

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

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MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 19, 2017

I. Introduction

The Advisory Committee on Criminal Rules met on April 28, 2017, in Washington, D.C. This report presents five action items. The Committee unanimously recommends that the Standing Committee approve and transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) Rule 49 (filing and service),
- (2) Rule 45(c) (conforming amendment), and
- (3) Rule 12.4 (government disclosure of organizational victims).

The Committee also recommends that the following proposed amendments be published for public comment:

- (1) Rule 16.1 (new), and
- (2) Rule 5 of the Rules Governing Proceedings under Sections 2254 and 2255.

The report also discusses two information items: continuing consideration of the recommendation of the Committee on Court Administration and Court Management (“CACM”)

for rules changes to protect cooperators, and the Federal Judicial Center’s undertaking to prepare a manual on complex criminal litigation.

II. Action Item: Rule 49

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts’ electronic filing system. Because Rule 49(b) and (d) currently provide that service and filing be made in the “manner provided for a civil action,” the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. With the approval of the Standing Committee, the Advisory Committee drafted and published a stand-alone Criminal Rule for filing and service that included provisions for e-filing and service. Parallel amendments providing for e-filing and service are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees. All were published for public comment in August of 2016.

The Committee reviewed the public comments received on the Criminal Rules, as well as comments that implicated common provisions. In response, the Committee revised two subsections in the published rule, and added a clarifying section to another portion of the Committee Note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required and certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised by the reporters and Advisory Committees. The published Criminal Rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed “within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court’s electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court’s electronic filing system the certificate must be filed “within a reasonable time after service of filing, whichever is later.” Because that might be read as barring filing of the certificate with the paper, (d)(1) was revised to state that the certificate must be filed “with it or within a reasonable time after service or filing.” Parallel changes have been recommended for Civil Rule 5(d).

The second change revised the language of (b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. The revised language, which is also proposed for Civil Rule 5, states:

An authorized filing made through a person’s electronic-filing account, together with the person’s name on a signature block, serves as the person’s signature.

One clarifying change was made to the Committee Notes to Rule 49(a)(3) and (4) and Civil Rule 5. In response to concerns expressed by clerks of court, a sentence was added to the Note stating that “The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

The Committee also considered, but declined to adopt, public comments recommending that it extend presumptive e-filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to e-filing was considered extensively during the drafting process, and the Committee was not persuaded that the comments warranted a change.

The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 49 governing service and filing in criminal cases, and the Committee Note, for submission to the Judicial Conference.

III. Action Item: Conforming Amendment to Rule 45

No comments were received on the published amendment revising cross references that would be made obsolete by the proposed amendment of Rule 49. Although this is a technical and conforming amendment, it was published with Rule 49 to avoid any concern that might arise. The Committee made no changes following publication.

The Committee unanimously recommends that the Standing Committee approve the proposed conforming amendment to Rule 45 governing computing and extending time, and the Committee Note, for submission to the Judicial Conference.

IV. Action Item: Rule 12.4

The proposed amendment to Rule 12.4, which governs the parties’ disclosure statements, was initially recommended by the Department of Justice. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the Committee Note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest “that could be substantially affected by the outcome of the proceedings.”

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of making the required disclosures upon a showing of “good cause.” The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. The published amendment also made changes in

Rule 12.4(b): (1) specifying that the time for making the disclosures is within 28 days after the initial appearance; (2) revising the rule to refer to “later” (rather than “supplemental”) filings; and (3) making clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were received. One stated that the proposed changes were unobjectionable. The other suggested that the phrase “good cause” should be limited to “good cause related to judicial disqualification.” The Committee declined to make that change, concluding that in context the amendment was clear.

The Committee was also made aware of concerns that its proposed clarifying language in 12.4(b) would be inconsistent with the language in Civil Rule 7.2(b)(1). The Committee concluded that clarification was not necessary, and that it would be desirable to track the language now in the Civil Rule. A motion to revise the published amendment to adopt the language drawn from Civil Rule 7.2(b)(1) was approved unanimously. As revised, Criminal Rule 12.4(b)(2) requires a party to “promptly file a later statement if any required information changes.”

The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 12.4 governing disclosure statements in criminal cases, and the Committee Note, for submission to the Judicial Conference.

V. Action Item: New Rule 16.1

Proposed new Rule 16.1 originated in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “gigabytes of information.” At the suggestion of Judge David Campbell, chair of the Standing Committee, the Committee held a mini-conference to learn more about the issues and to determine whether a rule amendment to deal with discovery in cases that are complex or involve large quantities of electronically stored information (ESI) would be warranted.

At the mini-conference, experienced private practitioners and public defenders working with these issues expressed strong support for a rule change. One question was whether the ESI Protocol worked out by the Justice Department and defense representatives¹ was sufficient to solve most problems. The defense attorneys reported that some prosecutors and judges do not know about the ESI Protocol, nor do they understand the problems some disclosures pose for the defense. The prosecutors who attended were not initially convinced a rule was needed. They did

¹ The Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

agree that not all judges or Assistant United States Attorneys are aware of the ESI Protocol and that more training would be useful. They also emphasized that any rule had to be flexible in order to address variation between cases. Prosecutors agreed that a rule directing prosecutors to the protocol would be helpful.

All attendees agreed that ESI discovery issues are handled very differently between districts, and that most criminal cases, large and small, now include ESI. Problems can arise, for example, with social media, cell site data, storage devices, and other evidence an incarcerated defendant would have trouble reviewing. A surprising degree of consensus developed about what sort of rule was needed: something simple, that puts the principal responsibility on the lawyers, and encourages the use the ESI Protocol, which saves time and is cost-effective for the courts. Some participants reported that once the parties get together and actually consult the ESI Protocol, discovery goes very smoothly. Participants did not support a rule that would attempt to specify narrowly the type of case in which this attention was required, or list the individual options that should be considered, such as providing an index.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified. The proposed amendment was drafted after reviewing several examples of local rules and orders addressing this issue, and unanimously approved first by the Subcommittee and then by the Advisory Committee at its April meeting. The Committee chose to place the new language in a new Rule 16.1 rather than Rule 16 because it addresses activity that is to occur shortly after arraignment and well in advance of discovery. Also, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

The new rule has two sections.

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting “no later than” 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial contact, which can then be followed by additional conversations. The rule does not prescribe a time period for seeking judicial assistance. Members noted that subsection (b) bears some resemblance to Civil Rule 26(f), but is much more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. If there is no applicable order or rule governing the schedule or manner of discovery, the parties

may ask the court to “determine” when and how disclosures should be made. But if they wish to change the existing discovery schedule, the parties must seek a modification. A modification is required if (1) the schedule or manner of discovery is ordered by the judge in their individual case or (2) is included in a standing order or local rule. In any case, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached.

The district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and in local rules and standing orders. The rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the court to accept their agreement or otherwise limit the court’s discretion. To avoid any confusion, this point is emphasized in the Committee Note, which states: “Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure.”

The Committee Note also emphasizes that the rule does not attempt to state specific requirements for the manner or timing of disclosure of ESI, but also states that counsel “should be aware of best practices.” As an example of these best practices, it cites the ESI Protocol. The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

The Committee considered but decided not to broaden this provision to include other grounds for judicial action, such as “the interests of justice” or simply “other grounds.” The proposal is narrowly focused, and the Committee concluded it does not need to accommodate other traditional concerns, such as delays for conflicts in trial dates. Members also expressed concern about the unanticipated consequences of a broad undefined phrase.

The Committee also considered a suggestion that it delete the phrase “to facilitate preparation for trial,” but concluded that it should be retained. This phrase is the heart of the proposal from the point of view of the defense community that first brought the problems of discovery in complex cases to the Committee’s attention.

After the adoption of amendments to incorporate some suggestions from the style consultants and to clarify the Committee Note, the Committee voted unanimously to forward Rule 16.1 to the Standing Committee with the recommendation that it be published for public comment. The Committee views the proposed rule as a modest but positive step to respond to significant changes in discovery.

The Committee unanimously recommends that the Standing Committee approve the new Rule 16.1, and the accompanying Committee Note, for publication for public comment.

VI. Action Item: Rule 5(d) of the Rules Governing 2255 Actions and Rule 5(e) of the Rules Governing 2254 Actions

Judge Richard Wesley first drew the Committee’s attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that “The moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the committee note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a thorough review of the cases, the Committee has concluded that the text of the current rule (as well as the parallel language in Rule 5(e) of the Rules Governing 2254 actions) is contributing to a misreading of the rule by a significant number of district courts. The current rule provides that a prisoner can file a reply “within a time fixed by the judge.” The reference to filing “within a time fixed by the judge” can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing. Indeed, some members acknowledged that they had previously been uncertain whether the rule granted a right to reply. Acknowledging the remote prospect that appellate review will correct the interpretation, the Committee agreed an amendment is warranted.

The Committee approved language that would clearly signal that the moving party in 2255 cases (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

The moving party may file a reply to the respondent’s answer or other pleading.
The judge must set the time to file, unless the time is already set by local rule.

There was some concern that retaining “may” (rather than “has a right to” or “is entitled to”) in the first sentence might not solve the problem. On the other hand, as the style consultants emphasized, it was important not to cast doubt on the meaning of “may,” a term that is used in many other rules. To address this, the Committee added a sentence to the Committee Note, which the style consultants accepted: “We retain the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’”

The proposed amendment does not set a presumptive time for filing, as there was considerable concern that the rule retain the discretion individual courts and judges use to accommodate local circumstances and practices. It also recognizes that the time for filing is sometimes set by local rule, as research by the Federal Judicial Center indicates. Declining to impose a new, presumptive filing period avoids disrupting the widely varying practices among the districts. When there is no local rule, requiring the judge to set a time for filing will help avoid uncertainty that might trip up unwary prisoners and create unnecessary litigation.

The Committee also approved a parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The earlier Committee that revised both amendments saw no reason to treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

The Committee unanimously recommends that the Standing Committee approve the amendments to Rule 5 of the Rules Governing Section 2254 and 2255 Cases, and the accompanying Committee Notes, for publication for public comment.

VII. Information Item: Cooperators

Judge Kaplan presented a progress report on the work of the Advisory Committee's Subcommittee on Cooperators, as well as the Task Force on Cooperators, both of which he chairs. CACM has proposed a variety of measures to protect cooperators. The Subcommittee is working on changes to the rules that would implement CACM's specific recommendations, and it will make a recommendation to Advisory Committee as to whether it thinks those changes should be adopted. The Subcommittee is also considering other rule changes that either go beyond what CACM has suggested or take a different approach. There is significant interaction between the Subcommittee and the Task Force. At the moment the Task Force is heavily focused on non-rules approaches to protecting cooperators, and the Subcommittee is focused on rules. The Task Force's ongoing efforts may affect the Subcommittee's tentative conclusions about what might or might not be done with the rules, and this is likely to continue.

When the Criminal Rules Committee makes its recommendation in the fall, the Task Force will be preparing a final report that will cover both rules and non-rules subjects which it hopes to have out at the end of the year.

Judge Kaplan explained that the Subcommittee is developing three sets of possible rules amendments. Preliminary drafts of each approach were provided in the agenda book.

The first set of draft amendments were intended to implement CACM's approach. CACM has recommended that various documents and transcripts of what happens in court be sealed in every criminal case, and the reporters prepared initial drafts of the amendments required to implement that approach. They also identified a number of potential rule changes that were not specifically recommended by CACM, which they thought would be necessary to fully implement the premises underlying the CACM report. The Subcommittee has tentatively concluded that it will present only the amendments necessary to implement CACM's recommendations, but flag in its report all of the other things that probably should be considered if the ultimate decision is to implement the CACM sealing approach full bore.

The second set of amendments were the result of Judge Kaplan's conversations with Judge Molloy and Judge Hodges, leading to the suggestion of an approach that would preserve confidentiality but not involve quite as much sealing as CACM's proposal. The idea was to take advantage of the historic confidentiality of Presentence Reports (PSRs). PSRs have traditionally been viewed as internal to the judiciary. In many cases they are never filed, although they are available to an appellate court if needed. These amendments attempt to use the PSRs to accomplish as nearly as possible the end product that CACM sought to achieve. Just before the April meeting the Subcommittee decided that it would not support a PSR approach that would change what happens in the courtroom, and it rejected a requirement that cooperation be discussed only at the bench, transcribed in a separate document that would then be added to the PSR.

The third approach being considered by both the Subcommittee and the Task Force, is limiting at least lay public access through PACER. This general approach could be used in combination with or in lieu of the other approaches. There is a good deal of at least anecdotal evidence that anonymous remote public access to PACER is a source of much of the information that gets into prisons about who is cooperating.

Judge Kaplan stressed that these are all preliminary drafts. The Subcommittee may end up recommending one, none, or some combination of them.

Turning to the Task Force, Judge Kaplan stated that the Bureau of Prisons ("BOP")/Marshal Service working group, chaired by Judge St. Eve, had produced a very substantial report to the Task Force that deals with what is going on in the prisons and what can be done to bring about change. The information from BOP is based on Task Force interviews with BOP personnel. BOP does not track which inmates are cooperators, nor does it link information on assaults and other adverse consequences affecting individual inmates to whether the inmate had cooperated in the past or was cooperating. Thus, BOP has no quantitative data. However, the BOP has been tremendously cooperative and totally forthcoming.

The BOP working group report describes widespread attempts by inmates to determine if someone arriving in prison has been a cooperator. In many places a new inmate is asked for "his papers" (whatever documents the inmate has, such as a PSR, sentencing minutes, judgment and commitment order, transcripts, etc.). If the inmate says he doesn't have his papers, he is told to get them. The report describes the various means by which inmates seek to obtain their own papers, as well as means that inmates use to learn about the cooperator status of others. This often involves use of PACER by someone outside the prison. The BOP working group also found that the problem of physical assaults is concentrated in high security facilities, and to a lesser extent in medium security facilities. It occurs rarely at lower security level institutions.

Judge Kaplan drew attention to the important role of several BOP policies. For some time, BOP has treated an inmate's PSR as contraband and made an inmate's possession of a PSR a disciplinary offense. If the inmate wants to see his own PSR, he can review it in a secure

environment, but may not copy it or retain a copy. That procedure has not been extended to other sensitive papers, such as sentencing minutes and plea agreements.

The Task Force is considering a recommendation for revisions in the BOP policies. For example, BOP currently has no policy restricting the posting of papers by inmates. Another aspect of the problem is that the possession of PSRs is not restricted for pretrial detainees, who need their PSRs to prepare for sentencing. And there are pretrial and post-conviction inmates in the same lockups. It will be critical to prevent papers from moving into the prison with inmates after they are convicted. Some changes in BOP policies will have to be negotiated with the union that represents BOP employees, which will take some time.

The Task Force Electronic Court Filing (“ECF”) working group, chaired by Judge Phillip Martinez, a member of CACM, has also been active. It is focused on possible changes to ECF that would make cooperation status opaque or nearly opaque to someone who gets access to the docket sheet. The working group has been considering six options, and is attempting to determine which options are feasible within a reasonable timetable.

The Task Force is scheduled to meet on June 14. It will have the full report from the BOP working group and perhaps a full report from the ECF working group. The Task Force may come to tentative views about possible recommendations for non-rules changes, subject to the input of the Justice Department and more discussion between May and October after the Task Force has met again.

There was extensive discussion (summarized in more detail on pages 8-20 of the minutes). Many members emphasized the importance of the problem and the need for changes to reduce the threats to cooperators. Representatives from the Department of Justice said that this is a paramount issue for the Department, and that prosecutors lose sleep over concerns about the safety of people who have agreed to cooperate. A judicial member said we have a moral duty to protect the safety of cooperators. But members were also concerned that there was a lack of data about the size of the problem, and questioned how much of the harm to cooperators could be linked to information from the court’s files and dockets, as opposed to other sources.

One important theme was the tension between the need to protect cooperators and the values of openness and transparency in the judicial system, which are reflected in the First Amendment. Some members sharply criticized the possibility of rules that would increase secrecy in federal judicial proceedings or result in secret dockets. A presumption of secrecy and sealing, they said, undermines the presumption of transparency and raises constitutional issues. Members also discussed the degree to which the problems could or should be addressed by the Executive Branch through changes in BOP procedures and by other means. Representatives of the Department of Justice agreed that the executive branch has the primary responsibility, but they also emphasized that judges had raised the issue and should be involved. In their view, judicial action is essential to solve the problem and necessary to protect the integrity of the judicial system.

Judge Campbell asked whether the different procedures adopted in the 94 district courts to protect cooperators—sealing documents revealing cooperation, keeping the documents out of the court’s records by lodging them with some other individual, or placing them in a master file of some sort—establish a consensus that a national rule is warranted despite concerns about transparency. Participants responded that there is considerable variety in the approaches of the districts. Some districts limit only remote access rather than sealing, and some districts are close to the traditional presumption of transparency with sealing only in individual cases. Less than a dozen districts have adopted the CACM approach. Some members emphasized the fundamental difference between a uniform national rule to seal certain kinds of documents in all cases and a judgment by an individual judicial officer to seal something in an individual case. From a constitutional and transparency point of view, the Supreme Court has said repeatedly that sealing to protect an informant, for example, is acceptable based on particularized findings in an individual case. A determination to seal every plea agreement in every criminal case, on the ground that in a few cases there is a real risk, is quite another thing. A member noted that the Eleventh Circuit has ruled that there can be no secret dockets, and members from other circuits doubted that their courts would allow blanket sealing.

Members also explored different options.

Several members expressed interest in the master sealing event which is placed on the docket of every criminal case in Judge Campbell’s district. The court can make an individualized determination whether public access to certain documents should be restricted to protect a cooperator. If access is restricted, the document is placed in the master sealed event. Because there is a master sealed event in every case, the public docket in every criminal case looks the same to third parties. All plea agreements are filed on the public docket, but each plea agreement states that there may or may not be a cooperation addendum. If there is a cooperation addendum, it is in the master sealed event. In that district, the courtroom is sealed for plea colloquies in cooperation cases.

Other members expressed interest in protecting cooperators by restricting remote access, at least as a first step. Many of the problems seem to trace back to, or be aggravated by, unrestricted remote access to the full docket in criminal cases, and members thought that there would be no constitutional impediment to restricting remote access. Some members noted that relatively few people take the trouble to come to the courthouse to look at judicial records, and restricting remote access seems to be working in some districts. But others characterized this as an unworkable approach in contemporary society, and they predicted that motivated individuals would come to the courthouse if necessary. Limiting remote access also raises serious issues under the E-Government Act, which states a very strong policy of openness, though it also provides for exceptions. The E-Government Act does allow for privacy and security based exceptions to be promulgated under the Rules Enabling Act. That is why the current rules require redaction of social security numbers and the names of juveniles. Restricting remote access to all or part of all criminal cases would be a major exception.

Members were also concerned about how various approaches would work in practice, noting the difficulties that would be raised when defense counsel in other cases make arguments about sentencing disparities under 18 U.S.C. § 3553. Discussion of a hypothetical revealed that it would be extremely difficult to give appropriate sentences to a cooperator and a non-cooperator who committed similar offenses without revealing the fact of cooperation or the status of the cooperator.

Members also expressed opposition to changes that would restrict what happens in the courtroom, such as requiring a bench conference in every sentencing or plea colloquy, or sealing the courtroom itself.

There was also interest in exploring new possibilities, such as an effort to determine, ex ante, which defendants were most likely to be subject to retaliation, and providing additional protections for those defendants at earlier stages of the proceedings.

VIII. Information Item: Federal Judicial Center Manual on Complex Criminal Litigation

The Federal Judicial Center will prepare a manual for Complex Criminal Litigation. The Rule 16.1 Subcommittee, chaired by Judge Kethledge, will take the lead in helping the Committee develop a list of the top five to ten issues it would like to see addressed in the manual.

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**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 49. Serving and Filing Papers**

2 (a) **Service on a Party.**

3 **(1) What is~~When~~ Required.** ~~A party must serve on~~
4 ~~every other party.~~ Each of the following must be
5 served on every party: any written motion (other
6 than one to be heard ex parte), written notice,
7 designation of the record on appeal, or similar
8 paper.

9 ~~(b) **How Made.** Service must be made in the manner~~
10 ~~provided for a civil action.~~

11 **(2) Serving a Party's Attorney.** Unless the court
12 orders otherwise, ~~W~~when these rules or a court
13 order requires or permits service on a party
14 represented by an attorney, service must be made

¹ New material is underlined; matter to be omitted is lined through.

15 on the attorney instead of the party, ~~unless the~~
16 ~~court orders otherwise.~~

17 **(3) Service by Electronic Means.**

18 (A) Using the Court's Electronic Filing System.

19 A party represented by an attorney may
20 serve a paper on a registered user by filing
21 it with the court's electronic-filing system.

22 A party not represented by an attorney may
23 do so only if allowed by court order or local
24 rule. Service is complete upon filing, but is
25 not effective if the serving party learns that
26 it did not reach the person to be served.

27 (B) Using Other Electronic Means. A paper

28 may be served by any other electronic
29 means that the person consented to in
30 writing. Service is complete upon
31 transmission, but is not effective if the

32 serving party learns that it did not reach the
33 person to be served.

34 (4) *Service by Nonelectronic Means.* A paper may
35 be served by:

36 (A) handing it to the person;

37 (B) leaving it:

38 (i) at the person's office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or

42 (ii) if the person has no office or the office
43 is closed, at the person's dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;

47 (C) mailing it to the person's last known
48 address—in which event service is
49 complete upon mailing;

50 (D) leaving it with the court clerk if the person
51 has no known address; or
52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.

57 **(b) Filing.**

58 **(1) When Required; Certificate of Service.** Any
59 paper that is required to be served must be filed
60 no later than a reasonable time after service. No
61 certificate of service is required when a paper is
62 served by filing it with the court’s electronic-
63 filing system. When a paper is served by other
64 means, a certificate of service must be filed with
65 it or within a reasonable time after service or
66 filing.

67 **(2) Means of Filing.**

68 (A) Electronically. A paper is filed
69 electronically by filing it with the court's
70 electronic-filing system. An authorized
71 filing made through a person's electronic-
72 filing account, together with the person's
73 name on a signature block, serves as the
74 person's signature. A paper filed
75 electronically is written or in writing under
76 these rules.

77 (B) Nonelectronically. A paper not filed
78 electronically is filed by delivering it:
79 (i) to the clerk; or
80 (ii) to a judge who agrees to accept it for
81 filing, and who must then note the
82 filing date on the paper and promptly
83 send it to the clerk.

84 **(3) Means Used by Represented and Unrepresented**

85 **Parties.**

86 **(A) Represented Party.** A party represented by
87 an attorney must file electronically, unless
88 nonelectronic filing is allowed by the court
89 for good cause or is allowed or required by
90 local rule.

91 **(B) Unrepresented Party.** A party not
92 represented by an attorney must file
93 nonelectronically, unless allowed to file
94 electronically by court order or local rule.

95 **(4) Signature.** Every written motion and other
96 paper must be signed by at least one attorney of
97 record in the attorney's name—or by a person
98 filing a paper if the person is not represented by
99 an attorney. The paper must state the signer's
100 address, e-mail address, and telephone number.
101 Unless a rule or statute specifically states

102 otherwise, a pleading need not be verified or
103 accompanied by an affidavit. The court must
104 strike an unsigned paper unless the omission is
105 promptly corrected after being called to the
106 attorney's or person's attention.

107 **(5) Acceptance by the Clerk.** The clerk must not
108 refuse to file a paper solely because it is not in
109 the form prescribed by these rules or by a local
110 rule or practice.

111 **(c) Service and Filing by Nonparties.** A nonparty may
112 serve and file a paper only if doing so is required or
113 permitted by law. A nonparty must serve every party
114 as required by Rule 49(a), but may use the court's
115 electronic-filing system only if allowed by court order
116 or local rule.

117 **(d) Notice of a Court Order.** When the court issues an
118 order on any post-arraignment motion, the clerk must
119 ~~provide notice in a manner provided for in a civil~~

120 ~~action~~ serve notice of the entry on each party as
121 required by Rule 49(a). A party also may serve notice
122 of the entry by the same means. Except as Federal
123 Rule of Appellate Procedure 4(b) provides otherwise,
124 the clerk's failure to give notice does not affect the
125 time to appeal, or relieve—or authorize the court to
126 relieve—a party's failure to appeal within the allowed
127 time.

128 ~~(d) **Filing.** A party must file with the court a copy of any~~
129 ~~paper the party is required to serve. A paper must be~~
130 ~~filed in a manner provided for in a civil action.~~

131 ~~(e) **Electronic Service and Filing.** A court may, by local~~
132 ~~rule, allow papers to be filed, signed, or verified by~~
133 ~~electronic means that are consistent with any technical~~
134 ~~standards established by the Judicial Conference of~~
135 ~~the United States. A local rule may require electronic~~
136 ~~filing only if reasonable exceptions are allowed. A~~

137 ~~paper filed electronically in compliance with a local~~
138 ~~rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, “Each of the following must be served on every party” restores to this part of the rule the passive

construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the “unless” clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court’s electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by “other electronic means,” such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court’s electronic filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing “in a manner provided for in a civil action” has been

replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state “Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.” A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court’s electronic filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court’s electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court’s electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney’s signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are “written or in writing,” deleting the words “in compliance with a local rule” as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court’s electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word “party” changed to “person” in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the

media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court’s electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided “in a manner provided for in a civil action” has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(d).

Changes Made after Publication and Comment

Subsection (b)(1) was revised to clarify when a certificate must be filed. No certificate is required for service using the court’s electronic filing system. Subsection (b)(2)(A) was revised to more clearly define what constitutes a person’s signature when a paper is filed electronically. The Committee Note was revised to include a statement that the amendment was not intended to impose any burden on the clerk’s office to notify the parties if service was not effective.

Summary of Public Comments

CR-2016-0005-0004. Oscar Amos Stilley. Describes experience as a former attorney who relies on the prison

mailbox rule to “certify that service has been accomplished by CM/ECF”; urges that Rule 49 “should not limit the right of an inmate to certify service on opposing counsel via CM/ECF.”

CR-2016-0005-0006. Pennsylvania Bar Association. Supports the amendment but recommends one revision: the “default rule of non-electric filing should be eliminated for nonparties, who should instead be permitted to elect between electronic and non-electronic service and filing.”

CR-2016-0005-0007. Heather Dixon. Expresses concern that the proposed Rule 49(b)(2)(A) regarding the signature requirement for electronic filing is “very confusing and seems to request that a filer include his/her user name and password on the signature block in the document being filed”; proposes alternative language.

CR-2016-005-0008. New York City Bar Association. Supports the “substantive changes” in the proposed amendment, but expresses concern that the provision regarding electronic signatures “could be read to mean that the attorney’s user name and password should be included on any paper that is electronically filed”; proposes clarifying language.

CR-2016-005-0009. Sai. Advocates (1) replacing presumptive prohibition of *pro se* use of CM/ECF filing with presumptive access, (2) treating *pro se* status as “rebuttably presumed good cause for nonelectronic filing; (3) making this presumption irrebuttable in the case of *pro se* prisoners; (4) requiring courts to “allow *pro se* CM/ECF access on a par with attorney filers”; (5) permitting “*individualized* prohibitions on CM/ECF usage for good cause”; and (6) clarifying and relocating the provisions regarding electronic signatures.

CR-2016-005-0010. National Association of Criminal Defense Lawyers. Expresses support for the elimination of a requirement for separate certificate of service,

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 45. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**

4 Whenever a party must or may act within a specified
5 time after being served and service is made under
6 Federal Rule of ~~Civil~~Criminal Procedure ~~49(a)(4)(C),~~
7 ~~(D), and (E)5(b)(2)(C) (mailing), (D) (leaving with~~
8 ~~the clerk), or (F) (other means consented to),~~ 3 days
9 are added after the period would otherwise expire
10 under subdivision (a).

Committee Note

Rule 49 previously required service and filing “in a manner provided” in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

¹ New material is underlined; matter to be omitted is lined through.

Changes Made After Publication and Comment

None.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3 **(1) *Nongovernmental Corporate Party.*** Any
4 nongovernmental corporate party to a proceeding
5 in a district court must file a statement that
6 identifies any parent corporation and any
7 publicly held corporation that owns 10% or more
8 of its stock or states that there is no such
9 corporation.

10 **(2) *Organizational Victim.*** Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity.~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~
15 ~~government must file a statement identifying the~~

¹ New material is underlined; matter to be omitted is lined through.

16 ~~victim.~~ If the organizational victim is a
17 corporation, the statement must also disclose the
18 information required by Rule 12.4(a)(1) to the
19 extent it can be obtained through due diligence.

20 **(b) Time ~~for~~to Filing; Supplemental~~Later~~ Filing.** A
21 party must:

22 (1) file the Rule 12.4(a) statement within 28 days
23 ~~after~~~~upon~~ the defendant’s initial appearance; and

24 (2) promptly file a ~~later~~~~supplemental~~ statement if
25 any required information changes ~~upon any~~
26 ~~change in the information that the statement~~
27 requires.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has “an interest that could be substantially affected by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of

making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance.

Because a filing made after the 28-day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have been revised to refer to a later, rather than a supplemental, filing. The text was also revised to be more concise and to parallel Civil Rule 7.1(b)(2).

Changes Made After Publication and Comment

The language of (b)(2) was simplified to parallel Civil Rule 7.1(b)(2).

Summary of Public Comments

CR-2016-0005-0010. Peter Goldberger and William J. Genego, National Association of Criminal Defense Attorneys. Expresses "confidence that federal judges will not misapply the newly created "good cause" exception when sought to be invoked" and "agrees that the added flexibility that this amendment would afford the government in making the required notification seems entirely unobjectionable."

CR-2016-0005-0006. Sara A. Austin, Pennsylvania Bar Association. "[S]upports the amendment, with one proposed revision: the first clause of proposed Rule 12.4(a)(2) should be modified to read, 'Unless the

government shows good cause bearing on judicial recusal,
it must . . .”

TAB 5C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

- 1 **Rule 16.1. Pretrial Discovery Conference and**
2 **Modification.**
- 3 (a) **Discovery Conference.** No later than 14 days after
4 the arraignment the attorneys for the government and
5 the defendant must confer in person or by telephone,
6 and try to agree on a timetable and procedures for
7 pretrial disclosure under Rule 16.
- 8 (b) **Modification of Discovery.** After the discovery
9 conference, one or both parties may ask the court to
10 determine or modify the timing, manner, or other
11 aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer in person or by telephone shortly after arraignment about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically

¹ New material is underlined in red; matter to be omitted is lined through.

stored information (ESI) or other voluminous or complex discovery.

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increases. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

Subsection (b) allows one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

**RULES GOVERNING SECTION 2254 CASES IN
THE UNITED STATES DISTRICT COURTS¹**

1 **Rule 5. The Answer and the Reply**

2 * * * * *

3 (e) **Reply.** The petitioner may ~~submit~~file a reply to
4 the respondent’s answer or other pleading ~~within a time~~
5 ~~fixed by the judge.~~ The judge must set the time to file
6 unless the time is already set by local rule.

Committee Note

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word “may,” which is used throughout the federal rules to mean “is permitted to” or “has a right to.” No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

¹ New material is underlined in red; matter to be omitted is lined through.

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**RULES GOVERNING SECTION 2255 PROCEEDINGS FOR
THE UNITED STATES DISTRICT COURTS¹**

Rule 5. The Answer and the Reply

* * * * *

(d) **Reply.** The moving party may ~~submit~~file a reply to the respondent's answer or other pleading ~~within a time fixed by the judge.~~ The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean "is permitted to" or "has a right to." No change in meaning is intended by the substitution of "file" for "submit."

As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

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TAB 5D

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 28, 2017, Washington, D.C.

I. Attendance

The Criminal Rules Advisory Committee (“Committee”) met in Washington, D.C., on April 17, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Kenneth A. Blanco, Esq.
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Gary Feinerman
Mark Filip, Esq. (by telephone)
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Justice Joan Larsen
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge David G. Campbell, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Daniel Coquillette, Standing Committee Reporter (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Rules Committee Officer, Secretary, Standing Committee
Laural L. Hooper, Esq., Federal Judicial Center
Julie Wilson, Esq., Rules Support Office
Lauren Gailey, Esq., Law Clerk, Standing Committee
Shelly Cox, Rules Support Office
Frances Skillman, Rules Support Office

II. CHAIR’S REMARKS AND OPENING BUSINESS

A. Chair’s Remarks

Judge Molloy introduced the Committee’s newest member, Justice Joan Larsen from the Michigan Supreme Court, and he welcomed Assistant Attorney General Kenneth Blanco.

After members had introduced themselves, Judge Molloy recognized two members for whom this is their last meeting: Carol Brook, who has served for six years, and Judge Terry Kemp, who is retiring. He asked each if they would like to make any comments.

Ms. Brook praised the experience of serving on the Committee, noting the fascinating and complex issues. She expressed gratitude for the privilege of working with people who were opening, welcoming, and listened to the defense concerns.

Judge Kemp said that although he was looking forward to retirement, he regretted leaving the committee. He noted the care the Committee takes with each word in the Rules and advisory committee notes to address problems substantively with clear rules that can be applied uniformly. The process also brings together many different perspectives and seeks consensus. Judge Kemp thought if people could see how the process works, they would read the rules and the comments differently.

Assistant Attorney General Blanco thanked the Committee for inviting him to participate and said he was looking forward to the discussion of issues of great importance to the Department.

The draft minutes of the fall meeting were approved unanimously by voice vote with no changes.

Judge Molloy noted that the minutes of the Standing Committee meeting were included in the agenda book and that the Supreme Court has approved the pending rules package. Absent any action by Congress, those rules will become effective Dec. 1, 2017.

Judge Molloy then asked Mr. Wroblewski to comment on legislative responses to the amendment of Rule 41. Mr. Wroblewski reminded the Committee that in December of 2016 an amendment to Rule 41 went into effect that permits a judge to issue a warrant for the remote electronic search of a computer within a district where a crime has occurred—rather than the district in which the computer is located—if anonymizing software has been used to disguise the computer's location. The amendment also allows a judge to issue a single warrant in a botnet situation when there are many computers in multiple districts. The process leading up to that amendment was contentious, and legislation was introduced to block the amendment. A similar bill is pending in the Senate, and the Department is following it carefully. Mr. Wroblewski informed the Committee that just a few weeks before the meeting the Department had taken down a botnet, using the amendment to get a warrant that applied to thousands of computers. The amendment was extremely helpful.

Judge Molloy asked Standing Committee chair Judge Campbell for any initial comments; Judge Campbell responded that he was pleased to be at the meeting.

Judge Molloy then turned the meeting over to Judge Kaplan, chair of both the Criminal Rules Subcommittee on Cooperators and the Cooperators Task Force. Judge Molloy complimented the Task Force, and especially Judge St. Eve, for the work they had completed.

Judge Kaplan agreed that Judge St. Eve had done a prodigious amount of work, with significant help from Judge Molloy, the reporters, and others on the Task Force. He stated that this was a progress report, and that the Subcommittee hopes to make its final report to Criminal Rules Committee in time for full consideration at the fall meeting. There is significant interaction between the Subcommittee and the Task Force. At the moment the Task Force is heavily focused on non-rules approaches to protecting cooperators, and the Subcommittee is focused on rules. Things that the Task Force has done very recently may affect the Subcommittee's tentative conclusions about what might or might not be done with the Rules, and this is likely to continue.

Judge Kaplan reminded the Committee of the background: the Committee on Court Administration and Court Management (CACM) has proposed a variety of measures to protect cooperators. The Subcommittee is working on changes to the rules that would implement CACM's specific recommendations, and it will make a recommendation to this Committee as to whether it thinks those changes should be adopted. The Subcommittee is also considering other rule changes that either go beyond or take a different approach than what CACM has suggested.

The Task Force has been gathering input from all the relevant constituencies, including the Bureau of Prisons (BOP) and the Marshal's Service. As the new administration takes hold, he said, we hope to have a good deal of input from the Department of Justice. When the Criminal Rules Committee makes its recommendation in the fall, the Task Force will be preparing a final report that will cover both Rules and non-rules subjects which we hope to have out at the end of the year.

Judge Kaplan drew the Committee's attention to the Subcommittee's side-by-side comparisons of two sets of possible rules amendments (Appendix A in the agenda book). The left column reflects the Subcommittee's initial draft of rules amendments necessary to implement CACM's approach. CACM has recommended that various documents and transcripts of what happens in court be sealed in every criminal case. In the course of the preparation of the left-hand column, the reporters identified a number of potential rule changes that were not specifically recommended by CACM, which they thought would be necessary to fully implement the premises underlying the CACM report. Some amendments in the left column fall into that category. Subcommittee discussions also identified other similar changes that are not reflected there. The Subcommittee is tentatively of the view that it will limit the left-hand column to amendments necessary to implement CACM's recommendations, but flag in its report all of the other things that probably should be considered if the ultimate decision is to implement the CACM sealing approach full bore.

Judge Kaplan explained that the rules in the right column were the result of his conversations with Judge Molloy and Judge Hodges, leading to the suggestion of another approach that would preserve confidentiality but not involve quite as much sealing as CACM's proposal. The idea was to take advantage of the historic confidentiality of Presentence reports (PSRs). PSRs have traditionally been viewed as internal to the judiciary. In many cases they are never filed, although they are available to an appellate court if needed. The amendments in the

right-hand column, drafted by the reporters, were an attempt to use the PSRs to accomplish as nearly as possible the end product that CACM sought to achieve.

The third approach (shown in Appendix B) being considered by both the Subcommittee and the Task Force, is limiting at least lay public access through PACER. This general approach could be used in combination with or in lieu of the other approaches. There is a good deal of at least anecdotal evidence that anonymous remote public access to PACER is a source of much of the information that gets into prisons about who is cooperating.

Judge Kaplan stressed that these are all preliminary drafts. The Subcommittee may end up recommending one, none, or some combination of them. The draft rules are still under consideration by the Subcommittee, which has already made one decision of significance that would result in substantial changes in the proposed rules in the right-hand column.

Turning to the Task Force, Judge Kaplan stated that the BOP/Marshal Service working group, chaired by Judge St. Eve, had produced a very substantial report to the Task Force, based on a huge amount of work by Judge St. Eve and Judge Molloy. It is enormously enlightening. It deals with what is going on in the prisons and what can be done to change what is going on there, and it is the most important document to be produced in the last year or so.

The information we have from BOP is based on interviews with BOP personnel conducted by Judges St. Eve and Molloy. BOP does not track cooperators when they are in custody as a category of inmate, nor does it link information on assaults and other adverse consequences affecting individual inmates to whether the inmate had cooperated in the past or was cooperating. Thus, BOP has no quantitative data about what is going on. However, the BOP has been tremendously cooperative, totally forthcoming, and made available everybody we wanted to talk to, which is important to recognize.

The BOP working group report describes widespread attempts by inmates to determine if someone newly designated to a particular facility has been a cooperator. In many places a newly arriving inmate is asked for "his papers" (whatever documents the inmate has, such as a PSR, sentencing minutes, judgment and commitment order, transcripts, etc.). If the inmate says he doesn't have his papers, he is told to get them. As a result, inmates ask people outside the prison, often their relatives, to get their papers. There have also been an increasing number of requests by inmates asking the district courts to send their papers to them in prison. The federal judiciary currently has no uniform practice for handling such requests. Some courts, such as the Northern District of Illinois and the Northern District of New York, have adopted practices, but others have not, and some documents are getting into prisons from the courts. The working group also learned that some inmates seeking cooperator information have developed form letters they give to the new inmates to sign and then send off to the court in which they were sentenced. Judge Kaplan said he had received one or two of these letters. There are certain institutions in which inmates, once they get their papers, are required to post them in their cells or outside their cells, so that they are freely available to anyone who wants to come and read them. We have no quantitative data of how frequently that happens, but it does happen. The transcript of a recent hearing before Judge Molloy provided an example of another facet of the problem. Although

inmates do not have access to PACER, they find it easy to call and ask people outside prison to do PACER searches to learn about the cooperator status of other inmates, and to report the information back into the prison by the telephone. This information is relevant to the option of limiting remote access to PACER, at least by lay people.

The BOP working group also found that the problem of physical assaults is not evenly distributed throughout the federal prison system: most assaults occur in high security penitentiaries, and to a lesser extent in medium security. They rarely occur at lower security level institutions.

Judge Kaplan drew attention to the important role of several BOP policies. For some time, BOP has, for most practical purposes, treated an inmate's PSR as contraband and made an inmate's possession of a PSR a disciplinary offense. If the inmate wants to see his own PSR, it can be exhibited to him in a secure environment, but not copied for him. That procedure has not been extended to all other sensitive papers, such as sentencing minutes and plea agreements. The Task Force is considering a recommendation for revisions in the BOP policies. For example, BOP currently has no policy restricting the posting of inmate papers. Another aspect of the problem is that the possession of PSRs is not restricted for pretrial detainees, because they need their PSRs to prepare for sentencing. And there are pretrial and post-conviction inmates in the same lockups. It will be critical to prevent papers not moving into the prison with inmates when they are convicted and designated.

The Task Force's interviews with special investigative agents from the BOP also yielded suggestions about how to reduce these problems. The agents thought limiting public access to PACER would be very helpful. They also favored punishing inmates who press others for their papers (which apparently is not done now).

Judge Kaplan reminded the Committee that the Task Force had not yet met to discuss the working group report, but he commented that it would be surprising if the Task Force did not make some strong and comprehensive recommendations about changes at the BOP.

The Task Force ECF working group, chaired by Judge Phillip Martinez, a member of CACM, has also been active. It is focused on possible changes to ECF that would make cooperation status opaque or nearly opaque to someone who gets access to the docket sheet. The working group has been considering six options.

(1) The first option would track a functionality that is presently available in the bankruptcy courts, but not the federal district courts. Bankruptcy courts have the ability today to make private entries on the docket sheet with an attached PDF document without assigning a sequential docket number to that private entry. The working group has not yet determined whether this function can be made available in the district court ECF system, or what the timetable would be.

(2) A second option would be to create two docket sheets for each criminal case. One would be publicly accessible, and the other would be a sealed docket for sealed entries. There would be sequential numbers assigned to sealed entries (sealed entry number 1, sealed entry

number 2, etc.). Because there would be no gaps in the sequential numbering of entries on the public docket sheet, someone looking at a docket sheet in a criminal case on PACER would not be able to tell if there are any sealed documents or what they might pertain to.

(3) An option used in the Northern District of New York is to lodge the PSR and the district court's statement of reasons—documents that would reveal cooperators status—with the U.S. Attorney's Office or Probation Officer. They would retain custody of the original document, which would not be filed. A variation of that is used in Judge Kaplan's court, the Southern District of New York.

(4) Another option in use in the Western District of Pennsylvania is to create a miscellaneous sealed case, one for every criminal case, which would be linked to the criminal case. All cooperation information would be placed on the miscellaneous sealed docket.

(5) Alternatively, a master sealed event could be created in each criminal case right after the initial entry on the docket sheet in a criminal case, and all cooperation related documents would go into that sealed event. The docket sheet looks identical in all criminal cases regardless of cooperation. This system is in use in the District of Arizona.

(6) The final option is the existing CACM proposal

The ECF working group is seeking to determine which options are feasible on a reasonable timetable.

Judge Kaplan said the Task Force is scheduled to meet on May 18. It will have the full report from the BOP working group and perhaps a full report from the ECF working group. The Task Force may come to tentative views about possible recommendations for non-rules changes, subject to the very important input of the Justice Department and more discussion between May and October after the Task Force has met again.

Judge Kaplan then summed up the progress made by the Subcommittee. The drafting for the CACM sealing recommendations is very far along, though the version in the agenda book may change if we remove the provisions that CACM did not recommend. As to the PSR approach, the Subcommittee met by telephone just before the April meeting, and there was a consensus that it would not support a PSR approach that would change what happens in the courtroom. The Subcommittee rejected a requirement that cooperation be discussed only at the bench, with a transcript added to the PSR. Thus the proposed amendment in the right-hand column will need significant revisions. Moreover, all of the options can affect one another. For example, if a judge seals sentencing minutes because there was a discussion of cooperation, it might be helpful to make a change in the ECF system so that the fact of sealing is not reflected on the docket.

Judge Molloy asked Judge St. Eve to add any comments she may have.

Judge St. Eve responded by thanking Judge Molloy for his assistance with the working group report, and noted that the BOP has been extremely helpful, making sure they had access to what they needed. We have to keep in mind that whatever recommendations we make for the

BOP will have to be negotiated with their union. That cannot be done very quickly, especially to the extent it will impact their employees, which some of our provisions certainly will. Another thing driving some of this is gang membership. This is not surprising, but they learned that the race of the gang has a significant impact on the consequences to cooperators. If the white Aryan brothers find out you are a cooperator, they won't give you a break, whereas other gangs may give the cooperator who is a member of their gang the opportunity to "walk off the yard." The consequences are hard to nail down because of the lack of data linking assaults to cooperators. In talking to investigators on the ground, assaults are certainly happening against cooperators at the higher security facilities. Additionally, we should not lose sight of the Special Housing Unit (SHU). Inmates who become fearful that they are going to be targeted because of cooperation often go into the SHU, and sentences in the SHU are a very different. If you are in the SHU, you are on lockdown, meaning you don't get the same outside exposure, and you don't get to participate in programs such as the GED or drug programs. It is a very different type of sentence.

Judge Molloy commented on several points. First, CACM's position is that whatever changes are made will likely be ineffective in the absence of a national rule, but the 94 district courts and 800 plus district judges all like to do things their own way. Second, the BOP was very supportive of having national policies for the federal prisons. Third, there is a tension between transparency and protecting cooperators. He referenced the reporters' memorandum about the First amendment, and emphasized that these are not simple problems. The more we get into it and learn more factual information, the more complicated the solution becomes.

Judge Campbell noted that the Standing Committee will inherit this problem, and it appreciates the efforts and work that is being done. The Task Force seems to be drilling down to find solutions to this, which is terrifically helpful. The Standing Committee will need to learn all it can from what you are doing. It was evident to him that these are really tough issues, especially when it comes to rulemaking. At this point, he said, he had more questions than helpful thoughts.

Assistant Attorney General Blanco characterized that this is one of the more important issues that the Department is facing. These are hard, important issues, and not something the Department can walk away from. We have to find a solution, though coming to a conclusion won't be easy because of the tension between transparency versus security and safety. What is that balance? Where is it appropriate? Should it be balanced in the judiciary, or is it better handled in the Justice Department? If our system is going to continue to function, this is an issue that must be resolved. He noted that the new Deputy Attorney General had just been sworn in, and these issues will be discussed with him and the Attorney General. Both will be extremely interested in the discussion here. Our system cannot function if we cannot provide safety for witnesses, both cooperators and others, so for the Department this is very critical. He had used cooperators and had them hurt and some killed, both here and abroad, and he emphasized this is a paramount issue. He stays awake at night worrying about people who have cooperated with the government and done the right thing; we need to be able to protect them. The BOP and the way we house our incarcerated people is a whole different world, and where we put our

cooperators must be resolved as well. But this is a tough issue, and it's got to get resolved, and the Committee will have the Department's support in resolving it. Mr. Blanco said that he and Mr. Wroblewski would provide their wholehearted support. He also noted that the new Deputy Attorney General and the Attorney General would have significant input.

Judge Molloy called for preliminary discussion and reactions to the draft amendments, noting it would be helpful to the Subcommittee and the Task Force to hear members' comments and questions.

Judge Campbell asked whether the prevalence of local efforts to protect cooperators reflects the existence of a consensus that justifies a national rule. He noted there seems to be a debate about whether there should be an attempt to amend the criminal rules to implement some sort of uniform national policy, and that debate is concerned in part with First Amendment issues and the transparency of our judicial system. But it seems that every court in the country is trying to do something to protect cooperators, and most or all probably involve to some degree either sealing documents, keeping them out of the record in the hands of some other individual, or putting them in a master file of some sort. Although there are 94 different approaches, that seems to demonstrate that courts think that it's appropriate to do something with our dockets to protect cooperators. If that's true, what not adopt a uniform national rule, so that no one can tell from district to district who cooperators are? The First Amendment and transparency issues are already here, even though we lack a uniform national approach.

Professor Beale responded that the staff of the Administrative Office is helping CACM track what is going on in the 94 districts. There is a third approach in some districts, restricting remote access in criminal cases to protect cooperators. That approach can be found in Appendix B. Judge Dever's district, for example, uses that approach. Other districts have much more selective sealing. Courts have always sealed in individual cases where there is an identifiable problem. Some districts that are much more selective in sealing. They begin from a baseline of transparency and availability, but will seal in individual cases when there is a problem. So in fact the picture is more mixed than all 94 having essentially reached a consensus on this fundamental question. Instead there is quite a wide array of approaches, and we are close to transparency in some of the districts. There are less than a dozen that have adopted the CACM approach. So if your question is there a consensus on a particular approach where we see sealing in every case and inability to tell from the docket, it is certainly not unanimous.

Judge Kaplan responded that with respect to sealing there is a fundamental difference between a uniform national rule to seal certain kinds of documents in all cases and a judgment by an individual judicial officer to seal something in an individual case. From a constitutional and transparency point of view, the Supreme Court has said over and over again that sealing to protect an informant, for example, is acceptable based on particularized findings in that individual case. That's one thing. A determination to seal every plea agreement in every criminal case, just to take a rhetorical example, on the ground that in a few cases there is a real risk, is quite another thing. That is an initial reaction to your question, not a well thought out answer.

A member agreed with Judge Kaplan's comment, and emphasized that there is a national policy: the court can seal only when there is a showing of need in an individual case. The member noted that he had once been a prosecutor and now represents people who cooperate. Protecting cooperators is a terrible problem you do lose sleep over. You do not want to have on your hands responsibility for someone being threatened or losing their life. That said, he preferred to place his trust more in the individual judge to make that determination rather than a flat rule of secrecy. He likened a uniform national policy of sealing in all cases to having two sets of books, and warned that would erode public confidence in the judicial system. With a general sealing policy, the public will not understand why cases are progressing the way they are progressing, victims will not understand why certain rights aren't being vindicated more quickly. Knowing that people are cooperating and progress is being made helps create public confidence. It also allows defense lawyers to determine whether to advise a client whether to continue to fight the charges against him, or to cooperate. Helping the defense in these ways also helps the prosecution to resolve cases. He objected strongly to increasing secrecy in federal criminal proceedings, which is not progress and is not something the judiciary should be involved in. Rather, the judiciary should seek ways to enhance fairness and integrity of the judicial process. The agreement to come up with rules that implement CACM's proposals is wrong, and is a backwards approach. The problem should be solved first by the executive branch. There are no data about whether this is a uniform problem, or about what types of cases are affected, and no data that any of the solutions CACM has proposed would be effective. How could we say under those circumstances we're justified in proposing rules?

Mr. Blanco noted that placing a sealed item in the docket for each case was not inconsistent with the court making particularized findings; the findings could be made and included in a sealed document. That is a consistent approach, which he favored. Responding to the comment that this is an executive branch problem, he noted that judges raised the issue and are concerned about what is happening. The judiciary should be involved. These rules protect the integrity of the judicial system and people's willingness to participate in the judicial system. So the courts should think about whether the rules should be changed.

Judge Kaplan agreed that the sealed docket idea helps with public access to certain sensitive documents. But the essence of the CACM proposal is different. It seals all documents of particular kinds in all cases. CACM believes a sealed docket for items sealed after particularized finding is insufficient, because cooperators can be identified by a process of elimination. So you have to seal everything.

Judge Campbell noted that everyone likes their own system. His court, the district of Arizona, uses a master sealed event. Every third or fourth item on the docket sheet in every criminal case is a master sealed event. If you have access to sealed documents, as a judge does, you will see that the master event is empty in non-cooperator cases. But from the outside you can't tell. In cooperator cases, the judge makes individualized decisions, but the materials that would reflect the cooperation that would otherwise be sealed in a particular docket entry go into that master sealed event. So in the master sealed event in a cooperator case you can see the addendum to the plea agreement that is the cooperation agreement, the 5K1.1 motion, and the

sentencing memorandum that deals with cooperation. All cases are uniform to the outside viewer, but it is still a judge making individual sealed decisions.

Judge Kaplan asked what happens in a case where there are 57 defendants and some cooperators. Do you seal the plea agreements of all 57 or just the ones who are cooperating?

Judge Campbell responded that his court doesn't seal any of the plea agreements, but for cooperators there is a sealed addendum to the plea agreement. All plea agreements (for both cooperators and noncooperators) include a statement that "There may or may not be an addendum to this plea agreement." If there is a cooperation addendum, it is in the master sealed event, filed separately in the court's record. It is not left in the hands of the probation office (which raises concerns about taking documents out of the court's record). But someone who goes to the docket of criminal cases will see a master sealed event and a plea agreement in every one. They can't tell if there is a cooperation addendum, they can't tell if there was a 5K1.1 motion because it would be in the master sealed event, whereas in other courts it would be a separate sealed item. So you are creating uniformity but you are not sealing anything in a non-cooperation case that would otherwise be public.

Judge Kaplan asked how the Arizona district courts handle the situation when a case goes to trial with eight defendants, it is getting close to trial, and someone has cooperated? Everyone knows that one defendant has pleaded. The sentence is being deferred, and deferred. Everybody knows he's a cooperator, right?

Judge Campbell responded that he did not think we can solve that problem. If the cooperator is going to testify at trial, that will be public, the defendants will have the right of confrontation, they are going to see him, and the government has a *Brady* obligation to disclose information. We can't solve that problem. And CACM is not trying to. But what we can do is try to eliminate the clues to cooperator status that are apparent in the docket sheet, without sealing anything more than what is already being sealed in individual cooperation cases.

A member expressed the view that the number of cooperators against whom there are threats is very few. We have been told the BOP hasn't kept the data that would show what kind of cases and reprisals occur in prison as a result of cooperation. That's a big black hole. So why should there be a presumption that there should be sealing in all cases. This reverses the presumption of transparency. There is more public benefit of disclosure that there are cooperators than there is danger of bad consequences. If there is the risk of bad consequences, the judge now has the discretion to respond. And there are plenty of ways that the executive branch can protect cooperators.

A member asked Judge Campbell who has access to the documents in that master sealed file. Does the attorney for the defendant have access to them? Do other attorneys have access to them? And what do you do in court? Is it your court's practice when you take the plea to go through the terms of the plea agreement including cooperation with him? And if so, do you do that in open court?

Judge Campbell responded that the only people that would have access to the master sealed event are the people who would normally have access to the sealed document. It does not change who has access. It is really just a docket management tool to put everything in one location so you do not see the gaps. His court does not use the CACM approach in plea colloquies and sentencings where there is sidebar in every case. He expressed concern about the logistics of that procedure. His court seals the courtroom when they do a plea colloquy with a cooperator, and the judge does go over with the defendant the terms of the cooperation addendum, which can be pretty draconian if the defendant doesn't fulfill the terms. That is discussed on the record. The entire colloquy and the sentencing is sealed if it involves a cooperator. People are excluded from the courtroom so that cooperation can be discussed. It's not a perfect system, because if that person appeals, his plea colloquy and sentencing transcript will be sealed and go into the master sealed event, and somebody looking at the docket can look at the docket and say "Ah ha! You're on appeal but you don't have a sentencing transcript in docket, so you must be a cooperator." So we are not solving that problem with our system. But his court takes 7,000 pleas a year, and CACM's proposal for a bench conference in every case would be unworkable.

Judge St. Eve asked if his court got pushback from defense lawyers seeking to make 3553(a) disparity arguments, objecting that they can't get the information about who is cooperating. That's one argument the Task Force has been hearing. If the defense counsel can't get access to sealed documents with information about who is cooperating, then they can't make those disparity arguments under 3553(a)(6).

Judge Campbell responded that although no objections were raised when the court adopted its policy in 2011, in some cases the argument is made that the defendant before the court is no more culpable than another defendant who has been given a reduced sentence. The implication is "I don't know if he's a cooperator, but you do judge." So the defense is without that information with some degree. But in many multi-defendant cases, people figure out who the cooperators are even with the Arizona system. So sometimes this will be discussed more by the defense attorneys. This does give less information to counsel for other defendants than in a case where there is information about who has cooperated. But that is also true in every case where there are judges sealing things. You can infer from the fact that the other defendant got a sealed document that he's probably a cooperator.

A member argued that there was no reason to impose this burden on the defense in white collar cases such as insider trading prosecution. For example, in white collar cases in the Southern District of New York, there is no threat to cooperators so it is not sealed. Often, counsel learns initially when one defendant refuses to join a joint defense agreement or later drops out. The member did not understand the need for a rule such as a master sealed event in all cases, and for all defendants, when in many cases there is no risk of threats. The idea of this rule is to protect against threat, and it overreaches substantially. Judges now have the power to give protection when there is a showing of need, and you are suggesting the adoption of rules that will apply in every case to every defendant in every district regardless of whether there is a risk.

Judge Campbell replied that in a system like Arizona's—where there is a master sealed event in every case and you can't tell by looking at the docket what has been sealed—cooperators have a choice. Those who want protection could have the documents put into the master sealed event, but a cooperator who doesn't want protection could tell the judge not to seal anything. When someone starts comparing dockets, they'll see some cooperators, such as white collar defendants in the 10b5 cases. But looking at all the other cases they can't tell who the cooperators are, and they can't see the sealed documents. He asked how that would be different than the current system.

In response, the member characterized the system described by Judge Campbell as one that allows an individual cooperating defendant to opt out of the master sealed event. That is not acceptable, because the burden should be on the government to keep information from the public the press and everybody else. It is the government's burden to show the necessity to seal. This burden is not insurmountable; it is surmounted every day in every district. Moreover, when you are talking about threats that occur in prison, that's a question of protecting the prisoners in prison.

Judge Molloy reminded the Committee that its charge is to come up with a proposed rule change to implement CACM's proposal, and then to make a recommendation to the Standing Committee whether the changes would be a good idea or a bad idea.

Judge St. Eve commented that although BOP doesn't track threats of harm to cooperators and thus cannot provide data, if you talk to the officers on the ground working at the facilities at the higher levels of risk, there are threats, they are pressuring inmates – some percentage of them – for their paperwork to prove they are not cooperators. However, at the lower level security facilities you don't see it. That makes it difficult to argue at sentencing that there will be a threat to a cooperating defendant. That's part of the tension.

Members discussed the significance of the information that the problem occurs largely at the maximum and medium security prisons. A member estimated that the percentage of prisoners in maximum security is less than half, so probably about 99% of defendants are not affected. Judge St. Eve said that more than one percent are threatened, and the member responded that is an important data point. Judge Molloy commented that there are thousands of defendants who receive 5K1 departures per year, although there were some issues about what that represented.

A member returned to the question whether we already have something like the CACM system now. The member explained how much the proposals would change practice in the member's district, and how it would adversely affect the defense function. Defense counsel need information about cooperation to advocate for their clients. The member had just filed a brief in the Seventh Circuit using all the cases that could be located on the docket sheets. Defense counsel must also advise their clients about cooperation, and need to be able to tell them what to expect if they do or don't cooperate. This requires information about the sentences of persons who cooperated in similar cases. There are some cases counsel will not know about now, because some cooperation cases in the Northern District of Illinois are sealed, though not the

majority. The member expressed the view that the Seventh Circuit would never allow mass sealing. Everything must be unsealed within something like 90 days unless we have some good reason. The other consideration is prosecutorial fairness. The member emphasized that she was not casting any aspersions on the fairness of the U.S. Attorney's Office, but the member still wants to be able to see—and thinks the public should be able to see—what is happening in various cases, rather than having mass sealing.

Judge Kaplan noted that every time we have a discussion of this, he is struck by the fact that people approach the issue from the standpoint of what happens in their own court, which may be entirely different than what happens somewhere else. It was brought home to him again when Judge Campbell talked about the practice in his court, in which all plea agreements are on the public docket, and cooperation is in a sealed addendum. In contrast, in the Southern District of New York and some other districts, the cooperation agreement is part of the plea agreement. This raises the question whether the Justice Department is in a position to establish uniform national practices on that and other issues.

Second, every time these issues are discussed, a new idea emerges. A year ago we sought data in the FJC report about whether this was a problem that was unique or heavily concentrated in certain kinds of offenses, but it was not possible to differentiate. The current discussion suggests another possibility. It seems that the problem is concentrated in the high security, and to a lesser extent medium security, penitentiaries but not in lower security facilities. The BOP has designation criteria, and it might be possible to craft a rule-based approach that would say certain procedures are followed in cases meeting certain criteria that would be closely related to the designation criteria BOP uses. Perhaps the rule could say, if a case gets so many points on a scoring scale, or if a defendant is likely to go into a high security institution if convicted, one set of consequences follows, but otherwise a another set of consequences. This is at least worth thinking about.

Mr. Wroblewski commented that we have to differentiate questions about first, what is actually happening, what gets sealed what doesn't get sealed, and then second, what is transparent to the public, especially online. It seems that Judge Campbell is suggesting that as long as what is available online does not tip off people about whose is cooperating, then we have accomplished a huge amount there, even if some white collar defendants are willing to have that information made public.

A judicial member expressed very serious concerns about the full-bore CACM approach with blanket sealing in every case and the courtroom procedures with sidebars. It is not the business of the federal courts to have that degree of secrecy. In considering the distinction between blanket sealing provisions and individualized determinations to seal, he noted that if the individual sealing determinations are based solely on collaborator status, it's not clear how big the difference is in terms of secrecy—though the docket may look different. But if the determination is more specific to the danger presented to that particular defendant, if that danger is based on what happens inside a particular penitentiary, then the district judge won't know that until something bad has happened. He also noted that the remote access restrictions seem very

appealing. It might get a lot done with a modest impact on access to court information. The concern there is whether outsiders working in concert with prisoners would be able to go down to the courthouse, get the information, and be able to share it with inmates on the phone. Perhaps a little more protective approach would be to limit access, even in person, to counsel, lawyers, and the press. Someone could not walk in off the street and to see anyone's criminal docket and cooperator information. But a federal defender or a member of the press could see them.

A member said that she was unable to choose between the CACM and PSR approaches, because neither would allow the defense to be effective, and they diminish transparency, creating a closed system. That is just backwards. The member expressed interest in the remote access issue, but expressed concern about closing the system in a way that has unanticipated and unintended consequences. Even if lawyers and press will have remote access—and today almost anybody is a member of the press, if you are a blogger—we are in a time when transparency of the criminal justice system seems to be extremely critical. The member hoped the Committee would not do anything to make it less transparent.

Judge St. Eve expressed the view that the real problems are arising from remote public electronic access not what is going on in the courtroom. It is what is available on the docket to inmates and to family members who can easily get this information, and provide it to inmates.

Another member stated he had no direct experience, and was coming at this from a fresh but uninformed perspective. First, it is unfortunate we may not be able to have a better sense about how the access to information is occurring, and what the implications would be if we shut off one way of access, say the online access. Would people go to the courthouse or not? It is hard to respond to the problem without knowing. His instinct is that remote online access is the difficulty, because it is so easy to go online and get cooperator information. It has always been the case that someone can go to the courthouse and get these records, but few people have been willing to do that for a range of reasons, especially when they have a nefarious purpose. So his instinct would be that shutting off or restricting the online access might be a good first step, and we could see how much of a difference that would make. Some of it could be implemented rather easily without a massive change in practice, and it may have a significant impact. If it doesn't, then we can consider more draconian options. It struck him as a good first step. The online access just changes how public this information is. If anybody can go on and get access to these private records, it is the easy way anybody is going to take. It will be easier than having someone walk into the clerk's office and ask for the file.

Judge Molloy stated that one of the people interviewed at the BOP told them that after their release some inmates had set up a private business to check PACER and then communicate the information back.

A member said that this is not a problem in the member's state courts because they have nothing like PACER. It does seem that the immediate problem arises from the online PACER access to without any showing of need or taking the step to go to the courthouse. So it might make sense to explore limiting remote access as a first step. The member also thought it would

be useful to explore whether is a way to find out ex ante which defendants will be going to which facilities.

Another member observed that there is anecdotal evidence, and in some cases just intuition, that some people are being identified as cooperators based upon information that is available online on the courts' dockets. But there are many other ways that people get identified as cooperators, and we don't know how much of the retaliation is triggered when a cooperator has been identified completely independent of what's on the docket. That lack of hard information makes it difficult to evaluate any of these proposals. Every proposal we are looking at has costs—not only administrative costs to the clerk's office and to the judges and lawyers – but also a public informational cost. It is helpful to weigh the costs against the benefits, but we don't know what the benefits of these proposals are.

The member also stated that he concurred completely in the view that the PSR approach has very significant problems. It is a serious problem to give documents that are ordinarily maintained by the court on its court docket to someone else to maintain. One of the functions of the clerk's office is to maintain the integrity of any document used in a court proceeding. Transferring that responsibility to somebody else (even the probation office) jeopardizes some of that integrity. That is a real problem.

The member noted that CACM approach proposes changing the way things are done in open court, as well as how things are done in the docket, and characterized both as real issues. The Committee should not change the way things are done in open court. It is important that courtroom proceedings be as public and transparent as possible, consistent with the need to protect specific people from individual threats of harm. In response to Judge Campbell's question why not replace the efforts of individual districts with a national rule to protect cooperators, the member said we do have a system right now. As another member said earlier, the system is that if the government or defendant makes a sufficient showing of individual harm, then the judge can seal. That's the only system that has a constitutional seal of approval. There are courts that are going beyond those traditional limits, and some of them have been tested. For example, a judge in Ohio was sealing every plea agreement because some of them included information about cooperation, and if he didn't seal them all then it was a red flag about which defendants were cooperators. The member said the Sixth Circuit reversed that practice, holding that sealing required an individualized showing. This should not be a system in which individuals opt out and allow their records to be public. That's backwards, and the member expressed real concerns about the legality. If the anecdotal and intuitive evidence is that there is some problem being created by online access to the docket, then limiting access to that information may be a good first step. Before we had electronic dockets, anybody who wanted to see anything had to walk physically into the clerk's office and ask for the file. There are some concerns about taking a step backwards in this day of electronic information. But for two hundred years, that's the way it was. If we need to restore that system in order to eliminate some harm to cooperators, it doesn't seem to create any significant constitutional problem. The member expressed interest in hearing whether others think it would create other sorts of

problems for practicing lawyers or the press. At least as a starting point he was inclined to support limiting remote access.

Judge Molloy commented that when CM/ECF came online in 2003, CACM recommended that there not be public access to criminal docket sheets.

Mr. Hatten, the Committee's clerk of court liaison, noted that the ECF system is a user input system, which has implications for the resources of the clerks' offices. At present clerks don't control what the users put in or how they put it in. Given their current resources, clerks could not review every document to see whether it should not be filed, and any solution that was designed to have that oversight by clerk's office would probably be ineffective. They would have to change their procedures substantially to be sure that documents that are supposed to be sealed either universally or automatically are actually sealed. Mr. Hatten noted that an Eleventh Circuit case rejected the idea of a secret docket. So in his district nothing can be left off of the docket in a criminal case, but you can have a sealed entry. The sealed entry doesn't identify what the document is, but it does give the person a chance to challenge because he knows something is there. He had not seen anything that addresses the idea of a master sealed entry, and whether that would be considered a secret docket. At least in the Eleventh Circuit the clerk cannot leave anything off the docket, which was one of the things being considered by the Task Force.

Based on discussions with the U.S. Attorney's office and the public defender, Mr. Hatten agreed that limiting remote access would accomplish something, even if it would not eliminate all the means of determining if an individual had cooperated. Remote access is exponentially greater than in-person access. He objected to any proposal to take court documents and give them to other offices. Protecting the integrity of the court record is a core function of the clerk's office. The clerk has to deal with court reporters who create transcripts and have to certify their accuracy. He was unsure what problems might arise if you divide transcripts up. But he acknowledged there are practical problems with any solution.

A judicial member stated that his court limits remote access. When this issue first came up about eight years ago, it was seen as a way to mitigate the risk, which can never be eliminated totally. If we legislated that everybody has to have a tank car that only goes 5 miles an hour, you'd still have traffic deaths because somebody would still drive that tank car off a cliff. But you'd limit the number, reduce the number. After considering the issues associated with transparency, the First Amendment, *Brady*, *Giglio* material, and effective arguments about sentencing disparities, his court concluded that many of the people who want to use information from the docket to harm cooperators would not take the trouble to come to the courthouse. He noted they have to show identification to get into the courthouse (though not at the clerk's office).

The member commended Judge Sutton who set up the Task Force, as well as Judges Kaplan, St. Eve, and Molloy, who have done a wonderful job gathering information. The executive branch is principally responsible for the safety of those charged with crimes and those convicted of crimes. They have the principal responsibility. He said both the CACM approach

and the PSR approach would really be a sea change—not a positive one—would really not mitigate the risk, and raise some serious First Amendment and *Brady/Giglio* issues. He expected defense lawyers and judges to push back on those. Although we have not fine tuned the proposed language on page 229 of the agenda book, using Rule 49.1 would be consistent with what we already do to limit access to other types of information. This would go a long way to mitigating the risk without all of these other things that would cause a great deal more concern.

Another judicial member expressed concern about just allowing limitations on remote access, and wondered if there might be some other forward thinking about that. Certainly there are at least as many different approaches as there are districts, and probably more. In the member's experience very often people want to seal too much, but only a small portion needs to be sealed. So the member was interested in something that allowed us to seal only the part that really should be sealed, not the whole thing. The member also expressed concern about who keeps the record. Other agencies have different means by which they collect their information and send it off somewhere to be stored. That might not be the same as the court. So the court would want to have documents that have to do with sentencing for cooperation in its own file. If forced to choose between the CACM and PSR approaches, except for that one point about keeping the record in the court, the PSR approach appears a little more open. But the member was interested in seeing if you could seal only what actually needs to be sealed. The whole Rule 11 plea agreement doesn't need to be sealed. The rest should still be public.

Another member characterized limiting remote access (Appendix B) as the only approach that is not unwise. The member did not see much harm in that approach, not any big constitutional issue in limiting remote access. His proposal would be to push back and say let's only deal with this rule, and not try to refine all the other rules. It appears there is a pretty good consensus that the Committee will not embrace the CACM approach. So why should the Committee spend its time trying to refine the rules that would implement the CACM approach?

Another judicial member called this a very significant problem and said he was stunned when he saw the statistics, including 31 murders and several hundred assaults over the past three or four years. While this is not Columbia, it is really, really, bad. We can't eliminate the problem, either from the BOP perspective or from a rules perspective. But to the extent that our procedures and our facilities are being used to effectuate that harm, we have a moral obligation to do something about it. When it comes to balancing the very important considerations of access and the First Amendment against the very important essential need to protect cooperators, the member did not find that a hard balance. We need to protect cooperators. But we should not go to an extreme of government secrecy, and we should take a measured approach. But to the extent that our procedures or our facilities are being used to allow people to assault or kill cooperators, we need to do something about it.

That member said it's hard to know where to strike the balance, and even if we do strike the right balance, whether a rules change or a BOP policy change, it's hard to know whether operationalizing those changes would have an impact. He posed a hypothetical. Defendant A is a cooperator, and the relevant portions of the docket are sealed. Defendant B is convicted of a

similar crime, and B's federal defender wants to argue under 18 U.S.C. § 3553(a)(6), based on the need to avoid unwarranted sentence disparities. If the federal defender can't figure out why A got a big break off the bottom of the guidelines range, that may be good for the defense. A defender can tell the judge I'm representing B, and A got a huge break off the bottom of the guidelines range. You have to be consistent across cases, and B ought to get the same consideration. What does the U.S. Attorney do in that situation? He can say there's a difference because A was a cooperator, but B has a right to be present, would hear that explanation, and then the cat's out of the bag. So the U.S. Attorney may decline to explain what happened with A. Then the judge who may have also sentenced A has a dilemma. Should the judge give B a higher sentence? If the judge does so, that reveals A was a cooperator. But if the judge gives B a similar sentence to avoid revealing A's cooperation, that's not fair to A, who then got no benefit from cooperation. If the judge says there is a difference between A and B, the judge has to articulate that on the record. And when the judge articulates on the record that the reason I'm giving defendant B a higher sentence than Defendant A because A was a cooperator. Then of course defendant B, knows that and can tell all of his or her friends. That's why this is a hornets' nest, first to figure out where the balance is, but also in operationalizing it and making it effective.

Mr. Wroblewski described the process the Department of Justice would follow after the meeting. He had already spoken to Mr. Rosenstein, the new Deputy Attorney General, about the issues, and noted Rosenstein had been the U.S. Attorney for the District of Maryland, which follows the CACM approach. The Department will be engaging with his office over the next few weeks, leading up to the Task Force meeting, but our goal, both on Rule 16.1 and cooperators, is that by the June Standing Committee meeting—which the Deputy Attorney General will attend—the Department will have a definitive position.

Mr. Wroblewski also offered his own views. First, restricting remote access in a broad way does not recognize the world that we live in now, so he does not favor that approach. On the other hand, what he had heard made him very optimistic that the process is working towards a solution. Not a 100% solution, but an 80% or 90% solution. Significant changes at BOP will make a huge difference. The Department of Justice has to make changes so there is a uniform rule about what is in the plea agreement and what is in an addendum. That will not be easy lift, but it could be done and would make a huge difference. He expressed enthusiasm for the docket entry master file, which allows continued use of PACER without revealing cooperator status on the docket. Then, determining whether something actually is sealed or whether it's public is different than whether it's going to be masked on PACER. That can be a completely different, a case-by-case determination. Finally, he suggested something that had not yet been discussed. We should think about having all master files sent to the Sentencing Commission, which could issue reports on cooperation. Cooperation would not be a black hole. The public would know, on an aggregate (though not case-by-case) basis how much cooperation there is nationwide and in each district. The Commission's release of such data would add some transparency.

Mr. Blanco said that transparency is critical from the perspective of the Justice Department, and he agreed with Mr. Wroblewski that limiting remote access would be only a

band-aid for a problem that is going to get bigger and bigger. If motivated people can't get remote access, they will find a different way. If there is a way to physically get a record of cooperation and use it, they will do so. He agreed that it is the executive's duty to protect cooperators in prison, but emphasized that it could not do so without assistance from the judiciary. The U.S. Attorney's Manual (USAM) is the result of the culture in the individual districts. And many of the procedures used aren't procedures set forth in the USAM. They are set forth by the courts and the government follows those procedures. So without the judiciary this problem will not be solved. It requires both sides. We're asking the Committee to take a look at the rules, and the Department will come up with an approach as well and do as much as it can. Noting he had twenty-nine years of experience, Mr. Blanco commented that there are sophisticated people who want to do bad things. We should protect our judicial system by coming up with a solution, a solution not just today, but for what's also going to happen in the future, as people become more sophisticated, as you're seeing more with respect to cybercrime. Although he accepted the member's point that threats to cooperators may be more common in organized crime and drug cases, in cybercrime you see sophisticated people threatening each other online, over money and access. He expressed appreciation for the very informative discussion. There is no easy solution, and it will take everyone's best efforts.

Professor Beale observed that limiting remote access raises issues under the E-Government Act, which are discussed on p. 213 of the agenda book. The Act states a very strong policy of openness, though it also provides for exceptions. The Committee would need to conclude that any restrictions on remote access meet the standards for an exception. The E-Government Act does allow for privacy and security based exceptions to be promulgated under the Rules Enabling Act. That is why the current rules require redaction of social security numbers and the names of juveniles. Restricting remote access to all or part of all criminal cases would be a major exception. There are two sides to the problem. One side is that there are people who are cooperating; they may be identified from the courts records, or from other things, such as their in-court testimony or their refusal to join a joint defense agreement. The other side is what happens in the prisons. The BOP Task Force working group noted that the BOP is starting to create some institutions where there is a higher level of protection, not exclusively cooperators, but for people who need more protection from whatever reason. Imagine a world in which the high security and medium security cooperators were in all in prisons either with other cooperators or with people who have committed other kinds of offenses that make them likely to be attacked by other prisoners. Suddenly the problem goes away. The problem is created because people are cooperating, their cooperation can be identified, and they are housed with other people who are not cooperators and who want to do bad things to them.

The problem is not cooperators hurting each other, it is housing them together with non cooperators. Most cooperators who seek protection within an institution housing non cooperators have very limited options for education and other programs. BOP generally assigns inmates within a certain security level to particular institutions for various reasons such as keeping them near their family, but not to separate cooperators and non cooperators. That's half

of what is causing the problem: housing them together. And BOP seems to be slowly moving toward something that would respond to that.

Changes can be made in the rules, but there is also this other side to the equation. And in limiting remote access the question is how much to include from each set of options: only remote access to certain information? Finally, what's the first step on the judicial side, as opposed to all the steps on the BOP?

Professor King requested that members notify her if their courts have a policy for identifying who is a member of the press and who is not. She also asked for more information about any cases that might be similar to hypothetical codefendants A and B. For example, would that exchange take place in briefing, as opposed to in person in the courtroom? If so, how is that handled when these arguments are submitted in writing at the plea or sentencing stage?

Judge Molloy introduced the 16.1 agenda item. The New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers had proposed an amendment to the rule that would have incorporated a very lengthy change to the rules addressing complex cases.

Judge Kethledge reported that the Subcommittee he chaired had been asked to explore the concerns about what he called overwhelming discovery – the production of a massive quantity of documents or data to defense counsel sometimes shortly before trial. He cited two examples given by members: in one case the defense was given 500,000 audio tapes, and another more data than is housed in the Smithsonian. The problem is compounded because the prosecution has typically been investigating and working on the case for a long time, but defense counsel has to learn the case and understand the record in whatever time is available between production and trial. Although the NYCDL/NACDL proposal was far too complex and detailed, the Subcommittee agreed there was a real problem and we should see if we could come up with a reasonable response. The Subcommittee developed its own drafts, which were shared with the full committee at its fall meeting. These were “court-driven” proposals: the court would make a determination whether the case was “complex” (though what “complex” meant was not clear). Those proposals received a mixed reception, and Judge Campbell suggested that we hold a mini conference to get more information about the problems and possible solutions.

The Subcommittee held an extremely helpful mini conference in February, bringing together fourteen invitees from the defense and prosecution, including lawyers dealing with these issues in the field and the drafters of the so-called ESI (electronically stored information) protocol. Although the ESI protocol is very helpful, the Subcommittee learned that counsel's awareness of it is uneven, and adherence varies within and between districts. But where it is being followed it is helpful and things seem to be going pretty well.

The defense lawyers at the meeting were unanimous and emphatic about the existence of a problem with overwhelming discovery, and with the need to do something about it. There is a need for a rule at least to recognize the problem and to encourage some process in the litigation to address it. We reached a consensus triggered by Mr. Wroblewski's lucid summation. The sea

change was to shift from the court-directed process to a party-directed process. The people who were most concerned—the defense lawyers—strongly supported the idea that the parties know the case better than the court does. They ought to take the first look at the case and talk to each other about whether the case warrants some departure from the rules that would normally apply (under Rule 16 or a standing order or the practices in that district). They should be considering whether there should be some departure or modification given the particular record that’s going to be produced in this case. The Department of Justice representatives, some line lawyers and some from Washington, also seemed supportive of the idea of the party-directed approach.

We had two Subcommittee calls after the mini conference to reduce this general concept to a proposal we could bring to the full committee. Our reporters did an excellent job of drafting language that is for the most part before you today. The proposal requires the parties to confer and try to reach agreement about the timing and manner of discovery. They have to meet within 14 days of arraignment and try to reach that agreement. If they do reach it, and if their agreement would require a modification of the order or practices that would otherwise apply in the case in the district, then they can move under subsection (b) to have the district court modify those procedures accordingly. If they don’t agree, the party that is unhappy with the background status quo, the applicable procedures, can go to the district court under subsection (b) and seek a modification. Then the court decides what to do. So it is a process initiated by the parties, but it is ultimately controlled by the district court.

Judge Kethledge drew attention to proposed changes by the style consultants, and expressed the view that he stylists’ revisions inadvertently made several substantive changes. One was brought to his attention before the meeting by a judicial member who pointed out that the proposal would take control of the discovery process away from the district court and give it to the parties. This was certainly not the Subcommittee’s intention. The Subcommittee’s draft provided that one or both parties may request that the court determine or modify the time, manner, or other aspects of disclosure to facilitate preparation for trial. As restyled, subsection (b) said “the parties may ask the court to modify the agreed-upon timetable and procedures for disclosure ...” So in the restyled version the court is modifying what the parties did. This implies that absent such a modification the parties’ agreement has its own effect. That is not what the Subcommittee intended. The Subcommittee concluded that its version of (b) was much better than the restyled version. Relatedly, the member who raised the concern also suggested some language for the committee note that would expressly say that the Rule is not intended to divest the district judge of any control over the discovery process.

In summary, Judge Kethledge said, we started with a very prescriptive proposal, we moved on to a less prescriptive but court-driven proposal, and now our proposal starts with the parties. They have to confer and try to reach agreement. Whether they do or don’t, if they need changes they can go to the district court. There is no need to define a “complex” case, and the rule does not attempt to prescribe procedures or specify factors will still be appropriate in ten years. The Subcommittee hopes this modest step will do some good in this area. It has the Subcommittee’s unanimous support.

Professor Beale noted that when we scheduled the mini conference we did not think we would have a proposal ready for publication at this point, but given the consensus that developed the Subcommittee believes its proposal is ready for publication—though there are still some issues to be worked out with the style consultants. The Subcommittee saw this as a modest but useful change. Subcommittee members learned that discovery issues are becoming more and more common, and are not limited to a few complex cases. Many apparently simple cases now have lots of electronically stored information, and that will not become less frequent. Everyone has a cell phone, and the cell phone is pinging off of the cell phone towers and so forth. So this is likely to become a more common problem, and should be addressed in this relatively uncontroversial way.

Professor Beale requested that subsections (a) and (b) be discussed separately, because the style proposals for (a) were not controversial. The reporters viewed the suggested changes in (a) as style, not substance. Style suggested “try” instead of “attempt,” i.e., “try to agree” instead of “attempt to agree” In contrast, the reporters agreed that the proposed changes to (b) would be substantive.

After a motion to accept restyled Rule 16.1(a) was made and seconded, members discussed the provision.

Mr. Wroblewski thanked Judge Kethledge and reporters for helping to build consensus. He reminded the Committee of several points. First there was initially a divergence as to whether or not this should focus on complex cases. One idea was that we need a calibration for proportionality, as is done in the Civil rules. But Professor Kerr suggested that we focus exclusively on ESI issues. The Department’s focus was being sure any amendment to Rule 16 did not impact on *Brady*, §3500, and other issues that had come before this committee before. We tried to steer clear of all of that, and have come up with a proposal that has support from both prosecutors and defense lawyers from all parts of the country. The ABA, which is currently considering Rule 16, likes the meet and confer aspect of our proposal. He praised the Committee Note, which says to look to best practices and cites the ESI protocol but is not limited to it. He has advised the ABA committee that if they want to have an impact, then they should develop best practices protocols. The Committee note sets for the ESI protocol as the only best practices example, but as other groups produce more examples they will be cited by the parties. That’s what we need. We need to tell judges this is an appropriate way to proceed, because sometimes people accustomed to doing something one way may not realize that this particular case requires that they pause and handle it differently. The proposed rule is a great framework for doing that.

A judicial member commented that this is sort of a criminal procedure parallel to Civil Rule 26(f) conference where the parties are required to get together and attempt to agree on a schedule. Rule 26(f)(2) says the attorneys should attempt in good faith to agree. If we are trying to keep some parallel, it says “attempt” rather than “try,” and it also refers to “good faith.” He wondered if that was intentionally omitted from the proposed rule because it’s implied. Those who had participated in the Subcommittee discussion stated that they had discussed and rejected that language.

In response to the question whether the Standing Committee would favor including “good faith” in to parallel Rule 26(f), Judge Campbell noted that Civil Rule 26(f) includes a lot more than proposed Rule 16.1. Given the limited objective of this rule, he doubted that anyone would suggest that it was necessary to incorporate all of the 26(f) procedures into criminal cases. If we’re not mimicking 26(f) in new Rule 16.1, then he doubted there would be much concern about how parallel the language is. Certainly the absence of the reference to good faith should not be taken by anybody as suggesting that they can participate in bad faith. He did not see the need to be parallel on that one point if we aren’t going to parallel everything else.

Professor Coquillette agreed there was no need to include “good faith” in if we are not acting in parallel with 26(f).

A judicial member asked if the attorneys meet and agree on a timetable, when do they come to the court? Judge Kethledge responded that if the court has a standing order, or the parties have agreed to a departure from the procedures that would otherwise govern, they have to come to the court. A practitioner member offered an example. The lawyers might bring a joint motion, saying given the amount of documents to review, we ask that instead of the six months your honor allocated for review, we ask that you give us 18 months, and that we’ll identify all of these exhibits by this date and all the other exhibits by __ date. Several speakers agreed that if what the parties have agreed to is consistent with the court’s standing procedures or prior orders in the case, then they do not need to come back to the court.

Another judicial member stated that he did not have a problem with 16(a) or with the Subcommittee’s version of 16.1(b), but he suggested adding language at the end of line 14 of the Committee Note, agenda book p. 174 to make clear what the intention had already been. He proposed adding “or limit the authority of the district judge to determine the timetable and procedures for disclosure.” Judge Kethledge expressed support for that suggestion.

Professor Coquillette expressed approval for pointing to examples of best practices in the Committee Note, but he cautioned that it is very important not to put anything in the note that actually changes the operation of the rule. Judge Kethledge said that addition would not change the operation of the rule as drafted by the Subcommittee.

A judicial member asked whether there is any value to the parties in having this conference before the arraignment. If so, she noted a recent case about exactly this language, “within x days after the arraignment,” in which the action had taken place before the arraignment. On appeal the issue was whether disclosure before arraignment complied. The member suggested that if the rule is intended to allow the parties to meet and confer before arraignment, it should be clarified to avoid litigation.

Discussion focused on whether there are cases where the parties want to meet and confer before arraignment. A practitioner member said that sometimes judges send timetables for motions to the magistrate judges at the bond hearing, so defense counsel would be talking to the government earlier than arraignment, especially in cases with a lot of discovery. Another

practitioner expressed doubt that the change was necessary, but said he had no objection to changing it to “no later than.”

A participant noted that the issue comes up in his district most often in complex cases, typically after all of the defense counsel have been identified, which usually happens at arraignment. They get together, and as a defense team, they talk about what they’re going to need and then the group or a designated individual goes to talk to the prosecutor. He doubted that would happen within 14 days of the first defendant’s arraignment, and he would not want the rule to force the parties to have premature discussions, before everybody is on board and can have a more meaningful discussion. Should the rule say “within a reasonable time”?

In response to an alternative suggestion that the rule might say “or as such as is designated by the court,” the member who had raised the issue said he would not want the parties coming to the court in every case to ask if they could have more than 14 days. So the question is whether we are trying to require this to happen early in the case. Or can we say you need to do it and you need to do it within a reasonable time?

A member responded that part of the problem is that often this meeting and discussion doesn’t happen. When these meetings are not occurring, it would not be helpful to specify “a reasonable time.”

Judge Molloy brought up the relationship to Speedy Trial issues. If there will be a request to extend the time for trial, setting a time for this conference 14 days after the arraignment will set the stage for making the determination under Speedy Trial Act. A member observed that (b) does not require that the parties go to the court within 14 days. Rather, within 14 days they have to meet and try to agree. But they can then take the time needed for their discussions and report to the court when they are ready.

A judicial member stated that in his district the U.S. Attorney’s policy on their website is that it will provide exculpatory evidence and their Rule 16 disclosures within 21 days after indictment or initial appearance whichever comes later. District practices around the country vary, and this may not be unusual. So to avoid disrupting local rules and practices, the “not later than” is an important change. Because they do it a lot earlier than this rule contemplates in our district in every case.

Professor King stated that defense attorneys at the mini conference expressed concern that they were not able to get the Assistant U.S. Attorneys to talk to them, and that they needed some sort of push from the rules. The response to the concern about 14 days being too soon was that in cases in which 14 days is too early to know what to do with specific pieces of information, the parties can have a quick early conversation, which satisfies the rule, then continue their discussions as they learn more. She noted that the ESI protocol provides for an ongoing continuing dialogue.

Professor Beale said if there is a multi-defendant case where some of the defendants haven’t been arraigned or don’t have their lawyers, but two defendants are coming up to the 14 days, counsel could pick up the phone and say here’s what we’re seeing now but we think we

should wait for the rest of the defendants. A quick conversation would be enough, kicking the can down the road to have the further meeting. But if the lawyers said actually I need to know right now, that discussion would be teed up by the fact that there is a deadline. The reporters were not sure if 14 days was the right number. Some local rules had a 7-day period, which is even shorter, so the reporters put 14 days in brackets to focus discussion. It would be fine to have it “no later than” because that was the intent. For example, if there is a codefendant who hasn’t been arraigned yet but he knows he’s in the case and he’s got the lawyer, he may want to join the group that is meeting and conferring. That would fall within the “no later than.”

A member moved to amend line 3 of 16.1(a), agenda book p. 173, to substitute “not later than” for “within.” The motion as seconded and passed unanimously by voice vote.

In response the Judge Molloy’s query whether all members were comfortable with 14 days, there was general agreement that this was satisfactory and that the brackets should be removed.

A member asked whether the Subcommittee discussed a question that came up at the mini conference: should the meet and confer requirement include “motions and other pretrial matters”? Professor Beale and Judge Kethledge responded that the Subcommittee focused, for the time being, on discovery, the issue upon which it had consensus.

In response to a query from Judge Molloy about the Department’s position, Mr. Wroblewski said that so far the Department did not object. He also noted the Committee should remember Rule 17.1. So this will not be the only pretrial conference.

There was a motion to approve restyled Rule 16.1(a) as modified, it was seconded, and approved unanimously by voice vote. The Committee then turned to proposed subsection (b).

Professor Beale noted several changes recommended by the style consultants. They broke up “modify and determine,” and their version seems to allow the court to modify the agreed-upon timetable only if the parties come to the court. That would restrict the authority of the judge. If the parties agree, they don’t come into the judge; it’s done. But that is not at all what the Subcommittee meant. And style suggests the court can “determine if the parties didn’t agree,” which is not what the Subcommittee agreed to and is not a good idea. The court should retain control. That sends us back to the Committee’s version. The earlier suggestion of an amendment to the Committee Note, on page 174 line 14, would highlight the fact that the rule doesn’t limit the authority of the district judge. The parties have to request that the court “determine or modify” aspects of discovery that would otherwise be governed by local court rules or an order to the parties at arraignment. Those are the background assumptions, and the parties are asking for a “modification.” The parties are saying this case requires something different from the ordinary, and they are asking the court to make an adjustment. That is the purpose of (b). Does it require any additional clarification for everyone to understand that’s all it’s doing?

Professor King returned to an earlier question by a member who was not clear what the judge was being asked to do as well as concerns about the style consultants’ apparent

misunderstanding of what the Subcommittee had intended. She suggested some clarifying language, but also noted the problems of trying to do drafting “on the fly.”

A judicial member who had raised this issue earlier said he favored retaining the Subcommittee’s language in the text, but revising the committee note. He reiterated his proposal that at the end of line 14, agenda book p. 174. After the word requirements, he would insert “or limit the authority of the district judge to determine the timetable and procedures for disclosure.” He expressed concern that, as drafted, the rule might be susceptible of arguments about its meaning over who has the ultimate control, because it speaks in terms of the parties requesting that the court determine the timing. That might be read as implying unless the parties make a request the court doesn’t have a say. The Committee Note, at line 13, says the rule does not displace local rules or standing orders. But suppose what we’re talking about is the judge giving the parties the schedule for their case at the first appearance with disclosure to be completed by x date. By not referring to the district court’s authority, the Committee Note could be read to allow displacing the court’s original order. That is not what’s intended. If the note is modified, there is no problem.

Members discussed whether to omit the word “determine,” and a practitioner member urged that it be retained because many judges do not have the practice of setting a schedule at the beginning of a case, so the parties are asking the judge to do this for the first time. Some judges don’t have preemptive rules. They don’t have the schedule at the arraignment. So it is important the rule includes both “determine” and “modify.”

Professor Coquillette endorsed making the rule itself explicit, rather than putting this in the Note though he acknowledged that that the problem here was caused by the Note itself rather than by the text.

Judge Kethledge stated that if there are downsides to removing “determine,” he favored retaining it. A member expressed concern about the draft Committee Note, which said that the rule does not displace standing rules and local orders. That might implicitly be read to allow it to displace a judge’s scheduling order unique to that case, which is neither a standing order or a local rule. The member expressed a preference to leave (b) as the Subcommittee drafted it (including “determine or modify”), and add language to the Note that removes the implication that was inadvertently created by lines 13 and 14. He favored adding this language: “or limit the authority of the district judge to determine the timetable and procedures for disclosure.”

Another member moved that the Committee approve subsection (b) as drafted by Subcommittee, with addition the amendment 14 of the Committee Note, and the motion was seconded.

Judge Campbell noted his approval of several aspects of the Subcommittee’s version of subsection (b), but he questioned whether it was necessary to include “other aspects of disclosure to facilitate preparation for trial” because the parties may seek modifications for other reasons (e.g., reducing the expense of production or avoiding a scheduling conflict with another case). So why limit the reasons for which a modification may be sought?

One member responded that the original defense proposal arose from the difficulty of preparing for trial in what the proposal had called complex cases. This language captures the idea of preparation for trial and being able to defend the case effectively. The defense needs to know what it's up against

Members suggested alternatives such as "preparation for trial or another reasons," "otherwise promote the efficiency of the litigation," or "in the interests of justice." Professor King noted her impression that for the defense bar the language "to facilitate preparation for trial" was essential. It was the whole reason for the rule. She noted, however, that this language could be moved within the rule. Some members expressed concern about the emphasis on preparation for trial, since more than 90% of cases are resolved by guilty plea.

There was a motion to revise the amendment to allow determination or modification "to facilitate preparation for trial or in the interests of justice." A member expressed concern with the breadth of this phrase and noted that Rule 16.1 isn't intended to control all of litigation. An attorney who has a trial somewhere else will make a motion to continue the trial. Rule 16.1 is not going to deal with that. He cautioned against trying to add too much to the proposed rule. He was also concerned that we don't know what the phrase "interests of justice" means. It could create an incentive to use this rule to resolve all sorts of issues.

Professor Beale urged the Committee to return to the reason that the amendment is being proposed, and not load other things in there. Counsel have been going to the court forever asking for delay because they have another trial. Those things are already occurring and don't need to be included in the amendment.

In response to a comment, Judge Kethledge reiterated that (b) just describes what the parties may ask to court to do. It does not circumscribe the district court's authority. Judge Campbell said this is describing the basis on which the parties can come to the court. He did not want it to have the appearance that they are limited to doing it only in situations where it will facilitate trial preparation. There are other reasons that they should be able to come in. We could just make clear with another sentence there that these are not words of limitation, there are other reasons that would justify.

Judge Molloy called for any motions to amend.

The first motion was to change "may request that" on line 9 to "may ask the court to." This change was included in the version proposed by the style consultants. It was seconded and passed unanimously.

The second proposal was to amend line 11 by omitting "to facilitate preparation for trial." Judge Kethledge emphasized the importance of this language to the defense, and urged that it be retained in the text of the rule. Wroblewski noted that his concern had been about broadening the rule to include open ended language such as "in the interests of justice," not this phrase. Mr. Blanco agreed that it was desirable to keep the rule narrow. Judge Campbell favored leaving the language in the rule because of its significance to the defense members. Perhaps it is so obvious

that the parties can ask to have the schedule extended that we can just leave it as it is. So he withdrew his suggestion.

There was a motion to approve (b) as presented in the agenda book with the style change on line 9. It was seconded and approved by voice vote.

Discussion turned to the Committee Note, and the proposed amendment to line 14, was approved. The suggestion to change “judge” to “court” was accepted as a friendly amendment, and the note, as amended, was approved unanimously.

Judge Feinerman then presented the Rule 49 amendments.

The Committee had approved the amendments for publication as part of a cross committee effort to update the rules on e-filing. The Criminal Rules Committee decided to delink Criminal Rule 49 from Civil Rule 5 for several reasons, including eliminating the need for those using the Rule to toggle back and forth between the two sets of rules, and more importantly, to accommodate the differences for e-filing between the criminal and civil contexts. Pro se criminal defendants, the Committee decided, should not have presumptive access to the CM/ECF system. The architecture of CM/ECF allows for filing by the defendant and the government and nobody else in criminal cases, unlike the civil context. The proposed amendments were published last fall, we received comments, and the Civil Committee received comments that our Committee will have to consider as well so that we can keep the amendments as uniform as possible.

The first set of comments dealt with the e-signature provision. Three commenters regarded the amendment as ambiguous, possibly requiring a filer to add her user name and password to the filing. But of course that was not what was intended. Together with the other three committees we came up with new language that will make it very clear:

An authorized filing [made] through a person’s electronic-filing account, together with the person’s name on a signature block, serves as the person’s signature.

Professor Beale also added that the Civil Committee has deleted the brackets around the word “made,” in that language, which we should consider as well so that the amendments are uniform. A motion to approve the new language (not including the brackets) was made, seconded, and approved unanimously without further discussion.

The next set of comments addressed who should receive presumptive permission to e-file. Three comments took issue with the policy judgment under the amendment as published that only represented parties receive that presumption, and others may e-file only with permission from the court. One commenter wanted inmates to be able to presumptively file electronically, another wanted non-parties, and another wanted all pro se filers. The Subcommittee discussed the comments, and it decided to stick with the original conclusion that in criminal cases presumptive electronic filing should be limited to the lawyer for the

government and the lawyer for the defendant, and not expanded to these other categories. Respectfully disagreeing with these public comments, the Subcommittee suggested no change be made to the published version.

Judge Molloy asked if anyone disagreed with that position, and no one did. In response to an inquiry about whether the commenters would receive a letter, Ms. Womeldorf explained that the Rules Office does not usually follow up.

Judge Feinerman turned to the comments on the Civil Rule that would impact our Rule as well. The published versions of both rules said that service is not effective if the serving party learns that the service was not effective. Some court clerks were concerned that this language might be read to place an obligation on the clerk's office to let the party know if the clerk of the court found out that the person to be served somehow wasn't served. They were concerned that the rule not suggest that they have an obligation to let the serving party know. The Civil Rules reporter addressed this concern by suggesting language for the Note.

Professor Beale explained that we were able to accept the sentence proposed by the Civil Rules, though a difference in the structure of the Civil and Criminal Rules is reflected in another portion of the note. The Subcommittee thought that it was unlikely that this language, which had long been included in Civil Rule 5, would suddenly be interpreted to impose a duty on the clerk. However, when the Civil Rules Committee decided to include new language in the note accompanying Rule 5, it was appropriate to include it in the note to the Criminal Rule as well. The proposed change to the note after publication must be approved by the Committee.

A member asked whether there was any concern that the clerk's office might feel that this language created an obligation to notify the party for whom the failed communication was intended? He related a case that dealt with the consequences of the failed receipt of a notice of appeal that divested his client of a right of appeal. It came about because the lawyer did not update his ECF registration to include his changed email address and he argued that should be ignored because his correct address was on some paper filed in the case and the clerk should have known and should have told him. Should the note say something like "the rule does not make the court responsible for notifying *any person* if an attempted transmission by the system fails"?

Professor Beale noted that Rule 49 as published tracks the language of Rule 5, and that would be difficult at this point to go back and alter that.

Judge Campbell stated the Civil Rules clerk liaison was not concerned that this language would place a general obligation on clerks to go track down people whose contact information is outdated. They were concerned only about letting the serving party know.

Mr. Hatten, the Criminal Rules clerk of court liaison, explained that the clerk gets a bounce-back message if the receiving party does not receive it, and they generally try to follow up. But they do not turn around and let the sending party know. Users of the CM/ECF system have an obligation to maintain their updated information.

Judge Campbell noted the issues raised by the number of users and bounce-back messages. An email to all users in his district, which is relatively small, goes to about 60,000 people and produces more than 5,000 bounce-backs. So a significant percentage is always out of date. Requiring the clerk to notify the lawyers every time they get a bounce-back it would be a huge burden. And the bounce-back often is not from the lawyer or the party but from a legal assistant or paralegal. So there was a good reason for this change.

Judge Feinerman moved that the Committee accept the new language for the Note; the motion was seconded and approved unanimously by the Committee without further discussion.

Judge Feinerman added that in at least one district, the Northern District of Illinois, the clerk's office puts something on the docket indicating there was a bounce-back so the serving party would know. But there is no obligation for other districts to do that.

He then turned to public comments received on the portion of the published amendment dealing with whether a certificate of service is required when a paper is e-filed, and whether others connected with the case have been served. In drafting the amendment, we implicitly assumed that if you e-file you don't need a certificate of service. A comment to the Civil Rules asked whether this should be made explicit. The proposal before the Committee would amend the published version to make this clear. As revised, the amendment would state:

(b) Filing.

(1) *When Required; Certificate of Service.* Any paper that is required to be served must be filed within a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system.

Prof. Beale noted that the language was drafted to make it clear for anyone using the rule, not just lawyers.

A motion to adopt the proposed change (lines 58-63 on p. 104 of the agenda book) was made and seconded, and passed unanimously without further discussion.

The next change, to the same section (lines 63-66), pertains to certificates of service when there is a non e-filer in the case (a pro se criminal defendant, a non-party, or a lawyer who was able to opt out of e-filing). The rule as published said that when a paper is served by other means, a certificate of service must be filed "within a reasonable time after service or filing, whichever is later."

Professor King explained that the Civil Rules Committee had decided to revise the published language because there may be simultaneous filing of the paper and the certificate of service. They proposed to revise the language to allow the certificate to be served "with it, or within a reasonable time after service." After a clarifying question by one member, Professor Beale indicated that she believed the language has been accepted by the other committees as well as style.

Judge Feinerman moved for approval of the revised language for this sentence: “When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service.” The motion was seconded and adopted unanimously, without further discussion.

Finally, Judge Feinerman returned to the first sentence of proposed Rule 49(b)(1), which stated “Any paper that is required to be served must be filed within a reasonable time after service.” He expressed concern that a reasonable person could read this as barring what happens 95% of the time. It seems to say that any paper required to be served must be filed after service. But that’s not what happens. The problem is serving non-e-filers. It is conceivable that the filing would be made before service was made. If service occurred after filing, that would violate the rule. It is also common practice in serving a non-e-filer to first file the paper using the electronic filing system, print off the CM/ECF version with the docket number at the top, copy it, and then serve the copy on the non-e-filer. Again this would be service after filing. Because the language could be read as mandating that the filing must occur after service, he proposed that the Committee replace “after” with “of” or “not later than.”

Professor Beale noted that the published language had been drawn from current Civil Rule 5, which presently governs in criminal cases as well. Given the effort to coordinate the Rules, this would require Civil to make the same change. So the question is whether the Criminal Rules Committee wants to make this change and try to convince the other committees to adopt it as well to maintain uniformity.

Judge Campbell advised the Committee to do what it thought was correct, and to delegate authority to chair and reporters to coordinate before the proposed amendment gets to the Standing Committee. Although the language could be read as Judge Feinerman suggested, Judge Campbell doubted it would cause a judge to reject something because it was filed before service.

A motion to substitute the word “of” for the word “after” was made and seconded.

A member questioned the need to make the change. The Civil Rule has been in effect for many years, apparently no one has raised this issue, and if someone did raise the issue they presumably would have to show some prejudice. Since this is a rule about notice, and they just got notice too early, one wonders whether there would ever be relief, even if technical violation of a possible interpretation of the rule. Since this is a long standing rule and there are no problems, why change it? The member also expressed concern that this could create a negative implication problem with other provisions.

Judge Feinerman responded that he would agree if this were the only change being made in Rule 49. But “we have the body on the operating table,” so to speak, and while we are operating on it we should take the opportunity to make the change. The Committee Note could say this is a clarification, and no change in meaning is intended.

A member agreed that since the language is technically wrong and the provision is being amended, the Committee should correct it.

Judge Campbell commented that because the Committee is writing a new criminal rule, it should do what it thinks is right. If you have a better way to write it, do that. Maybe it would cause the Civil Rule Committee to make a parallel change. It would tee up the issue for the other committees to consider. Of course it might then be changed by the style consultants.

The motion to change “after” to “of” in the revised language passed unanimously.

Professor Beale asked the Committee to recognize that the reporters would need to revise the Committee Note to reflect the changes just made, subject to review by Judge Feinerman and Judge Molloy, as well as review by the reporters and chairs from the other committees. Last minute changes may be made before the Rule goes to the Standing Committee. And there will be another wave of style changes. Judge Molloy said this was consistent with the Committee’s prior practice.

Prof. Beale said no changes were suggested for Rule 45. There was a motion to approve and send to Standing as published the changes to Rule 45. The motion was seconded and approved unanimously without further discussion.

Judge Molloy recognized Judge Kethledge to introduce the discussion of Rule 12.4.

Judge Kethledge, chair of the Rule 12.4 Subcommittee, reminded the Committee that amendments to the rule were published in the fall. The amendment was originally requested by the Department of Justice because the existing rule was burdensome in particular cases, such as those with a large numbers of corporate victims all suffering very small losses. The amendment addressed this problem in Rule 12.4(a), but it also included changes in Rule 12.4(b).

Professor Beale explained that the amendment as published made three changes to Rule 12.4(b). The first was adding a 28-day period for filing. The second replaced the term “supplemental” with “later” because if there is no initial filing, a later filing does not “supplement” anything. No comments were received on these first two changes. A third revision made it clear that the government must file a statement not only when there was a change in earlier information, but also when there was “additional” information. During the review period the Subcommittee learned that making that third change was problematic because it altered language that was common to other rules, particularly Civil Rule 7.1(b)(2). The Subcommittee agreed that creating this inconsistency would be undesirable, and that Rule 12.4 should be parallel to and consistent with the Civil Rule.

Judge Kethledge said there were two public comments. The National Association of Criminal Defense Lawyers said the proposed amendment was “unobjectionable.” The Pennsylvania Bar Association suggested that good cause should be explicitly limited to cause bearing on judicial recusal. The Subcommittee thought that was already clear and declined that suggestion.

A motion to revise the published language to track the Civil Rule, as shown in the agenda book, p. 124, lines 24-27, was made, seconded, and unanimously approved without further discussion.

A final motion to send the amendment to the Standing Committee was made, seconded, and unanimously approved. Mr. Wroblewski indicated that the Justice Department was grateful for the Rules Committee's attention to this.

Judge Molloy recognized Judge Kemp to introduce the discussion of Rule 5.

Judge Kemp, chair of the Rule 5 Subcommittee, presented the proposed amendments to Rule 5 of the 2255 rules and Rule 5 of the 2254 rules. These amendments grew out of a dispute about the meaning of this rule, which was intended to make it clear that there is a right to file a reply. The Committee decided that part of the problem was that judges were relying upon outdated precedent and also that the current rule was ambiguous, because some were construing it to allow a reply only if the judge fixes a time to do that. To address this problem, the Committee asked the Subcommittee to separate the two parts of the sentence. That is the proposal before the Committee. The Subcommittee discussed whether to replace the word "may" in the current rule with something such as "is entitled to," but "may" appears in many of the Rules, and changing it in one rule might cause problems. Separating the two sentences makes this much clearer, and the Committee Note is explicit. Judge Kemp thanked the reporters for their work.

Discussion focused on the Committee Note. Professor King added that the note to the 2254, at p. 137 of the agenda book, contains two errors that will be changed: the reference to 2255 should be changed to 2254, and the reference to (d) will be changed to (e). Further, Judge Campbell's suggestion that "throughout" was intended to be "through" was accepted as a friendly amendment. Professor Coquillette advised the Committee that notes are not subject to review by the style consultants.

Judge Molloy asked why the 2255 rules use "moving party" and 2254 uses "petitioner." Professor Beale indicated that that this is the language of the current rules, and the terminology was not being changed.

Judge Campbell noted that the proposed note refers to the court's discretion "to set the time" for filing a response, which could still read to mean to set or not to set a time. Should it be changed to "in setting or determining" a time for reply? Members offered other suggestions for rewording the note, and the Committee agreed that the Reporters, in consultation with Judge Kemp, should revise the language to prevent misunderstanding.

A motion to approve Rule 5(d) amendments was made, seconded, and unanimously approved, with the understanding that changes to the note will be made to address members' concerns.

A motion to approve parallel changes to Rule 5(e) for 2254 proceedings was made, seconded, and unanimously approved, with the understanding that parallel changes will be made to the note for the 2255 rules, plus the two additional corrections noted by Professor King.

The proposed amendments will be presented to the Standing Committee with the recommendation that they be published for public comment.

The next item on the agenda was discussion of our suggestion that the Federal Judicial Center (FJC) prepare a manual for complex criminal litigation. Judge Jeremy Fogel, the Director of the FJC, has asked the Committee to develop a list of the five to ten issues it would be most important to cover. An email from one of those at the mini-conference suggested some topics, largely related to discovery, including funding of discovery assistance for Criminal Justice Act (CJA) attorneys and others.

A member suggested it would be important for the FJC to reach out to the CJA Review Committee. Judges have lots of budgetary issues, and in these cases the CJA lawyers don't always get the appointment they need early enough, or the money they need to get the experts they need. If that alone could be covered in this manual, that would be a huge help. Members also noted that there are a handful of coordinating attorneys that handle these issues, but there are not enough of the specialists to handle all of the cases.

Ms. Hooper stated that she would be happy to take a list of topics back to Judge Fogel, and noted that the FJC would also be likely to reach out to other judges and experts. A member agreed that it would be important to get information from the federal defenders, support analysts, and CJA lawyers to find out what kind of problems they have.

Judge Molloy asked the Rule 16.1 Subcommittee, chaired by Judge Kethledge, to develop a list of the most important topics to be included in a FJC manual for handling complex criminal cases, and to present the list for discussion at the next meeting. If any member has suggestions, they should contact Judge Kethledge.

Judge Campbell suggested that the Rule 16.1 Subcommittee reach out to several Judicial Conference committees: defense services, criminal law, and CACM.

Judge Molloy asked Mr. Wroblewski to present the next information item. Mr. Wroblewski explained that the Department of Justice has new software that tracks grand jury subpoenas and their return. An issue was raised regarding whether the software complies with Rule 17. CACM said it does comply. The Department is still responding to questions and concerns from some clerks of court, and the criminal chiefs from the U.S. Attorney's Offices will report any problems that require a rules amendment to him. Mr. Wroblewski concluded that he thought the issue was being resolved, and there will be no need for an amendment.

Judge Molloy announced that the fall meeting will be in Chicago on October 24, 2017.

In closing, Judge Molloy thanked the reporters for their extraordinary work and the amount of time they put in. He also thanked the staff of the Administrative Office and the FJC, who provided wonderful help. And he extended a final thanks to Ms. Brook and Judge Kemp, who have been great contributors to the work of the Committee.