ADVISORY COMMITTEE
ON
CRIMINAL RULES

Seattle, WA
September 28-29, 2015

TABLE OF CONTENTS

AGENDA 5

TAB 1 OPENING BUSINESS

ACTION ITEM: Approve Minutes of March 2015 Criminal Rules Meeting 17

TAB 2 RULE 49 SUBCOMMITTEE

A. Reporters' Memorandum (September 3, 2015) 45

B. Proposed Amendment to Rule 49 59

C. Administrative Office Survey of Electronic Filing Provisions for Pro Se Litigants 63

C.1 Memorandum Regarding Survey (September 2, 2015) 67

C.2 Survey of District Courts..73

C.3 Survey of Bankruptcy Courts..87

TAB 3 NEW SUGGESTED AMENDMENTS TO THE CRIMINAL RULES

A. RULE 12.4 97

A.1 Reporters' Memorandum (September 1, 2015) 101

A.2 Memorandum to Hon. Reena Raggi from Jonathan J. Wroblewski, Department of Justice, Regarding Rule 12.4 (June 8, 2015)..............................105

A.3 Excerpt from the Advisory Committee on Appellate Rules Fall 2014 Meeting Minutes 109

A.4 Excerpt from the Advisory Committee on Appellate Rules Spring 2015 Meeting Minutes (Draft) 117

B. RULE 15(d) 123

B.1 Reporters' Memorandum (August 31, 2015)..............127

B.2 Memorandum to Hon. Reena Raggi from Jonathan J. Wroblewski, Department of Justice, Regarding Rule 15(d) (June 26, 2015)..........................133

C. **RULE 6** 137

C.1 **Reporters' Memorandum (August 31, 2015)**..............141

C.2 **Suggestion 15-CR-B (Andrew D. Stitt)** 147

D. **RULE 23** 149

D.1 **Reporters' Memorandum (August 31, 2015)**..............153

D.2 **Suggestion 15-CR-C (Hon. Susan P. Graber)** 159

E. **RULE 32.1** 161

E.1 **Reporters' Memorandum (August 31, 2015)**..............165

E.2 **Suggestion 15-CR-C (Hon. Susan P. Graber)** 173

E.3 **Excerpts from Committee Notes to Rule 32.1** 177

TAB 4 **STATUS OF PENDING PROJECTS**

A. **Legislative Update: Statement of the Department of Justice Submitted for Senate Judiciary Committee Hearing on Inspector General Access (August 5, 2015)** 187

B. **Proposed Amendments to the Criminal Rules Approved by the Standing Committee and Transmitted to the Judicial Conference** 193

Rule 4. Arrest Warrant or Summons on a Complaint 195

Rule 41. Search and Seizure...205

Rule 45. Computing and Extending Time 211

AGENDA
CRIMINAL RULES COMMITTEE MEETING
SEPTEMBER 28-29, 2015
SEATTLE, WASHINGTON

I. PRELIMINARY MATTERS

A. Chair's Remarks and Administrative Announcements
B. Introduction of New Members
C. Recognition of Members Whose Terms End in 2015
D. Draft Minutes of March Meeting in Orlando, Florida
E. Status of Criminal Rules: Report of the Rules Committee Support Office

II. SUBCOMMITTEE REPORT RULE 49 (service and filing)

A. Reporters' Memorandum
B. Proposed Amendment
C. Administrative Office Survey of Local Court Rules

III. NEW CRIMINAL RULE SUGGESTIONS

A. Rule 12.4 (disclosure statements)
  1. Reporters' Memorandum
  2. Department of Justice Memorandum
  3. Excerpts from Minutes Appellate Rules Committee
B. Rule 15(d) (deposition expenses)
  1. Reporters' Memorandum
  2. Department of Justice Memorandum
C. Rule 6 (grand jury) (15-CR-B)
  1. Reporters' Memorandum
  2. Mr. Stitt's Email
D. Rule 23 (15-CR-C) (waiver of jury trial)
  1. Reporters' Memorandum
  2. Memorandum from Judge Graber
E. Rule 32.1 (15-CR-C) (revocation procedures)
  1. Reporters' Memorandum
  2. Memorandum from Judge Graber
  3. Excerpts from Committee Notes

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure
   1. Senate Hearing on Inspector General Access

B. Proposed Amendments Approved by the Standing Committee and Transmitted to the Judicial Conference
   1. Rule 4. Arrest Warrant or Summons on a Complaint
   2. Rule 41. Search and Seizure
   3. Rule 45. Computing and Extending Time

C. Other

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Spring meeting, April 18-19, Washington, D.C.

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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
Reena Raggi Chair	C	Second Circuit	2011	2015
Carol A. Brook	FPD	Illinois (Northern)	2011	2017
James C. Dever III	D	North Carolina (Eastern)	2014	2017
Morrison C. England, Jr.	D	California (Eastern)	2008	2015
Gary Scott Feinerman	D	Illinois (Northern)	2014	2017
Mark Filip	ESQ	Illinois	2013	2018
David E. Gilbertson	CJUST	South Dakota	2010	2016
Orin S. Kerr	ACAD	Washington, DC	2013	2016
Raymond M. Kethledge	C	Sixth Circuit	2013	2016
David M. Lawson	C	Michigan (Eastern)	2009	2015
Mythili Raman*	DOJ	Washington, DC	----	Open
Timothy R. Rice	M	Pennsylvania (Eastern)	2009	2015
John S. Siffert	ESQ	New York	2012	2018
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open

Principal Staff: Rebecca Womeldorf 202-502-1820

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Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
March 16-17, Orlando, Florida

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Orlando, Florida on March 16-17, 2015. The following persons were in attendance:

Judge Reena Raggi, Chair
Hon. David Bitkower[1]
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge David M. Lawson
Judge Timothy R. Rice
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison
James N. Hatten, Clerk of Court Liaison[2]

In addition, the following members participated by telephone:

Carol A. Brook, Esq.
Judge Morrison C. England, Jr.

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Frances F. Skillman, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center

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[1] The Department of Justice was also represented throughout the meeting by Jonathan Wroblewski, Director of the Criminal Division's Office of Policy & Legislation.

[2] Mr. Hatten was present only on March 17.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced Rebecca Womeldorf, the new Rules Committee Officer and Secretary to the Committee on Practice and Procedure. She welcomed observers Peter Goldberger of the National Association of Criminal Defense Lawyers and Robert Welsh of the American College of Trial Lawyers. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of November 2014 Meeting

Judge Raggi reminded Committee members that the minutes, which were included in the Agenda Book, were approved last fall before their inclusion in the Agenda Book for the Standing Committee's January meeting.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 41

Judge Kethledge, chair of the Rule 41 Subcommittee, reported on the history of the proposed amendment, the Subcommittee's review of the responses submitted during the public comment period, and its recommendations.

In September 2013 the Department of Justice came to the Advisory Committee with two problems. The current version of Rule 41 provides (1) no venue to apply for a warrant to search a computer whose physical location is unknown because of anonymizing technology, and (2) only a cumbersome procedure to apply for warrants to search computers that have been damaged by botnets that extend over many districts. Judge Kethledge emphasized these are procedural—not substantive—problems. The Department proposed an amendment to address these procedural problems.

In April 2014, the Advisory Committee significantly revised the Justice Department's original proposal, crafting a narrowly tailored proposed amendment that closely tracked the contours of the two problems that gave rise to it. The Standing Committee approved the publication of the proposed amendment for public comment.

The Rule 41 Subcommittee received and gave careful consideration to the public comments, including more than 40 written comments and three additional memoranda from the Department of Justice. Several hours of public comments were also presented at hearings before the full Advisory Committee in November 2014. The Subcommittee then held three conference calls in which it discussed the testimony, the written comments, the Department's memoranda, and its own concerns about some of the language of the published amendment.

After careful consideration, the Subcommittee unanimously recommended that the Advisory Committee approve several proposed revisions to the amendment as published, and

approve the revised amendment for transmittal to the Standing Committee.

Judge Kethledge summarized the issues raised in the public comments before stating the Subcommittee's specific recommendations for revisions.

In general, the concerns of those opposing the amendment are substantive, not procedural. Commenters argued that searches conducted under the proposed amendment would not satisfy the Fourth Amendment's particularity requirement, or would be conducted in an unreasonably destructive manner, or would violate Title III's restrictions on wiretaps. These are all substantive concerns on which the amendment expressly takes no position. The amendment leaves these issues for the courts to decide on a case-by-case basis, applying the Fourth Amendment to each application for a warrant.

Similarly, arguments that any changes should be left to Congress are unpersuasive. Venue is not substance. It is process, and Congress has authorized the courts "to prescribe general rules of practice and procedure." This amendment would be an exercise of that authority. Judge Kethledge noted that the Department of Justice had acted in conformity with Judicial Conference policy by using the Rules Enabling Act for these procedural issues rather than going to Congress.

The Department came to the Committee with a procedural problem that is impairing its ability to investigate serious computer crimes that are occurring now. Judge Kethledge respectfully submitted that it would be irresponsible for the Advisory Committee not to provide a venue for the government to make a showing to a judicial officer as to the lawfulness of these searches. He then invited other members of the Subcommittee (Judge Dever, Judge Lawson, Judge Rice, Mr. Filip, Professor Kerr, and the representatives of the Department of Justice) to comment.

Subcommittee members noted that the deliberative process had worked well: the proposed amendment had been narrowed to address the problems created by the current rule, and all of the comments had been reviewed and considered with great care. They expressed support for the amendment (with the proposed revisions to be discussed), and agreed that it addresses procedural—not substantive—issues. One member noted that a proposed revision to be discussed later in the meeting, using the term "venue" in the caption, may help to make this clear to the public. Responding to the concern that these matters should be left to Congress, Judge Raggi commented that under the Rules Enabling Act, Congress will necessarily play a significant role: any proposed amendment must be submitted to Congress before it can go into effect.

Professor Beale stated that the proposed amendment also includes provisions describing how notice of remote electronic searches is to be given. This portion of the proposed amendment will be applicable to all remote electronic searches, including those now being made under Rule 41 when the location of the device to be searched is known. The current notice provisions of Rule 41 are not well adapted to searches of this nature, because they refer to leaving a copy of the warrant and a receipt "at the place where the officer took the property." She noted that some of the comments focused on the adequacy of the proposed notice provisions, and that several of the

Subcommittee's proposed revisions of the amendment concerned the notice provisions.

Professor Beale thanked Ms. Healy for her work in the preparation of the agenda book, and noted that members had before them a hard copy replacement for one tab in the section on Rule 41.

Judge Raggi noted that the Subcommittee members and the staff had worked heroically to review the large number of comments received, including many at the very end of the comment period, and to prepare the agenda book under significant time constraints due to the short interval between the end of the comment period and the date for publication of the Agenda Book. Judge Kethledge concurred and also thanked the reporters.

Judge Raggi then invited comments from members not on the Rule 41 Subcommittee, asking members to focus first on the general issues raised by the proposed amendment. She confirmed that the members on the telephone could hear all of the discussion.

One member, acknowledging the care and hard work that had gone into the drafting and revision of the proposed amendment, nonetheless opposed it, raising concerns heard from the defense community as well as those who filed public comments. The member disagreed with the characterization of this as a procedural rule, arguing that it has too many substantive effects to be regarded as merely procedural. In effect, it opens the door to judges making ex parte decisions about core privacy concerns, and the defense does not participate until too late in the process, in back-end litigation. This is too great a risk. Authority tends to expand, and it is not possible to predict exactly how this authority will develop. Given the importance of the privacy concerns and the many unknowns, it is preferable for Congress to act first, as it did in Title III. In this member's view, the commenters who opposed did not misunderstand the amendment, because the result will not be narrow. In response to an observation that the defense role would be the same under the amendment as it would be for all other searches, the member expressed the view that the privacy concerns are greater here. For many people, computers are their lives, and these privacy concerns should be considered by Congress.

Another member said he was not hearing the same concerns from the criminal defense bar. He emphasized the public's interest in protections against new ways criminals can use technology to jeopardize the economy, national security, and individual privacy by identity theft, terrorism, corporate espionage, child pornography, and other serious offenses. Defense lawyers agree the government must be able to do its job in protecting society. For example, if a trade secret is lost, it is gone forever. The risk of such criminal activity is clear and present. In this member's view, the commenters who opposed the amendment did not recognize that the government must demonstrate probable cause to obtain a warrant, and they did not recognize the importance of affording the government a venue to show that it is entitled to a warrant to take the necessary actions to respond to these threats. There are risks that individual privacy will be invaded, but the greater risk to privacy comes from burgeoning electronic criminal activity, often shielded by anonymizing software, rather than government search warrants that must satisfy probable cause regardless of venue.

Judge Kethledge stated that it is the Committee's role and responsibility to address new problems when they arise, and this venue concern is a serious new procedural problem. There is a gap in Rule 41 that may prevent the government from obtaining a warrant because there is no way to identify the court that would have venue to consider the warrant application. The Committee should act to remedy this gap, which will allow the case law on the constitutional issues to develop in an orderly process as courts review warrant applications, rather than after the fact following warrantless searches based on exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant, and it would likely conduct a warrantless search under the exigent search doctrine, without prior judicial review.

Judge Raggi agreed that if the New York Stock Exchange were to be hacked by a computer using anonymizing software, it would be preferable to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting an exigent warrantless search. Concerns that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

A member observed that much of the public response is based, incorrectly, on the view that the amendment itself authorizes remote electronic searches. In fact, courts now issue such warrants under the current rules when the government knows the location of the subject computer. The only question addressed by this rule is how to proceed when anonymizing technology prevents the government from learning the computer's location so that it may go to the proper court to seek a warrant. Judge Raggi agreed, but noted that providing venue when anonymizing technology has been used may increase the number of warrant applications, and we cannot know how many such searches there will be, or how frequently they will be used in various kinds of cases.

Judge Kethledge and another member both noted that commenters who opposed the rule offered no alternative solution to the real venue problem the government has presented. A member noted that some opponents stated candidly that they did not want to provide a forum. This may immunize people who use anonymizing technology to commit serious crimes. Given the serious nature of the criminal threats requiring investigation, it would be irresponsible for the Committee to decline to take action to fill the current gap in the venue provisions. Here, as in many other situations, judges reviewing search warrants in any venue will have the duty to apply the substantive law to new situations.

On behalf of the government, Mr. Bitkower addressed the opponents' privacy concerns. He challenged the apparent assumption of many commenters that digital privacy concerns are greater than traditional privacy concerns. To the contrary, he said, cases such as the Supreme Court's decision in *Riley v. California* (2014) have recognized that the privacy rights in technology may be *on a par with* traditional privacy rights in the physical world. In the

government's view we should apply the same rules, as much possible, to technology as to the physical world: the same probable cause rules, the same particularity rules, and as much as possible the same procedural rules. Remote searches are conducted today, and by themselves do not present new issues. What is new is the ease with which someone can conceal his location by anonymizing technology, and the amendment addresses the venue gap created by that reality. The proposed amendment is privacy enhancing, because it provides a venue in which the government can seek advance judicial authorization of a search, just as it would before conducting a search of someone's home. This process allows the courts to apply the basic principles of the Fourth Amendment to new forms of technology, as they have done, for example, with heat sensors and tracking devices. The government's goal here is to secure a warrant, a privacy enhancing process.

Although several commenters argued that the Committee should follow the precedent of Title III and wait for Congress to act, Professor Beale observed that the history of Title III cuts the other way. Title III was enacted *after* the case law on wiretaps developed, just as the case law is doing now with other forms of technology in cases such as *Riley v. California*. In general, Congress has legislated after a sufficient number of cases have been litigated to shed light on the policy issues. In the case of new technology, the courts are grappling with questions of what information is protected by the Fourth Amendment as well as how requirements such as particularity apply in new contexts. The proposed venue provision would permit the same process to operate with remote electronic searches, allowing the courts to rule on the issues of concern to the commenters. Although it is possible that providing venue will increase the number of remote searches, Professor Beale noted that it may instead increase the number of remote searches reviewed by the courts ex ante in the warrant application process, rather than only ex post following a search yielding information that the government seeks to introduce at trial.

Judge Sutton complimented the Committee on narrowing the proposed amendment and being responsive to the public concerns. He observed that approving venue for warrant applications is not the same as approving remote electronic searches. Rather, it permits more litigation as to search warrants that will shed light on the process and issues. He emphasized that the Rules Enabling Act tells the judiciary to promulgate rules of procedure, not to wait for Congress to act first. Instead, Congress responds to proposed rules.

The member who had stated opposition to the proposed amendment acknowledged that courts must deal with the issues raised by new technology but remained unable to support the amendment, characterizing it as substantive and reiterating there are many unknowns.

Discussion turned to the question what would be known or unknown in the warrant applications covered by the amendment. Mr. Bitkower noted that to obtain any warrant the government must know what crime it is investigating and what it is looking for. In the anonymizing software cases covered by the amendment, the only new unknown is the physical location of the device to be searched. Because Rule 41 currently provides no venue for a warrant application in such cases, if the government deems a situation serious but not "exigent," it must

now either wait or pursue other investigative techniques that may in some cases be more invasive. In botnet cases, he noted, the problem is the large number of computers, not the lack of information.

A member expressed the view that the most significant unknowns would arise in the botnet cases: what information might be sought from thousands or even millions of computers that had been hacked. Moreover, the technology required for different botnets may vary. He also noted that the Committee was being forward thinking in addressing these issues, since there have been relatively few botnet investigations and only one decision holding that a court cannot issue a warrant when anonymizing software has disguised the location of the device to be searched. It was sensible, he concluded, to address both problems with a narrowly tailored "surgical" amendment.

Agreeing that each criminal botnet is unique, Mr. Bitkower explained that one function of warrants under the proposed amendment could be to map a botnet before seeking to shut it down, collecting the IP addresses of the affected computers to determine the botnet's size and where the computers are located. In previous botnet investigations, the cumbersome requirement of seeking a warrant in each district played a role in determining the government's strategy, and civil injunctions were used. He also noted that warrant applications under the amendment would vary widely: in some cases they may be quite simple and narrow (as in the case of a single email account when the government has already obtained the password), but in other cases there will be more significant complications and new issues on which courts will have to rule.

Members compared the procedural options under the current rule and the proposed amendment in the investigation of the hacking of a major corporation or institution such as the New York Stock Exchange. If the NYSE were hacked and anonymizing software disguised the location of a device the government had probable cause to search, members speculated that the government would conduct a search under some legal theory. They identified three possible scenarios under the current rule: (1) the government might persuade a court in the Southern District of New York to grant the warrant, and then claim good faith reliance if the warrant were later invalidated for lack of venue; (2) a court in the Southern District might find probable cause but determine it had no authority to issue a warrant, in which case the government might conduct a warrantless search and argue that the failure to obtain a warrant was harmless error because the search was nevertheless supported by probable cause; or (3) the government might search without a warrant under a claim of exigent circumstances. Members expressed the view that these examples showed why it would be preferable to amend Rule 41 to provide venue for warrant applications, so that courts asked to approve such warrants would be able to focus on the constitutional issues presented by remote computer searches. Concerns about the judiciary's understanding of the technology could be addressed by judicial education.

In response to the question how frequently the government expects to seek warrants under the proposed amendment, Mr. Bitkower noted the use of anonymizing technology by criminals is likely to become much more common. Until recently only sophisticated criminals employed

anonymizing software, but the technology is now more readily available and easier to use. In the case of botnets, in prior cases the government used non-criminal tools, but the lack of efficient venue provisions skewed the government's choices. So that authority might be employed in future cases.

Judge Raggi then called for a vote on the question whether to move forward with the proposed amendment.

By a vote of 11 to 1, the Committee voted to approve the amendment for transmission to the Standing Committee (subject to further discussion of the minor revisions proposed by the Subcommittee).

At Judge Kethledge's request, Professor Beale described the revisions proposed by the Subcommittee. The first revision was to substitute "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This proposal responded to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). These commenters mistakenly viewed the amendment as providing substantive authority for such remote electronic searches, which they strongly opposed.

Beale noted that after the final Subcommittee call agreeing to amend the caption, Professor Kimble, the style consultant, first opposed making any change on the ground that no reasonable reader of Rule 41 as a whole could fail to see the many additional requirements. When advised that much of the opposition to the rule was founded on this misunderstanding, Kimble proposed an alternative caption "District from Which a Warrant May Issue." Professor King suggested that Professor Kimble may have believed this language would be clearer to lay readers than the term "venue."

Discussion focused on the need for a change in the caption, and the difference between the alternative captions. Professor Beale reminded the Committee that if there were no substantive difference, but only a question of style, it would ordinarily accept the style consultant's proposed language.

Judge Kethledge stated his strong support for amending the caption and using the Subcommittee's language. The current caption is overbroad and misleading, seeming to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Although Professor Kimble suggested this reading would be unreasonable, Judge Kethledge asserted that the current caption is unclear and is causing serious public opposition. By retaining the reference to "issu[ing]" warrants, Professor Kimble's language may perpetuate the misunderstanding. "Venue" is much clearer.

Members discussed the impact of different words and phrases. Several expressed support for the use of "venue," though another noted that it may not be known to non-lawyers and "venue" for the filing of a criminal case is defined differently than "venue" for the warrant applications under Rule 41(b). Judge Raggi observed that "venue" would be very clear to the

judges applying the rule. A member who agreed with the Subcommittee's recommendation also noted that other references to "authority" in the existing subsections of Rule 41(b) are also unclear; he observed that at some point it might be helpful for the Committee to revise and clarify all of the subsections.

Professor Coquillette commented that the discussion had made it clear that the Committee was grappling with a question of substance, not mere style.

The Committee voted unanimously to amend the caption of Rule 41(b) to "Venue for a Warrant Application."

Professor Beale explained that the Subcommittee also recommended two small changes in the notice provisions, Rule 41(f)(1)(C), both of which are intended to make notice of remote electronic searches parallel to the notice provided for physical searches to the extent possible.

The first change adds the requirement that the government serve a "receipt" for any property taken (as well as the warrant authorizing the search). In drafting the published notice provisions, the Committee had inadvertently omitted this requirement. Since this addition would parallel the requirements Rule 41(f)(1)(C) now imposes when the government makes a physical search and provide an additional protection for privacy, the reporters were confident it would not require republication.

The second change rephrased the obligation to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>." Again, the Subcommittee's intent was to parallel the requirement for physical searches. The Subcommittee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" <u>and</u> whoever "possessed the information that was seized or copied," since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches. Discussion followed on how the current notice provisions applied to various hypotheticals.

The Committee voted unanimously to revise the amendment as published to require the government to serve a "receipt" as well as the warrant, and to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>."

Professor Beale then turned to two proposed revisions to the Committee Note. The first addition explained the new caption:

> **Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must also be met.

Members emphasized that the first sentence was not inconsistent with their earlier conclusion that the language of the caption presented a substantive, not merely a style issue. The

point made in the Committee Note is that the change in the caption does not alter the meaning of the existing provisions in Rule 41(b). Rather, it clarifies the effect of the amendment, making clear what the amendment does and does not do. The last sentence responds directly to the many public comments misunderstanding the effect of the amendment, stating that there are also constitutional requirements that must be met. A member suggested that the meaning would be clearer if the last sentence were revised to state that the constitutional requirements must "still" be met, and Judge Kethledge accepted this as a friendly amendment.

The Committee voted unanimously to add the following language to the Committee Note:

> **Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Finally, Professor Beale asked for approval of the Subcommittee's proposed addition to the Committee Note regarding notice. The proposed addition explains the changes after publication, and also responds to the many comments that criticized the proposed notice provisions as insufficiently protective because they required only reasonable efforts to provide notice. The addition draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and then provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioners. Members agreed that the citation "See" is appropriate because at present the statute referenced is the only authority for delayed searches (though other provisions might at some point be added).

The Committee voted unanimously to add the underlined language to the Committee Note:

> **Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying<u>, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).</u>

B. Proposed Amendment to Rule 4

Judge Lawson, chair of the Rule 4 Subcommittee, described the public comments on the proposed amendment and the Subcommittee's recommendation that the amendment be approved as published and transmitted to the Standing Committee. One speaker at the hearings in November 2014 supported the proposed amendment, and there were six written comments. One comment urged that the proposal be withdrawn. The others supported the amendment, though some suggested modifications in the text or committee note. The Subcommittee met by telephone to consider the comments.

Judge Lawson reminded the Committee that the proposed amendment is intended to fill a

gap in the current rules, which provide no means of service on an institutional defendant that has committed a criminal offense in the United States but has no physical presence here.

Judge Lawson explained the Subcommittee's views on various issues raised by the law firm of Quinn Emanuel Urquhart & Sullivan (which represents a foreign corporation that the Justice Department has been unable to serve) in support of its recommendation that the proposed amendment should be withdrawn. First, Quinn argued, by stating that any means which provides actual notice is sufficient, the rule creates a situation in which any institutional defendant that appears to contest service has in effect admitted it has been served. The Subcommittee agreed with the Justice Department's response: the point of the amendment is to provide a means of service that gives notice, and there is no legitimate interest in allowing a procedure in which an institutional defendant can feign lack of notice. If the amendment were adopted, there would be, however, objections an institutional defendant might assert by a special appearance (such as a constitutional attack on Rule 4, an objection to a retroactive application of the amendment, or a claim that an institutional defendant has been dissolved.) And, Judge Lawson said, the Subcommittee also found unpersuasive the Quinn law firm's reliance on the Supreme Court's decision in *Omni Capital Int'l v. Wolff*. The Court simply required that service be made in compliance with the Rules of Civil Procedure. Here, by amending Rule 4 to provide for service, the amendment will allow the government to make service in a manner provided for in the Rules of Criminal Procedure.

The Subcommittee was not persuaded by comments of the Quinn firm and the National Association of Criminal Defense Lawyers (NACDL) expressing concern about the consequences of not honoring a summons, particularly a concern that this would permit trials in absentia. Judge Lawson noted that Rule 43 generally prohibits trial in absentia. Institutional defendants may appear by counsel, but their counsel must be present. NACDL suggested that the amendment or Committee Note be revised to include a reference to Rule 43. Noting the general principle that the Rules are to be read as a whole, the Subcommittee concluded it would not be wise to cross reference here to a single rule. Indeed, doing so might have negative implications when other provisions are not cross referenced. Judge Lawson also noted that trial in absentia was not among the long list of possible remedies that the Department of Justice identified in the August 2013 memorandum (included on pages 79-84 of the Agenda Book), which included criminal contempt, injunctive relief, the appointment of counsel, seizure and forfeiture of assets, as well as a variety of non-judicial sanctions (such as economic and trade sanctions, diplomatic consequences, and debarment from government contracting).

The Subcommittee also declined to adopt suggestions that the amendment be revised to provide an order of preference among the permitted methods of service. This issue, Judge Lawson noted, had been considered by the full committee, which previously determined that a requirement of this nature could generate burdensome litigation. The Subcommittee agreed.

The Subcommittee declined the Federal Magistrate Judges Association's suggestion that the committee note be revised to state that the manner of service must comply with Due Process. Judge Lawson explained the Subcommittee's view that this was unnecessary, since the Constitution must always be honored.

The Quinn law firm argued that the amendment was unwise because it would lead to reciprocal action by foreign governments against U.S. firms. Judge Lawson reminded the

Committee that it had discussed this issue at length before voting to approve the amendment for publication. As explained by the Justice Department's representatives and described in detail in the Department's August 2013 memorandum, federal prosecutors would be required to consult with the Justice Department's Office of International Affairs (which consults with the Department of State) in effecting international service.

Judge Lawson noted a final suggestion by NADCL fell outside the current proposal.

After considering all of the comments, Judge Lawson said, the Subcommittee voted unanimously to recommend that the proposed amendment be approved as published and transmitted to the Standing Committee. He then called on the Subcommittee members, Judge Rice, Mr. Siffert, and Mr. Wroblewski (representing the Department of Justice) for any additional comments.

Mr. Wroblewski thanked Judge Lawson, the Subcommittee members, and the reporters for their efforts, and he noted that the Justice Department's original proposal had been revised and improved. He commented on the reciprocity concerns, noting that federal prosecutors face reciprocity concerns every day in a variety of contexts, such as arrests and witness interviews. The United States Attorneys' Manual provides that whenever a federal prosecutor attempts to do any act outside the United States relating to a criminal investigation or prosecution or takes any other action with foreign policy implications the prosecutor is required to consult with the Office of International Affairs.

Judge Raggi observed that because that the government cannot try a defendant who has not filed a notice of appearance, the amendment might not result in a significant increase in prosecutions if non-U.S. entities don't file a notice of appearance. In such cases, however, if service has been made the government will be able to take a variety of collateral actions. The amendment is not radical. It simply provides a means of service, filling a gap in the rules.

Professor Coquillette recalled occasions when foreign governments raised objections to proposed amendments for the first time very late in the process (even at the point of Congressional consideration). He was happy to hear that the Departments of Justice and State had already consulted about this rule, and he urged the Department of Justice to do whatever it could to encourage counterparts at the State Department to bring to light now any possible objections from other nations. The Department's representatives agreed this was important, noting there had been long discussions between the Departments of State and Justice before the proposal was submitted, and throughout its consideration.

Judge Lawson added one final observation. The Quinn law firm proposed withdrawing the amendment without providing any alternative, which would mean that it would not be possible to make effective service on entities such as the Pangang Group (which the government has been unable to serve under the current rules). He noted that the Quinn law firm represents the Pangang Group, and in effect was seeking to defend it by preventing the initiation of the prosecution. This case, he said, demonstrates the necessity for the amendment. Without it, foreign entities can violate U.S. law with impunity.

Judge Sutton inquired into the breadth of the language in the proposed amendment to Rule 4(a), allowing the court to take "any action authorized by United States law" if an organization defendant fails to appear after service. Should it be limited to actions against the organizational defendant? Judge Raggi explained that not all appropriate responses would be actions against the organizational defendant itself. Notably, in rem sanctions might be available. And Professor Beale noted that United States law would not authorize sanctions that lacked a sufficient connection to the organizational defendant. Judge Sutton indicated he was satisfied that the broad language was appropriate.

On Judge Lawson's motion, the Committee voted unanimously to approve the proposed amendment as published and transmit it to the Standing Committee.

C. Proposed amendment to Rule 45

Judge Lawson, chair of the CM/ECF Subcommittee, presented the Subcommittee's recommendations regarding the previously published amendment to Rule 45 that would eliminate the three extra days provided after electronic service. The amendment reflects the view that electronic transmission and filing are now commonplace and no longer warrant additional time for action after service. It was published for comment in the fall of 2014. Similar proposals will be considered at the spring meetings of the other Rules Committees.

Judge Raggi noted that with this and other uniform rule changes being considered by all of the Rules Committees, the Criminal Rules Committee ought to consider whether criminal cases require different treatment. For example, in criminal cases there may have to be more play in the procedural joints, both as a matter of fundamental fairness when someone's liberty is at stake, and to avoid collateral challenges when convictions are obtained.

Judge Lawson discussed the Subcommittee's review of the comments received on the amendment to Rule 45. He first noted that the Subcommittee had rejected the Federal Magistrate Judges Association's suggestion either to eliminate all of the parentheticals in the proposed rule or to revise the rule to refer to "(F) (other means consented to except electronic service)." The Subcommittee concluded that the parentheticals were helpful, not confusing, and that the Committee Note clearly states that no extra time is provided after electronic service.

The Subcommittee recommended one change to the Committee Note that was published for comment and two changes to the text.

Judge Lawson first addressed the Subcommittee's recommended change to the Committee Note, which responded to concerns raised in the public comments. The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers had opposed the proposed amendment's elimination of the additional three days because of the difficulty it would cause practitioners and their clients. They emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern

about situations in which service after business hours or from a location in a different time zone, or an intervening weekend or holiday, may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

The Subcommittee recommended that in light of these legitimate concerns, the Committee Note to Rule 45(c) be revised to include language addressing this problem drafted by the Department of Justice:

This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

Judge Lawson noted that the Subcommittee thought added language encouraging judges to be flexible when appropriate and to expand those deadlines would allow judges to address matters on the merits. This was consistent with the position the Committee adopted for Rule 12. Liberality is especially important in the criminal context, he explained, because overly rigid application would inevitably result in Section 2255 motions and other collateral attacks. The note language keeps the text of the rule the same among committees but recognizes the particular need for flexibility in this context.

A member opposed to the amendment objected to this "compromise," arguing that Note language is not the same as leaving the extra three days in the text of the Rule. A client may be incarcerated and cannot be reached, and if the lawyer learns about it late Friday night, but the judge says no once there is a chance to seek an extension on Monday, three or four days to respond is not enough. Another member noted that local rules may have seven day limitations even if there are no seven day limitations in the Criminal Rules.

Professor Coquillette asked the Committee to focus on why the criminal rule should be different, if the other committees are comfortable with the elimination of the three extra days after electronic service. A member explained that the client in a criminal case is often incarcerated, which restricts counsel's access, and that responses often must be run by the client face to face in order to be accurate. Another member voiced opposition to eliminating the three days in criminal cases for two reasons. First, it is much more difficult to talk to the client before filing a response because of the distance to the location where the client is incarcerated and second, in some places local rules are interpreted liberally and some not.

Judge Raggi emphasized that there is a strong preference for uniform timing rules, so that a departure for the Criminal Rules must be justified.

After a short break, a member previously expressing opposition to the amendment to the text of the Rule withdrew that opposition based on the expectation that the note language would be included.

The Committee then unanimously approved adding to the Committee Note as published the additional language concerning extensions that had been proposed by the Department of Justice.

Professor Beale noted that the chair and reporters might need some latitude in moving forward with the new note language, given that each of the other committees will be considering this in the weeks to come and some tweaks might be necessary to achieve uniformity.

Judge Lawson then presented the Subcommittee's two recommendations to modify the text of the published amendment, each based on comments received during the publication period. The Subcommittee did not believe either change required republication.

The first recommended change was to eliminate the added phrase "Time for Motion Papers" from the caption of Rule 45, and keep the caption as it is now. Rule 12 deals extensively with the time for motions and Rule 45 does not.

The second recommendation was to modify the language of Rule 45(c) to parallel the language used in other sets of rules, referring to action "within a specified time after being served" instead of "after service." There was no reason for different phrasing in the Criminal Rule.

A motion was made to approve the text of the rule as published, with these two changes, and adopted unanimously.

D. CM/ECF Subcommittee

Judge Lawson presented the Subcommittee's recommendation regarding a mandatory electronic filing amendment being considered by the Civil Rules Committee (as well as the Appellate and Bankruptcy Committees). He explained that the proposed Civil amendment is of particular concern to the Criminal Rules Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, changes in the Civil Rules regarding service and filing will be incorporated by reference into the Criminal Rules. Also, the Criminal Rules Committee has traditionally taken responsibility for amending the Rules Governing 2254 Cases and 2255 Cases, and these rules also incorporate Civil Rules.

Judge Lawson explained that the Civil Rules Committee is considering a proposal mandating e-filing that does not exempt as a class pro se filers or inmates. Exemption is allowed either by local rule or by a showing of good cause. There are a number of districts that do not permit pro se e-filing except upon motion, and particularly discourage prisoners from e-filing because of the potential for mischief. There are also issues regarding electronic signatures. The question for the Committee is whether criminal cases warrant a different rule than that being considered by the Civil and Appellate Committees.

Professor King added that the issue is on the agenda now so that the Criminal Rules Committee's views on these issues can be conveyed to the other committees which will be considering this in the weeks to come. Also, she noted that the CM/ECF Subcommittee discussed the pro se issue and was unanimous in rejecting for criminal cases any rule that would require either a local rule or a showing of good cause in order to exempt pro se and prisoner filers. The reporters have conveyed our Subcommittee's view to those working on the rules for the other committees but so far they have not been sympathetic. Professor Beale added that the members of the working group for the Civil Committee preferred allowing districts to handle rules for pro se filers on a district-by-district basis.

The Committee's Clerk of Court Liaison, Mr. Hatten, who had been asked to share his views and experience on this issue with the Committee, presented several concerns raised by a rule that did not include an exception for pro se or inmate filers.

Mr. Hatten noted that because the CM/ECF system is a national platform that individual districts cannot modify, problems raised by extending e-filing to pro se filers will become embedded, and allowing courts to opt out will not avoid those structural problems. He noted various districts have been able to extend e-filing at their own pace, adapting to resource constraints and local challenges, and he knows of no court that extends e-filing to prisoners. Among the variations are differences in whether attorney filers may e-file sealed documents and case initiating documents.

As to pro se electronic filing, Mr. Hatten doubted the system was ready for a mandatory rule. We do not know the number of courts that presently allow this, and the extent of their experience. Many courts, perhaps even a majority, do not allow any electronic filing by pro se litigants. We really don't know how this would work because the experience with it has not been evaluated. He reviewed the history of the development of the CM/ECF system, designed for attorney use, and expressed the concern that many courts may find as a matter of policy that e-filing by pro se litigants is inappropriate or that the system is inadequate. A transition to pro se e-filing, he suggested, would not be facilitated by an opt-out rule, but instead would require further study and adequate resources, including staff resources.

Next, Mr. Hatten reviewed a number of potential problems that might arise. First, the current system anticipates a certain level of legal training and knowledge on the part of the person using the system, including knowledge of the rules as to what to file, when, and in what format. Non-lawyer, untrained filers may incorrectly characterize or describe their filings, tasks that are already a challenge for some lawyers. Pro se filers may file the same thing multiple times, fail to attach required documents, or attach the wrong document. This difficulty would be enhanced if the person is not a recurring user. Judges must use these designations, which may not be clear. Lawyers who must respond to the filing also may experience additional burdens. Court staff review docket entries for accuracy, and if there is an error, the staff must make a separate entry to rename the docket entry; they do not change the original filing. Increased errors would require increased staff resources for review and correction of docket entries. His court has had experience with pro se filers inferring some nefarious motive on the part of court staff when a docket entry is changed. This is in addition to the increased resources needed to train pro se filers.

Judge Raggi asked whether electronic filing or paper filing is a more efficient use of clerk's office staff. Mr. Hatten responded that for attorney filers there is a great advantage in electronic filing, but there will not be the same advantages for pro se filers. Pro se filers will be calling staff with normal questions you would expect from someone with less experience about how to file and other aspects of the system. And the quality control will be a very significant burden because pro se litigants will not understand the significance of what they are filing.

Mr. Hatten continued that in contrast to paper documents which can be screened before entry in the system, there is no ability to pre-screen materials before they are e-filed to identify any pornographic, confidential, libelous, or otherwise offensive or objectionable materials. E-filing results in immediate access via the internet to whatever is filed, through PACER or through subscription services such as Lexis or RSS feeds. There is no filter on the PACER system, which anyone can use. There are services that provide to a subscriber instantaneous access to anything filed in a particular case. Once captured and broadcast by these services, documents cannot be re-captured. This could lead to the release of personal data or materials that should not have been filed. Because electronic filings made late Friday are not reviewed by staff until Monday, there is a period of time when the unreviewed information would be available to anyone. Issues created by a pro se filer's use of the system could be addressed by a court after the fact, but any harm through unretrievable dissemination of offensive, confidential, or sealed materials would already have taken place. If the filing was in paper and screened first, the staff would review the document, then scan it, give it an appropriate name, and docket it.

Additionally, Mr. Hatten raised the potential of the "loss of docket integrity" if login and password information is made available to non-lawyers. Once issued a password in CM/ECF, any individual using that login information may access and file in any case in the system, regardless whether that person is a party to the case or whether the case is open or closed. For example they can file in any defendant's case. That login and password could be used by anyone who obtains it. There are no means to verify the identity of the actual individual accessing the system, if someone were to suggest that the login information was used without authorization. Potentially, with login information, someone unconstrained by the rules governing attorneys could maliciously interfere in unrelated cases. Expanded access by non-attorneys could even lead to denial of service attacks on the system, he noted, emphasizing that this was speculation. He did not know if expanding access would raise the risk of the introduction of malware or other viruses into the system, which until now has been very reliable. He noted that courts can block use of a password, but it would be "shutting the door after the cow's left the barn." Any information, such as information about a victim, or sealed materials that someone had filed electronically after obtaining them in paper form, would have already been released.

Judge Raggi asked if this ability to file in any case has been the subject of previous discussion. Mr. Hatten noted that it hadn't been a problem as far as he knew, because all filers were attorneys. Judge Lawson noted that this was one of the main reasons his district restricted CM/ECF access to attorneys.

Mr. Hatten continued that electronic notice of filing requires an individual email account, and it is not known whether pro se filers filing from an institution will be able to receive such notices, because of capacity limits or spam filters. Even in instances with a good lawyer email address, those email accounts are sometimes so full the court gets a bounce back. Sources a pro se party may use for filing, such as a public library, may be unavailable to receive email. The CM/ECF system requires the ability to contact a filer regarding missing information such as address or phone number. If delivery is not available, a paper notice would be required, which would reduce any advantage from e-filing.

Electronic filing, Mr. Hatten observed, may also require that the filer qualify for electronic payment. Those who lack credit cards, such as inmates, may not be able to file case-initiating documents.

Another concern, Mr. Hatten stated, was that the round-the-clock availability of the e-filing system. Past experience with some pro se paper filings suggests that extending e-filing to pro se litigants would significantly increase the volume of prisoner and pro se filings. Courts have experience measuring the filings of vexatious litigants in pounds not pages. Many examples are readily available. He mentioned two in his district: one, using paper filings only, filed 964 appeals in eleven regional circuits and the Federal Circuit and 2637 civil actions nationwide; another, using paper filings only, filed 76 appeals in four circuits, and 33 civil actions in 17 districts.

Perhaps extending e-filing to pro se filers could overcome some of these issues if the system could be modified to allow pro se filings to drop into a box so that court staff could review them before anybody else would see them. That might be better, but it is not possible in the existing system. Moreover, there are no resources available to court staff to implement a program of this potential magnitude, he said.

Mr. Hatten also raised the concern that if the rule changed to require e-filing unless there was a local rule or a showing of good cause, courts may expect demands by pro se and prisoner filers that they are entitled to access CM/ECF. Finally he raised a concern about the language of the proposed change to the Civil Rule referring to the electronic signature.

Judge Raggi asked the Department of Justice to share its views about extending e-filing to pro se and prisoner filers. Mr. Wroblewski stated that it seems clear the CM/ECF system is just not ready to handle all of the types of cases the Department sees, especially the Section 2255 cases. For example, the courts are in the middle of a retroactive guideline change, and in many districts the prisoners have no attorneys, but all are required to file, and although many have access to email, none have access to the internet. And there are tens of thousands of prisoners who are being held by the Marshal's Service, mostly in county jails, not federal facilities, with no computer access. We are just not ready for this, he stated, and are very concerned that we need to provide access to the courts for all of the pro se litigants, including those incarcerated.

On the electronic signature issue, he noted, there had been concern that it might cause problems with prosecuting bankruptcy fraud, but the Department doesn't see a huge problem with the criminal filings, at this point. But they are not ready to jump to a mandatory system.

In response to a question whether the Department thought the proposed rule provides enough flexibility, Mr. Wroblewski stated they will defer to the courts, but just want to make sure that all criminal litigants, including Section 2254 filers, have a way to access to the courts. If courts want to opt out of a new rule, and guarantee access that way, that is fine, but the courts must be open to these litigants.

Judge Raggi noted that the electronic filing proposal is being advanced with great vigor by the other Committees, but no one has indicated what the fallback plan would be should the system fail, either from an attack on the system itself or some other disaster. There is a real need for courts to operate in times of emergency, such as 9-11 or Hurricane Sandy, but there seems to be no fallback plan should the computers fail. District judges no longer maintain their own dockets, but are subject to the dictates of nationwide technology. She urged that in working with other committees, we should keep in mind that the Criminal Rules' unique concern with liberty. She also observed that requiring e-filing may put more distance between those who use the courts and the courts, and that the added resources needed to allow this to work aggravates these concerns. But the fundamental point is that these are criminal litigants in proceedings about liberty. She encouraged members to think about what is the advantage to them or us of having those papers filed electronically as opposed to hard copy.

In response to her request for input from members about whether this could be handled at the local level, one member related that in his district 10% of pro se filings are being filed electronically. As to pro se filers, this member reported, they have not had any problems. If a pro se filer does not want to file in CM/ECF, it is simple to opt out, and 90% of pro se's do opt out and file with paper. They file a form requesting they not have to file electronically and the magistrate routinely grants it. The good cause is usually "I don't have access to the Internet."

His district also has two state prisons, the member continued, and the state department of corrections has a very new limited pilot program allowing prisoners to file electronically in Section 1983 cases, not habeas actions. This is a good thing, he reported, because it has cut down the many, many pages of hard to decipher handwriting. Prisoners use a computer station to file these documents, so they come in typed in a standard format. Prisoners have time allotted to go to that location and file that document. He noted that there were so many prisoner filings, more than half of the docket, and the program was driven by that volume. He reiterated that the program is in "an infant stage," and that it could go sideways.

Another member noted that her district allows pro se filing in civil cases but requires training first, and she thought that a few districts were working on pilot projects allowing persons in custody to make filings. But this member could not imagine how this could possibly be required in habeas cases because state facilities don't give access.

Another member noted that if there is a top-down rule that says e-filing is required but you can opt out, at least 92 districts will opt out. Those who are detained but not yet convicted are in county jails in his district, with no computers. The state doesn't even have electronic filing for lawyers, and his district doesn't allow pro se e-filing, for some of the reasons stated before. There are ways to work toward this gradually, but having a top-down rule that everyone opts out of is not

good process, and reflects badly on the credibility of the rules process.

Professor Coquillette noted that local rules have been a matter of concern for Congress for decades, because they don't have the oversight provided by the Rules Enabling Act. Sometimes, however, there is a national rule that says go out and make local rules. This occurs in two situations: where there are real differences district to district, and where the subject matter is so premature it requires experimentation. Both of those conditions may apply here.

Another member noted that in 90% of situations the mandatory e-filing rule is ill advised and out of touch for people in county jails. His state has a tremendous budget crisis, won't fund providing prisoners with facilities to file electronically, and prisoners would file suits alleging denial of access to the courts. It is a top-down rule to fix a problem that doesn't exist. Already there are functioning local rules, and no need for this massive energy to change a system that seems to be working. This member was not aware of any reason that providing internet access to prisoners would be a priority, or that prisoner filings should be lock step with filings in civil cases.

Professor Beale suggested that we could amend Rule 49 in various ways to accommodate a different rule for criminal cases if the Civil Rules Committee proceeds with the existing draft. However, the Civil Rules Committee might put their proposed rule on hold, and study it more, or decide it is ready to publish something now, but agree to slow down later.

Professor Coquillette stated that the Standing Committee would want to hear what the Criminal Rules Committee thinks is best for criminal cases.

Judge Raggi asked the Subcommittee to meet again before the Standing Committee meets to consider what sections might be amended to deal with these concerns as to Rule 49 and also the 2254 and 2255 Rules to the extent we are responsible for them.

A member added that our goal would be to have our own amendment to Rule 49 take effect before 92 districts had to opt out of a mandate.

Judge Lawson expressed appreciation for Mr. Hatten's contribution. He noted the Subcommittee was comfortable with requiring e-filing for lawyers, and had not addressed prisoner filings in 1983 cases. The Subcommittee opposed a Civil Rules amendment that provided no carve out for pro se or prisoner filers. He agreed with the many concerns discussed, and noted that not all of those who file in criminal cases are parties. Witnesses, law enforcement, and third party owners would not necessarily have CM/ECF access. Most importantly, he argued, the rule implicates constitutional rights that do not arise in civil cases, and requiring pro se prisoner filers to demonstrate good cause before they can access the courts would probably raise constitutional issues. He asked the Committee to convey its preference for an approach that carves out pro se filers from any mandatory rule.

A member noted that he is in favor of that motion, that in his district this is not done, and that a top-down rule is a bad idea if clerks and local committees in almost every district wonder how out of touch this is. On the ground, pro se litigants are not filing through CM/ECF.

Judge Raggi agreed we can make these suggestions to the Civil Rules Committee, and she favored doing so, noting that a litigant who wants to go into every case in a judge's docket could cause a fair amount of trouble. But she also urged that the Criminal Rules Committee should also have an alternative plan in reserve.

A member said our alternative should be to work on delinking our rule from the Civil Rules. Another member noted the Committee may have to recommend amendments to 49(b) and (d), and a third noted that 49(e) may need work as well.

There was discussion about whether the Committee favored retaining current Rule 49(e), to preserve status quo. Judge Lawson thought there may need to be different treatment for those who are incarcerated and those who are not, and said that his initial proposal was not to preserve status quo.

A member stated he was unprepared to vote on specifics. He did not favor going beyond conveying the Committee's concerns to the other Committee at this point. He specifically did not agree with any rule stating pro se or prisoners may have CM/ECF access.

Judge Lawson agreed with Judge Raggi's suggestion that the committee vote on whether to inform the other committees that the Criminal Rules Committee has reservations about requiring mandatory electronic filing for pro se litigants and pro se criminal litigants, because we predict that almost every district would create an exception.

A member agreed that if a Rules Committee gets out in front of what is happening on the ground in 92 of 94 districts, that's a problem. Now Rule 49 allows local rulemaking, and all districts have local rules that are working well. It doesn't make sense to require the local rules committees in all of these districts to reconvene and do something else.

The resolution of the sense of the Committee was adopted unanimously.

Judge Raggi stated that she would voice these concerns,[3] and our Subcommittee will continue to look at our own rule.

E. Proposed Amendment to Rule 35 (15-CR-A)

In a law review article submitted to the Committee in February, Professor Kevin Bennardo urged that Rule 35 be amended to bar appeal waivers before sentencing. Judge Dever, the chair of the subcommittee that reviewed another recent proposal to amend Rule 35, was asked to comment

[3] Following the meeting, the reporters and chair conveyed these concerns. The chairs, reporters, and members working on the proposed Civil Rule and parallel changes in the Bankruptcy and Appellate Rules were very responsive to the Advisory Committee's concerns, and a revised version of the proposed Civil Rule excluding persons not represented by counsel was presented to the Advisory Committee on Civil Rules. Representatives of all committees will continue to collaborate as the rules on electronic service, filing, and signature move forward.

on Professor Bennardo's proposal.

Judge Dever concluded that the proposal is trying to solve a nonexistent problem by creating a second Rule 11 process that will not save the appellate courts any time. He recommended that the proposal not be referred to a subcommittee and that it not be pursued further. He noted several problems with the assumptions underlying the proposal. First, the circuits uniformly accept waivers of appeal in plea agreements, rejecting one of the article's central premises, namely that there cannot be a knowing waiver of appeal until the sentence is imposed. Second, the article erroneously assumes that judges do not consider the Section 3553(a) factors if there is an appellate waiver. Finally, the proposal is intended to save the appellate courts time, because it assumes that the appeal would be stayed while the government negotiations an appeal waiver after sentencing, after which there would be a new process in the trial court by which the defendant will receive a lower sentence. The article also asserted that this will lead to fewer defendants who breach the appeal waiver by asking their lawyer to file the notice of appeal.

Judge Raggi asked for members to comment. Hearing no comment, she called for a vote on the recommendation not to pursue this further.

The motion not to pursue the proposal passed unanimously.

F. Proposed Amendment to Rule 35 (14-CR-E)

The New York Council of Defense Lawyers submitted a proposal to amend Rule 35 to permit a judge to reduce a sentence of a defendant who has served two thirds of his incarceration and establishes one of the following circumstances by clear and convincing evidence: (1) newly discovered scientific evidence that raises a substantial question about the validity of his conviction; (2) substantial rehabilitation during confinement; or (3) deterioration of condition (providing an alternative to compassionate relief). Following brief discussion at the November 2014 meeting, Judge Raggi appointed a subcommittee, chaired by Judge Dever, to consider the proposal.

Judge Dever presented the report of the Subcommittee, which concluded that the proposed amendment to Rule 35 involved changes beyond the Committee's purview and recommended that the Committee take no further action on the proposal.

The motion not to pursue the proposal passed unanimously.

G. Other Business

Judge Raggi stated that if the Rule 41 changes are adopted, that would be a good time to help the Federal Judicial Center work on a primer on how electronic searches work. She stated that Judge Kethledge, Chair of the Rule 41 Subcommittee, Professor Kerr, the Department of Justice, Mr. Siffert and she would work with the FJC on this project.

Finally, Judge Raggi noted the next meeting of the Committee will be September 28-29 in

Seattle, Washington.

The meeting was adjourned.

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TAB 2

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 49

DATE: September 3, 2015

The proposed amendment grows out of a project considering the implications for all of the Federal Rules of ongoing revisions to the CM/ECF filing system. The Standing Committee's CM/ECF Subcommittee – which included representatives of all of the advisory committees – concluded that it would be desirable for the Federal Rules to reflect the reality that electronic filing and service are now the norm. Virtually all districts now have local rules that require e-filing and service, and there was general agreement that it was time for the Federal Rules themselves to require e-filing and service, subject to appropriate exceptions.

This memorandum (1) briefly reviews the discussion at the spring meeting of the Criminal Rules Committee as well as the later actions of other advisory committees, and (2) reports on the recommendations of the Criminal Rules CM/ECF Subcommittee, which has proposed a significant revision of Rule 49 to detail the requirements for filing and service, requirements presently noted only by reference to the civil rules.

The Subcommittee's proposal, Tab B, is a discussion draft. We anticipate that changes will be made as a result of the discussion at our September meeting, and further consultation with other advisory committees is likely to suggest additional revisions. The Subcommittee intends to submit a revised proposal, including proposed Committee Notes, as an action item at the spring meeting.

If all goes well, each advisory committee will be prepared to submit a proposed electronic filing and service rule at the spring meeting of the Standing Committee, so that all of the proposed amendments can be considered by the Standing Committee for publication at the same time.

I. Background

A. Discussion at the spring meeting

At the time of our 2015 spring Committee meeting, an amendment mandating electronic filing was being prepared for presentation to the Civil Rules Advisory Committee. The draft Civil Rules amendment made no exception for pro se parties or inmates, though it allowed exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments.

The proposed amendment to the Civil Rules was of particular concern to the our committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "service must be made in the manner provided for a civil action," and Rule 49(d) states "a paper must be filed in a manner provided for in a civil action." Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Criminal Rules Committee has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 cases, and these rules also incorporate Civil Rules.

At our spring meeting committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically. The Committee expressed the unanimous view that a pro se litigant's use of paper filing in a criminal case should require either of the showings required by the draft civil rule, namely (1) a showing of good cause in an individual case, or (2) that the local district had exempted pro se litigants from the national requirement.

Our Committee's clerk of court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of a crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and an increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases – even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as the

inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in custody in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of a crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rule making to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners, the Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Committee that the proposed national rule should not be adopted if it would require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers had already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Some members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules by reference. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project would also include the Rules Governing 2254 and 2255 cases, for which the our Committee has responsibility.

B. The response from other committees

Following our spring meeting, the reporters and chair shared the Committee's concerns with their counterparts on other committees, who were very responsive. The Civil Rules Committee received and approved at its spring meeting a revised version of the e-filing and service amendment under consideration that exempted persons not represented by counsel from the requirement to file electronically. The other committees also discussed extensively electronic service and signatures, issues that our Committee has not yet considered.

At the spring Standing Committee meeting, there was general agreement that the various Advisory Committees would continue work on their draft rules.. This allows the Criminal Rules Committee the opportunity to study the provisions under consideration by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committee), and to determine how best to revise the Criminal Rules, including consideration of new provisions in the Criminal Rules that would replace the current provisions adopting the Civil Rules on filing and service.

C. Study undertaken by the Administrative Office

In order to assist all of the advisory committees, the Rules staff at the Administrative Office of U.S. Courts has undertaken a study of all of the local rules concerning electronic filing by pro se litigants. The results from this survey were not available in time for review by the Subcommittee, but they are included as Tab C.

II. The Subcommittee's recommendations

The Subcommittee recommends that the Criminal Rules be delinked from the Civil Rules on filing and service, and unanimously approved a discussion draft (Tab 2). There are several points noted below on which the Subcommittee is especially eager to receive feedback.

The discussion draft has been revised extensively after consultation with our style consultant, Professor Kimble. It was also shared with the reporters for the other advisory committees. Some comments from those reporters were received in time to be considered by the Subcommittee and incorporated in the discussion draft; others that were not discussed are noted below.

A. Delinking Rule 49 from the Civil Rules

The threshold issue facing the Subcommittee was whether to amend Rule 49 to sever the link to the Civil Rules, which currently govern both filing and service. The Subcommittee unanimously concluded that the advantages of severing the tie to the Civil Rules warranted the transaction costs of a comprehensive revision to Rule 49 to import all of the applicable rules for filing and service in criminal cases. The Subcommittee identified two major advantages of this approach.

First, the Subcommittee's approach reflects an understanding that there are important differences between criminal and civil litigation, which are reflected in the institutional expertise

of the various advisory committees. Placing the rules governing filing and service in the Federal Rules of Criminal Procedure ensures that decisions about filing and service in criminal cases will be made by the Advisory Committee on Criminal Rules, which is most familiar with – and is charged with the responsibility of crafting rules that best accommodate – the distinctive issues, interests, and policies in criminal cases. The discussion of electronic filing and service highlighted some of these differences, including the constitutional obligation to provide criminal defendants and prisoners with access to the courts, and the special difficulties prisoner litigants would have in filing or receiving service electronically.

Although the Civil Rules Advisory Committee modified its proposal to respond to the concerns raised by the Criminal Rules Committee, there is no guarantee all future differences of opinion would be resolved in the same way. If it proved to be impossible to reach agreement on some future issue, the Criminal Rules Committee might find it necessary to work very quickly to develop an amendment to counter the effect of an imminent change in the Civil Rules. Additionally, Subcommittee members expressed concern that the Criminal Rules Committee might even be unaware of some change in the Civil Rules that would work a change in the rules of filing and service in criminal cases.

Second, it is desirable to include the rules on filing and service in the Criminal Rules, rather than requiring the parties to consult two sets of rules. Federal prosecutors and many defense lawyers specialize in or limit their practice to criminal cases. Including the rules of filing and service in the Federal Rules of Criminal Procedure would be more convenient for them, and it might help them avoid errors. This would also be very beneficial for pro se defendants and prisoners litigating habeas cases and actions under Section 2255.

Finally, the Subcommittee recognized a secondary benefit of severing the link to the Civil Rules. The process of migrating the rules for filing and service from Civil Rule 5 to Criminal Rule 49 provides an opportunity to review the current rules to determine whether any changes would be desirable. This might include substantive changes, or simply rewording to improve clarity.

The Subcommittee was persuaded that these advantages were sufficient to justify the transaction costs inherent in proposing a comprehensive revision of Rule 49, rather than the relatively simple approach of dealing only with e-filing and service. It seeks feedback from the Committee on this threshold issue.

C. Drafting issues

The discussion draft was based on Civil Rule 5, but there is one key organizational difference. Unlike current Civil Rule 5, the Subcommittee draft gives electronic filing and service the central position in the rule that they now occupy in practice. Thus for both filing and service the discussion draft provides first for electronic means, which most parties will employ (and indeed, will be required to employ), before turning to other means.

The Subcommittee is seeking feedback on the following drafting issues.

1. Service rules

Lines 3–5

The Subcommittee considered, but decided not to include, a provision in the text further defining what must be served under Rule 49(a) (and hence must be filed under Rule 49(b)(1)). At present the rule refers to the service of "any written motion (other than one to be heard ex parte), written notice, designation on appeal, or similar paper." By common understanding, Rule 49 has not been applied to the service of summonses (governed by Rule 4), indictments, or search warrant applications, and the Subcommittee found no indications that the failure to provide any further definition had caused any difficulties.

Subcommittee members discussed whether this issue should be mentioned in a Committee Note, but concluded that would be unnecessary. The amendment works no change in the scope of pleadings and filings covered by the rule, and an effort to provide a comprehensive definition in the Note is not necessary and might produce unintended consequences.

Lines 14–16

A Subcommittee member questioned the justification for the rule that electronic service "is not effective if the serving party learns that it did not reach the person to be served." Because this provision was drawn from Rule 5, it is currently applicable in criminal cases pursuant to Rule 49(b).

This provision was added to the Civil Rules in 2001. The Committee Note explain the rationale:

> Paragraph (3)[1] addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.
>
> Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these

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[1]At the time of restyling, Rule 5 was reorganized, and this provision was relocated to (b)(2)(E).

problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

To some degree, experience with electronic filing and service has undercut the rationale for this provision. Indeed, the pending proposal to eliminate the extra three days for responses after electronic service in civil, criminal, and bankruptcy cases[2] rests on the accumulated experience with electronic service. The proposed Committee Note for Federal Rule of Criminal Procedure 45(c) explains:

> There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

On the other hand, electronic service may still occasionally fail for a variety of reasons. When that occurs, the person who attempted to make service will, in some instances be aware of that failure. He may, for example, receive an error message. Under the current discussion draft, lines 15-16, under those circumstances that service would not be effective.

Lines 22–26

A Subcommittee member suggested that some of this language, drawn from Civil Rule 5(b)(2)(B), is too vague to be helpful. He wrote:

> (4)(B)(I) reference to "a conspicuous place in the office" is vague and invites litigation. Can I lay it on the floor? Put it on a lunch table? Tape it to the door or a photo? I would revise this to read "at the office"
>
> Also, reference in (4)(B)(ii) "with someone of suitable age and discretion" is vague. Will a bright 5-year-old suffice? A ditzy 13-year-old? An elderly cleaner?
>
> I would revise it to end the provision after the word "abode" and eliminate the rest of the sentence.

This language was in the text of Rule 5 as originally adopted. The brief 1937 Committee Note does not discuss it. Initial research by the reporters did not bring to light any civil litigation raising these issues.

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[2]Parallel proposals to amend Criminal Rule 45(c), Civil Rule 6(d), Appellate Rule 26(c), and Bankruptcy Rule 9006(f) have been approved by the Standing Committee and submitted to the Judicial Conference. These proposals govern the time required for action following service, and eliminate the three days that are currently added when electronic service has been made.

Because the Subcommittee did not have an opportunity to discuss this comment, it asked for discussion at the September meeting.

Lines 30–32

The Subcommittee's discussion draft includes the following as one option for service: delivery "by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery." This option is listed in the Civil Rule without regard to whether the serving party is represented by counsel. One reporter from another committee thought the draft's language – which prohibits electronic service by pro se parties except if allowed by court order or local rule – would also preclude service by email, even with the consent of the person being served. This reporter noted that the option of email service by consent is available to represented and pro se parties alike under the present rule, and argued that an approach that lets a pro se litigant serve by email if the party being served has consented would be "particularly useful to pro se litigants since they're much more likely not to be on CM/ECF."

The Subcommittee did not have an opportunity to consider this comment, so discussion of the following questions at the September meeting would be helpful:

(1) Does the language of the discussion draft bar a person who is not represented by counsel from using email service when the person to be served consents;

(2) Are there specific reasons to preclude pro se litigants in criminal, habeas, and 2255 cases from serving by email if the served party consents;

(3) Do any United States Attorney's Offices ever consent to email service by pro se litigants in civil or criminal cases? Do state's attorneys in habeas cases? and

(4) If the prerequisite of consent is sufficient protection against any anticipated problems with email service by pro se litigants in criminal, habeas and 2255 cases, should written consent be required to deter and resolve disputes over whether consent was provided?

2. Filing rules

Lines 35–37

Under this rule

The bracketed language on line 35 highlights the limited scope of the filing requirement under Rule 49; it applies only when Rule 49(a) requires a party to serve "a paper." Thus the rule does not govern the filing of an indictment, an information, or a search warrant application, since they are not governed by Rule 49(a). This limitation may be implicit in the structure of the subparts of Rule 49, but the Subcommittee thought it might be desirable to make that limitation clear.

Certificate of service

The Subcommittee would appreciate feedback on the draft language concerning the certificate of service.

Reasonable time requirement

Civil Rule 5(d)(1) presently contains a "within a reasonable time after service" requirement: "Any paper after the complaint that is required to be served – together with a certificate of service – must be filed within a reasonable time after service." The Subcommittee decided to leave this timing requirement out of the requirements for filing in its proposed amendments to Rule 49. Members voiced two reasons. First, Subcommittee members did not view untimely filing after service as a problem, and perceived no need for such a requirement. Second, some questioned whether this timing mandate fell within the Rule 49 language referencing filing "in a manner provided" by the civil rules. "Manner" of filing, they argued, is different than time of filing. According to this reasoning, federal criminal practice does not presently include a reasonable time requirement.

The reporters from other committees who provided feedback on this draft questioned the omission of this language on time of filing and thought it should be included. They inquired whether there is some reason that justifies changing the status quo, noting the value in having uniformity among the filing rules absent a significant reason for variation.

Our research suggests this restriction is rarely at issue, even in civil cases. Courts have held that filing two months after service is unreasonably late, *Gan v. Hillside Ave. Associates*, No. 01 CIV. 8457 (AGS), 2001 WL 1505988, at *2 (S.D.N.Y. Nov. 26, 2001) (unreasonable when over two months elapsed since service of the amended complaint, yet the amended complaint has not been filed, declining to consider the amended complaint), but that six days is not. *Chesson v. Jaquez*, 986 F.2d 363, 365 (10th Cir. 1993) (motion for reconsideration received and file-stamped in the district court, six days after service, was within a reasonable time after service, especially considering the six days included a weekend).

The Subcommittee did not have the opportunity to consider this issue again after the comments were received from the other reporters. It would be helpful to hear from the Committee whether it favors including this timing restriction on filing. If added, the words "within a reasonable time after service" would be inserted on line 35 of the discussion draft, between the word "service" and the period.

Lines 41-49

This language – which was not included in the earlier draft prepared by the Civil Rules Committee – was drawn from the local rules applicable in one Subcommittee member's district. It would be helpful to have discussion on the question whether it would be desirable to have this level of specificity I n Rule 49, and, if so, whether there should be any changes in the draft language. Two of the other reporters and a clerk representative to another Committee quickly

reviewed this draft before this memo was drafted and suggested that leaving detailed signature requirements to local rule would be better than adding this detail (which may be inconsistent with some local rules) in the national rule. The Subcommittee has not considered their feedback.

Assuming that lines 41-47 are retained, Professor Kimble questions whether it is also necessary to include lines 48-49, and he requested discussion on the relationship between the requirements on lines 41-47 (including the scanned signature) and the attorney's signature on lines 48-49.

Lines 53–55

Lines 53–55 are drawn from Civil Rule 5(d)(2), which is currently applicable in criminal cases under Rule 49(d). It provides that a party may file by delivering a paper to "to a judge who agrees to accept it for filing, and who must then note the filing date on the [paper] [item] and promptly send it to the clerk." A member suggested that this language might encourage a party to file with the judge, rather than a clerk, and questioned the necessity for this alternative form of filing in criminal cases . The Subcommittee requested that the reporters provide the Committee with information about the purpose of this requirement in the Civil Rules, and whether it has been useful or caused problems.

This language was included in Civil Rule 5 as originally adopted. The 1937 Committee Note does not discuss it, but Wright and Miller explain its function:

> This provision is designed to avoid delay and to facilitate the implementation of temporary restraining orders and the hearing of emergency applications. For example, in one case in which a hospital petitioned for an order authorizing an emergency blood transfusion, the papers were permitted to be filed with the district judge. It also should be noted that filing in this context is complete when the judge has custody of the papers; a judge's failure to forward them "promptly" or to enter a necessary order will not prejudice the party who has attempted to comply with the filing requirement.[3]

Although in emergency cases – such as the application for a stay in a death penalty case – the filing may be made at the judge's home late at night, the filing with a judge may also occur in the courtroom. As one court explained, "a judge may wish to facilitate a matter, by permitting a paper to be filed in court with the judge, rather than putting a trial or hearing on hold for counsel to run to the clerks's office to file a paper." *In re EQUIVEST ST THOMAS, INC*., No. 2004/156, 2007 WL 517672 at *4 (D. V.I., Feb. 8, 2007). Moreover, the rule does not require the judge to accept filings. It is applicable only if the judge agrees to accept a filing, and a judge may choose not to do so. *Id.*

In addition to the cases described in Wright and Miller, *supra*, there are only a few published cases dealing with this provision, and they reveal no significant pattern.

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[3] WRIGHT, MILLER, KANE, MARCUS, & STEINMAN, 4B FED. PRAC. & PROC. CIV. § 1153 (4th ed. and Supps.) (footnotes omitted).

In two criminal cases the government was permitted to "file" a notice of the defendant's prior felony drug convictions under 21 U.S.C. § 851 with the district judge in the courtroom. Although the defendant objected to this procedure, the district court accepted the filing and the court of appeals found no error. *United States v. Kent*, 649 F.3d 906, 911 (9th Cir. 2011); *United States v. Brown*, 921 F.2d 1304, 1308–09 (D.C. Cir. 1990). In *Kent*, the defendant was attempting to enter a quick plea before the government had time to file the notice under § 851, and in *Brown* the trial was about to begin. In both cases, the judge's acceptance of courtroom filing allowed the government to meet the timing requirements for a sentence enhancement.

In another case, a pro se prisoner repeatedly mailed pleadings and letters directly to the judge in violation of the local court rules. After repeatedly admonishing the prisoner to file documents with the clerk rather than sending them to the judge, the judge issued an opinion noting that he would consider sanctions if the conduct persisted. *Althouse v. Cockrell*, No. 3:01-CV-0774, 2004 WL 377049 at *1 (N.D. Tex., Feb. 13, 2004). There is no indication that the prisoner had relied on Civil Rule 5(d)(2), which was mentioned in a footnote in which the judge stated that he did not permit papers to be filed by mailing a copy to his chambers. *Id.* at n.1.

We also sought the views of the reporters for the other advisory committees. In general, they thought it advisable to retain the provision allowing filing with the judge for unusual cases in the absence of evidence that it was causing difficulties. They were unaware of any problems with the provisions in the Civil and Appellate rules, and noted that they believed them to be useful for emergencies or unusual situations. Although these provisions may have been more important before e-filing was available, Professor Ed Cooper noted the possibility that hacking might paralyze the e-filing system, which might make alternative forms of filing essential as a back-up.

Line 54

Both Rule 49 and the Civil Rules refer only to "paper." A Subcommittee member noted, however, that parties do, under some circumstances, file objects or items. For example, a physical object, such as a DVD or a CD, might be filed as an attachment to a suppression or other motion, particularly in districts that do not allow filing of digital audio or video files in CM/ECF.

Lines 58–62

Two options are presented for discussion. Option 2 more closely conforms to the version presented to the Civil Rules Committee last spring after review and discussion among all of the reporters. It emphasizes not only the general requirement for electronic filing, but also the circumstances under which paper filing must be permitted. Professor Kimble and the reporters from the other Committees that have provided feedback on this draft also prefer this version.

Lines 66–68

A Subcommittee member requested an explanation of the need for this provision. It was based on Civil Rule 5(d)(4). The Civil Rule reflects a policy decision about the role of court clerks. The 1999 Committee Note explains the origins of the provision:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

It is not entirely clear whether Civil Rule 5(d)(4) is currently applicable in criminal cases. Criminal Rule 49(d) states that "[a] paper must be *filed in a manner provided for* in a civil action." (Emphasis added.) On its face, Civil Rule 5(d)(4) is addressed to the clerk, not the filer, and it does not state requirements for filing. On the other hand, by requiring that papers must be accepted for filing regardless of errors in the "form prescribed," the rule makes it clear that prescribed form is not a feature of the filing requirements under the Civil Rules, nor, presumably, under the Criminal or 2254 or 2255 Rules.

3. <u>Service and Filing on Nonparties</u>

Lines 82–83

The Subcommittee drafted this new provision in response to a point raised by Professor Cathie Struve, the reporter for the Appellate Rules Committee, who raised the question whether the Criminal Rules need to provide for service by nonparties. Although Rule 49 now refers only to filing and service by the parties, other provisions in the Criminal Rules currently permit or require nonparties to file and serve motions or other pleadings. For example, Rule 15(a)(2) provides that a material witness who is being detained may file a motion seeking to be deposed. And Rule 60(b)(1) and (2) provide for motions asserting a victim's rights, and allow the victim or the victim's lawful representative to assert these rights.

The Subcommittee agreed that the rule should provide for such nonparty filings, but also thought it important to word the new provision in an manner that did not unintentionally create new rights for nonparties to make filings.

TAB 2B

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

2 **(a) Service**

3 (1) ***When Required.*** A party must serve on every other party any written motion
4 (other than one to be heard ex parte), written notice, designation of the record on
5 appeal, or similar paper.

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

7 (2) ***Whom to Serve***. When these rules or a court order requires or permits
8 service on a party represented by an attorney, service must be made on the
9 attorney instead of the party, unless the court orders otherwise.

10 (3) ***How Made Electronically***.

11 (A) *By a Represented Party*. A party represented by an attorney may
12 serve a paper by sending it through the court's electronic-transmission
13 facilities to a registered user or by other electronic means that the person
14 consented to [in writing]. Electronic service is complete upon
15 transmission, but is not effective if the serving party learns that it did not
16 reach the person to be served;

17 (B) *By an Unrepresented Party*. A party not represented by an attorney
18 may use electronic service only if allowed by court order or by local rule.

19 (4) ***How Made by Other Means***. Alternatively, a paper may be served by:

20 (A) handing it to the person;

21 (B) leaving it:

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

24 (ii) if the person has no office or the office is closed, at the
25 person's dwelling or usual place of abode with someone of
26 suitable age and discretion who resides there;

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

29 (D) leaving it with the court clerk if the person has no known address; or

30 (E) delivering it by any other means that the person consented to in
31 writing—in which event service is complete when the person making
32 service delivers it to the agency designated to make delivery.

33 **(b) Filing**

34 (1) ***When Required.*** A party must file with the court a copy of any paper the
35 party is required to serve [under this rule], along with a certificate of service. A
36 notice of electronic filing constitutes a certificate of service on any party served
37 through the court's transmission facilities.

38 (2) ***How Done.***

39 (A) *Electronically.* A paper is filed electronically by using means that are
40 consistent with any technical standards established by the Judicial Conference of
41 the United States. The paper must include a signature block with the filer's:

42 · name [represented by "s/" or a scanned signature]:
43 · firm name (if any):
44 · street address;
45 · telephone number;
46 · primary email address [if any]; and
47 · bar ID number (if any).

48 The user name and password of an attorney of record~~[, together with the~~
49 ~~attorney's name on a signature block,]~~ serves as the attorney's signature.

50 (B) *Nonelectronically.* A paper [or other item] not filed electronically is
51 filed by delivering it:

52 (i) to the clerk; or
53 (ii) to a judge who agrees to accept it for filing, and who must then
54 note the filing date on the [paper] [item] and promptly send it to
55 the clerk.

56 (3) ***Means Used by Represented and Unrepresented ~~Parties~~ .***

57 (A) *Represented Party.*
58 OPTION #1: Unless excused by the court for good cause or local
59 rule, a person represented by an attorney must file electronically.
60 OPTION #2 A person represented by an attorney must file
61 electronically, but paper filing must be allowed for good cause, and
62 may be required or allowed for other reasons by local rule.

63 (B) *Nonrepresented Party.* A party not represented by an attorney
64 must file nonelectronically, unless allowed to file electronically by
65 court order or local rule.
66 (4) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper
67 solely because it is not in the form prescribed by these rules or by a local
68 rule or practice.
69 **(c) Notice of a Court Order.** When the court issues an order on any post-
70 arraignment motion, the clerk must provide notice in a manner provided for in a
71 civil action. Except as Federal Rule of Appellate Procedure 4(b) provides
72 otherwise, the clerk's failure to give notice does not affect the time to appeal, or
73 relieve—or authorize the court to relieve—a party's failure to appeal within the
74 allowed time.
75 ~~**(d) Filing.** A party must file with the court a copy of any paper the party is required to~~
76 ~~serve. A paper must be filed in a manner provided for in a civil action.~~
77 ~~**(e) Electronic Service and Filing.** A court may, by local rule, allow papers to be filed,~~
78 ~~signed, or verified by electronic means that are consistent with any technical standards~~
79 ~~established by the Judicial Conference of the United States. A local rule may require electronic~~
80 ~~filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with~~
81 ~~a local rule is written or in writing under these rules.~~
82 **(d) Service and Filing by Nonparties.** Non-parties who are permitted or required by law
83 to file [papers] must comply with this rule.

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TAB 2C

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TAB 2C.1

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MEMORANDUM

TO: Rules Committees Reporters

FROM: Julie Wilson
Bridget Healy

DATE: September 2, 2015

RE: Survey of Electronic Filing Provisions for Pro Se Litigants

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I. Introduction

This memorandum is in response to the request that the Rules Office conduct a survey of each federal district's local rules and procedures for provisions regarding electronic filing by pro se litigants; specifically, whether pro se litigants are permitted to file electronically via the CM/ECF filing system. The Rules Office researched the following three categories of pro se litigants: (1) non-incarcerated pro se litigants in the district courts; (2) incarcerated pro se litigants in the district courts; and (3) pro se debtors in the bankruptcy courts.

The accompanying spreadsheets contain information on all ninety-four federal judicial districts and bankruptcy courts. The spreadsheets indicate: (1) whether pro se litigants are permitted to file electronically; (2) where the provisions regarding electronic filing are located; and (3) any additional relevant notes.

II. Results of Survey

A. District Courts

1. Non-Incarcerated Pro Se Litigants

In the majority of districts, pro se litigants are expected (or required) to file paper documents. Thirty-nine districts categorically prohibit electronic filing; thirty-four districts have a default rule requiring paper filing, but do permit pro se litigants to file electronically after

seeking and obtaining permission from the court. Only sixteen districts allow pro se litigants who are not incarcerated to file electronically without having to first obtain permission from the court.

2. Incarcerated Pro Se Litigants

The default rule requiring paper filing is even more evident with regard to incarcerated pro se litigants. Among the federal districts, fifty-five categorically prohibit electronic filing by incarcerated pro se litigants. It is difficult to assess the number of districts that permit an incarcerated pro se litigant to use the CM/ECF system (or conceivably permit electronic filing by requesting leave of court). The difficulty is due to the fact that the provisions governing pro se litigants often do not distinguish between types of pro se litigants. In these instances, we assumed the rule for pro se litigants applied to all pro se litigants; however, we made note of the lack of clarity.

There are three districts that expressly permit electronic filing by incarcerated pro se litigants: the Central District of Illinois, the Southern District of Illinois, and the Eastern District of Washington. It is worth noting that, in these districts, electronically filed documents are filed by prison library staff and not the incarcerated litigant.

It is also worth noting that it was often difficult to find the answer to the question of whether pro se litigants (incarcerated or not) are permitted to file electronically. There is little uniformity among the federal districts with regard to the location of the provision governing pro se litigants. In some cases, even after looking at the local rules, standing orders, general orders, CM/ECF procedures, and pro se materials posted on the court's website, the answer was elusive. In such cases, we indicated that the answer was "unclear."

B. Bankruptcy Courts

Very few bankruptcy courts, ten in total, permit electronic filing by pro se debtors. For the few that do, the provisions permitting such filing are usually located within the court's local rules or electronic filing procedures. Two of the courts that permit electronic filing by pro se debtors do so through the Electronic Self-Representation program (eSR), a program developed with the Administrative Office that provides access for pro se debtors to file case opening forms electronically. The program permits electronic filing for case opening forms only; later filings must be done in paper unless otherwise permitted by the court and these courts otherwise do not permit electronic filing by pro se debtors.

The majority of bankruptcy courts do not permit electronic filing by pro se debtors. For a few of the courts (ten), it is unclear whether or not pro se debtors are permitted to file electronically, although the lack of any specific permission leads to the conclusion that it is not permitted.

Most local rules (usually a variant of Local Rule 5005) refer to the electronic filing procedures to provide greater detail about permitted electronic filers and the procedure for registration and filing. Usually the local rules do not specifically prohibit electronic filing by pro se debtors; instead, any specific prohibition is included in the electronic filing procedures.

In completing the review, it was often time consuming to determine whether pro se debtors were permitted to file electronically, given that it required reviewing both the local rules and electronic filing procedures, and the procedures were located in various places on court websites. Also, despite the fact that most bankruptcy courts have sections on their websites for pro se filers, specific guidance on whether or not a pro se debtor could file electronically was often not included in that section.

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	Electronic Filing Provisions for Pro Se Litigants									
	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Alabama Middle		No			No. Admin. Procedures: "Pro se litigants shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute."		No			No. Same reference.
Alabama Northern		No			No. Admin. Procedures: "Pro se litigants shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute."		No			No. Same reference.
Alabama Southern	Yes				Yes. Admin. Procedures: "Pro se filers may conventionally file paper originals of complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute. *Pro se filers may also register for electronic filing.* "	Yes				Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Alaska		No			No. Electronic Filing Admin. Policies & Procedures: "Non-attorney filers may not file documents electronically but must file all documents conventionally on paper."		No			No. Same reference.
Arizona			With Permission		With permission. LRCiv 5.5(d) states "Unless the Court orders otherwise, parties appearing without an attorney shall not file documents electronically."			With Permission		With permission. LRCrim 49.3 incorporates LRCiv 5.5.
Arkansas Eastern		No			No. Admin. Procedures for Civil Filings: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statute. The Clerk's office will scan these original documents into an electronic file in the system, but shall also maintain the original in a paper file."		No			No. Admin. Procedures for Criminal Filings: "Pro se filers shall file paper originals of all motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statute. The Clerk's office will image these original documents into an electronic file in the system, but shall also maintain the original in a paper file."
Arkansas Western		No			No. Admin. Procedures for Civil Filings: "Pro se filers shall file paper originals of pleadings with the Clerk's office. The Clerk's office will scan these original documents into an electronic file, uploadand file them in the System. The original pleadings will be maintained by the Clerk's office in a paper file."		No			No. Admin. Procedures for Criminal Filings: "Pro se filers shall file paper originals of documents with the Clerk's office. The Clerk's office will scan these original documents into an electronic file, upload and file them in the System. The original documents will be maintained by the Clerk's office in a paper file."

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
California Central			With Permission		With permission. LR 5-4.2 Unless otherwise ordered by the Court, pro se litigants shall continue to present all documents to the Clerk for filing in paper format.			With Permission		No/with permission. LRCrim 49-1.2: "Unless otherwise ordered by the Court, pro se litigants shall continue to present all documents to the Clerk for filing in paper format. "
California Eastern			With Permission		With permission. LR 133(b)(2): "Any person appearing pro se may not utilize electronic filing except with the permission of the assigned Judge or Magistrate Judge." (see also LR 183(c))			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
California Northern			With Permission		With permission. LR 5-1: "A case that involves a pro se party is subject to electronic filing, unless it is a sealed case. However, the pro se party may not file electronically unless the pro se party moves for and is granted permission by the assigned judge to become an ECF user in that case. Parties represented by counsel in a case involving a pro se party must file documents electronically and serve them manually on the pro se party unless the pro se party has been granted permission to become an ECF user."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants, but LRCrim 44-3 implies that it is possible: "Any act these local rules require to be done by defense counsel shall be performed by the defendant, if appearing pro se."
California Southern			With Permission		With permission. ECF Policies & Procedures: "Unless otherwise authorized by the court, all documents submitted for filing to the Clerk's Office by parties appearing without an attorney must be in legible, paper form. The Clerk's Office will scan and electronically file the document. A pro se party seeking leave to electronically file documents must file a motion and demonstrate the means to do so properly by stating their equipment and software capabilities in addition to agreeing to follow all rules and policies in the CM/ECF Administrative Policies and Procedures Manual. If granted leave to electronically file, the pro se party must register as a user with the Clerk's Office and as a subscriber to PACER within five (5) days. A pro se party must seek leave to electronically file documents in each case filed. If an attorney enters an appearance on behalf of a pro se party, the attorney must advise the Clerk's Office to terminate the login and password for the pro se party."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Colorado			With Permission		With permission. LR 5.1(b)(3): "All unrepresented parties must file in paper unless receive permission from court to file electronically."		No			No. LR 5.1(b)(2): Prisoners must file in paper
Connecticut		No			No. Guide for Pro Se Litigants & Admin. Procedures: Pro se litigants may not file electronically, but can consent to receiving electronic notices		No			No. Same reference.
Delaware			With Permission		With permission. Subsection N of the Admin. Procedures: "A party to a case who is not represented by an attorney may file and serve all pleadings and other documents on paper. Upon approval of the judge, a pro se party may register as a user of CM/ECF in accordance with subsection (B) of these procedures."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
District of Columbia			With Permission		With permission. LR 5.4(e)(2): "A party appearing pro se shall file with the Clerk and serve documents in paper form and must be served with documents in paper form, unless the pro se party has obtained a CM/ECF password."		No			No. LCrR 49(e)(2): "A party appearing pro se shall file with the Clerk (original plus one) and serve documents in paper form and must be served with documents in paper form, unless the pro se party has obtained a CM/ECF password."
Florida Middle			With Permission		With permission. Admin. Procedures: "A pro se litigant (i.e., an individual proceeding without legal representation) is not permitted to file electronically, absent authorization by the Court. A pro se litigant must file all pleadings and documents in paper format with the appropriate divisional Clerk's Office. The Clerk will scan a pro se litigant's documents and file them in CM/ECF."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Florida Northern			With Permission		With permission. LR 5.1: "All documents in civil and criminal cases shall be filed by electronic means, except that documents in cases filed pro se (prisoner and non-prisoner), and documents in other categories of cases (or types of documents) identified by Administrative Order, shall continue to be filed in paper form. A judicial officer may grant other exceptions for good cause."			With Permission		With permission. Same reference.
Florida Southern		No			No. Section 5 of the Admin. Procedures states that pro ses must file paper.		No			No. Same reference.
Georgia Middle			With Permission		With permission. LR 5.0 (A): "Pro se parties are not authorized to file electronically without permission from the court." Guide for Self-Represented Litigants (http://www.gamd.uscourts.gov/sites/gamd/files/GuideForSelfRep			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.

Page 3 of 12

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Georgia Northern		No			No. Appx. H, Ex. A of LR states: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk's Office will scan these original documents and upload them into ECF, but will also maintain a paper file."		No			No. Same reference.
Georgia Southern		No			No. Admin. Procedures state: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk's Office will scan these original documents and upload them into ECF. Once documents are scanned into the system, the electronic version will become the official record."		No			No. Same reference.
Guam		No			No. General Order No. 13-0003: "Non-ECF Users, including pro se parties, shall continue to file documents conventionally by submitting paper documents to the court."		No			No. Same reference.
Hawaii			With Permission		With permission. LR 100.2.2(1): Pro se filers may not file electronically without leave of the court			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Idaho			With Permission		With permission. Electronic Case Filing Procedures: non-attorney pro se parties cannot file electronically without leave of court			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Illinois Central			With Permission		With permission. LR 5.5(B): Unless the court, in its discretion, grants leave to a pro se filer to file electronically, pro se filers must file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents.	Yes				Yes. Electronic submissions are made by library staff of participating correctional facility. Prisoner E-Filing Initiative (http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/General%20Order%2014-01.pdf)
Illinois Northern	Yes				Yes. General Order 14-0024: "A party to a pending civil action who is not represented by an attorney and who is not under filing restrictions imposed by the Executive Committee of this Court, may register as an E-Filer solely for purposes of the case."		No			No. General Order 14-0024: "Parties who are in custody are not permitted to register as E-Filers. If, during the course of the action, a party who is registered as an E-Filer is placed in custody, the E-Filer shall promptly advise the Clerk of the Court to terminate the E-Filer'sregistration as an E-Filer."
Illinois Southern	Yes				Yes. Electronic Filing Rule 1: Pro se filers may, but do not have to, utilize the ECF system. Pro se filers who do not utilize the ECF system shall file all documents with the Clerk of Court by U.S. Mail or personal delivery to the Clerk's Office.	Yes				Yes. Electronic submissions are made by library staff of participating correctional facility. Prisoner E-Filing Initiative (http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/General%20Order%2014-01.pdf)
Indiana Northern		No			No. CM/ECF User Manual: "While all parties, including those proceeding pro se, may register to receive "read only" PACER accounts, only registered attorneys, as officers of the court, are permitted to file electronically at this time."		No.			Same; however, unclear if incarcerated pro se litigants can also obtain "read only" PACER accounts.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Indiana Southern		No			No. LR 5-2: Papers filed by pro se litigants are exempt from electronic filing requirement and must be filed directly with the clerk.		No			No. LCrR 49-1: Papers filed by pro se defendants are exempt from electronic filing requirement and must be filed directly with the clerk.
Iowa Northern		No			No. LR 5.2: "All documents submitted to the Clerk of Court for filing by parties proceeding pro se must be in paper form."		No			No. LCrR 55.1 incorporates LR 5.2.
Iowa Southern		No			No. LR 5.2: "All documents submitted to the Clerk of Court for filing by parties proceeding pro se must be in paper form."		No			No. LCrR 55.1 incorporates LR 5.2.
Kansas	Yes				Yes. LR 5.4.2: "[P]ro se parties may register as Filing Users of the court's Electronic Filing System."		No			No. Admin. Procedures: Incarcerated pro se civil litigants must email their documents to the clerk, who will file electronically. Incarcerated pro se criminal litigants must file paper.
Kentucky Eastern			With Permission		With permission. General Order 11-02: "A party proceeding pro se shall not file electronically, unless otherwise permitted by the court. Pro se filers shall file paper originals of all documents. The clerk's office will scan these original documents into the court's electronic System."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Kentucky Western			With Permission		With permission. General Order 11-02: "A party proceeding pro se shall not file electronically, unless otherwise permitted by the court. Pro se filers shall file paper originals of all documents. The clerk's office will scan these original documents into the court's electronic System."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Louisiana Eastern		No			No. Rule 13, Admin. Procedures: "All pleadings and documents filed by unrepresented parties including individuals who are incarcerated."		No			No. Same reference.
Louisiana Middle		No			No. Admin. Procedures: Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statue, unless otherwise authorized by the court. The Clerk's Office will scan these original documents into an electronic file in the System.		No			No. Same reference.
Louisiana Western		No			No. Admin. Procedures: "Pro se filers shall file fully signed paper originals of all petitions, lists, schedules,statements, amendments, pleadings, affidavits, and other documents which must contain either original signatures or verification by unsworn declaration under any applicable rule or statute. These documents will be scanned by the Office of the Clerk and the original documents will be retained by the Clerk of Court for at least five (5) years after the case is closed."		No			No. Same reference.

U.S. District Court	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
	A: Yes	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Maine	Yes				Yes. Admin. Procedures: "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register to receive service electronically and to electronically transmit their documents to the Court for filing in the ECF system. If during the course of the action the person retains an attorney who appears on the person's behalf, the Clerk shall terminate the person's registration upon the attorney's appearance."		No			No. Admin. Procedures: "All pleadings and documents filed by pro se litigants who are incarcerated or who are not registered filing users in ECF" must be filed in paper.
Maryland				Unclear	Unclear. Electronic Filing & Requirements & Procedures (Civil & Criminal) refer only to attorneys.		No			No. There are Electronic Filing Procedures for Self-Represented Prisoner Cases (includes § 1983, *Bivens* , writs of mandamus, § 2254 petitions, § 2241 petitions, and other civil actions; does not include § 2255 motions), but the procedures require the litigant to file paper.
Massachusetts			With Permission		With permission. Admin. Procedures: "Pro Se Litigants. Anyone who is a party to a civil action, and not a prisoner, and who is not represented by an attorney may register as a filer in the CM/ECF system. The party must (1) have the approval of the judicial officer assigned to the case; and (2) attend a training session offered by the clerk's office on the ECFsystem or otherwise prove their proficiency on the use of the CM/ECF system before an ECF login will be issued."		No			No. Admin. Procedures: "Pro Se Litigants. Anyone who is a party to a civil action, *and not a prisoner* , and who is not represented by an attorney may register as a filer in the CM/ECF system. The party must (1) have the approval of the judicial officer assigned to the case; and (2) attend a training session offered by the clerk's office on the ECFsystem or otherwise prove their proficiency on the use of the CM/ECF system before an ECF login will be issued."
Michigan Eastern		No			With permission. Rule 3 of the Electronic Filing Policies & Procedures: "A filing user must be . . . a non-incarcerated pro se party granted access permission."		No			No. Rule 3 of the Electronic Filing Policies & Procedures does not apply to pro se defendants.
Michigan Western			With Permission		No. LR 5.7(d): "Pro se parties who are not members of the bar of the Court may not file pleadings or other papers electronically, but must submit them in paper form."		No			No. Same reference.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Minnesota			With Permission		With permission. ECF Procedures Guide: "Non-Prisoner Pro Se. A non-prisoner pro se party may complete and sign an "Application for Pro Se Litigant to File Electronically" form. The form is available from the Clerk's Office or on the "Court Forms" page of the court's website at: www.mnd.uscourts.gov. If the application is approved, the applicant will receive a login ID and password and the applicant's account will be activated, enabling the applicant to file electronically and to receive system-generated notices of electronic filing. If the court becomes aware of misuse of ECF, access will be revoked by the court without advance notice. Upon closure of the case for which access is granted (and the expiration of all appeal periods), the account will be deactivated."		No			No. ECF Procedures Guide: "Prisoner Pro Se. Prisoner pro se parties may not receive a login and password to use ECF and must file their documents in paper."
Mississippi Northern		No			No. Admin. Procedures: "While all parties, including those proceeding pro se, may register with PACER to receive "read only" accounts, only registered attorneys, as officers of the court, are permitted to file electronically. Pro Se (Non-Prisoner) parties may consent to receive documents electronically."		No			No. Same reference.
Mississippi Southern		No			No. Admin. Procedures: "While all parties, including those proceeding pro se, may register with PACER to receive "read only" accounts, only registered attorneys, as officers of the court, are permitted to file electronically. Pro Se (Non-Prisoner) parties may consent to receive documents electronically."		No			No. Same reference.
Missouri Eastern		No			No. Rule 3-2.10: "Filings shall be made by means of the Court's electronic case filing system, except by pro se litigants." Note: the district has an electronic document preparation application called E-Pro Se that allows pro se litigants to create case initiation documents for Social Security, employment, consumer, and civil rights complaints		No			No. Same reference.
Missouri Western				Unclear	Unclear, but implication is that pro se litigants cannot file electronically. LR 5.1: "[A]ll litigants and other interested parties represented by legal counsel shall electronically file all pleadings and documents (including initiating documents) in connection with a case on the Court's electronic filing system."; Admin. Procedures state that only attorneys are eligible to register for ECF.				Unclear	Unclear. Same reference.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Montana				Unclear	Unclear. LR 1.4 states: "All attorneys and self-represented litigants must follow the guidance of the Clerk's Office to facilitate electronic filing and to make the record legible and complete."				Unclear	Unclear. Same referemce.
Nebraska	Yes				Yes. LR 1.3: "A pro se party, i.e., one not represented by an attorney, to a pending civil case may register to use the System only in that case. A pro se party is assigned a password allowing electronic retrieval and filing of documents in the case."				Unclear	Unclear, but implication is that an incarcerated pro se litigant could file electronically. LR Crim 49.1(c)states that pro se parties *who are not registered users* are excepted from mandatory electronic filing.
Nevada				Unclear	Unclear. The Pro Se Assistance Packet refers to paper filings.				Unclear	Unclear. Same reference.
New Hampshire			With Permission		With permission. Supplemental Rules for Electronic Case Filing 2.1(d): A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain an Electronic Case Filing (ECF) login and password.		No			No. Same reference.
New Jersey		No			No, but may apply to receive filed documents electronically. Electronic Case Filing Policies and Procedures: A party who is not represented by counsel must file documents with the Clerk as a Paper Filing. A Pro Se party who is not incarcerated may request to receive filed documents electronically upon completion of a "Consent & Registration Form to Receive Documents Electronically."		No			No. Same reference.
New Mexico			With Permission		With permission. CM/ECF Admin. Procedures Manual: Pro se parties can register and consent to electronic service, but must request permission to be able to file electronically.			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
New York Eastern		No			No, but can receive electronic notifications of filings. https://img.nyed.uscourts.gov/files/forms/ProSeConsElecSvc-Flier.pdf		No			No. Incarcerated pro se litigants cannot file or receive electronic notification of filings.
New York Northern			With Permission		With permission. Admin. Procedures (Gen. Order #22) 12.1: "A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain an Electronic Case Filing (ECF) login and password on a form prescribed by the Clerk's Office."		No			No. Same reference.
New York Southern			With Permission		With permission. Electronic Case Filing Rules & Instructions Section 2.2(a): "The Court may permit or require a pro se party to a pending civil action to register as a Filing User in the ECF system solely for purposes of that action." Section 2.2(b): A pro se party may also consent to receiving electronic notifications.				Unclear	Electronic Case Filing Rules & Instructions Section 2.2(a) does not distinguish between types of pro se litigants; however, implication is that an incarcerated pro se could not file electronically because, in order to file electronically, a pro se litigant may be required to attend in-person training and because only non-incarcerated pro se

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
New York Western			With Permission		With permission. Admin. Procedures: "Pro Se litigants who have been granted permission to file documents electronically must register as a Filing User of the Court's Electronic Filing System." (Default is paper filing.)			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
North Carolina Eastern		No			No. Admin. Policies. www.nced.uscourts.gov/pdfs/cmecfPolicyManual.pdf		No			No. Same reference.
North Carolina Middle		No			No. Admin. Procedures: http://www.ncmd.uscourts.gov/sites/ncmd/files/ecfprocman.pdf		No			No. Same reference.
North Carolina Western		No			No. Admin. Procedures http://www.ncwd.uscourts.gov/ECFDocs/ADMINORDER.pdf		No			No. Same reference.
North Dakota			With Permission		With permission. Section II, Administrative Policy Regarding Electronic Filing & Service		No			No. Sections II & XI, Administrative Policy Regarding Electronic Filing & Service
Northern Mariana Islands				Unclear	Unclear. Admin. Procedures imply that a pro se litigant could register as a Filer: "All pleadings and documents filed by pro se litigants who are not registered Filing Users in the Electronic Filing System [shall be filed in paper]."				Unclear	Unclear. Same reference.
Ohio Northern			With Permission		Yes, with court permission. LR 5.1(b) and LCrR 49.2 refer to Electronic Filing Policies and Procedures Manual, located in Appendix B http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixB.pdf			With Permission		Same.
Ohio Southern		No			No. LR 5.1 refers to ECF Manual http://www.ohsd.uscourts.gov/sites/ohsd/files/Electronic%20Filing%20Policies%20and%20Procedures.%202013.0222.pdf; LCrR 49.1 addresses signatures of criminal defendants		No			Same.
Oklahoma Eastern		No			No. LR 5.1 and LCrR 49.1 refer to the CM/ECF Administrative Guide of Policies and Procedures		No			Same.
Oklahoma Northern			With Permission		Yes, with court permission. LR 5.1 and LCrR 49.3 refer to the CM/ECF Administrative Guide of Policies and Procedures. See http://www.oknd.uscourts.gov/docs/08906891-22d0-4806-9544-b574b9932935/CMECFAdminManual.pdf			With Permission		Same.
Oklahoma Western		No			No. LR 5.1 and LCrR 49.1 refer to Electronic Case Filing Policies and Procedures Manual (ECF Policy Manual)		No			Same.
Oregon	Yes				Yes. LR 5.2 and LCrR 3001 refer to the CM/ECF User Manual http://www.ord.uscourts.gov/index.php/about-cmecf-and-pacer/user-manual. Signature Requirements in LR 11	Yes				Same.
Pennsylvania Eastern			With Permission		Yes, with court permission, for the specific case. LR 5.1.2 "Electronic Case Filing Procedures"			With Permission		Same.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	**A: Yes**	**A: No**	**A: With Permission**	**A: Unclear**	**A: Reference**	**B: Yes**	**B: No**	**B: With Permission**	**B: Unclear**	**B: Reference**
Pennsylvania Middle	Yes				Yes. LR 5.6 refers to Standing Order and to ECF User Manual http://www.pamd.uscourts.gov/sites/default/files/ecf_manualv2.pdf	Yes				Same.
Pennsylvania Western		No			No. LR 5.5 and LCrR 49 refer to the Court's Standing Order regarding Electronic Case Filing Policies and Procedures and the ECF User Manual		No			Same.
Puerto Rico			With Permission		Yes, with court permission, limited to specific cases. See http://www.prd.uscourts.gov/sites/default/files/documents/ajax/2014%20CM%20ECF%20Manual%20%28rev%2007%202015%29_0.pdf			With Permission		Same.
Rhode Island	Yes				Yes. See http://www.rid.uscourts.gov/; also Local Rule 303 (http://www.rid.uscourts.gov/menu/generalinformation/rulesandprocedures/localrulesandprocedures/Local_Rules-121514.pdf). Pro se filers must move to file electronically.		No			No. Same reference.
South Carolina		No			No. Local Rule 5.02 and Local Cr Rule 49.02 refer to ECF Policies and Procedures Manual http://www.scd.uscourts.gov/AttorneyResourceManuals/ECF/ECF_Policy_and_Procedures.pdf		No			Same.
South Dakota		No			No. Local Rule 5. See http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/Civil_Local_Rules.pdf		No			No. Local Rule 49.1 See http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/LocalRulesCriminal.pdf
Tennessee Eastern	Yes				Yes. LR 5.2 refers to Electronic Filing Rules and Procedures http://tned.uscourts.gov/docs/ecf_rules_procedures.pdf	Yes				Same.
Tennessee Middle	Yes				Yes. See http://www.tnmd.uscourts.gov/files/AO167-1AmendedPracticesandProcedures.pdf (see also Local Rule 5.03 http://www.tnmd.uscourts.gov/files/LocalRules-20120425.pdf)	Yes				Same.
Tennessee Western		No			No. Electronic Case Filing Policies and Procedures Manual located in Appendix A to the Local Rules		No			Same.
Texas Eastern	Yes				Yes. Local Rule 5.6.	Yes				Same.
Texas Northern		No			No Local Rule 5.1.		No			Same.
Texas Southern		No			No. Administrative Procedures for Electronic Filing http://www.txs.uscourts.gov/attorneys/cmecf/district/admcvcrproc.pdf		No			Same.
Texas Western	Yes				Yes. See http://www.txwd.uscourts.gov/CMECF/Documents/efileprocd.pdf		No			No. See http://www.txwd.uscourts.gov/CMECF/Documents/efileprocd.pdf

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Utah			With Permission		Only if permitted by the court. See http://www.utd.uscourts.gov/documents/utahadminproc.pdf			With Permission		Same.
Vermont		No			No. LR 5 refers to Administrative Procedures for Electronic Case Filing http://www.vtd.uscourts.gov/sites/vtd/files/ECFAdminProc.pdf		No			Same.
Virgin Islands			With Permission		Yes, if permitted by the court. LR 5.4. See http://www.vid.uscourts.gov/sites/vid/files/local_rules/VID_LRCi_1-10-2014.pdf			With Permission		Same.
Virginia Eastern		No			No. E-Filing Policies and Procedures Manual http://www.vaed.uscourts.gov/ecf/documents/ECF%20Procedures%20Manual/.pdf		No			Same.
Virginia Western			With Permission		If permitted by court. See http://www.vawd.uscourts.gov/media/3355/ecfprocedures.pdf			With Permission		Same.
Washington Eastern	Yes				Yes. See http://www.waed.uscourts.gov/sites/default/files/ECF%20Administrative%20Procedures%20-%20Rev.%20May%206%202015_0.pdf and Local Rule 3.1.	Yes				A prisoner who is a party to a civil action, is not represented by an attorney and resides in a correctional facility that participates in the prison electronic filing initiative is required to adhere to the procedures established in General Order No. 15-35-1, absent a court order to the contrary. Prisoners who reside in correctional facilities that do not participate in the prison electronic filing initiative are not eligible to register or participate in electronic filing.
Washington Western	Yes				Yes. Pro se filers are permitted but not required to file electronically. See http://www.wawd.uscourts.gov/sites/wawd/files/ECFFilingProceduresAmended8-3-15.pdf	Yes				Same.
West Virginia Northern			With Permission		Yes, with permission of the court. See Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf		No			No. See Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf
West Virginia Southern			With Permission		Yes, with permission of the court. See http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures.pdf		No			No. See http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures.pdf
Wisconsin Eastern		No			No. Electronic Case Filing Policies and Procedures Manual file:///Users/juliemwilson10/Downloads/072811%20ECF%20Policies%20and%20Procedures%20-%20FINAL.pdf		No			Same.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Wisconsin Western	Yes				Yes. See http://www.wiwd.uscourts.gov/electronic-filing-procedures#C._Exceptions_to_Electronic_Filing	Yes				Same.
Wyoming		No			No. See http://www.wyd.uscourts.gov/pdfforms/cmprocmanual.pdf		No			Same.

TAB 2C.3

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U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Alabama Middle	Local Rule 5005-1 and CM/ECF procedures	http://www.almb.uscourts.gov/sites/almb/files/local_rules/120109%20Amended%20Local%20Rules.pdf	No	Beginning May 1, 2015, the court offers Debtor Electronic Bankruptcy Noticing (DeBN). With DeBN debtors receive court notices and orders by email in .pdf format the same day they are filed by the court, and there is no charge and	
Alabama Northern	Local Rule 5005-4	5005-4, http://www.alnb.uscourts.gov/sites/default/files/Local%20Rules%2010-1-13_0.pdf	No	The court offers debtors the opportunity to request receipt of orders and court-generated notices via email, instead of U.S. mail, through DeBN.	
Alabama Southern	Local Rule 5005-1	http://www.alsb.uscourts.gov/sites/alsb/files/local_rules/localrules.pdf	No		
Alaska	Local Rule 5005-4	LR 5005-4; http://www.akb.uscourts.gov/pdfs/2012_lbr.pdf	No		
Arizona	Local Rule 5005-2	http://www.azb.uscourts.gov/rule-5005-2	No	Pro se filers are specifically excepted from the electronic filing requirements.	
Arkansas Eastern & Western	Local Rule 5005-4	http://www.arb.uscourts.gov/orders-rules-opinions/rules/LR5005-4.pdf	No	Pro se filers are specifically excepted from the electronic filing requirements.	
California Central	Local Rule 5005-1	http://www.cacb.uscourts.gov/esr	Pro se filers can file electronically through the Electronic Self-Representation program.	Court offers Debtor Electronic Bankruptcy Noticing (DeBN). Pro se filers are excepted from mandatory requirements other than the eSR program.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
California Eastern	Local Rule 5005-1(d)	http://www.caeb.uscourts.gov/documents/Forms/LocalRules/15.Local_Rules.pdf	No		
California Northern	Local Rule 5005-1	http://www.canb.uscourts.gov/procedures/local-rules	No	The court offers Debtor Electronic Bankruptcy Noticing http://www.canb.uscourts.gov/faq/ebn	
California Southern	General Order 162-A	http://www.casb.uscourts.gov/pdf/GO162a.pdf	No		
Colorado	Local Rule 5005-4	http://www.cob.uscourts.gov/files/mrfa.pdf	No		
Connecticut	Standing Order No. 7	http://www.ctb.uscourts.gov/Doc/sorders/STorder7-1.pdf	No		
Delaware	Local Rule 5005-4	http://www.deb.uscourts.gov/sites/default/files/local_rules/LocalRules_2015.pdf	No	Debtors are not required to file electronically.	
District of Columbia	Administrative Order Relating to Electronic Case Filing	http://www.dcb.uscourts.gov/dcb/sites/www.dcb.uscourts.gov.dcb/files/AdmOrderSigned.pdf	No		
Florida Middle	Local Rule 5005-1	http://www.flmb.uscourts.gov/localrules/rules/5005-1.pdf	No	Debtors may sign up to receive electronic notice. http://www.flmb.uscourts.gov/filing_without_attorney/documents/pro_se_registration.pdf	
Florida Northern	Standing Order; Local Rule 5005-1	http://www.flnb.uscourts.gov/sites/default/files/standing_orders/so11.pdf	No	Debtors are not required to file electronically.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Florida Southern	Local Rule 5005-4	http://www.flsb.uscourts.gov/?page_id=2305#50054	No		
Georgia Middle	Local Rule 5005-4(b)	http://www.gamb.uscourts.gov/USCourts/sites/default/files/local_rules/Updated_Local_Rules.pdf	No		
Georgia Northern	Local Rules 5005-5; 5005-6	http://www.ganb.uscourts.gov/content/blr-5005-5-electronic-filing	No	See also: http://www.ganb.uscourts.gov/content/blr-5005-6-attorneys-trustees-and-examiners-required-file-documents-electronically	
Georgia Southern	General Order for Administrative Procedures	http://www.gasb.uscourts.gov/usbcGenOrders.htm#go_2010_1	No		
Hawaii	Local Rule 5005-2	http://www.hib.uscourts.gov/localrules/LBRs.pdf	No	The court permits Debtor Electronic Noticing through DeBN - http://www.hib.uscourts.gov/	
Idaho	ECF Procedures	http://www.id.uscourts.gov/announcements/ECFProcedures_Final.pdf	No		
Illinois Central	Standing Order	http://www.ilcb.uscourts.gov/sites/ilcb/files/3rd%20amd%20GO%20re%20ECF.pdf	Yes, with court approval. Limited to specific case.	Offers Debtor Electronic Bankruptcy Noticing through DeBN.	The Bankruptcy Court does not have separate local rules but instead refers to the District Court rules. The District Court rules permit pro se electronic filing (see District Court Local Rule
Illinois Northern	ECF Procedures and Local Rule 5005-2	http://www.ilnb.uscourts.gov/sites/default/files/Procedures_for_CMECF.pdf	No		
Illinois Southern	Electronic Filing Rules; Local Rule 5005-1	http://www.ilsb.uscourts.gov/sites/default/files/ElectronicFilingRulesDec2013.pdf; http://www.ilsb.uscourts.gov/sites/default/files/LocalRules-BkSoDistrict.pdf	No	There is a reference in the rules to pro se filers scanning their filings at the clerk's office.	
Indiana Northern	Standing Order	http://www.innb.uscourts.gov/pdfs/6thAmendedECFOrder.pdf	No		
Indiana Southern	Local Rule 5005-4 and Administrative Procedures	http://www.insb.uscourts.gov/AdminManual/Attorney/Admin_Policies_and_Procedures.htm	No		
Iowa Northern	Standing Order	http://www.ianb.uscourts.gov/publicweb/sites/default/files/standing-ordes/ExhibitOnetoStandingOrder1-Revised11-08.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Iowa Southern	None.		Not clear but most likely no.	The court offers debtors the opportunity to request receipt of court notices and orders via email, instead of U.S. mail, through a program called DeBN.	The court abolished its local rules in 2003.
Kansas	Local Rule 5005-1; Administrative Manual(see http://www.ksb.uscourts.gov/images/local_rules/LOCALRULES.MARCH.2015CompleteFiled.pdf)	http://www.ksb.uscourts.gov/images/local_rules/2014_Local_Rules.pdf	Yes, with court approval. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Kentucky Eastern	Local Rule 5005-4; Administrative Procedures Manual	http://www.kyeb.uscourts.gov/sites/kyeb/files/June%202015%20APM%20with%20TOC%20Web%20Version.pdf	Yes, with court approval. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Kentucky Western	None.		No	http://www.kywb.uscourts.gov/fpweb/pro_se_faqs.htm#6	
Louisiana Eastern	Local Rule 5005-1; Administrative Manual	http://www.laeb.uscourts.gov/sites/laeb/files/AdminProcManual121213.pdf	Not clear but most likely no.		
Louisiana Middle	Administrative Procedures	http://www.lamb.uscourts.gov/sites/lamb/files/adminprocedures-2013-12.pdf	No		
Louisiana Western	Administrative Procedures	http://www.lawb.uscourts.gov/sites/lawb/files/court/Administrative_Procedures_Feb2011.pdf	No		
Maine	Administrative Procedures	http://www.meb.uscourts.gov/meb/pdf/Administrative%20Procedures_%203_2011.pdf	No		
Maryland	Administrative Procedures	http://www.mdb.uscourts.gov/content/training-and-registration	No	Offers Debtor Electronic Bankruptcy Noticing through DeBN.	
Massachusetts	CM/ECF FAQs	http://www.mab.uscourts.gov/mab/ecf-faqs	No		
Michigan Eastern	Administrative Procedures	http://www.mieb.uscourts.gov/sites/default/files/courtinfo/ECFAdminProc.pdf	No		
Michigan Western	Administrative Procedures	http://www.miwb.uscourts.gov/sites/miwb/files/local_rules/AdminProc.pdf	Not clear but most likely no.	There are conflicting statements in the Administrative Procedures. It may be that pro se filers are permitted but not required to use the electronic filing system.	
Minnesota	Website, under Electronic Filing tab	http://www.mnb.uscourts.gov/cmecf-case-managementelectronic-case-filing	No		
Mississippi Northern	Local Rule 5005-1	http://msnb-dev.jdc.ao.dcn/sites/msnb/files/Red_Line_Local_Rules_12-1-2014.pdf	No		
Mississippi Southern	Local Rule 5005-1	http://msnb-dev.jdc.ao.dcn/sites/msnb/files/Red_Line_Local_Rules_12-1-2014.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Missouri Eastern	Procedures Manual; Local Rule 5005 (see http://www.moeb.uscourts.gov/pdfs/local_rules/2014/2014_Local_Rules.pdf)	http://www.moeb.uscourts.gov/pdfs/local_rules/2013/Procedures_Manual_2013.pdf	Not clear but most likely no.	The language in Local Rule 5005 reads:All documents filed by an attorney shall be filed electronically in accordance with the procedures for electronic case filing set forth in the Procedures Manual. If the deadline to file a document occurs, or a party must file an emergency motion while the Court's CM/ECF system is shut down, the attorney filer may file the document by paper following the procedures set forth in these Rules and the Procedures Manual for paper filing by unrepresented parties. The attorney filer may, in such an instance,	
Missouri Western	Local Rule 11002-1	http://www.mow.uscourts.gov/bankruptcy/rules/bk_rules.pdf	No		
Montana	Local Rules 5005-1; 5005-2	http://www.mtb.uscourts.gov/Reports/2009BKRulesFinal.pdf	No		
Nebraska	Local Rule 5005-1	https://www.neb.uscourts.gov/Robohelp_Manuals/Local_Rules/index.htm	No		
Nevada	Local Rule 5005	http://www.nvb.uscourts.gov/downloads/rules/local-rules-2012_12-17-12.pdf	No	Pro se filers are exempt from the mandatory electronic filing requirements.	
New Hampshire	Local Rule 5005-4	http://www.nhb.uscourts.gov/OrdersRulesForms/LocalRulesOrdersPDFs/2012%20LBRs%20IBRs%20AOs%20and%20LBFs%20-%20Clean.pdf	Not clear but most likely no.	Language from 5005-4: Attorneys admitted to the bar of this court (including those admitted pro hac vice), United States trustees and their assistants, trustees and others as the court deems appropriate, may register as Filing Users of the court's CM/ECF system upon: (A) completion of the court's training program, or (B) certification that the proposed Filing User has been trained in another court and is qualified to file pleadings in a federal court.	
New Jersey	Local Rule 5005-1	http://www.njb.uscourts.gov/sites/default/files/local_rules/Local_Rules_August_1_2015.pdf	Not clear but most likely no.		
New Mexico	Local Rule 5005-3	http://nmb.uscourts.gov/sites/default/files/local_rules/lr111514.pdf	Pro se filers can file electronically through the Electronic Self-Representation program.	The rule provides that: "except for proofs of claim and petitions filed using court-approved electronic filing procedures, all papers filed by unrepresented parties must be submitted to the clerk in paper unless the court, for good cause, authorizes an unrepresented party to submit papers for filing by alternate means." The District of New Mexico is participating in the eSR program that permits debtors to file case opening documents electronically.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
New York Eastern	Electronic Filing Procedures; Local Rule 5005-1 (see http://www.nyeb.uscourts.gov/usbc-edny-local-bankruptcy-rules#5005-1)	http://www.nyeb.uscourts.gov/sites/nyeb/files/general-ordes/ord_559.pdf	No		
New York Northern	Local Rule 5005-2; Electronic Filing Procedures (see http://www.nynb.uscourts.gov/sites/default/files/LBR_GenOrders/LBRs_2014.pdf#page=81)	http://www.nynb.uscourts.gov/sites/default/files/CMECF/AdminProc010112.pdf	No		
New York Southern	Administrative Procedures	http://www.nysb.uscourts.gov/sites/default/files/5005-2-procedures.pdf	Not clear but most likely no.		
New York Western	Administrative Procedures	http://www.nywb.uscourts.gov/sites/nywb/files/ECF_Administrative_Procedures_Oct_2010_update.pdf	No		
North Carolina Eastern	Local Rule 5005-1	http://www.nceb.uscourts.gov/sites/nceb/files/local-rules.pdf	No		
North Carolina Middle	Local Rule 5005-4(2)	http://www.ncmb.uscourts.gov/sites/default/files/local_rules/LR%20July%201%202014%20update%20final%20with%20TOC.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
North Carolina Western	None.		Not clear but most likely no.	The court offers Debtor Electronic Bankruptcy Noticing through DeBN.	
North Dakota	Administrative Procedures	http://www.ndb.uscourts.gov/CM-ECF%20Administrative%20Procedures/CM-ECF_Administrative_Procedures.htm	Not clear but most likely no.	See Administrative Procedures (in effective through Local Rule 5005-1)	
Ohio Northern	Administrative Procedures	https://www.ohnb.uscourts.gov/ecf/repository/administrative_procedures_manual.pdf	No		
Ohio Southern	Administrative Procedures	https://www.ohsb.uscourts.gov/New%20Local%20Rules/AdminProcs_Clean.pdf	No		
Oklahoma Eastern	Administrative Procedures	http://www.okeb.uscourts.gov/sites/default/files/AdmGuide10-01-09.pdf	No		
Oklahoma Northern	Local Rule 5005-1	http://www.oknb.uscourts.gov/sites/default/files/Local%20Rules.pdf	No		
Oklahoma Western	Local Rule 5005	http://www.okwb.uscourts.gov/sites/okwb/files/Local_Rules.pdf	No		
Oregon	Local Rules 5005-4	http://www.orb.uscourts.gov/sites/orb/files/documents/general/Local_Rules_clean.pdf	No		
Pennsylvania Eastern	Procedures for Electronic Filing	http://www.paeb.uscourts.gov/sites/paeb/files/general-ordes/StandingOrder1.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Pennsylvania Middle	Local Rules	http://www.pamb.uscourts.gov/sites/default/files/LocalRulesandForms/USBC_PAMB_Local_Rules.pdf	No	Debtors can now request to receive court notices and orders from the Bankruptcy Noticing Center (BNC) by email rather than by U.S. mail via DeBN.	
Pennsylvania Western	Local Rule 5005-2	http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule5005-2.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Puerto Rico	Local Rule 5005-4	http://www.prb.uscourts.gov/sites/default/files/local_rules/LBR-5005-4.pdf	No	The rule states that pro se filers "may" conventionally file rather than an actual prohibition on electronic filing.	
Rhode Island	Local Rule 5005-4	http://www.rib.uscourts.gov/newhome/rulesinfo/html5/default.htm#5000/5005-4.htm%3FTocPath%3D5000%7C_____6	No		
South Carolina	Local Rule 5005-4, Order Regarding Electronic Filing and Participant's Guides	http://www.scb.uscourts.gov/pdf/oporder/opor13-03.pdf	No	Debtor electronic noticing is available through DeBN.	
South Dakota	Administrative Procedures	http://www.sdb.uscourts.gov/sites/sdb/files/Administrative%20Procedures.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Tennessee Eastern	Administrative Procedures	http://www.tneb.uscourts.gov/sites/default/files/2008_admin_procedures.pdf	No		
Tennessee Middle	Administrative Procedures for Electronic Filing	http://www.tnmb.uscourts.gov/documents/ecf_procedures[1].pdf	Yes, with court approval. Limited to specific case.		
Tennessee Western	ECF Guidelines	http://www.tnwb.uscourts.gov/PDFs/ECF/ECF_guidelines.pdf	No	Debtor electronic noticing is available through DeBN. Also, pro se parties are permitted to access CM/ECF through computers at the Clerk's Office. See http://www.tnwb.uscourts.gov/PDFs/ECF/ecffaq.pdf	
Texas Eastern	Administrative Procedures	http://www.txeb.uscourts.gov/LBRs%2012_09/5005.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Texas Northern	Administrative Procedures	http://www.txnb.uscourts.gov/content/ecf-administrative-procedures	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Texas Southern	Administrative Procedures	http://www.txs.uscourts.gov/attorneys/cmecf/bankruptcy/adminproc.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Texas Western	Administrative Procedures	administrative_procedures_electronic_filing-2.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text	
Utah	Local Rule 5005-2	https://www.utb.uscourts.gov/sites/default/files/news-attachments/2014localrules_clean.pdf	Not clear - see notes.	Offers Debtor Electronic Bankruptcy Noticing. Local rule permits "individuals" with the court's consent.	
Vermont	Local Rule 5005-3	http://www.vtb.uscourts.gov/sites/vtb/files/Local_Rules_2012.pdf	Yes, with court approval and training. Limited to specific case.		
Virginia Eastern	Local Rule 5005 and Electronic Filing Procedures	https://www.vaeb.uscourts.gov/wordpress/?wpfb_dl=546	No	The court offers debtors the opportunity, pursuant to Federal Rule of Bankruptcy Procedure 9036, to request delivery by email, rather than by U.S. mail, of court-generated notices and orders that have been filed by the court, through DeBN, a Bankruptcy Noticing Center ("BNC") program.	
Virginia Western	Administrative Procedures	http://www.vawb.uscourts.gov/sites/default/files/adminpro08.pdf	No		
Washington Eastern	Local Rule 5005-3	http://www.waeb.uscourts.gov/sites/default/files/waeb/local_rules/Local_Rules_Complete_Set.pdf	No		
Washington Western	Local Rule 5005 and Administrative Procedures	http://www.wawb.uscourts.gov/read_file.php?file=3812&id=919	No		
West Virginia Northern	Local Rule 5005.4-02	http://www.wvnb.uscourts.gov/sites/wvnb/files/local_rules/N.D.W.V.%20LBR%205005-4.02.pdf	No		
West Virginia Southern	General Order re: Administrative Procedures for Electronic Filing	http://www.wvsb.uscourts.gov/sites/wvsb/files/general-ordes/genord08-07.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Wisconsin Eastern	Administrative Procedures	http://www.wieb.uscourts.gov/index.php/orders-rules/1-local-rules/41-rules-a-procedures	No		
Wisconsin Western	Administrative Procedures	http://www.wiwb.uscourts.gov/pdf/admin_procedures.PDF	No		
Wyoming	Local Rule 5005-2	http://www.wyb.uscourts.gov/sites/default/files/pdf-files/local-rules-20120701.pdf	No	Due to original signature requirements per Rule 9011, the Court's electronic filing system is not available to pro se filers.	

TAB 3

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TAB 3A

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TAB 3A.1

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 12.4(a)(2)

DATE: September 1, 2015

In a memorandum dated June 8, 2015, Tab 2, Jonathan Wroblewski wrote on behalf of the Justice Department asking the Advisory Committee to consider "whether some amendment to Rule 12.4 might be warranted in light of the 2009 change to the Code of Conduct and to address the cases where compliance with the current rule may be problematic and unnecessary." Additionally, he noted that other advisory committees may be considering changes to their disclosure requirements, and he expressed the hope that the Criminal Rules Committee could coordinate with them.

The Department's proposal is on the agenda for discussion of the question whether a subcommittee should be appointed to consider whether and how to amend the rule, while coordinating with other committees.

Rule 12.4 governs the parties' disclosure statements. It provides:

(a) Who Must File.

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

(2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

12.4 was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

The Department of Justice Memorandum presents two reasons for reconsideration of the notice requirement regarding organizational victims. First, the Code of Judicial Conduct was significantly amended in 2009, and it no longer treats all victims entitled to restitution as parties. Since the purpose of the rules was to require the disclosure of information necessary to assist judges in making rescusal decisions, a change in the recusal requirements may warrant a parallel change in Rule 12.4.

Second, the Department indicated that there are some cases in which it is difficult or impossible to provide the notification required by the current rule. For example, in some antitrust cases there may be hundreds or thousands of corporate victims. Providing the notification required for each of them, even if possible, would be extremely burdensome.

One other advisory committee has a related issue on its agenda. The Appellate Rules Committee has discussed whether to amend its own disclosure rules, and one of the issues was whether it should adopt a provision parallel to Rule 12.4(b)(2). At this time, this issue remains on the Appellate Rules study agenda, but there is no proposal under active consideration. Excerpts of the minutes of that Committee's fall 2014 and spring 2015 meetings are included as Tab 3.

TAB 3A.2

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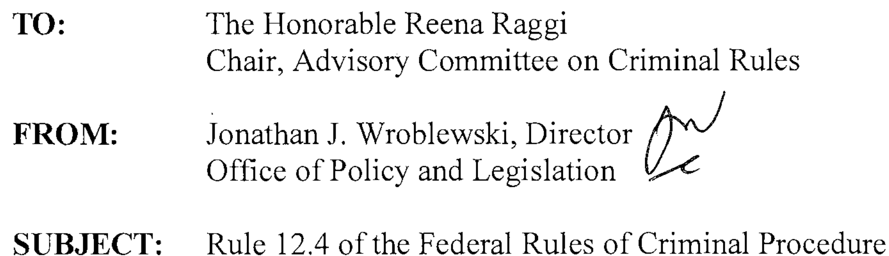
U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General | *Washington, D.C. 20530*

June 8, 2015

MEMORANDUM



TO: The Honorable Reena Raggi
Chair, Advisory Committee on Criminal Rules

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Rule 12.4 of the Federal Rules of Criminal Procedure

As I mentioned to you recently, I was contacted in April by Justice Department colleagues who staff other rules committees concerning Rule 12.4 of the Federal Rules of Criminal Procedure and consideration being given to adding a similar rule to the appellate rules (and perhaps others as well). My colleagues also indicated some concerns about the government's ability to fully comply with the rule as now written in certain cases with large numbers of corporate victims. As you know, Rule 12.4 requires the government to identify corporate victims in relevant cases to assist judges in complying with their obligations under the Judicial Code of Conduct.

After our discussion, I contacted Robert Deyling, Counsel to the Judicial Conference's Committee on Codes of Conduct, and Rebecca Womeldorf of the Rules Support Office about this matter. Mr. Deyling indicated that the relevant provision of the Code of Conduct for United States Judges was amended in 2009 to limit its reach, but that to his knowledge no consideration was given to making conforming changes to Rule 12.4. Specifically, the following commentary was added to Canon 3C(1)(c) in 2009:

> In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

In addition, I contacted federal prosecutors across the Department concerning this issue and found a number who had concerns related to the breadth of the current rule (especially given the 2009 amendment to the Code of Conduct) and the ability of prosecutors to comply with the rule in cases involving numerous corporate victims in certain types of prosecutions (*e.g.* in some antitrust cases where hundreds or even thousands of corporations may have been victimized to some extent by the offense).

My understanding is that other rules committees may be considering this issue over the coming months. As I indicated in our discussion, I think such consideration would benefit from our committee's involvement. I also believe that our committee should consider whether some amendment to Rule 12.4 might be warranted in light of the 2009 change to the Code of Conduct and to address the cases where compliance with the current rule may be problematic and unnecessary.

Please let me know if you would like to discuss this. We appreciate your consideration of this matter.

cc: Professor Sara Sun Beale
Professor Nancy King
Rebecca Womeldorf

TAB 3A.3

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DRAFT

Minutes of Fall 2014 Meeting of
Advisory Committee on Appellate Rules
October 20, 2014
Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, October 20, 2014, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Mr. Robert Deyling, Counsel to the Committee on Codes of Conduct and Assistant General Counsel at the AO, attended part of the meeting, as did Mr. Joe S. Cecil and Ms. Catherine R. Borden of the FJC.

IV. Discussion Items

A. Item No. 08-AP-R (disclosure requirements)

Judge Colloton introduced this item, which concerns local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Judge Colloton noted that Judge Chagares, Professor Katyal, and Mr. Newsom had agreed to form a subcommittee on this topic, and he thanked them for their research. He thanked Mr. Deyling for attending the meeting in order to share the perspective of the Committee on Codes of Conduct. A central question, Judge Colloton noted, is whether there is information currently elicited by local circuit provisions but not required by the Appellate Rules that would be relevant to a judge's determination whether to recuse from a matter. A related question is whether, as to some types of information, the Appellate Rules Committee needs further guidance in order to assess the implications of such information for recusal determinations. Judge Colloton reported that the Chair of the Committee on Codes of Conduct had designated Judge Paul Kelly of the Tenth Circuit, a member of the Codes of Conduct Committee, to serve as a liaison to the Appellate Rules Committee in connection with this project.

Judge Colloton invited Judge Chagares, Professor Katyal, and Mr. Newsom to summarize the results of their research. Judge Chagares observed that recusal issues present a minefield for judges; despite judges' best efforts, it is possible that something relevant to recusal might be overlooked. He stated that, of the topics on which he had focused, the two key sets of issues concerned criminal appeals and bankruptcy appeals. Appellate Rule 26.1, Judge Chagares noted, applies to all types of appeals. However, some attorneys assert that Rule 26.1 does not apply to criminal appeals. The Third Circuit Clerk, at Judge Chagares's request, surveyed the other Circuit Clerks concerning corporate disclosures in criminal cases. The responses reported some resistance by attorneys to the application of Rule 26.1 in criminal cases, as well as a few instances in which a circuit had not been enforcing the rule in criminal cases. A benefit of the survey, Judge Chagares noted, was that it had sensitized the Circuit Clerks to the issue, which should improve enforcement of the Rule. Because appeals involving corporate criminal defendants are very rare, Judge Chagares suggested, it should not be necessary to consider amending Rule 26.1 to address this issue. Judge Chagares pointed out that, unlike Criminal Rule 12.4, Appellate Rule 26.1 does not require disclosures concerning crime victims. As to local provisions on this topic, the Third Circuit requires disclosures concerning organizational victims, while the Eleventh Circuit requires disclosures concerning all victims.

Judge Chagares noted the distinct challenges posed by bankruptcy appeals. Not everyone involved in the bankruptcy proceeding below is a party for purposes of analyzing recusal issues. An Advisory Opinion on this topic (Advisory Opinion No. 100), Judge Chagares observed,

provided helpful guidance. The opinion states that parties, for this purpose, include the debtor, members of the creditors' committee, the trustee, parties to an adversary proceeding, and participants in a contested matter. The Third Circuit's local provision on point roughly tracks this guidance; so does the Eleventh Circuit's provision, but that provision also requires disclosure of entities whose value may be substantially affected by the outcome.

Judge Colloton invited Judge Chagares to summarize his findings on the third topic that he had investigated – namely, a judge's connection with participants in the litigation. Judge Chagares noted that instances may arise when a judge on an appellate panel previously participated in the litigation. For example, Judge Chagares recalled an instance when a then-recently-elevated appellate judge discovered that an appeal involved a defendant whom he had arraigned while serving as a Magistrate Judge.

The Reporter noted that Criminal Rule 12.4 requires the government to make disclosures concerning organizational victims. In 2009, the Criminal Rules Committee – at the suggestion of the Codes of Conduct Committee – considered whether to expand Rule 12.4 to require disclosures concerning individual victims and to require disclosures by the organizational victims themselves. The Committee ultimately decided not to propose amendments making such changes; participants in the Committee discussions noted that requiring disclosures concerning individual victims would raise privacy concerns.

Professor Coquillette reminded the Committee that, under Appellate Rule 47, local circuit rules must be consistent with federal statutes and with the Appellate Rules. He observed that the requirement of "consistency" raises interesting questions: For instance, if the Appellate Rules impose a limited set of requirements concerning a given topic, can circuits impose additional local requirements concerning that same topic? The Reporter observed that, when Rule 26.1 was initially adopted, the drafters saw the Rule as setting minimum requirements to which a particular circuit was free to add.

An appellate judge member asked what disclosure requirements apply in proceedings under 28 U.S.C. §§ 2254 and 2255. The Reporter undertook to research this question. The member also asked whether Criminal Rule 12.4 defines the term "victim." The Reporter responded that Criminal Rule 1(b)(12) defines "victim" to mean a "crime victim" as defined in the Crime Victims' Rights Act.

Mr. Deyling stated that the topics discussed thus far seemed to him like topics worth exploring. He explained that the Codes of Conduct Committee's 2009 suggestion concerning crime victims arose from the Committee's desire to ensure that the courts' electronic conflicts screening program was picking up all the relevant conflicts. The Codes of Conduct Committee has altered its view, over time, concerning the significance of a judge's interest in a crime victim. The Committee's current view – which accords with the view found in relevant caselaw – is that recusal is necessary only if a judge has a substantial interest in a victim.

Judge Colloton, summarizing the Committee's discussion up to this point, suggested that

the Appellate Rules Committee might consider whether to adopt a provision reflecting Advisory Opinion No. 100's guidance concerning bankruptcy matters. The Committee could also consider adopting a provision requiring some disclosures concerning victims. On the other hand, he suggested, perhaps some caution is warranted because a provision requiring broad disclosure might suggest that certain interests require recusal when in fact they do not. It was noted that, in some instances, the recusal standard presents a judgment call that the judge must make based upon adequate information.

Judge Colloton invited Mr. Newsom to present his findings concerning the topics that he researched. Mr. Newsom turned first to disclosures by intervenors. It is rare, he observed, for intervention to occur in the first instance on appeal. But when such intervention does occur, the intervenor should be required to make the same disclosures as any party. Indeed, Mr. Newsom noted, some circuits have local provisions requiring intervenors to make the same types of disclosures as named parties.

Mr. Newsom next discussed local provisions requiring disclosures by amici. Local provisions take varying approaches concerning which amici must make disclosures and what those amici must disclose. As to the nature of the disclosure, a few circuits require amici to identify parent corporations (or, in one rule, parent companies); some other circuits require disclosure of any entities with a financial interest in the amicus brief. The subcommittee did not feel that it would be necessary for a national rule to require the latter sort of disclosure.

Mr. Newsom also noted local provisions that require disclosure of the identity and nature of parties to the litigation – such as the identity of pseudonoymous parties, or the members of a trade association. The idea behind such provisions, he observed, is to require disclosure concerning interested persons whose identity is not otherwise ascertainable from the filings on appeal.

Judge Colloton invited Mr. Deyling to comment on recusal issues that might be raised by amicus participation. Mr. Deyling conceded that the Codes of Conduct Committee had not provided comprehensive guidance on that topic, even in the Committee's unpublished compendium of summaries of its unpublished opinions. (That compendium, he explained, contains responses to specific requests for advice.) For the most part, Mr. Deyling noted, the Committee had not required recusal because of the participation of an organizational amicus, except in rare situations – for example, where a judge's spouse was involved in the affairs of an amicus. Advisory Opinion No. 63 states that the participation of an amicus that is a corporation does not require recusal if the judge's interest in the amicus would not be substantially affected by the outcome of the litigation and if the judge's impartiality could not reasonably be questioned. Judge Colloton noted that the Appellate Rules Committee might seek further guidance from the Codes of Conduct Committee concerning recusal issues raised by amicus filings.

A member asked whether there might be a concern that parties might engineer the participation of a particular amicus in an effort to generate a recusal. Another member agreed

that this could be a concern; he noted that when he is considering whether to file an amicus brief, he tries to avoid doing so in situations where the filing might trigger a recusal.

Mr. Deyling expressed agreement with Mr. Newsom's suggestion that an intervenor should be treated like any other party for purposes of disclosures. He noted as well that if an intervenor's participation raises a recusal issue, that issue will arise – even before intervention is granted – in connection with the *request* to intervene.

Judge Colloton observed that, when a judge owns shares in a member of a trade association and the trade association is a party to a lawsuit, the recusal issue will focus on whether the judge's interest in the member would be substantially affected by the outcome of the proceeding. Disclosure of the trade association's members would permit the judge to assess this question. Mr. Deyling noted that the question is who has the burden of discerning and disclosing such information.

Mr. Newsom pointed out that questions concerning real parties in interest can arise in a variety of situations. Mr. Byron noted that the Appellate Rules do not define who is a "party" or who counts as an "appellee"; what about those who do not actually participate in the litigation but who may benefit from it? Mr. Letter recalled that the Committee had previously considered defining "appellee" in the Appellate Rules, but the Committee had decided not to do so.

Summarizing this portion of the discussion, Judge Colloton noted that the Committee would further investigate questions relating to intervenors and amici, and that the Committee might seek further guidance concerning recusal obligations triggered by an amicus's participation.

Judge Colloton invited Professor Katyal to report on the results of his research. Professor Katyal noted that he had focused on disclosures concerning corporate relationships. The bottom line, he suggested, is that there is no need to change the disclosure requirements to address these topics. However, if the Committee is considering other possible amendments concerning disclosure requirements, then it might consider what parties other than corporations should be required to make disclosures under Rule 26.1. The D.C. Circuit's local provision, he observed, requires all nongovernmental, non-individual entities to make disclosures under Rule 26.1; this requirement encompasses, for example, joint ventures and partnerships. A prudent attorney representing such an entity would likely comply with existing Rule 26.1, but the Rule could be amended to cover such entities explicitly. The Reporter noted that Judge Easterbrook's comment – which initially provided one of the sources for this agenda item – had pointed out that Rule 26.1 is underinclusive because it covers only corporations and not other types of business entities.

The Committee might also consider what types of ownership interests might be encompassed within an amended disclosure rule. The D.C. Circuit's local provision requires disclosure of any ownership interest – not merely stock ownership – that is greater than 10 percent. Professor Katyal noted that if the Committee were inclined to expand Rule 26.1 in this

respect, it could propose amending the Rule to refer to "any publicly held entity that owns 10 percent or more of an ownership interest in the party." Such an amendment, he suggested, could be modestly helpful.

By contrast, Professor Katyal said, some other local requirements – such as the Eleventh Circuit's requirement that corporate parties disclose their full corporate title and stock ticker symbol – do not seem worthwhile candidates for inclusion in the national Rule. An appellate judge noted that the Eleventh Circuit had adopted its local disclosure requirements in an effort to avoid recusal problems. Mr. Gans reported that the Circuit Clerks face a complex task when assessing corporate disclosures; sometimes he finds that it is necessary to call counsel to obtain further information (including both some information currently required by Rule 26.1 and some additional information). Mr. Deyling noted that a judge's interest in a party's *subsidiary* would not trigger a recusal obligation.

By consensus, the Committee retained this item on its agenda. Judge Colloton noted that the Committee might seek further guidance from the Codes of Conduct Committee on particular issues.

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C. Item No. 08-AP-R (disclosure requirements)

Judge Colloton invited Professor Capra to present this item, which focuses on disclosures required by local circuit provisions but not required by the Appellate Rules' disclosure provisions (contained in Rules 26.1 and 29(c)). Previously, a subcommittee composed of Judge Chagares, Professor Katyal, and Mr. Newsom had researched these issues. More recently, Professor Capra analyzed the issues and prepared sketches of possible Rule amendments.

Professor Capra explained that he had focused on identifying local rule requirements, not in the current Appellate Rules, that the Committee might be interested in discussing. His memo took a "building block" approach, discussing each requirement in turn and showing its addition to a consolidated sketch of possible Rule amendments. Some of the possible amendments, Professor Capra noted, seemed more viable than others.

Professor Capra first directed the Committee's attention to the topic, discussed at page 923 of the agenda book, that concerned a judge's connection with a prior or current participant in the litigation. The sketch on page 923 illustrated a rule that would elicit information about a judge's prior participation in the case. The sketch on page 924 showed a rule that would also elicit information about lawyers who had previously appeared in the case. That information, Professor Capra suggested, could be compiled fairly easily.

Professor Capra turned next to the question of disclosures in criminal appeals. The key issue here, he suggested, was whether the Appellate Rules should be amended to include a provision paralleling Criminal Rule 12.4(a)(2). That Rule requires the Government to file a statement identifying an organizational victim and – if that victim is a corporation – also requires the Government to disclose the ownership information referred to in Criminal Rule 12.4(a)(1) (the cognate provision to Appellate Rule 26.1(a)) "to the extent that it can be obtained through due diligence." The sketch set out at page 926 of the materials illustrates an amendment that would add to Appellate Rule 26.1 a provision paralleling Criminal Rule 12.4(a)(2). Such an amendment, Professor Capra predicted, would not affect many appeals; but it would have the virtue of increasing uniformity across the Appellate and Criminal Rules. The Committee would coordinate with the Criminal Rules Committee on these issues.

Turning to the question of disclosures in bankruptcy cases, Professor Capra observed that the Code of Conduct Committee's Advisory Opinion No. 100 provided guidance concerning the participants (in a bankruptcy proceeding) that should be considered parties for purposes of the disclosure rules. The guidance from that Advisory Opinion is not currently reflected in the disclosure provisions in either the Appellate Rules or the Bankruptcy Rules. But the Bankruptcy Rules Committee has indicated a lack of interest in proceeding with an amendment on the topic of disclosures – a reluctance that weighs against proceeding with a bankruptcy-disclosure amendment to the Appellate Rules. For illustrational purposes, Professor Capra set out on page 927 of the agenda book a sketch showing an amendment that would incorporate into Appellate Rule 26.1 additional disclosure requirements for appeals in bankruptcy proceedings.

Next, Professor Capra observed that the Appellate Rules direct a corporate party or

amicus to disclose "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Some local rules, Professor Capra noted, require disclosure of ownership interests other than stock. This makes sense; because recusal rules focus on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit. The sketch at page 928 of the agenda book illustrated an amendment that would require disclosure of ownership interests other than stock. At page 929, the sketch would extend the disclosure obligation to encompass ownership interests held by publicly held entities other than corporations. Page 930 of the agenda book showed an amendment that would extend Rule 26.1's disclosure obligations to non-governmental entity litigants other than corporations.

Professor Capra noted that he had sketched, at page 931 of the agenda materials, an amendment that would require disclosure concerning corporate affiliates. However, guidance from the Codes of Conduct Committee indicates that recusal is not automatically required when the judge has an ownership interest in a party's corporate affiliate. Accordingly, it does not seem worthwhile to amend Rule 26.1 to require disclosures concerning a party or amicus's corporate affiliates (beyond entities that have an ownership interest in the party or amicus).

Professor Capra next turned to the question of disclosure requirements applicable to intervenors. Intervention on appeal, he noted, is sufficiently rare that the Committee had previously decided not to pursue amendments that would govern the general topic. (Appellate Rule 15(d) addresses intervention in the specific context of proceedings for review or enforcement of an agency order.) Morever, Professor Capra pointed out, once intervention has been granted, the intervenor should be viewed as having the status of a party and should thus be seen as subject to Rule 26.1's existing disclosure requirements for parties generally.

Professor Capra pointed out that, depending on the Committee's decisions with respect to the disclosure obligations for parties, changes to Rule 29(c)(1)'s disclosure requirement for amici might become necessary in order to ensure a proper fit between that Rule and Rule 26.1. Some disclosures, he noted, need not be required of amici because a party would already have disclosed the relevant information.

Responding to a suggestion by a member of the Standing Committee, the sketch on page 937 illustrated an amendment that would elicit the names of witnesses who had testified in a case. Professor Capra observed that, on the one hand, instances where a judge's relation to a witness causes recusal are likely to be relatively rare. But on the other hand, it should not be very burdensome for a party to disclose any relevant witness list.

Professor Capra pointed out that the Committee would also need to consider whether any additional disclosure requirements should apply to individuals as well as entities. If the Committee decided to apply some disclosure requirements to individual litigants, it would likely be necessary to restructure the Rule 26.1 sketches shown in his memo.

An attorney member thanked Professor Capra for his work on this topic and stated that he generally agreed with Professor Capra's assessments. This member suggested that the provision sketched on page 923 of the agenda book – designed to elicit information concerning a judge's

prior participation in the litigation – should not be limited to participation as a trial judge. Thus, the member suggested deleting the word "trial."

Turning to the sketch on page 924 of the agenda book, which focused on appearances by law firms and lawyers, the attorney member suggested that it would be better to refer to "attorneys" rather than "partners and associates." Some firms, he noted, create positions other than partner and associate, such as "counsel." An appellate judge member asked about that sketch's reference to firms and lawyers who "are expected to appear" for the party. Another attorney member noted that it could be difficult for a firm to predict in advance which associates it might staff on a matter. An appellate judge member noted that the sketch on page 924 was based on Federal Circuit Rule 47.4(a)(4), which requires disclosure of "[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court." The Federal Circuit, he reported, has discerned no difficulties with this provision. It is important, this member stressed, to get a lot of information early on. If the information is not provided until later, the court will deny an entry of appearance by a new attorney if that attorney's appearance would cause a recusal.

An attorney member stated that the sketch shown on page 936 – which would require amici to disclose whether "a lawyer or law firm contributed to the preparation of the brief, and, if so, [to] identif[y] each such lawyer or firm" – would require disclosures beyond those required by the Supreme Court's rules. If the Supreme Court's rule does not require such information, the member suggested, neither should the Appellate Rules. Supreme Court Rule 37.6 requires that amici (other than specified governmental amici) must "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Professor Capra queried whether the Supreme Court's rule would elicit the information necessary to discern situations in which a Justice's family member worked on the amicus brief. The member responded that the Stern and Gressman treatise takes the view that such work would count as a monetary contribution.[1] An appellate judge member expressed doubt about the merit of the treatise's view, because the ordinary meaning of "monetary contribution" does not include an attorney's labor on a brief.

An attorney member, turning to the question of disclosures by intervenors, stated that he agreed with Professor Capra that, once intervention is granted, the intervenor is subject to the same disclosure obligations as any other party. But, this member asked, what about disclosures *before* the grant of intervention? Mr. Byron reported that, in proceedings for review of agency rulemaking, he very frequently sees intervenors seeking to come in on both sides. Most such

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[1] *See* Stern et al., Supreme Court Practice § 13.14 at 756 n. 62 ("Some nonparty organizations, desirous of helping an impecunious amicus present its views to the Court, may assist in writing the amicus brief. The nonparty organization, by paying its own lawyers, would thereby seem to be making a 'monetary contribution to the preparation' of the amicus brief. Unless and until the Clerk's Office advises otherwise, prudence dictates that such a 'monetary contribution' be revealed to the Court.").

instances occur in proceedings in the D.C. Circuit, but some also occur in the regional circuits. Professor Capra noted the possibility of adding a rule provision to address such instances.

An appellate judge member expressed skepticism about the desirability of requiring disclosure of witness lists. Another appellate judge member stated that information relevant to recusal is very important to judges; however, he asked whether the disclosures being discussed would be onerous for lawyers.

An attorney member suggested that some of the information – concerning participation by attorneys and judges – could be compiled relatively readily. Another attorney member, however, warned that a list of lawyers who had participated in a case could end up being 15 pages long. One of the appellate judge members noted that, in the Eighth Circuit, the Circuit Clerk's office runs the recusal check based on the list (available in CM/ECF) of the lawyers who appeared in the district court. Another appellate judge member asked whether that sort of check would suffice to determine the names of the lawyers who had appeared before an agency. Mr. Gans responded that his office adds that information in manually. An attorney member suggested that it would be useful for judges to have this information. An appellate judge member noted that it is important to limit any required disclosures to the names of those who have actually appeared in a proceeding. The attorney member suggested that a provision could be tailored so that it only requires disclosure of the names of firms and lawyers who appeared in an agency proceeding. An appellate judge member asked whether the rule might state that there is no need to disclose any names of lawyers whose participation is already listed in the CM/ECF system. Mr. Gans noted that the Clerk's Offices should already be checking for lawyers' prior participation, because Judicial Conference policy requires such checks. Professor Capra noted that a rule on this topic should also account for any related state proceedings; the rule could do so by requiring the disclosure of any firms or lawyers not already listed in CM/ECF. Mr. Gans suggested that the Clerk's Office could send the lawyers the list his office generated from CM/ECF, and the lawyers could then disclose only the names not already on the list. An attorney member suggested that, alternatively, the rule might target particular types of prior proceedings (agency proceedings and state-court proceedings). An appellate judge member responded that it would be better to have a single source for all of the information. This member questioned whether lists generated using CM/ECF would always be complete; and he suggested that if the information is submitted by the attorneys, then the court can apply a kind of estoppel based on the disclosures. An attorney member noted, however, that creating this sort of list would be costly for litigants.

An appellate judge participant, commenting on the disclosures project as a whole, expressed concern that some might question why a disclosure would be required unless the information elicited by that disclosure required recusal. That is to say, the addition of a particular disclosure requirement might generate a perception that information responsive to that requirement necessitates recusal. And problems sometimes arise when a litigant takes certain steps in an effort to generate a recusal. Proceeding with this project, he suggested, would entail consultation with the Codes of Conduct Committee and the Committee on Court Administration and Case Management. Judge Colloton noted that the subcommittee was attuned to the concern that new disclosure requirements should be connected to recusal obligations and that the Committee would engage in appropriate consultation.

An appellate judge member noted that some disclosures (such as those concerning attorneys' prior participation) were relevant to individual litigants, not only to entities. He asked whether the rule should be adjusted to account for that. On the other hand, he noted, perhaps compliance would be more burdensome for individual litigants.

By consensus, the Committee retained this item on its study agenda.

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TAB 3B

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TAB 3B.1

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 15(d)

DATE: August 31, 2015

As explained in a memorandum from Jonathan Wroblewski (Tab 2), the Department of Justice has identified an inconsistency between the text of Rule 15(d) and the Committee Note.

The Department requests that the Committee address the inconsistency, revising both the rule and the note to state that (1) the government's obligation to pay defense deposition expenses applies only to depositions requested by the government, and (2) expenses relating to depositions requested by the defense should be borne by the defendant, or, if the defendant is unable to pay, paid using Criminal Justice Act funding.

This issue has been raised in the cases cited on pages 1-2 of Mr. Wroblewski's memo, many of which involve counterterrorism or human rights prosecutions where one or more parties sought to take depositions overseas.

This item is on the agenda for initial discussion by the Committee. This memorandum briefly (1) compares the text of the rule and note, (2) reviews the history of the Committee's prior consideration, (3) explains the Department of Justice proposal, and (4) notes some issues may need to be addressed if the Committee moves forward with the proposal.

A. Comparing the text and the Committee Note

The government is correct that the text and Committee Note are not consistent. Rule 15(d) provides (emphasis added):

> **(d) Expenses.** If the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court *must*—order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

The text imposes a mandatory duty ("must") on the government to pay the defendant's deposition expenses only in cases in which (1) the government requests the deposition and (2) the defendant "is unable to bear" them. Otherwise, the rule permits ("may") but does not require the government to pay these expenses in cases in which the government has requested the deposition. It does not appear to speak, at all, to expenses for defense depositions.

The 2002 Committee Note accompanying the restyled rule, however, erroneously imposes a broader mandatory duty on the government (italics in original):

> Under the amended rule, if the government requested the deposition, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs--regardless of who requested the deposition.

B. **The Advisory Committee's prior consideration of this issue**

Although the Committee previously recognized the inconsistency between the text and Committee Note, it felt constrained by the general policy that precludes revising committee notes without revising the text of the rule.

In attachments accompanying Mr. Wroblewski's memo (TAB A), the Committee's former reporter recognizes the inconsistency. In May, 2004, the Committee discussed the inconsistency, and it directed the Chief of the Rules Support Office to alert publishers to it. As a result, Westlaw inserted a footnote obliquely noting the problem.

C. **The Justice Department's proposal**

The Justice Department urges the Committee to promulgate an amendment that would limit the government's obligations to pay defense expenses to only those cases in which the government seeks the depositions. In all other cases, the defendant would bear the burden of his or her expenses; if the defendant is unable to pay, these expenses would be paid using funding from the Criminal Justice Act.

D. **Other issues raised by the proposal**

If the Committee decides to pursue this proposal, we suggest that it consider both technical drafting issues and the larger budgetary implications

1. *Drafting issues*

The government's proposal raises some drafting issues that a subcommittee might wish to consider. For example, it assumes a single defendant. But frequently there are multiple defendants. If one requests a deposition, the rule would need to consider the effect on each defendant. One might be able to afford the expenses, and the other not. Perhaps there are situations in which both parties request a deposition.

2. *Budgetary implications*

Because this proposal has implications for Criminal Justice Act funding, it may be appropriate to notify the Judicial Conference Criminal Justice Act Committee that this issue is under consideration. (By coincidence, we understand that Professor Kerr has just been appointed to serve as the academic member of that Committee.)

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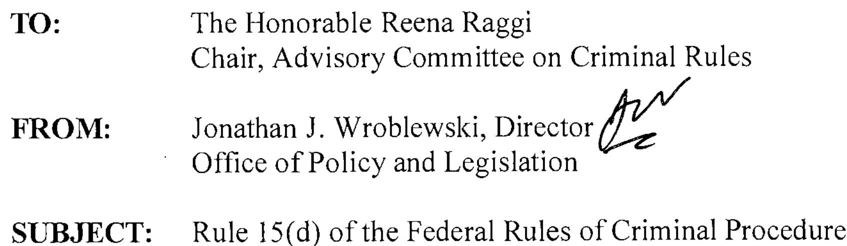
U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 26, 2015

MEMORANDUM



TO: The Honorable Reena Raggi
Chair, Advisory Committee on Criminal Rules

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Rule 15(d) of the Federal Rules of Criminal Procedure

Rule 15(d) of the Federal Rules of Criminal Procedure provides for the payment of a defendant's expenses for depositions requested by the government. The rule was last amended in 2002 as part of the Committee's restyling project. The Committee Note accompanying the 2002 amendment, however, goes beyond the parameters of the rule, requiring the government to pay deposition expenses for indigent defendants "regardless of who requested the deposition."

In April 2004, then-Committee Reporter David Schlueter authored a memorandum noting the "clear inconsistency between the text of the rule . . . and the text of the Committee Note."[1] The matter was discussed at the subsequent Committee meeting in May 2004. According to the meeting minutes, Professor Schlueter noted the inconsistency between the rule and the note but then indicated the general policy of the rules committees not to amend a note in the absence of an amendment to the rule itself.[2] No change was made to either the rule or the Committee Note, and the inconsistency remains in place today. According to the minutes, the Rules Support Office offered to contact "the publisher" and point out the issue, with the thought that some sort of notation could be added noting the inconsistency.[3]

This issue has come to our attention through several counterterrorism and human rights prosecutions where one or both parties have sought to take depositions overseas, and the courts

[1] Memorandum from David Schlueter for Criminal Rules Advisory Committee (April 12, 2004) (on file with the Rules Support Office of the Administrative Office of the United States Courts). The memorandum is attached below.

[2] *See* Minutes of Spring 2004 Meeting of Advisory Committee on Criminal Rules, 13 (April 13-14, 2004). Page 13 of the minutes is attached below.

[3] *See id.*

have been confused as to the application of the rule. The courts have come to conflicting results on the payment of defendants' deposition expenses for defense-requested depositions. For example, in a recent international human rights case charged in the Northern District of Georgia, *United States v. Mitrovic*, the defendant obtained an order permitting his counsel to depose 22 witnesses in Eastern Europe and asserted that the Department of Justice was responsible to pay all the expenses associated with the depositions.[4] Because of the lengthy and complex procedural posture of the case, concerns about delaying the case by litigating the issue, and the inconsistency between the rule and Committee Note, the government agreed to share the cost with the defense of the defense-requested depositions. In a terrorism case from the Southern District of Florida, *United States v. Khan*, the court ordered the government to pay the substantial costs of defense depositions of multiple witnesses residing in Pakistan.[5] Conversely, in other jurisdictions, courts have ordered the cost of defense-requested depositions to be paid using Criminal Justice Act funding for indigent defendants, while the Department has borne the costs of depositions requested by the government.[6] As a general matter, expenses incurred on behalf of indigent defendants are paid pursuant to the Criminal Justice Act and not by the prosecution.

We believe the current inconsistency between the rule and Committee Note should be addressed and the two provisions reconciled. Moreover, we note that a requirement that the government pay the costs of depositions requested by the defense is inconsistent with the manner in which other defense-related legal expenses are typically handled in our system, and may particularly increase the burden on the government in prosecuting cases, such as those involving human rights violations or terrorism, that are likely to involve overseas witnesses. We think the Committee should consider this issue at its next meeting and should clarify, in the rule itself and the notes that the requirement that the government pay for deposition expenses applies only to depositions requested by the government, and that a defendant's expenses relating to depositions requested by the defense should be borne by the defendant, or, if the defendant is unable to pay, paid using Criminal Justice Act funding.

Please let me know if you would like to discuss this. We appreciate your consideration of this matter.

cc: Professor Sara Sun Beale, Committee Reporter
Professor Nancy King, Committee Reporter
Rebecca Womeldorf, Rules Support Office

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[4] *United States v. Mitrovic*, 1:12-cr-311 (N.D. Ga. filed Sept. 19, 2012).
[5] *United States v. Khan*, 11-20331 (S.D. Fla. 2013).
[6] *See United States v. Sakoc*, 2:13-CR-106 (D. Vt. 2015); *United States v. Naseer*, 10-CR-019 (E.D. N.Y. 2015); *United States v. Kaziu*, 09-CR-660 (E.D. N.Y. 2012); *United States v. Faibish*, 2-CR-265 (E.D. N.Y. 2014); *United States v. Kaffo*, 11-CR 146 (E.D. N.Y. 2011).

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 15; Inconsistency Between Text of Rule and Committee Note

DATE: April 12, 2004

During the restyling project, the Committee amended Rule 15 regarding payment of deposition expenses. The amended Rule provides as follows:

> (d) **Expenses.** If the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court must —order the government to pay:
>
> (1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and
>
> (2) the costs of the deposition transcript. (emphasis added)

The Committee Note accompanying this provision states:

> "Revised Rule 15(d) addresses the payment of expenses incurred by the defendant and the defendant's attorney. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice." (emphasis in the original).

There seems to be a clear inconsistency between the text of the rule, regarding the payment of expenses, etc, when the government requests the deposition, and the text of the Committee Note. My notes at this point do not indicate clearly whether the Committee intended to use the word "must" in the rule itself, instead of "may" or the word "may" in the Committee Note, instead of the word "must."

This matter is on the agenda for the May meeting.

Mr. Goldberg expressed the hope that any consideration of an amendment would not flounder on the specifics of the rule itself. Judge Jones observed that the Committee could draft a rule that granted greater protections than *Brady*. Other members noted that attempts to codify the *Jencks* obligations in a rule had been unsuccessful.

Judge Friedman believed that it would be helpful to consider the issue further and that it might be time for an amendment to the rules. Other members agreed with that view, noting however that it would be important to address those issues that could be included in a rule. Mr. Goldberg moved that the Committee consider the College's proposal further. Mr. Fiske seconded the motion, which carried by a vote of 9 to 3. Judge Carnes appointed a subcommittee to give further consideration to the proposal: Mr. Goldberg (chair); Mr. Fiske, Mr. Campbell, Professor King, and Ms. Rhodes.

3. Rule 15; Discussion of Variance in Rule and Committee Note Regarding Payment of Costs.

Professor Schlueter informed the Committee that the Rules Committee Support Office had received information that there appeared to be an inconsistency between the text of Rule 15(d) and the Committee Note. The rule states that "if the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay…" (emphasis added). On the other hand, the Note states in relevant part: "Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay…" (emphasis in original). Professor Schlueter indicated that the general policy is to not amend only the Committee Note and that in the absence of an amendment to the rule itself, it would probably not be appropriate to change the language of the Note to conform to the clear text of the rule itself. Following additional discussion, Mr. Rabiej offered to contact the publisher and point out the issue, with the thought that some sort of notation could be added, noting the inconsistency.

4. Rule 16(a)(1)(B)(ii); Proposed Amendment Regarding Defendant's Oral Statements.

Judge Carnes indicated that the Committee had a proposal from Magistrate Judge Robert Collings concerning a possible amendment to Rule 16. Judge Collings had recently decided a case involving interpretation of Rule 16 vis a vis the obligation of the government to give to the defense an agent's rough notes of an interview with the defendant. Judge Carnes continued by stating that Judge Collings believed that Rule 16 could be clarified by placing all of the provisions dealing with a defendant's oral statements under one subdivision. Several members of the Committee observed that the law concerning disclosure of an agent's notes seemed settled, that revising Rule 16 would not change the substance of the law, and that there appeared to be no need for the change. Following additional discussion, a consensus emerged that no further action was required on the proposed amendment.

TAB 3C

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 6; 15-CR-B**

DATE: **September 1, 2015**

Mr. Andrew D. Stitt has written to the Advisory Committee urging a series of reforms to increase the independence of the grand jury:

> I therefore suggest a rule allowing a citizen to submit information concerning a matter under investigation by a grand jury directly to it. Grand juries should be instructed that probable cause means it is more than likely after a review of all the evidence can access of the truth of the charge(s) and they should be instructed they may invite the person(s) under investigation any witnesses in their defense to testify and consider that testimony in fining probable cause. Also the secrecy requirement should be amended to make clear it means only the power of the grand jury to investigate without the interference of the court or district attorney[.] Lastly I believe grand juries should have the power to initiate charges by presentment which the fifth amendment recognizes but has been written out of the rules.

Mr. Stitt's proposal is on the agenda for discussion of the question whether the Committee wishes to appoint a subcommittee to consider one or more of these suggestions in detail. We have identified four elements in Mr. Stitt's proposal:

- providing for direct citizen submissions to the grand jury
- providing certain instructions to the grand jury
- amending the requirements of grand jury secrecy
- providing for grand jury presentments

This memorandum provides background information relevant to each of the elements of Mr. Stitt's proposal.

Direct submission of information to the grand jury

The Federal Rules of Criminal Procedure do not address the question whether members of the public have a right to submit information directly to the grand jury. Although the issues has not arisen frequently in the federal courts, there is authority holding that a complainant or informer has no right to appear before the grand jury or communicate with it in writing without the authorization of the prosecutor.[4] Several states have statutes or court rules requiring the grand jury to hear persons who wish to testify under certain circumstances, and some state statutes give the courts discretion to permit witnesses not called by the prosecutor to testify before the grand jury.[5]

The grand jury charge

The Federal Rules of Criminal Procedure do not address the charge to the grand jury. Similarly, they do not address the charge to be given to trial juries. A model charge is provided in the BENCHBOOK FOR U.S. DISTRICT JUDGES § 7.04 at 247-56 (6th ed. 2013), *available at* http://www2.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf.

The scope of grand jury secrecy

It is not clear precisely what reform Mr. Still seeks in the rules of grand jury secrecy, which is governed by Rule 6(e)(2).

The grand jury secrecy provisions were included in the original Rules of Criminal Procedure adopted in 1946, and the secrecy rules have been amended eight times, in 1966, 1977, 1979, 1983, 1985, 2002 (substantive amendment as well as restyling), 2006, 2014 (technical and conforming amendment). Rule 6(e)(2)(B) now states a general prohibition against the disclosure of "a matter occurring before the grand jury," which is then qualified by exceptions detailed in (e)(2)(3)(A)-(E), according to the procedures in (e)(2)(F)-(G).

Charges by presentment

Rule 7 does not provide for presentments, i.e., charges coming directly from the grand jury. The original 1944 Committee Note stated: "Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts." Although the Committee Note does not provide any additional information, academic commentators have noted that earlier drafts from the Advisory Committee stated that the Constitution used the term "presentment" narrowly, to refer to a grand jury's statement of facts that would be used later by a prosecutor to draft an indictment, or

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[4]BEALE, BRYSON, FELMAN, ELSTON, AND YANES, 1 GRAND JURY LAW AND PRACTICE, § 419, text and notes 6-7 (collecting cases).

[5]*Id.*, text accompanying notes 13-19.

possibly to an accusation that could provide the basis for a private prosecution.[6] According to this view, presentments had become "obsolete" by 1944 because there was no longer a need for this procedure in the federal system: federal prosecutors were available at all times to assist the grand jury in drafting charges, and prosecutions by private individuals were no longer permitted.[7] This historical view has been challenged,[8] and some commentators have called for the reintroduction of presentments in the federal system.[9]

[6]See LAFAVE, ISRAEL, KING AND KERR, 6 CRIMINAL PROCEDURE § 15.1(d), text accompanying notes 150-546 (3d ed. 2007 and Supps.)

[7]*Id.*

[8] *See, e.g.*, *id.* at n. 156; Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L. J. 1333, ???? (1994)

[9] *See, id.* at ????. As a practical matter, although presentments would allow grand juries to bring to light corruption or other wrongdoing, at present there is no mechanism available to compel the government to prosecute the charges. Although there are only a few cases on this issue, which has never reached the Supreme Court, the lower courts have concluded that a federal prosecutor cannot be compelled to sign an indictment stating charges approved by a grand jury. The leading case on point is United States v. Cox, 342 F.2d 167 (5th Cir. 1965) (en banc). For a discussion of *Cox*, see BEALE, BRYSON, FELMAN, ELSTON, AND YANES, 1 GRAND JURY LAW AND PRACTICE, § 416 (2nd ed. 1997 and Supps.). Both signing an indictment and initiating a prosecution are discretionary, rather than ministerial functions. Nonetheless, some have urged that there would be a value to allowing grand juries to make public accusations of wrongdoing. *See* AKIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE at 178 (1997) (equating the jury with popular sovereignty and advocating allowing the grand juries to inform the public of abuses even if no indictable offense has occurred).

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: Grand Jury Rules
Andy Stitt
to:
Rules_Support@ao.uscourts.gov
05/27/2015 08:26 PM
Hide Details
From: Andy Stitt <stittad@yahoo.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Please respond to Andy Stitt <stittad@yahoo.com>

15-CR-B

To Whom It May Concern,

Grand Juries have been criticized for not being independent from the District Attorney for example jurors must rely on witnesses who have first gone through the District Attorney for most of their evidence. This is not what the founders intended. Rather a grand jury was supposed to be able to receive evidence from witnesses without the help of the District Attorney. In 1794 Attorney General Bradford stated a citizen may approach a grand jury directly... I therefore suggest a rule allowing a citizen to submit information concerning a matter under investigation by a grand jury directly to it. Grand juries should be instructed that probable cause means it is more than likely after a review of all the evidence can access of the truth of the charge(s) and they should be instructed they may invite the person(s) under investigation any witnesses in their defense to testify and consider that testimony in fining probable cause. Also the secrecy requirement should be amended to make clear it means only the power of the grand jury to investigate without the interference of the court or district attorney Lastly I believe grand juries should have the power to initiate charges by presentment which the fifth amendment recognizes but has been written out of the rules.

Sincerely,

Andrew D. Stitt

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TAB 3D

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TAB 3D.1

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 23; 15-CR-C

DATE: August 31, 2015

Rule 23(a) now states that the trial must be by jury unless the defendant "waives a jury trial in writing," and Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors. Judge Susan Graber has written (Tab 2) to suggest that the Committee consider revising the rule in light of cases holding that an oral waiver is sufficient if it is made knowingly and intelligently. Additionally, she has noted that other cases have held that the failure to make the waiver in writing was harmless error.

The question before the Committee at the September meeting is whether to refer this proposal to a subcommittee for further discussion. To give some context for this discussion, we provide here a brief analysis of other provisions in the rules governing waiver.

A. Written waivers

Many other Criminal Rules require that a party (usually the defendant) who waives a right or consents a certain procedure do so in writing, and other rules require that approvals, stipulations and the like be in writing. These rules draw the party's attention to the importance of the decision being made, help avoid misunderstanding or ambiguity, and by providing a record of the waiver, consent, or other action, also assist in the adjudication of later claims challenging the existence, validity, scope, or nature of the waiver.

Rule 10(b) provides that a defendant who has signed a written waiver of appearance, affirmed receipt of the indictment or information, and is pleading not guilty need not be present if the court accepts the waiver.

Rule 11(a) allows entry of a conditional guilty or nolo plea (with the consent of the court and government) "reserving in writing" appellate review of a specified pretrial motion.

Rule 15(c)(1) provides that a defendant may "waive[] in writing the right to be present" at a deposition.

Rule 17.1 provides that the government may not use any statement by the defendant or counsel made at a pretrial conference unless the statement is "in writing and is signed by the defendant and the defendant's attorney." In this context, the provision of a written statement operates to waive the general rule preventing admission.

Rule 20(a) provides that a prosecution may be transferred to another district if the defendant states "in writing" a wish to plead guilty, consents "in writing" to disposition in the transferee district, and the U.S. Attorneys in both districts "approve the transfer in writing."

Ruler 20(d) provides for transfer of a case involving a juvenile when, inter alia, the juvenile consents to the transfer "in writing" and the U.S. Attorneys in both districts "approve the transfer in writing."

Rule 32(e) provides that unless "the defendant has consented in writing" a presentence report may not be submitted to the court or otherwise disclosed before the defendant has been found guilty or pleaded guilty or nolo contendere.

Rule 32.2 provides for a stay of forfeiture pending appeal and prevents transfer to a third party until the appeal becomes final "unless the defendant consents in writing or on the record."

Rule 43(b)(2) provides that in certain low level misdemeanor cases the defendant need not be present if he or she gives "written consent" and the court agrees to permit arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

Rule 58(b)(3)(A) allows a plea to be taken before a magistrate judge if the defendant consents "either in writing or on the record" to be tried before a magistrate judge and specifically waives trial before a district judge.

Rule 58(c)(2)(a) allows waiver of venue if the defendant "state[s] in writing a desire to plead guilty or nolo contendere," to waive venue, and to consent to the court's disposing of the case in the district.

B. The proposal for oral waiver of right to trial by jury

Allowing an oral, on-the-record waiver of the right to trial by jury, so long as it is knowing and intelligent, would provide for greater procedural flexibility. Several states demand just this and do not require that a jury waiver be in writing. *See, e.g.*, LAFAVE, ISRAEL, KING AND KERR, 6 CRIMINAL PROCEDURE § 22.1(h) at notes 133-136 (3d ed. 2007 and Supps.) (collecting authority); Annot., Sufficiency of waiver of full jury, 93 A.L.R.2d 410 (collecting authority); ABA Principles for Juries and Jury Trials, Principle I.D.2 (2013) ("The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver, personally waives the right to trial by jury in writing *or in open court on the record.*") (emphasis added). This approach would not raise constitutional concerns,

so long as the oral waiver was knowing and voluntary. After all, the right to trial by jury is waived orally when a federal defendant enters a guilty plea under Rule 11.

On the other hand, there are several reasons to hesitate to amend Rule 23's writing requirement.

* First, the requirement of a written waiver in Rule 23 now provides a clear, bright line rule that emphasizes to the defendant the importance of the decision and provides a reliable record should the existence or validity of the waiver be challenged.

* Second, among the many procedural rights for which the Rules now require a written waiver, the Sixth Amendment right to trial by jury is arguably the most important. Indeed, noting the importance of the right to jury, a majority of circuits have endorsed, in *addition* to the written waiver required by rule, some form of colloquy between the defendant and the district judge in order to ensure that the waiver is knowing and voluntary. *See, e.g.*, *United States v. Lilly*, 536 F.3d 190, 197-98 (3d Cir. 2008) (joining and listing authority from First, Second, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits). Also, most states agree that "whether to be tried by a jury is an important matter to be decided by the defendant personally; it is not merely a tactical decision which may be left to defense counsel." LAFAVE, ISRAEL, KING AND KERR, 6 CRIMINAL PROCEDURE § 22.1(h) at note 137 (3d ed. 2007 and Supps).

* Third, it is not clear that the current rule is presenting a problem for courts. There is no suggestion in Judge Graber's memorandum that the effort required to obtain a written waiver is particularly burdensome for trial courts, that the number of cases in which there is no written waiver is increasing, or that defendants, prosecutors, or trial judges are otherwise concerned about the writing requirement.

* Finally, Judge Graber collects a number of cases in which appellate courts have used the harmless error rule to uphold a criminal judgment despite the absence of a valid written waiver, when other evidence indicated that the defendant's jury waiver was knowing and intelligent. It is not clear, however, that the application of the harmless error rule–which preserves convictions and sentences despite violations of a Rule of Criminal Procedure–demonstrates that the underlying Rule itself is unnecessary or unwise.

C. <u>An alternative: judicial colloquy *and* written waiver</u>

As noted above, the majority of circuits now require some form of colloquy in addition to a written waiver to ensure that the waiver of the right to jury trial is knowing and intelligent. If the Committee wishes to consider amending Rule 23, it may wish to consider incorporating this requirement into the text.

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MEMORANDUM

TO: Judge Sutton

FROM: Judge Graber

DATE: August 7, 2015

RE: Suggestions for potential Rule amendments

I recently noticed two provisions in the Federal Rules of Criminal Procedure that might benefit from amendment. If you agree, feel free to share this memo with others, as may be appropriate.

1. Rule 32 governs sentencing, and Rule 32.1 governs revocation of supervised release. We recently held that a "gap" exists in Rule 32.1, and we imported into the revocation context the requirement from Rule 32 that the district court solicit the government's view at sentencing. United States v. Urrutia-Contreras, 782 F.3d 1110, 1113–14 (9th Cir. 2015); see also United States v. Whitlock, 639 F.3d 935, 940 (9th Cir. 2011) (importing into the revocation context certain disclosure requirements from Rule 32). The Rules Committee might consider amending Rule 32.1 in response to Urrutia-Contreras and Whitlock to define more concisely the procedures applicable to revocation proceedings. See Whitlock, 639 F.3d at 939–40 (noting that Rule 32.1 was amended in response to a gap described in United States v. Carper, 24 F.3d 1157 (9th Cir. 1994), superseded in part by rule as stated in United States v. Reyes-Solosa, 761 F.3d 972, 975 n.2

(9th Cir. 2014)).

2. Rule 23 requires that a waiver of the right to a jury trial or a waiver of the 12-member aspect of jury trials be "in writing." Fed. R. Crim. P. 23(a)(1) & (b)(2). In many decisions, circuit courts have held that a defendant may meet the "in writing" requirement orally, so long as the waiver is knowing and intelligent. See, e.g., United States v. Fisher, 912 F.2d 728, 731–33 (4th Cir. 1990); United States v. Saadya, 750 F.2d 1419 (9th Cir. 1985); United States v. Lane, 479 F.2d 1134, 1136 (6th Cir. 1973) (per curiam); United States v. Ricks, 475 F.2d 1326, 1327–28 (D.C. Cir. 1973) (per curiam); see also United States v. Essex, 734 F.2d 832 (D.C. Cir. 1984) (holding that an oral waiver violated Rule 23(b) but that the error was harmless because the oral waiver was knowing and intelligent). The Rules Committee might consider amending Rule 23 either by emphasizing that non-written forms of waiver are insufficient or by replacing the "in writing" requirement with a "knowing and intelligent" requirement, in conformance with courts' actual practice.

Thank you for considering my suggestions.

TAB 3E

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TAB 3E.1

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 32.1; 15-CR-C

DATE: August 31, 2015

Judge Susan Graber has written the Committee (Tab 2) bringing to its attention two cases[10] from the Ninth Circuit in which the courts have imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. She suggests that the Committee consider whether it would be desirable to address these issues in the text of Rule 32.1.

This memorandum provides a brief history of Rule 32.1 and the Ninth Circuit decisions drawing on Rule 32 to fill perceived gaps. As discussed below, Rule 32.1 reflects the development of a body of law regarding the procedural rights of parolees, probationers, and prisoners on supervised release. The Rule was created to implement several decisions of the Supreme Court holding that due process required a hearing, and it has subsequently been amended to include additional procedural rights in response to decisions in the lower courts. However, Rule 32.1 does not address all of the issues that are covered in Rule 32, and in some cases in which the defendant was being sentenced for violating the terms of his supervised release the Ninth Circuit drew upon Rule 32 to address these gaps.

The question for discussion at the September meeting is whether the Committee wishes to refer the proposal to a subcommittee for in-depth consideration. It would be helpful for the Committee to discuss two issues.

First, as a matter of policy, should the government have a right to address the court at a hearing regarding the sentence to be imposed for a violation of the terms of supervised release?

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[10]The analysis in this memo focused on one of these cases, *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), because it appears to present a more significant issue. The issue in the other case, *United States v. Whitlock*, 639 F.3d 935, 940 (9th Cir. 2011), was whether the district court erred when it prohibited the probation officer from disclosing that officer's sentencing recommendation to the defendant. The court held that the district court could prohibit disclosure, adapting the rule of Rule 32(e)(3). If the Committee refers Rule 32.1 to a subcommittee, this issue could be addressed as well.

As described in greater detail below, the Ninth Circuit concluded that the government should be given that opportunity, noting the importance of the court having the views of both parties (as well as the probation officer) before deciding on the sentence.

If the Committee agrees with that decision as a matter of policy, it still leaves the question whether this requirement should be added to the text of Rule 32.1. When considering other rules, such as Rule 11, the Committee has recognized that the Rules of Criminal Procedure may become too complex if they are amended to address every possible issue. Thus the question is whether this issue is sufficiently import to warrant treatment in the text of Rule 32.1.[11]

A. The Evolution of Rule 32.1

Rule 32.1 governs the procedures applicable to revoking or modifying probation or supervised release. As explained in the original Committee Note, the Rule was adopted in 1979 in response to Supreme Court decisions defining the due process rights of probationers and parolees. It was been significantly amended and expanded twice, in 2002 and 2005, to more fully define the procedures applicable in revocation proceedings, incorporating provisions that parallel some, but not all of the procedures in Rule 32. We reprint excepts of the Committee Notes in Tab 3.[12]

As first promulgated in 1979, the rule Subdivision (a)(1) requires, consistent with the holding in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), that a prompt preliminary hearing must be held whenever "a probationer is held in custody on the ground that he has violated a condition of his probation." As initially drafted, the rule listed the requirements for the preliminary hearing, as developed in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and made applicable to probation revocation cases in *Scarpelli.* The notes recognize the distinctive nature of the proceeding: it is not a trial, and thus the Rules of Evidence do not apply and proof beyond a reasonable doubt is not required. On the other hand, the individual has a strong interest in his liberty, and at the final hearing he was entitled to written notice of the alleged violation, disclosure of all the evidence against him, and notice of his right to counsel. He was not required to specifically request the right to confront adverse witnesses, and was given a full opportunity to question the witnesses against him.

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[11]As noted in the previous footnote, if a Subcommittee is appointed, it might also wish to consider whether any other changes in the Rule should be made, such as another gap identified by the Ninth Circuit: the absence of a rule parallel to Rule 32(e)(3) (stating that the district court may direct the probation officer not to disclose the officer's sentencing recommendation to anyone other than the court).

[12]Two other amendments to Rule 32.1 are less relevant to the current enquiry. The rule was amended in 2006 to allow the submission of judgments, warrants, and warrant applications by reliable electronic means. In 2010, 32.1(a)(6) was added, specifying the burden of proof when the issue is the detention or release of the person under 18 U.S.C. § 3142(a)(1) pending further proceedings.

In 2002, the Committee noted that the rule had been "completely revised and expanded," because it was "important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release." The new provisions spelled out the requirement for an initial appearance and addressed the ability of the releasee to question adverse witnesses at the preliminary and revocation hearings, providing for a balancing test, weighing "the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it."

In 2005, the Rule was again expanded to provide that the individual has a right to allocution in revocation proceedings. The Committee Note stated that the amendment was "intended to address a gap in the rule" that had been noted by various courts. As the Note explained, the Eighth and Fifth Circuits had concluded that a right of allocution could be drawn from Rule 32 to fill this gap, but the Sixth and Eleventh Circuits disagreed with that approach. Describing the decision in *United States v. Frazier*, 283 F.3d 1242, 1245 (11th Cir. 2002), and the Committee's decision to fill the gap, the Note explained:

> The *Frazier* court observed that the "problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1." Nonetheless the *Frazier* court held that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." Against this backdrop, the Advisory Committee recognized the importance of allocution, and it proposed the amendments to Rule 32.1(b)(2) and (c)(1) that extended it to both revocation and modification hearings.

B. The Ninth Circuit's "gap filling" decision

In *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), the court of appeals vacated the consecutive sentence the district court had imposed and remanded the case because the district court had not allowed the government an opportunity to address the court on the sentence to be imposed upon revocation.[13] The court began by comparing Rules 32 and 32.1. In contrast to Rule 32(i)(4)(A)(iii), which provides that "[b]efore imposing sentence, the court must . . . provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney," Rule 32.1 grants a defendant the right to make a statement but is silent as to whether the government must also be given an opportunity to do so. Id. at 1112. The court concluded that "[w]hen Rule 32.1 is silent with respect to the matters that must be considered by a district court in imposing a sentence for violating the terms of supervised release, Rule 32 may be used to 'fill in the gap' in Rule 32.1." *Id.* at 1113.

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[13] The procedural posture of *Urrutia-Contreras* was somewhat unusual: the defendant, not the government, raised the issue of the court's failure to allow the government to speak to the proper sentence. The government did not appeal this issue. To the contrary, it argued that Rule 32.1 did not require the court to allow the government to speak. See Appellee's Br. at 10-15.

The *Urrutia-Contreras* court then considered whether the rationale for allowing the government to make a statement at sentencing was applicable in proceedings under Rule 32.1. It concluded that "like the defendant's right to allocute and the probation officer's recommendation, the government's position with respect to the sentence to be imposed for violating the conditions of supervised release is an important factor for the sentencing court to consider and include in its reasoning." *United States v. Booker*, 543 U.S. 220 (2005), requires the district court to consider and discuss the sentencing factors contained in the Sentencing Guidelines and 18 U.S.C. § 3553(a) when imposing a sentence, and this requirement "cannot be met if the district court fails to solicit the government's position, whether at a post-conviction sentencing or at a revocation proceeding." *Urrutia-Contreras*. 782 F.2d at 1113.

The court also reviewed its prior decision, *United States v. Waknine*, 543 F.3d 546 (9th Cir.2008), holding that the failure to allow the government to speak at sentencing was plain error. The court concluded that it is equally important to allow the government to speak to the proper sentence at a revocation proceeding:

> It may appear irregular for a court to make a decision as important as imposing a sentence of incarceration without soliciting the position of all parties. After the court has heard arguments from the defense, and considered a recommendation by the probation officer in the violation report, the imposition of a sentence without hearing the government's recommendation may create the appearance of the court standing in for the government, calling into question the impartiality of the sentencing court.

Id. at 1114. Moreover, this requirement applies regardless whether the government will agree or disagree with the sentencing recommendation:

> Just as the government must be given the opportunity to disagree with a defendant or a probation officer's sentencing recommendation, the government must be given the opportunity to indicate agreement. Even silence in the face of a well-articulated defense argument for a particular sentence may convey the message to the sentencing court that the government has no objection to, or even agrees with, the recommended sentence. This is an important factor that the district court must consider, although, of course, there is no requirement that the district court agree with that position.

Id.

The court did not discuss or even refer to the argument made in the government's appellate brief "that Rules 32.1 and 32 serve different purposes":

> When a defendant is sentenced at a sentencing hearing, he or she is sentenced for a crime against the United States. In that situation, it is clear why Congress would require that the court hear from the government. As the representative of the people, the government should be heard by the court in regards to a sentence being issued to a defendant who has violated the laws of the United States. When a defendant is sentenced at a revocation hearing, however, he or she is sentenced for a breach of the district court's trust. *See United States v.*

Reyes-Solosa, 761 F.3d 972, 975 (9th Cir. 2014). Supervised release is about the district court's supervision of a convicted defendant, not a violation of the laws of the United States. This distinction explains why Congress intentionally left out the district court's requirement to allow the government an opportunity to make a statement regarding the violator's sentence in a revocation hearing in Rule 32.1.[14]

[14] As noted above, it was the defendant, not the government, who argued that the district court erred in failing to allow the government to speak to the sentence upon revocation.

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MEMORANDUM

TO: Judge Sutton

FROM: Judge Graber

DATE: August 7, 2015

RE: Suggestions for potential Rule amendments

I recently noticed two provisions in the Federal Rules of Criminal Procedure that might benefit from amendment. If you agree, feel free to share this memo with others, as may be appropriate.

1. Rule 32 governs sentencing, and Rule 32.1 governs revocation of supervised release. We recently held that a "gap" exists in Rule 32.1, and we imported into the revocation context the requirement from Rule 32 that the district court solicit the government's view at sentencing. United States v. Urrutia-Contreras, 782 F.3d 1110, 1113–14 (9th Cir. 2015); see also United States v. Whitlock, 639 F.3d 935, 940 (9th Cir. 2011) (importing into the revocation context certain disclosure requirements from Rule 32). The Rules Committee might consider amending Rule 32.1 in response to Urrutia-Contreras and Whitlock to define more concisely the procedures applicable to revocation proceedings. See Whitlock, 639 F.3d at 939–40 (noting that Rule 32.1 was amended in response to a gap described in United States v. Carper, 24 F.3d 1157 (9th Cir. 1994), superseded in part by rule as stated in United States v. Reyes-Solosa, 761 F.3d 972, 975 n.2

(9th Cir. 2014)).

2. Rule 23 requires that a waiver of the right to a jury trial or a waiver of the 12-member aspect of jury trials be "in writing." Fed. R. Crim. P. 23(a)(1) & (b)(2). In many decisions, circuit courts have held that a defendant may meet the "in writing" requirement orally, so long as the waiver is knowing and intelligent. See, e.g., United States v. Fisher, 912 F.2d 728, 731–33 (4th Cir. 1990); United States v. Saadya, 750 F.2d 1419 (9th Cir. 1985); United States v. Lane, 479 F.2d 1134, 1136 (6th Cir. 1973) (per curiam); United States v. Ricks, 475 F.2d 1326, 1327–28 (D.C. Cir. 1973) (per curiam); see also United States v. Essex, 734 F.2d 832 (D.C. Cir. 1984) (holding that an oral waiver violated Rule 23(b) but that the error was harmless because the oral waiver was knowing and intelligent). The Rules Committee might consider amending Rule 23 either by emphasizing that non-written forms of waiver are insufficient or by replacing the "in writing" requirement with a "knowing and intelligent" requirement, in conformance with courts' actual practice.

Thank you for considering my suggestions.

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Committee Notes Rule 32.1

1979 Addition

Rule 32.1(a)(1). Since *Morrissey v. Brewer*, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), it is clear that a probationer can no longer be denied due process in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935), that probation is an "act of grace." See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967).

Subdivision (a)(1) requires, consistent with the holding in *Scarpelli* that a prompt preliminary hearing must be held whenever "a probationer is held in custody on the ground that he has violated a condition of his probation." See 18 U.S.C. § 3653 regarding arrest of the probationer with or without a warrant. If there is to be a revocation hearing but there has not been a holding in custody for a probation violation, there need not be a preliminary hearing. It was the fact of such a holding in custody "which prompted the Court to determine that a preliminary as well as a final revocation hearing was required to afford the petitioner due process of law." *United States v. Tucker*, 524 F.2d 77 (5th Cir.1975). Consequently, a preliminary hearing need not be held if the probationer was at large and was not arrested but was allowed to appear voluntarily, *United States v. Strada*, 503 F.2d 1081 (8th Cir.1974), or in response to a show cause order which "merely requires his appearance in court," *United States v. Langford*, 369 F.Supp. 1107 (N.D.Ill.1973); if the probationer was in custody pursuant to a new charge, Thomas v. United States, 391 F.Supp. 202 (W.D.Pa.1975), or pursuant to a final conviction of a subsequent offense, *United States v. Tucker*, supra; or if he was arrested but obtained his release.

Subdivision (a)(1)(A), (B) and (C) list the requirements for the preliminary hearing, as developed in *Morrissey* and made applicable to probation revocation cases in *Scarpelli*. Under (A), the probationer is to be given notice of the hearing and its purpose and of the alleged violation of probation. "Although the allegations in a motion to revoke probation need not be as specific as an indictment, they must be sufficient to apprise the probationer of the conditions of his probation which he is alleged to have violated, as well as the dates and events which support the charge." *Kartman v. Parratt*, 397 F.Supp. 531 (D.Neb.1975). Under (B), the probationer is permitted to appear and present evidence in his own behalf. And under (C), *upon request* by the probationer, adverse witnesses shall be made available for questioning unless the magistrate determines that the informant would be subjected to risk of harm if his identity were disclosed.

Subdivision (a)(1)(D) provides for notice to the probationer of his right to be represented by counsel at the preliminary hearing. Although *Scarpelli* did not impose as a constitutional requirement a right to counsel in all instances, under 18 U.S.C. § 3006A(b) a defendant is entitled to be represented by counsel whenever charged "with a violation of probation."
The federal magistrate (see definition in rule 54(c)) is to keep a record of what transpires at the hearing and, if he finds probable cause of a violation, hold the probationer for a revocation hearing. The probationer may be released pursuant to rule 46(c) pending the revocation hearing.

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Rule 32.1(a)(2). Subdivision (a)(2) mandates a final revocation hearing within a reasonable time to determine whether the probationer has, in fact, violated the conditions of his probation and whether his probation should be revoked. Ordinarily this time will be measured from the time of the probable cause finding (if a preliminary hearing was held) or of the issuance of an order to show cause. However, what constitutes a reasonable time must be determined on the facts of the particular case, such as whether the probationer is available or could readily be made available. If the probationer has been convicted of and is incarcerated for a new crime, and that conviction is the basis of the pending revocation proceedings, it would be relevant whether the probationer waived appearance at the revocation hearing.

The hearing required by rule 32.1(a)(2) is not a formal trial; the usual rules of evidence need not be applied. See *Morrissey v. Brewer*, supra ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"); Rule 1101(d) (e) [sic; probably should be "Rule 1101(d)(3)"] of the Federal Rules of Evidence (rules not applicable to proceedings "granting or revoking probation"). Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. *United States v. Francischine*, 512 F.2d 827 (5th Cir.1975). This hearing may be waived by the probationer.

Subdivisions (a)(2)(A)-(E) list the rights to which a probationer is entitled at the final revocation hearing. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing; (i) the notice under (A) must be written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him.

Under subdivision (a)(2)(E) the probationer must be given notice of his right to be represented by counsel. Although Scarpelli holds that the Constitution does not compel counsel in all probation revocation hearings, under 18 U.S.C. § 3006A(b) a defendant is entitled to be represented by counsel whenever charged "with a violation of probation."

Revocation of probation is proper if the court finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of the probationer that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

See American Bar Association, Standards Relating to Probation § 5.1 (Approved Draft, 1970)
If probation is revoked, the probationer may be required to serve the sentence originally imposed, or any lesser sentence, and if imposition of sentence was suspended he may receive any sentence which might have been imposed. 18 U.S.C. § 3653. When a split sentence is imposed under 18 U.S.C. § 3651 and probation is subsequently revoked, the probationer is entitled to credit for the time served in jail but not for the time he was on probation. *Thomas v. United States*, 327 F.2d 795 (10th Cir.), cert. denied 377 U.S. 1000 (1964); *Schley v. Peyton*, 280 F.Supp. 307 (W.D.Va.1968).

Rule 32.1(b). Subdivision (b) concerns proceedings on modification of probation (as provided for in 18 U.S.C. § 3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. American Bar Association, Standards Relating to Probation § 3.1(c) (Approved Draft, 1970). This avenue is important for two reasons: (1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.
Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation. See generally ABA Standards, supra, § 3.3. The sentencing court is given the authority to shorten the term or end probation early upon its own motion without a hearing. And while the modification of probation is a part of the sentencing procedure, so that the probationer is ordinarily entitled to a hearing and presence of counsel, a modification favorable to the probationer may be accomplished without a hearing in the presence of defendant and counsel. *United States v. Bailey,* 343 F.Supp. 76 (W.D.Mo.1971).

2002 Amendments

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release. To that end, some language formerly located in Rule 40 has been moved to revised Rule 32.1. Throughout the rule, the terms "magistrate judge," and "court" (see revised Rule 1(b)(Definitions)) are used to reflect that in revocation cases, initial proceedings in both felony and misdemeanor cases will normally be conducted before a magistrate judge, although a district judge may also conduct them. But a district judge must make the revocation decision if the offense of conviction was a felony. See 18 U.S.C. § 3401(i) (recognizing that district judge may designate a magistrate judge to conduct a hearing and submit proposed findings of fact and recommendations).

Revised Rule 32.1(a)(1)-(4) is new material. Presently, there is no provision in the rules for conducting initial appearances for defendants charged with violating probation or supervised release--although some districts apply such procedures. Although the rule labels these proceedings as initial appearances, the Committee believed that it was best to separate those proceedings from Rule 5 proceedings, because the procedures differ for persons who are charged with violating conditions of probation or supervised release.

The Committee is also aware that, in some districts, it is not the practice to have an initial appearance for a revocation of probation or supervised release proceeding. Although Rule 32.1(a) will require such an appearance, nothing in the rule prohibits a court from combining the initial appearance proceeding, if convened consistent with the "without unnecessary delay" time requirement of the rule, with the preliminary hearing under Rule 32.1(b).

Revised Rule 32.1(a)(5) is derived from current Rule 40(d).

Revised Rule 32.1(a)(6), which is derived from current Rule 46(c), provides that the defendant bears the burden of showing that he or she will not flee or pose a danger pending a hearing on the revocation of probation or supervised release. The Committee believes that the new language is not a substantive change because it makes no change in practice.

Rule 32.1(b)(1)(B)(iii) and Rule 32.1(b)(2)(C) address the ability of a releasee to question adverse witnesses at the preliminary and revocation hearings. Those provisions recognize that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994).

Rule 32.1(c)(2)(A) permits the person to waive a hearing to modify the conditions of probation or supervised release. Although that language is new to the rule, the Committee believes that it reflects current practice.

The remainder of revised Rule 32.1 is derived from the current Rule 32.1.

2005 Amendments

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon revocation of supervised release. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. See *United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in

Rule 32 was not incorporated into Rule 32.1. See *United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." Id.

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at Rule 32.1(b)(2) revocation hearings, and extends it as well to Rule 32.1(c)(1) modification hearings where the court may decide to modify the terms or conditions of the defendant's probation. In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

2010 Amendments

Subdivision (a)(6). This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. See *United States v. Mincey,* 482 F.Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence.

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TAB 4

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TAB 4A

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Department of Justice

STATEMENT OF THE

U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR A HEARING CONCERNING

INSPECTOR GENERAL ACCESS

PRESENTED

AUGUST 5, 2015

Statement of the
U.S. Department of Justice
Committee on the Judiciary
United States Senate
August 5, 2015

Good morning Chairman Grassley, Ranking Member Leahy, and Members of the Committee. We are pleased to appear before you today to discuss the Department of Justice's unwavering commitment to ensuring that the Office of the Inspector General (OIG) has timely access to all records necessary to complete its reviews, audits, and investigations, consistent with existing law.

The Department greatly appreciates the commitment that the Chairman, the Ranking Member, and other Members of the Committee have shown to guaranteeing that the OIG can effectively and efficiently fulfill its critical oversight functions. As Attorney General Lynch and Deputy Attorney General Yates have stated consistently and unequivocally, the Department shares the belief that an effective, efficient, and independent OIG is absolutely critical to a well-functioning Department of Justice. We recognize and appreciate the critical role of the OIG in identifying misconduct and malfeasance, as well as waste, fraud, and abuse. To that end, the Department has been and remains committed to ensuring that the OIG has access to the information it needs to perform effectively its oversight mission and complete its reviews.

Notwithstanding the Department's view that the OIG should be able to obtain all of the information that it believes is necessary to perform its important oversight role within the Department, the Department has grappled with two different, and potentially conflicting, sets of statutory commands when responding to the OIG's requests for records that could include the contents of intercepted communications, grand jury materials, and consumer credit information. On the one hand, Congress has enacted three statutes that tightly regulate the disclosure of such information: the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (2012) ("Title III"), which prohibits law enforcement and investigative officers from disclosing intercepted communications except in narrow circumstances; Rule 6(e) of the Federal Rules of Criminal Procedure ("Rule 6(e)"), which prohibits attorneys for the government from disclosing grand jury information except pursuant to one of the Rule's express exceptions; and section 626 of the Fair Credit Reporting Act, 15 U.S.C. § 1681u (2012) ("FCRA"), which prohibits the Federal Bureau of Investigation (FBI) from disclosing consumer credit information obtained pursuant to a National Security Letter except in two narrow circumstances. It is important to underscore the sensitivity of all three of these categories of information, which is precisely why Congress designed elaborate statutory schemes to limit their disclosure. On the other hand, however, another statute—the Inspector General Act of 1978 ("IG Act")—grants each inspector general in the federal government a right to obtain access to "all records" of the agency within its jurisdiction.

Background

To assist the Department in resolving the complex legal issues implicated by the interaction of the three statutes described above and the IG Act, in May 2014, then Deputy Attorney General James Cole requested a formal opinion from the Office of Legal Counsel (OLC) to address this issue. Since that time, the Department has continued to work with the OIG to ensure access to the materials the OIG needed, and has directed all components and agencies to provide to the OIG, in a timely fashion, all of the documents needed to complete its reviews to the extent permitted by law. The Department is unaware of any occasion in which the OIG sought access to Title III, grand jury, or FCRA materials and did not receive them. Additionally, it is the experience of the Department that these three categories of information have historically constituted a very small minority of the overall information sought by the OIG in its investigations. Deputy Attorney General Cole also committed to work with the OIG on any legislative remedies necessary, following the OLC opinion, to ensure its access to all the information it needs to effectively perform its oversight mission and complete its reviews, a commitment shared by the current Deputy Attorney General and leadership throughout the Department.

Since her appointment as Acting Deputy Attorney General and following her confirmation, Deputy Attorney General Yates and the Department have worked diligently to find a solution to these issues and continue to work with the OIG, in a genuine spirit of cooperation and collaboration, to expedite its access to the records it needs. Pending the completion of the OLC opinion, the Department took further steps to ensure timely OIG access to the greatest extent possible under the current law. Specifically, on April 23, 2015, Deputy Attorney General Yates issued a Department-wide memorandum to implement a new process to ensure that the OIG promptly receives Title III, grand jury, and FCRA material when it believes that material is necessary for it to complete its reviews, consistent with current controlling statutes. The memorandum noted that the OIG "serves an important function in ensuring that the Department of Justice is run efficiently, effectively, and with integrity," and the memorandum made clear that "[r]esponding to OIG's requests is of the highest priority."

The FBI takes very seriously its obligation to enable the OIG to conduct effective oversight of all of its activities and has been transparent with the Department, the OIG, and Congress concerning the challenges presented by the potentially conflicting statutory commands described above. Notwithstanding these challenges, over the past year, the FBI has provided nearly 400,000 pages of documents and 136,000 e-mails to the OIG. These documents were produced in response to 118 document requests submitted by the OIG to the FBI, with 343 subparts therein. During this same time, the OIG initiated 20 new audits and over 30 investigations directed at the FBI. To fulfill the OIG's requests, the FBI has dedicated almost a dozen individuals to these tasks.

The FBI and the OIG have worked cooperatively to expedite the OIG's access to materials consistent with the law and in accordance with the commitments and goals discussed above. In the past few months, the FBI has taken a number of steps to ensure the OIG receives documents in a timely manner. Specifically, the FBI has moved its document collection and production function back to the Inspection Division. Since that time, the FBI has consistently

provided documents to the OIG in advance of requested deadlines. In addition, the Bureau is actively working to complete one remaining aspect of a document request that was the subject of a prior notification to Congress under Section 218 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2200 (Dec. 16, 2014). In that instance, the OIG has already received all requested e-mails, yet the FBI continues to process 1,325 attachments contained therein. The other three document requests that were the subject of prior notifications to Congress under section 218 have been completed in their entirety.

OLC Opinion

On July 23, 2015, OLC published its memorandum dated July 20, 2015, to Deputy Attorney General Yates, entitled *The Department of Justice Inspector General's Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act* (OLC Opinion). *See* http://www.justice.gov/olc/opinions. In drafting this opinion, OLC had to reconcile two different, and potentially conflicting, sets of statutory commands. On the one hand, in Title III, Rule 6(e), and FCRA, Congress stated that it is unlawful—and sometimes criminal—for Department officials to share the contents of intercepted communications, grand jury materials, and consumer credit information obtained pursuant to a National Security Letter with anyone, except pursuant to specific statutory exceptions. On the other hand, in the IG Act, Congress stated that the OIG may obtain access to "all records" available to the Department, without any express restriction. OLC's role was to determine as a matter of law, in light of these potentially conflicting statutory commands, how much access Congress intended to give the OIG.

OLC began by determining whether Title III, Rule 6(e), and FCRA themselves permit the Department to disclose covered information to the OIG, thereby avoiding any conflict with the IG Act. The opinion concludes that these three statutes permit the Department to disclose covered information to the OIG in connection with many—but not all—of the OIG's investigations and reviews. In particular:

Title III Wiretap Information. The OLC Opinion concludes that Department investigative and law enforcement officers may disclose directly to the OIG the contents of intercepted communications protected by Title III when doing so could aid the disclosing official or the OIG in the performance of their duties related to law enforcement. Such duties could include the OIG's duty to investigate criminal misconduct, to investigate administrative misconduct that has a reasonable prospect of uncovering criminal misconduct, or to conduct broad programmatic reviews of the Department's criminal law enforcement programs, policies, or practices. Consistent with this conclusion, any investigative or law enforcement officer within the Department may disclose the contents of intercepted communications *directly* to the OIG in connection with any investigation or review that meets this objective standard. The OIG does not need to obtain the approval of the Attorney General or anyone else in Department leadership to access Title III information.

Rule 6(e) Grand Jury Material. The OLC Opinion concludes that an "attorney for the government"—which the Federal Rules of Criminal Procedure define as an attorney who may conduct criminal proceedings, such as a prosecutor—may disclose (or authorize disclosure of)

grand jury materials to the OIG if that attorney determines that doing so could assist the attorney in performing her duty to enforce federal criminal law. Much like Title III, Rule 6(e) thus permits Department prosecutors to disclose grand jury information in connection with an OIG investigation of criminal misconduct, an investigation of administrative misconduct that has a reasonable prospect of uncovering criminal misconduct, or a broad programmatic review of the Department's criminal law enforcement programs, policies or practices. And while, unlike Title III, the text of Rule 6(e) requires that a Department prosecutor make the determination that an OIG investigation meets the relevant legal standard, it is critical to underscore that many different Department prosecutors—from Assistant U.S. Attorneys to the Deputy Attorney General—may be the appropriate attorney to make this determination depending on the circumstances, and that the need to seek disclosure from a prosecutor places the OIG on the exact same footing and in the exact same position as any other law enforcement entity—including the FBI or others—seeking access to grand jury materials; and that the determination to be made is an objective determination about the nature of the OIG's investigation, not a determination about whether a prosecutor is inclined to give particular documents to the OIG.

FCRA Material. The OLC Opinion concludes that the FBI may disclose to the OIG consumer information obtained pursuant to section 626 of FCRA if such disclosure could assist in the approval or conduct of foreign counterintelligence investigations, including in the supervision of such investigations on a programmatic or policy basis. Consistent with this conclusion, any employee within the FBI may disclose information protected by FCRA *directly* to the OIG in connection with any investigation or review that meets this objective standard. As with Title III information, the OIG does not need to obtain the approval of anyone in the Department leadership to access FCRA information.

The OLC Opinion also concludes that Title III, Rule 6(e), and FCRA do not permit the Department to disclose covered information to the OIG where these standards are not met. Thus, for example, Department officials may not disclose such information to the OIG in connection with a review that has little or no connection with the Department's criminal activities or foreign counterintelligence investigations, such as a financial audit. But they do permit disclosure in connection with most of the circumstances in which such information would be relevant.

In addition, the OLC Opinion concludes that the IG Act does not override the limits on disclosure contained in Title III, Rule 6(e), and FCRA. As the opinion explains in detail, the IG Act does not refer to those statutes or the information they protect, and its broad, general language does not contain a sufficiently clear statement that Congress intended to override the statutes' carefully crafted limitations. Moreover, the legislative history of the IG Act affirmatively indicates that Congress expected an inspector general's right of access to be subject to statutory limits on disclosure. The opinion also concludes that section 218 of the Consolidated and Further Continuing Appropriations Act, 2015, does not alter this conclusion, in light of the same clear statement of principles that apply to the IG Act, and the strong presumption that appropriations riders do not amend substantive law.

On July 27, 2015, Deputy Attorney General Yates issued a Department-wide memorandum providing guidance consistent with the OLC Opinion. As outlined by Deputy Attorney General Yates in this Department-wide guidance, responding to the OIG's requests is

of the highest priority. Consistent with the OLC Opinion, the guidance directs components to provide Title III and FCRA material directly to the OIG, and states that different attorneys for the government, as defined in the Federal Rules of Criminal Procedure, may provide grand jury material to the OIG depending on the circumstances.

*　　*　　*

We remain committed to continuing to work with Congress and the OIG to ensure that the OIG has access to all of the information it requires to fulfill its essential oversight functions of the Department. More specifically, we reiterate our commitment—shared by the Attorney General, Deputy Attorney General, FBI Director, Drug Enforcement Administrator, Bureau of Alcohol, Tobacco, Firearms and Explosives Director, U.S. Marshals Service Director, and leadership throughout the Department—to work with the OIG and Members of Congress on legislation that enables the Department to comply with the law while providing the OIG with the documents it needs as quickly as possible. Thank you for the opportunity to provide the Department's perspective on these issues.

TAB 4B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 4. Arrest Warrant or Summons on a Complaint**

2 **(a) Issuance.** If the complaint or one or more affidavits
3 filed with the complaint establish probable cause to
4 believe that an offense has been committed and that
5 the defendant committed it, the judge must issue an
6 arrest warrant to an officer authorized to execute it.
7 At the request of an attorney for the government, the
8 judge must issue a summons, instead of a warrant, to a
9 person authorized to serve it. A judge may issue more
10 than one warrant or summons on the same complaint.
11 If an individual defendant fails to appear in response
12 to a summons, a judge may, and upon request of an
13 attorney for the government must, issue a warrant. If
14 an organizational defendant fails to appear in response

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

15 to a summons, a judge may take any action authorized
16 by United States law.
17 * * * * *
18 **(c) Execution or Service, and Return.**
19 **(1)** ***By Whom.*** Only a marshal or other authorized
20 officer may execute a warrant. Any person
21 authorized to serve a summons in a federal civil
22 action may serve a summons.
23 **(2)** ***Location.*** A warrant may be executed, or a
24 summons served, within the jurisdiction of the
25 United States or anywhere else a federal statute
26 authorizes an arrest. A summons to an
27 organization under Rule 4(c)(3)(D) may also be
28 served at a place not within a judicial district of
29 the United States.
30 **(3)** ***Manner.***
31 (A) A warrant is executed by arresting the

32 defendant. Upon arrest, an officer
33 possessing the original or a duplicate
34 original warrant must show it to the
35 defendant. If the officer does not possess
36 the warrant, the officer must inform the
37 defendant of the warrant's existence and of
38 the offense charged and, at the defendant's
39 request, must show the original or a
40 duplicate original warrant to the defendant
41 as soon as possible.
42 (B) A summons is served on an individual
43 defendant:
44 (i) by delivering a copy to the defendant
45 personally; or
46 (ii) by leaving a copy at the defendant's
47 residence or usual place of abode with
48 a person of suitable age and discretion

49 residing at that location and by
50 mailing a copy to the defendant's last
51 known address.
52 (C) A summons is served on an organization in
53 a judicial district of the United States by
54 delivering a copy to an officer, to a
55 managing or general agent, or to another
56 agent appointed or legally authorized to
57 receive service of process. ~~A copy~~If the
58 agent is one authorized by statute and the
59 statute so requires, a copy must also be
60 mailed to the organization~~organization's~~
61 ~~last known address within the district or to~~
62 ~~its principal place of business elsewhere in~~
63 ~~the United States~~.

64 (D) A summons is served on an organization
65 not within a judicial district of the United
66 States:
67 (i) by delivering a copy, in a manner
68 authorized by the foreign
69 jurisdiction's law, to an officer, to a
70 managing or general agent, or to an
71 agent appointed or legally authorized
72 to receive service of process; or
73 (ii) by any other means that gives notice,
74 including one that is:
75 (a) stipulated by the parties;
76 (b) undertaken by a foreign authority
77 in response to a letter rogatory, a
78 letter of request, or a request
79 submitted under an applicable
80 international agreement; or

81 (c) permitted by an applicable

82 international agreement.

83 * * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

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1 **Rule 41. Search and Seizure**

2 * * * * *

3 **(b)** ~~**Authority to Issue a Warrant**~~**Venue for a Warrant**
4 **Application.** At the request of a federal law
5 enforcement officer or an attorney for the
6 government:

7 * * * * *

8 **(6)** a magistrate judge with authority in any district
9 where activities related to a crime may have
10 occurred has authority to issue a warrant to use
11 remote access to search electronic storage media
12 and to seize or copy electronically stored
13 information located within or outside that district
14 if:
15 (A) the district where the media or information
16 is located has been concealed through
17 technological means; or

18 (B) in an investigation of a violation of
19 18 U.S.C. § 1030(a)(5), the media are
20 protected computers that have been
21 damaged without authorization and are
22 located in five or more districts.
23 * * * * *
24 **(f) Executing and Returning the Warrant.**
25 **(1)** ***Warrant to Search for and Seize a Person or***
26 ***Property.***
27 * * * * *
28 (C) *Receipt.* The officer executing the warrant
29 must give a copy of the warrant and a
30 receipt for the property taken to the person
31 from whom, or from whose premises, the
32 property was taken or leave a copy of the
33 warrant and receipt at the place where the
34 officer took the property. For a warrant to

35 use remote access to search electronic
36 storage media and seize or copy
37 electronically stored information, the
38 officer must make reasonable efforts to
39 serve a copy of the warrant and receipt on
40 the person whose property was searched or
41 who possessed the information that was
42 seized or copied. Service may be
43 accomplished by any means, including
44 electronic means, reasonably calculated to
45 reach that person.
46 * * * * *

Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

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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 ~~period~~ time after ~~service~~ being served and service is

6 made ~~in the manner provided~~ under Federal Rule of

7 Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving

8 with the clerk), ~~(E),~~ or (F) (other means consented to),

9 3 days are added after the period would

10 otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

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