the transparency of judicial proceedings; and some participants suggested that the changes wrought by such amendments would be broader than necessary. Participants also noted that recommendations by the Task Force held the promise of addressing the problem of cooperation-related information through other means, such as through actions by the BOP and through changes to the case management/electronic case filing ("CM/ECF") system.

In 2018 the Task Force rendered an interim report recommending changes that BOP could make to diminish retaliation against cooperators housed in BOP facilities, and a final report that recommended changes in filing and docketing practices in CM/ECF, changes to the amended judgment form, and training for justice-system participants in how to handle cooperator information. The Task Force noted that these changes did not require any changes to the Criminal Rules, and it did not recommend any rule amendments. After the Task Force provided its recommendations to the Director of the AO, the AO Director asked CACM and the Criminal Law Committee, as appropriate, as well as the BOP, to review the Task Force's recommendations for potential implementation. The AO Director also circulated the report to the judges and district and circuit clerks of all federal district courts and courts of appeals.

B. Evaluation of Existing Redaction Requirements

The privacy rules' redaction requirements have been reviewed by the rules committees on a number of occasions since the 2011 privacy rules report. A 2015 study by the FJC provided one occasion for review of the rules' operation. Subsequent proposals for amendments to the Civil and Appellate privacy rules were considered in 2015-2016 and 2018. These deliberations, however, did not result in proposals for amendments to the privacy rules.

As noted in the 2011 privacy rules report, the FJC in 2010 conducted a survey of federal court filings to ascertain how often unredacted SSNs appeared in those filings.³ In 2015, the FJC reported the results of its follow-up study on the same topic.⁴ The follow-up study searched 3,900,841 documents filed during a one-month period in late 2013 and found that 5,437 (or less than 0.14 percent of the documents) included one or more unredacted SSNs. This is a greater percentage than was found in the 2010 study; but the 2015 study explained that the difference was due to an improvement in search methodology. In the 2015 study (unlike in the 2010 study), the researchers reprocessed the documents using optical character recognition ("OCR"), which

³ See Memorandum from George Cort & Joe Cecil, Research Division, FJC, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010).

⁴ See Joe S. Cecil et al., Unredacted Social Security Numbers in Federal Court PACER Documents (FJC 2015).

enabled them to spot SSNs in documents that were originally filed in non-text-searchable format. The researchers noted that, because OCR had not been used for the 2010 study, that study had failed to reflect the full incidence of unredacted SSNs. They observed that a comparison of the two studies' findings, taking into account the difference in methodologies, "suggests that the federal courts have made progress in recent years in reducing the incidence of unredacted Social Security numbers in federal court documents, especially in bankruptcy court documents."⁵ The Standing Committee discussed the FJC's findings at its January 2016 meeting; it concluded that no amendments to the privacy rules were warranted, but that the rules committees would stand ready to consult with CACM in the latter's ongoing efforts to implement the existing privacy rules.

In 2015-2016, the Bankruptcy, Civil, Criminal, and Appellate Rules Committees considered a proposal that the privacy rules be amended so as to direct the redaction of the entirety of an individual's SSN or taxpayer-identification number. The proponent argued that for many SSNs, the portion of the SSN other than the last four digits can be deduced from other sources of data. In considering this suggestion, participants noted that the rules committee had considered this particular question when formulating the existing privacy rules, and that the rules committees had decided not to direct redaction of the last four digits because of the need for that information in bankruptcy proceedings and the value of a uniform approach across all the privacy rules. Based on continued agreement with that analysis, the advisory committees decided not to propose amendments to the privacy rules. The Appellate Rules Committee did, however, proceed with what would become the 2018 amendment to Appellate Form 4 (discussed in Part I.B, above).

In 2018, CACM raised a privacy concern regarding sensitive personal information made public in judicial opinions in Social Security and immigration cases. Noting that judicial opinions are not subject to Civil Rule 5.2(c)'s limits on remote electronic access, see Civil Rule 5.2(c)(1)(B), CACM's chair wrote to the chief judges and circuit and district clerks of the federal district courts and courts of appeals to suggest that courts consider redacting all but the first name and last initial of any nongovernment parties when writing opinions in such cases. In addition, CACM asked the Standing Committee to consider whether to adopt amendments to the privacy rules to address this issue. The Standing Committee referred this suggestion to the Civil and Appellate Rules Committees. Those committees discussed CACM's suggestion at their fall 2018 meetings and decided not to propose a rule amendment. Participants in the committee discussions expressed hesitation at the prospect of drafting rules that would tell courts how to write their opinions, and noted that the problem might be effectively addressed by changes in local court practices in response to CACM's suggestion.

C. Other Proposals

It remains to briefly mention four other items, relevant to the privacy rules, that did not result in proposals to amend the rules.

In 2012 and again in 2015-2016, the Bankruptcy Rules Committee decided not to amend Bankruptcy Rule 2002's requirement that the notice to creditors include the debtor's SSN. The Bankruptcy Rules Committee concluded in 2012 that creditors needed the full SSN in order to identify debtors. In response to a 2015 suggestion on the same topic, the Bankruptcy Rules Committee engaged in further study to gauge whether creditors were still reliant on having full

⁵ Id. at 11.

SSNs. These inquiries confirmed the need to retain the full SSN on the notice to creditors. However, the form for the notice to creditors was amended in 2012 to feature a warning that the notice to creditors should not be filed with the court.⁶

In 2016-2017, the Civil, Criminal, and Appellate Rules Committees considered whether to adopt a provision similar to new Bankruptcy Rule 9037(h) that would address the process for seeking redactions in previously-filed documents; but the advisory committees concluded there was no need to adopt such a provision outside the bankruptcy context. Bankruptcy Rule 9037(h) took effect in 2019.⁷

In 2015-2016, the advisory committees considered a proposal that the rules be amended to provide that affidavits in support of applications to proceed IFP should be presumptively filed under seal. None of the advisory committees felt that rulemaking action on this topic was warranted. However, the Appellate Rules Committee did proceed with an amendment that narrowed the information requested by Appellate Form 4.⁸ And a subsequent project to study the scope of disclosures required for IFP applications is ongoing in the Civil and Appellate Rules Committees.⁹

In 2018, the Civil and Criminal Rules Committees considered a suggestion by the National Association of Professional Background Screeners that the Civil and Criminal Rules be amended to require that parties who are natural persons file a “confidential disclosure statement” (containing the person’s full name and date of birth) with the court clerk. The suggestion was that this information, once filed, could be input into the court’s Public Access to Court Electronic Records (“PACER”) system so that PACER users could search by a party’s name and birth date. The Civil and Criminal Rules Committees decided not to proceed with such an amendment. Participants in the committees’ discussions observed that the proposed amendment did not seem to serve any purpose that lay within the scope of the rules.

IV. Conclusion

In the years since the Judicial Conference’s second report to Congress on the adequacy of the privacy rules, the rules committees have included considerations about the privacy and security of personal information in their study of multiple proposals to revise the privacy rules and other rules. As noted in Part I, a number of those proposals have borne fruit in amendments to particular rules or forms. Part II surveyed pending proposals that may touch upon privacy-related issues. As evidenced in Part III’s discussion of deliberations that did not result in proposals to amend the rules, it is often the case that goals relating to the privacy and security of information filed with the court may be served through non-rules-based approaches that work together with the existing privacy rules. The rules committees will continue to work with other entities within and outside the judicial branch to monitor and address issues of privacy and security in the light of modern access to electronically-filed court documents.

⁶ See Part I.A.

⁷ See Part I.C.

⁸ See Part I.B.

⁹ See Part II.B.