ADVISORY COMMITTEE
ON
APPELLATE RULES

San Francisco, CA
April 28, 2006

Agenda for Spring 2006 Meeting of
Advisory Committee on Appellate Rules
April 28, 2006
San Francisco, California

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JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Honorable Thomas S. Zilly
United States District Judge
United States District Court
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2600

Honorable Susan C. Bucklew
United States District Judge
United States District Court
United States Courthouse
801 North Florida Avenue, Suite 1430
Tampa, FL 33602

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Professor Patrick J. Schiltz
University of St. Thomas
School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Professor Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Box 90360
Durham, NC 27708-0360

Professor Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Members:

Honorable Jeffrey S. Sutton
United States Circuit Judge
United States Court of Appeals
260 Joseph P. Kinneary
United States Courthouse
85 Morconi Boulevard
Columbus, OH 43215

Honorable T.S. Ellis III
United States District Judge
United States District Court
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314-5799

Honorable Randy J. Holland
Associate Justice of the
Supreme Court of Delaware
44 The Circle
Georgetown, DE 19947

Dean Stephen R. McAllister
University of Kansas School of Law
1535 West 15th Street
Lawrence, KS 66045

Mark I. Levy, Esquire
Kilpatrick Stockton LLP
607 14th Street, N.W., Suite 900
Washington, DC 20005-2018

Maureen E. Mahoney, Esquire
Latham & Watkins LLP
555 11th Street, N.W., Suite 1000
Washington, DC 20004-1304

James F. Bennett, Esquire
Bryan Cave LLP
One Metropolitan Square, 211 N. Broadway
St. Louis, MO 63102-2750

Solicitor General (ex officio)
Honorable Paul D. Clement
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5143
Washington, DC 20530

Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 7513
Washington, DC 20530

March 27, 2006
Projects

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Reporter:

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Advisors and Consultants:

Charles R. Fulbruge III
Clerk of Court
United States Court of Appeals
109 John Minor Wisdom Building
600 Camp Street
New Orleans, LA 70130

Liaison Member:

Honorable J. Garvan Murtha
United States District Judge
United States District Court
204 Main Street
Brattleboro, VT 05301

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON APPELLATE RULES

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Chair			Chair: 2005	2008
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Kermit Edward Bye	C	Eighth Circuit	2005	2008
Paul D. Clement*	DOJ	Washington, DC	-----	Open
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2006
Randy J. Holland	JUST	Delaware	2004	2007
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Jeffrey S. Sutton	C	Sixth Circuit	2005	2008
Patrick J. Schiltz	ACAD	Minnesota	1997	Open
Reporter				

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

Advisory Committee on Appellate Rules
Table of Agenda Items — March 2006

FRAP Item	Proposal	Source	Current Status
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Standing Committee returned to Advisory Committee for further study 06/04; referred to Federal Judicial Center for study Approved with further changes by Advisory Committee 04/05 Approved by Standing Committee 06/05 Approved with changes by Judicial Conference 09/05
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04 Draft approved 04/05 for submission to Standing Committee Approved for publication by Standing Committee 06/05 Published for comment 08/05
04-04	Amend FRAP 25(a) to authorize courts to mandate electronic filing.	Hon. John W. Lungstrum (D. Kan.) on behalf of CACM	Awaiting initial discussion Draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 11/04 Published for comment 11/04 Approved with changes by Advisory Committee 04/05 Approved with changes by Standing Committee 06/05 Approved by Judicial Conference 09/05
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice
05-04	Amend FRAP 41 to address *Bell v. Thompson* issue.	John G. Kester, Esq.	Awaiting initial discussion
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Awaiting initial discussion
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Awaiting initial discussion
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Awaiting initial discussion
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Awaiting initial discussion
06-03	Add new FRAP 28(g) to bar pro se filings by represented parties.	Solicitor General	Awaiting initial discussion

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Minutes of Spring 2005 Meeting of
Advisory Committee on Appellate Rules
April 18, 2005
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 18, 2005, at 9:15 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Robert D. McCallum, Jr., Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee, and his law clerk, Ms. Brook Coleman; Judge J. Garvan Murtha, liaison from the Standing Committee; Ms. Marcia M. Waldron, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

Judge Alito welcomed Justice Holland and Dean McAllister to the Committee. Judge Alito also said that the Committee was pleased to have Associate Attorney General McCallum representing the Solicitor General at this meeting.

II. Approval of Minutes of November 2004 Meeting

The minutes of the November 2004 meeting were approved.

III. Report on January 2005 Meeting of Standing Committee

The Reporter said that this Advisory Committee had not requested action on any items at the Standing Committee's January 2005 meeting.

The Reporter said that Judge Alito had described the intention of the Advisory Committee to take a "dynamic-conformity" approach to protecting the privacy of court filings, permitting the Bankruptcy, Civil, and Criminal Rules Committees to make the policy choices,

and incorporating those choices by reference in the Appellate Rules. The Reporter said that the Standing Committee expressed support for that approach.

The Reporter also said that Judge Alito had described the excellent study that the FJC had done on the proliferation of local rules regarding briefing. This provoked an animated discussion among members of the Standing Committee, with a couple of attorney members urging the Advisory Committee to aggressively pursue more uniformity, and a couple of judge members urging the Advisory Committee to instead exercise restraint and permit circuits leeway to reflect local conditions. It was clear that members of the Standing Committee were not of one mind on the question of whether substantially more uniformity in briefing rules would be either feasible or desirable.

IV. Action Items

A. Item No. 01-01 (new FRAP 32.1 — unpublished opinions)

Judge Alito introduced the following proposed amendment and Committee Note:

Rule 32.1. Citing Judicial Dispositions

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

(b) **Copies Required.** If a party cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of unpublished opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as unpublished or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court — federal or state. In particular, it takes no position on whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional. *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). (Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), of course, a federal court sitting in a diversity case is required to respect state law concerning the precedential effect of state-court decisions on matters of state law.) Rule 32.1 addresses only the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an unpublished opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because a party hopes that it will influence the court as, say, the opinion of another court of appeals or a district court might. Some circuits have freely permitted the citation of unpublished opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances.

Parties seek to cite unpublished opinions in another context in which parties do not argue that the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an argument by pointing to the presence or absence of a substantial number of unpublished opinions on a particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most no-citation rules do not clearly address the citation of unpublished opinions in this context.

Rule 32.1(a) is intended to replace these inconsistent and unclear standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal or state court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of unpublished opinions. For example, a court may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. In an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither Rule 32.1 nor this Note takes any position — they cannot be justified as a policy matter.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize

unpublished opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of unpublished opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, unpublished opinions are as readily available as "published" opinions, and soon every court of appeals will be required to post all of its decisions — including unpublished decisions — on its website "in a text searchable format." *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.

As the original justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if all unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g.*, *Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). Unpublished opinions are often read and cited precisely because they can contain valuable information or insights. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about unpublished opinions.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues

imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions, because judges know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished decisions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. It is, of course, true that every court is different. But the federal courts of appeals are enough alike, and have enough in common with state supreme courts, that there should be *some* evidence that permitting citation of unpublished opinions results in, say, opinions being issued more slowly. No such evidence exists, though.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand. Because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about the impact on judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions,

attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which make unpublished opinions widely available at little or no cost.

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, Rule 32.1 abolishes such rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion must provide a copy of that opinion to the court and to the other parties, unless that opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the unpublished opinions cited in

their briefs or other papers. Unpublished opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of unpublished opinions, requiring parties to file and serve copies of every unpublished opinion that they cite is unnecessary and burdensome and is an example of a restriction forbidden by Rule 32.1(a).

Judge Alito reminded the Committee that, after publishing Rule 32.1 for public comment, the Committee approved the proposed rule at its April 2004 meeting. But the Standing Committee returned Rule 32.1 to the Advisory Committee for further study. The Standing Committee noted that many of the claims of Rule 32.1's opponents were capable of being tested empirically, and the Standing Committee wanted to make certain that every reasonable effort was made to gather information before making a final decision about Rule 32.1.

Judge Alito said that, over the past year, Dr. Reagan and his colleagues at the FJC have conducted an exhaustive study. The study is mostly, but not entirely, concluded. The research that has been completed was summarized in a 134-page report entitled *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report*. That report was distributed to members of the Advisory Committee before the meeting. A complete report will be circulated to members of the Standing Committee before their meeting in June.

Judge Alito said that, before calling on Dr. Reagan to describe the results of the study, he wanted to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research. Judge Alito acknowledged that the study was a major undertaking, but said that it had proven to be worth the effort, as it had supplied much-needed data to help the Advisory and Standing Committees assess the validity of arguments for and against Rule 32.1 that relied largely on speculation.

Dr. Reagan said that the FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. The FJC is done compiling the results of the two surveys (although a few more attorney responses might trickle in), but the FJC is not yet done with its analysis of the briefs and opinions.

Dr. Reagan said that the judges did not receive identical surveys. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C.

Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. Attorneys, by contrast, received identical surveys. Dr. Reagan said that the response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule

32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that

view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1 have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed to explain this anomaly, Dr. Reagan responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1 point), "a little less burdensome" (2 points), "no appreciable impact" (3 points), "a little bit more burdensome" (4 points), and "substantially more burdensome" (5 points). The average "score" was 3.1. In short, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

Judge Alito said that the AO had also done research for the Advisory Committee. Judge Alito said that, before calling on Mr. Rabiej to describe the AO's findings, he wanted to thank everyone at the AO for their hard work.

Mr. Rabiej said that the AO had identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). Mr. Rabiej reported that the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of

summary dispositions. The data failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Committee discussed the FJC and AO studies at length. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, demonstrated that the arguments against Rule 32.1 were "not proven." Some Committee members — including one opponent of Rule 32.1 — went further and said that the studies in some respects actually refuted those arguments.

A few members cautioned that it was important not to overstate the results of the studies. The studies relied to a substantial extent on predictions, and predictions are inherently unreliable. One member said that the claims of Rule 32.1's opponents were not only "not proven," but "not provable." Other members pointed out, though, that the AO's work did not rely at all on predictions, and that a good part of the FJC's work involved asking judges and attorneys what *had happened*, not what *will happen*.

A member pointed out — and Mr. Rabiej agreed — that the AO's data were inherently limited. Over a one- or two-year period, there could be many reasons why case disposition times might increase or decrease. The AO's study makes it fairly clear that liberalizing or abolishing no-citation rules does not cause an immediate and substantial increase in disposition times or in summary dispositions, but it does not show much more than that.

A member said that, in his view, one shortcoming of the FJC study is that it was not precise about the different *types* of unpublished opinions. Unpublished opinions vary dramatically, from one short paragraph that says little more than "we affirm for the reasons given by the district court" to 20 or more pages of detailed factual and legal analysis. The member said that simply asking judges about "unpublished opinions" — without differentiating among types of unpublished opinions — might fail to capture some shifts in judicial behavior that would be occasioned by Rule 32.1. For example, the member thought it likely that judges would issue the same number of unpublished opinions, but that more of those opinions would be of the one-paragraph variety.

Dr. Reagan responded that, in designing its study, the FJC had to sacrifice some precision for brevity. In general, the longer the survey, the lower the response rate. The FJC tried to design a survey that was long enough to be helpful but short enough to be answered. Asking about "long" unpublished opinions and "medium" unpublished opinions and "short" unpublished opinions would have added a lot of length and complexity to the survey and likely reduced the response rate.

Dr. Reagan and a couple of members also pointed out that the FJC had asked judges about the impact of liberalizing citation rules on the *length* of unpublished opinions. For example, the FJC asked the judges in the four restrictive circuits and in the six discouraging

circuits whether approval of Rule 32.1 would result in changes to the length of unpublished opinions. That question would seem to get at the point that concerned the member.

One member who had voted against Rule 32.1 in the past said that he had changed his mind in light of the FJC and AO studies and in light of his own further reflections. Although he was not yet prepared to support a permissive rule such as Rule 32.1, he was prepared to support a discouraging rule, such as the rule that had originally been proposed by the Solicitor General. He proposed that Rule 32.1 be amended to provide:

> (a) Citation of a written decision or disposition by the court that it determines is "not for publication" or "non-precedential" or the like is disfavored, and permitted only when: (a) it has persuasive value on a material issue [that has not been (adequately) addressed in a published decision] [and no published decision would serve as well], (b) it demonstrates the existence of a [conflict] [lack of consistency] among the court's decisions, (c) relevant to establish res judicata, collateral estoppel or law of the case, and (d) relevant for factual purposes to show double jeopardy, notice, abuse of the writ, entitlement to attorneys' fees, sanctionable conduct, related cases, or the like.

The member said that imposing a discouraging rule on the circuits would adopt the approach now taken by six circuits — a near majority — rather than the approach taken by only three circuits. Moreover, the approach would reflect what the member said he took to be the bottom line of the FJC study: that citation of unpublished opinions is generally not very useful, but there are some unpublished opinions that should be citable. The member said that, although this approach raised the possibility of satellite litigation over whether the citation of a particular unpublished opinion was proper, he thought that much of that satellite litigation could be prevented if the Committee Note would state clearly that a party who objected to the citation of an unpublished opinion should just state the objection in the party's brief and not file a motion to strike.

A second member said that he, too, had voted against Rule 32.1, but that he, too, was willing to support a version of a discouraging citation rule. He does not believe that circuits should be free to altogether prohibit the citation of unpublished opinions in unrelated cases. He believes that unpublished opinions are sometimes useful. Moreover, he believes that opinions are sometimes designated as unpublished for reasons that are improper or mistaken, and that allowing parties to cite unpublished opinions would provide a check on this practice. At the same time, he does not support Rule 32.1 because he believes that circuits should be free to require parties to provide a good reason for citing an unpublished opinion.

The second member said that he cannot support the proposal by the first member because it would force the permissive circuits to become discouraging circuits. In the second member's view, if a circuit wants to freely permit the citation of unpublished opinions, it should be able to

do so. Judge Levi asked whether the goals of the second member might be accomplished by removing the words "or restrict" from proposed Rule 32.1(a), so that the rule would read:

> **(a) Citation Permitted.** A court may not prohibit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

A couple of members pointed out that such a rule would not require a single circuit to change its current practice. No circuit altogether prohibits the citation of unpublished opinions; for example, every circuit allows unpublished opinions to be cited to establish res judicata. To accomplish the member's goals, Rule 32.1 would have to do more than bar circuits from "prohibiting" the citation of unpublished opinions.

After further discussion, the second member suggested that the first member's proposal be changed to provide as follows:

> (a) Citation of a written decision or disposition by the court that it determines is "not for publication" or "non-precedential" or the like shall not be prohibited, except that courts may, by local rule, permit the citation of such opinions only when: (a) it has persuasive value on a material issue [that has not been (adequately) addressed in a published decision] [and no published decision would serve as well], (b) it demonstrates the existence of a [conflict] [lack of consistency] among the court's decisions, (c) relevant to establish res judicata, collateral estoppel or law of the case, and (d) relevant for factual purposes to show double jeopardy, notice, abuse of the writ, entitlement to attorneys' fees, sanctionable conduct, related cases, or the like.

The other members of the Committee said that they would not support a discouraging version of Rule 32.1, regardless of how it was worded. These members said that a discouraging version would be inconsistent with almost all of the reasons that the Committee has given for proposing Rule 32.1, such as disagreement with the proposition that courts can dictate when their official public actions may be cited. These members gave additional reasons for not supporting a discouraging version of Rule 32.1, including:

— The version proposed by the first member would force the permissive circuits to restrict the citation of unpublished opinions. Judge Levi stressed that, although the Standing Committee has not yet voted on Rule 32.1, it is clear that there are several members who strongly support the rule, and who would strongly oppose any rule that seemed to endorse restrictions on the citation of unpublished opinions, such as the discouraging versions proposed by the two members.

— The restrictions in a discouraging version are likely to be ignored. For years, Rule 35(b) has instructed parties not to petition for rehearing unless an opinion conflicts with another opinion or addresses a question of "exceptional importance." And yet parties routinely petition for rehearing in cases that do not come close to meeting those criteria. A discouraging version would accomplish little, while at the same time putting the Committee in the position of endorsing the view that unpublished opinions may be treated as "second-class precedent" — a question on which the Committee has been careful to take no position.

— A discouraging version would do little to ease the concerns of the judges who have opposed Rule 32.1. Those judges have said that, if their unpublished opinions can be cited, they will spend much more time preparing those opinions. Under a discouraging citation rule, a judge will not know whether his or her opinion will be cited in the future. Thus, he or she will have to behave no differently than he or she would under a permissive rule.

Justice Holland said that his court — the Delaware Supreme Court — had adopted a rule similar to Rule 32.1 about 15 years ago, and the court's experience has been entirely positive. He said that unpublished opinions are not cited much, and citation of unpublished opinions is not often helpful, but he and his colleagues nevertheless *want* to know if their court has addressed an issue in the past.

Judge Stewart said that he disagrees with those who dismiss the FJC and AO studies as involving mere predictions. The fact is that three of the circuits — including his own, the Fifth Circuit — have real-world experience with rules similar to Rule 32.1, and these circuits have experienced none of the problems predicted by Rule 32.1's opponents. The Fifth Circuit is one of the largest circuits, and its per-judge caseload is always the highest or second-highest in the nation. It has a huge prisoner population, and it confronts a huge amount of pro se litigation. And yet it has had absolutely no problem living under a rule similar to Rule 32.1.

Several other members agreed with Justice Holland and Judge Stewart that Rule 32.1 should be approved.

At Judge Levi's request, the Committee moved on to the question of retroactivity: Should Rule 32.1 apply only to unpublished opinions issued after the effective date of the rule? Although one member said that he would support a prospective-only rule, other members disagreed. They pointed out that a rule that applied only prospectively would be inconsistent with almost all of the reasons why the Committee had approved Rule 32.1. How can the Committee argue, for example, that Article III courts should not be able to bar citation of their own opinions, and then approve a rule that allows Article III courts to bar citation of tens of thousands of their own opinions?

In addition, a prospective-only rule would appear to endorse the argument that judges will have to spend much more time drafting unpublished opinions — or would draft unpublished opinions much differently — if those opinions were citable. The Committee has consistently rejected this argument, and the argument now seems even weaker in light of the FJC and AO studies.

Members also expressed concern that a prospective-only rule would create a patchwork of rules and make the disuniformity problem even worse. A single court such as the D.C. Circuit might end up with one rule that governs the citation of one group of unpublished opinions, a second rule that governs the citation of another group, and a third rule (Rule 32.1) that governs the citation of yet another group.

After further discussion, the Committee agreed that, if Rule 32.1 is approved, it should be applied to all unpublished opinions — past and future. If either the Standing Committee or the Judicial Conference were to defeat Rule 32.1, and if it were to appear that a prospective-only version would pick up the necessary votes, the Committee would consider a change. For now, though, the Committee will stick with Rule 32.1 as written.

The final issue addressed by the Committee was the question of Rule 32.1's applicability to the unpublished opinions of state courts. At its June 2004 meeting, the Standing Committee asked the Advisory Committee to give thought to a concern that was raised by Chief Justice Charles Wells of the Florida Supreme Court (a member of the Standing Committee). Chief Justice Wells said that some state judges are concerned about the impact that Rule 32.1 would have on state law.

Members were of two minds. On the one hand, members did not think that the concerns of the state judges were well founded. The unpublished opinions of state courts already can be cited in most federal appellate courts, as state judges do not have the power to tell litigants what they may or may not cite in federal court. There is no evidence that such citation has caused any problems. Moreover, it is clear that under *Erie R.R. Co. v. Tompkins* a federal court sitting in a diversity case must respect a state court's determination that its unpublished opinions are not binding precedent on issues of state law. It is therefore difficult to know why state judges would be concerned about Rule 32.1.

On the other hand, the focus of the Committee from the beginning has been on federal opinions. Most federal appellate courts do not now restrict the citation of state court opinions, and it is highly unlikely that federal courts will do so if Rule 32.1 is approved. Removing state court opinions from the scope of Rule 32.1 would thus be a costless way of providing assurance to state court judges and eliminating one more objection to Rule 32.1.

A member moved that Rule 32.1 be amended by inserting the word "federal" in front of "judicial opinions" in subdivision (a) and in front of "judicial opinion" in subdivision (b), and

that the Reporter be instructed to make conforming changes to the Committee Note. The motion was seconded. The motion carried (8-0, with one abstention).

A member moved that Rule 32.1 be approved as amended. The motion was seconded. The motion carried (7-2).

A member asked that the Reporter insert into the Committee Note a citation to the FJC study. The Reporter said that he would do so.

B. Item No. 03-10 (new FRAP 25(a)(5) — electronic filing/privacy protections)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. All other proceedings are governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

* * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security

concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order or the review of a decision of the tax court — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

The Reporter reminded the Committee that the E-Government Act requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, Judge Levi appointed an E-Government Subcommittee to work with the advisory committees to develop a privacy-rule template that all of the advisory committees could then adopt with minor changes. That template has been through two rounds of review by the advisory committees, and several issues still need to be resolved.

At its November 2004 meeting, this Committee decided that, rather than try to pattern an Appellate Rule after the template, the Committee would instead amend the Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions can be left to the Committee on Court Administration and Case Management ("CACM") and to the other advisory committees — all of whom have far more of a stake in the privacy issues than this Committee — and the Appellate Rules will not have to be amended continually to keep up with changes to the other rules of practice and procedure. The Committee instructed the Reporter to draft a rule reflecting this "dynamic-conformity" approach.

The Reporter said that drafting such a rule proved more difficult than he had anticipated, in part because of complications caused by bankruptcy cases. But with the assistance of the other reporters — particularly Prof. Ed Cooper (Civil) and Prof. Jeff Morris (Bankruptcy) — he was able to draft a rule. That rule has been circulated to the other reporters, and all agree that it should work nicely.

Several members said that they continue to believe that the Appellate Rules should adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. They believe that the rule drafted by the Reporter should work well.

A member asked how trial exhibits will be treated under the proposed rule, given that they are not filed in the district court, but often filed in the court of appeals. The Reporter said that it depended on what rule governed the case in the district court. For example, if the case was governed by Civil Rule 5.2 in the district court, then Civil Rule 5.2 will apply to the exhibits filed in the court of appeals.

Another member asked why the second sentence was necessary. The Reporter said that the first sentence applies to "[a]n appeal." Although the first sentence will cover most of the business of the courts of appeals, it will not cover some things, such as original proceedings commenced by the filing of a petition for extraordinary relief under Appellate Rule 21.

A member suggested that the second sentence of the second paragraph of the Committee Note be amended by adding an explicit reference to petitions for extraordinary relief. By consensus, the Committee asked the Reporter to make the change.

A member moved that proposed Rule 25(a)(5) be approved for publication. The motion was seconded. The motion carried (unanimously).

C. Item No. 04-04 (FRAP 25(a) — authorize courts to mandate electronic filing)

Judge Alito introduced the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with technical

standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 25(a)(2)(D).

Judge Alito said that the proposed amendment to Appellate Rule 25(a)(2)(D) would authorize the courts of appeals to enact local rules that would require all papers to be filed electronically. At its last meeting, the Committee approved the proposed amendment for publication on an expedited basis. The Bankruptcy Rules Committee approved for publication an identical amendment to Bankruptcy Rule 5005(a)(2), and the Civil Rules Committee approved for publication an identical amendment to Civil Rule 5(e) (which is incorporated by reference into the Criminal Rules). The three proposed amendments were published in November 2004 and accompanied by virtually identical Committee Notes. The question now before this Committee is whether to give final approval to the proposed amendment to Appellate Rule 25(a)(2)(D).

A member said that, although the comments on the proposed amendment were not many, most of those comments made the same argument: that the national rule should either include a hardship exception or require that local rules include a hardship exception. The member said that he thought the concerns raised by the commentators were legitimate. Judge Levi responded that the advisory committees initially thought that it would be sufficient to caution in the Committee Notes that exceptions should be made to accommodate those for whom electronic filing would be impossible or difficult. However, a number of thoughtful commentators disagreed, and their arguments persuaded the Bankruptcy and Civil Rules Committees. At their recent meetings, both Committees agreed that the national rules should require that local rules mandating electronic

filing include a hardship exception. Both Committees agreed that the national rules should not spell out the scope of the hardship exception, but merely require that *a* hardship exception be included in local rules mandating electronic filing.

After a brief discussion, the Committee agreed that the national rule should include a hardship exception. The Reporter noted that the hardship exception approved by the Civil Rules Committee differed from the hardship exception approved by the Bankruptcy Rules Committee, and thus that the chairs and reporters of the advisory committees would have to get together to work out common language. The Reporter asked Judge Levi whether, given that fact, it would be sufficient for the Appellate Rules Committee simply to agree that a hardship exception should be incorporated, but leave the drafting of the exception to the advisory committee chairs and reporters — and, ultimately, to the Standing Committee. Judge Levi said that he thought it made sense to proceed in that manner.

A member asked about a concern raised by Judge Sandra L. Lynch of the First Circuit. Judge Lynch believes that many of the courts of appeals are likely to enact local rules that require parties to file their briefs electronically, but that also require parties to file one or more paper copies of their briefs. On her circuit, for example, no judge wants to receive *only* an electronic copy of a brief, although there are some who would like to receive an electronic copy *in addition to* a paper copy. The First Circuit's local rules are thus likely to require a "written" copy or "paper" copy, in addition to an electronic copy. But the last sentence of Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Judge Lynch's concern is that Rule 25(a)(2)(D) has defined both "written" and "paper" to mean "electronic," leaving the courts of appeals without an adjective to describe "real" paper. Judge Lynch would like to add a sentence to the Committee Note clarifying that nothing in Rule 25(a)(2)(D) should be read to prohibit a court from requiring a "real" paper copy of a filing — a sentence such as the following: "A local rule may require that both electronic and 'hard' copies of a paper be filed; nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise."

A couple of members, as well as Judge Levi, said that they would like to accommodate Judge Lynch. A member asked whether Judge Lynch's concern should be addressed in the text of the rule. The Reporter said that addressing the concern in the text of Rule 25(a)(2)(D) would likely result in differences between the Appellate Rule and the corresponding Bankruptcy and Civil Rules. Those rules are now virtually identical, and the Standing Committee would like to keep them as close as possible. The Reporter also said that a sentence in the Committee Note is highly likely to solve the problem — and, if it does not, the Committee always has the option of amending the rule again.

A member moved that the proposed amendment to Rule 25(a)(2)(D) be approved, with the understanding that a hardship exception will be added to the rule and a sentence addressing Judge Lynch's concern will be added to the Committee Note. The motion was seconded. The motion carried (unanimously).

Before leaving the topic of electronic filing, members of the Committee provided comments on *Draft Model Local Appellate Rules for Electronic Filing*, which Mr. Rabiej had distributed to the Committee, and which will be considered by CACM at its next meeting. Mr. Rabiej said he would communicate the Committee's comments to CACM.

V. Discussion Items

A. Item Nos. 02-16 & 02-17 (FRAP 28 & 32 — inconsistent local rules on briefs and covers of briefs)

Judge Alito reminded the Committee that Item Nos. 02-16 and 02-17 arose out of complaints about variations in local circuit rules regarding briefing. The Committee discussed the problem at its November 2003 meeting and decided to ask the FJC to collect further information. After an exhaustive study, Ms. Leary and the FJC produced a comprehensive report entitled *Analysis of Briefing Requirements in the United States Courts of Appeals*. That report was discussed at length by the Committee at its November 2004 meeting. The Committee determined that it would not undertake a major effort to bring about uniformity or near-uniformity in briefing requirements. Members disagreed about the importance of uniformity in this area, but agreed that, desirable or not, uniformity is simply not achievable. At the same time, the Committee agreed that Judge Alito should mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the rules identified by Ms. Leary and, where possible, to repeal them. The letter should also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local requirements relating to briefing.

At the Committee's request, the Reporter had prepared a draft letter, with the assistance of Judge Alito, Mr. Letter, and Mr. Rabiej. That draft letter appeared under Tab V-A in the Committee's agenda book.

The Committee discussed the draft letter at length, focusing on three issues:

First, several members suggested that the letter would be more effective if it included an "executive summary" for each circuit — pointing out, in the text of the letter, exactly which of the circuit's local rules concerned the Committee. A letter that was specific in pointing chief judges to problem rules is more likely to spur action than a letter that simply asks chief judges to read an attached report, most of which addresses the rules of other circuits. The Committee agreed, by consensus, that the letter should be revised in this manner.

Second, the draft letter asserted that "[t]he FJC confirms that many of these local rules are inconsistent with FRAP." The impression of members — confirmed by Ms. Leary — is that the local rules identified by the FJC do not directly conflict with any of the national rules, in the sense of requiring *x* when the national rules require *not x*. Instead, the problem was that the local

rules imposed requirements that are not imposed by the Appellate Rules. Judge Levi and the Reporter said that the two major Local Rules Projects conducted by the Standing Committee had defined "conflict" very narrowly, being careful not to characterize a local rule as "conflicting" with a national rule unless the conflict was direct. Members agreed that this Committee should follow the lead of the Local Rules Projects and that the letter should be revised so that it does not imply that any local rules on briefing are in conflict with or inconsistent with any of the Appellate Rules.

Finally, members discussed whether the letter should be stronger. For example, should the letter not only ask the chief judges to review the problematic local rules, but, if they choose to retain those rules, to justify that decision? Or should the letter ask the chief judges to let the Committee know whether the circuit decides to repeal any of the problematic local rules?

Some members expressed the fear that being too aggressive might create resentment, which, in turn, might make progress less likely. Members said that, if the letter did nothing more than cause circuits to clearly identify all local variations in one place on their websites, that would be a major accomplishment. It is hard to imagine that the circuits will object to the request that all local variations be clearly identified, unless the letter goes too far and creates a backlash. Other members agreed, but said that they believe that most chief judges will appreciate having these local rules called to their attention and appreciate the fact that the Committee is trying to use collaboration rather than coercion to address the problem.

By consensus, the Committee agreed that the letter was fine as drafted, except that it should be revised so that it does not imply that any local rules are in conflict with the Appellate Rules, and it should include a circuit-specific "executive summary" when it is mailed. Judge Alito said that, as previously agreed, he or his successor will mail the letter after the controversy over Rule 32.1 subsides.

B. Items Awaiting Initial Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) — conform to Justice for All Act)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that the "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. Section 102 of the Act creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that is of particular concern to this Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a

victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least three things about this are troubling:

First, § 3771(d)(3) provides that a single judge may issue a writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue a writ "pursuant to circuit rule or the [Appellate Rules]."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. It is difficult to imagine that a court can review a petition, order the respondent to file an answer, await the answer, read the answer, make a decision, and draft a written opinion — all within 72 hours.

Finally, the fact that the deadline is stated in hours rather than days raises interesting time-computation issues. For example, if the victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? It is not clear how the time-computation rules of Rule 26(a) will apply.

The Reporter said that, at this point, the Committee has at least three options for addressing the problems created by the Act:

One option for the Committee is to propose systematic changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus, or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting an answer, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the Committee is to add a new subdivision (e) to Rule 21 — a subdivision that would specifically address mandamus petitions filed under § 3771(d)(3). That subdivision would supersede the other rules and set up a "fast-track" system that would apply just to § 3771(d)(3) petitions.

A third option for the Committee is to do nothing for the time being. That would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be only a handful every year) and to get a better understanding of the problems that the courts of appeals will encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

Mr. Letter said that the Department of Justice believes that the Appellate Rules should not be amended at this time. He said that the Department hopes there will be very few proceedings under the Act and that the Department believes that the Committee should wait to see whether and what problems actually develop before amending the rules.

Mr. Rabiej said that the Criminal Rules Committee has decided to take a wait-and-see approach, for the reasons given by Mr. Letter and the Reporter.

A member said that he, too, favors doing nothing for the time being. He predicted, though, that victims will seek relief from the appellate courts in two situations. First, victims will assert the right to be protected from defendants, and victims will be unhappy with the level of protection that can practically be afforded. Second, victims will assert the right to full and timely restitution, but soon will grow frustrated at the inability to collect restitution from largely judgment-proof defendants.

A member said that he was not convinced that the Committee should do nothing. What would be the harm in amending the Appellate Rules to authorize a single judge to issue a writ of mandamus? Or to create a fast-track procedure for § 3771(d)(3) petitions?

Members responded that, while there would likely be no harm in the first amendment, there could be harm in the second. Members said that putting a fast-track procedure in the Appellate Rules would encourage Congress to add additional types of cases to the fast track. Before long, the courts of appeals will have an array of cases that require fast-track consideration. One member said that fast-track provisions raise substantial separation-of-powers concerns when they do not give federal judges adequate time to exercise "judicial Power" under Article III.

The member responded that, while he understood those concerns, he thought the Committee could move forward on a more modest set of amendments, such as amendments to permit a single judge to issue a writ of mandamus, to specify how deadlines stated in hours should be calculated, and perhaps to authorize the courts of appeals to use their local rules to establish a fast-track procedure for § 3771(d)(3) petitions.

After further discussion, the Committee agreed to ask the Department of Justice to study this matter further and present a recommendation to the Committee at a future meeting.

2. Item No. 05-02 (FRAP 35 and 40 — replace page limits with word limits)

Attorney Roy H. Wepner has proposed that the page limitations of Appellate Rules 35(b)(2) (petitions for hearing or rehearing en banc) and 40(b) (petitions for panel rehearing) be replaced with word limitations. An identical proposal was discussed at length by the Committee at its last meeting and rejected by vote of 2 to 5. By consensus, the Committee agreed to remove Item No. 05-02 from its study agenda.

3. Item No. 05-03 (FRAP 5 — reflect bankruptcy reform legislation)

The Reporter said that Judge Alito had asked him to investigate whether the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 will require any changes in the Appellate Rules.

The Reporter said that, as far as he can determine, only one section of the Act has a direct impact on the Appellate Rules. Under current law — found in 28 U.S.C. § 158 — an appeal cannot be taken directly from a bankruptcy court to a court of appeals. Instead, the appeal must first be decided by a district court or bankruptcy appellate panel ("BAP"). Section 1233 of the Bankruptcy Act would change that. It would amend § 158 to permit appeals *by permission* — both of final orders and of interlocutory orders — directly from a bankruptcy court to a court of appeals. Such appeals would be permitted only under certain circumstances (e.g., when an order of a bankruptcy court "involves a matter of public importance") and only pursuant to certain procedures (e.g., the circumstances — such as "public importance" — would have to be certified either by order of a lower court or by agreement of the parties). Most importantly, in all cases, a direct appeal would have to be authorized by the court of appeals.

When Rule 5 was restyled in 1998, the Committee intentionally wrote the rule broadly so that it could accommodate new permissive appeals authorized by Congress or the Rules Enabling Act process. In this instance, that strategy appears to have worked, as Rule 5 seems broad enough to handle the new permissive appeals authorized by § 1233. Indeed, § 1233 specifically provides that "an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28 . . . shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure." Section 1233 clarifies that references in Rule 5 to "district court" should be deemed to include a bankruptcy court or BAP and that references to "district clerk" should be deemed to include a clerk of a bankruptcy court or BAP.

The Reporter said that neither he nor Prof. Morris (the Reporter to the Bankruptcy Rules Committee) believes that anything in § 1233 requires this Committee to amend Rule 5. With the clarifications made by § 1233 itself, Rule 5 should suffice to handle the new permissive appeals.

The Committee discussed § 1233, with Mr. McCabe and Ms. Waldron describing some of the background to the provision. Several members agreed with the Reporter that no action

was necessary. Mr. Letter reported that he had spoken with the Justice Department's representative on the Bankruptcy Rules Committee, and he concurred that there was no need to amend the Appellate Rules.

By consensus, the Committee agreed to remove Item No. 05-03 from its study agenda.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Date and Location of Fall 2005 Meeting

The Committee will next meet in Santa Fe, New Mexico. The date will be set by Judge Alito after Mr. Rabiej canvasses the members of the Committee about their availability in October and November.

VIII. Adjournment

The Committee adjourned at 12:45 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 15-16, 2005
Boston, Massachusetts
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Boston, Massachusetts, on Wednesday and Thursday, June 15-16, 2005. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Deputy Attorney General James B. Comey
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Tim Reagan of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor David A. Schlueter, Reporter
Professor Sara Sun Beale, Consultant
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice were John S. Davis, Associate Deputy Attorney General, and Elizabeth Shapiro, Assistant Director, Civil Division.

INTRODUCTORY REMARKS

Judge Levi reported that new bankruptcy forms and interim bankruptcy rules must be in place by October 17, 2005, the effective date of the comprehensive new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This, he explained, will require an enormous amount of work by the Advisory Committee on Bankruptcy Rules.

He stated that the Standing Committee would miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — David Bernick and Charles Cooper. He reported that Judge John Roberts had been selected to replace Judge Samuel Alito as chair of the Advisory Committee on Appellate Rules. Judge Levi also noted that the Advisory Committee on Criminal Rules was about to lose its reporter, Professor David Schlueter, who will be replaced by Professor Sara Sun Beale. He also explained that Peter McCabe, the committee's secretary, was unable to attend the meeting because he was undergoing back surgery. He expressed the committee's best wishes for a speedy recovery.

Judge Levi reported that the Judicial Conference had approved changes in the civil and bankruptcy rules as part of the consent calendar at its March 2005 session.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 13-14, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that pending legislation would undo the successful 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure and require a judge to impose sanctions for violations of the rule. Mr. Rabiej explained that the legislation had been reintroduced in Congress a number of times over the years, and each time it had progressed further. Last year, he said, it had been passed by the House, but not by the Senate. This year it is likely that the House will pass it once again.

He noted that the Administrative Office had written to Congress in defense of retaining the 1993 amendments. The Federal Judicial Center, he pointed out, had conducted surveys and prepared a report on the issue. The Center's report, which was shared with Congress, found that district judges are remarkably unified in opposition to the proposed change in Rule 11. In addition, members of the committee had met with members of Congress to discuss the issue.

Mr. Rabiej reported that the Class Action Fairness Act had been enacted by Congress, and the Administrative Office is watching carefully for any impact it may have on the federal courts. There had been speculation in some quarters, he said, that the federal courts might be inundated by extra work as a result of the legislation, but the clerks of court have reported only a modest increase so far.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Reagan reported that the Federal Judicial Center had published empirical studies on both FED. R. CIV. P. 11 (sanctions) and proposed FED. R. APP. P. 32.1 (citation of judicial dispositions). He also distributed a status report on the various educational and research projects of the Center.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Amendments for Publication

PRIVACY PROTECTION RULES

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. P. 49.1

Judge Fitzwater reported that the E-Government Act Subcommittee had coordinated the development of new rules to protect privacy and security interests implicated by internet posting of electronic court filings. The subcommittee had produced a template rule for each advisory committee to use in adapting the rule to its own circumstances. The resulting rules, he said, were ready to be published for public comment and will undergo further style review during the comment process.

Professor Capra explained that the E-Government Act requires the federal judiciary to promulgate rules to protect the privacy of court filings made available on-line. He observed that the "practical obscurity" that had once protected private information in court case files is no more. The work of the subcommittee, he said, in large measure reflects the Judicial Conference's existing privacy policy, developed after comprehensive study by the Committee on Court Administration and Case Management.

The general principle guiding the subcommittee's work, he said, is that "public is public." In other words, whatever records are available to the public at the courthouse should also be available on the Internet, with certain exceptions. Otherwise, a cottage industry of Internet service providers would step in to disseminate courthouse information electronically.

Professor Capra explained that under the proposed rules — and existing Judicial Conference policy — parties must redact filings to eliminate certain personal identifiers, such as social security numbers and names of minor children. The redaction requirement

applies whether the documents are filed in paper form or electronically and whether they are available at the courthouse, on-line, or both. The new rules, though, make an exception for voluminous documents because it is very burdensome for parties to redact all the personal identifiers in extensive records.

Professor Capra noted that the Committee on Court Administration and Case Management had recommended that special treatment be given to social security cases because the records in those cases contain substantial amounts of private medical information that can only be redacted with considerable difficulty. Accordingly, the proposed rules specify that electronic remote access will not be provided for the records in social security cases.

He added that the Department of Justice had argued that records in immigration cases should receive similar treatment, because they too contain substantial private information. The Advisory Committee on Civil Rules agreed with the recommendation. In addition, he said, the E-Government Subcommittee had consulted with the Committee on Court Administration and Case Management, which agreed to the exemption for purposes of obtaining public comment. Therefore, proposed FED. R. CIV. P. 5.2(c) (privacy protection for filings made with the court) provides for restricted public access in both social security and immigration cases.

In addition, he explained, the new rules confirm a court's discretion on a case-by-case basis to protect private or sensitive information by limiting or prohibiting remote access by non-parties. The rules also provide that a party filing a redacted document may also file an unredacted copy of the document under seal. Finally, the new rules state that a party waives its privacy protections under the proposed rules by filing unredacted information not under seal.

Judge Alito reported that the approach adopted in the proposed appellate rule (FED. R. APP. P. 25(a)(5)) (privacy protection) is that, with limited exceptions, matters on appeal will continue to be governed by the applicable civil, criminal, or bankruptcy rules that had governed them in lower court proceedings. All other matters would be governed by the Federal Rules of Civil Procedure.

One participant asserted that there is also a need to provide an exemption for civil and criminal forfeiture cases. In a forfeiture, he noted, the government must identify the property to be forfeited. Indeed, in the case of a civil forfeiture, the property itself is listed as the defendant in an *in rem* proceeding. The government, moreover, must give public notice of the proceeding, usually by publication in a newspaper. Thus, he said, it would be anomalous for the government to have to redact the very information it is publicizing.

Professor Capra stated that a forfeiture exemption might not be necessary in bankruptcy cases. He suggested that for purposes of publishing the proposed rules, the matter might be left as presented by the Advisory Committee on Bankruptcy Rules, *i.e.*, with no exemption for bankruptcy cases. But the advisory committee could reconsider the matter following the public comment period.

Professor Morris responded that it is unclear whether there is a real issue in bankruptcy cases. The advisory committee, he added, would be pleased to consider the need for a forfeiture exemption in the bankruptcy rules as the public comments come in.

Judge Zilly noted that, in the bankruptcy context, the court does not see the forfeiture proceeding itself. All the judge sees is the government's motion for relief from the automatic stay, permitting it to forfeit the property. He suggested that a forfeiture exemption could be included in the amendments for publication, in order to achieve as much uniformity among the rules as possible while awaiting public comment. He added that the bankruptcy court can always seal or redact private information in particular cases, as appropriate.

One member observed that if the forfeiture exemption were included in the rules as published, it would be more likely to be noticed and to generate comments. If, however, the exemption were not included, few readers would notice the omission or comment on it.

One participant noted that, under the proposed amendments to the bankruptcy rules, certain privacy protections would attach to the names of persons known to be, and identified as minors. There may be many names listed in a bankruptcy case, some of which may be the names of minors, but no one will know as a practical matter who is a minor. Another participant stated that if the name of a parent is known, there is no doubt that someone who wants to can readily ascertain the name of the child. He reiterated that the judiciary must explain the insolubility of this problem, so that it does not face hostile and unfair criticism damaging to it as an institution.

Judge Levi reported that following discussion during a break, Judge Zilly and Professor Morris had agreed, on behalf of the bankruptcy advisory committee, that the new bankruptcy rule, as published, would be uniform with the other rules and include the same forfeiture exemption.

One member asked whether the suggested revisions to the respective sets of rules would be published side-by-side or separately. If published separately, the absence of a forfeiture exemption in the bankruptcy rules might not be noticed. Another participant added that an advantage of side-by-side publication is that it is easier for readers to

review inconsistencies between the revisions to the various sets of rules. Another participant suggested that the amendments be published in both formats.

One participant suggested the need for some public expression by the committee that the drafting task is extremely difficult. For one thing, it is impossible to predict the impact of future technology, and provisions may quickly become obsolete. Moreover, the rules inevitably will not satisfy all competing interests. Some will complain about inadequate protection of privacy, others about interference with the public's right to know.

Nevertheless, he said, the judiciary must proceed with national rules because of the specific statutory mandate to do so. But the publication should state that full reconciliation of the competing principles and interests at stake cannot be accomplished, certainly not with the current ability to predict future technology. The committee, thus, should document its awareness of these limitations on its capacity to deal with the problem. Professor Capra stated that he would prepare a draft insertion to this effect, and Judge Levi agreed to its inclusion.

The committee approved the proposed new rules and amendments for publication by voice vote, with one objection.

Amendments for Final Approval

MANDATORY ELECTRONIC FILING RULES

FED. R. APP. P. 25(a)(2)
FED. R. BANKR. P. 5005(a)(2)
FED. R. CIV. P. 5(e)

Professor Cooper noted that draft FED. R. CIV. P. 5(e) (filing with the court), along with its uniform counterparts in the appellate rules and the bankruptcy rules, would allow a court by local rule to require electronic filing of documents. The rule, he said, had its impetus in the fact that many courts have already mandated that all papers be filed electronically. In addition, electronic filing has the potential of saving significant resources for the courts.

Judge Zilly noted that there had been a good deal of public comment, most of which had focused on the need for courts to provide appropriate exceptions. Professor Cooper added that the draft committee note recognizes the importance of providing exceptions from the electronic filing requirement for those who cannot file by electronic means. But, he explained, the proposed rules do not specify which exceptions must be

provided. Instead, they permit a court by local rule to mandate electronic filing "if reasonable exceptions are allowed."

Professor Beale observed that there is no need for a parallel provision in the criminal rules because those rules specify that papers in criminal cases be filed in the manner prescribed by the civil rules.

Judge Alito noted that one circuit court recently had adopted a local rule mandating electronic filing. One purpose of the rule is to avoid the use of disks, because technological experts advise that it is much harder to screen for viruses on disks. In addition, electronic briefs offer a cost savings. Court employees have less need to cart heavy briefs around, and the clerk's office does not have to ship hundreds of pounds of briefs every month to the judges.

A participant added that electronic filing also helps expedite urgent appeals. He said that he knew of several appeals in which a court of appeals had specially ordered electronic filing in order to expedite the appeal.

The committee without objection approved the proposed amendments for final approval by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum of May 6, 2005. (Agenda Item 7) He noted that Professor Schiltz, the committee's reporter, was unable to attend the meeting.

Amendments for Final Approval

FED. R. APP. P. 32.1

Judge Alito reported that concerns had been expressed by appellate judges in some circuits that the proposed new Rule 32.1 (citation of judicial dispositions) would result in additional work for judges, lead to shorter opinions, delay disposition times, create inconsistencies in circuit case law, and impose additional research burdens on attorneys. The advisory committee, he said, had asked the Administrative Office and the Federal Judicial Center to conduct studies to determine whether there is empirical support for these claims.

In response, the Administrative Office had assembled data comparing disposition times, summary dispositions, and other indicators — before and after — in the circuits

that had changed their local rules to permit citation of unpublished opinions. The results showed that the permissive citation policy had resulted in few, if any, changes in these workload indicators.

Mr. Reagan reported that the Federal Judicial Center's study for the committee involved three research components: (1) a survey of federal judges; (2) a survey of attorneys; and (3) an examination of case files. The research approach had divided the circuits into "restrictive," "discouraging," and "liberal" circuits, in accordance with each circuit's current policy regarding citation of unpublished opinions.

Judge Alito noted that the Center study shows that very few judges sitting in the circuits with liberalized citation rules believe that restricting citation of unpublished opinions would reduce their workload. The great majority, rather, believe that the length of opinions would not change and there would be the same number of unpublished opinions. No significant increase in the judges' workload had occurred in the circuits that have liberalized their rules, and few judges in the survey had expressed concerns about inconsistencies in precedent.

One participant observed that he had been struck by the strength of conviction shown by the chief judges of the non-citation circuits. They had expressed fears about the workload and other consequences of permitting citation of unpublished opinions. But the empirical studies had substantially allayed his prior concerns. Judge Alito added that the Center study also appeared to have convinced some members of the advisory committee who initially had been skeptical of proceeding with a rule on unpublished opinions.

Another participant emphasized that he was unequivocally in favor of the proposed rule. He noted that the distinction between published and unpublished opinions had largely disappeared, as "unpublished" opinions are generally available from the electronic legal research services. He argued that it is absurd to have a practice that lets an attorney cite a law review note by a law student, but not an opinion of the court itself.

One member noted that some segments of the bar had expressed consternation over non-citable opinions. The law, he said, should be driven by transparency. An important court practice that is not transparent should not be condoned.

Another member acknowledged that some circuit judges fear that "the sky will fall" as a result of the new rule, but argued that there is no empirical support for that fear. The real issue, he said, is not the citation of unpublished opinions, but the precedential effect that opinions have. The revised rule, he emphasized, deliberately does not address the question of the precedential effect of opinions. That is left to each circuit to decide.

Another member emphasized that the rule change is really very simple. It does not address either the meaning or precedential value of unpublished opinions. It merely permits them to be cited to the court.

Another stated that there is a significant distinction between precedential and non-precedential opinions. Judges do not spend time worrying about the precise language of a non-precedential opinion. On some courts of appeals, each precedential opinion is disseminated to the entire court, and each judge has a fixed number of days to comment. The same process does not apply to non-precedential opinions. The main point of an "unpublished" or non-precedential opinion is that the court in a later case does not have to go en banc to disagree with it. The rule change, however, does not affect that practice, for it merely permits lawyers to cite unpublished opinions.

Another member added that he supported the rule change, but thought that its impact might be more significant than anticipated. If, for example, the change were to result in one more hour of judge work per opinion, the total for each judge would be 60 hours a year, a significant amount. Moreover, the rule might cause additional, unnecessary work for the bar.

One member noted that the committee may be perceived as forcing the change on the four circuits that have opposed it. With that in mind, he suggested, it might be better to make the change effective only prospectively. Judge Alito responded, though, that the advisory committee had discussed and rejected that idea.

One member predicted that most of the circuits that currently allow citation of unpublished opinions, but with restrictions, probably would make the rule change retroactive in any event. The idea behind a "prospective-only" change, however, would be to respect the expectations of judges who thought at the time an unpublished opinion was written that it could not be cited back to them as precedent. It might be better, he said, not to force circuits to change the ground rules after the fact.

One member suggested that there is a principled objection to the practice of barring citation of unpublished opinions. If one accepts that principled objection, then to allow a phased transition to permitting citations is simply wrong.

One participant added that a national rule to overturn local non-citation practices had been on the judiciary's agenda for years. Any concern about embarrassment or unfairness to judges incurred by making the rule change retrospective would be *de minimis*. One member stated that he would prefer to have the circuits work out for themselves how to treat prior unpublished opinions. Making the change prospective-only, he suggested, would be a minor nod to the circuits opposing any change.

The committee without objection approved the proposed new rule for final approval by voice vote.

One member suggested that he would move to make the new rule prospective only. But noting a lack of interest, no motion was made.

Judge Levi stated that the new rule itself having been approved, the Standing Committee should turn to consideration of the accompanying committee note. Two members stated that they supported the shorter version of the note. Another agreed, but suggested that the material in the longer version should be disseminated to the public in some form, but not as part of a committee note.

The committee without objection approved the shorter version of the committee note for final approval by voice vote.

FED. R. APP. P. 25 (a)(2)

As noted above on pages 7-8, the committee approved an amendment to FED. R. APP. P. 25(a)(2) (method and timeliness of filing) that would allow a court by local rule to require electronic filing of documents with the court.

Amendments for Publication

FED. R. APP. P. 25(a)(5)

As noted above on pages 4-7, the committee approved for publication a new FED. R. APP. P. 25(a)(5) (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002.

Informational Item

Judge Alito noted that complaints had been expressed by appellate litigants about the briefing requirements imposed by local appellate court rules. He reported that a recent Federal Judicial Center study for the advisory committee had documented a large number of additional briefing and procedural requirements imposed by local rules, some of which are inconsistent with the Federal Rules of Appellate Procedure. The study, he said, had been sent to all the courts of appeals. The advisory committee, moreover, plans to follow up with a letter that will cite the Center study, urge national uniformity, and point out those specific local rules that appear to be inconsistent with the Federal Rules of Appellate Procedure.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 2, 2005. (Agenda Item 8)

Judge Zilly reported that the advisory committee had been consumed with implementing the massive new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that at the time the Act was passed, the Supreme Court had pending before it a proposed amendment to FED. R. BANKR. P. 4008 (discharge and reaffirmation hearing) that would set a deadline for filing reaffirmation agreements. The advisory committee, he said, had reviewed the amendment in light of the legislation and had concluded that it would conflict with the new statute. As a consequence, the Court — at the committee's request and with the concurrence of the Executive Committee — returned the rule for further consideration.

Amendments for Final Approval

FED. R. BANKR. P. 4002

Judge Zilly reported that, following publication, the advisory committee had received a number of comments on revised Rule 4002 (duties of the debtor). The amendments, initiated at the request of the Executive Office for United States Trustees would require the debtor to bring additional documentation to the first meeting of creditors. In addition, he pointed out, the new bankruptcy statute will require changes in the committee's draft.

For these reasons, he said, the advisory committee had decided that the revised rule should not be presented to the Judicial Conference. Instead, the committee will incorporate its substance into a new interim rule for adoption locally by the bankruptcy courts in advance of the effective date of the new legislation (October 17, 2005). Judge Zilly added that it would be very confusing for the Judicial Conference to submit a revised Rule 4002 to the Supreme Court at the same time that many of the same changes are being set out in a new interim rule.

The committee without objection approved withdrawal of the proposed amendment by voice vote.

FED. R. BANKR. P. 1009

Judge Zilly stated that the proposed amendment to Rule 1009 (amendments to voluntary petitions, lists, schedules, and statements) would require the debtor to submit a

corrected social security number when the debtor becomes aware of an error in a previously submitted statement.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 5005(a)(2)

As noted above on pages 7-8, the committee approved an amendment to FED. R. BANKR. P. 5005(a)(2) (filing and transmitting papers) that would allow a court by local rule to require electronic filing of documents with the court.

FED. R. BANKR. P. 5005(c)

Judge Zilly noted that the proposed amendment to Rule 5005(c) (error in filing or transmittal) would expand the list of persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court. The expanded list adds district judges and clerks of the bankruptcy appellate panels.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 7004

Judge Zilly explained that the proposed amendment to Rule 7004 (process and service) would require service on the debtor's attorney whenever the debtor is served with a summons and complaint.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

Judge Zilly explained that the amendments proposed for publication would not be affected by the new bankruptcy statute. He noted that most of them had arisen as a result of the efforts of a joint subcommittee of representatives from both the advisory committee and the Committee on the Administration of the Bankruptcy System.

FED. R. BANKR. P. 3001

Judge Zilly noted that the proposed amendments to Rule 3001(c) and (d) (proof of claim) would add page limits for the filing of a proof of claim or evidence of perfection of a security interest.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 3007

Judge Zilly reported that the proposed amendments to Rule 3007 (objections to claims) would prohibit a party in interest from including within an objection to a claim a request for relief that requires the initiation of an adversary proceeding. It would also place restrictions on, and provide procedures for, omnibus objections to claims.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 4001

Judge Zilly stated that the proposed amendments to Rule 4001 (relief from the automatic stay, cash collateral, and obtaining credit) would specify the content and service of motions seeking authority to use cash collateral, to obtain debtor-in-possession financing, and to approve related agreements.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 6003

Judge Zilly explained that the proposed new Rule 6003 (interim and final relief immediately following commencement of a case) would limit the type of motions and relief that a court may grant during the first 20 days of a case.

The committee without objection approved the proposed new rule for publication by voice vote.

FED. R. BANKR. P. 6006

Judge Zilly stated that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would place

restrictions on, and provide procedures for, omnibus assumptions, rejections, and assignments of executory contracts and unexpired leases.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed new Rule 9005.1 (constitutional challenge to a statute) would incorporate the new FED. R. CIV. P. 5.1, scheduled to take effect on December 1, 2005, and make it applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

The committee without objection approved the proposed new rule for publication by voice vote.

FED. R. BANKR. P. 9037

As noted above on pages 4-7, the committee approved for publication a new FED. R. BANKR. P. 9037 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees, with appropriate modifications to meet bankruptcy needs.

Informational Item

Judge Zilly stated that most of the provisions of the new bankruptcy statute will take effect on October 17, 2005. Interim bankruptcy rules, he said, must be in place by that date to assist the courts and the bar. In addition, he noted, the advisory committee has had to modify almost every existing bankruptcy form.

He explained that the advisory committee had identified five major categories of issues raised by the new statute: (1) business; (2) consumer; (3) health care; (4) cross-border proceedings; and (5) direct appeals to the courts of appeals. To reflect these five sets of issues, the committee had created five corresponding working groups, plus a sixth working group to deal with the forms. In August 2005, the committee will meet again to approve the interim bankruptcy rules and the new and revised bankruptcy forms. The rules and forms will then be sent for expedited approval by the Standing Committee and the Executive Committee of the Judicial Conference so they can be in place by October 17, 2005.

He explained that the Official Forms, once approved by the Judicial Conference, must be used in all bankruptcy cases and proceedings. But it will be up to each district to decide whether to adopt the new interim rules. The committee will strongly encourage each district to adopt the rules without change in order to promote national uniformity. He added that public comment would be sought on both the interim rules and the forms, and the advisory committee will use them as the starting point in developing permanent national rules through the normal Rules Enabling Act process. In addition, the actual experience of the courts in using the interim rules can serve as a laboratory to aid the committee's consideration of permanent revisions to the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 27, 2005. (Agenda Item 9)

Amendments for Final Approval

FED. R. CIV. P. 5(e)

As noted above on pages 7-8, the committee approved an amendment to FED. R. CIV. P. 5(e) (filing with the court) that would allow a court by local rule to require electronic filing of documents with the court.

FED. R. CIV. P. 50

Judge Rosenthal stated that the proposed amendments to Rule 50 (judgment as a matter of law) would delete the requirement that a renewed motion for judgment as a matter of law under Rule 50(b) be supported by a motion for judgment as a matter of law made at the close of the evidence. The amendment would allow a renewed Rule 50(b) motion to be supported by any Rule 50(a) motion for judgment as a matter of law made at trial.

Professor Cooper explained that decisional law had long eroded the traditional rule that requires renewal of the motion at the close of the evidence. The gradual erosion, he said, had created a growing uncertainty among practitioners, creating a need for a clear rule to let attorneys know what they have to do. The current rule can be a trap for the unwary and for those who simply forget to renew their motion at the close of the evidence. The few public comments received, he added, generally supported the change.

The committee without objection approved the proposed amendment for final approval by voice vote.

CIVIL FORFEITURE AMENDMENTS

SUPPLEMENTAL ADMIRALTY RULE G
& conforming amendments to
SUPPLEMENTAL ADMIRALTY RULES A, C, and E
FED. R. CIV. P. 9, 14, and 26(a)(1)(E)

Professor Cooper reported that there had been very little public comment on the new Supplemental Admiralty Rule G. He explained that the rule had been developed with the active cooperation of the Department of Justice and the National Association of Criminal Defense Lawyers. It represents the culmination of several years of work by the advisory committee to adapt the admiralty rules to deal better with the great growth that has occurred in civil forfeiture actions and to remove inconsistencies with federal forfeiture statutes.

Many civil forfeiture statutes, he pointed out, explicitly invoke the admiralty rules. There are, however, a number of practical differences between forfeiture actions, on the one hand, and admiralty and maritime actions on the other. Consequently, Rule G establishes distinctive procedures for forfeiture actions within the overall framework of the supplemental rules. It also establishes new provisions that take account of the Civil Asset Forfeiture Reform Act of 2000 and reflects developments in decisional and constitutional law.

Judge Levi stated that these were very beneficial changes that fill a gap in the existing rules. He also observed that Judge H. Brent McKnight, an outstanding member of the advisory committee, deserved great recognition for his important role in chairing the subcommittee that had developed the changes. He noted, with sadness, Judge McKnight's recent untimely death.

The committee without objection approved the proposed new rule and amendments for final approval by voice vote.

ELECTRONIC DISCOVERY AMENDMENTS

FED. R. CIV. P. 16, 26, 33, 34, 37, and 45, FORM 35

Judge Rosenthal explained that the proposed package of rules amendments was intended to address a number of problems that have emerged from the widespread exchange of information in electronic form as part of the discovery process. She noted

that the advisory committee had been asked repeatedly since the early 1990s to consider amendments to tailor the rules more specifically to the realities of discovery in the electronic age.

The committee, she said, had been reluctant to amend the discovery rules at first. Nevertheless, it made considerable efforts to educate itself on the issues by bringing together many people with expertise and differing perspectives at committee-sponsored symposia. As a result of the discussions and debates, the members became convinced that electronic communication was fundamentally different from paper communication by virtue of its volume and changeable quality. In addition, because electronic information may not be intelligible except through the system that created it, difficulties of accessing and deciphering such information can arise that have no counterpart in paper.

Judge Rosenthal reported that the package of proposed electronic discovery amendments had been published in August 2004, and at least 250 public comments had been submitted to the Administrative Office. In addition, the advisory committee had conducted well-attended and vigorous public hearings in San Francisco, Dallas, and Washington.

She noted that electronic discovery rules must take into account the speed and unpredictability of technological change and yet be drafted in a way that is not later made obsolete by new technology. In short, they have to be general enough to survive changes in technology, but specific enough to provide meaningful guidance to judges, lawyers, and clients.

Judge Rosenthal explained that the proposed electronic discovery amendments can be grouped into five categories:

1. *Encouraging early attention to electronic discovery issues*
2. *Protecting claims of privilege*
3. *Defining interrogatories and requests for production*
4. *Discovering electronically stored information that is not reasonably accessible*
5. *Protecting parties against sanctions when information is lost through the routine operation of an electronic system*

1. Encouraging early attention to electronic discovery issues

FED. R. CIV. P. 16(b), 26(a), and 26(f), FORM 35

Judge Rosenthal pointed out that discovery of electronically stored information requires more management and communication than discovery of paper documents. More decisions must be made at an earlier stage of litigation, both by the attorneys and the court. Professor Cooper added that as electronic discovery issues become more complex, it becomes critical for parties and the court to focus on them at the outset of the litigation.

The proposed amendments, therefore, call on the parties themselves to discuss technical issues relating to the exchange and preservation of discoverable electronic information. Revised Rule 26(f) (conference of the parties) directs the parties to discuss discovery of electronically stored information during their discovery and planning conference. Revised Rule 16(b) (scheduling and planning), in turn, alerts the court to the need, in appropriate cases, to address in its scheduling order potential problems regarding the discovery of electronically stored information.

Professor Cooper explained that some had voiced concern that flagging electronic discovery issues in the rule would serve as an invitation to parties to ask the court for preservation orders, increasing the burdens and costs that flow from overbroad preservation orders. For this reason, he said, a paragraph had been added to the committee note following publication warning that courts should not routinely enter preservation orders. It states, moreover, that courts should issue *ex parte* preservation orders only in "extraordinary circumstances."

One participant observed that the language of the draft note may be substantive in nature — though the rule amendment itself is not — because it suggests that the parties' agreement on a procedure for asserting privilege and protection claims will protect them against the risk of privilege waiver. Judge Rosenthal responded that the note does not promise any substantive outcome. It merely points out that one purpose of an agreement by the parties is to have them address specifically the potential problems associated with inadvertent production of work product or privileged information. She suggested that the note could be changed to make clear that it addresses only agreements between the parties and does not intend to preclude waiver issues as to third-parties not present in the litigation.

The committee without objection approved the proposed amendments for final approval by voice vote.

2. Protecting claims of privilege

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that enormous problems exist in screening discovery materials to detect privileged and protected items. Parties worry about waiving privilege as to all information pertaining to the subject matter, not merely as to the specific item produced, particularly as to third parties. Thus, he said, there is widespread interest in having the committee devise an effective rule governing discovery and privilege agreements. But there is also a recognition that the rules cannot address the substantive law of privilege without express Congressional approval.

One practical problem, he said, is that a party may produce a good deal of electronic information in response to a discovery request and then realize that some of the information it has turned over may be privileged. The risk of such production is greater with electronic information than with paper, because of the volume and the dynamic nature of the information, and because the way it is stored may make privilege review more difficult.

The new rule would provide a defined procedure for the producing party to raise the privilege issue and recover the pertinent material. But it does not touch the substantive questions of what is privileged nor what the scope of the waiver may be. To invoke the new procedure, the producing party must give notice of the privilege claim to the receiving party. The receiving party must stop using the described material, and must take reasonable steps to retrieve it if it has been disclosed to third parties, pending resolution of the issue. The proposed rule would allow the receiving party to submit the material to the court under seal and obtain a ruling on privilege and waiver.

One member noted that the amendment specifies that the receiving party may not use the information for "any" purpose until the court resolves the issue of privilege. The language could be read to mean that the receiving party could not even use the information for the purpose of arguing against the privilege.

A participant responded that states differ on whether a receiving party may discuss the document in question for purposes of litigating the privilege issue. Another stated that the law is very confused on these points, varying from district to district and from state to state, and it is not for the rules committees to sort out all the problems.

One member remarked that once a third party has received a privileged document and has notice that the court is considering the privilege question, it should be bound by the court's decision on the matter. He added that it may be unclear whether the court has

jurisdiction to bind a non-party, but non-parties at least can be notified that a party has asserted a privilege.

One member observed that third parties beyond the control of the court can do whatever they want until they are given notice that the privilege has been claimed or determined. But once they receive notice, ethical obligations attach to restrict their conduct if they are attorneys. One participant objected that the rule seemed to be an attempt, through the guise of procedure, to impose a substantive obligation on third parties.

Judge Rosenthal acknowledged the difficulty of these thorny issues, but stated that the committee simply cannot fix all the problems. All that the amendment attempts to do, she said, is to put in place an orderly and consistent procedure for the parties, recognizing that the problem is likely to occur more frequently with electronic discovery. It is not intended to put a thumb on the substantive scales in deciding whether there has been a waiver of privilege or not.

One member voiced serious reservations about dealing with privilege problems by rule, arguing that the amendment could lead to disruption of civil litigation. For example, it does not set a time deadline for asserting a claim of privilege, and its procedure is not limited to electronic discovery or to voluminous materials. Moreover, it does not change the substantive law of waiver, so parties will still have to go through the laborious process of examining all documents before they are turned over in order to protect work product and avoid disclosing privileged information. He suggested a scenario where a party dumps 10,000 documents on the other party. Three months later, the receiving party attempts to use the documents to depose a witness. Suddenly, the producing party proclaims: "Wait a minute! I claim privilege. You cannot use this particular document. The deposition must stop until the court rules on my privilege claim." Thus, he concluded, the revised rule could lead to more intractable, expensive, and unpredictable litigation.

He acknowledged the advisory committee's assertion that the amendment is nothing more than a procedure for prompt determination of privilege claims. But, he argued, if that is all it is, existing Rule 26(b)(5) is sufficient. In practice, he said, attorneys normally negotiate privilege issues and present them to the court only when they cannot agree. Thus, privilege questions are raised with the court at the time the documents are produced, not months or years later. The new procedure, he said, will cause unanticipated problems by creating a second, parallel procedure for addressing privilege problems.

A member responded that the amendment should include a specific reference to the inadvertent production of documents and the need to raise privilege issues in a timely

fashion. It could say that the asserting party must declare that the production was inadvertent and raise the issue within a reasonable time. He also said that discovery is a two-way street, pointing out that he had never seen a case in which only one side had inadvertently produced a privileged document. The amendment, he said, was aimed at production of voluminous information, and it is sorely needed in cases with large amounts of discovery materials.

Judge Rosenthal added that all these concerns had been discussed by the advisory committee. In most jurisdictions, she said, the existence of a waiver of privilege turns on whether the claim of privilege has been timely asserted. Thus, the asserting party has every incentive to raise the issue of privilege as soon as it arises, rather than delay and increase the risk that a court will find waiver.

She agreed that the concerns addressed by the amendment are not limited to discovery of electronic information. The concerns, though, are more acute with electronic discovery because privileged information is more likely to escape detection in privilege review.

Judge Rosenthal emphasized that the committee cannot change the substantive law of privilege and privilege waiver. Once privileged information is released, the asserting party must consider its options under governing substantive law. The rules committee, she said, cannot address that problem, and the amendment merely establishes a procedure for raising the issue in the district court.

One member stated that all agree that the amendment does not affect the substantive law of waiver and will not eliminate the expenses flowing from the substantive law. But, he claimed, it will change the litigation environment, for some attorneys will use it to delay and disrupt the process and engage in gamesmanship. It will give unscrupulous attorneys the ability to claim that a particular document is privileged and cannot be used by the other side until they obtain a court ruling. The amendment, he said, will create a totally open-ended procedure.

Judge Levi stated that the Advisory Committee on Evidence Rules had on its agenda the drafting of a statute on the substantive law of privilege waiver for possible submission to Congress. One option, he said, would be to hold up the proposed discovery rule for a year and allow the evidence committee to catch up.

Judge Rosenthal stated her concern about the timing and the uncertainty of any effort that depends on Congressional action. In any event, she did not see how a potential statute on substantive privilege waiver would be inconsistent with the pending rule amendment, which is purely procedural and addresses a real and present problem.

One member stated that the amendment may cause some confusion, and the parties will still need to sift through documents before releasing them. Therefore, the key question is whether the amendment will add any value to the discovery process. Others responded that the rule will tighten up current practice to make it more routine and mandatory. It also makes it clear that the receiving party cannot freely use a challenged document.

One participant objected that the amendment places the burden on the receiving party to show that a document is not privileged. Instead, he said, the burden should be on the releasing party to show privilege. Judge Rosenthal explained that the amendment effects no shift in the burden. The asserting party notifies the receiving party of the basis for the claim of privilege. Then the receiving party has to go to court if it wants to use the document. The party asserting the privilege stills bear the burden of proving the basis for the claim of privilege. One member responded that there may still be some burden-shifting as a practical matter because the receiving party must initiate the contest by bringing the matter to the court.

Judge Rosenthal observed that this is the way smart attorneys handle these problems now. The amendment, a modest proposal, simply codifies good practice. The public comments, she said, had convinced the committee that although the amendment does not do a great deal, it certainly does enough to make it worthwhile.

One member stated that the existing system works well because a receiving party knows that it will want the same treatment at a later time when it becomes an asserting party. Good lawyers, thus, have an interest in maintaining the integrity of the discovery process. No asserting party, he added, will attempt to claw back a document unless the document is very important and the claim of privilege is serious.

One participant suggested that the rule should not speak about the "inadvertence" of production, but instead require the asserting party to specify all the steps that it has taken to guard against inadvertent production. Judge Rosenthal responded that the law already requires that effort as part of the substantive showing that a waiver of privilege has occurred.

Judge Levi noted that the amendment had been uncontroversial during the public comment period.

The committee, by a vote of 8 to 4, approved the proposed amendment for final approval.

3. Defining interrogatories and requests for production

FED. R. CIV. P. 33 and 34

Judge Rosenthal reported that the advisory committee had received very little comment on the proposed amendment to Rule 33 (interrogatories), which makes clear that the option to produce business records — or make them available for examination, audit, or inspection — includes electronically stored information.

The proposed amendment to Rule 34 (production of documents) would add "electronically stored information" as a separate category subject to production, apart from "documents." Judge Rosenthal explained that an initial issue surrounding the amendment to Rule 34 was whether electronic information should be included as a subset of "documents," or as a new category in addition to "documents." The advisory committee had opted for the latter.

She noted that courts effectively have shoehorned all sorts of information into the elastic term "documents." But, she said, it is difficult to fit all forms of electronically stored information, many of which are dynamic in nature, within the traditional concept of a "document." In addition, the amendments make it clear that electronic information is different in kind and needs special attention, and they facilitate the rules providing distinctive treatment when appropriate.

The amendment to Rule 34(b) (procedure for production) sets out a procedure for parties to deal with the form in which electronic information is produced. The request may specify a form or forms for producing electronically stored information. The responding party may object. Even if the request does not specify a form, the responding party cannot simply produce materials in a way that presents unnecessary obstacles to review. Rather, it must produce the information requested either in the form or forms in which it is ordinarily maintained or in a form or forms that are "reasonably usable." Moreover, a party need not produce the same electronically stored information in more than one form.

The language of the amendment, she noted, uses the terminology "form or forms" because the committee did not want to suggest that all materials must be produced in the same form. Parties may agree that some information will be produced in one form, other information in another form. She noted, though, that the Style Subcommittee would prefer not to use the terminology "form or forms," because the applicable style conventions specify that the singular of a term incorporates the plural. Judge Levi suggested that Judge Rosenthal work with Judge Murtha, chair of the Style Subcommittee, to work out the precise language as part of the Style Project.

The committee without objection approved the proposed amendments for final approval by voice vote.

4. Discovering electronically stored information that is not reasonably accessible

FED. R. CIV. P. 26(b)(2)(B)

Judge Rosenthal stated that electronic information is often stored on sources that make it difficult to retrieve. If so, the information is not "reasonably accessible" because of the burdens and costs involved in retrieving it. By way of examples from current technology, information may be stored only on backup tapes that are not organized or searchable, and legacy data from obsolete systems may only be captured by recreating those systems.

She explained that sophisticated parties look first at what information is reasonably available. Often that is enough to satisfy the legitimate needs of the litigation. But if it is not sufficient, they will appraise the burdens and costs of looking further, balanced against the potential value of the information sought, and consider whether to incur those burdens and costs and, if so, how best to allocate them. The amendment seeks to provide guidance and structure to this effort.

She noted that many public comments had asserted that the draft rule is not clear enough as to what is meant by "not reasonably accessible" and what constitutes "good cause." As a result, the advisory committee, following publication, had clarified the rule by defining "not reasonably accessible" in terms of undue burden and cost. The advisory committee had also clarified the showing that a party must make to establish "good cause" for production of inaccessible information by tying it to the limitations set forth in Rule 26(b)(2)(C). Professor Cooper added that technical experts normally use the adjective "accessible" and the verb "to access," and that is one reason the committee chose the term "accessible."

Judge Rosenthal explained that the rule is intended to be a tool for discovery management. Electronic discovery requires special management and supervision by the court in ways that paper discovery usually does not. She noted that people generally expect that electronic information will be cheaper to access, but producing some electronic information can be extremely expensive.

She emphasized that the rule is not one of presumed non-discoverability, but instead makes the existing proportionality limits more effective in a novel area in which the rules can helpfully provide better guidance. In addition, the committee note clarifies that nothing in the amendment undermines or reduces existing preservation obligations under the rules or the common law. In a nutshell, the amendment in no way encourages or permits parties to bury evidence.

One member emphasized that the amendment does not relieve the producing party of any obligation it would otherwise have to preserve data. The rule, deliberately, does not affect that obligation, and it should not. Another member objected, though, that the last sentence of the fourth paragraph of the note addresses the rule's effect on a party's preservation obligation. Judge Rosenthal agreed to delete the sentence.

One member recommended that the note set forth some concrete examples of electronic information that is not reasonably accessible, even though the examples might soon become outdated. Professor Cooper responded that the committee had received testimony from computer experts that if the committee were to give concrete examples, it would not be long before they would become not only obsolete, but also misleading. As one example, he said, it used to be very expensive to search backup systems, but that is not necessarily the case today.

A member stated that the real problem is not the cost of providing discovery. The current rules, he said, already address that matter. What the amendment adds is an explicit recognition that the additional costs of searching sources that are not readily accessible may be unnecessary because the information to be retrieved will not make much difference. Thus, the amendment allows the relevance of information to be determined as a case proceeds.

The committee without objection approved the proposed amendment for final approval by voice vote.

5. *Protecting parties against sanctions when information is lost through the routine operation of an electronic system*

FED. R. CIV. P. 37(f)

Judge Rosenthal explained that inadvertent destruction is more likely to occur with electronic information than with paper records. Electronic systems typically automatically overwrite, discard, or filter information without conscious human intervention. Individuals may not be aware that particular records have been eliminated. This is an inherent feature of electronic systems. But it poses a great risk for companies facing regular litigation because they may be subjected to sanctions for unintentionally losing relevant information. She said that there is an acute need to provide guidance and some kind of protection for litigants when information is deleted as part of the routine, good-faith operation of their automated business systems.

She pointed out that defensive over-preservation of records for potential discovery purposes also has its costs. In addition to the costs of storage, the parties have to review substantially more information. What is needed is a rule that neither over-protects nor

under-protects parties in storing their records on electronic systems. The rule, she added, cannot enact substantive standards for preservation, but it should protect a party from sanctions if information is lost due to routine operation of its electronic system.

She reported that the advisory committee had received a great deal of public comment on this difficult issue. Some comments objected to using a negligence standard in the rule because it would only protect those parties that would not be sanctioned anyway because they were not negligent. On the other hand, if sanctions were available only for intentional or reckless failure to preserve, the rule might preclude sanctions in situations where courts might consider them appropriate.

She noted that the term "good faith" in proposed Rule 37(f) (sanctions) was a deliberate choice of the advisory committee. A party will not face sanctions if it loses information due to the "routine, good-faith operation of an electronic system." Thus, protection exists only if the operation of the system is "routine," and not where information has been specifically targeted for deletion. Moreover, with the "good faith" requirement, a party does not have a license to thwart discovery by sitting back and knowingly letting discoverable information be deleted by the routine operation of a computer system. The protection provided by the amendment is geared to situations where a party simply does not realize that discoverable information will be lost.

Judge Rosenthal added that the advisory committee had considered whether it was necessary to republish the amendment because the current language differs from what was published. But the committee had decided against republication because it had already received all the benefits that public comment is intended to provide. The public comments had thoroughly addressed the issues.

One member objected that the amendment appeared to imply that as long as a party acts in good faith, it has no duty to preserve information that will be lost routinely, even though the party knows it faces litigation or is actually in litigation. Judge Rosenthal and Professor Cooper responded that the amendment does not attempt to define the independent preservation obligations of parties. It simply limits the imposition of sanctions under specified conditions.

One participant objected that the word "routine" should be deleted from the amendment. Once litigation is initiated or a preservation order is entered, life is no longer "routine" for a party holding discoverable information. Judge Rosenthal responded that the complete phrase is "routine operation." The two words go together. What is "routine" is the operation of the electronic system, operating according to criteria not tied to particular litigation.

One member said that the advisory committee was very wise in attempting to provide a safe harbor for the routine, good-faith operation of electronic systems. He emphasized that companies need practical guidance on this issue, as they need to know when to put a "litigation hold" on some part of their electronic systems. But, he said, the text of the committee note may be inconsistent with the rule itself in discussing the imposition of sanctions in exceptional circumstances, even when information is lost as a result of routine, good-faith operations. Others suggested deleting the note's discussion of sanctions to remedy prejudice and sanctions to punish or deter discovery conduct.

One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers "severe prejudice." Another added that the distinctions between remedial and punitive sanctions are not as explicit as they could be, and the concept of "good faith" is asked to carry a good deal of weight.

A member said that one important merit of the amendment is that it does not attempt to address specifically the different types of situations that may occur: (1) before the litigation, (2) after the litigation is brought, and (3) after the issuance of a preservation order. Instead, it speaks generally of good faith and gives parties flexibility and leeway. In essence, he said, the rule does not provide a complete safe harbor. A party cannot remain ignorant and be confident that it is operating in good faith. And once a company faces a preservation order and does not direct a litigation hold, it presumably is not acting in good faith. Yet the amendment cannot be more explicit and do more because it might modify common-law substantive obligations to preserve information.

Another member added that the amendment makes it clear, though, that a party has no duty to vary its regular business practice, as long as it adheres to that practice in good faith.

Judge Rosenthal responded that the rule had been very difficult to draft because the jurisprudence and terminology in this area are not crisp. Court opinions often label as "sanctions" a wide range of actions not normally considered to be "sanctions." Judges, for example, may describe routine discovery management orders as "remedial sanctions." The rule seeks to preserve judges' discretion to respond effectively to a wide range of circumstances and is only intended to foreclose the imposition of "real" sanctions. She added that the proposal is more like a "protective coat" than a "safe harbor."

Professor Coquillette added that the amendment only precludes sanctions "under these rules." That permits the court to impose sanctions under other sources of authority. But several members observed that it is unclear that anyone will catch that subtlety. Therefore, they said, the note needs to be more explicit on the matter.

Judge Rosenthal responded that in light of the concerns expressed, she would support redrafting appropriate portions of the committee note.

Dean Kane moved to adopt the amendment, delete the portions of the committee note that were troubling some of the members, and add language to the note emphasizing that the rule refers only to sanctions "under these rules."

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 45

Judge Rosenthal explained that the proposed amendments to Rule 45(d)(2)(B) (subpoenas) would apply the proposed amendments dealing with electronically stored information to discovery requests aimed at non-parties. One member objected that the part of the proposed amendments to Rule 45(d)(2)(B) dealing with the inadvertent disclosure of privileged material is not an electronic discovery rule, but a privilege rule — a counterpart to proposed Rule 26(b)(5). Therefore, the same objections raised to proposed Rule 26(b)(5) would apply to Rule 45. He added that the full implications of the new procedure established by the amendments had not been fully explored.

Judge Levi pointed out that, following the discussion of Rule 26(b)(5), the committee had rejected these objections by a vote of 8 to 4. That vote, he said, apparently would apply to Rule 45 as well.

Judge Murtha moved to reconsider the vote as to both Rule 26(b)(5) and Rule 45.

The committee, by a vote of 7 to 5, agreed to reconsider the proposed amendment to FED. R. CIV. P. 26(b)(5) as part of its consideration of the proposed amendment to FED. R. CIV. P. 45.

One member stated that the proposed amendments do not explicitly recognize the substantive principles of waiver. He suggested that language be added to explain that the rule does not change the applicable substantive principles of waiver. It could also specify that a party seeking to preserve a claim of privilege is not relieved of any evidentiary burden it has under substantive law. Another member added that even if it is clear that the burdens as to waiver are unaffected, the amendments offer an opportunity for gamesmanship in the discovery process.

Judge Rosenthal reiterated that it is clear that the amendments do not displace any burdens under the substantive law of privilege and waiver. Whatever opportunity there may be for gamesmanship, *i.e.*, for a party to assert privilege claims at a time calculated

to disrupt the litigation, already exists under the current rules. All the amendments do is provide a procedure for addressing a wide variety of situations. In effect, if a receiving party receives a privileged document, it has a club. The amendments state that the receiving party cannot use that club, but instead must bring the matter to the attention of the court.

Judge Thrash moved to remand the two amendments to the advisory committee for further consideration.

The committee, by a vote of 6 to 5, rejected the motion to remand the amendments to the Advisory Committee on Civil Rules.

The committee, by a vote of 9 to 3, approved the proposed amendments for final approval.

Amendments for Publication

FED. R. CIV. P. 5.2

As noted above on pages 4-7, the committee approved for publication a new FED. R. CIV. P. 5.2 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The rule fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Rosenthal reported that the style project was progressing very well. She noted that a number of law professors and attorneys had agreed to review the restyled rules, provide comments, and focus on whether any unintended changes in substance have been made.

The Style Subcommittee, she said, had made great progress in restyling the civil forms. It plans to circulate them to the Standing Committee later in the summer and ask for approval to publish them. As a result, the advisory committee will be able to receive public comment simultaneously on both the restyled rules and the restyled forms.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew, Professor Schlueter, and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum of May 17, 2005. (Agenda Item 10).

Amendments for Final Approval

Judge Bucklew reported that the advisory committee had received only two public comments on the amendments it had published in August 2004, three of which would authorize warrants and certain other documents to be transmitted by "reliable electronic" means.

FED. R. CRIM. P. 5

Judge Bucklew noted that the proposed amendment to Rule 5 (initial appearance) would permit a magistrate judge to accept a warrant from law enforcement authorities by reliable electronic means.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 6

Judge Bucklew explained that the changes to Rule 6 (grand jury) did not have to be published for public comment because they are merely technical and stylistic. They conform statutory language added by the Intelligence Reform and Terrorism Prevention Act of 2004 to the language used in the rest of the criminal rules.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 32.1

The proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) would allow a magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 40

The proposed amendment to Rule 40 (arrest for failing to appear in another district) would fill a perceived gap in the rules regarding persons arrested for violating the conditions of release in another district. It would specify that a magistrate judge in the district of arrest may set conditions of release.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CRIM. P. 41

The proposed amendment to Rule 41 (search warrant) would authorize a magistrate judge to use reliable electronic means to issue a warrant.

Judge Bucklew stated that a separate amendment to Rule 41 would provide procedures to assist magistrate judges in issuing warrants for tracking devices. The proposal, she added, had been approved by the Standing Committee in June 2003, but not submitted to the Judicial Conference because the Department of Justice had asked for more time to consider it. She pointed out that the Department had now completed a further review of the amendment and had no further recommendations. Accordingly, she said, the amendment should now be forwarded to the Conference.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 58

The proposed amendment to Rule 58(b)(2) (initial appearance in a misdemeanor) sets out the advice that a magistrate judge must give at an initial appearance on a misdemeanor charge. It would eliminate a conflict with Rule 5.1(a) (preliminary hearing) regarding the defendant's entitlement to a preliminary hearing.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

Judge Bucklew stated that the proposed amendments to Rule 11 (pleas), Rule 32 (sentence and judgment), and Rule 35 (correcting or reducing a sentence) are needed to bring the criminal rules into conformity with the Supreme Court's recent decision in *United States v. Booker,* 125 S. Ct. 738 (2005), which makes the federal sentencing

guidelines effectively advisory. She added that the advisory committee had made only those changes deemed absolutely necessary in light of *Booker*.

FED. R. CRIM. P. 11

Judge Bucklew stated that the proposed amendment to Rule 11 (pleas) is consistent with the sentencing practice followed by most district judges after *Booker*. It would impose an obligation on a sentencing judge to calculate the applicable sentencing guideline range and to consider that range, possible departures under the guidelines, and the other sentencing factors set out in 18 U.S.C. § 3553(a).

Judge Levi stated that the amendment is consistent with his reading of the remedy section of *Booker*. He noted that if a sentencing judge does not actually calculate the guidelines sentence, the Sentencing Commission will report the case to Congress as a non-guidelines sentence. One participant added that if the sentencing judge does not calculate the guidelines sentence, the judge does not know what the guidelines would dictate and therefore cannot be said to have "considered" the guidelines.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. CRIM. P. 32

Judge Bucklew explained that the amendments to Rule 32 (sentencing and judgment) reflect the urging of the Committee on Criminal Law that district judges use a uniform statement of reasons form to explain their sentencing decisions, so that reliable statistics can be presented to the Sentencing Commission and Congress. It also makes clear that a judge may instruct the probation office to gather and include in the presentence report any information relevant to the sentencing factors articulated in 18 U.S.C. § 3553(a). And it requires the court to give the parties notice if it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 35

Judge Bucklew noted that the proposed amendment to Rule 35 (correcting or reducing a sentence) is needed to avoid the present implication in the rule that a guidelines sentence is mandatory.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 45

Judge Bucklew stated that the proposed amendment to Rule 45 (computing and extending time) would adjust the time-counting provision of the rule to conform more closely with the equivalent provision in the civil rules, FED. R. CIV. P. 6(e) (additional time after service). It would remove any doubt about how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, by electronic means, or by other means consented to by the party served.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. CRIM. P. 49.1

As noted above on pages 4-7, the committee approved for publication a new FED. R. CRIM. P. 49.1 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The amendment fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Bucklew described a proposed amendment to FED. R. CRIM. P. 29 (motion for a judgment of acquittal), urged by the Department of Justice, that would require a court to defer ruling on a motion for judgment of acquittal until after the jury returns a verdict. She noted that the Department had submitted additional materials recently, and the advisory committee had considered a revised draft rule at its April 2005 meeting. The current version follows a proposal suggested by Judge Levi that would allow a defendant to consent to an appealable pre-verdict ruling conditioned upon waiving double jeopardy rights.

Judge Bucklew said that a majority of the committee at the April meeting had voted in favor of making some change in the rule. But drafting a rule had been very difficult, particularly with regard to hung juries and waiver of double jeopardy rights. She added that a subcommittee was working on polishing a rule and a committee note that would be considered at the committee's October 2005 meeting.

She pointed out that the Crime Victims' Rights Act had been signed into law in October 2004. The advisory committee, she reported, was in the process of reviewing the

full body of criminal rules to determine which might be affected by the statute and have to be amended.

Judge Bucklew reported that the American College of Trial Lawyers (ACTL) had submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense under *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), and other Supreme Court cases. The committee had reviewed all the local district court rules on the subject, some of which attempt to codify *Brady* and define the government's disclosure obligations. She said that a majority of the committee had voted in favor of proceeding with some amendment to FED. R. CRIM. P. 16 (discovery and inspection).

Deputy Attorney General Comey stated that the Department of Justice was very strongly opposed to the proposal. He said that prosecutors already are required to disclose exculpatory evidence under *Brady*, and they err on the side of production. The Department instructs prosecutors that they have a firm obligation to disclose. Prosecutors, he emphasized, act properly, and the defendant's right to a fair trial is protected.

Most of the suggestions, he said, go well beyond constitutional requirements and would create new rights that the courts have refused to recognize. One likely result of the proposed rule would be unnecessary pretrial disclosure of the identity of government witnesses. The change could create unintended consequences that everyone, not just prosecutors, will regret. Under the ACTL proposal, he pointed out, the government would have to bear the burden in every case of showing that it has turned over all evidence that "tends" to be exculpatory. This, he said, is an impossible burden.

He observed that ACTL had catalogued a number of successful *Brady* challenges, but most of them had occurred in the state courts. There is no point in changing a federal criminal rule in order to address reported lapses by state prosecutors. He admitted that the few errors committed by federal prosecutors were not enough to justify a rule change. If there were a problem, the Department of Justice could place more specific guidance for prosecutors in the U.S. Attorneys' Manual.

In short, he concluded, the current system is not broken, and no rule amendment is justified. Moreover, the proponents of the rule have not carried the burden of establishing that a problem exists to justify such a fundamental change.

On that point, one member inquired as to whether any actual empirical data existed, beyond case decisions, as to how significant the problem of non-disclosure might be. Without a sounder empirical basis, the rationale for the proposed rule is weak. But

another participant responded that the *Brady* case decisions arise in circumstances where the exculpatory evidence, one way or another, ultimately is revealed. On the other hand, there is little information available regarding the instances in which relevant exculpatory information never comes to light. Those cases are not litigated and cannot be detected.

Another member observed that the proposed national rule is more modest than the local rules that currently exist in about a third of the federal district courts. Accordingly, if the local court rules have not caused problems, there should be no problem with a national rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 16, 2005. (Agenda Item 11)

Amendments for Final Approval

FED. R. EVID. 404(a)

Judge Smith stated that there has been a long-standing conflict among the circuits as to whether character evidence may be used to prove conduct in a civil case. The proposed amendment to Rule 404(a) (general inadmissibility of character evidence) would make it clear that character evidence should not be admitted for this purpose in a civil case.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. EVID. 408

Judge Smith stated that the proposed amendment to Rule 408 (compromise and offers to compromise) would allow conduct or statements made in compromise negotiations to be admitted in later criminal cases under certain limited circumstances. He pointed out that the Department of Justice had sought the amendment.

Professor Capra observed that the current case law is in disarray, and there is no certainty for an attorney as to what will be disclosable and useable in this area. The amendment, he said, is a compromise that should provide some certainty by making a limited exception for statements made to civil regulatory agencies to settle claims brought by them.

Associate Deputy Attorney General Davis stated that the Department of Justice supported the amendment in concept. He argued that people ought to know that what they say to the government is on the record and that they can be held responsible for lying.

He added, however, that the amendment's reference to a government regulatory agency was too vague and limiting. He suggested language along the lines of "a claim by or against a public office or agency exercising public regulatory or enforcement authority." He noted that the phrase "public office or agency" is used already in Rule 803 (hearsay). Under this language, if a government agency acts like a private party, contacts with it are treated as private conversations. The exception established by the proposed amendment would apply only when the public entity exercises public, *i.e.*, regulatory or enforcement, authority. This is a distinction that the current version of the amendment does not address.

Judge Smith stated that he supported the proposed new "public office or agency" language, but opposed the additional suggestion that the amendment be broadened to extend the exception to claims brought either "by" or "against" a government agency. He stated that claims against a government agency should not be included. Individuals should be able to sue the government for various reasons without having to worry that if they settle their claim, something they say in settlement negotiations could be used against them in a later criminal matter.

Judge Levi stated that attorneys in some private cases urge their reluctant clients to apologize just to get a case to go away. There is no way that clients will do that if their statements can be treated as an admission of guilt in a later criminal case. Therefore, the proposed amendment is limited to statements made in connection with claims brought by the government. In those claims, there is a sense that a party is on notice that what it says to the government can be used against it.

Professor Capra suggested — and the committee accepted — the following revised language: "a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

The committee, by a vote of 8 to 2, approved the proposed amendment for final approval.

FED. R. EVID. 606(b)

Judge Smith stated that Rule 606(b) (inquiry into the validity of a verdict or indictment) generally prohibits parties from introducing testimony or other evidence from jurors to impeach a jury's verdict. But some courts have permitted jurors to testify as to

the intent of their verdict. This, he said, should lie beyond the reach of the rule. The amendment, therefore, would limit inquiries of jurors to proving that the verdict reported was the result of a mistake in entering it on the verdict form. The amendment, thus, would make it clear that a juror cannot testify about the intended effect of the verdict.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. EVID. 609

Judge Smith stated that the proposed amendment to Rule 609 (impeachment by evidence of conviction of a crime) would address the portion of the rule that admits evidence of a prior criminal conviction if the crime involved "dishonesty or false statement." The key question is how the court is to determine whether the crime involved dishonesty or false statement. It would be undesirable, he explained, for a court to get bogged down on this determination, or to hold a mini-trial to consider the terms of a past crime. Accordingly, the proposed language would admit evidence of a prior conviction "if it can readily be determined" that the crime involved dishonesty or false statement.

Deputy Attorney General Comey voiced support for the rule and the committee note. He noted that the point of the amendment is to allow a court to look beyond the formal elements of the crime itself to the actual offense committed. He said that mini-trials on this issue would be inappropriate, but some license should be provided to a court to delve beyond the mere elements of the crime.

For this reason, however, Mr. Comey objected to the language "as proved or admitted" contained in the proposed amendment. He suggested that it could cause confusion. Judges might read it to mean that they are limited to considering only the formal elements of the crime. Yet the whole point of the rule change is to allow them to go beyond that.

Professor Capra suggested that the problem could be solved by adding the word "establishing" to the amendment, so that it would read: "evidence that any witness has been convicted of a crime shall be admitted . . . if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement." The committee accepted the revised language.

The committee without objection approved the proposed amendment for final approval by voice vote.

NEXT COMMITTEE MEETING

The next committee meeting was tentatively scheduled for Friday and Saturday, January 6-7, 2006, in Phoenix, Arizona.

The secretary would like to thank Jeffrey Barr very much for his invaluable assistance in preparing a draft of the minutes of the meeting.

Respectfully submitted,

Peter G. McCabe,
Secretary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2006
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Friday and Saturday, January 6-7, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Associate Attorney General Robert D. McCallum, Jr.
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, senior attorney in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, was unable to attend in person, but he participated by telephone in the bankruptcy portion of the meeting.

In addition to Associate Attorney General McCallum, the Department of Justice was represented at the meeting by Benton J. Campbell, Counselor to the Assistant Attorney General for the Criminal Division. Alan Dorhoffer attended on behalf of the U.S. Sentencing Commission.

At the committee's request, Professor Alan N. Resnick, Donald B. Ayer, and James C. Duff made presentations to the committee.

INTRODUCTORY REMARKS

Judge Levi reported that he and Professor Coquillette had met with the new Chief Justice. He said that John Roberts will be an excellent Chief Justice and a very good friend to the rules process. He noted that the Chief Justice had served on the Advisory Committee on Appellate Rules for five years, and he would have become the new chair of that committee on October 1, 2005, but for his appointment to the Supreme Court. The committee conveyed its congratulations to Chief Justice Roberts and wished him great success in his new endeavor.

Judge Levi added that Judge Samuel Alito, chair of the Advisory Committee on Appellate Rules until October 1, 2005, had also been nominated to the Supreme Court. The committee congratulated Judge Alito on his selection and wished him well in his confirmation hearings and his future position on the Court.

Judge Levi noted that Professor Patrick Schiltz, reporter to the Advisory Committee on Appellate Rules, had just been nominated by the President to be a district judge for the District of Minnesota. He thanked Professor Schiltz for his excellent service and dedication as a reporter. The committee congratulated Professor Schiltz and wished him success.

Finally, Judge Levi reported that Judge Carl Stewart had been appointed by the Chief Justice as the new chair of the Advisory Committee on Appellate Rules. He emphasized that the high quality of these four appointments reflects very well on the quality of the membership of the rules committees as a whole.

Judge Levi noted that the terms of two members of the Standing Committee had expired on October 1, 2005 – Charles J. Cooper and David M. Bernick. He pointed out that neither was able to attend the meeting, but Professor Coquillette read a letter of appreciation from Mr. Cooper expressing his view that his participation in the work on the committee had been among the most rewarding service of his professional career. Judge Levi added that Mr. Bernick will attend the next committee meeting.

Judge Levi also welcomed Mr. Cox and Mr. Maledon as new members to the committee and read their impressive professional qualifications.

Judge Levi reported that the Judicial Conference at its September 2005 session had approved many rule amendments as part of its consent calendar, including some relatively controversial rules. The amendments included the package of changes to the civil rules relating to discovery of electronically stored information. They also included amendments to the evidence rules, including Rule 408 (use of admissions made in the course of settlement negotiations in a later criminal case) and Rule 609 (automatic

impeachment of a witness by evidence of a prior conviction involving dishonesty or false statement).

Judge Levi explained that a great many changes were needed in the bankruptcy rules to comply with the provisions of the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed to the enormous effort of the Advisory Committee on Bankruptcy Rules in producing a comprehensive package of revised official forms and interim bankruptcy rules. The advisory committee, he said, had effectively completed several years of rules work in just six months. Even organizing the advisory committee into subcommittees to write so many different rules, he said, had been difficult. He noted, too, that the new legislation was very complex and had given rise to many problems of interpretation, making it difficult to draft rules and forms.

He added that he had asked Professor Alan Resnick to attend the meeting and give the members a perspective on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and what it means for the rules process. Finally, he noted that Congress was likely to conduct oversight hearings on implementation of the legislation, and the revised bankruptcy rules will be examined closely by Congress.

Judge Levi reported that the Judicial Conference had placed one proposed rule on its discussion calendar for the September 2005 session – new FED. R. APP. P. 32.1, governing citation of judicial dispositions. The rule, he said, was controversial and had encountered opposition from a number of circuit judges. He explained that he and Judge Alito had made a joint presentation on the new rule to the Conference. Judge Levi spoke first about the thorough procedures followed by the rules committees in considering the new rule, and then Judge Alito addressed the substance of the rule.

Judge Levi noted that one chief circuit judge spoke against the rule, arguing that each circuit is different and there is no need for national uniformity on citation policy. The chief judge also objected to having the rule made retroactive. In the end, Judge Levi noted, the Conference approved the rule, but made it prospective only. He said that the new rule was a great achievement, and the work of the Advisory Committee on Appellate Rules had been truly exceptional. The thoroughness of the committee's work, he said, had been very persuasive to the Conference.

Judge Levi reported that the Advisory Committee on Criminal Rules was in the process of considering controversial amendments to two criminal rules – Rule 29 (judgment of acquittal) and Rule 16 (disclosure of information). Under the proposed revision to Rule 29, he explained, a trial judge would normally have to defer entering a judgment of acquittal until after the jury returns a verdict. But the judge could enter a judgment of acquittal before a jury verdict if the defendant waives his or her double jeopardy rights. The revised rule, thus, would allow the Department of Justice to appeal

the trial judge's granting of a judgment of acquittal. He noted that the advisory committee is considering amendments to Rule 16 that would address the recommendation of the American College of Trial Lawyers that the rule specify the government's obligations to disclose exculpatory and impeaching information under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1972).

Judge Levi reported that the Advisory Committee on the Rules of Evidence had under active consideration a new rule governing privilege waiver. He explained that the Advisory Committee on Civil Rules had been concerned for many years that reviewing documents for privilege waiver as part of the discovery process adds substantially to the cost and complexity of civil litigation without real benefit. He said that the new electronic discovery rules just approved by the Judicial Conference contain a "clawback" provision, allowing a party to recover privileged or protected material inadvertently disclosed during the discovery process, and a "quick peek" provision, recognizing agreements between the parties to allow an initial examination of discovery materials without waiving any privilege or protection.

But, he said, the new rules do not address the substantive question of whether a privilege or protection has been waived or forfeited. Nor do they address whether an agreement of the parties or an order of the court protecting against waiver of privilege or protection in a specific case can bind later actions or third parties.

Judge Levi noted that it is very unusual for the rules committees to consider a rule invoking substance because the Rules Enabling Act specifies that the rules may not abridge, enlarge, or modify any substantive right. The Act, moreover, states that any rule creating, abolishing, or modifying an evidentiary privilege can only go into effect if approved by an act of Congress. He reported that he had discussed the problems of privilege and protection waiver with the chairman of the House Judiciary Committee, who responded that the matter was one of great interest to the Congress. The chairman stated that he will send a letter asking the committee to develop a privilege-waiver rule that could eventually be enacted as a statute. Thus, Judge Levi explained, the Advisory Committee on the Rules of Evidence would develop a rule through the regular rulemaking process. After the Judicial Conference and the Supreme Court approve the rule, it would be submitted to Congress for enactment as a statute.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 15-16, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that legislation had passed the House of Representatives to undo the 1993 amendments to FED. R. CIV. P. 11 (sanctions), thereby requiring a court to impose sanctions for every violation of the rule. The legislation would also require a federal district court to suspend an attorney from practice in the court for a year if the attorney has violated Rule 11 three or more times.

Mr. Rabiej noted that other provisions had been added to the bill on the House floor. One would prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety.

Mr. Rabiej pointed out that the House Judiciary Committee's Subcommittee on Commercial and Administrative Law had held an oversight hearing in July 2005 on the judiciary's implementation of the new bankruptcy legislation. He noted that Judge A. Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, had appeared on behalf of the Judicial Conference and testified as to the substantial amount of work accomplished by the rules committees, other Judicial Conference committees, and the Administrative Office. Mr. Rabiej reported that the testimony had been very impressive, and Judge Small had reassured the Congressional subcommittee that the judiciary would be able to meet all the statutory deadlines.

Mr. Rabiej said that proposed legislation to allow cameras in federal courtrooms at the discretion of the presiding judge was gathering steam. He noted that the Judicial Conference generally opposes cameras in the courtroom.

Mr. Rabiej reported that the rules office had received a request from the Foreign Intelligence Surveillance Court in October to comment on its local rules and to inquire about the rules process in general. He said that he and Professor Capra had reviewed the court's rules, and the court had accepted virtually all their suggested comments.

Judge Levi noted that the Director of the Administrative Office, Leonidas Ralph Mecham, had announced his retirement, and a search committee of judges had been appointed by the Chief Justice to assist him in recommending a replacement.

Mr. McCabe reported that the Administrative Office's rules web site had become very popular. He noted that the staff had posted all rules committee minutes and reports back to 1992, and they will soon post all the committee agenda books back to 1992. He added that all public comments are now being posted as they are received, and the rules office is attempting to locate all the key records of the rules committees – especially

minutes and reports – back to the earliest days of the rules program. These records, once posted, should be of substantial benefit to scholars, judges, and lawyers.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of various pending projects of the Federal Judicial Center, as summarized in Agenda Item 4. He directed the committee's attention to two projects involving the federal rules.

First, the Center is examining the impact of the Class Action Fairness Act of 2005 on the resources of the federal courts. The study will begin by determining whether there has been any increase in the number of class actions filed as a result of the Act. Center staff will then examine whether there have been any changes in the workload burdens of the district courts. Finally, they will also look at the burdens imposed by class actions on the courts of appeals. Mr. Cecil reported that there are serious limitations on the data available, and researchers are going through individual case records on a district-by-district basis.

Second, Mr. Cecil described the Center's project to address ongoing confusion regarding the standard of review in patent claims construction. He noted that about one-third of the patent cases are remanded to the district courts on claims construction issues. He said that a survey was being conducted of district judges and attorneys to identify case-management techniques that might improve the claims-construction process and to explore whether some increased ability for interlocutory appeals in patent cases would be helpful.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 5).

Judge Stewart reported that the advisory committee had no action items to present. He pointed out that the committee had just completed its marathon efforts to approve new Rule 32.1, governing citation of opinions. He said that the thorough work of the committee, the extent of the public comments, and the invaluable research produced for the committee by the Federal Judicial Center and the Administrative Office had shown that the Rules Enabling Act process had worked exceedingly well.

Judge Stewart noted that the advisory committee would meet next in April 2006 and would address a number of issues described in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Morris and Judge Zilly (by telephone) presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 12, 2005 (Agenda Item 6).

Professor Morris reported that the committee had met twice since the last Standing Committee meeting and had conducted numerous teleconferences in order to complete work on the package of official forms and interim rules to implement the omnibus bankruptcy legislation. He pointed out that the interim rules and the forms had been circulated to the courts in August 2005 and posted on the rules web site for public comment. The advisory committee considered the public comments and made a few essential changes in the interim rules and the forms at its September 2006 meeting. He added that every district had adopted the interim rules without change or with very minor changes.

Professor Morris said that the advisory committee will meet next in March 2006, and it plans to submit a package of permanent rule revisions for publication at the June 2006 meeting of the Standing Committee. The proposed national rules will build on the interim rules and include a number of other provisions not included in the interim rules and some amendments unrelated to the bankruptcy legislation.

Professor Morris reported that the advisory committee had also conducted a cover-to-cover study of the restyled civil rules at the request of the Advisory Committee on Civil Rules. He explained that the civil rules apply generally in adversary proceedings, and they may be applied in contested matters. In addition, some bankruptcy rules are modeled on counterpart provisions in the civil rules. He noted that the advisory committee had broken into six groups, each of which carefully reviewed an assigned block of rules, checked for any possible impact on the bankruptcy rules, and examined whether any changes were needed in language or cross-references. At the end of this detailed study, he said, the advisory committee found very few problems with the restyled civil rules, and it communicated its observations to the Advisory Committee on Civil Rules.

Judge Zilly added that the individual members of the advisory committee had spent an enormous amount of time studying the new bankruptcy legislation and drafting the interim rules. In addition, they devoted an enormous amount of time to revising the official bankruptcy forms and devising new forms to implement the new procedural

requirements of the legislation. He noted that the official forms took effect on October 17, 2005, following approval by the Executive Committee of the Judicial Conference.

Historical Perspective

At the request of Judge Levi, Professor Resnick gave the committee a historical perspective on the bankruptcy system and the Federal Rules of Bankruptcy Procedure.

He explained that the Constitution gives Congress authority to establish uniform laws on the subject of bankruptcy and to make bankruptcy exclusively federal. The first meaningful national bankruptcy law, he said, was enacted in 1898, and it lasted until 1978. The 1898 Bankruptcy Act was amended substantially in the 1930s. Enactment of Chapter 11 in 1938 marked a major move away from liquidation and towards saving businesses.

By the late 1960s, several bankruptcy experts thought that it was time to conduct a complete review of the bankruptcy system. So Congress passed a law in 1968 creating a national bankruptcy commission, comprised of members of Congress, law professors, judges, and lawyers. The commission filed a report in 1973 that recommended replacing the 1898 Act with a new substantive bankruptcy law and a revised bankruptcy court structure. From 1973 to 1978, a great deal of debate ensued over the commission's recommendations, both in Congress and in the bankruptcy community, and in 1978 Congress enacted a new Bankruptcy Code and a new Article I court structure.

New procedural rules were needed to implement the 1978 Code. But there was not sufficient time to promulgate rules under the regular Rules Enabling Act process before the provisions of the 1978 Code took effect on October 1, 1979. Therefore, the Advisory Committee on Bankruptcy Rules drafted a set of "suggested interim rules" over a period of nine months. They were circulated to the courts in October 1979, with the notation that they had not been approved either by the Standing Committee or the Judicial Conference. They were generally adopted by the courts as local rules. The advisory committee then began work on drafting the new Federal Rules of Bankruptcy Procedure, which eventually took effect in 1983.

In 1982, the Supreme Court declared the jurisdictional provisions of the 1978 law unconstitutional in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). In 1984, new legislation was enacted that cured the jurisdictional defects and created the current bankruptcy court system under which bankruptcy jurisdiction is vested in the district courts and then delegated to the bankruptcy judges. The new court structure was reflected in a package of rule amendments that took effect in 1987. In 1986, the pilot U.S. trustee program – which took over the estate administration responsibilities in

bankruptcy cases – was made a nationwide system. The advisory committee drafted rule amendments to implement the U.S. trustee system, and they took effect in 1991.

In the early 1990s, credit and lending groups complained that the pendulum in bankruptcy had swung too far toward protecting debtors at the expense of creditors, and they initiated efforts to change the Bankruptcy Code. In 1994, Congress created another national bankruptcy review commission, which issued a comprehensive report in 1997. But the credit community was not satisfied with the recommendations, and their efforts led to the introduction of legislation in 1997 that would amend the Code substantially to better protect creditors' rights. The legislation was pending in each Congress from 1997 until April 2005, when it was enacted as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At first, the Advisory Committee on Bankruptcy Rules did not move to draft potential rule changes to implement the pending legislation because its future was uncertain. In fact, the bill was vetoed by President Clinton. But with the election of President Bush in 2000, it appeared very likely that it would be enacted soon. So, the advisory committee, under the leadership of Judge Small, retained two additional bankruptcy law professors as consultants and began to study the legislation in depth to determine what changes would be needed in the bankruptcy rules and forms. By 2002, the committee had developed rough drafts of rules amendments.

The legislation was eventually enacted in April 2005, and it contained a general effective date of October 17, 2005. Fortunately, the six-month grace period gave the judiciary and the Department of Justice time to accomplish the many tasks required of them. The advisory committee, through concentrated efforts and starting from the 2002 drafts, was able to complete an emergency package of interim rules and revised official forms.

Professor Resnick said that the legislation was very controversial and had been opposed by the National Bankruptcy Conference, a committee of the American Bar Association, and virtually all bankruptcy judges and academics. But it was strongly supported by the credit card companies, banks, landlords, and certain other special interest groups.

In consumer cases, the legislation imposes additional restrictions on debtors, particularly Chapter 7 debtors. Among other things, they must undergo credit counseling and debtor education, and they must submit to a means test to determine whether they are presumed to be abusing the bankruptcy system. The test examines the debtor's monthly income, expenses, and discretionary income. Consumer bankruptcy lawyers, moreover, must meet new requirements and are exposed to additional liability that may lead them to raise their fees or go out of the consumer bankruptcy business.

For Chapter 11 business cases, a court's ability to extend the debtor's exclusive period to file a plan has been limited. The new law, moreover, generally makes it harder for small businesses to reorganize. It also gives landlords additional authority regarding leases.

Professor Resnick said that the legislation also contains some very good provisions, such as the new Chapter 15, dealing with cross-border insolvencies, and provisions dealing with health care, nursing homes, and patient rights. It also allows direct appeals from the bankruptcy court to the court of appeals in appropriate circumstances.

Professor Resnick pointed out that there are many technical flaws and ambiguities in the 500-page legislation, largely because it was drafted by special interest groups and lobbyists, and Congress was reluctant to make any changes. Moreover, he said that he thought it unlikely that Congress would enact technical amendments to correct the flaws in the near future.

He reported that the day after the legislation was signed, on April 21, 2005, the Advisory Committee on Bankruptcy Rules held a meeting of its subcommittee chairs and committee staff to decide on organizing its work. The committee decided at the outset that it should not wait the full three years it normally takes to complete the rules process. Rather, it had to produce forms and interim rules before the October 17, 2005 effective date of the legislation.

In Professor Resnick's view, there were three reasons for the advisory committee to act expeditiously. First, many of the existing national rules were now inconsistent with the statute. Second, rules and forms were needed quickly to implement the various new concepts and procedures contained in the law, such as the means test and Chapter 15 cross-border insolvency. Third, the new law explicitly directed the Judicial Conference to promulgate several new rules and forms.

Professor Resnick noted that the format of the interim rules drafted by the advisory committee differs from interim rules issued in the past. The committee, he said, decided to create the interim rules as amendments to the existing national rules, striking through deleted provisions and underlining new provisions. The interim local rules, therefore, will become the advisory committee's first draft of the proposed permanent amendments to the national rules.

He pointed out that the advisory committee had encountered a number of difficult problems in drafting the rules and forms. First of all, addressing some of the provisions in the legislation required a great deal of technical and specialized expertise in several different areas. Moreover, the advisory committee did not have time to benefit from public

comment. It adopted a subcommittee system, with six different subcommittees addressing different aspects of the legislation – consumer provisions, business provisions, cross-border insolvency, health care, appeals, and forms. Professor Resnick praised Judge Zilly as a truly amazing chair, delegating work to the subcommittees, but also serving as an active participant in the work of every subcommittee.

After the advisory committee had completed and published the interim rules and forms on the Internet in August 2005, it received a number of helpful public comments pointing out a few technical errors. The advisory committee quickly made the corrections at its September 2005 meeting.

Professor Resnick pointed out that the advisory committee had drafted interim rules only in those areas where it was important to have a rule in place by October 17, 2005, such as where the new statute conflicted with an existing national rule. The advisory committee, he said, had involved the U.S. trustee organization in all its deliberations and activities, and it received a good deal of help and advice from the U.S. trustees.

The advisory committee also tried to make the rules and forms as neutral as it could on substantive issues. For the most part, it tried to leave the resolution of ambiguities in the legislation up to the courts. But in several instances it had to resolve ambiguities in order to devise the rules and forms. Most importantly, he said, in his opinion, every member of the advisory committee left behind any personal views or opposition to the legislation, and everybody worked hard to implement the law faithfully. The advisory committee, moreover, tried to be as transparent as possible, posting its work product on the Internet. The entire staff of the Administrative Office was outstanding, and particular appreciation is due to Patricia Ketchum, who was the centerpiece of the committee's efforts to redraft the bankruptcy official forms.

Professor Resnick said that he believes that it is very unlikely that the advisory committee will consider making any additional changes in the interim rules. Instead, it will concentrate on drafting the permanent amendments to the national rules. In the process, it will look at the actual experiences of the courts in using the interim rules, review all the public comments, and add some additional rules and forms at its March 2006 meeting.

In conclusion, Professor Resnick said that the advisory committee should approve a complete set of amendments to the national rules and official forms at its March 2006 meeting and publish them for public comment in August 2006. The revisions, therefore, will be on track under the regular Rules Enabling Act process, and the revised national rules would become effective on December 1, 2008.

Mr. McCabe added that the Act also contains a number of provisions that adversely impact the finances of the federal judiciary. For example, it allows debtors to petition for filing in forma pauperis. If the petition is granted, the judiciary loses its designated portion of the filing fee, which is used to fund basic court operations. Moreover, if the debtor does not pay a filing fee, there is no statutory authority in a chapter 7 case to pay the case trustee the $60 fee that funds the trustee's work. In addition, the Act imposes substantial additional work and costs on the courts. Among other things, the Administrative Office is required to compile and report substantial new statistics in areas that are of no direct concern to the business needs of the judiciary. The Act's requirements have required the Administrative Office to expedite development of a multi-million dollar new statistical infrastructure capable of receiving and processing the new statistics.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachment of December 15, 2005 (Agenda Item 7).

Amendment for Publication

FED. R. CIV. P. 8(c)

Judge Rosenthal reported that the advisory committee had only one action item to present. She explained that FED. R. CIV. P. 8(c) (pleading affirmative defenses) lists "discharge in bankruptcy" as one of the affirmative defenses that a party must plead. She said that bankruptcy judges had suggested to the advisory committee that the rule is incorrect because § 524 of the Bankruptcy Code specifies that a discharge voids any judgment obtained on the discharged debt. It also operates as an injunction against a creditor bringing any action to collect the debt. Therefore, a discharge is not an affirmative defense as a matter of substantive bankruptcy law.

Judge Rosenthal said that the advisory committee was seeking authority to publish a proposed amendment to eliminate "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c). She added, however, that the advisory committee did not plan to publish the amendment immediately, but would hold it for publication as part of a package of amendments at a later date.

The committee without objection approved the proposed amendment for publication at a later date by voice vote.

Informational Items

Style Project

Professor Cooper provided a status report on the work of the advisory committee in restyling the body of civil rules. He noted that the project to restyle all the federal rules of procedure had been initiated in the early 1990's by Judge Robert Keeton and Professor Charles Alan Wright. Their goal was to rewrite the rules to achieve greater clarity and ease of use without changing meaning or substance. In addition, they sought to eliminate inconsistencies and to use language consistently throughout the federal rules of procedure.

Professor Cooper pointed out that the Federal Rules of Appellate Procedure had been the first body of rules to be restyled. They were followed by the restyled Federal Rules of Criminal Procedure. Now, the Advisory Committee on Civil Rules had completed a style revision of all the Federal Rules of Civil Procedure, which it published for comment in February 2005. Professor Cooper noted that the advisory committee had received 21 written comments to date and had held one hearing in Chicago. The hearing, he said, was essentially a comprehensive round table discussion on the restyled rules with Gregory P. Joseph and Professor Stephen B. Burbank, who represented the views of a group of 21 distinguished lawyers and professors who had read the restyled rules carefully and provided detailed written comments to assist the advisory committee.

Professor Cooper noted that a majority of the reviewing group had expressed the view that the project to restyle the civil rules should not proceed further because it could introduce inadvertent changes in the meaning of rules and possibly lead to litigation and added transactional costs. It might also preclude a more comprehensive overhaul of the civil rules. He also reported that members of the reviewing group had expressed concern that if the entire body of civil rules were re-adopted as a package, the supersession clause of the Rules Enabling Act process might cause mischief by overturning statutory provisions. Professor Cooper responded, though, that the advisory committee was considering a number of options for dealing with this problem.

Judge Rosenthal added that there had been no supersession problems when the restyled criminal rules were promulgated. Professor Cooper agreed that the fears expressed at the time about the criminal and appellate rules had not been realized in practice. He noted, for example, that the Department of Justice had reported that lawyers in its various divisions had not experienced any problems with the other restyled rules. Three of the law professors at the meeting added that they regularly read all the reported decisions in their fields and have not seen a single problem to date with the restyled rules.

Judge Rosenthal said that much of the public commentary on the restyled rules had been very positive, adding that the new rules are much clearer, easier to understand, and easier to use. She said that the advisory committee had been extraordinarily disciplined in its work and had avoided making any changes in language where there could be a potential change in meaning. She also thanked the Litigation Section of the American Bar Association for its help in supporting the project and providing very helpful input.

Other Amendments Under Consideration

Judge Rosenthal reported that the advisory committee had been so occupied with the restyling and electronic discovery projects that it had put aside a number of other issues. She listed several future committee agenda items, including:

(1) Rule 15 (amended and supplemental pleadings) – whether to consider changes in the automatic right of a party to amend its pleading or in the provision allowing relation back of an amendment changing the party against whom a claim is asserted, if the plaintiff files a case without knowing the name of the defendant but later discovers the name;

(2) Rule 26(a)(2)(B) (pretrial disclosure of expert testimony) – whether reports should have to be filed by employees who only sporadically give expert testimony;

(3) Rule 30(b) (notice of deposition) – whether to address a number of problems and possible misuses of the rule in taking depositions of institutional witnesses;

(4) Rule 48 (number of jurors and participation in the verdict) – whether the rule should be amended to include a provision on polling the jury as found in FED. R. CRIM. P. 31;

(5) Rule 58(c)(2) (entry of judgment in a cost or fee award) – together with Rule 54(d)(2) (motion for attorneys' fees) and FED. R. APP. P. 4 (timing of a notice of appeal) – whether to examine the practical effect of the provisions that give a district judge discretion to suspend the time to file an appeal when a motion is filed for attorney fees;

(6) Rule 60 (relief from judgment or order) — whether the rule should be amended, or a new rule drafted, to authorize a district court to make "indicative rulings" on post-trial motions when a pending appeal has deprived it of jurisdiction; and

(7) Rule 56 (summary judgment) – whether the rule should be rewritten to provide time limits, specify standards for granting summary judgment, and cure the disconnect between the text of the rule and the way that summary judgment motions are actually litigated in the courts.

Finally, Judge Rosenthal said that the advisory committee has also had on its agenda for a long time a controversial suggestion to reexamine notice pleading in the civil rules. She said that a number of courts are tempted to impose heightened pleading requirements, and the interplay between the pleading rule and the discovery rules had arisen several times during the advisory committee's deliberations on the discovery rules. She added that if the advisory committee decides to change Rule 56, the pleading rule will necessarily be implicated.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Earlier in the morning, before the meeting began, Judge Bucklew presided over a hearing to listen to the testimony of Federal Public Defender Jon M. Sands, on behalf of the Federal Defenders Sentencing Guidelines Committee, regarding the advisory committee's proposed amendments to FED. R. CRIM. P. 11 (pleas), 32 (sentencing and judgment), and 35 (correcting or reducing a sentence), published in August 2005. The proposed amendments would conform the criminal rules with *United States v. Booker,* 543 U.S. 220 (2005).

Following the committee's lunch break, Judge Bucklew presided over a hearing of the testimony of Mike Sankey, on behalf of the National Association of Professional Background Screeners, regarding proposed new FED. R. CRIM. P. 49.1 (privacy protection for filings made with the court), published for public comment in August 2005.

Judge Bucklew and Professor Beale then presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 8, 2005 (Agenda Item 8).

Judge Bucklew reported that the advisory committee had spent most of its October 2005 meeting on three issues: (1) rule amendments to implement the Crime Victims' Rights Act (part of the Justice for All Act of 2004); (2) a proposed amendment to FED. R. CRIM. P. 29 (judgment of acquittal); and (3) a proposed amendment to FED. R. CRIM. P. 16 requiring the disclosure of *Brady* information before trial.

Amendments for Publication

Judge Bucklew said that the advisory committee was seeking authority from the Standing Committee to publish amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act. The amendments consist of one new rule and changes to five existing rules. She added that the advisory committee had incorporated Judge Levi's suggested improvements in the text of the rules and committee notes.

FED. R. CRIM. P. 1

Judge Bucklew explained that the proposed amendment to Rule 1 (scope and definitions) would merely incorporate the statutory definition of a "crime victim" set forth in the Crime Victims' Rights Act. She added that the statutory definition was quoted in full in the proposed committee note.

FED. R. CRIM. P. 12.1

Judge Bucklew said that the proposed amendment to Rule 12.1 (notice of alibi defense) would provide that a victim's address and telephone number not be given automatically to the defendant if an alibi defense is made. The amendment would give the court discretion to order disclosure of the information or to fashion an alternative procedure giving the defendant the information necessary to prepare a defense, but also protecting the victim's interests.

Two members questioned the language of proposed new subparagraph (b)(1)(B) that places the burden on the defendant to establish a need for the victim's address and telephone number. They said that the presumption should be reversed. Thus, the rule would provide that the defendant has the right to speak with the victim, and the government would have the burden of showing that there is a need to protect the victim's interests. One participant suggested that the advisory committee might consider drafting alternate versions of the provision and including both in the publication of the rules. Another suggested that the matter might simply be highlighted in the covering letter accompanying the publication.

FED. R. CRIM. P. 17

Judge Bucklew said that the proposed amendment to Rule 17 (subpoena) would require court approval to obtain a subpoena served on a third party that calls for personal or confidential information about a victim. The court could also require that the victim be given notice of the subpoena and an opportunity to move to quash or modify it.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require the court to consider the convenience of any victim in setting the place of trial.

FED. R. CRIM. P. 32

Judge Bucklew pointed out that the proposed amendments to Rule 32 (sentencing and judgment) would delete the current definition in the rule of a victim of a crime of violence or sexual abuse. The new, broader definition of a "crime victim," taken from the Crime Victims' Rights Act itself and incorporated in FED. R. CRIM. P. 1 (definitions), includes all federal crimes. The amended rule would also eliminate the current restriction that only victims of a crime of violence or sexual abuse are entitled to be heard at sentencing. The other proposed changes in the rule, she said, were relatively minor.

FED. R. CRIM. P. 43.1

Judge Bucklew explained that Rule 43.1 (victim's rights) was a completely new rule. She said that the advisory committee had debated whether to incorporate the changes implementing the Crime Victims' Rights Act into a single new rule or spread them throughout the rules. She said that the committee consensus was to place the principal changes in one rule.

Judge Bucklew said that subdivision (a) of the new rule deals with the right of a victim to receive notice of every public court proceeding, to attend the proceeding, and to be reasonably heard at certain proceedings. She noted that the government has the burden of using its best efforts to provide victims with reasonable, accurate, and timely notice of every court proceeding. Professor Beale added that paragraph (a)(3) uses the term "district court," rather than "court," to make sure that the rule does not provide a right to be heard in the court of appeals. This limitation tracks the language of the statute.

Some participants questioned whether all the provisions set forth in the proposed new rule are actually needed because most of them are specified in the Crime Victims' Rights Act itself. One participant noted, moreover, that FED. R. EVID. 615 already allows a court to exclude witnesses so that they cannot hear the testimony of other witnesses. Judge Bucklew and Professor Beale responded that victims' groups have argued strongly that pertinent provisions of the Act should be highlighted and located in the key provisions of the rules used every day by the bench and bar. They added that the advisory committee did not go beyond the substance of the statute itself in any way, but the committee was convinced that it was necessary to include some of the key victims' statutory provisions in the rules themselves.

One participant noted that the rules committees generally avoid repeating statutory language in the rules. Another added that the Standing Committee in its local rules project had discouraged the courts from repeating statutes in local rules because it can create style problems and lead to legal conflicts.

One member suggested that the new rule should not be numbered as Rule 43.1 because the preceding rule, FED. R. CRIM. P. 43, deals only with the presence of the defendant. He recommended that one of the open rule numbers, taken from abrogated rules, should be used. It was the consensus of the committee that an abrogated rule number should be used or the new rule placed at the end of the rules.

One member questioned the meaning of proposed subdivision (b), which states that the court must decide promptly "any motion asserting a victim's rights." Judge Bucklew explained that the main purpose of the amendment was to emphasize the need for the court to act promptly. Professor Beale added that the statute covers the matter and uses the word "forthwith." She said that the rule may not strictly be necessary, but it is politically important. Another member suggested that the rule should be limited to motions asserting a victim's rights "under these rules." The committee consensus was to include the additional language.

Judge Bucklew reported that paragraph (b)(1) states that the rights of a victim may be asserted either by the victim or the government. One member suggested that paragraphs (1) through (4) do not fit well under subdivision (b), but should become new subdivisions (c) through (f). Judge Levi recommended that the advisory committee consider whether renumbering of the provisions would be appropriate.

The participants suggested a number of other potential improvements in language and organization of the rule for the advisory committee to consider.

The committee without objection approved the proposed amendments and new rule, including the changes suggested by the members, for publication by voice vote.

Informational Items

Judge Bucklew reported that the Standing Committee had returned the proposed amendments to Rule 29 (judgment of acquittal) to the advisory committee for further consideration. She said that drafting the rule had been more difficult than anticipated. A subcommittee had been working on it, and the advisory committee expected to present a draft rule to the Standing Committee for action at its June 2006 meeting.

As revised, Rule 29 would allow a judge to deny a motion for acquittal before the jury returns a verdict, or to reserve decision on the motion until after a verdict. But if the judge decides to *grant* the motion of acquittal, the judge would have to wait until after the jury returns a verdict – unless the defendant waives double jeopardy rights. The proposed rule sets forth what the judge must tell the defendant in open court, and it addresses the substance of the defendant's waiver.

One member opposed the rule and said that the Standing Committee had not returned the rule to the advisory committee with an implied endorsement. Judge Bucklew responded that the instruction to the advisory committee was to produce the best possible rule. Judge Levi added that when a final draft is presented to the Standing Committee in June 2006, the advisory committee should make it clear whether or not it endorses the rule as a matter of policy.

Judge Bucklew described the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection), which would require the government to turn over exculpatory evidence to the defendant 14 days before trial. She said that the advisory committee did not have actual rule language yet, but it had taken a straw vote, and a majority of the members favored continuing work on a rule. She noted, though, that the Department of Justice was firmly opposed to the rule.

Professor Beale added that the proposal submitted by the American College of Trial Lawyers would go beyond the Supreme Court's substantive requirements in *Brady v. Maryland* and related cases. It would also specify the procedures for the government to follow in turning over specified types of information to the defendant before trial.

One participant emphasized that the rule would be very controversial, and he said that it would be essential for the advisory committee to prepare a complete background memorandum on the applicable law if it decides to present a rule to the Standing Committee. Judge Bucklew added that the advisory committee had also discussed the desirability of the Department of Justice making appropriate revisions to the U.S. attorneys' manual.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2005 (Agenda Item 9).

Judge Smith reported that the advisory committee had no action items to present.

Informational Items

Judge Smith noted that the advisory committee had continued its work on a rule governing waiver of privileges for submission to Congress. He said that the advisory committee was considering holding a special meeting or conference to complete work on a rule that could be submitted to the Standing Committee in June 2006.

Judge Smith reported that the advisory committee was continuing to monitor case law developments following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), which limits the admission of "testimonial" hearsay. He said that because of the uncertainty raised by *Crawford,* the advisory committee would not move forward with any rule amendments dealing with hearsay. Judge Smith also reported that the advisory committee was considering a possible amendment governing evidence presented in electronic form.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Schiltz presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 9, 2005 (Agenda Item 10).

Judge Kravitz pointed out that the subcommittee included several practicing lawyers, and it was blessed with having Professor Schiltz as its reporter. He reported that the subcommittee's work had begun with a memorandum drafted by Professor Schiltz that outlined all the potential time-computation issues in the federal rules. The memorandum, he said, had been circulated to the committee reporters for comment and then considered at a subcommittee meeting in October 2005.

Judge Kravitz explained that the subcommittee was focusing at the moment on how time should be computed, rather than on the specific time limits scattered throughout the rules. The latter, he said, would be addressed later by the respective advisory committees.

Judge Kravitz noted that the subcommittee had decided preliminarily to propose a number of changes in how time is computed, the most significant of which would be to eliminate the "10-day rule," set forth in FED. R. CIV. P. 6(e) and counterpart provisions in the appellate, bankruptcy, and criminal rules. The existing rules, he explained, specify two different ways of counting time. If a time period specified in a civil, criminal, or appellate rule is 10 days or less, intervening weekends and holidays are excluded in the computation. But if a time period set forth in a rule is 11 days or more, weekends and holidays are in fact counted. (For bankruptcy rules, the dividing line is 8 days, rather than 11.) Judge Kravitz said that by abolishing the "10-day rule," all days would then be

counted in the future. And if the last day of a prescribed period is a weekend or holiday, the deadline would roll over to the next weekday.

Professor Schiltz said that in drafting a proposed model rule, the subcommittee had decided against simply eliminating the "10-day" language in the current rule. That approach, he said, might be too subtle and could be missed by lawyers. Instead, the proposed rule attracts attention to the change and tells the bar affirmatively to count every day or hour.

Judge Kravitz said that after the subcommittee makes its final recommendations, the individual advisory committees will take a hard look at the impact on each of the specific deadlines in their rules. For example, 10-day deadlines in the current rules would necessarily be shortened because the parties will no longer get the benefit of excluding weekends. The advisory committees, thus, might wish to increase some 10-day deadlines to 14 days.

He added that the time-computation subcommittee was comprised largely of members of the advisory committees. The members, he said, would be expected to go back to their respective advisory committees and take a leading role in examining and adjusting the deadlines. Judge Kravitz added that the subcommittee's recommendations would be completed by early 2006, circulated to the advisory committees for comment, and considered by the Standing Committee in June 2006. After reviewing all the comments, the subcommittee would send its recommendations to the advisory committees and ask them to proceed with making any needed changes in their deadlines.

Judge Kravitz reported that the subcommittee had also considered amending the time-computation rules to take account of electronic filing and service. Anticipating that electronic filing and service will become virtually universal in the future, the subcommittee discussed eliminating the provision that gives a party three additional days to act after being served by mail, electronically, or by leaving papers with the clerk's office. He pointed out that the practicing attorneys on the subcommittee were strongly of the view that as long as mail remains a service option, the three additional days must be retained. But, he said, even though the additional three days had been provided to encourage the use of electronic service, that incentive is probably no longer needed. Judge Kravitz said that the subcommittee needs to address the three-day rule, and it would likely decide to retain the three-day rule for mail but eliminate it for other kinds of service.

In addition, Judge Kravitz said, the subcommittee had drafted a provision to calculate time periods stated in hours, rather than days. Professor Schiltz explained that the subcommittee had drafted a simple rule that would extend a deadline by 24 hours if the last day falls on a weekend or holiday.

Judge Kravitz said that the subcommittee had also addressed the issue of "backwards counting," such as in computing the deadline for a party to file a paper in advance of a hearing or other event. Professor Schiltz pointed out that the proposed draft states that when the last day is excluded, the computation "continues to run in the same direction," *i.e.,* backwards. Thus, if the final day of a backward-looking deadline falls on a Saturday, the paper would be due on the Friday before the Saturday, not on the Monday following the Saturday.

Judge Kravitz reported that the subcommittee also considered whether all time limits in the rules should be expressed in seven-day increments, but decided not to mandate such a rule. Rather, it would encourage the advisory committees to keep such a protocol in mind as they adjust deadlines in response to the subcommittee's new time-counting rule.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. He noted that proposed amendments to the rules had been published in August 2005 to implement section 205 of the E-Government Act of 2002. The legislation requires the Supreme Court to prescribe rules –

> "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Fitzwater reported that some comments had been received on the proposed rules, but there had been only one request to testify at a scheduled public hearing. He also noted that he had recently attended a conference at which some concern had been expressed regarding the viability of the two-tier access system contemplated in the proposed rules, under which certain sensitive records would be made available at the courthouse, but not on a court's web site.

One of the members pointed out that many of the provisions dealing with electronic filing are set forth in local court standing orders and general orders, rather than in local court rules. He suggested that it would be very helpful if the committee provided guidance to the courts and circuit councils as to what matters should be placed in local rules and what should be set forth in orders.

PANEL DISCUSSION ON THE LEGACY OF CHIEF JUSTICE REHNQUIST

Judge Levi explained that he had asked former committee member Charles Cooper and current committee member Judge Kravitz to put together a panel reflecting on the rich legacy of the late Chief Justice William H. Rehnquist and his contributions to the federal rulemaking process. He noted, though, that after putting the program together, Mr. Cooper was unable to attend because of a last-minute conflict. Judge Levi noted that both Judge Kravitz and Donald Ayer had been law clerks of the late Chief Justice, and James Duff had served as the chief justice's administrative assistant, *i.e.*, chief of staff, from 1996 to 2000.

Judge Kravitz explained that he would speak about the personal qualities that impressed him most about the late Chief Justice when he had served as his law clerk. Mr. Ayer, he said, would then discuss the Chief Justice's legacy on the important issue of federalism. Finally, he added, Mr. Duff would speak about the Chief Justice as the administrative leader of the Third Branch and his support of the rules program.

Judge Kravitz noted that Mr. Ayer has an active appellate practice in Washington and had served in the past as the principal deputy to the Solicitor General, as Deputy Attorney General, and as the U.S. attorney for the Eastern District of California. Mr. Duff, he said, is the managing partner in the Baker Donelson law firm in Washington and also serves as the legislative counsel for the Federal Judges Association.

Judge Kravitz said that he had read many tributes to the late Chief Justice and saw a number of common themes reflected in them. The eulogists all recognized the same character traits in Chief Justice Rehnquist, namely: (1) how brilliant he was; (2) what a wonderful teacher he was; (3) how well he understood the Supreme Court as a decision-making body; and (4) how decent, modest, and normal he was for a person of such enormous stature and authority.

As for his brilliance, Judge Kravitz said, the Chief Justice's mind was encyclopedic and his memory prodigious. He had an amazing ability to memorize citations, and he knew details about every congressional district. He could cite poetry, Gilbert and Sullivan librettos, and literature by heart. He could also dictate completely polished opinions into a tape recorder without any editing.

He was a dedicated teacher who spent a great deal of time with his law clerks. He had regular conferences with his clerks, but he did not have them write bench memos. Rather, he would tend to go for a walk with the clerks on the Mall and talk to them about cases and upcoming issues and opinions. He saw it as a way of training the clerks to think on their feet, without notes. It was also his way of preparing for arguments.

As a training device, he would have the clerks write opinions on stays, even though not strictly needed. He told them that it was important for them to be able to write under pressure. He set very tough deadlines and had the clerks produce draft opinions within 10 days after argument. He also spent a great deal of time teaching the clerks about life and about family, and he was very interested in the clerks' plans for the future.

He was also a master of the politics of the Court and how the Court functioned as a decision-making body. He knew how to move the Court and how to marshal a majority of votes in a case.

Finally, Judge Kravitz added, William Rehnquist's most important quality was his basic decency. In some courts, he noted, disputes arise among the judges, and dissenters occasionally use uncivil language. But the Chief Justice was overwhelmingly civil and polite. He got along very well with his ideological opponents, and he knew that the best way to influence people was with kindness.

He deeply loved his family, and they were the most important thing in his life. His law clerks put on skits, and he was the butt of their jokes and loved it. In all, he had great common sense, pragmatism, and good judgment.

Mr. Ayer agreed with the observations of Judge Kravitz and said that the great successes of the Chief Justice had everything to do with who he was as a person. He was a phenomenon in melding all these great personal qualities, and he ended up being loved by all the members of the Court. Mr. Ayer emphasized that very few people in high places today possess the same qualities.

The Chief Justice, he said, was also a person with a vision and an indelible sense of what the Constitution is and should be. He had an agenda and knew where he wanted to go. Thus, over the course of 33 years on the Court, he moved the Court in his direction, particularly in cases involving religion, habeas corpus, federalism, and criminal procedure.

Mr. Ayer presented a scholarly review of the late Chief Justice's decisions regarding federalism – the area where he affected the law most profoundly. The Chief Justice's allegiance, Mr. Ayer said, was to the union intended by the founding fathers that balanced federal and state powers. He was an activist in trying to restore that balance of power and undo the expansions of federal power that began with the New Deal.

Mr. Ayer divided his detailed analysis of the federalism cases into three broad areas: (1) "commandeering," *i.e.*, where Congress orders the behavior of state employees; (2) narrowing the Commerce Clause power of the federal government; and (3) the 11th Amendment and sovereign immunity.

Mr. Duff concurred that William Rehnquist was an extraordinary man with a combination of great talents. His support of the rules process was no different from the approach he took with everything else. He was intimately familiar with all the agendas of the Judicial Conference committees, including items on the Conference's consent calendar. He invariably would ask penetrating questions about agenda items that went right to the heart of a matter.

In the late 1980s, before the Chief Justice streamlined the Judicial Conference's operating procedures, Conference sessions used to go on for several days, as each committee chair would read his or her report. Chief Justice Rehnquist, though, pushed most of the work from the Conference to its committees. He instituted the discussion and consent calendars, and he rotated the committee members and chairs. Nevertheless, he recognized that there is a need for greater continuity in the area of the federal rules, so he extended the terms of some rules committee chairs and members.

Mr. Duff said that the Chief Justice had an exacting sense of the separation of powers and the balance between the federal government and the states. He was also passionate about the independence of the judiciary. He recognized the important role of the rules committees, both in guiding Congress on procedural matters and in maintaining judicial independence.

Mr. Duff pointed to *Nixon v. United States,* involving the impeachment of a federal judge who had been convicted of perjury and imprisoned. Judge Nixon challenged the procedures chosen by the Senate in having a committee, rather than the full body, take the evidence at his impeachment trial. The opinion of the Supreme Court held that since the Constitution authorizes the Senate to conduct impeachment trials, the Senate can decide on its own procedures. He said that the decision was very important to the separation of powers and works ultimately to the benefit of the judiciary when it exercises its own powers. The rules committees, he said, need to exercise their authority over court procedures wisely and keep Congress from filling a vacuum with statutes.

Mr. Duff said that both sides of the aisle praised the Chief Justice for his leadership role in the impeachment trial of President Clinton. He pointed out that the chief justice and he had met with the Senate leadership to discuss trial procedure, and the exchanges had been very cordial. The chief justice had offered to conduct the trial as an ordinary trial, but the Senate had its own idea as to how the trial should be conducted. The Chief Justice, he said, was able to adapt very well to the Senate's rules.

In conclusion, Mr. Duff pointed out that in addition to his role as the leader of the Supreme Court, 84 different statutes give the chief justice administrative responsibilities.

Mr. Rabiej reported that the Chief Justice never announced his views regarding any rules proposal before the Judicial Conference. Nevertheless, he was able to affect the outcome of a proposal by shaping the procedure. For example, at its September 1999 session, the Conference had before it an important package of rules dealing with the scope of discovery and disclosure. Normally, only one rules committee chair would be allowed to speak. But with the 1999 package, the Chief Justice allowed both the chair of the Standing Committee and the chair of the civil advisory committee to address the Conference. He also decided who would speak first on an issue. Thus, he let both rules committee chairs speak first on the discovery rules package, before any opponent could speak. In addition, speakers normally would be given only five minutes to make a presentation, but the Chief Justice allowed the rules committee chairs a great deal more time. In the end, the 1999 rules package was approved by one vote.

Mr. Rabiej pointed out that several years ago, legislation had been introduced in Congress that would have required that a majority of the members of each rules committee be practicing lawyers. The Chief Justice, he said, made a number of phone calls, and the issue quickly died down. In addition, Mr. Rabiej said, the Chief Justice established the tradition of having the chair and the reporter of the Standing Committee meet annually with him to discuss the current and future business of the rules committees.

Judge Kravitz concluded the panel discussion by reading a letter from Judge Anthony Scirica, former chair of the Standing Committee, emphasizing how supportive Chief Justice Rehnquist had been in rules matters and how he had been the best friend of the rules process.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 22-23, 2006, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

MEMORANDUM

DATE: March 23, 2006

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Proposed Amendments to Federal Rules of Appellate Procedure
Published for Comment in August 2005

I. New Rule 25(a)(5)

A. Introduction

Section 205(c)(3)(A)(i) of the E-Government Act of 2002 directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to this directive, Judge David F. Levi, the Chair of the Standing Committee, appointed an E-Government Subcommittee. That Subcommittee has worked closely with the Committee on Court Administration and Case Management ("CACM") and the chairs and reporters of the advisory committees to develop a set of privacy rules.

These efforts have essentially followed two tracks — a "trial-court" track and an "appellate-court" track. The trial-court track has been traveled by the Bankruptcy, Civil, and Criminal Rules Committees, which have worked together to develop a set of rules to govern filings in the bankruptcy and district courts. In August 2005, the Committees published three rules for comment — Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Committees are considering the public comments on those rules at their meetings this spring.

To give you a sense of what is being proposed for the trial courts, I have attached in "Appendix B" the published version of Civil Rule 5.2, as well as a summary of the public comments that were submitted regarding that rule. The summary was drafted by Professor Edward Cooper, the Reporter to the Civil Rules Committee. I am grateful that he is willing to share his summary with us.

As the materials in Appendix B demonstrate, the trial-court provisions are many and complicated, and they touch on several difficult and controversial issues. The appellate-court track has been easy by comparison. This Committee decided in November 2004 that, rather than attempt to pattern an Appellate Rule after the trial-court provisions, this Committee would instead propose an Appellate Rule that would simply adopt by reference the privacy provisions of

the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions would be left to CACM and the other advisory committees — all of whom have more of a stake in the privacy issues than this Committee — and the Appellate Rules would not have to be amended continually to keep up with changes to the other rules of practice and procedure. Under this "dynamic-conformity" approach, any changes in trial practice will automatically be reflected in appellate practice without the need to amend the Appellate Rules.

As this Committee instructed, I drafted a new subdivision (5) to Rule 25(a) that reflected the dynamic-conformity approach. Proposed Rule 25(a)(5) was approved for publication by this Committee in April 2005 and by the Standing Committee in June 2005, and the proposed rule was published for comment in August 2005. This Committee must now consider the public comments and decide whether to approve Rule 25(a)(5).

B. Text of Rule and Committee Note

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. All other proceedings are governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

* * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed

electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

C. Summary of Public Comments

We received a total of seven public comments. Copies of those comments appear in "Appendix A." Only three of the seven comments address Rule 25(a)(5); the other four are devoted solely to the trial-court provisions. The three comments regarding Rule 25(a)(5) are small parts of long letters that are devoted mostly to the trial-court provisions.

The **National Association of Professional Background Screeners** (05-AP-001) submitted the testimony that it gave before the Criminal Rules Committee in January 2006. That testimony is devoted entirely to Criminal Rule 49.1 — and, in particular, to the likely impact on professional background screeners of Criminal 49.1(a)(3)'s requirement that only the year of birth appear in court records. The Association expresses no views about Rule 25(a)(5).

The **Committee on Court Administration and Case Management of the Judicial Conference of the United States** (05-AP-002) supports Rule 25(a)(5): "Th[e] approach [taken in Rule 25(a)(5)] is consistent with the [Judicial Conference] Privacy Policy's statement that appellate cases are to be treated the same way the cases were treated below and [CACM] supports the rule as proposed." CACM also approves of the fact that Rule 25(a)(5) "gives more specific guidance than does the privacy policy" in addressing not only appeals from the lower courts, but "matters that originate in the court of appeals or that come from an administrative agency or entity other than a lower court."

Peter A. Winn, Esq. (05-AP-003) — an Assistant United States Attorney and adjunct professor at the University of Washington School of Law — generally supports the privacy rules and addresses his suggestions solely to the trial-court provisions.

Public Citizen Litigation Group (05-AP-004) generally supports the privacy rules, although it believes that, in some respects, the trail-court provisions go too far in protecting sensitive information. For example, Public Citizen opposes Civil Rule 5.2(c), which prohibits remote electronic access to the records of Social Security and immigration cases, but permits access to those same records at the courthouse. Public Citizen believes that more information

should be available by remote electronic access and less information should be available at the courthouse.

As for Rule 25(a)(5), Public Citizen "generally supports" the decision to protect "private information on appeal to the same extent it is protected in the district court." But Public Citizen opposes exempting the records of Social Security and immigration cases from remote electronic access in the appellate courts, just as Public Citizen opposes the exemption in the trial courts. Public Citizen stresses the importance of the appellate record to the outcome of a case on appeal and argues that appellate filings "are less likely to contain private information than filings in the district court because the issues on appeal are often narrower in scope and legal rather than factual in nature."

Public Citizen argues that, if the exemptions for Social Security and immigration cases are retained, then Rule 25(a)(5) should at least provide that "appellate briefs and potentially dispositive motions should be remotely available to the public in these cases, absent a court's decision to the contrary."

The **Electronic Privacy Information Center** (05-AP-005) directs its comments solely to the trial-court provisions. It does not comment on Rule 25(a)(5).

The **National Association of Criminal Defense Lawyers ("NACDL")** (05-AP-006) generally agrees with the approach taken in Rule 25(a)(5), but it argues that the rule or the Committee Note needs to be clarified "with respect to appellate filings in habeas corpus and 2255 matters." Such matters, NACDL points out, "are governed in the district courts by special sets of federal rules and only in the court's discretion by the civil or criminal rules." According to NACDL, this makes it difficult to know to what extent privacy protection is extended to such cases on appeal. Rule 25(a)(5) "would appear to say that habeas appeals (not being otherwise mentioned) are subject to proposed Fed. R. Civ. P. 5.2, and yet that rule by its own terms excludes filings in such cases." NACDL argues that "the appellate rule should be made clear by adding either to the Rule or to the Committee Note a proviso which states whether the exemptions of Civil Rule 5.2(b) continue to apply in appeals from decisions in matters that were subject to those exemptions in the district court."

Judge William G. Young (D. Mass.) (05-AP-007) directs his comments solely to the trial-court provisions. He does not comment on Rule 25(a)(5).

The **Style Subcommittee of the Standing Committee** does not believe that captioning the rule "Privacy Protection" is sufficient to draw the attention of judges and attorneys to the fact that the rule addresses privacy protection. It thus recommends that references to "privacy protection" be inserted in the text of the rule as follows:

Privacy Protection. An appeal in a case whose privacy protection ~~that~~ was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In a~~A~~ll other proceedings, privacy protection is ~~are~~ governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

D. Recommendation

I do not think that the changes proposed by the Style Subcommittee are necessary. I am skeptical that adding the phrase "privacy protection" six words after the phrase "Privacy Protection" appears in boldface is going to make the rule much clearer. At the same time, I fear that the change will introduce redundancy and ambiguity.

The published version of Rule 25(a)(5) refers to "[a]n appeal in a *case* that was governed by" Bankruptcy Rule 9037, Civil Rule 5.2, or Criminal Rule 49.1. The Style Subcommittee proposes that the rule instead refer to "[a]n appeal in a case *whose privacy protection* was governed by" those same rules. Because Bankruptcy Rule 9037, Civil Rule 5.2, or Criminal Rule 49.1 do not govern anything *except* privacy protection, the words added by the Style Subcommittee are redundant. At the same time, the words may create confusion, as by singling out the governing of "privacy protection," they imply that Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 also govern something in addition to privacy protection. They do not.

I would leave Rule 25(a)(5) as written. That said, I do not think that the changes suggested by the Style Subcommittee affect matters of substance, and the general practice has been to defer to the Style Subcommittee on matters of style.

As to Public Citizen's suggestion: I believe that Public Citizen and other commentators make a good argument that the records of Social Security and immigration cases should not be available in their entirety at the courthouse. I know that Professor Cooper agrees, and that the Civil Rules Committee will be revisiting this issue at its meeting this spring. But whatever the Civil Rules Committee decides, I do not think that this Committee should make a different policy choice. CACM has worked on these issues for almost a decade, and the Civil Rules Committee has worked on these issues for over two years, and this Committee should probably defer to their judgment. The official position of the Judicial Conference (for whom we all work) is that the privacy protections that apply on appeal should match the privacy protections that applied below.

Finally, as to NACDL's concern: Rule 25(a)(5) is clear that appeals in habeas and § 2255 proceedings are governed by Civil Rule 5.2. NACDL concedes as much. But NACDL says that it is confused by the fact that, on the one hand, Rule 25(a)(5) provides that habeas and § 2255 proceedings are governed by Civil Rule 5.2, but, on the other hand, Civil Rule 5.2 itself provides that filings in habeas and § 2255 proceedings do not have to be redacted to remove personal identifiers.

I guess I do not understand why that is confusing. Rule 25(a)(5) does not provide that filings in habeas and § 2255 proceedings must be *redacted*; it provides that filings in those cases are governed by Civil Rule 5.2. Thus, if a judge or attorney wants to know what to do on appeal, he or she needs to read and apply Civil Rule 5.2.

Likewise, Civil Rule 5.2 does not provide that habeas and § 2255 proceedings are exempt from *Civil Rule 5.2*. The rule provides merely that those cases are exempt from the redaction requirement of subdivision (a). Thus, personal identifiers do not have to be redacted from filings in such cases, but the rest of Civil Rule 5.2 applies.

All of this seems straightforward to me. What I fear *would* cause confusion is to add language to the Committee Note saying, in essence, "When Rule 25(a)(5) provides that Civil Rule 5.2 'governs,' it means the entire rule, including the exemption from redaction for habeas and § 2255 cases." To single out one provision of Civil Rule 5.2 in this manner might cause judges and practitioners to wonder what is special about that provision and why other provisions of Rule 25(a)(5) were not mentioned in the Committee Note.

In sum, I recommend that this Committee approve Rule 25(a)(5) as published, except that this Committee might want to adopt the changes recommended by the Style Subcommittee.

APPENDIX A

COLLINS
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2111 Wilson Blvd., Suite 700
Arlington, Virginia 22201

phone 703.351.5057
fax 703.522.1738

05-CR- 008

December 8, 2005

05-BK- 003

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

05-AP- 001

Dear Mr. McCabe:

I understand the Judicial Conference Advisory Committee on Criminal Rules will hold a public hearing on the proposed amendments to the rules and forms on January 9, 2006 in Phoenix, Arizona. I am writing on behalf of the National Association of Professional Background Screeners, which represents almost 500 firms nationwide who rely on court records to conduct criminal background checks for employers. As such, NAPBS has a substantial interest in these proceedings. NAPBS is particularly interested in the implications of rule 49.1 of the Criminal Rules section. **Mike Sankey**, Associate Member Director of NAPBS, would like the opportunity to present the Association's perspective by providing testimony before the advisory committee at the Jan. 9, hearing. In accordance, with the requirements put forth by the committee, I am informing you of Mr. Sankey's intention to testify 30 days in advance of the hearing. A preliminary draft copy of his testimony and the Association's recommended language for Rule 49.1 are attached to this letter. On behalf of NAPBS, I thank you for your consideration. I know the entire Association looks forward to the opportunity to aid the Committee by providing our unique insight into the filing and records system.

Sincerely,

Shay D. Stautz
On behalf of NAPBS
Vice-President for Technology Programs
Collins & Company, Inc.
stautzs@collinsandcompany.com

cc Mike Sankey Associate Member, NAPBS
Jason Morris, Co-Chairman NAPBS
Tracey Seabrook, Executive Director, NAPBS

05-CR-008-1
Testimony

The Use of Date of Birth in Criminal Filings and Records

Testimony of the National Association of Professional Background Screeners
Provided by Mike Sankey, Associate Member Director of NAPBS
Hermosa Inn, Scottsdale, AZ, January 6th, 2006

I appreciate the opportunity to testify before you today on behalf of the National Association of Professional Background Screeners (NAPBS), an association of nearly 500 firms that provide background screening services to over 500,000 employers and landlords across America. On behalf of our members and the people we serve, I would like to speak about the provisions in the proposed rule changes that address the filing and display of key "identifiers" in court records – identifiers such as full names, social security numbers, and dates of birth. NAPBS is completely aware of the sensitivity of this issue, and we applaud the Committee's initiatives to increase the privacy protections of the nation's citizens.

However, we would direct the Committee's attention to one aspect of the proposed changes that is problematic. Removing, or encouraging the removal of, the dates of birth for adults in criminal filings will impact the hiring procedures of nearly every employer in this country, and it will likely make citizens more vulnerable to crime. We believe a slight change to the proposed rules can maintain increased privacy protection to citizens without disrupting the employee or tenant screening procedures that are so important for safety in the workplace and in the renting industry. As I will elaborate on, NAPBS strongly urges the Committee to consider a slight modification of the proposed changes to Rule 49.1 to retain full dates of birth in criminal court record filings. To this end, we have submitted modifying language for your consideration with this written testimony.

First, let me provide a bit of context for our industry. Background screening companies are engaged by employers and landlords to do background checks on potential employees and tenants. As such, we serve employers, job applicants, landlords and potential tenants by providing the critical information employers and landlords need to make safe, intelligent hiring and leasing decisions. This information is essential because, in the case of employers, our customers are compelled to investigate the backgrounds of those they would hire if the would-be employee is in a position to potentially harm a third party. This covers many categories of employees. Failure to conduct adequate background checks of employees can make an employer vulnerable to a lawsuit for negligent hiring practices. Aside from mitigating employer liability, background screening protects the public, other employees, and the employer. Ensuring a dangerous person does not have the opportunity to abuse his or her employment position is in the public interest. Industry statistics indicate that 10 percent of all applicants fail to disclose their criminal histories when asked on applications. This statistic is particularly unsettling when viewed in the light of another -- that the cost to the American economy due to workplace violence is estimated at $55 billion each year in lost wages alone.

A key point must be made about the kinds of background searches we do – they are *always* conducted with the consumer's written consent, as required by the Federal Fair Credit Reporting Act and several state fair credit reporting acts.

A major component of background checks is a criminal history search. This criminal history component of employment screening is dependant on access to court records, as provided for under law by the Freedom of Information Act. Screeners use information provided by a consumer to verify his or her criminal history through public documents. However, because of concern over protecting citizens from identity theft, critical identifiers are increasingly being stripped from available public court records. The removal of these identifiers, specifically social security numbers and dates of birth, makes it hard or impossible for screeners to do their jobs adequately and efficiently. The proposed change to Rule 49.1, which seeks to redact information from filings in criminal proceedings, is another example of this trend.

Citizens have a right to privacy, and they have a need for employment and security. The system we operate under requires a certain balance to see that they receive all of these. The proposed Rule 49.1, in stripping the day and month of birth for adults in criminal cases, fails to maintain this balance. Without a *full* date of birth, numerous "false positives" are generated when individuals are screened for employment purposes. Since many people having the same or similar names are born in the same year, their records cannot be distinguished without more complete information, leaving employers to guess about the criminal history of those they intend to hire. The absence of this information requires the individual to "prove" the record in question belongs to someone else, which delays the start of their employment, and results in additional work for court employees when assisting individuals to resolve potential issues related to criminal records. This delay can cost honest applicants jobs, or, if an employer decides not to wait, can allow dishonest applicants with criminal histories to obtain sensitive jobs. In the effort to protect consumers from criminals and identity theft, the removal of identifiers could unintentionally make the public more vulnerable to criminals.

Six percent of criminal convictions are federal crimes. Some of these are arguably the most serious crimes - crimes like those that involve terrorism. Taking date of birth out of federal court records *blinds* screeners to that six percent. We would not feel comfortable if we failed to check the passports of six percent of foreign visitors. Our standards should not be more lax for those we take into our homes and businesses. Without access to identifiers in records, screeners lose the ability to keep applicants honest. If date of birth is not readily available in federal court records, how many applicants with federal criminal histories will lie to gain employment?

Significantly, the rule changes implemented by this Committee and the Judicial Conference will have consequences reaching beyond the *federal* courts. State courts look to federal courts as a model. If federal courts fail to include adequate identifier information, state court systems will likely follow suit. This will make criminal background checks on those who commit the remaining 94% of crimes (at the state and local level) also difficult or impossible to conduct.

Another potential impact of the rule change is a substantial increase on the burden of court clerks. If identifiers, like date of birth, are not available in a database, employers

will be required to pull every relevant court file to try to establish identification, putting a strain upon the resources of clerks' offices. Given the number of background checks that are conducted, thousands each day, requests to access court files may be overwhelming. Employers and background screeners will need to see the public files. The courts may need to add staff to handle the requests for public records, which will have a financial impact on courts and taxpayers. In addition to adding to a significant burden to private enterprise, employers, and consumers, the stripping of necessary identifiers may create an extra burden for the courts themselves.

As the preeminent association for those who conduct employment screening, our members understand public concern for personal data security. We understand concerns about identity theft. Our screens are conducted for the expressed purpose of finding out if people are who they say they are. It is understandable for the federal courts to seek to protect the personal information of citizens. NAPBS agrees that social security numbers or financial account numbers may need to be redacted in court records to address these concerns. However, an individual's date of birth is not as useful or relevant to identity theft as a social security number, where a criminal endeavors to fraudulently obtain credit using someone else's identity. NAPBS is not aware that the listing of the date of birth of those convicted of crimes in public records has ever resulted in a case of identity theft or misuse of personal data. while well-intentioned , we see no evidence to suggest that a rule change stripping date of birth will serve to protect either the individuals involved or the public at large.

While we cannot be sure of the benefits of removing dates of birth, we can be sure of the consequences. For all the reasons I have mentioned here, failure to include full dates of birth in the records for adults charged in criminal proceedings will almost certainly harm job seekers, employers, and the public. Every screen conducted by every employer or landlord on every applicant will be affected by a failure to include this information. The removal of identifiers will create increased strain on the resources of court clerks. It will make it hard or impossible for screeners to identify the six percent of criminals convicted of a federal crime. The sure result of this failure will be that average citizens will be less safe, at their workplaces and in their homes. In the face of all this, NAPBS strongly urges the Committee to consider a slight modification of the proposed changes to Rule 49.1 to retain full dates of birth in the criminal court record filings. To this end, we have submitted modifying language for your consideration with this written testimony.

On behalf of the nearly 500 member of NAPBS who serve the nation's employers and public, I thank the Committee for the opportunity to present our industry's views and comments here today. I am happy to answer any questions members of the Committee wish to pose at this time.

NAPBS-RECOMMENDED AMENDMENT TO RULE 49.1

From the Criminal Procedure portion (Pg. 150):

Rule 49.1 Privacy Protection for Filings Made with the Court**

(a) **Redacted Filings.** Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number, or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, a financial account number or the home address of a person may include only:

(1) the last four digits of the social security number and tax identification number;

(2) the minor's initials;

(3) the year of birth **for minors; and the day, month, and year of birth for adults;**

(4) the last four digits of the financial account number; and

(5) the city and state of the home address.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

February 8, 2006

05-AP- 002

Honorable David F. Levi
Chief Judge
United States District Court
2504 Robert T. Matsui
United States Courthouse
501 I Street
Sacramento, CA 95814-7300

05-BK- 006

05-CV- 025

05-CR- 011

Dear Judge Levi,

Enclosed please find the comments of the Judicial Conference Committee on Court Administration and Case Management regarding the Proposed Rules to Address Privacy and Security Concerns as required by the E-Government Act of 2002. Our Committee appreciates the work you have done, as well as the opportunity to comment on this important issue. Do not hesitate to contact me with any questions or concerns.

Sincerely,

John R. Tunheim

John R. Tunheim

cc: Abel Mattos
John Rabiej

Enclosure

Comments of the Committee on Court Administration and Case Management
on Proposed Rules to Address Privacy and Security Concerns
as Required by the E-Government Act of 2002

Background

In an effort to balance the competing interests of the public's right to have access to court information and the need to protect personal data in the electronic age, this Committee began studying privacy and public access to electronic case files in 1999. After two years of study, a public comment period, and a public hearing, the Committee recommended to the Judicial Conference of the United States the adoption of a policy that would allow access to civil and bankruptcy cases, with the requirement that specific personal identifiers (Social Security numbers, financial account numbers, dates of birth and names of minor children) be partially redacted from the document. The CACM Committee recommended that such access to criminal cases be studied for two years because of safety and security concerns unique to criminal cases. In September 2001, the Judicial Conference adopted this policy. (JCUS-SEP/OCT 01, pp. 48-50). Following a study that revealed no instances substantiating such concerns, this Committee, together with the Committee on Criminal Law, recommended that public access to criminal cases also be allowed. The Conference adopted this position (JCUS-SEP 03, pp. 15-16) and later adopted specific guidance recommended by this Committee for public access to criminal cases. (JCUS-MAR 04, p. 10). This guidance provides that redaction of personal information is also required for criminal documents, with the addition of the redaction of home address to city and state. The Conference-approved guidance also addresses whether certain documents and information should be included in public criminal case files.[1]

Proposed Federal Rule of Appellate Procedure 25, Filing and Service

Proposed Federal Rule of Appellate Procedure 25 would apply the proposed bankruptcy privacy rule and the proposed criminal privacy rule in cases that applied those rules below. In all other cases on appeal, the proposed civil privacy rule would apply, except the criminal rule would apply when a extraordinary writ is sought in a criminal case. This approach is consistent with the Privacy Policy's statement that appellate cases are to be treated the same way the cases were treated below and the Committee supports the rule as proposed. It also specifically recognizes that, because the Case Management/Electronic Case Files system for the courts of appeals is not yet operational, there is less experience with privacy issues at the appellate level.

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[1] A copy of the Judicial Conference Privacy Policy (the Privacy Policy) and the Criminal Implementation Guidance are attached for your reference and are available at www.privacy.uscourts.gov.

Further, the Committee recognizes the fact that the proposed appellate rule gives more specific guidance than does the privacy policy in making the proposed civil privacy rule generally applicable, with specific exceptions. Thus, the proposed rule addresses how to treat matters that originate in the court of appeals or that come from an administrative agency or entity other than a lower court.

Proposed Federal Rule of Bankruptcy Procedure 9037, Privacy Protection For Filings Made with the Court

Proposed Federal Rule of Bankruptcy Procedure 9037 would require redaction of the standard personal identifiers (Social Security number, financial account number, name of minor child and date of birth) and would also provide for exemptions from the requirement. Further, it addresses sealed documents, protective orders, use of a reference list and waiver of the redaction requirements. This proposed rule, like the others, is largely based upon the Privacy Policy, as the notes make clear, and, in large part, the Committee supports it. However, the Committee does wish to point out several concerns it has regarding specific portions of the proposed rule.

Subsection (a) states that a filing "may include only" the redacted versions of the identifiers while subsection(g) states that a party waives the protections of redaction as to its own information if that information is not filed under seal and not redacted. The Privacy Policy *requires* redaction and does not contain an explicit waiver. The Notes to the proposed rules clarify that the waiver only applies to the specific information filed without redaction and not under seal and that if such is done accidentally, a party may seek relief from the court. It also points out that the waiver provision may be beneficial in cases where a party determines that costs of redaction may outweigh its privacy benefits. Based on these clarifications, the Committee supports the waiver provision and understands that in order for this provision to be possible, the wording of the redaction requirements must remain permissive.

This proposed rule, as do the proposed civil and criminal rules, includes exemptions from the redaction requirement that the current policy does not specifically include. The Committee understands the need for these exemptions and generally supports them. However, concern has been expressed that the exemption for records of a court "whose decision is being reviewed" may not be appropriate because the language could be read to suggest appellate review, in which bankruptcy courts do not engage. However, the record in a bankruptcy case does often contain a record from another court proceeding as evidence, or otherwise. The Committee therefore suggests that thought be given to using language other than "reviewed" in the wording of this exemption. (For example, perhaps the rule could refer to a court whose "decision becomes part of the record.") Since identical wording is used for this exemption in the proposed civil and criminal rules, as well, this suggestion would apply to those rules as well. Regardless of the specific wording, the Committee believes that the focus should remain on the fact that a record from another court does not need to be redacted.

Proposed Federal Rule of Civil Procedure 5.2, Privacy Protections for Filings Made with the Court

Proposed Federal Rule of Civil Procedure 5.2 would also require redaction of the standard personal identifiers and also provides for exemptions from these requirements. Like the bankruptcy rule, it also addresses sealed documents, protective orders, use of a reference list and waiver of the redaction requirements. Again, the basic structure and provisions of this rule are similar to the Privacy Policy and the Committee supports it. There are, however, two specific points the Committee wishes to make regarding the proposed civil rule.

First, our comments made above in reference to the proposed bankruptcy rule regarding the waiver provision and the exemption for records of a court "whose decision is being reviewed," also apply to the civil rule. Second, the Committee has some concerns regarding subsection (c), which provides for limitations on remote access to electronic case files.

The Privacy Policy provided for such limitations only in the context of social security cases on the grounds that such cases often contain voluminous administrative records that necessarily include the claimant's social security number and detailed medical and financial information.[2] The proposed rule retains limited access to these cases, which the Committee supports, yet also provides for limited access in immigration cases. In previous communications with the Rules Committee, this Committee opposed extension of such limited access because it views social security cases as distinctive since extensive personal information is necessary in every case. We suggested that other types of cases be handled on a case by cases basis rather than by category. However, this Committee indicated that it would consider limited access for immigration cases if it could be demonstrated that their volume is substantial and that the information routinely appearing in their records should be protected. The Committee recognizes that there has been a substantial increase in the number of immigration cases in the federal courts since this restriction was first suggested. The Committee also appreciates that the data routinely contained in such cases includes personal and identifying information. Thus, the Committee would support limited electronic access to the bulk of documents in immigration cases as long as the initiating documents (e.g., opinions issued by the Bureau of Immigration Appeals and Immigration Judges) and orders and opinions remain remotely, electronically available to the public. Because these documents would likely contain personal information, the Committee further suggests that the party filing the appeal from the prior decision be required to redact the initiating document as it would any other filing under the proposed civil rule.

[2] Even though the Privacy Policy limits remote public electronic access to filings in social security cases, such limitation is not intended to apply to court opinions. The Committee assumes that opinions will be available in immigrations cases as well, if the same limitations are applied.

Proposed Federal Rule of Criminal Procedure 49.1: Privacy Protection for Filings Made with the Court

Proposed Federal Rule of Criminal Procedure 49.1 would apply the same redaction provisions as the other proposed rules, with the addition of home address to city and state. Likewise, it also contains exemptions from these provisions as do the bankruptcy and civil rule. Again, the Committee generally supports this proposed rule, but has several specific areas of concern. First, our comments about the waiver and exemption for records of a court "whose decision is being reviewed" would again apply to this proposed rule.

Further, the Committee notes that the exemptions from redaction in the criminal rule are more extensive than those in bankruptcy and civil. It exempts the same documents as the other rules, but also exempts habeas filings, a filing in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case, arrest or search warrants, and charging documents or affidavits in support thereof. The Committee is concerned that this list may be overly inclusive and suggests that personal identifiers can be redacted from many of these documents, such as executed warrants and charging documents. This redaction will allow the document to be included in the public file while still protecting the privacy of the individual concerned.

It should be noted that the initial Privacy Policy did not allow for remote public electronic access to criminal files and that such access was only recommended by the CACM Committee and approved by the Judicial Conference after a two-year pilot program and study conducted by the Federal Judicial Center revealed no instances of harm and a substantial benefit to the bar and public in the 11 courts where such access was permitted.

When the Judicial Conference decided in September 2003 to allow remote electronic public access to criminal case files subject to the redaction requirements, it stayed the implementation of this change until the CACM Committee could work with the Committee on Defender Services and the Committee on Criminal Law to develop guidance for implementation of access to electronic criminal case files. That guidance, which the Judicial Conference approved, explains that certain documents and information are not to appear in the public case file, in paper or electronic form, at the courthouse or via remote access. These included presentence and pretrial reports, juvenile records, statements of reasons, unexecuted warrants of any kind, sealed documents, and identifying information about jurors and potential jurors. This is designated as "III. Documents for which public access should not be provided" (Part III of the guidance) and it is not clear how the exemptions of the proposed rule relates to this guidance. In order to comply with current policy, many courts are redacting or having filers redact the stated personal identifiers from executed warrants so that they can be filed and available to the public. Likewise, courts are being instructed to redact copies of documents with juror identifying information, such as the foreperson's name in the form of his or her signature, so that a copy of the indictment can be included in the public criminal case file, whether it be paper or electronic. The original indictment or other document with this information is most often sealed to protect

the identifying information.

If the proposed rule is intended to permit the filing of the name of the grand jury foreperson, thereby identifying that individual, it contravenes the guidance, and the Committee would oppose it. The notes mention the guidance, even the specifics of Part III, yet suggest that their substance can be accommodated by sealing the documents. The problem with sealing the indictment without providing a redacted version for the public file is that there then is no public access to that document. If a redacted document is filed in addition to the sealed document, the public can see the substance of the indictment, such as its specific counts, without impacting the privacy, in this case, the grand jury foreperson.

The Committee understands that there may be opposition to requiring redaction of these documents for several reasons. The first being, in the case of an indictment, concern about the impact of redaction upon the requirement in Rule 6 of the Federal Rules of Criminal Procedure that the indictment be signed by the foreperson. Following the guidance, the indictment would still be signed and returned in open court, where it could be stated on the record that the foreperson's signature is on the return. However, to protect the identity of the foreperson, the publicly available copy of the indictment would confirm but not display the signature of the foreperson. The indictment with the signature could be sealed or retained by the government. There may also be concern over retaining two copies of the indictment, one sealed with the signature and one public without it. This concern is understandable because it does require some duplication of records, but it is necessary in order to both protect the juror and provide the public with the information contained in the charging document. Finally, concern has been expressed over who will effect the redaction of the indictment. In keeping with the redaction requirements elsewhere in the Privacy Policy, it is recommended that the government, as the filer of the document, have this responsibility.

In summary, the CACM Committee generally supports the proposed privacy rules and recognizes and appreciates the difficult task undertaken by the Rules Committee in drafting them. The CACM Committee also appreciates the opportunity to comment on the proposed rules and to have been included during the drafting process. Please do not hesitate to contact Abel Mattos of the Court Administration Policy Staff at 202-502-1560 if you have any questions.

Attachments

Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files

The Judicial Conference of the United States requested that its Committee on Court Administration and Case Management examine issues related to privacy and public access to electronic case files. The Committee on Court Administration and Case Management formed a special subcommittee for this purpose. This subcommittee, known as the Subcommittee on Privacy and Public Access to Electronic Case Files, consisted of four members of the Committee on Court Administration and Case Management: Judge John W. Lungstrum, District of Kansas, Chair; Judge Samuel Grayson Wilson, Western District of Virginia; Judge Jerry A. Davis, Magistrate Judge, Northern District of Mississippi; and Judge J. Rich Leonard, Bankruptcy Judge, Eastern District of North Carolina, and one member from each of four other Judicial Conference Committees (liaison Committees): Judge Emmet Sullivan, District of Columbia, liaison from the Committee on Criminal Law; Judge James Robertson, District of Columbia, liaison from the Committee on Automation and Technology; Judge Sarah S. Vance, Eastern District of Louisiana, liaison from the Committee on the Administration of the Bankruptcy System; and Gene W. Lafitte, Esq., Liskow and Lewis, New Orleans, Louisiana, liaison from the Committee on the Rules of Practice and Procedure. After a lengthy process described below, the Subcommittee on Privacy and Public Access to Electronic Case Files, drafted a report containing recommendations for a judiciary-wide privacy and access policy.

The four liaison Committees reviewed the report and provided comments on it to the full Committee on Court Administration and Case Management. After carefully considering these comments, as well as comments of its own members, the Committee on Court Administration and Case Management made several changes to the subcommittee report, and adopted the amended report as its own.

Brief History of the Committee's Study of Privacy Issues

The Committee on Court Administration and Case Management, through its Subcommittee on Privacy and Public Access to Electronic Case Files (the Subcommittee) began its study of privacy and security concerns regarding public electronic access to case file information in June 1999. It has held numerous meetings and conference calls and received information from experts and academics in the privacy arena, as well as from court users, including judges, court clerks, and government agencies. As a result, in May 2000, the Subcommittee developed several policy options and alternatives for the creation of a judiciary-wide electronic access privacy policy which were presented to the full Committee on Court Administration and Case Management and the liaison committees at their Summer 2000 meetings. The Subcommittee used the opinions and feedback from these committees to further refine the policy options.

In November 2000, the Subcommittee produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files." This document contains the alternatives the Subcommittee perceived as viable following the committees' feedback. The Subcommittee published this document for public comment from November 13, 2000 through January 26, 2001. A website at www.privacy.uscourts.gov was established to publicize the comment document and to collect the comments. Two hundred forty-two comments were received from a very wide range of interested persons including private citizens, privacy rights groups, journalists, private investigators, attorneys, data re-sellers and representatives of the financial services industry. Those comments, in summary and full text format, are available at that website.

On March 16, 2001, the Subcommittee held a public hearing to gain further insight into the issues surrounding privacy and access. Fifteen individuals who had submitted written comments made oral presentations to and answered the questions of Subcommittee members. Following the hearing, the Subcommittee met, considered the comments received, and reached agreement on the policy recommendations contained in this document.

Background

Federal court case files, unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference policy, are presumed to be available for public inspection and copying. See Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"). The tradition of public access to federal court case files is also rooted in constitutional principles. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-78 (1980). However, public access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles. See Nixon, 435 U.S. at 596 ("[E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes").

The term "case file" (whether electronic or paper) means the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include several other types of information, including non-filed discovery material, trial exhibits that have not been admitted into evidence, drafts or notes by judges or court staff, and various documents that are sometimes known as "left-side" file material. Sealed material, although part of the case file, is accessible only by court order.

Certain types of cases, categories of information, and specific documents may require special protection from unlimited public access, as further specified in the sections on civil, criminal, bankruptcy and appellate case files below. See United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (noting that technology may affect the balance between access rights and privacy and security interests). To a great extent, these recommendations rely upon counsel and litigants to act to protect the interests of their clients and themselves. This may necessitate an effort by the courts to educate the bar and the public about the fact that documents filed in federal court cases may be available on the Internet.

It is also important to note that the federal courts are not required to provide electronic access to case files (assuming that a paper file is maintained), and these recommendations do not create any entitlement to such access. As a practical matter, during this time of transition when courts are implementing new practices, there may be disparity in access among courts because of varying technology. Nonetheless, the federal courts recognize that the public should share in the benefits of information technology, including more efficient access to court case files.

These recommendations propose privacy policy options which the Committee on Court Administration and Case Management (the Committee) believes can provide solutions to issues of privacy and access as those issues are now presented. To the extent that courts are currently experimenting with procedures which differ from those articulated in this document, those courts should reexamine those procedures in light of the policies outlined herein. The Committee recognizes that technology is ever changing and these recommendations may require frequent re-examination and revision.

Recommendations

The policy recommended for adoption by the Judicial Conference is as follows:

General Principles

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
4. Except where otherwise noted, the policies apply to both paper and electronic files.
5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
6. The availability of case files at the courthouse will not be affected or limited by these policies.
7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Case Types

Civil Case Files

Recommendation: That documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

The recommendation provides for liberal remote electronic access to civil case files while also adopting some means to protect individual privacy. Remote electronic access will be available only through the PACERNet system which requires registration with the PACER service center and the use of a log in and password. This creates an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises. Further, this recommendation contemplates that certain personal, identifying information will not be included in its full and complete form in case documents, whether electronic or hard copy. For example, if the Social Security number of an individual must be included in a document, only the last four digits of that number will be used whether that document is to be filed electronically or at the courthouse. If the involvement of a minor child must be mentioned, only that child's initials should be used; if an individual's date of birth is necessary, only the year should be used; and, if financial account numbers are relevant, only the last four digits should be recited in the document. It is anticipated that as courts develop local rules and instructions for the use and implementation of Electronic Case Filing (ECF), such rules and instructions will include direction on the truncation by the litigants of personal identifying information. Similar rule changes would apply to courts which are imaging documents.

Providing remote electronic access equal to courthouse access will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential to their case to file certain documents containing private sensitive information or by the use of motions to seal and for protective orders. It will also depend upon the discretion of judges to protect privacy and security interests as they arise in individual cases. However, it is the experience of the ECF prototype courts and courts which have been imaging documents and making them electronically available that reliance on judicial discretion has not been problematic and has not dramatically increased or altered the amount and nature of motions to seal. It is also the experience of those courts that have been making their case file information available through PACERNet that there have been virtually no reported privacy problems as a result.

This recommended "public is public" policy is simple and can be easily and consistently applied nationwide. The recommended policy will "level the geographic playing field" in civil cases in federal court by allowing attorneys not located in geographic proximity to the courthouse easy access. Having both remote electronic access and courthouse access to the same information will also utilize more fully the technology available to the courts and will allow clerks' offices to better and more easily serve the needs of the bar and the public. In addition, it might also discourage the possible development of a "cottage industry" headed by data re-sellers who, if remote electronic access were restricted, could go to the courthouse, copy the files, download the information to a private website, and charge for access to that website, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

Each of the other policy options articulated in the document for comment presented its own problems. The idea of defining what documents should be included in the public file was rejected because it would require the courts to restrict access at the courthouse to information that has traditionally been available from courthouse files. This would have the net effect of allowing less overall access in a technological age where greater access is easy to achieve. It would also require making the very difficult determination of what information should be included in the public file.

The Committee seriously considered and debated at length the idea of creating levels of access to electronic documents (i.e., access to certain documents for specific users would be based upon the user's status in the case). The Committee ultimately decided that levels of access restrictions were too complicated in relation to the privacy benefits which could be derived therefrom. It would be difficult, for example, to prohibit a user with full access to all case information, such as a party to the case, from downloading and disseminating the restricted information. Also, the levels of access would only exist in relation to the remote electronic file and not in relation to the courthouse file. This would result in unequal remote and physical access to the same information and could foster a cottage industry of courthouse data collection as described above.

Seeking an amendment to the Federal Rules of Civil Procedure was not recommended for several reasons. First, any such rules amendment would take several years to effectuate, and the Committee concluded that privacy issues need immediate attention. There was some discussion about the need for a provision in Fed. R. Civ. P. 11 providing for sanctions against counsel or litigants who, as a litigation tactic, intentionally include scurrilous or embarrassing, irrelevant information in a document so that this information will be available on the Internet. The Committee ultimately determined that, at least for now, the current language of Fed. R. Civ. P. 11 and the inherent power of the court are sufficient to deter such actions and to enforce any privacy policy.

As noted above, this recommendation treats Social Security cases differently from other civil case files. It would limit remote electronic access. It does contemplate, however, the existence of a skeletal electronic file in Social Security cases which would contain documents such as the complaint, answer

and dispositive cross motions or petitions for review as applicable but not the administrative record and would be available to the court for statistical and case management purposes. This recommendation would also allow litigants to electronically file documents, except for the administrative record, in Social Security cases and would permit electronic access to these documents by litigants only.

After much debate, the consensus of the Committee was that Social Security cases warrant such treatment because they are of an inherently different nature from other civil cases. They are the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program. Further, all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case. Thus, making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant. Social Security files would still be available in their entirety at the courthouse.

Criminal Case Files

Recommendation: That public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

The Committee determined that any benefits of public remote electronic access to criminal files were outweighed by the safety and law enforcement risks such access would create. Routine public remote electronic access to documents in criminal case files would allow defendants and others easy access to information regarding the cooperation and other activities of defendants. Specifically, an individual could access documents filed in conjunction with a motion by the government for downward departure for substantial assistance and learn details of a defendant's involvement in the government's case. Such information could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families.

Likewise, routine public remote electronic access to criminal files may inadvertently increase the risk of unauthorized public access to preindictment information, such as unexecuted arrest and search warrants. The public availability of this information could severely hamper and compromise investigative and law enforcement efforts and pose a significant safety risk to law enforcement officials engaged in their official duties. Sealing documents containing this and other types of sensitive information in criminal cases will not adequately address the problem, since the mere fact that a document is sealed signals probable defendant cooperation and covert law enforcement initiatives.

The benefit to the public of easier access to criminal case file information was not discounted by the Committee and, it should be noted that, opinions and orders, as determined by the court, and criminal docket sheets will still be available through court websites and PACER and PACERNet. However, in view of the concerns described above, the Committee concluded that individual safety and the risk to law enforcement personnel significantly outweigh the need for unfettered public remote access to the content of criminal case files. This recommendation should be reconsidered if it becomes evident that the benefits of public remote electronic access significantly outweigh the dangers to victims, defendants and their families, and law enforcement personnel.

Bankruptcy Case Files

Recommendation: That documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

The Committee recognized the unique nature of bankruptcy case files and the particularly sensitive nature of the information, largely financial, which is contained in these files; while this recommendation does provide open remote electronic access to this information, it also accommodates the privacy concerns of individuals. This recommendation contemplates that a debtor's personal, identifying information and financial account numbers will not be included in their complete forms on any document, whether electronic or hard copy (i.e., only the last four digits of Social Security and financial account numbers will be used). As the recommendation recognizes, there may be a need to amend the Bankruptcy Code to allow only the last four digits of an individual debtor's Social Security number to be used. The bankruptcy court will collect the full Social Security number of debtors for internal use, as this number appears to provide the best way to identify multiple bankruptcy filings. The recommendation proposes a minor amendment to § 107(a) to allow the court to collect the full number, but only display the last four digits. The names of minor children will not be included in electronic or hard copies of documents.

As with civil cases, the effectiveness of this recommendation relies upon motions to seal filed by litigants and other parties in interest. To accomplish this result, an amendment of 11 U.S.C. § 107(b), which now narrowly circumscribes the ability of the bankruptcy courts to seal documents, will be needed to establish privacy and security concerns as a basis for sealing a document. Once again, the experiences of the ECF prototype and imaging courts do not indicate that this reliance will cause a large influx of motions to seal. In addition, as with all remote electronic access, the information can only be reached through the log-in and password- controlled PACERNet system.

The Committee rejected the other alternatives suggested in the comment document for various reasons. Any attempt to create levels of access in bankruptcy cases would meet with the same problems discussed with respect to the use of levels of access for civil cases. Bankruptcy cases present even more issues with respect to levels of access because there are numerous interests which would have a legitimate need to access file information and specific access levels would need to be established for them. Further, many entities could qualify as a "party in interest" in a bankruptcy filing and would need access to case file information to determine if they in fact have an interest. It would be difficult to create an electronic access system which would allow sufficient access for that determination to be made without giving full access to that entity.

The idea of collecting less information or segregating certain information and restricting access to it was rejected because the Committee determined that there is a need for and a value in allowing the public access to this information. Further, creating two separate files, one totally open to the public and one with restricted access, would place a burden on clerks' offices by requiring the management of two sets of files in each case.

Appellate Case Files

Recommendation: That appellate case files be treated at the appellate level the same way in which they are treated at the lower level.

This recommendation acknowledges the varying treatment of the different case types at the lower level and carries that treatment through to the appellate level. For cases appealed to the district court or the court of appeals from administrative agencies, the documents in the appeal will be treated, for the purposes of remote electronic access, in the same manner in which they were treated by the agency. For cases appealed from the district court, the case file will be treated in the manner in which it was treated by the district court with respect to remote electronic access.

Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files

In September 2001, the Judicial Conference of the United States adopted a policy on privacy and public access to electronic case files (JCUS-SEP/OCT 01, pp. 48-50). This policy addressed civil, criminal, bankruptcy and appellate case files separately. With regard to criminal case files, the policy prohibited remote public access to criminal case files at that time, with the explicit statement that the Conference would revisit this issue within two years. In March 2002, the Judicial Conference approved the establishment of a pilot project that would allow 11 courts, ten district courts and one court of appeals, to provide remote electronic public access to criminal case files (JCUS-MAR 02, p. 10). A study of these courts conducted by the Federal Judicial Center outlined the advantages and disadvantages of such access, to court employees, the bar, and the public. The study did not reveal any instances of harm due to remote access to criminal documents. The results of the study were reported to the Committees on Court Administration and Case Management and Criminal Law.

The Committee on Court Administration and Case Management reviewed and discussed the study in depth, ultimately concluding that the benefits of remote public electronic access to criminal case file documents outweighed the risks of harm such access potentially posed. This decision was based not only on the results of the FJC study, but also on the extensive information the Committee, through its Privacy Subcommittee, gathered and evaluated during the period of deliberation that led to the Judicial Conference's adoption of the initial privacy policy in September 2001. That process included the receipt of 242 comments from a wide variety of interested persons including private citizens, privacy advocacy groups, journalists, attorneys, government agencies, private investigators, data re-sellers and members of the financial services industry. It also included a public hearing at which 15 individuals representing a wide spectrum of public, private, and government interest made oral presentations and answered questions from Privacy Subcommittee members.

From the comments received and presentations made, it was clear that remote electronic access to public case file information provides numerous benefits. Specifically, several speakers noted that such access provides citizens the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government. The benefit that electronic access "levels the geographic playing field" by allowing individuals not located in proximity to the courthouse easy access to what is already public information was also frequently mentioned. Others noted that providing remote electronic access to this same public information available at the courthouse would discourage the creation of a "cottage industry" by individuals who could go to the courthouse, copy and scan information, download it to a private website and charge for access, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

After thoroughly analyzing and weighing all of the information before it, in June 2003, the Committee on Court Administration and Case Management recommended that the Judicial Conference amend its prohibition on remote public access to electronic criminal case files, the amendment to become effective only after specific guidance for the

courts was developed. The Committee on Criminal Law concurred in this recommendation.

At its September 2003 session, the Conference discussed the issue and adopted the recommendation, thereby amending its policy regarding remote public access to electronic criminal case file documents to permit such access to be the same as public access to criminal case file documents at the courthouse with the effective date of this new policy delayed until such time as the Conference approves specific guidance on the implementation and operation of the policy developed by the Committees on Court Administration and Case Management, Criminal Law and Defender Services (JCUS-SEP 03, pp. 15-16).

This guidance, which was prepared by a specially-created subcommittee consisting of members from the Committees on Court Administration and Case Management, Criminal Law and Defender Services and approved by the Judicial Conference, sets forth the implementation guidelines required by the Judicial Conference. This document has three parts. The first provides a short explanation of the policy on remote public access to electronic criminal case files and explains how it relates to similar policies for other case types. The second part provides information about the redaction requirements which are an integral part of the policy and require the court to educate the bar and other court users. The third part is a discussion of specific documents that courts are not to make available to the public.

I. Explanation of the policy permitting remote public access to electronic criminal case file documents

Not all documents associated with a criminal case are properly included in the criminal case file. The policy regarding remote public electronic access to criminal case file documents is intended to make all case file documents that are available to the public at the courthouse available to the public via remote, electronic access if a court is making documents remotely, electronically available through the Case Management/Electronic Case Files system or by the scanning of paper filings to create an electronic image. Simply stated, if a document can be accessed from a criminal case file by a member of the public at the courthouse, it should be available to that same member of the public through the court's electronic access system. This is true if the document was filed electronically or converted to electronic form.

This policy treats criminal case file documents in much the same way civil and bankruptcy case file documents are treated. Filers of documents have the obligation to partially redact specific personal identifying information from documents before they are filed. (See Section II, below for a discussion of redaction requirements.) However, because of the security and law enforcement issues unique to criminal case file information, some specific criminal case file documents will not be available to the public remotely or at the courthouse. (See Section III, below for a discussion of these documents.) It is not the intent of this policy to expand the documents that are to be included in the public criminal case file and, thereby, available both at the courthouse and electronically to those with PACER access.

It should also be noted that at its September 2003 session, the Judicial Conference adopted a policy that provides for the electronic availability of transcripts of court proceedings. The effective date of this policy is delayed pending a report of the Judicial

Resources Committee regarding the impact the policy may have on court reporter compensation. However, once that policy becomes effective, there are separately articulated requirements and procedures regarding redaction which will apply to transcripts in criminal cases.

II. Redaction and Sealing Requirements

The policy adopted by the Conference in September 2003 states in part:

> Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, require that personal data identifiers be redacted by the filer of the document, whether the document is filed electronically or in paper, as follows:
>
> 1. Social Security numbers to the last four digits;
> 2. financial account numbers to the last four digits;
> 3. names of minor children to the initials;
> 4. dates of birth to the year; and
> 5. home addresses to city and state[.]

In order to inform all court users of these requirements, courts should post a Notice of Electronic Availability of Criminal Case File Documents on their websites and in their clerks' offices. An example of such a notice appears below. As part of the pilot project and study conducted by the Federal Judicial Center (FJC), participating courts were asked to implement similar redaction requirements and to inform all court users of these requirements. To assist in these requests, the participating courts were provided with a sample Notice of Electronic Availability of Criminal Case File Documents that was reviewed by a Subcommittee of the Committee on Court Administration and Case Management, with a representative from the Criminal Law Committee, that was working with the FJC on the study's design. It was suggested that the courts post this notice on their websites and in their clerks' offices in order to inform all filers and other court users that documents filed in criminal cases will be available to the general public on the Internet and that the filer has the obligation to redact the specified identifying information from the document prior to filing. A version of this notice, updated to reference the E-Government Act of 2002, is provided.

Please be informed that documents filed in criminal cases in this court are now available to the public electronically.

> You shall not include sensitive information in any document filed with the court. You must remember that any personal information not otherwise protected will be made available over the Internet via WebPACER. The following personal data identifiers must be partially redacted from the document whether it is filed traditionally or electronically: Social Security numbers to the last four digits; financial account numbers to the last four digits; names of minor children to the initials; dates of birth to the year; and home addresses to the city and state.
>
> In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an

unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, also require the party to file a redacted copy for the public file.

Because filings will be remotely, electronically available and may contain information implicating not only privacy but also personal security concerns, exercise caution when filing a document that contains any of the following information and consider accompanying any such filing with a motion to seal. Until the court has ruled on any motion to seal, no document that is the subject of a motion to seal, nor the motion itself or any response thereto, will be available electronically or in paper form.

1) any personal identifying number, such as driver's license number;
2) medical records, treatment and diagnosis;
3) employment history;
4) individual financial information;
5) proprietary or trade secret information;
6) information regarding an individual's cooperation with the government;
7) information regarding the victim of any criminal activity;
8) national security information; and
9) sensitive security information as described in 49 U.S.C. § 114 (s).

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all documents and pleadings comply with the rules of this court requiring redaction of personal data identifiers. The clerk will not review filings for redaction.

The court should also be aware that it will need to partially redact the personal identifiers listed above from documents it prepares that routinely contain such information (e.g., order setting conditions of release).

III. Documents for which public access should not be provided

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other

services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

Courts maintain the discretion to seal any document or case file sua sponte. If the court seals a document after it has already been included in the public file, the clerk shall remove the document from both the electronic and paper public files as soon as the order sealing the document is entered. Counsel and the courts should appreciate that the filing of an unsealed document in the criminal case file will make it available both at the courthouse and by remote electronic access. Courts should assess whether privacy or law enforcement concerns, or other good cause, justify filing the document under seal.

There are certain categories of criminal case documents that are available to the public in the clerk's office but will not be made available electronically because they are not to be included in the public case file for individual criminal cases. These include but are not limited to vouchers for claims for payment, including payment for transcripts, (absent attached or supporting documentation) submitted pursuant to the Criminal Justice Act. (For detailed guidance about the public availability of Criminal Justice Act information, please see paragraph 5.01 of Volume VII of *Guide to Judiciary Policies and Procedures.*)

Model Local Rule Regarding Privacy and Public Access to Electronic Criminal Case Files

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to documents in the criminal case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court.

a. **Social Security numbers**. If an individual's Social Security number must be included, only the last four digits of that number should be used.

b. **Names of minor children**. If the involvement of a minor child must be mentioned, only the initials of the child should be used.

c. **Dates of birth**. If an individual's date of birth must be included, only the year should be used.

d. **Financial account numbers**. If financial account numbers are relevant, only the last four digits of the number should be used

e. **Home addresses**. If a home address must be included, only the city and state should be listed.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court, may, however, still require the party to file a redacted copy for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review filings for compliance with this rule.

COMMENTARY

Parties should consult the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." This Guidance explains the policy permitting remote public access to electronic criminal case file documents and sets forth redaction and sealing requirements for documents that are filed. The Guidance also lists documents for which public access should not be provided. A copy of the Guidance is available at the court's website.

700 Stewart Street, Suite 5220
Seattle, WA 98101
(206) 553-4985
Fax: (206) 553-4073

05-AP- 003

05-BK- 008

05-CV- 027

05-CR- 014

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
1 Columbus Circle, N.E.
Suite 4170
Washington, D.C. 20544

Re: Proposed Rule 5.2 – FED.R.CIV.P.
Proposed Rule 49.1 – FED.R.CRIM.P.
Proposed Rule 25(a)(5) – FED.R.APP.P.
Proposed Rule 9037 – FED.R.BANKR.P.

Dear Mr. McCabe:

I am submitting these comments with respect to the proposed federal rules of practice and procedure referenced above, relating to the protection of privacy of court records in civil cases, criminal cases, bankruptcy cases and appellate cases. I am an Assistant U.S. Attorney, but also serve as an adjunct professor at the University of Washington School of Law where I teach Privacy Law. I have written and spoken frequently on the problem of balancing public access and privacy in the context of a system of electronic court records.[1] In preparing these comments, I have received helpful suggestions from Justice John Dooley, Judge Ronald Hedges, Robert Deyling, Professor Peter Swire, as well as many other people who have been active in the Sedona Conference and in the Courtroom 21 Project at William and Mary Law School. The views I express, however, are my own.

As set forth below, I believe that the proposed rules successfully balance the right of public access to court records against the need to protect from misuse the sensitive personal and commercial information that may be contained in them. I also believe that, consistent with current funding limitations, the proposed rules implement the Congressional directive in the E-Government Act of 2002 to make court records available on-line, while still protecting the privacy and security of sensitive information in court records, and that they do so in a manner that is consistent with the Constitutional right of access to court records. Finally, at the end of my comments, I suggest a minor change in the proposed rules which could take advantage of the

[1] See, e.g., Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash. L. Rev. 307 (2004).

existing PACER technology to facilitate greater public access to court records, while, at the same time, enhancing the ability of litigants to protect sensitive information in court filings.

Any system of court records in a free society must be open to the watchful gaze of the public. The openness of judicial proceedings and records serves to check against the misuse of judicial power, and increases public respect and involvement by citizens in the legal system.[2] For this reason, every federal circuit protects the right of public access to judicial proceedings and court records–either under the First Amendment or as a matter of common law. At the same time, unfair publicity can be used by parties as an instrument of oppression–for instance, when parties attempt to use the public nature of judicial proceedings to generate unfair publicity and achieve an unfair advantage in the underlying litigation. Thus, there are times when the disclosure of sensitive personal or business information can create unacceptable risks of a miscarriage of justice, and cause unnecessary harm to parties and non-parties alike. As Justice Powell wisely noted:

> [T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.[3]

Courts have long been aware of the need to balance the public's general right of access to judicial records against the need, on occasion, to protect information in judicial proceedings and court records from improper disclosure. Balancing the competing claims of transparency and privacy has never been a simple task. Both sets of interests–those in favor of the disclosure of information, and those in favor of protecting it–can be supported by forceful and cogent arguments. Over the years, however, in case after case, as courts have carefully weighed and decided between these competing interests, general common law principles have arisen which establish the proper balance between transparency and privacy.

Our society is now engaged in an electronic revolution. Information is processed faster and more cheaply than ever before in the past, and used in ways that were never before

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[2] See Blackstone, Commentaries on the Laws of England, III, Ch. 23, p. 377 (1768) ("[T]he only effectual and legal verdict is the public verdict."), see also Vol. IV, Ch. 3 "On Courts in General", p. 24 ("A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony.") Blackstone, of course, was greatly influenced by the Italian legal scholar, Cesare Beccaria, who argued strongly for the need for transparency in judicial proceedings. See Beccaria, On Crimes and Punishments, Ch. 14, p. 36 (1764) ("All trials should be public, that opinion, which is the best, or perhaps the only cement of society, may curb the authority of the powerful, and the passions of the judge, and that the people may say, 'We are protected by the laws; we are not slaves.'").

[3] *Nixon v. Warner Communications, Inc.* 435 U.S. 589, 598 (1978).

imaginable. Courts, as quintessential information processing systems, are not immune from the effects of these technological changes. The adoption of electronic filing systems by state and federal courts has allowed the legal system to realize substantial operational benefits, and has permitted the public to more easily access and understand the federal judicial process. At the same time, the electrification of judicial records has created new threats to the integrity of the judicial process and the administration of justice which did not exist in the past.

In the days of a paper based system of court records, much of the sensitive information contained in court files was protected merely by the cost of retrieving the records. Only those with a relatively strong and individualized interest in the information would take time out of their day to travel to the clerk's office, wait in line, fill out the necessary forms to request the retrieval of the records, wait for the clerk to find the files, read through them to find the relevant records, copy them, and then pay the necessary copy charges. As a result, while records in a paper based system were technically "public" in the sense that any member of the public had the ability to access almost any court record, the vast bulk of the sensitive information in judicial records was protected by a the sheer difficulty of accessing the particular record in question. This fact greatly reduced the dangers of the misuse of sensitive information–something which was recognized by the Supreme Court when it recognized and granted legal protection to the "practical obscurity" of court records.[4]

The practical obscurity of paper records allowed our legal system to treat court records as public, although we still could enjoy substantial practical protections for any sensitive personal information in those records. Now that judicial records are fully electronic, however, computers can search, compile, aggregate and combine vast quantities of information in court records in a matter of minutes, and at minimal cost. Technological change brings its rewards and its punishments indifferently. As we enjoy the great convenience of a system of on-line electronic court records, we also must mourn the death of practical obscurity. As our new technology renders all court records fully transparent, the risk of misuse of sensitive personal information in court files dramatically expands. Thus, the death of practical obscurity has not eliminated the need for the courts to continue to engage in the careful process of balancing transparency and privacy–it has merely made this balancing process infinitely more difficult.

Whether one views these changes as a blessing or a curse, there is no turning back. The inevitability of the technological revolution in court records was acknowledged by Congress in section 205 of the E-Government Act of 2002 (the "E-Government Act" or the "Act").[5] In the Act, Congress directed the federal courts to provide for electronic public access to court records. With its usual desire to eat its public cake and have its privacy too, Congress also directed that the federal courts establish rules governing such electronic access which would protect the

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[4] *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 764 (1989).

[5] Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913-2915.

privacy and security of personal information. For this Herculean task, Congress saw fit to provide no additional funding to the courts. Congress did provide the courts with the following suggestion--that the rules adopted by the courts to address privacy and security concerns take into account the "best practices of federal and state courts." Unfortunately, since federal and state courts have only recently implemented their systems of electronic access, there is relatively little experience measuring the costs and benefits of different competing systems of electronic access.

The subject itself is relatively obscure. There is only a small number of people at the state and federal levels who are even interested in the problem–consisting mostly of certain federal and state judges, staff attorneys at the Administrative Office of U.S. Courts, attorneys like myself at the Department of Justice, as well as information brokers, the media, privacy advocates, and law professors. There has been an excellent dialogue among this group, and the process does not appear to have been politicized. However, the various technologies are changing too quickly for there to be any clear consensus about "best practices." We are all scrambling, and we will be lucky if we can just muddle through. One thing is clear with respect to the federal process. With no new funds, the federal courts have only the computer systems that were in place before the passage of the E-Government Act. For better or for worse, for the foreseeable future, the PACER system will be he technological backbone of the federal courts.

The federal PACER system uses a system of computer privileges to manage remote access to court records. There are roughly *three* different levels of privileges.

1) The first level of privileges allows court records to be filed "under seal." Access to this information is not permitted to members of the general pubic.

2) The second level of privileges allows on-line access to court records on an individualized basis--to specially named persons only. While this level of privileges is usually used when a record is filed under seal, the technology actually permits any other specifically designed person to have on-line access on an individualized basis.

3) The third level of privileges–the default--allows access to the general public–or more accurately, to any person who possesses a userid and a password, and pays a small fee to download the pleading.

In addition to the system of remote electronic access, it is still possible to file paper records with the clerk's office. Such paper based filings are still permitted for the bulky records on review from federal administrative proceedings, social security cases, immigration cases or on collateral attack from other state and federal tribunals in *habeas corpus* litigation. In these cases, the pleadings themselves are filed electronically, but the administrative records are allowed to remain in paper form. At some point, it may be assumed that this system will change when the records of the various tribunals themselves become electronic.

It is important to note that given the PACER's system's computer architecture, there is no option to make all judicial records available to any person at no cost on the Internet. Userids and passwords are necessary to insure the financial integrity of a self-financing system in the absence of a specific Congressional appropriation to pay for a new one. Interestingly, this aspect of the PACER technology indirectly, and probably unintentionally, allows greater protection for the privacy and security of sensitive information in court records. When all users are required to maintain a minimum level of financial accountability to obtain their userids and passwords, the courts are in a better position to police what users do with the information. Users who engage in systematic misuse of personal information in judicial records are at risk of losing their privileges. While hardly a perfect system, PACER does provide some protection against the most obvious potential harms which would take place if all information in court records were freely and anonymously searchable though powerful Internet search engines like Google. However, there are also aspects of PACER's technology which are probably best described as a technological purgatory. The PACER system's technology was not designed with the competing goals of facilitating access and protecting privacy in mind. As a result it contains very few privacy enhancing technologies--e.g., software programs which can automatically identify and flag sensitive information such as social security numbers, or programs which permit the easy and effective redaction of sensitive information in pleadings. Thus, in fashioning the proposed rules, the Judicial Conference is necessarily constrained by the limits of the PACER technology.

To make up for the lack of privacy enhancing technologies, the proposed rules make attorneys the front line in the protection of sensitive information in judicial filings. The rules provide that if sensitive information is in a document that needs to be protected, the decision to do so must be made before it is filed, not afterwards. And the rules also caution attorneys to file sensitive personal information under seal or in a redacted form, after obtaining permission from the court. Unfortunately, while attorneys may be in a good position to decide what information of their clients is in need of protection, they may not be quite as attuned to the need to protect the sensitive personal information of others–the opposing party, witnesses to the case, jurors, and the many other voluntary and involuntary participants in the judicial system. This is an obvious weakness in the rules, but, given the PACER technology, there appears to be little choice in the matter. The courts have done the best they can with the technological cards they have been dealt by Congress, and attorneys will have to bear that burden until Congress steps in with financial assistance.

In an attempt to lessen the burden on attorneys, the proposed rules create a presumption that certain identifiers not be placed in the court record, and they permit the redaction without court approval of certain sensitive information--social security and tax identification numbers, names of minor children, birth dates, and financial account numbers. As the comment makes clear, similar forms of information would also probably qualify--such as driver's license and alien registration numbers. One could add to this list individual health identification numbers and physician identification numbers, as well as other similar types of numerical identification systems.

The presumption in the proposed rules that certain types of personal identifiers be excluded from the public record, may appear to change the traditional presumption about the openness of court records. However, as the comments to the rules emphasize, the rules are not intended to affect the limitations on sealing that are otherwise applicable under the law. In the past, of course, courts would have excluded such obviously sensitive information from the court record after a case by case balancing. But courts have never held that the right of public access requires that individuals be exposed to a needless risk of identity theft, merely because personal identifiers happen to be contained in otherwise public court records. Accordingly, the proposed rules eliminate the time-consuming balancing process. Instead, the rules implement the mandate of Congress in the E-Government Act, which codifies a result that earlier common law and Constitutional decisions would have reached in any event.

Finally, the rules permit the entry of protective orders. As we have seen, protective orders may be used to seal sensitive information by redaction or by the removal of the record itself from the public record. However, the proposed rules also permit a second option which was not previously available in the days of paper records. The rule allows for protective orders to be entered to provide that remote electronic access to certain records be limited to the parties and their attorneys alone, with the general public access limited to access "at the courthouse." This is an extremely interesting and important step. It appears to be an attempt to permit parties, upon court order, to create within the electronic filing system a "proxy" for the practical obscurity of the days of paper records.

There are good pragmatic reasons to try to create an "intermediate" form of access to court records–that is, to attempt to re-create something like the old system of "practical obscurity." For instance, many court records contain large amounts of confidential medical records. While the courts certainly could require the redaction of medical information in a social security case, the cost of doing so would be prohibitive. It would also be unfair, since social security claimants are often in distressed financial circumstances. Likewise, the files in immigration and naturalization appeals also contain similar sensitive personal information for which it would be burdensome and unfair to require redaction. Accordingly, for these types of files, it makes eminent practical sense to have an intermediate system of access. Under the proposed rules, then, on-line access is available for the parties and their attorneys, with public access otherwise available "at the courthouse." For social security and immigration cases, the rules create a presumption that the intermediate system of access will be the default. In other cases, the parties can seek protective orders to obtain similar treatment if they believe similar treatment is needed. Such treatment would appear to be most appropriate in almost any case in which there is a large amount of sensitive information--administrative appeals of Medicare claims and personal injury suits with large amounts of health records come immediately to mind.

An intermediate system of access certainly complies with the Constitutional and common law right to public access. The cases establishing a strong right of access to court records only apply where the public has been denied access to a judicial record *in toto*--that is, where the underlying information is filed *under seal*. So long as the public has some means of access to the

underlying information (for instance, the same "at the courthouse access" the public has always had), the courts are free to impose different levels of computerized privileges for different types of court records within the on-line system.

While I praise the proposed rules' attempt to establish an intermediate system of access, the "at the courthouse" rule appears to be misguided. In an electronic age, such a rule cannot actually re-create the old system of practical obscurity; it merely imposes a system of "contrived inconvenience." The proposed rule does not protect sensitive information in court records from a "cottage" industry of copyists, who travel from courthouse to courthouse, selling the information from court files to third parties without restriction–a cottage industry that already appears to thriving. The "at the courthouse " rule also discriminates against people who may reside farther away from the courthouse, in favor of people who reside nearer to the courthouse. The "at the courthouse" rule still requires clerks' offices to expend valuable staff time addressing their requests for access, and forces the needless conversion of electronic into paper records at public expense. Finally, since staff at clerks' offices may not legally screen access requests, the "at the courthouse only" rule is unlikely to secure any meaningful privacy. For instance, a stalker seeking information about his victim will still be able anonymously and secretly to obtain the personal information he seeks. The artificiality and burdensomeness of the "at the courthouse" solution may even discourage some judges from entering protective orders which use this option, in spite of the obvious need at times for a system which avoids the cost of redacting large amounts of sensitive personal and commercial information.

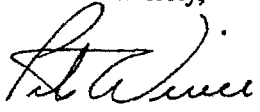
While I strongly support the attempt in the proposed rules to create an intermediate level of access, I would respectfully suggest that there may be a much simpler way to achieve it–one which takes advantage of the existing PACER technology. Instead of providing for "at the courthouse" access, the proposed rules could provide simply for remote electronic access for any interested member of the public, upon request, after notice to the parties (a notice which is automatically emailed to the parties without cost by the operation of the PACER system). In the absence of any objection, access would then be automatically granted, and the requesting person would receive the same level of access to the court file as the parties themselves enjoy. Local rules could be established to provide for a briefing schedule if any of the parties objected to access. The objecting party would, of course, then have the burden to meet the Constitutional and common law requirement for limiting such access. They would also have the expense of redacting any particularly sensitive information they wished to protect if their objection were overruled. Of course, in the vast majority of cases–as in the days of paper records–such access would raise little if any concern of harm. Furthermore, unlike an "at the courthouse" system of access, the parties with a direct interest in protecting their personal information would be in a position to know who, for instance, wanted to review their medical records. If a university researcher or a newspaper reporter wished to review social security records in a study of the Social Security Administration's treatment of claimants, it is unlikely that many claimants would object, particularly if the requester had no interest in the individual persons in the file but was only interested in general trends. On the other hand, if the requesting party were believed to be a stalker and a party feared the potential misuse of any of the sensitive information in the court

record, that party would then be in a position to object to the access to the information, or to pursue other legal remedies they might have under applicable law.

As a matter of drafting, I would respectfully suggest that the proposed rule be changed to replace the words "at the courthouse" with "as otherwise ordered by the court, or as provided for by local rule." The court could then, on a case by case basis, or by local rule, establish a procedure for allowing the parties to seek permission to use a system of intermediate access, could implement a schedule for filing any objections, and could establish any other procedures to account, as necessary, for the specific concerns of the parties.

Please do not take my comment as suggesting anything less than full respect for what has already been accomplished in the draft rules. As presently drafted, the proposed rules successfully navigate between the Scylla of a electronic court system of complete publicity, and the Charybdis of a system of complete privacy. This achievement is even more remarkable given the technological limits of the PACER system, and the lack of funding by Congress. I would only suggest that the PACER system may have a greater capacity to solve certain problems than the drafters of the rules may have been aware. Thus, instead of attempting to "retrofit" the PACER system to reverse engineer an equivalent of "practical obscurity," it may be more appropriate to exploit the existing PACER technology to provide a different, and potentially more convenient form of "intermediate" access. This intermediate access would be individualized, instead of anonymous; and it would offer a system of accountability, if not a system of full privacy. I hope the Committee seriously considers amending the proposed rules to incorporate what I respectfully submit may be a practical and workable solution.

Yours sincerely,



Peter A. Winn

PUBLIC CITIZEN LITIGATION GROUP
1600 TWENTIETH STREET, NW
WASHINGTON, DC 20009
(202) 588-1000
(202) 588-7795 (fax)

05-AP- 004

05-BK- 010

February 15, 2006

05-CV- 029

By Electronic Submission

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

05-CR- 015

Re: Proposed Amendments to Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure—Comments of Public Citizen Litigation Group

Dear Mr. McCabe:

Enclosed are the comments of Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure. If you or any Committee member has any questions or concerns, do not hesitate to contact me. Thank you.

Sincerely,

s/ Gregory A. Beck
Gregory A. Beck

PUBLIC CITIZEN LITIGATION GROUP
1600 TWENTIETH STREET, NW
WASHINGTON, DC 20009
(202) 588-1000
(202) 588-7795 (fax)

Comments of Public Citizen Litigation Group on the Proposed Amendments to the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure

February 15, 2006

Introduction

Public Citizen Litigation Group ("PCLG") is filing these comments on the proposed amendments to the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure that were published for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on August 15, 2005.

PCLG is a ten-lawyer public interest law firm located in Washington, D.C. It is a division of Public Citizen, a nonprofit advocacy organization with more than 100,000 members nationwide. Since its founding in 1972, PCLG has worked toward improving the administration of justice in the courts. It has submitted proposals to amend the civil and appellate rules and has frequently commented on proposed amendments to these rules. Collectively, PCLG's lawyers have litigated hundreds of cases in the federal courts and have appeared before the Supreme Court of the United States, every federal circuit (in most of them, on many occasions), many federal district courts across the country, and

the courts of many states. As a result, PCLG's lawyers have considerable experience with the rules and issues that are the subject of the proposed amendments. In addition, PCLG has extensively litigated cases involving both consumer privacy and public access to judicial records, and is thus qualified to address the balancing process that must occur when attempting to accommodate these sometimes competing interests.

In general, PCLG supports the proposed amendments. As the courts move to make more records available online, it is critical that they scrupulously protect private information. We have concerns, however, about the way the proposed rules reconcile these admittedly important privacy interests with the interest of the public in access to court filings. In particular, certain provisions in the proposed rules will lead to overprotection of privacy interests at the expense of the public's interest in access to judicial records. We suggest several changes to the proposed rules that would ameliorate these concerns.

I. Proposed Federal Rule of Civil Procedure 5.2

PCLG strongly supports the protection of private information in court filings. The proposed rule generally does a good job of protecting this information by requiring in subdivision (a) the partial redaction of Social Security numbers, tax identification numbers, names of minors, birth dates, and financial account numbers. The rule also properly allows the court to order redaction of additional private information in particular cases pursuant to subdivision (e). However, we believe that the proposed rule in several

ways goes too far in restricting access to filings.

A. Limitations on Remote Access in Social Security and Immigration Cases

PCLG opposes proposed subdivision (c), which bars *all* remote electronic access by the public to filings in Social Security appeals and immigration cases. The committee note to the proposed rule contends that "[t]hose actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings." With one exception, however, we do not agree that these considerations warrant the special treatment given to these types of cases. Indeed, as explained further below, the proposed rule would have the unfortunate effect of blocking socially beneficial use of the courts' files, while leaving the most private and sensitive information, including unredacted Social Security and financial account numbers, freely available to identity thieves and data brokers at the courthouse.

The first reason given for the rule—the prevalence of sensitive information—does not justify the imposition of the bar on remote electronic access. Many other kinds of cases may contain information just as sensitive (such as civil suits over health benefits, claims of workplace discrimination, and civil claims regarding violence against women or the sexual abuse of minors), but are given no special protection under the rule. Bankruptcy cases, in particular, often involve detailed private financial information, but will continue to be available online under the proposed rule. In general, we believe that

private information in Social Security and immigration cases should be protected in the same way as in these other types of litigation—through application of subdivisions (a), (d), and (e) of the proposed rule—rather than by carving out a specific and total exemption for these two particular categories of cases.

We recognize, however, that the administrative record in Social Security and some immigration cases might raise particular privacy concerns not present in other cases because, for example, the record may contain private identifiers that are exempt from the redaction requirement pursuant to subdivision (b)(2), or health and financial information that would be both private and not of interest to the general public. These files are generally kept confidential at the agency level, and we support continuing to restrict electronic access to the files in the district court absent a court's decision to the contrary. This restriction would not constitute a substantial change from current practice; administrative records are frequently exempt from electronic filing requirements under local rules, because the rules provide either a specific exception for administrative records or a more general exception for filings that are particularly large or difficult to convert to electronic form.[1]

Other documents, such as the briefs of the parties, may also contain private information, but this information would be limited in scope to issues relevant to deciding

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[1]The administrative record in Social Security cases, along with the rest of the record, is not currently available online pursuant to the Judicial Conference's policy on public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm.

the case. In addition, these filings would be subject to the redaction requirement of subdivision (a) and would thus not contain the kinds of private information that could subject parties to identity theft. In particular cases, the court could also allow redaction of other private information pursuant to subdivision (e)(1). And in cases where private information is too extensive for redaction to be practical, the court could either order redaction of the parties' names, or limit remote access to the record pursuant to subdivision (e)(2). These decisions, however, should be narrowly tailored and made on a case-by-case basis instead of pursuant to a categorical exception. Courts have traditionally relied on such case-by-case decisionmaking to decide questions regarding public access to records and are guided in this process by well-defined case law.[2]

Although it may be simpler to allow parties and courts to skip case-by-case decisionmaking in favor of a presumption of secrecy, such a system would close almost *all* filings in these cases to the public. Parties in most cases have no incentive to argue that the record should be available on the Internet, so motions to make cases available online would rarely, if ever, be made. If the default rule were a restricted file, this default therefore would almost never be overridden unless the court independently undertook to

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[2]The public benefits from allowing access to filings even in cases that primarily involve private matters because such access discourages abuse of the system by both parties and courts. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (noting that openness "giv[es] assurance that the proceedings were conducted fairly for all concerned, and [] discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality").

examine the privacy interests at stake. In contrast, parties have a strong self-interest in protecting themselves from identity theft and invasions of privacy, and can be expected to vigorously enforce these interests by demanding additional protection in cases that truly raise such concerns. A rule that provides a presumption of openness therefore ensures appropriate levels of protection in cases raising genuine privacy issues, while at the same time assuring that the public will properly have access to filings in the remainder of cases. In contrast, the proposed rule risks a slippery slope of categorical exceptions—if Social Security and immigration cases should not be available online, what about, for example, bankruptcy cases? The presumption should favor public access whenever possible.

Even if the Committee is inclined to retain an exception for Social Security cases, the rules should not treat immigration cases the same way. Unlike Social Security cases, which are already exempted from online availability pursuant to the Judicial Conference's policy on public electronic access to files, no such exception is currently followed in immigration cases. Eliminating the proposed immigration exception therefore would not entail a change in policy or risk unpredictable effects. Although immigration files may well contain some information that the participants would prefer to keep private, they often do not involve the detailed financial and health documentation that is regularly part of the agency record in Social Security cases. Particular cases, of course, might warrant greater protection. For example, immigration benefits cases can involve private financial information, and aliens in certain removal cases would face potential danger if their

identities were revealed in the public record. But in these cases the court can readily address the problem under subdivisions (d) and (e) without blocking remote access to all other immigration filings.

Moreover, barring remote electronic access to the records of district courts, which review agency decisions, would shield problems at the agency level from the public eye and thereby undermine the watchdog function of the public and press. Courts have recognized serious problems in the agency adjudication of immigration cases resulting from clogged dockets, biased immigration judges, and summary affirmances by the Board of Immigration Appeals. *See, e.g.*, Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1. As a consequence of these problems, the U.S. Court of Appeals for the Seventh Circuit in one recent opinion noted that "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Public access to government records serves as a key check against the arbitrary use of power that can occur when government operations are allowed to proceed in secret. *See, e.g.*, *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988) ("Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."). Indeed, public access to the record in immigration cases is even more important than in many other types of cases because of

the critical nature of the litigation to the lives of the participants. Immigration removal orders can involve literally life-and-death decisions about whether to send aliens back to countries where they may be persecuted or killed.

To be sure, the continued availability of these files at the courthouse goes some way toward allowing the public to engage in its oversight role. But the E-Government Act of 2002, pursuant to which these rules were proposed, was enacted on the premise that public availability of documents on the Internet is necessary "to provide increased opportunities for citizen participation in government" and "[t]o make the Federal Government more transparent and accountable." Pub. L. No. 107-347, § 2(b)(2) & (9). There is a legitimate public interest in remote electronic access to the court's files in many cases. Reporters based in distant cities, for example, may not have easy access to the courthouse to review the paper version of filings. Remote electronic access is also extremely useful, if not essential, for academics conducting research into court files that are scattered throughout the country. And lawyers and pro se litigants often use filings in other cases to use as a model when crafting their own arguments or to gauge the bases for decisions in other cases. Indeed, all the policy concerns that mandate public access to files at the courthouse also support making public access *easier* by making the files available on the Internet.

Nor does proposed subdivision (c)(2)'s allowance for online access to the court's ultimate disposition satisfy the public's interest in openness, because access to the filings

of the parties is often necessary to an understanding of the court's decision. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (noting that court documents "often provide important, sometimes the only, bases or explanations for a court's decision"). Potentially dispositive filings such as motions for summary judgment are the foundation on which the court's resolution of a case is based, and should remain open to the public "absent the most compelling reasons." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004). Without access to records that influenced a judge's decision, "[h]ow else are observers to know what the suit is about or assess the judges' disposition of it?" *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002).

The remaining justification for the proposed rule—the volume of filings—is also inadequate to justify restricting remote access to Social Security or immigration cases. Subdivision (c)(2) contemplates that the files will in any case have to be accessible in electronic form from computers at the courthouse, and making the same documents also available over the Internet would not pose a substantial additional burden on the resources of the courts or parties. Furthermore, judges would not be significantly burdened because parties can be expected to flag privacy issues on their own without significant judicial involvement, and because judges have long experience with the familiar process of balancing privacy concerns against the public interest in open access. Although the government would be put to the additional burden of redacting the information specified by subdivision (a) from its filings, this requirement is unlikely to be overwhelming given

subdivision (b)'s exclusion from the redaction requirement of the records of administrative agencies.[3] We do not believe any extra burden on the government imposed by requiring it to redact its own original filings justifies overriding the public's compelling interest in remote access.

Ironically, to accommodate the government's interest in avoiding the burden of redaction in these two categories of cases, the proposed rule excepts from the redaction requirement even private information like Social Security numbers, birth dates, and financial account numbers—the very types of information most likely to be used for identity theft. Although paper filings, in addition to electronic submissions, are required to be redacted pursuant to subdivision (a), subdivision (b)(5) exempts Social Security and immigration cases from this requirement. This private information would be fully accessible from paper files and public computer terminals at the courthouse, and would thus receive even *less* privacy protection than the same information in other cases. Determined identity thieves cannot be expected to be deterred merely because they are unable to access court files from their personal computers at home. In addition, restricting remote access enhances the market value of data brokers who could obtain private information from the courthouse and disseminate it for a fee.

Finally, one other potential quirk in the language of the proposed rule deserves

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[3]In immigration cases, the burden of redaction would not be a new one, since the Judicial Conference's current policy on public access to electronic case files does not, as noted above, exclude immigration cases from public access and redaction requirements.

mention. Subdivision (c)(2) provides that the public "may have *electronic* access to the full record at the courthouse." However, because the proposed rule purports to govern the privacy of both paper and electronic filings, the rule's failure to mention public access to the paper version of the court's files might be read to prohibit by implication this traditional form of public access. Allowing only electronic access to the files would prohibit *all* public access to those filings that are filed only in paper form. We therefore recommend that the proposed rule be revised to recognize the public's right to access the court's "physical and electronic" files.

To satisfy fully the goals of the E-Government Act, the rules should ensure that the public has access to judicial records to the greatest extent consistent with privacy concerns. This can best be achieved by modifying subdivision (c) to prohibit only remote non-party access to the administrative record, and to leave other privacy concerns to be resolved under subdivisions (d) and (e). Subdivision (c)(2) could thus be re-worded as follows: "any other person may have physical and electronic access to the full record at the courthouse, but may not have remote access to the administrative record." Subdivisions (c)(2)(A) and (B) could then be eliminated.

B. Filings Made Under Seal

Subdivision (d) of the proposed rule provides that a "court may order that a filing be made under seal without redaction." This subdivision allows the court to order an unredacted document to be filed *as a substitute* to the redacted filing, thus ensuring that

no public version of the filing will be available unless the court subsequently orders that such an additional filing be made. The text of the proposed rule does not limit the type of "filing" covered by the rule, and thus appears to allow the court to order a document to be filed under seal regardless of whether the filing contains private information that would ordinarily require redaction under subdivisions (a) or (e). Because the rule prohibits access to paper versions at the courthouse in addition to online versions, the rule appears to grant the courts a general authority to seal any filing for any reason.

Such a general grant of power is unnecessary because, as recognized by the committee note to the proposed rule, the courts already have the inherent power to seal documents pursuant to their supervisory authority over their own records and files. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). In cases where the court seals a document under this authority, the E-Government Act would then prohibit the document from being made available online. Pub. L. No. 107-347, § 205(c)(2). The judicial power to seal documents, however, is tempered by requirements that the court adopt certain procedural protections and carefully balance the public's strong presumption of access against the privacy interests involved. *See, e.g., Press Enter. Co. v. Superior Ct.*, 464 U.S. 501, 510-11 (1984); *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005).

To be sure, the committee note goes some way toward clarifying the impact of the proposed rule by stating that it is not intended to limit or expand traditional doctrines

governing sealing, but merely to "reflect the possibility that redaction may provide an alternative to sealing." The committee note, however, does not have the force of law, *Ross v. Marshall*, 426 F.3d 745, 752 n.13 (5th Cir. 2005), and the text of the rule itself appears to suggest the opposite—providing *sealing* as an alternative to *redaction*. Under the judicial doctrines for sealing documents, courts are traditionally required to consider alternatives such as redaction *prior* to sealing documents. *See, e.g.*, *Buchanan*, 417 F.3d at 429.

Given the recognized authority of the courts to seal filings in appropriate circumstances, subdivision (c) of the proposed rule is unnecessary and should be stricken. At a minimum, however, we recommend that the proposed rule be amended by adding the clause "When authorized by law," to the start of the first sentence of subdivision (d). This amendment would help ensure that courts do not construe the provision as a general grant of authority to seal documents unmoored from traditional restrictions on that authority and would implicitly limit invocation of the rule to those cases where sealing is necessary to protect privacy interests that outweigh the public's compelling interest in open court files.

C. Filings Subject to Protective Orders

We support proposed subdivision (e), which authorizes the court to issue protective orders requiring redaction of additional information or to limit remote electronic access to filings. We also generally support the language in the rule allowing

these restrictions only in cases where "necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a)." However, we believe that the word "sensitive" sets too low of a bar for information entitled to protection. Companies, for example, frequently desire to shield "sensitive" commercial information from competitors and the public, but courts recognize that "this desire [] cannot be accommodated . . . without seriously undermining the tradition of an open judicial system." *Brown & Williamson*, 710 F.2d at 1180; *see Baxter Int'l*, 297 F.3d at 545, 547 (denying motion to seal "commercially sensitive information," and holding that "many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed"). Similarly, courts have rejected the government's attempt to shield information from public view on claimed grounds of national security. *See Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (noting that "[e]ven disputes about claims of national security are litigated in the open"). Courts therefore properly restrict public access to information only when it is a legitimate trade secret, is covered by a recognized privilege, or is required by statute to be maintained in confidence. *Baxter Int'l*, 297 F.3d at 546. We strongly urge, therefore, that the rule be strictly limited to information that is truly *private*, i.e., not merely sensitive.

In addition, the proposed subdivision (e) currently does not require consideration of the public interest prior to restricting access to judicial records. In many cases, neither

party has a motivation to advocate for the public interest in open proceedings. For example, defendants in product liability cases often demand, and are willing to pay a premium for, secrecy as a condition of settlement; and plaintiffs, who will receive the premium, generally have little interest in defending the public's right to access court files at the cost of a lower settlement for themselves. As a result, courts are frequently faced with unopposed motions to seal the record and can be expected to receive similar motions under proposed subdivision (e). The rule should therefore specify that the court is required to consider the public interest prior to restricting access to filings. *See Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process . . . ."). In the absence of these safeguards, we are concerned that large swaths of documents may be subjected to redaction, and many other documents taken offline, based on vague claims of commercial secrecy, personal privacy, national security, and "sensitivity."[4]

These concerns can best be addressed by rewording the first sentence of subdivision (e) as follows: "If necessary to protect private information that is not

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[4]As noted above, PCLG recommends that the Committee delete proposed subdivision (d). If the Committee is inclined to retain the subdivision, however, PCLG's suggestion to limit subdivision (d) to cases "authorized by law" would incorporate the judge-made rules governing sealing that already require the court to balance privacy interests in the case against the public right of access. These traditional limitations would not necessarily be recognized, however, in the context of a decision about whether to redact additional information or to restrict remote access to a file. For this reason, the consideration of the public interest should be explicitly written into subdivision (e).

otherwise protected under Rule 5.2(a), and only where the interest in privacy outweighs the public interest in openness, a court may by order in a case: . . . ."

II. Proposed Federal Rule of Criminal Procedure 49.1

PCLG's comments regarding proposed Federal Rule of Civil Procedure 5.2(d) and (e) apply equally to the corresponding sections of proposed Federal Rule of Criminal Procedure 49.1. We note only that public access to judicial records is even more critical in the criminal context. *See Press Enter. Co.*, 464 U.S. at 508-09.

III. Proposed Federal Rule of Bankruptcy Procedure 9037

PCLG's comments regarding proposed Federal Rule of Civil Procedure 5.2(d) and (e) apply equally to the corresponding sections of proposed Federal Rule of Bankruptcy Procedure 9037.

IV. Proposed Federal Rule of Appellate Procedure 25

PCLG generally supports the protection of private information on appeal to the same extent it is protected in the district court. However, the public availability of filings in the court of appeals is especially critical "because the appellate record normally is vital to the case's outcome." *Baxter Int'l*, 297 F.3d at 545. Filings in a court of appeals are also less likely to contain private information than filings in the district court because the issues on appeal are often narrower in scope and legal rather than factual in nature. Although the record on appeal under Federal Rule of Appellate Procedure 10(a) consists of all papers and exhibits filed in the district court, original *filings* in the court of appeals,

including the joint appendix, are typically focused on the narrow questions at issue on appeal. In addition, courts have recognized that parties have the ability to "pare down the appellate record" by sending irrelevant documents back to the district court. *Baxter Int'l*, 297 F.3d at 548.

For this reason, the categorical exception in proposed FRCP 5.2(c) for Social Security and immigration cases does not make sense as a rule on appeal. If the Committee is inclined to retain FRCP 5.2(c), PCLG therefore supports adding a provision specifying that the rule does not apply to filings in the court of appeals. At a minimum, however, we believe that the rule should provide that appellate briefs and potentially dispositive motions should be remotely available to the public in these cases, absent a court's decision to the contrary. Lawyers and pro se litigants rely on their ability to view these filings in order to craft arguments in other cases and to appreciate the bases of a court's decision, and these documents are also necessary to enable the public and press to understand the court's ultimate disposition of the case. In those filings that do raise privacy concerns, courts can deal with the problem under FRCP 5.2(d) and (e).

05-AP- 005

05-BK- 012

05-CV- 030

05-CR- 016

ELECTRONIC PRIVACY INFORMATION CENTER

[Submitted Electronically at http://www.uscourts.gov/rules/]

February 15, 2006

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Comments of EPIC concerning Proposed Rule 5.2 of the Federal Rules of Civil Procedure; Proposed Rule 49.1 of the Federal Rules of Criminal Procedure; Proposed Rule 9037 of the Federal Rules of Bankruptcy Procedure and Proposed Rule 25(a)(5) of the Federal Rules of Appellate Procedure.

Introduction

Thank you for soliciting public comment on privacy and court records. The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.

EPIC occupies a unique space in this debate because the organization both advocates for the right of privacy and pursues access to government records under the Freedom of Information Act. EPIC is one of two judicially-recognized entities with "news media" status under the Freedom of Information Act.[1] EPIC is a strong supporter of access to government information. At the same time, the presence of personal information within public records raises serious privacy issues. **We wish to emphasize that the very purpose of public records—the ability of the individual to learn about the government—is turned on its head when the records include excessive personal information. Instead of being citizens' window into government activities, public records are giving the government, law enforcement, and data brokers a**

[1] *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003).

window into our daily lives. Without privacy protections, court and other public records will be commodified for commercial purposes unrelated to government oversight.

Court records are becoming the fodder for dossiers on Americans. Currently in Congress, lobbyists from data companies are attempting to place an exemption into privacy legislation that would free data companies from consumer protections, so long as the information they sell is present in a public record. This would mean that companies that traffic in sensitive personal information--including Social Security Numbers--would not have to abide by security safeguards or inform consumers if this information was stolen! The data brokers are banking on the courts to pour personal information into the public record so that it can be sold without privacy safeguards.

We wish to highlight five points to guide the Committee in its revisions of rules to protect personal information in public records:

Minimization is key to protecting privacy

First, we recommend that court systems generally approach privacy issues by first determining whether they need the personal information collected. Institutions should not collect personal information unless it is necessary for some legitimate purpose. This practice, known as minimization, encourages entities to collect the minimum amount of information necessary to carry out a government function. Minimization is highly effective at reducing privacy risks.

Paper and Courthouse Access should be protected too

Second, the relevant issue here is not access to electronic records, but rather access to public records. If electronic records are treated in a more restrictive fashion, it only means that the average person will have reduced access to the information in those records. Sophisticated data aggregators and others have the resources to visit the actual courthouse and scan paper

records, which then are effectively made "electronic." Commercial data brokers employ hundreds of stringers who hand-copy sensitive personal information out of paper public records.

We therefore encourage the Committee to revise rule 5.2(c). This section limits online reproduction of certain sensitive case files, but allows complete access from within the courthouse. This loophole will allow sophisticated data aggregators to collect sensitive health information and personal identifiers.

Consider limitations on the use of personal information in public records

Third, we urge the Committee to consider use limitations to protect privacy. Under such a scheme, acceptable uses could be defined for public records that are consistent with the policy reasons for providing them to the public. One system worth visiting was reviewed by the Supreme Court in *LAPD v. United Reporting*.[2] As noted above, in that case, the LAPD only released arrest information to the public for specific purposes, including law enforcement, research, and journalistic uses. Commercial resale of the information was restricted.

Reduce the appearance of unique identifiers

Fourth, we urge the Committee to pay particular attention to the minimization of unique identifiers. Unique identifiers make aggregation and secondary use of public records possible. The Committee has recommended the partial redaction of Social Security Numbers, dates of birth, and account numbers. Because redaction policies are not consistent (some institutions redact the first five digits of the SSN, while others redact the last four), we recommend complete removal of the SSN from the file. Partial redaction allows sophisticated data companies to "reidentify," or reconstruct, full SSNs.

We furthermore recommend that home addresses, telephone numbers and mother's maiden names be redacted. These identifiers are being used by the credit industry to

[2] 528 U.S. 32 (1999).

"authenticate" individuals for new accounts, and therefore, their availability exposes individuals to identity theft.

Limit Bulk Downloads

Finally, we recommend that the Committee consider limitations on bulk downloads of documents from the PACER system. There is increasing evidence that lists of personal information obtained from companies and public records in bulk are being used to target individuals for scams. For instance, the Iowa Attorney General has initiated a probe of database seller "Walter Karl" for providing lists to scam artists.[3] The company has used database technology to locate individuals who are "impulsive buyers...primarily mature" and "highly impulsive consumers...sure to respond to all of your low-end offers."[4] More recently, the Wall Street Journal covered the story of an identity thief who located victims by acquiring lists of prison inmates.[5] Bulk access should be allowed for legitimate journalistic, research, and academic purposes, but not for commercial solicitations or profiling.

Respectfully submitted,

/s

Chris Jay Hoofnagle
Electronic Privacy Information Center

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[3] Attorney General of Iowa, A.G. asks Court to Order List Broker to Respond to Telemarketing Fraud Probe. State asks court to order list-broker "Walter Karl, Inc." to cooperate with consumer protection investigation of direct mail and telemarketing schemes, Mar. 3, 2005, available at http://www.state.ia.us/government/ag/latest_news/releases/mar_2005/Walter_Karl.html.

[4] Affidavit of Barbara Blake, Investigator, Office of the Attorney General of Iowa, Mar. 1, 2005, available at http://www.state.ia.us/government/ag/latest_news/releases/mar_2005/Walter%20Karl%20BBlake%20Affidavit%203-1-05.pdf.

[5] Andrea Coombes, *Identity Thieves Head Off to College*, Oct. 25, 2005, available at http://online.wsj.com/article/SB113019456857878139.html. See also David Lazarus, *Annuities Used as Come On*, San Francisco Chron., Oct. 26, 2005, available at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/10/26/BUG3CFDSU11.DTL (marketers buy lists to target customers for grey-market schemes); Adam Smith, Ruining My Credit Was Easy, Thief Says, St. Petersburg Times, Oct. 23, 2005, available at http://www.sptimes.com/2005/10/23/Worldandnation/Ruining_my_credit_was.shtml (identity thieves use list of consumers with good credit to target victims).

05-AP-006
05-CV-033
05-CR-019

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 15, 2006
Via E-Mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

Re: Proposed Changes in Federal Rules of Criminal and Appellae Procedure: Request for Comments Issued August 2005

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal and Appellate Procedure. Our organization consists of more than 12,600 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of more than 28,000 private and public defenders.

COMMENTS ON FEDERAL RULE OF APPELLATE PROCEDURE

Rule 25. Filing and Service (Privacy Protection).

The National Association of Criminal Defense Lawyers agrees that the Appellate Rules should make clear when materials filed with the courts of appeals (particularly appendices and exhibits to motions) must be redacted to remove personal identifiers which may facilitate identify theft and other invasions of privacy. Proposed Rule 25 is helpful in that regard, but the Advisory Committee Note needs further clarification with respect to appellate filings in habeas corpus and 2255 matters. As presently drafted, filings in such cases (which are governed in the district courts by special sets of federal rules and only in the court's discretion by the civil or criminal rules), are exempt from the redaction rules at the district court level. See proposed Fed.R.Civ.P. 5.2 (b)(6); Fed.R.Crim.P. 49.1(b)(6),(7).

On appeal, the drafting of proposed FRAP 25 makes the question more convoluted, as the rule would appear to say that habeas appeals (not being otherwise mentioned) are subject to proposed Fed.R.Civ.P. 5.2, and yet that rule by its own terms excludes filings in such cases. As discussed in our comment to Criminal Rule 49.1, we do not see why counseled habeas (including 2255) filings, at least, should not be subject to the privacy rules. However that point is resolved, the appellate rule should be made clear by adding either to the Rule or to the Committee Note a proviso which states whether the exemptions of Civil Rule 5.2(b) continue to apply in appeals from decisions in matters that were subject to those exemptions in the district court.

COMMENTS ON FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

We agree that Rule 11 must be amended in light of United States v. Booker, 543 U.S. 220 (2005). However, the committee proposal does more than is required, and thus more than is appropriate. There is no need to have the district court, while taking a change of plea, try to explain the sentencing process to the defendant. The purpose of the Rule 11 colloquy is to ensure that the guilty plea, which entails a wide array of constitutional waivers, is voluntary and intelligent. Part of that process is to ensure that the defendant understands the potential penalties s/he faces as a result of the conviction which the plea generates. The reason advice about the Guidelines was added after 1987 to the previous versions of Rule 11, which had required that the defendant be advised of the statutory maximum punishment and any mandatory minimum, was that sentencing within the guideline range was then, by virtue of 18 U.S.C. § 3553(b), virtually mandatory. In effect, the Rule recognized what the Supreme Court later held in Booker -- that the top of the Guideline range constituted, for all intents and purposes, a sort of statutory maximum.

With § 3553(b) stricken and excised from the statute for precisely that reason, however, the purposes of the Rule no longer mandate any discussion of the Guidelines at all. (Defense counsel, on the other hand, has a duty to discuss the significance of the Guidelines with the defendant in every case.) The purpose of Rule 11 is not to have the judge conduct a seminar on federal criminal procedure for the defendant, but rather to ensure that the plea is voluntary. The Rule should now revert to its pare-Guidelines terminology, and require that the judge advise the defendant of the maximum possible penalties which the plea would authorize at sentencing, whether imposition of any or all of that potential maximum is mandatory, and that the actual

sentence cannot be predicted or promised. No more should be attempted, and any more is likely to be confusing.

Moreover, the proposed language is a misleading rendition of 18 U.S.C. § 3553(a), the law which governs the district court at sentencing after Booker The proposed language would inappropriately single out the "sentencing guideline range" and "possible departures under the Sentencing Guidelines" as factors the court at sentencing must consider, plainly implying that these are of greater importance. Yet the Guidelines and the policy statements governing departure are listed at § 3553(a)(4) and (a)(5) under a statutory provision with seven subsections, many of them containing more than one factor. The language would then reference as a seeming afterthought all the other considerations, almost a dozen in number, identified in § 3553(a)(1), (a)(2)(A)-(D), (a)(3), (a)(6) and (a)(7), with the single opaque phrase, "other sentencing factors under 18 U.S.C. § 3553(a)." This would not fairly inform anyone of what § 3553(a) actually says. See United States v. Kikumura, 918 F.2d 1084, 1111 (3d Cir. 1990) (per Becker, J.: § 3553(a) does not elevate any one factor over the others mentioned). If anything, all the court should tell the defendant after advising him or her of the statutory maximum(s) and any mandatory minimum is that the sentence imposed will be that which seems "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), after the court has considered all pertinent factors.

At best, the proposed language would have the Standing Committee inappropriately take sides in a developing controversy over the role the Guidelines should and do play in a post-Booker sentencing system. Compare, e.g., United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005), with United States v. Cooper, -- F.3d --, 2006 WL 330324, *5 (3d Cir., filed Feb. 14, 2006) (per Scirica, Ch.J.) (declining, contrary to Mykytiuk, to adopt any presumption of reasonableness for within-Guidelines sentences). This is a substantive, not a procedural question, and so should not be addressed by a Rules amendment. For all these reasons, NACDL strongly opposes the proposed formulation for changing the sentencing-related advice to be given at a change of plea.

Rule 32(d). Presentence Report.

We agree that Rule 32(d) must be amended in light of Booker, supra. The proposed amendment, however, falls far short of what is necessary to bring the rule into conformity with Booker. The significance of Booker lies both in dramatically reducing the previous importance of the guidelines by making them advisory only -- that is, by bringing them in to the sentencing decision through § 3553(a)(4) -- and in requiring the court to consider equally the other factors listed in § 3553(a). Booker thus

commands a fundamental change in federal sentencing with respect to the information the court must consider in determining the sentence, and the importance of that information. Given that the court's primary source of information is the presentence report, and given that Rule 32(d) specifies the information that must be included in the report, Rule 32(d) needs to be comprehensively revised to reflect and conform with the change in federal sentencing that Booker requires. The proposed amendment, in contrast, seeks to bring the rule into conformity with Booker merely by adding an arguably redundant phrase at the end of subparagraph (d)(2), and otherwise maintaining the existing rule in its entirety without any change whatsoever. The proposed amendment thus falls short on two fronts - - it fails to make the changes that are needed to elevate the importance of the non-guideline § 3553(a) factors to reflect their post-Booker significance, and it fails to make the changes that are needed to diminish the importance that the rule presently requires the guidelines be given. In order to accomplish the Committee's objective of bringing the rule into conformity with Booker, both the structure and the content of the rule must be changed.

The structure of the existing rule reflects the primacy the guidelines had prior to Booker, as it divides the information that must be included in the presentence report into two categories -- information about the sentencing guidelines (Rule 32(d)(1)), and all other information (Rule 32(d)(2)). In order to conform with the spirit and letter of Booker -- that in determining the sentence, a court comply not with the unconstitutional § 3553(b) but with the controlling, post-severance terms of § 3553(a) -- the existing structure of the rule needs to be changed so that it no longer gives prominence to the guidelines. Unless the present structure of the rule is changed, it will continue to misleadingly convey and wrongly encourage the continued primacy of the guidelines, risking replication of the constitutional flaw which led to Booker itself.

The change in the structure of the rule is necessary but not sufficient to bring it into conformity with Booker. The text of the rule must be amended to require that the composition of the presentence report be changed to be in conformity with the Sentencing Reform Act, as it stands after severance as directed in Booker. The rule thus must be amended to require that the report address individually all of the factors specified in § 3553(a), and provide any additional information needed for the factors to be considered adequately by the court. For example, the rule should specify that the report must include statistical data on the sentences actually imposed by courts (locally and nationally, both state and federal) in cases involving "similar" (not necessarily identical) criminal behavior, so the court may give adequate consideration to its statutory obligation to "avoid unwarranted sentence disparities among defendants with similar

records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

The content of the rule also must be amended to eliminate provisions or terminology that require or encourage that special consideration be given to the sentencing guidelines over other statutory factors. For example, existing subparagraph (d)(1)(E) requires the report "identify any basis for departing from the applicable sentencing ranges," which incorrectly suggests the court ought not deviate from the guideline range unless a recognized departure ground is found to exist. That provision should either be stricken in its entirety, or amended so that it no longer refers to the act of "departing." Of course, Commission "policy statements," including those which define, recommend or disapprove grounds for "departure," should be covered, so that these, too, may be "considered," as required by law. 18 U.S.C. § 3553(a)(5). Alternative terminology might include referring to the "sentencing range" as the "Guideline sentence" and referring to a sentence that does not fall within that range as an "individualized sentence."

Rule 32(h). Notice of Intent to Consider Other Sentencing Factors.

We agree that Rule 32(h) also must be amended in light of Booker, supra. We also agree with the proposed change in the subheading of the rule from "Notice of Possible Departure From Sentencing Guidelines" to "Notice of Intent to Consider Other Sentencing Factors," as it accomplishes the intended objective of bringing the rule into conformity with Booker by both removing the language that (now) incorrectly gives exclusive focus to the guidelines, and by substituting new language that conveys accurately the equal importance of all sentencing factors.

The proposed amendment in the text of the rule, however, does neither. Instead, the proposed amendment simply substitutes new language that perpetuates the primacy of the guidelines and wrongly limits the circumstances in which notice is required to those in which a court is contemplating "departing from the applicable guideline range" or imposing a "non-guideline sentence." Again, we emphasize that at the very least the weight to be given the Guidelines at this time is a substantive and controversial question, on which a Rules amendment should not opine. 28 U.S.C. § 2072(b). The Rule, in our view, should simply require a court to give notice whenever it is contemplating imposing a sentence based on a factor or ground not identified either in the presentence report or in a party's prehearing submission. References to a court's engaging in the act of "departing," and references to "the applicable guideline range" and to a "non-guideline sentence," should be eliminated,

both because they are unnecessary for the rule to accomplish its objective, and because to continue to use those terms impedes the transformation to the post-Booker sentencing system built around a direct application of all the commands of § 3553(a). Alternatively, to the extent it might be deemed necessary or desirable to make reference to sentences with relation to whether they are within or outside an applicable guideline range, different terms should be used to identify them. As noted above, alternative terminology might include "Guideline sentence" for a sentence that is within a guideline range, and an "individualized sentence" for one that is not.

Rule 32(k). Judgment.

We support the adoption of a uniform judgment form, and the express requirement that the court include in that judgment "the statement of reasons required by 18 U.S.C. § 3553(c)." In order for the judgment to be consistent with and aid in the transformation to post-Booker federal sentencing, it is important that the judgment form and statement of reasons not use or make reference to terms such as "guideline sentence" or "non-guideline sentence."

Rule 35. Correcting or Reducing a Sentence.

For the reasons expressed in our comment on the proposed amendment to Rule 11, NACDL believes that the Committee's proposed change to Rule 35(b) is largely right. The Guidelines are no longer mandatory. It is therefore no longer appropriate to require that any Rule 35 reduction take them into account. However, for the same reason, it is no longer appropriate that the Rule require that the motion be made by an attorney for the government. That requirement was written into the Rule by Congress in the Sentencing Reform Act of 1984 (effective in 1987), as amended by the Anti-Drug Abuse Act of 1986 (effective in 1986), at the same time that Congress added the reference to the Commission's Guidelines and policy statements. As the Committee implicitly recognizes, by implementing this concept by the direct amendment of a Rule of Procedure, Congress left the question of later amendments in the hands of the Committee pursuant to the Rules Enabling Act process. Just as the Committee can remove the Guidelines reference, so (and for the same reasons) it can eliminate the government motion requirement.

It is only by virtue of USSG § 5K1.1 (p.s.), that a government motion is "required" before a downward departure from the guideline range can be granted at the time of sentencing on account of "substantial assistance." But now (at least where

there is no mandatory minimum sentence), after Booker, a judge may sentence outside and below the Guideline range to recognize a defendant's favorable change of attitude toward society, even without a government motion. See generally Roberts v. United States, 445 U.S. 552 (1980). The words "the government's" in the introductory sentence of Rule 35(b)(1) are a relic of the pre-Booker mandatory guidelines system, and should be stricken as well. District judges can surely be trusted to evaluate the soundness of any motion for sentence reduction presented by either party, after taking into account the views and evidence offered by the other side, and to exercise their discretion appropriately.

A sincere effort at cooperation with the authorities may constitute new and powerful evidence of rehabilitation, and thus a reduced need to protect the public from further crimes, that justifies a lower sentence. What the district court must do when reducing a sentence on account of post-sentence cooperation, rather than depend upon the "guidelines and policy statements," is comply with 18 U.S.C. § 3553(a) -- which remains mandatory. That means that the judge must adjust the sentence, if at all, to the extent that it will become or remain "sufficient, but not greater than necessary" to achieve the purposes of the criminal justice system.

Rule 45. Computing and Extending Time.

NACDL thanks the committee for clarifying (correctly, in our view) the operation of a rule which has occasionally vexed and confused the most dedicated practitioner.

Rule 49.1. Privacy Protection for Filings.

The committee note explains that the exclusion of habeas corpus and 2255 papers from the salutary operation of proposed Rule 49.1 is due to the pro se nature of such filings. The exclusion is thus revealed as both under- and over-inclusive. Many habeas corpus and 2255 petitioners are represented by counsel (either retained or appointed under the Criminal Justice Act) and some criminal defendants act pro se in ordinary criminal cases. The categorical exclusion of such filings should be deleted. It should be replaced with a provision stating that pro se litigants are encouraged but not required to abide by the provisions of this rule. (Alternatively, the committee might revise the draft to provide only that pro se litigants in habeas corpus and 2255 cases are so encouraged but not required; the committee may think that it would be better to attempt to require compliance by pro se criminal defendants, just as they are gener-

ally required to comply with the rest of the Rules). This comment applies equally to proposed revised Fed.R.Civ.P. 5.2.

As always, NACDL appreciates the opportunity to offer our comments on the Advisory Committees' proposals. We look forward to working with you further on these important matters.

Very truly yours,

William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA
Co-Chairs, National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger, Esq.
50 Rittenhouse Pl.
Ardmore, PA 19003

05-AP- 007 05-BK- 015 05-CV- 034

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON, 02210

05-CR- 012

WILLIAM G. YOUNG
DISTRICT JUDGE

February 6, 2006

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Peter:

As directed in the notice of the Standing Committee on Rules of Practice and Procedure, I am sending my comments to you with copies to other individuals who play a role in the process. I'll try to be brief. I've arranged my comments by proposed rule.

The gravamen of my remarks points out that the proposed privacy rules - - adopted in response to the E-Government Act which seeks greater transparency in government - - ironically remove from the public domain significant data in which the public has important, indeed constitutional, interests.

1. Residential Street Addresses: Proposed criminal rule 49.1 requires redaction of this information but proposed civil rule 5.2 does not. This data ought be eliminated in all cases unless the presiding judge otherwise orders.

It is unwise to introduce this variance between civil and criminal rules. First, it will cause confusion on the part of court personnel and the bar who have to administer the rules. Second, the division is arbitrary. What about habeas cases? Technically, they're civil. As written, residential street addresses will be redacted from the criminal record, only to appear in the habeas record. Third, we're sending a false and dangerous signal with this dichotomy. If we fear identity theft, residential street addresses ought never appear in the electronic record in either civil or criminal cases. Do we really wish to be admitting that we fear violence against witnesses and jurors in criminal cases? Far better routinely to redact this data in every case than to single out criminal cases for special treatment.

RECOMMENDATION: Amend proposed civil rule 5.2 to require redaction of residential street addresses.

2. Trial exhibits: The first sentence of the proposed Advisory Committee Note to both

Civil Rule 5.2 and Criminal Rule 49.1 reads: "Trial Exhibits are subject to the redaction requirements of the [the particular] Rule [ ] to the extent they are filed with the court."

There is the potential for a great deal of mischief here. In this Court - - in both civil and criminal cases - - exhibits introduced (and many times to be introduced) in evidence are delivered to the courtroom deputy clerk who marks them properly and maintains them (save for weapons and contraband) in her custody for the duration of the trial, available only to the jury, judge, and law clerks not to the public or the press. After trial, the exhibits are returned to the parties. Trial exhibits are never docketed and only the list of exhibits appear in the district court records. Under these procedures are trial exhibits "filed with the court"?

Respectfully, the language needs to be clarified. If it is the intent of the committee to require redaction in the scenario set out above, the trial process will be needlessly slowed and an element of confusion introduced to jury deliberations. Surely the lawyers are uninterested in fiddling with actual trial exhibits and will avoid like the plague suggesting to the jury that "another [redacted] version" exists. Who, then, will do the redaction? For what purpose? To what audience? It is unwise to suggest, as this language does, that the public - - as opposed to their representative, the jury - - has some sort of entitlement to every trial exhibit. I'm a trial judge; I express no opinion on the filing of the appellate record (the subject of the second sentence of this paragraph of the note).

RECOMMENDATION: Amend the sentence quoted above by deleting the words "to the extent they are filed with the court" and substituting "whenever docketed as part of the court record."

3. Option for Additional Unredacted Filing Under Seal: I recognize that proposed civil rules 5.2 (f) and 49.1(e) came *in haec verba* out of the E-Government Act and are mandated by that statute. I also understand that the Department of Justice insisted on this language in the Act, supposedly to smooth their filings in white collar criminal cases. Nevertheless, we must work to have the Act amended as this "option" is a disaster for the courts. Here's why:

Both the government and many private parties today frequently wish to litigate free from public scrutiny and confidentiality orders are sought routinely, often to the considerable detriment of the public. The confidential settlements that deprived the public for months from receiving the information that Bridgestone/Firestone was paying substantial sums to settle claims of tire defects and SUV rollovers is but one recent example. Litigants seek confidentiality in virtually every case.

It is the most supreme irony that the E-Government Act gives it to them. All a litigant need do is include some scrap of redactable information in a filing and it can exercise the "option" to make its entire filing under seal. Don't think for a moment that attorneys won't bolt for this loophole (of course filing a "redacted" copy that is, in fact, bowlderized to omit anything

that attorney can claim is "confidential," i.e. virtually everything).

As a result, the "paperless" court is rendered a meaningless aspiration, necessary file space will burgeon, our staffing needs to file all this paper will grow exponentially, and - - as the court is forbidden directly to regulate such filings - - a vast array of data will disappear from the public record even as our budget requirements grow apace.

Absent a statutory amendment, I'm not sure how to address this issue. I am confident, however, that this "option" is going to cause us no end of trouble. The best I can come up with is a requirement that, unless the court enters its own confidentiality order, it need not consult any unredacted paper document until there is on file in the court public electronic record a full counterpart document omitting only the data required to be redacted by civil rule 5.2(a) or criminal rule 49.1(a).

RECOMMENDATION: Add this (or comparable) language to civil rules 5.2 (f) and 49.1(e):

Unless the court shall adopt some other procedure, it need not consult any unredacted paper document filed pursuant to this subsection until there is on file in the court's public record a full counterpart document omitting only the data required to be redacted by this rule.

4. Proposed criminal rule 32(k)(1) adds this first sentence: "The court must use the judgment form prescripted by the Judicial Conference of the United States."

This is the most objectionable aspect of these proposed rules. I fully recognize that - - to the surprise of so many of my colleagues who provide to the Sentencing Commission extensive and nuanced reasons for the imposition of criminal sentences, either by written opinions or transcripts - - that the Commission ignores the stated reasons and collects its data only from the judgment form itself. Thus, I agree that there ought be a single judgment form in use throughout the federal courts. The proposed form - - while extremely complex and subject to internal error - - is perhaps the best we can do.

My initial problem arises from the fact that, if adopted, the Standing Committee will have delegated its powers under the Rules Enabling Act to the Judicial Conference who then will be able to revise the judgment form wholesale without any further reference to the Standing Committee, the Supreme Court, or the Congress. As the judgment in a criminal case is perhaps the most important form in all our civil and criminal procedures, one wonders whether this is a lawful delegation.

Second, the form presently proposed by the Judicial Conference states on the top of the last four pages devoted to the Statement of Reasons, "Not For Public Disclosure." While this is in accordance with Judicial Conference policy, it runs counter to the policy of the District of Massachusetts which is that, unless the presiding judge seals the Statement of Reasons, the

entire judgment form is a public document. This case specific approach has occasioned no problem and indeed, has garnered much praise from the press in this area.

Now, without any public debate, we propose to **require** secrecy with respect to the document that, better than any other source, spells out in simple terms both the reasons for the sentence and how that sentence compares to the Sentencing Guidelines. These are matters of significant public debate. Is it likely such an imposed secrecy requirement can evade Congressional scrutiny when these proposed rules come up for review? This seem to me unlikely as the press here is already onto this issue. (We had a state judge driven from the bench for speech and conduct during and post-sentencing).

RECOMMENDATION: I express no opinion on the delegation issue. That is a policy judgment for the Standing Committee, charged as it is with the central responsibility for effectuating the Rules Enabling Act.

I strongly recommend that the words "Not for Public Disclosure" be omitted from the Statement of Reasons form in the criminal judgment. This leaves Judicial Conference policy intact but permits us here in Massachusetts to continue our wayward, "public" ways.

5. Some general reflections:

A word about **jury lists** (which contain residential addresses). In this court, such lists are not routinely made part of the court record. The data, however, may be vital to counsel in jury selection, especially in major urban areas. On occasion, the press will demand the jury list. See In re Globe Newspaper Co., 920 F. 2d 88 (1st Cir. 1990) for the law in the First Circuit. Apparently, proposed Rule 49.1 will require redaction of residential street addresses before compliance. Does this implicate any constitutional concerns?

More important, who will do this redaction? We no longer have the personnel to do individual redactions upon request. Indeed, those courts who have reduced docket clerk staff in compliance with the request of the Information Technology Committee, see In re Relafen Antitrust Litigation, 231 F.R.D. 52, 90 n. 30 (D. Mass. 2005), are finding it surpassingly difficult to monitor and correct attorney electronic filings that do not comply with what are today "guidelines" but will (apparently) soon become rules. We ought not be promulgating rules we know we're not going to enforce.

Likewise, the redaction guidelines promulgated by CACM for **transcript preparation** are so labrynthine that they either will be universally ignored or they will so delay transcript preparation as to utterly bog down the courts of appeals. Naturally, these unworkable guidelines will be routinely ignored, probably in favor of waiver rules or standing orders that instruct counsel not to inquire into matters which must be redacted. I do both already and find that the following approach works well: My standing order for trials tells lawyers not to inquire into redactable data without the prior permission of the court. This takes care of most problems.

Where a residential street address (a search, for example) or a minor's name (loss of consortium, for example) is relevant, counsel (so far) have waived the privacy protections. Thought ought be given by CACM, if not by this Committee, to revisiting the unworkable transcript redaction rules.

Should the Committee wish, I'd be happy to be heard on any aspect of these matters or to respond to any inquiry.

Respectfully,

William G. Young
District Judge

WGY/mlb

cc: Hon. David F. Levi
Chair Standing Committee

Hon. Paul Cassell
Chair, Criminal Law Committee

Hon. Julia Gibbons
Chair, Budget Committee

Hon. Thomas Hogan
Chair, Executive Committee

Hon. James Robertson
Chair, Information Technology Committee

Hon. John Tunheim
Chair, Committee on Court Administration

Professor Daniel R. Coquillette
Reporter

Hon. Leonidas Ralph Mecham
Director, Administrator Office

APPENDIX B

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) **Redacted Filings.** Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, or a financial account number may include only:

(1) the last four digits of the social security number and tax identification number;

(2) the minor's initials;

(3) the year of birth; and

(4) the last four digits of the financial account number.

(b) **Exemptions from the Redaction Requirement.** The redaction requirement of Rule 5.2(a) does not apply to the following:

(1) in a forfeiture proceeding, a financial account number that identifies the property alleged to be subject to forfeiture;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to Rule 5.2(a) when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a filing made in an action brought under 28 U.S.C. § 2241, 2254, or 2255.

(c) **Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases.** Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) **Protective Orders.** If necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a), a court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit remote electronic access by a nonparty to a document filed with the court.

(f) **Option for Additional Unredacted Filing Under Seal.** A party making a redacted filing under Rule 5.2(a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) **Option for Filing a Reference List.** A filing that contains information redacted under Rule 5.2(a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.

(h) **Waiver of Protection of Identifiers.** A party waives the protection of Rule 5.2(a) as to the party's own information to the extent that the party files such information not under seal and without redaction.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan

paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case require more extensive redaction than otherwise required by the rule, where necessary to protect against

disclosure to nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

SUMMARY OF COMMENTS: CIVIL RULE 5.2
PROF. EDWARD COOPER

Jack E. Horsley, Esq., 05-CV-006: Suggests adding a new paragraph (5) to Rule 5.2(a) to require redaction of "the employee number if the person is a state or federal employee." [This could be made parallel to other identification numbers by adding "the last four digits of the employee number"; that formulation might suggest including this element as part of paragraph (1).]

Federal Magistrate Judges Assn., 05-CV-024: Supports the published draft, but urges incorporation in rule text of two sentences from the Committee Note: "The responsibility to redact filings rests with counsel and the parties. The clerk is not required to review each filing for compliance with this rule." Experience shows that if this warning is buried in the Committee Note "an expectation may arise that the court, through the clerk, will review documents for compliance with this rule."

Judicial Conference Committee on Court Administration and Case Management, 05-CV-025: **(1)** Rule 5.2(b)(4) should be amended to exempt from redaction: "the record of a court or tribunal whose decision ~~is being reviewed~~ becomes part of the record * * *." The discussion focuses on the parallel language in the Bankruptcy Rule. A Bankruptcy Court does not "review" any other court, but frequently has occasion to consider a record of proceedings in another court. The same thing is true of district courts.

(2) Supports the limit on public remote electronic access "to the bulk of documents in immigration cases." But the Rule 5.2(c) limit on remote public access to records in immigration proceedings should be relaxed to permit "all other persons" to have remote electronic access to "the initiating documents (e.g., opinions issued by the Bureau of Immigration Appeals and Immigration Judges) * * *." The party filing the appeal from the prior decision should be required to redact the initiating document. (Under 5.2(b)(4) these things are not redacted. The comment does not reveal whether the general public has remote electronic access to the originals.)

David J. Piell, Esq., 05-CV-026: Simply deleting the first five digits of social-security and tax-identification numbers provides little protection; most large organizations use the last four digits to identify individuals, and many public records data warehousers provide the first five digits in their reports. (The idea seems to be that a court filing that identifies a person by name and also provides the last four digits leads down an easy path to getting the first five digits.) The answer is to enhance

the CM/ECF system to generate an automatic reference list. Each case file would have a protected page that sets out each protected item and assigns it a reference number. Only attorneys of record and the judge assigned to the case would have access to the protected page, and the system would identify each person who had access to enable identification of anyone who misuses the information.

Peter A. Winn, Esq., 05-CV-027: This long comment is made by an Assistant United States Attorney who teaches privacy law and has written on access to online court records, 79 Wash.L.Rev. 307 (2004). There is high praise for the proposed rules as implementing the E-Government Act's mandate in light of the capabilities of the PACER system. The PACER system "was not designed with the competing goals of facilitating access and protecting privacy in mind. * * * [I]t contains very few privacy enhancing technologies – e.g., software programs which can automatically identify and flag sensitive information such as social security numbers, or programs which permit the easy and effective redaction of sensitive information in pleadings." "To make up for the lack of privacy enhancing technologies, the proposed rules make attorneys the front line in the protection of sensitive information in judicial filings. * * * Unfortunately, while attorneys may be in a good position to decide what information of their clients is in need of protection, they may not be quite as attuned to the need to protect the sensitive personal information of others * * *. [G]iven the PACER technology, there appears to be little choice in the matter."

It is important that the rule recognizes the opportunity to redact information in addition to that listed. Examples include not only driver's license and alien registration numbers, but such matters as individual health identification numbers and physician identification numbers.

There are good reasons to attempt to create an intermediate form of "online" access to court records in some circumstances, such as the social-security and immigration cases identified in Rule 5.2(c). Administrative appeals in Medicare claims and personal injury actions with large amounts of health records also are suitable for this treatment. But it is misguided to provide for full electronic access "at the courthouse" as Rule 5.2(c) would do. This "merely imposes a system of 'contrived inconvenience.' The proposed rule does not protect sensitive information in court records from a 'cottage' industry of copyists, who travel from courthouse to courthouse, selling the information from court files to third parties without restriction – a cottage industry that already appears to be thriving. The 'at the courthouse' rule also discriminates against people who may reside farther away from the courthouse * * *." There is a

much simpler way to create an intermediate level of access. Existing PACER technology would support a rule that allows remote electronic access by any interested member of the public "upon request, after notice to the parties." PACER can automatically send notice to the parties. There would be a protected interval during which any party could object. If no party objects, full remote access would be allowed. If a party objects, the matter could be briefed and decided. As compared to access at the courthouse without notice, the parties would know the identity of anyone requesting access, and could respond accordingly — requests from researchers, for example, might not be opposed, while a request from a potential stalker would be.

This change could be accomplished by rewriting Rule 5.2(c) to authorize access to an electronic file: "all other persons may have electronic access to the full record ~~at the courthouse~~ as ordered by the court or as provided by local rule, ~~but~~ and also may have remote electronic access ~~only~~ to: * * *."

National Court Reporters Assn., 05-CV-028: This comment "seeks to ensure that members of the court family will not be adversely affected by these new requirements to redact information." The Committee Note statement that the responsibility for redaction rests on counsel and the parties should be expanded and incorporated in rule language:

> (b) *Responsibility for Redacted Filings.* The responsibility for identifying the personal information to be redacted in filings made with the courts rests solely with counsel and the parties. Clerks are not required to review documents filed with the courts for compliance with this rule. Nothing in this rule is intended to create a private right of action against court reporters or transcribers for any failure to redact the required information or for any errors associated with such redaction.

Public Citizen Litigation Group, 05-CV-029: This extensive comment is difficult to summarize briefly. This attempt is designed to help recall the major points, not all of the supporting arguments.

Subdivision (c). The central suggestion at the end is that remote nonparty access should be permitted as to all but the administrative record in social security cases; there is some ambiguity, but the suggestion may be that even the administrative record should be available for remote nonparty access in immigration cases.

At the end of the comment another suggestion is made. Rule 5.2(c) should not apply to "filings in the court of appeals." Apparently this means materials created for the court of appeals, not things filed in the district court. These materials, even

the appendix, are less likely to contain private information, and public access is critical to support public understanding of the appellate disposition. At a minimum, appellate briefs and potentially dispositive motions should be available to the world by remote electronic access.

Beginning with social security cases, it is recognized that the administrative files generally are kept confidential at the agency level. Continued restriction on electronic access after filing in court is appropriate, and will not change present practice under Judicial Conference policy on public access to electronic case files. Redaction in other court papers — or a case-specific limit on remote nonparty access — can be accomplished by court order for information not already subject to subdivision (a); requiring a court order protects the public and enables parties to protect against identity theft and invasions of privacy "in cases that truly raise such concerns."

Immigration cases are different. Current policy provides no limit on remote nonparty access. The files "often do not involve the detailed financial and health documentation that is regularly part of the agency record in Social Security cases. Particular cases, of course, might warrant greater protection." Barring access "would shield problems at the agency level from the public eye * * *. Courts have recognized serious problems in the agency adjudication of immigration cases * * *." Remote public access will serve interests of reporters based in distant cities, of academics conducting research, and lawyers and pro se litigants who use filings in other cases as models in their own. Access to the filings, further, is often necessary to understand the court disposition that is available for nonparty remote access.

The broad reach of subdivision (c) as proposed cannot be justified by the volume of filings. The rule contemplates public electronic access at the courthouse; availability over the internet will not impose significant added burdens. The government would have to redact subdivision (a) information from its filings, but the burden would not be great in light of subdivision (b)'s exemption of administrative records from redaction.

It is pointed out that proposed Rule 5.2(b)(5) exempts from redaction all filings covered by 5.2(c) — the result is that the private information in social security and immigration proceedings would be fully available from paper files and electronic access at the courthouse. Apart from the direct irony, the result would be that data brokers have an added incentive to retrieve the information at the courthouse — the resale price will increase because of the disadvantage of individual inquiry at the courthouse.

Finally, the provision in subdivision (c)(2) that the public may have electronic access to the full record at the courthouse

may imply that there is no public access to the paper record. This would bar all public access to information that is held only in paper form.

Subdivision (d). This subdivision "appears to grant the courts a general authority to seal any filing for any reason." That is contrary to the carefully developed rules that govern sealing practice. The Committee Note disclaiming this result "does not have the force of law, * * * and the text of the rule itself appears to suggest the opposite." Subdivision (d) "is unnecessary and should be stricken." If not stricken, it should open: "When authorized by law * * *."

Subdivision (e). In general, "We support proposed subdivision (e), which authorizes the court to issue protective orders requiring redaction of additional information or to limit remote electronic access to filings." But it goes too far to protect "sensitive" information. Public access should be restricted only to protect a legitimate trade secret, a recognized privilege, or matter required by statute to be maintained in confidence. The rule also "should specify that the court is required to consider the public interest prior to restricting access to filings." Rule 5.2(e) should be revised:

> If necessary to protect private ~~or sensitive~~ information that is not otherwise protected under Rule 5.2(a), and only where the interest in privacy outweighs the public interest in openness, a ~~the~~ court may by order in a case limit or prohibit * * * ."

Electronic Privacy Information Center, 05-CV-030: "Instead of being citizens' window into government activities, public records are giving the government, law enforcement, and data brokers a window into our daily lives." Data companies are seeking legislative exemptions that would free them from consumer protections so long as the information they sell is in a public record; they "are banking on the courts to pour information into the public record so that it can be sold without privacy safeguards." **(1)** Courts first should minimize the private information they collect. **(2)** Paper records must be protected in addition to electronic records; Rule 5.2(c) should be revised to prevent data aggregators from gathering electronic records at the courthouse or scanning paper records. Indeed, commercial data brokers employ hundreds of stringers who hand-copy sensitive personal information. **(3)** The Committee should consider adopting limits on the uses that can be made of information obtained from court records. **(4)** "Unique identifiers" should be reduced beyond the redactions required by 5.2(a). Different institutions follow different redaction policies. Some, for example, delete the last four digits of social security numbers; data from such a source can be combined with the last four digits in a court record to

reconstruct the full number. Home addresses, telephone numbers, and mother's maiden names also should be redacted; the credit industry is using these numbers to authenticate individuals for new accounts, creating a risk of identity theft. **(5)** The PACER system should limit bulk downloads.

United States Department of Justice, 05-CV-031: The Committee should continue to monitor implementation of Rule 5.2 for several reasons. Subsections (d) through (g) provide flexibility to protect information not specifically addressed; it will be important to determine whether this is the most effective means of protecting such information as medical records or confidential business plans. Additional exemptions may be needed for money laundering cases that require that proceeds be traced through a complex chain of transactions.

Trial exhibits not filed in the district court present a problem. Rule 5.2(b)(4) could be read to mean that because the unfiled exhibit was not subject to redaction in the district court, it is not subject to redaction when included in an appellate appendix. But the Committee Note states redaction is required. "The Rule should be made clear as to the treatment of such materials. Further, differing redaction requirements at two levels of court review have the potential to cause confusion and mistake." At the least, continuing monitoring is required.

The language of Rule 5.2(b)(1) should be rearranged: "~~in a forfeiture proceeding,~~ a financial account number that identifies the property alleged to be subject to forfeiture in a forfeiture proceeding." This will clarify that redaction is not required when issues relating to property subject to forfeiture arise "in related cases that may implicate the identified assets. In addition, the changes would clarify that the exemptions apply to forfeiture seizure warrant applications and warrants, which often are used to take forfeitable property into custody before the commencement of any 'forfeiture proceeding.'"

Reporters Committee for Freedom of the Press, 05-CV-032:"Remote access enables the news media to discover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic needs." (Examples are given of major stories based on computer analysis of massive volumes of court records — 800,000 criminal cases were examined for an article that found, for example, that white defendants had a 50% better chance than blacks to receive a plea agreement that erases felony convictions from their records; 3,000,000 state and federal computer records, including court records, were analyzed to show that more than 1,700 people had been killed accidentally due to mistakes by

nurses burdened by cost-cutting measures; and so on.) Remote access also improves accuracy.

Rule 5.2(a). Years of birth and minors' names should not be redacted. This information is used to correctly identify the subjects of news stories. In addition, there should be a provision recognizing that members of the public may move to unseal the unredacted version of a pleading; the standard should be stated — for example, that the public interest in access outweighs the asserted privacy interest.

Rule 5.2(c). Remote electronic access should be as extensive as that available at the courthouse. The purpose for seeking access does not matter. This best accommodates established First Amendment and common-law rights of access. The public's capacity to monitor the justice system is enhanced. The proposed rule seems to reflect the theory of "practical obscurity" that values the impediments to access that arise from time, cost, and distance. But this theory is inapposite. The practically obscure information will be gathered by private companies, used by businesses, and even compiled in commercial electronic databases. Any real need to protect truly sensitive information can be served by a protective order. Immigration cases illustrate the value of public access — analysis of electronic court records to monitor immigration decisions is particularly important because immigration courts rarely issue published opinions explaining their decisions. Social security appeals are a like example. New York and Maryland have liberal electronic access policies and "have not suffered any adverse results." "The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft."

Rule 5.2(d). This provision for sealed filings should specify the standards for sealing, "for example, by requiring specific findings on the record and giving the public an opportunity to be heard on the issue and by requiring a showing of good cause that the party would otherwise suffer an undue burden." There also should be a provision recognizing public standing to move to unseal or dissolve a protective order "when the public's interest in the information outweighs the asserted interest in privacy."

National Association of Criminal Defense Lawyers, 05-CV-033: The comment on Criminal Rule 49.1 is extended to Civil Rule 5.2(b)(6). There should not be an exemption from "the salutary operation of" the rule for habeas corpus or § 2255 proceedings. The argument that many petitioners proceed pro se and should not face redaction burdens is offset by the fact that many petitioners are represented. Conversely, some criminal defendants are not represented and must comply with redaction

requirements. Instead of an exemption, there should be a statement that pro se petitioners are encouraged to abide by redaction requirements but are not required to do so.

Hon. William G. Young, 05-CV-034: Several observations:

(1) Residential street addresses "ought to be eliminated in all cases unless the presiding judge otherwise orders." To have different rules for civil and criminal cases will confuse court personnel and the bar. The criminal defendant addresses will appear in the inevitable post-conviction proceedings anyway (this observation seems to overlook the 5.2(b)(6) exemption). The fear of identity theft applies in both civil and criminal actions; do we want to admit, by distinguishing criminal actions, that they involve special fears of violence against witnesses and jurors?

(2) The Committee Note observation about trial exhibits has "the potential for a great deal of mischief." In D.Mass. trial exhibits "are never docketed and only the list of exhibits appear[s] in the district court records." To require redaction of exhibits that are in the custody of the deputy courtroom clerk and not available to the public would slow the trial and introduce confusion to jury deliberations. The lawyers will not want to do the redaction – but who else could? Above all, the Committee Note should not suggest that the public has some sort of entitlement to every trial exhibit. The Committee Note should be revised to say that trial exhibits should be redacted "whenever docketed as part of the court record."

(3) The Rule 5.2(f) option for additional unredacted filing under seal is mandated by a statute secured by the Department of Justice, but it "is a disaster for the courts." Litigants routinely seek confidentiality for things that should not be confidential, such as sealed settlement agreements. They can achieve confidentiality under the rule by including some scrap of redactable information in a filing and then "exercise the 'option' to make [the] entire filing under seal." (This comment reads the rule to mean that the redacted version placed in the public file can not only exclude the information that must be redacted but can also exclude anything the filing party regards as "confidential." The recommendation is that the rule should provide that the court "need not consult any unredacted paper document until there is on file in the court public electronic record a full counterpart document omitting only the data required to be redacted by civil rule 5.2(a) or criminal rule 49.1(a)." The recommendation reflects the intended operation of the rule: a party can redact information that Rule 5.2(a) does not require to be redacted only by obtaining a court order for additional redaction. A party can file under seal only by obtaining a court order – and Rule 5.2 does not expand the grounds for ordering a seal.)

Comments on Other E-Government Rules

05-CR-001, Bruce Berg: Mr. Berg is a consultant to the screening industry. He recommends that the Judicial Conference Policy should be changed to read: "Because the basic method for differentiating people with the same name is the Date of Birth and/or the SSN, the electronic record shall include these elements (at a minimum in the abbreviated form), and will be displayed in the electronic access (Pacer)."

05-CR-008 (also 05-BK-003, 05-AP-001), National Assn. of Professional Background Screeners: (This comment includes a submission by Shay D. Stautz, and the written form of testimony presented at a hearing before the Standing Committee by Mike Sankey): Background screening companies protect the interests of employers and applicants for employment, as well as landlords and prospective tenants, by searching for criminal records. Many people with the same or similar names are born in the same year. The full date of birth is needed to save extensive alternative inquiries into court records that will impose heavy burdens on court clerks. Criminal Rule 49.1(a)(3) should be revised to provide that the filing "may include only * * * (3) the year of birth for minors; and the day, month, and year of birth for adults * * *."

MEMORANDUM

DATE: March 24, 2006

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-01

The "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. A copy of § 102 of the Act is attached.

Section 102 creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that has concerned this Advisory Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least two things about this are troubling:[1]

First, § 3771(d)(3) provides that a single judge may issue the writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a)(1) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue the writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. Thus, under the Act, a court has 72 hours to (1) docket the mandamus petition; (2) distribute the petition to a panel of judges; (3) read the petition; (4) order the respondent to file an answer; (5) serve that order on the respondent; (6) give the respondent time to draft and file an answer; (7) docket that answer; (8) distribute that answer to the panel; (9) read the answer; (10) deliberate and make a decision; and (if the decision is to deny relief) (11) draft, circulate, file, and serve "a written opinion." Obviously, the 72-hour deadline is very difficult to meet under the current rules.

At its April 2005 meeting, this Committee discussed whether any of these problems should be addressed by amending the Appellate Rules. I presented three options:

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[1]A third problem is the fact that the deadline is stated in hours. If a victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? The answer is not clear under the Appellate Rules, as Rule 26(a) does not address deadlines that are stated in hours. However, the Time-Computation Subcommittee is working on this issue, and the template that the Subcommittee has proposed would provide specific instructions for computing deadlines that are stated in hours.

First, the Committee could propose systematic changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting a response. These changes would not be confined to mandamus petitions filed under the Justice for All Act; they would apply to all mandamus petitions.

Second, the Advisory Committee could add a new subdivision (e) to Rule 21 — a subdivision that would apply only to mandamus petitions filed under the Justice for All Act. That subsection would supersede the other rules and set up a "fast-track" system for such petitions. (Of course, once such a fast-track system was in place, Congress might very well add additional types of cases to the fast track.)

Finally, the Advisory Committee could do nothing for the time being. This would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be fewer than a handful every year) and to discover what problems the courts of appeals actually encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

After discussing these options, the Committee postponed a decision and asked the Department of Justice to make a recommendation. That recommendation is attached.

UNITED STATES PUBLIC LAWS
108th Congress - Second Session
Convening January 7, 2004

PL 108-405 (HR 5107)
October 30, 2004
JUSTICE FOR ALL ACT OF 2004

An Act To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 42 USCA § 13701 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Justice for All Act of 2004".

(b) TABLE OF CONTENTS.--The table of contents for this Act is as follows:

SEC. 102. CRIME VICTIMS' RIGHTS.

<< 18 USCA prec. § 3771 >>

(a) AMENDMENT TO TITLE 18.--Part II of title 18, United States Code, is amended by adding at the end the following:

"CHAPTER 237--CRIME VICTIMS' RIGHTS

"Sec.

"3771. Crime victims' rights.

<< 18 USCA § 3771 >>

"§ 3771. Crime victims' rights

"(a) RIGHTS OF CRIME VICTIMS.--A crime victim has the following rights:

"(1) The right to be reasonably protected from the accused.

"(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding,

involving the crime or of any release or escape of the accused.

"(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

"(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

"(5) The reasonable right to confer with the attorney for the Government in the case.

"(6) The right to full and timely restitution as provided in law.

"(7) The right to proceedings free from unreasonable delay.

"(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

***2262** "(b) RIGHTS AFFORDED.--In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

"(c) BEST EFFORTS TO ACCORD RIGHTS.--

"(1) GOVERNMENT.--Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

"(2) ADVICE OF ATTORNEY.--The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

"(3) NOTICE.--Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

"(d) ENFORCEMENT AND LIMITATIONS.--

"(1) RIGHTS.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

"(2) MULTIPLE CRIME VICTIMS.--In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

"(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take

up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

"(4) ERROR.--In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

"(5) LIMITATION ON RELIEF.--In no case shall a failure to afford a right under this chapter provide grounds for a *2263 new trial. A victim may make a motion to re-open a plea or sentence only if--

"(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

"(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

"(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.".

"(6) NO CAUSE OF ACTION.--Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

"(e) DEFINITIONS.--For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

"(f) PROCEDURES TO PROMOTE COMPLIANCE.--

"(1) REGULATIONS.--Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

"(2) CONTENTS.--The regulations promulgated under paragraph (1) shall--

"(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

"(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

"(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

"(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.".

***2264**
(b) TABLE OF CHAPTERS.--The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

<< 18 USCA prec. § 3001 >>

"237. Crime victims' rights.....3771".

<< 42 USCA § 10606 >>

(c) REPEAL.--Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7513
Washington, D.C. 20530

DNL

Douglas N. Letter
Appellate Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

March 23, 2006

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Re: Possible FRAP Amendments in Light of the Justice for All Act of 2004

Dear Patrick:

At our prior Committee meeting in April 2005, I was asked to give you a report on the question of whether or not we should propose FRAP amendments in light of the relevant portions of the Justice for All Act of 2004 – known as the Crime Victims' Rights Act. You had made a presentation to the Committee at the 2005 meeting, pointing out that there are new requirements in that statute concerning appellate review of district court actions involving rights for victims of crime, and that some of those statutory requirements might raise problems with certain current FRAP provisions.

I have polled the relevant parts of the Department of Justice in Washington, D.C. (among others, the Criminal Division and the Solicitor General's Office), as well as United States Attorneys' Offices. To date, it appears that there is only one appellate case we know of addressing the possibly problematic new appellate provisions in 18 U.S.C. § 3771(d).

In Kenna v. U.S. District Court, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit considered a mandamus petition after a district court had denied fraud victims the opportunity to speak at a sentencing hearing. The Ninth Circuit granted the petition and remanded the matter. In doing so, the court noted its "regrettable failure to consider the petition within the time limits of the statute, and apologize[d] to the petitioner for this inexcusable delay." Id. at 1018. The Ninth Circuit explained that it was in the process of promulgating procedures for expeditious handling of such petitions in the future. Ibid.

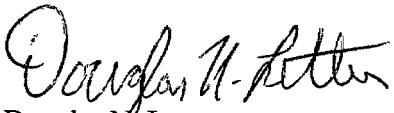
I spoke to Cathy Catterson, the Clerk of the Ninth Circuit, about this issue, and she informed

me that the Ninth Circuit indeed now has a new Rule 21-5. But Ms. Catterson explained that this rule merely requires notice to the court when a petition under the provisions of the Crime Victims' Rights Act is to be filed, so that appropriate arrangements can be made for expeditious filing and service. She indicated that a panel of the court would then issue necessary orders at that time in order to provide timely consideration of the particular petition. Thus, the new Ninth Circuit rule does not itself set any procedures for timely handling.

I am not aware of any other Circuits that have adopted new rules to implement this statute. The Criminal Rules Committee has proposed amendments to the FRCrP for this purpose. I looked at them and, not surprisingly, they do not appear to address appellate matters in any way.

Given the lack of appellate experience at this point, the Department of Justice continues to believe that the Committee should not propose any new FRAP provisions at this time. There is currently no serious problem in the Circuits, and we are concerned that we might propose FRAP changes only to learn that the problems that actually do arise require somewhat different solutions. Thus, we recommend that the Committee continue to monitor this matter, and make any appropriate proposals based on what happens in actual practice. (Ms. Catterson authorized me to say that she agrees with this assessment.) I am happy to report on this subject again at the next Committee meeting after our April 2006 session, if the Committee wishes.

Sincerely,



Douglas N. Letter
Appellate Litigation Counsel

MEMORANDUM

DATE: March 24, 2006

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-04

In *Bell v. Thompson*, 125 S.Ct. 2825 (2005), the Supreme Court identified a number of ambiguities in Rule 41. (Rule 41 governs the issuance of the mandate.) The Justices were able to decide *Bell* without resolving those ambiguities. But John G. Kester, a member of the Standing Committee, has suggested that this Committee consider whether Rule 41 should be amended in light of *Bell*.

Bell involved a strange series of events. The district court dismissed the habeas petition of a state prisoner (Thompson), the Sixth Circuit affirmed, and the Sixth Circuit stayed the issuance of its mandate pending the disposition of Thompson's certiorari petition. The Supreme Court denied certiorari on December 1, 2003. At that point, the mandate should have issued, as Rule 41(d)(2)(D) directs that, when the mandate is stayed pending the filing of a certiorari petition, the mandate must issue "immediately" after the Supreme Court denies the petition.

The mandate did not issue. Instead, Thompson asked the Sixth Circuit to again stay the issuance of the mandate — this time until the Supreme Court disposed of his petition for rehearing. The Sixth Circuit agreed, ordering that "the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court disposes of the case." *Id.* at 2929-30. That second stay expired when the Supreme Court denied the rehearing petition on January 20, 2004.

Inexplicably, though, the Sixth Circuit still failed to issue the mandate, even though no stay was in effect after January 20 — or, if a stay was in effect, the Sixth Circuit had not told anyone about it. Less inexplicably, neither the state nor Thompson noticed that the mandate had not issued. Instead, over the next few months, the parties engaged in further litigation in both state and federal court, with parties, attorneys, and judges all naturally assuming that the federal habeas litigation ended when the Supreme Court denied rehearing.

Back at the Sixth Circuit, though, one of the judges decided, on his own initiative, and without notice to any of the parties, that he would reexamine the merits of the case. He convinced the rest of the panel to go along and on June 23, 2004 — five months after the

Supreme Court had denied rehearing — the Sixth Circuit issued an amended opinion, this time vacating the district court's judgment and remanding the case for an evidentiary hearing.

Needless to say, the state was startled when, without any warning, it suddenly received an opinion in a case that it thought had ended five months earlier. The state sought review in the Supreme Court, and the Court granted certiorari.

Before the Court, the state argued that the Sixth Circuit was required by Rule 41(d)(2)(D) to issue its mandate "immediately" after it received a copy of the order denying certiorari and thus that the Sixth Circuit had no authority to issue even the second stay, much less the "silent" third stay. Thus, in the view of the state, what the Sixth Circuit had actually done was recall its mandate — an action that is forbidden except in the narrow circumstances described in *Calderon v. Thompson*, 523 U.S. 538 (1998).[1]

Thompson, of course, disagreed:

> Thompson counters by arguing that Rule 41(d)(2)(D) is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. The provision, Thompson says, does not affect the court of appeals' broad discretion to enter a stay for other reasons. He relies on Rule 41(b), which provides the court of appeals may "shorten or extend the time" in which to issue the mandate. Because the authority vested by Rule 41(b) is not limited to the period before a petition for certiorari is denied, he argues that the Court of Appeals had the authority to stay its mandate following this Court's denial of certiorari and rehearing. Although the Court of Appeals failed to issue an order staying the mandate after we denied rehearing, Thompson asserts that the court exercised its Rule 41(b) powers by simply failing to issue it.

Bell, 125 S.Ct. at 2831.

A five-to-four majority ducked the question of the Sixth Circuit's authority under Rule 41, holding that, even if the Sixth Circuit had the authority to issue a third stay of the mandate following the denials of the petitions for certiorari and rehearing, and even if the Sixth Circuit had the authority to do so without entering an order or notifying the parties, the Sixth Circuit abused its discretion under the circumstances of the case. *Id.* at 2832-37. The majority cited a number of factors, including the length of time between the Supreme Court's denial of rehearing and the Sixth Circuit's issuance of the amended opinion, the Sixth Circuit's failure to issue an order extending the stay of the mandate after the Supreme Court denied rehearing, Thompson's

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[1]*Calderon* held that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998).

failure even to request a third stay of the mandate, the Sixth Circuit's failure to give notice to the parties that it was reconsidering the merits of the case, and the reliance by the state, by Thompson, and by the state and federal judicial systems on the reasonable assumption that proceedings in the habeas action had concluded.

Having reviewed not only the Supreme Court's opinion but also the briefs of the parties, I think it fair to say that the litigants and the Court found the language of Rule 41 unhelpful in resolving the questions presented in *Bell*. Rule 41 seems to contemplate that the mandate will be stayed in only two circumstances. First, the mandate will be automatically stayed when a party files a rehearing petition and will automatically issue when that petition is denied. Second, a party may ask that the mandate be stayed pending the filing of a certiorari petition; if that request is granted, the mandate will issue when the Supreme Court denies the petition.

That said, Rule 41 does not actually forbid the court of appeals to stay the mandate in other circumstances, nor does the rule clearly address the questions that arose in *Bell*. For example, may a court "stay [its] mandate following the denial of certiorari"? *Id.* at 2832. Under what circumstances? Without being asked to do so? Without giving the parties notice? Without even entering an order? May a court *ever* "stay the mandate without entering an order" (*id.*) — that is, "extend the time for the mandate to issue through mere inaction" (*id.*)?

Bell obviously exposed ambiguities in Rule 41, and perhaps an overhaul is in order. At the same time, the Committee should bear in mind that, over the past 20 years, the federal courts of appeals have issued mandates in roughly a million cases, almost always without a hitch. *Bell* was an exception, but, in the words of Justice Breyer, *Bell* arose "out of unusual circumstances — circumstances of a kind that I have not previously experienced in the 25 years I have served on the federal bench." *Id.* at 2837 (Breyer, J., dissenting). The Committee may create more problems than it will solve if it rewrites a rule that has worked well for many years in order to address questions that may never arise again.

A copy of *Bell* is attached.

minimal procedural safeguards creates an unacceptable risk of arbitrary and "erroneous deprivation[s]," *Mathews*, 424 U.S., at 335, 96 S.Ct. 893. According to respondent's complaint—which we must construe liberally at this early stage in the litigation, see *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)—the process she was afforded by the police constituted nothing more than a "'sham or a pretense.'" *Joint Anti—Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

Accordingly, I respectfully dissent.

Ricky BELL, Warden, Petitioner,

v.

Gregory THOMPSON.

No. 04–514.

Argued April 26, 2005.

Decided June 27, 2005.

Background: After his first-degree murder conviction and death sentence were upheld on direct appeal, 768 S.W.2d 239, and he was denied state postconviction relief, 958 S.W.2d 156, state prisoner sought federal habeas corpus relief. The United States District Court for the Eastern District of Tennessee, granted summary judgment for state, and the United States Court of Appeals for the Sixth Circuit, 315 F.3d 566, affirmed. Prisoner applied for certiorari which was denied. Subsequently, the Court of Appeals issued amended opinion, 373 F.3d 688, vacating district court's judgment and remanding case for evidentiary hearing. State petitioned for certiorari which was granted.

Holding: The Supreme Court, Justice Kennedy, held that assuming that appellate procedure rule authorizes stay of mandate by a Court of Appeals following denial of certiorari by the Supreme Court, and that a Court of Appeals may stay the mandate without entering an order, Court of Appeals abused its discretion in doing so in instant case, where Court delayed issuing its mandate for over five months until it released amended opinion, and where evidence of ineffective assistance presented by petitioner supported only an arguable constitutional claim.

Reversed.

Justice Breyer filed dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

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Assuming that appellate procedure rule authorizes stay of mandate by a Court of Appeals following denial of certiorari by the Supreme Court, and that a Court of Appeals may stay the mandate without entering an order, Court of Appeals abused its discretion in doing so in habeas corpus case, where Court delayed issuing its mandate for over five months until it released amended opinion, and where evidence of ineffective assistance presented by petitioner supported only an arguable constitutional claim. U.S.C.A. Const. Amend. 6; F.R.A.P.Rule 41, 28 U.S.C.A.

(1970) ("[T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing"); cf. *ibid.* ("[O]f course, an impartial decision maker is essential").

Syllabus *

After respondent Thompson was convicted of murder and sentenced to death, Tennessee state courts denied postconviction relief on his claim that his trial counsel had been ineffective for failing to adequately investigate his mental health. His federal habeas attorneys subsequently retained psychologist Dr. Sultan, whose report and deposition contended that Thompson suffered from serious mental illness at the time of his offense. The District Court dismissed the petition, but apparently Thompson's habeas counsel had failed to include Sultan's deposition and report in the record. Upholding the dismissal, the Sixth Circuit, *inter alia*, found no ineffective assistance and did not discuss Sultan's report and deposition in detail. That court later denied rehearing, but stayed issuance of its mandate pending disposition of Thompson's certiorari petition. After this Court denied certiorari on December 1, 2003, the Sixth Circuit stayed its mandate again, pending disposition of a petition for rehearing, which this Court denied on January 20, 2004. A copy of that order was filed with the Sixth Circuit on January 23, but the court did not issue its mandate. The State set Thompson's execution date, and state and federal proceedings began on his competency to be executed. Competency proceedings were pending in the Federal District Court on June 23, 2004, when the Sixth Circuit issued an amended opinion in the federal habeas case, vacating the District Court's habeas judgment and remanding the case for an evidentiary hearing on the ineffective-assistance claim. The Sixth Circuit supplemented the record on appeal with Sultan's deposition and explained that its authority to issue an amended opinion five months after this Court denied rehearing was based on its inherent power to reconsider an opinion before issuance of the mandate.

Held: Assuming that Federal Rule of Appellate Procedure 41 authorizes a stay of a mandate following a denial of certiorari and that a court may stay the mandate without entering an order, the Sixth Circuit's decision to do so here was an abuse of discretion. Pp. 2830–2837.

(a) This Court need not decide the scope of the court of appeals' Rule 41 authority to withhold a mandate in order to resolve this case. Pp. 2830–2832.

(b) Prominent among the reasons warranting the result here is that the Sixth Circuit did not release its amended opinion for more than five months after this Court denied rehearing. The consequence of delay for the State's criminal justice system was compounded by the Sixth Circuit's failure to issue an order or otherwise give notice to the parties that it was reconsidering its earlier opinion. The express terms of the Sixth Circuit's stay state that the mandate would be stayed until this Court acted on the rehearing petition. Thus, once rehearing was denied, the stay dissolved by operation of law. Tennessee, relying on the Sixth Circuit's earlier orders and this Court's certiorari and rehearing denials could assume that the mandate would issue, especially since Thompson sought no additional stay and the Sixth Circuit gave no indication that it might be revising its earlier decision. The latter point is important, for it is an open question whether a court may exercise its Rule 41(b) authority to extend the time to issue a mandate through mere inaction. Without a formal docket entry neither the parties nor this Court had, or

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

have, any way to know whether the Sixth Circuit had stayed the mandate or simply made a clerical mistake. That court could have spared the parties and state judicial system considerable time and resources had it notified them that it was reviewing its decision. The scheduling of Thompson's execution and the resulting competency proceedings were steps taken in reliance on the assumption that the federal habeas case was final. That assumption was all the more reasonable because the delay in issuing the mandate took place after this Court had denied certiorari, which usually signals the end of litigation. See Fed. Rule App. Proc. 41(d)(2)(D). The fact that the Sixth Circuit had the opportunity at the rehearing stage to consider the same arguments it eventually adopted in its amended opinion is yet another factor supporting the determination here. A review of the Sultan deposition also reinforces this conclusion. While the evidence would have been relevant to the District Court's analysis, it is not of such a character as to warrant the Sixth Circuit's extraordinary departure from standard procedures. Finally, by withholding its mandate for months—based on evidence supporting only an arguable constitutional claim—while the State prepared to carry out Thompson's sentence, the Sixth Circuit did not accord the appropriate level of respect to the State's judgment that Thompson's crimes merit the ultimate punishment. See *Calderon v. Thompson*, 523 U.S. 538, 554–557, 118 S.Ct. 1489, 140 L.Ed.2d 728. Pp. 2832–2837.

373 F.3d 688, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

Paul G. Summers, Attorney General, State of Tennessee, Michael E. Moore, Solicitor General, Gordon W. Smith, Associate Solicitor General, Jennifer L. Smith, Associate Deputy Attorney General, Counsel of Record, Angele M. Gregory, Assistant Attorney General, Nashville, Tennessee, for Petitioner.

Daniel T. Kobil, Capital Univ. Law School, Columbus, OH, Walter Dellinger, Counsel of Record, Matthew M. Shors, Charles E. Borden, Scott M. Hammack (admitted only in New York), O'Melveny & Myers, LLP, Washington, D.C., for Respondent.

For U.S. Supreme Court briefs, see:

2005 WL 435904 (Pet.Brief)

2005 WL 760329 (Resp.Brief)

2005 WL 916158 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

This case requires us to consider whether, after we had denied certiorari and a petition for rehearing, the Court of Appeals had the power to withhold its mandate for more than five months without entering a formal order. We hold that, even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion.

I

In 1985, Gregory Thompson and Joanna McNamara abducted Brenda Blanton Lane from a store parking lot in Shelbyville, Tennessee. After forcing Lane to drive them to a remote location, Thompson stabbed her to death. Thompson offered

no evidence during the guilt phase of trial and was convicted by a jury of first-degree murder.

Thompson's defense attorneys concentrated their efforts on persuading the sentencing jury that Thompson's positive qualities and capacity to adjust to prison life provided good reasons for not imposing the death penalty. Before trial, Thompson's counsel had explored the issue of his mental condition. The trial judge referred Thompson to a state-run mental health facility for a 30–day evaluation. The resulting report indicated that Thompson was competent at the time of the offense and at the time of the examination. The defense team retained their own expert, Dr. George Copple, a clinical psychologist. At sentencing Copple testified that Thompson was remorseful and still had the ability to work and contribute while in prison. Thompson presented the character testimony of a number of witnesses, including former high school teachers, his grandparents, and two siblings. Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, also testified on his behalf. She claimed that Thompson's behavior became erratic after he suffered head injuries during an attack by three of his fellow servicemen. In rebuttal the State called Dr. Glenn Watson, a clinical psychologist who led the pretrial evaluation of Thompson's competence. Watson testified that his examination of Thompson revealed no significant mental illness.

The jury sentenced Thompson to death. His conviction and sentence were affirmed on direct review. *State v. Thompson*, 768 S.W.2d 239 (Tenn.1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3288, 111 L.Ed.2d 796 (1990).

In his state postconviction petition, Thompson claimed his trial counsel had been ineffective for failing to conduct an adequate investigation into his mental health. Thompson argued that his earlier head injuries had diminished his mental capacity and that evidence of his condition should have been presented as mitigating evidence during the penalty phase of trial. Under Tennessee law, mental illness that impairs a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a mitigating factor in capital sentencing. Tenn.Code Ann. § 39–2–203(j)(8) (1982) (repealed); § 39–13–204(j)(8) (Lexis 2003). The postconviction court denied relief following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. *Thompson v. State*, 958 S.W.2d 156 (1997). The Tennessee Supreme Court denied discretionary review.

Thompson renewed his ineffective-assistance-of-counsel claim on federal habeas. Thompson's attorneys retained a psychologist, Dr. Faye Sultan, to assist with the proceedings. At this point, 13 years had passed since Thompson's conviction. Sultan examined and interviewed Thompson three times, questioned his family members, and conducted an extensive review of his legal, military, medical, and prison records, App. 12, before diagnosing him as suffering from schizoaffective disorder, bipolar type, *id.*, at 20. She contended that Thompson's symptoms indicated he was "suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law." *Ibid.* Sultan prepared an expert report on Thompson's behalf and was also deposed by the State.

In February 2000, the United States District Court for the Eastern District of Tennessee granted the State's motion for

summary judgment and dismissed the habeas petition. The court held that Thompson failed to show that the state court's resolution of his claim rested on an unreasonable application of Supreme Court precedent or on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U.S.C. § 2254(d). The District Court also stated that Thompson had not presented "any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation." No. 4:98–CV006 (ED Tenn., Feb. 17, 2000), App. to Pet. for Cert. 270. Sultan's deposition and report, however, had apparently not been included in the District Court record.

While Thompson's appeal to the Court of Appeals for the Sixth Circuit was pending, he filed a motion in the District Court under Federal Rule of Civil Procedure 60(b) requesting that the court supplement the record with Sultan's expert report and deposition. Thompson's habeas counsel at the time explained that the failure to include the Sultan evidence in the summary judgment record was an oversight. Thompson also asked the Court of Appeals to hold his case in abeyance pending a ruling from the District Court and attached the Sultan evidence in support of his motion.

The District Court denied the Rule 60(b) motion as untimely, and the Court of Appeals denied Thompson's motion to hold his appeal in abeyance. On January 9, 2003, a divided panel of the Court of Appeals affirmed the District Court's denial of habeas relief. 315 F.3d 566. The lead opinion, authored by Judge Suhrheinrich, reasoned that there was no ineffective assistance of counsel because Thompson's attorneys were aware of his head injuries and made appropriate inquiries into his mental fitness. *Id.*, at 589–592. In particular, Thompson's attorneys had requested that the trial court order a competency evaluation. A team of experts at the Middle Tennessee Mental Health Institute, a state-run facility, found "no mental illness, mental defect, or insanity." *Id.*, at 589. Dr. George Copple, the clinical psychologist retained by Thompson's attorneys, also "found no evidence of mental illness." *Ibid.* Judge Suhrheinrich emphasized that none of the experts retained by Thompson since trial had offered an opinion on his mental condition at the time of the crime. *Id.*, at 589–592. The lead opinion contained a passing reference to Thompson's unsuccessful Rule 60(b) motion, but did not discuss the Sultan deposition or expert report in any detail. *Id.*, at 583, n. 13. Judge Moore concurred in the result based on Thompson's failure to present "evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." *Id.*, at 595.

Thompson filed a petition for rehearing. The petition placed substantial emphasis on the Sultan evidence, quoting from both her deposition and expert report. The Court of Appeals denied the petition for rehearing and stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari.

This Court denied certiorari on December 1, 2003. 540 U.S. 1051, 124 S.Ct. 804, 157 L.Ed.2d 701. The following day, Thompson filed a motion in the Court of Appeals seeking to extend the stay of mandate pending disposition of his petition for rehearing in this Court. The Court of Appeals granted the motion and "ordered that the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court

disposes of the case." App. to Pet. for Cert. 348. On January 20, 2004, this Court denied Thompson's petition for rehearing. 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058. A copy of the order was filed with the Court of Appeals on January 23, 2004. The Court of Appeals, however, did not issue its mandate.

The State, under the apparent assumption that the federal habeas corpus proceedings had terminated, filed a motion before the Tennessee Supreme Court requesting that an execution date be set. The court scheduled Thompson's execution for August 19, 2004.

From February to June 2004, there were proceedings in both state and federal courts related to Thompson's present competency to be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The state courts, after considering Sultan's testimony (which was based in part on followup observations after her initial 1998 examination) as well as that of other experts, found Thompson competent to be executed. *Thompson v. State*, 134 S.W.3d 168 (Tenn.2004). Thompson's *Ford* claim was still pending before the Federal District Court when on June 23, 2004, some seven months after this Court denied certiorari, the Court of Appeals for the Sixth Circuit issued an amended opinion in Thompson's initial federal habeas case. 373 F.3d 688. The new decision vacated the District Court's judgment denying habeas relief and remanded the case for an evidentiary hearing on Thompson's ineffective-assistance-of-counsel claim. *Id.*, at 691–692. The Court of Appeals relied on its equitable powers to supplement the record on appeal with Dr. Sultan's 1999 deposition after finding that it was "apparently negligently omitted" and "probative of Thompson's mental state at the time of the crime." *Id.*, at 691. The court also explained its authority to issue an amended opinion five months after this Court denied a petition for rehearing: "[W]e rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case." *Id.*, at 691–692. Judge Suhrheinrich authored a lengthy separate opinion concurring in part and dissenting in part, which explained that his chambers initiated the *sua sponte* reconsideration of the case. He agreed with the majority about the probative value of the Sultan deposition, referring to the evidence as "critical." *Id.*, at 733. Unlike the majority, however, Judge Suhrheinrich would have relied upon fraud on the court to justify the decision to expand the record and issue an amended opinion. *Id.*, at 725–726, 729–742. He found "implausible" the explanation offered by Thompson's habeas counsel for his failure to include the Sultan deposition in the District Court record, *id.*, at 742, and speculated that counsel "planned to unveil Dr. Sultan's opinion on the eve of Thompson's execution," *id.*, at 738, n. 21.

We granted certiorari. 543 U.S. ——, 125 S.Ct. 823, 160 L.Ed.2d 609 (2005).

II

At issue in this case is the scope of the Court of Appeals' authority to withhold the mandate pursuant to Federal Rule of Appellate Procedure 41. As relevant, the Rule provides:

"(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

"(c) Effective Date. The mandate is effective when issued.

"(d) Staying the Mandate.

"(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

"(2) Pending Petition for Certiorari.

"(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

"(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

. . . . . .

"(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

Tennessee argues that the Court of Appeals was required to issue the mandate following this Court's denial of Thompson's petition for certiorari. The State's position rests on Rule 41(d)(2)(D), which states that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." This provision, the State points out, admits of no exceptions, so the mandate should have issued on the date that a copy of this Court's order denying certiorari was filed with the Court of Appeals, *i.e.*, December 8, 2003.

The State further contends that because the mandate should have issued in December 2003, the Court of Appeals' amended opinion was in essence a recall of the mandate. If this view is correct, the Court of Appeals' decision to revisit its earlier opinion must satisfy the standard established by *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). *Calderon* held that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.*, at 558, 118 S.Ct. 1489. See also *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

Thompson counters by arguing that Rule 41(d)(2)(D) is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. The provision, Thompson says, does not affect the court of appeals' broad discretion to enter a stay for other reasons. He relies on Rule 41(b), which provides the court of appeals may "shorten or extend the time" in which to issue the mandate. Because the authority vested by Rule 41(b) is not limited to the period before a petition for certiorari is denied, he argues that the Court of Appeals had the authority to stay its mandate following this Court's denial of certiorari and rehearing. Although the Court of Appeals failed to issue an order staying the mandate after we denied rehearing, Thompson asserts that the court exercised its Rule 41(b) powers by simply failing to issue it.

To resolve this case, we need not adopt either party's interpretation of Rule 41. Instead, we hold that—assuming, *arguen-*

do, both that the Rule authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order—here the Court of Appeals abused its discretion in doing so.

III

We find an abuse of discretion for the following reasons.

Prominent among our concerns is the length of time between this Court's denial of certiorari and the Court of Appeals' issuance of its amended opinion. We denied Thompson's petition for certiorari in December 2003 and his petition for rehearing one month later. From this last denial, however, the Court of Appeals delayed issuing its mandate for over five months, releasing its amended opinion in June.

The consequence of delay for the State's criminal justice system was compounded by the Court of Appeals' failure to issue an order or otherwise give notice to the parties that the court was reconsidering its earlier opinion. The Court of Appeals had issued two earlier orders staying its mandate. The first order stayed the mandate pending disposition of Thompson's petition for certiorari. The second order extended the stay to allow Thompson time to file a petition for rehearing with this Court and "thereafter until the Supreme Court disposes of the case." So by the express terms of the second order the mandate was not to be stayed after this Court acted; and when we denied rehearing on January 20, 2004, the Court of Appeals' second stay dissolved by operation of law. Tennessee, acting in reliance on the Court of Appeals' earlier orders and our denial of certiorari and rehearing, could assume that the mandate would—indeed must—issue. While it might have been prudent for the State to verify that the mandate had issued, it is understandable that it proceeded to schedule an execution date. Thompson, after all, had not sought an additional stay of the mandate, and the Court of Appeals had given no indication that it might be revisiting its earlier decision.

This latter point is important. It is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction. Even assuming, however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind. "Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders." *Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 44 (C.A.4 1984). Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake. Cf. *Ballard v. Commissioner*, 544 U.S. ——, ——, 125 S.Ct. 1270, 1282–1283, 161 L.Ed.2d 227 (2005). The dissent claims "the failure to notify the parties was likely due to a simple clerical error" on the part of the Clerk's office. *Post*, at 2843–2844 (opinion of BREYER, J.). The record lends no support to this speculation. The dissent also fails to explain why it is willing to apply a "presumption of regularity" to the panel's actions but not to the Clerk's. *Ibid.*

The Court of Appeals could have spared the parties and the state judicial system considerable time and resources if it had notified them that it was reviewing its original panel decision. After we denied Thompson's petition for rehearing, Tennessee scheduled his execution date. This, in turn, led to various proceedings in state and federal court to determine Thompson's present competency to be executed. See,

e.g., Thompson v. State, 134 S.W.3d 168 (Tenn.2004). All of these steps were taken in reliance on the mistaken impression that Thompson's first federal habeas case was final. The State had begun to "invok[e] its entire legal and moral authority in support of executing its judgment." *Calderon v. Thompson,* 523 U.S., at 556–557, 118 S.Ct. 1489.

The parties' assumption that Thompson's habeas proceedings were complete was all the more reasonable because the Court of Appeals' delay in issuing its mandate took place after we had denied certiorari. As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. See, *e.g., First Gibraltar Bank, FSB v. Morales,* 42 F.3d 895 (C.A.5 1995); *Alphin v. Henson,* 552 F.2d 1033 (C.A.4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent. See Fed. Rule App. Proc. 40(a) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment"). See also Fed. Rules App. Proc. 35 (rehearing en banc), 40 (panel rehearing).

Indeed, in this case Thompson's petition for rehearing and suggestion for rehearing en banc pressed the same arguments that eventually were adopted by the Court of Appeals in its amended opinion. The Sultan evidence, first presented to the Court of Appeals as an attachment to Thompson's motion to hold his appeal in abeyance, was quoted extensively in the petition for rehearing to the Court of Appeals. Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 2:00–5516(CA6), pp. 12–20, 28–31. After the request for rehearing was denied, the State could have assumed with good reason that the Court of Appeals was not impressed by Thompson's arguments based on the Sultan evidence. The court's opportunity to consider these arguments at the rehearing stage is yet another factor supporting our determination that the decision to withhold the mandate was in error. Cf. *Calderon v. Thompson, supra,* at 551–553, 118 S.Ct. 1489 (questioning whether a "mishandled law clerk transition" and the "failure of another judge to notice the action proposed by the original panel" would justify recalling the mandate in a non habeas case).

The dissent's explanation of how the Sultan evidence was overlooked is inaccurate in several respects. For example, the statements that the "Sultan documents were not in the initial record on appeal," *post,* at 2841, and that "the panel previously had not seen these documents" before the rehearing stage, *id.,* at 2842, convey the wrong impression. Although the Sultan evidence was not part of the District Court's summary judgment record, the documents were included in the certified record on appeal as attachments to Thompson's Rule 60(b) motion. Record 133; Docket Entry 4/5/02 in No. 98–CV–6 (ED Tenn.); Docket Entry 4/10/02 in No. 00–5516(CA6). The dissent also argues the petition for rehearing did not adequately bring the Sultan evidence to the attention of the Court of Appeals. *Post,* at

2841–2842, 2843–2844. This is simply untrue. The original panel opinion, which did not discuss the Sultan evidence in any detail, emphasized that Thompson had failed to produce any evidence that he was mentally ill at the time of his offense. 315 F.3d, at 590; *id.*, at 595–596 (Moore, J., concurring). The petition for rehearing attacked this conclusion in no uncertain terms and placed the Sultan evidence front and center. Here, for example, is an excerpt from the petition's table of contents:

> "II. THE CONCLUSION THAT THERE IS NO EVIDENCE PRESENTED IN THE RECORD OF THOMPSON'S MENTAL ILLNESS AT THE TIME OF THE CRIME IS WRONG
>
> "A. Thompson Has Set Forth Above The Record Facts Demonstrating His Mental Illness At The Time of The Crime
>
> "B. The Majority Overlooks The Facts And Expert Opinion Set Forth In Dr. Sultan's Report and Deposition." Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 2:00–5516(CA6), p. ii.

See also *id.*, at 1 (mentioning the Sultan evidence in the second paragraph of the statement in support of panel rehearing). The rehearing petition did not explain why Sultan's deposition and expert report had been omitted from the summary judgment record but that is beside the point. The petition acknowledged that the Sultan evidence was first presented to the District Court as an attachment to the Rule 60(b) motion, *id.*, at 29, and gave the Sultan evidence a prominent and explicit mention in the table of contents. It is difficult to see how Thompson's counsel could have been clearer in telling the Court of Appeals that it was wrong. The dissent's treatment of this issue assumes that judges forget even the basic details of a capital case only one month after issuing a 38–page opinion and that judges cannot be relied upon to read past the first page of a petition for rehearing. The problem is that the dissent cannot have it both ways: If the Sultan evidence is as crucial as the dissent claims, it would not easily have been overlooked by the Court of Appeals at the rehearing stage.

Our review of the Sultan deposition reinforces our conclusion that the Court of Appeals abused its discretion by withholding the mandate. Had the Sultan deposition and report been fully considered in the federal habeas proceedings, it no doubt would have been relevant to the District Court's analysis. Based on the Sultan deposition Thompson could have argued he suffered from mental illness at the time of his crime that would have been a mitigating factor under Tennessee law and that his trial attorneys were constitutionally ineffective for failing to conduct an adequate investigation into his mental health.

Relevant though the Sultan evidence may be, however, it is not of such a character as to warrant the Court of Appeals' extraordinary departure from standard appellate procedures. There are ample grounds to conclude the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim. Sultan examined Thompson for the first time on August 20, 1998, App. 37, some 13 years after Thompson's crime and conviction. She relied on the deterioration in Thompson's present mental health—something that obviously was not observable at the time of trial—as evidence of his condition in 1985. (Indeed, there was a marked decline in his condition during the 6–month period between Sultan's first two visits. *Id.*, at 51–58.) Sultan's findings regarding Thompson's condition in 1985 are contradicted by the testimony of two experts who examined

him at the time of trial, Dr. Watson and Dr. Copple. Watson performed a battery of tests at the Middle Tennessee Mental Health Institute, where Thompson was referred by the trial court for an examination, and concluded that Thompson " '[did] not appear to be suffering from any complicated mental disorder which would impair his capacity to appreciate the wrongfulness of the alleged offenses, or which would impair his capacity to conform his conduct to the requirements of the law.' " 19 Tr. 164. Indeed, Watson presented substantial evidence supporting his conclusion that Thompson was malingering for mental illness. *Id.*, at 151–152; 20 *id.*, at 153–160. For example, Thompson claimed he could not read despite a B average in high school and one year's college credit. 19 *id.*, at 137; 20 *id.*, at 151. Thompson's test scores also indicated that he was attempting to fake schizophrenia. 20 *id.*, at 153–154. Copple, the psychologist retained by Thompson's defense team, agreed with Watson that Thompson was not suffering from mental illness. 19 *id.*, at 58. Had the Sultan deposition been included in the District Court record, Thompson still would have faced an uphill battle to obtaining federal habeas relief. He would have had to argue that his trial attorneys should have continued to investigate his mental health even after both Watson and Copple had opined that there was nothing to uncover.

Sultan's testimony does not negate Thompson's responsibility for committing the underlying offense, but it does bear upon an argument that Thompson's attorneys could have presented at sentencing. Sultan's ultimate conclusion—that Thompson's mental illness substantially impaired his ability to conform his conduct to the requirements of the law—is couched in the language of a mitigating factor under Tennessee law. Tenn.Code Ann. § 39–2–203(j)(8) (1982). See also § 39–13–204(j)(8) (Lexis 2003). Thompson's trial attorneys, however, chose not to pursue a mitigation strategy based on mental illness, stressing instead character evidence from family and friends and expert testimony that he had the capacity to adjust to prison. *Thompson v. State*, 958 S.W.2d, at 164–165. This strategic calculation, while ultimately unsuccessful, was based on a reasonable investigation into Thompson's background. Sultan relied on three witnesses in preparing her report: Thompson's grandmother, sister, and ex-girlfriend. These witnesses not only were interviewed by the defense attorneys; they testified at sentencing. Consultation with these witnesses, when combined with the opinions of Watson and Copple, provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy. As the Tennessee Court of Criminal Appeals noted, "Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.*, at 165.

Without a single citation to the record, the dissent suggests that Thompson's attorneys failed to conduct adequate interviews of the defense witnesses on whom Sultan relied in her report. *Post*, at 2844–2845. Most of the information on Thompson's childhood was provided to Sultan by Nora Jean Wharton, Thompson's older sister. App. 16–18. Setting aside the fact that Thompson did not argue in state court that his counsel's interview of Wharton was inadequate, *Thompson v. State*, 958 S.W.2d, at 160–169, Thompson's attorneys cannot be faulted for failing to elicit from her any details on Thompson's difficult home life. After all, Wharton testified at trial that Thompson's childhood was "poor," but "very happy." 18 Tr. 3. The dissent also implies that the experts who

examined Thompson lacked information necessary to reach an accurate assessment. The record refutes this assertion. In conducting his examination, Watson had access to Thompson's social history and military records. 19 *id.*, at 149; 20 *id.*, at 186 (Exh. 102, pp. 11, 27–28). Watson was also aware of the prior head injuries as well as Thompson's claim that he heard voices. 19 *id.*, at 152; 20 *id.*, at 154–155. Nevertheless, Watson, whose evaluation was contemporaneous with the trial, found no evidence that Thompson was mentally ill at the time of the crime. Watson's report was unequivocal on this point:

> " 'Mr. Thompson's speech and communication were coherent, rational, organized, relevant, and devoid of circumstantiality, tangentiality, looseness of associations, paranoid ideation, ideas of reference, delusions, and other indicators of a thought disorder. His affect was appropriate to his thought content, and he exhibited no flight of ideas, manic, depressed, or bizarre behaviors, and his speech was not pressured nor rapid. He exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender–Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.) Mr. Thompson's memory for recent and remote events appeared unimpaired.' " 20 *id.*, at 159–160.

Sultan's testimony provides some support for the argument that the strategy of emphasizing Thompson's positive attributes was a mistake in light of Thompson's deteriorated condition 13 years after the trial. This evidence, however, would not come close to satisfying the miscarriage of justice standard under *Calderon* had the Court of Appeals recalled the mandate. Neither, in our view, did this evidence justify the Court of Appeals' decision to withhold the mandate without notice to the parties, which in turn led the State to proceed for five months on the mistaken assumption that the federal habeas proceedings had terminated. The dissent suggests that failing to take account of the Sultan evidence would result in a "miscarriage of justice," *post*, at 2837, 2845, but the dissent uses that phrase in a way that is inconsistent with our precedents. In *Sawyer v. Whitley*, 505 U.S., at 345–347, 112 S.Ct. 2514, this Court held that additional mitigating evidence could not meet the miscarriage of justice standard. Only evidence that affects a defendant's eligibility for the death penalty—which the Sultan evidence is not—can support a miscarriage of justice claim in the capital sentencing context. *Id.*, at 547, 112 S.Ct. 2608; *Calderon*, 523 U.S., at 559–560, 118 S.Ct. 1489.

One last consideration informs our review of the Court of Appeals' actions. In *Calderon*, we held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate. This case also arises from federal habeas corpus review of a state conviction. While the State's reliance interest is not as strong in a case where, unlike *Calderon*, the mandate has not issued, the finality and comity concerns that animated *Calderon* are implicated here. Here a dedicated judge discovered what he believed to have been an error, and we are respectful of the

Court of Appeals' willingness to correct a decision that it perceived to have been mistaken. A court's discretion under Rule 41 must be exercised, however, in a way that is consistent with the " 'State's interest in the finality of convictions that have survived direct review within the state court system.' " *Id.*, at 555, 118 S.Ct. 1489 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson's crimes merit the ultimate punishment. By withholding the mandate for months—based on evidence that supports only an arguable constitutional claim—while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment. See *Calderon v. Thompson*, *supra*, at 554–557, 118 S.Ct. 1489.

The Court of Appeals may have been influenced by Sultan's unsettling account of Thompson's condition during one of her visits. She described Thompson as being in "terrible psychological condition," "physically filthy," and "highly agitated." App. 51. This testimony raised questions about Thompson's deteriorating mental health and perhaps his competence to be executed, but these concerns were properly addressed in separate proceedings. Based on the most recent state-court decision, which rejected the argument that Thompson is not competent to be executed, it appears that his condition has improved. *Thompson v. State*, 134 S.W.3d, at 184–185. Proceedings on this issue were underway in the District Court when the Court of Appeals issued its second opinion. If those proceedings resume, the District Court will have an opportunity to address these matters again and in light of the current evidence.

Taken together these considerations convince us that the Court of Appeals abused any discretion Rule 41 arguably granted it to stay its mandate, without entering a formal order, after this Court had denied certiorari. The judgment of the Court of Appeals for Sixth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

This capital case arises out of unusual circumstances—circumstances of a kind that I have not previously experienced in the 25 years I have served on the federal bench. After an appellate court writes and releases an opinion, but before it issues its mandate, the writing judge, through happenstance, comes across a document that (he reasonably believes) shows not only that the court's initial decision is wrong but that the decision will lead to a serious miscarriage of justice. What is the judge to do?

What the judge did here was to spend time—hundreds of hours (while a petition for certiorari was pending before this Court and during the five months following our denial of the petition for rehearing)—reviewing the contents of the vast record with its many affidavits, reports, transcripts, and other documents accumulated in the course of numerous state and federal proceedings during the preceding 20 years. The judge ultimately concluded that his initial instinct about the document was correct. The document was critically important. It could affect the outcome of what is, and has always been, the major issue in the case. To consider the case without reference to it could mean a miscarriage of justice.

The judge consequently wrote a lengthy opinion (almost 30,000 words) explaining what had happened. The other members of the panel did not agree with everything in that opinion, but they did agree that their initial decision must be vacated.

The Court commendably describes what occurred as follows: A "dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken." *Ante*, at 2836. The Court, however, does not decide this case in a manner consistent with that observation. A somewhat more comprehensive account of the nature of the "error"—of the matter at stake, of the importance of the document, of the mystery of its late appearance, of the potential for a miscarriage of justice—should help make apparent the difficult circumstance the panel believed it faced. It will also explain why there was no "abuse" of discretion in the panel's effort to "correct a decision that it perceived to have been mistaken."

I

Judge Suhrheinrich, the panel member who investigated the record, is an experienced federal judge, serving since 1984 as a federal trial court judge and since 1990 as a federal appellate judge. He wrote a lengthy account of the circumstances present here. To understand this case, one must read that full account and then compare it with the Court's truncated version. I provide a rough summary of the matter based upon my own reading of his opinion. 373 F.3d 688, 692–742 (C.A.6 2004).

A

The panel's initial decision, issued on January 9, 2003, focused upon an issue often raised when federal habeas courts review state proceedings in a capital case, namely, the effectiveness of counsel at the original trial. 315 F.3d 566, 587–594 (C.A.6 2003). See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this instance, the federal ineffective-assistance claim was that state trial counsel had not sufficiently investigated the background of the defendant, Gregory Thompson. Thompson claimed that an adequate investigation would have shown, to the satisfaction of testifying experts, that he suffered from episodes of schizophrenia at the time of the crime. The schizophrenia—though episodic—would have proved a mitigating circumstance at the penalty phase. 373 F.3d, at 697–698, and n. 4.

Thompson's trial took place in a Tennessee state court, where he was found guilty of murder and sentenced to death. His state-appointed counsel put on no defense at trial. At sentencing, however, counsel sought to show that Thompson was schizophrenic. State forensic psychologists examined Thompson and concluded that Thompson, probably "malingering," did not show genuine and significant symptoms of schizophrenia at that time and was not mentally ill. A clinical psychologist hired by Thompson's counsel examined Thompson for eight hours and reached approximately the same conclusion: he said that Thompson was not *then* mentally ill. *Id.*, at 692, 694–695.

Thompson raised the issue of his mental condition in state postconviction proceedings, which he initiated in 1990. His expert witness, Dr. Gillian Blair, testified (with much supportive material) that Thompson was by that time clearly displaying serious schizophrenic symptoms—voice illusions, attempts at physical self-mutilation, and the like. Indeed, the State conceded that he was under a regime of major antipsychotic medication. But Dr. Blair said that she could not determine

whether Thompson had been similarly afflicted (*i.e.*, suffering from episodes of schizophrenia) at the time of the crime without a thorough background investigation—funds for which the state court declined to make available. The state court then ruled in the State's favor. *Id.*, at 694–695.

Thompson filed a habeas petition in Federal District Court about eight months after the state court's denial of postconviction relief became final. As I said above, see *supra*, at 2838, he claimed ineffective assistance of counsel. The Federal District Court appointed counsel, an assistant federal public defender. Counsel then obtained the services of two experts, Dr. Barry Crown and Dr. Faye Sultan. Both examined Thompson, and the latter, Dr. Sultan, conducted the more thorough background investigation that Dr. Blair had earlier sought. The State, after deposing Dr. Sultan, moved for summary judgment. 373 F.3d, at 696, 700–704, 711.

The District Court granted that motion on the ground that "Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime," nor "has Thompson provided this Court with any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." *Id.*, at 712–713 (quoting District Court's memorandum opinion (emphasis and internal quotation marks omitted)).

Thompson (now with a new public defender as counsel) appealed the District Court's grant of summary judgment in the State's favor. (A little over a year later, while the appeal was still pending, Thompson's new counsel, apparently having discovered that Dr. Sultan's deposition and report had not been included in the record before the District Court, filed a motion in that court for relief from judgment under Federal Rule of Civil Procedure 60(b), seeking to supplement the record with those documents. Counsel also filed a motion in the appellate court, with the Sultan deposition attached, requesting that the appeal be held in abeyance while the District Court considered the Rule 60(b) motion. Both motions were denied, and Thompson's counsel did not take an appeal from the District Court's denial of the Rule 60(b) motion.) 373 F.3d, at 714–715, and n. 10, 724–725.

The Court of Appeals reviewed the District Court's grant of summary judgment. In doing so, the appellate panel examined the record before that court. It noted that Thompson's federal habeas counsel had hired two experts (Crown and Sultan), and had told the court (in an offer of proof) that they would provide evidence that Thompson suffered from mental illness *at the time of the crime*. But the appellate panel found that neither expert had done so. Indeed, said the panel, Thompson had "never submitted to any court *any* proof that he suffered from severe mental illness at the time of the crime." 315 F.3d, at 590 (emphasis altered). Though Thompson's several attorneys had made the same allegation for many years in several different courts (said the panel), "at each opportunity, counsel fail[ed] to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime." *Ibid.* That fact, concluded the panel (over a dissent), was fatal to Thompson's basic ineffective-assistance-of-counsel claim. Obviously "trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." *Ibid.*; see also *id.*, at 595 (Moore, J., concurring in result) ("Thompson has presented no evidence that his [trial] counsel knew or should have known either that Thompson

was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime"). The dissenting judge thought Thompson had made out an ineffective-assistance claim by showing that his trial counsel had relied on an inadequate expert, that is, an expert without the necessary qualifications to counter the State's experts' conclusions. *Id.*, at 599–605 (opinion of Clay, J.).

The appeals court issued its opinion on January 9, 2003. Thompson's appointed federal appeals counsel filed a rehearing petition, which the court denied on March 10, 2003. See App. to Pet. for Cert. 346 (Order in No. 00–5516(CA6)). Thompson's counsel then sought Supreme Court review. This Court denied review (and rehearing) about one year later. 540 U.S. 1051, 124 S.Ct. 804, 157 L.Ed.2d 701 (2003) (denying certiorari); 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058 (2004) (denying rehearing).

B

The Court of Appeals, following ordinary appellate-court practice, withheld issuance of its mandate while the case was under review here, namely during calendar year 2003. During that time and in the months that followed, something unusual happened. Judge Suhrheinrich realized that the panel, in reaching its decision, seemed to have overlooked documents provided by Dr. Sultan that likely were relevant. In September 2003, the appellate court called for the entire certified record. Upon reviewing that record, Judge Suhrheinrich found Dr. Sultan's deposition and accompanying report. 373 F.3d, at 692–693; App. to Pet. for Cert. 347–348; see also Appendix, *infra*.

The Sultan documents filled the evidentiary gap that underlay the District Court's and the appellate panel's determinations. These documents made clear that Dr. Sultan had investigated Thompson's background in depth and that in her (well-supported) opinion, Thompson *had* suffered from serious episodic bouts of schizophrenia *at the time the crime was committed.* Clearly the documents contained evidence supporting Thompson's claim regarding his mental state at the time of the offense. Why had the District Court denied the existence of *any* such evidence? Why had Judge Suhrheinrich, and the other members of the panel (and the State, which took Dr. Sultan's deposition) done the same?

Judge Suhrheinrich then drafted an opinion that sought to answer three questions:

Question One: Do these documents actually provide strong evidence that Thompson was schizophrenic (and seriously so) at the time of the crime?

Question Two: If so, given the many previous opportunities that Thompson has had to raise the issue of his mental health, to what extent would these documents be likely to matter in respect to the legal question raised in Thompson's federal proceedings, *i.e.*, would they likely lead a federal habeas court to hold that Thompson's trial counsel was ineffective for failing to undertake a background investigation akin to that performed by Dr. Sultan?

Question Three: How did these documents previously escape our attention?

1

The panel answered the first question—regarding the importance of the documents—unanimously. Sultan's report and deposition were critically important. As Judge Suhrheinrich's opinion explains, these documents detail Thompson's horrendous childhood, his family history of mental illness, his self-destructive schizophrenic behavior (including auditory hallu-

cinations) as a child, his mood swings and bizarre behavior as a young adult, and a worsening of that behavior after a serious beating to his head that he suffered while in the Navy. For example, Dr. Sultan's examination of Thompson and her interviews with Thompson's family members and others revealed that as a child Thompson would repeatedly bang his head against the wall to "knock the Devil out" after his grandmother yelled at him, "You have the Devil in you." 373 F.3d, at 716 (internal quotation marks omitted). These documents explain how Thompson, as a young adult, would talk to himself and scream and cry for no apparent reason. They suggest that he had bouts of paranoia.

The documents provide strong support for the conclusion that Thompson suffered from episodes of schizophrenia at the time of the offense. And they thereby offer significant support for the conclusion that, had earlier testifying experts had this information, they could have countered the State's experts' conclusion that Thompson was malingering at the time of trial. Thus, the Sultan materials seriously undermined the foundation of the State's position in respect to Thompson's mental condition.

The Sultan materials also revealed that trial counsel failed to discover other mitigating evidence of importance. Interviews with family members revealed repeated incidents of violence in the family, including an episode in which, as a young boy, Thompson witnessed his father brutally beat and rape his mother. His grandmother, with whom Thompson and his siblings lived after their mother died, subjected them to abuse and neglect. She would forget to feed the children, leaving them to steal money from under her bed to buy food. These and other circumstances are detailed in sections of the Sultan report and deposition reproduced in the Appendix, *infra*.

2

The panel also responded unanimously and affirmatively to the second question: Would federal-court access to the Sultan documents likely have made a significant difference in respect to the federal legal question at issue in Thompson's habeas petition, namely, the failure of Thompson's trial counsel to investigate his background? Trial counsel had had important indications that something was wrong. Indeed, counsel himself had sought an evaluation of Thompson's mental condition. He also was aware of Thompson's violent behavior in the military, and knew that Thompson had said he had had auditory hallucinations all his life. He was aware, too, of the changes in Thompson's behavior. Should counsel not then have investigated further?

The Sultan documents make clear that, had he done so, he would have had a strong answer to the State's experts. Thus the documents were relevant to the outcome of the federal habeas proceedings. The Federal District Court based its grant of summary judgment on the premise that there was *no* evidence supporting Thompson's claim. The documents showed that precisely such evidence was then available.

3

The panel (while disagreeing about how to allocate blame) agreed in part about the answer to the third question: how these documents previously had escaped the panel's attention. The judges agreed that the Sultan documents were not in the initial record on appeal. The panel's original opinion, while mentioning both Dr. Sultan and Dr. Crown, assumed that neither expert had addressed Thompson's mental condition at the time of the crime. 315

F.3d, at 583, n. 13 ("Sultan's affidavit does not discuss Thompson's mental state *at the time of the offense*" (emphasis added)); *ibid.* (explaining that Thompson filed a Rule 60(b) motion to supplement the record with Dr. Sultan's report, but not mentioning that the report addressed Thompson's mental condition at the time of the offense); see also *supra*, at 2839.

How had the panel overlooked the copies of the Sultan deposition attached to (1) the rehearing petition and (2) the (Rule 60(b)-related) motion to hold the appeal in abeyance? As for the rehearing petition, the reason could well lie in the petition's (incorrect) suggestion that the panel had already considered the appended document as part of the original record. See Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 2:00–5516(CA6), p. 1 ("A majority of this panel overlooked other proof in the record, including but not limited to, the expert opinion of Dr. Faye E. Sultan"); see also *id.*, at 28–32. While the petition explains the importance of the documents, it does not explain the circumstances, namely, that the panel previously had not seen these documents. Instead, it gives the impression that counsel was simply reemphasizing a matter the panel had already considered. To that extent, the petition reduced the likelihood that the panel would make the connection it later made and fatally weakened its argument for *re*-hearing.

As for the motion to hold the appeal in abeyance, the panel's failure to recognize the significance of the appended Sultan materials is also understandable. The motion gives the impression that the appellate court would have been able to handle any problem arising from the exclusion of these materials in an appeal taken from the District Court's Rule 60(b) decision. The appellate court, however, never had any such opportunity because counsel did not appeal the District Court's denial of the Rule 60(b) motion.

C

Once the panel understood the significance of the Sultan report, it had to decide what to do. An appellate court exists to correct legal errors made in the trial court. What legal error had the District Court committed? The appeal concerned its grant of summary judgment in the State's favor. The District Court made that decision on the basis of the record before it, and that record apparently lacked the relevant documents. How then could an appeals court say that the District Court was wrong to grant the summary judgment motion?

The panel answered this question by *not* holding that the District Court had erred. Finding that the Sultan documents had been "apparently negligently omitted" from the record, it exercised its equitable powers to supplement the record with the deposition. 373 F.3d, at 691. It also found that, since the State itself had helped to create that document (because the State had taken Sultan's deposition), the District Court's reconsideration of the matter would not unfairly prejudice the State. And it noted that this case is a death case. Then, relying on its "inherent power to reconsider" an opinion "prior to the issuance of the mandate," the court issued a new opinion, vacating the District Court's grant of summary judgment to the State and remanding the case to the District Court for further proceedings on the matter. *Ibid.*

II

The question before us is not whether we, as judges, would have come to the same conclusions as did the panel of the Court of Appeals. It is whether the three members of the appellate panel abused

their discretion in reconsidering the matter and, after agreeing unanimously that they would have reached a different result had they considered the overlooked evidence, vacating the District Court's judgment and remanding the case.

The Court concludes that the panel's reconsideration of the matter and decision to vacate the District Court's judgment amounted to an "abuse of discretion." *Ante,* at 2827. It therefore reverses the panel's unanimous interlocutory judgment remanding a capital case to the District Court for an evidentiary hearing. The Court lists five reasons why the Court of Appeals "abused its discretion." None of these reasons, whether taken separately or considered together, stands up to examination.

Reason One. During the 5-month period after this Court denied rehearing of Thompson's certiorari petition, during which time the Court of Appeals was reconsidering the matter, it gave "no indication that it might be revisiting its earlier decision." Had it "notified" the parties, the court "could have spared the parties and the state judicial system considerable time and resources." *Ante,* at 2833.

If this consideration favors the Court's conclusion, it does so to a very modest degree. For one thing, the Federal Rules themselves neither set an unchangeable deadline for issuance of a mandate nor require notice when the court enlarges the time for issuance. Compare Fed. Rule App. Proc. 41(b) (2005) ("The court may shorten or extend the time"), with Rule 41(b) (1968) (mandate "shall" issue "unless the time is shortened or extended *by order*" (emphasis added)). The Advisory Committee Notes to Rule 41 expressly contemplate that the parties will themselves check the docket to determine whether the mandate has issued. See Advisory Committee's 1998 Note on subd. (c) of Rule 41 ("[T]he parties can easily calculate the anticipated date of issuance and verify issuance of the mandate[;] the entry of the order on the docket alerts the parties to that fact"). And Sixth Circuit Rules require the Circuit Clerk to provide all parties with copies of the mandate. See Internal Operating Procedure 41(a) (CA6 2005) ("Copies of the mandate are distributed to all parties and the district court clerk's office"). Thus, the State's attorneys knew, or certainly should have known, that the mandate had not issued, and, as experienced practitioners, they also knew, or certainly should have known, that a proceeding is not technically over until the court has issued its mandate. And if concerned by the delay (and some delay in such matters is not uncommon), they could have asked the Circuit Clerk why the mandate had not issued. If necessary, they could have filed a motion seeking that information or seeking the mandate's immediate issuance.

For another thing, since notification is a clerical duty, the panel may have thought the parties *had* been notified. One of the judges on the panel could well have instructed the Circuit Clerk not to issue the mandate, and then simply have assumed that the Clerk would notify the parties of that fact (though the Clerk, perhaps inadvertently, did not do so). Why would the court want to hide what it was doing from the parties? Once we apply a presumption of regularity to the panel's actions, we must assume that the failure to notify the parties was likely due to a simple clerical error.

Further, the prejudice to the State that troubles the Court was likely small or nonexistent. The need to reset an execution date is not uncommon, and the state court's execution order explicitly foresaw that possibility. See 373 F.3d, at 692 (Tennessee Supreme Court order set

Thompson's execution date for August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority" (internal quotation marks omitted)). Moreover, the State has not even argued—despite ample opportunity to do so—that the further proceedings ordered by the panel would actually have required it to set a new date.

Finally, the State did not, by way of a petition for rehearing, make any of its "failure to notify" arguments to the Court of Appeals. Although the law does not require the State to seek rehearing, such a petition would have permitted the panel to explain why the State was not notified and possibly to explore the matter of prejudice. There is no reason to reward the State for not filing a petition by assuming prejudice where none appears to exist.

Given the State's likely knowledge that the mandate had not issued, the existence of avenues for resolving any uncertainty, and the small likelihood of prejudice, the lack of notice does not significantly advance the Court's "abuse of discretion" finding. Indeed, if the Court believes that the Court of Appeals could have issued a revised opinion correcting its earlier judgment *if only it had given notice to the parties*, the sanction it now imposes—outright reversal—is far out of proportion to the crime.

Reason Two. The court's "opportunity to consider" the Sultan evidence "at the rehearing stage is yet another factor supporting" the abuse-of-discretion "determination." Ante, at 2834. I agree that it is unfortunate that, upon review of the rehearing petition, the panel failed to make the connection that would have allowed it, at that time, to reach the same conclusion it reached later. Still, the petition wrongly implied that the Sultan documents were part of the original appeal. Because it did not request rehearing on the ground that the documents were *not* in the record, it did not offer a genuine "opportunity to consider" the Sultan evidence.

Under these circumstances, I cannot agree that the court's opportunity to consider these documents at the rehearing stage should militate in favor of finding an abuse of discretion. To the contrary, I believe we should encourage, rather than discourage, an appellate panel, when it learns that it has made a serious mistake, to take advantage of an opportunity to correct it, rather than to ignore the problem.

Reason Three. The "Sultan evidence ... is not of such a character as to warrant [a] ... departure from standard appellate procedures" because "the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim." Ante, at 2834. *That is to say, given the expert testimony in the trial court, the Sultan evidence is unlikely meaningfully to have strengthened Thompson's claim before the Federal District Court. Ante,* at 2835.

This conclusion is wrong. The Court argues the following: (1) Dr. Sultan's conclusion rests in significant part upon interviews with three witnesses, Thompson's grandmother and sister (with whom Dr. Sultan spoke directly) and his girlfriend (whose interview with a defense investigator Dr. Sultan reviewed); (2) since all three of these witnesses testified at sentencing, Thompson's counsel must have consulted them at the time; and (3) "[c]onsultation with these witnesses, when combined with the opinions of [the State's expert] and [Thompson's expert], provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy." *Ante,* at 2835. The Court then says that trial counsel's "strategy" may have

been "a mistake," *ante*, at 2836, but apparently not enough of a mistake to amount to inadequate assistance of counsel.

But how do the Court's conclusions follow from the premises? Dr. Sultan's interview of the three witnesses apparently turned up new information, indeed, crucial information. Why does that fact not tend show that trial counsel's own "consultation" with those witnesses was inadequate? Or, if trial counsel was aware of the information, why does that not tend to show that trial counsel hired an expert who was not qualified to assess Thompson's mental condition, or that counsel failed adequately to convey the critical information to that expert? This Court in *Wiggins v. Smith*, 539 U.S. 510, 523–525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), found trial counsel inadequate for failing to conduct a reasonable investigation, given notice that such an investigation would likely turn up important mitigating evidence. See also *Rompilla v. Beard*, — U.S. —, 125 S.Ct. 2456, 162 L.Ed.2d 360. Why is the same not true here, where Thompson's trial counsel was fully aware of the need for a background investigation, and then either did not ask the right questions, or did not hire the right expert, or did not convey the right information to that expert? At the least, is there not a good argument to this effect—an argument that the Sultan documents significantly strengthened? All three judges on the panel thought so: They concluded that they would have reached a different result on Thompson's ineffective-assistance-of-counsel claim had they been aware of the Sultan documents. The Court does not satisfactorily explain its basis for second-guessing the panel on this point.

Reason Four. The Sultan evidence does "not come close to satisfying the miscarriage of justice standard under Calderon." *Ante*, at 2836 (referring to *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)). As the Court apparently agrees, see *ante*, at 2831, *Calderon* does not apply here. And the panel's basic conclusion—that consideration of Thompson's ineffective-assistance-of-counsel claim without the benefit of the Sultan evidence would constitute a grave miscarriage of justice—survives *any* plausible standard of review. I can find nothing in the Court's opinion that explains why the panel's conclusion is wrong.

Reason Five. The Court of Appeals "did not accord the appropriate level of respect" to the State's "judgment." *Ante*, at 2837. If by "judgment" the Court means to refer to the state court's original judgment of conviction, this reason simply repeats Reason Four. The panel carefully examined the entire record and determined that there is a significant likelihood the Sultan evidence would demonstrate a violation of the Federal Constitution.

If the Court means to refer to the state court's judgment not to set aside the conviction in state postconviction proceedings, the Court is clearly wrong. The state court on collateral review refused to authorize funds for a background investigation, one for which Thompson's expert then showed a strong need, and which Thompson's expert now shows could well have demonstrated a significantly mitigating mental condition. How is it disrespectful of the State for a federal habeas court to identify a constitutional error that occurred in state-court proceedings in a capital case, by taking account of a key piece of evidence, mistakenly omitted from the record?

If the Court means to refer to the State's decision to proceed with the execution, I cannot possibly agree. The Court could not mean that *any* exercise by a federal court to correct an inadvertent,

and important, evidentiary error is "disrespectful" of a State's effort to proceed to execution. But if it does not mean "any" exercise at all, then how can it say the present exercise is disrespectful? The present exercise embodies as thorough an examination of the record and as significant a piece of evidence as one is likely to find. The process—the detail and care with which the Court of Appeals combed the record—does not show "disrespect." It shows the contrary.

The upshot is that the Court's five reasons are unconvincing. The Court simply states those reasons as conclusions. It fails to show how, or why, the unanimous panel erred in reaching diametrically opposite conclusions, all supported with detailed evidence set forth in Judge Suhrheinrich's opinion. It does not satisfactorily explain the evidentiary basis for its own conclusions. And, in the process, it loses sight of the question before us: again, *not* whether we, as judges, would have reached the same conclusion that the three judges on the panel reached, but rather whether they, having unanimously agreed that their earlier decision was wrong, abused their discretion in setting it right.

III

Ultimately this case presents three kinds of question. The first is a narrow legal question. Has the Court of Appeals abused its discretion? For the reasons I have set forth, the answer to that question, legally speaking, must be "no."

The second is an epistemological question. How, in respect to matters involving the legal impact of the Sultan report and deposition, can the Court replace the panel's judgment with its own? Judge Suhrheinrich's opinion demonstrates why any assessment of that legal impact must grow out of thorough knowledge of the record. He spent hundreds of hours with its numerous documents in order to make that assessment. Those of his conclusions that were shared by the other members of the panel are logical, rest upon record-based facts, and are nowhere refuted (in respect to those facts) by anything before us or by anything in the Court's opinion. How can the Court know that the panel is wrong?

The third question is about basic jurisprudence. A legal system is based on rules; it also seeks justice in the individual case. Sometimes these ends conflict. To take account of such conflict, the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears. When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result. The American judicial system has long sought to avoid that divorce. Today's decision takes an unfortunate step in the wrong direction.

APPENDIX TO OPINION OF BREYER, J.

Excerpts from the Gregory Thompson Psychological Report prepared by Dr. Faye E. Sultan at the Riverbend Maximum Security Institution (RMSI) (July 22, 1999), App. 11–20.

"REFERRAL QUESTIONS:

"Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

APPENDIX TO OPINION OF BREYER, J.—Continued

"1. Mr. Thompson's current psychological status[.]

"2. Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.

"3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be[en] considered to be mitigating in nature at the time of his trial.

"PROCEDURE:

"Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory–2 (MMPI–2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr. Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was made to replicate this type of assessment.

"Following the 8–20–98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

. . . .

"... Two further interviews were conducted with Mr. Thompson for [the] limited purpose [of determining Thompson's competence to participate in habeas proceedings], on 2–2–99 and 4–7–99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

. . . .

"[T]he extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson's mental state at and around the time of the 1985 offense.

"CLINICAL OBSERVATIONS:

"Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

"Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

"FORMAL PSYCHOLOGICAL TESTING:

"The Minnesota Multiphasic Personality Inventory–2 (MMPI–2) was administered to Mr. Thompson on 8–20–98. It had been determined in other examination settings that Mr. Thompson's level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

APPENDIX TO OPINION OF BREYER, J.—Continued

"The MMPI–2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid features. There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

"Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

"RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA CONTAINED IN RECORDS:

"The[re] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of ... his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

"INTERVIEWS WITH COLLATERAL WITNESSES:

"Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

"Ms. Maybelle Lamar

"Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

"Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she 'took to my bed' for approximately five or six weeks following the accident. Ms. Lamar was unable to attend to these children in any way at that time. She did not recall

APPENDIX TO OPINION OF BREYER, J.—Continued

how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

"Ms. Lamar described Mr. Thompson as displaying significantly 'different' behavior when he returned to visit her following his discharge from the U.S. Navy. 'Greg didn't act the same'. Unlike the 'eager to please', passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was 'angry', 'sometimes sad'. 'I don't think he wanted me to know what was going on with him. He mostly just stayed away from me.' Ms. Lamar reported that she noticed Mr. Thompson sometimes 'staring off into space' or 'talking to himself'. She would ask him about these behaviors. 'He'd deny it. He acted like he didn't know what I was talking about.' Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson's trial.

"Ms. Nora Jean Hall Wharton

"Nora Jean Wharton is Mr. Thompson's older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

"Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar[,] was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

"Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

"Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates. Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

"Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg 'You have the Devil in you.' Mr. Thompson would tell his sister that he was attempting to 'knock the Devil out' of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

APPENDIX TO OPINION OF BREYER, J.—Continued

"Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

"Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and anti-depressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

"CUSTODY OFFICERS AT RMSI

"Following the second interview conducted with Mr. Thompson on 2–2–99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

"MICHAEL CHAVIS

"Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2, 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together for approximately four years, from 1980 to 1984.

"Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions proved by Ms. Nora Wharton, Ms. Cajulao reported several episodes of 'paranoid' and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were 'after' him. He would close all the curtains in the house because he did not want the person who was 'looking' for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson's mental state.

"SUMMARY AND CONCLUSIONS:

"Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

APPENDIX TO OPINION OF BREYER, J.—Continued

"It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

"Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

"It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

"[signed]

"Faye E. Sultan, Ph.D."

* * *

Excerpts from the Deposition of Dr. Faye E. Sultan (July 22, 1999), *Id.*, at 71–73, 76–80.

"Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

APPENDIX TO OPINION OF BREYER, J.—Continued

"A. . . . .

"By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. [His sister, Ms. Wharton] would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

. . . . . .

"Q. Sort of a self-punishment or a self-exorcism type thing?

"A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript. She told me much more detail about actually the extent of those kind[s] of emotional outbursts.

"At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the

time, and Nora Wharton was not really permitted much interaction outside of their home.

. . . . .

"Q. Your diagnosis for Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

"A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur—lots of different kinds of delusions actually—auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

"The psychological testing early on in Mr. Thompson's incarceration confirm[s] the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

"The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

"Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

"A. Well . . . [p]rior to his entry into the military Mr. Thompson is described almost uniformly . . . as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

"At some point . . . he began to notice that people were trying to hurt him all the time, that officers and other people of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

"Q. This is what he related to you during your interview last August?

"A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, 'different.' Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

APPENDIX TO OPINION OF BREYER, J.—Continued

"The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her to approach her grandmother about what to do for treatment for him.

. . . . . .

"Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

"A. There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

"Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

"A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

"Q. Meaning?

"A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

"Q. When you say 'he's not in control of what he's doing,' are you saying that it's impulsive behavior?

"A. If I am emotionally disregulated, if I'm over-aroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I also think things are going on that aren't, I have a combination in which yes, I suppose you could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

"Q. Does this disorder prevent Mr. Thompson from planning his activities?

"A. Sometimes, yes, it does.

"Q. And so the inability to plan, would that be a factor that would prevent him from conforming his conduct to the requirements of the law?

"A. If that were in operation at some time. In the history of the Department of Corrections' mental health records, when he's properly medicated I don't think that's true about him.

"Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicat-

APPENDIX TO OPINION OF BREYER, J.—Continued

ed he does not always have the ability to plan?

"A. Those two things are true. It's also true that if he's inadequately medicated or improperly medicated he doesn't have the ability to plan anything. I don't know whether he has impulses. I think he's all impulse, so to have impulses implies that there's a part of you that's not impulsive. For example, when Mr. Chavis and I saw him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that's why I have to put that qualifier in there."

Thomas VAN ORDEN, Petitioner,

v.

Rick PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.

No. 03–1500.

Argued March 2, 2005.

Decided June 27, 2005.

Background: Texas resident brought § 1983 action against state and state officials, seeking declaration that display of monument inscribed with the Ten Commandments on grounds of Texas State Capitol violated First Amendment's Establishment Clause and injunction requiring its removal. Following bench trial, the United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., entered judgment for state. Resident appealed. The United States Court of Appeals for the Fifth Circuit, Patrick E. Higginbotham, J., 351 F.3d 173, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Rehnquist, held that:

(1) *Lemon v. Kurtzman* test was not useful in dealing with erection by Texas of passive monument on its Capitol grounds, and court's analysis instead would be driven both by nature of monument and by nation's history,

(2) display was typical of unbroken history, dating back to 1789, of official acknowledgements by all three branches of government of religion's role in American life;

(3) while Ten Commandments were undoubtedly religious, they also had undeniable historical meaning; and

(4) Establishment Clause was not violated by monument's display.

Affirmed.

Justices Scalia and Thomas filed concurring opinions.

Justice Breyer filed opinion concurring in the judgment.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.

Justice O'Connor filed dissenting opinion.

Justice Souter filed dissenting opinion in which Justices Stevens and Ginsburg joined.

1. Constitutional Law ⇐84.1

First Amendment's Establishment Clause does not bar any and all governmental preference for religion over irreligion. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐84.5(11)

The three-part *Lemon v. Kurtzman* test was not useful in analyzing whether

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009

(202) 588-1000
(202) 588-7795 (FAX)

BRIAN WOLFMAN
DIRECT DIAL: (202) 588-7730
E-MAIL: BRIAN@CITIZEN.ORG

May 25, 2005

Honorable Samuel A. Alito, Jr.
Chair
Advisory Committee on Appellate Rules
United States Post Office and Courthouse
Federal Square and Walnut Street, Room 357
P.O. Box 999
Newark, New Jersey 07101-0999

Re: Timing of amicus briefs under FRAP

Dear Judge Alito:

I am writing regarding the time for filing amicus briefs under FRAP 29(e). The issue arose in a case that we are currently litigating on behalf of an appellant. Rule 29(e) provides that an amicus brief is due no later than 7 days after the filing of the principal brief of the party supported by the amicus. When an amicus brief is filed in support of an appellant, that leaves plenty of time – usually about 20 days – for the appellee to reply both to the appellant's brief and, if necessary, to the amicus brief. However, the time is much tighter for an appellant, which has only 14 days to file its reply brief. If, as in most cases, the appellee's amicus files on the due date, the appellant has only half of the allotted time, or, nominally, only 7 days, to consider and respond to the amicus brief.

I say "nominally" because the period is effectively shorter than 7 days. Under FRAP 26(a)(2), weekends and holidays are excluded in counting the 7-day period. Therefore, an amicus will *always* have at least 9 days to file its brief. In the case of an amicus brief filed in support of an appellee, then, the effect of Rule 26(a)(2) is to shorten the already quite short nominal 7-day period for considering and responding to the amicus brief.

An example illustrates our point. Say that the appellee files its brief at the clerk's office on Thursday June 9, 2005, and serves the brief by hand (as occurs in about half of our appellate cases). The appellant's reply is due on Thursday, June 23, 2005. The appellee's amicus need not, and as a matter of practice generally will not, be filed until the deadline – in this example, late in the day on Monday, June 20, 2005. That leaves only 3 calendar days for the appellant to

consider the amicus brief and incorporate a response into its reply brief. The problem would be considerably exacerbated if the amicus chose to file and serve the brief by regular U.S. mail, as it has a right to do. If that occurred, the brief probably would not be received by appellant's counsel until Wednesday or Thursday, the due date for appellant's reply. To make matters worse, if, in the above example, either Monday, June 13 or Monday, June 20, were a federal holiday, the amicus brief would not be due until late in the day on Tuesday, June 21, 2005, just two days before appellant's reply would be due. Finally, the time crunch would be magnified if, as is sometimes the case, more than one amicus files a brief in support of the appellee.

The above example – involving the filing of an appellee's brief on a Thursday – maximizes the time crunch imposed by the interaction of Rules 26(a)(2) and 29(e). However, even a scenario that *minimizes* the filing period for the amicus is highly problematic. Let's say that the appellee physically files its brief on Wednesday June 8, 2005, and serves the brief by hand. The appellant's reply is due on Wednesday, June 22, 2005. The appellee's amicus need not file until late in the day on Friday, June 17, 2005. That leaves only 5 calendar days, including two weekend days, for the appellant to consider the amicus brief and incorporate a response into its reply brief. As above, the problem would be exacerbated if the amicus chose to file and serve the brief by regular U.S. mail, because the appellant likely would not receive the amicus brief until Monday or even Tuesday.

It is possible that the effect on Rule 29(e) was not contemplated by the Advisory Committee when Rule 26(a)(2) was amended in 2002 to increase from less than 7 days to less than 11 days the time periods for which interim weekends and holidays are excluded. In any event, amici do not need the extension provided by Rule 26(a)(2) as do other litigants facing filing deadlines of less than 11 days. Amici generally know about the case and have an idea of what they are going to say before they receive the brief of the party that they are supporting. Indeed, they are often provided drafts of the principal brief as the process unfolds. Perhaps that is why, until 1998, FRAP required amici briefs to be filed at the same time as the principal brief that they were supporting. Although we think the 7-day window for amici is sensible for a number of reasons, we do not think it is necessary to extend that window under Rule 26(a)(2), given the difficulty such an extension imposes on appellants. Therefore, we recommend that the Committee propose that Rule 29(e) be amended to require that an amicus file its brief no later than 7 *calendar* days after the principal brief of the party that it is supporting. Moreover, we suggest that a Committee note strongly encourage amici to serve their briefs electronically, given the short time period for response (particularly for appellants).

The time for responding to an amicus brief is sometimes shorter than the nominal period for another reason as well. The time for a party to answer a principal brief runs from the service of that brief, not from its physical filing in the clerk's office. But the time for the filing of the amicus brief runs from the time when the brief that the amicus supports is actually received and filed stamped at the clerk's office. Thus, in cases where the appellee mails its brief to the

courthouse, the time for the appellant to consider the appellee's amicus brief is effectively shortened. Indeed, even without Rule 26(a)(2), depending on the speed of the mail, the amicus may not be required to file its brief until 10 days (or more) into the 14 day-period in which the appellant has to reply. The Advisory Committee was aware of this issue when it established the 7-day amicus filing window. *See* 1998 Adv. Comm. Note to Rule 29(e). We recognize that the time crunch created by this problem will not generally be as severe as the Rule 26(a)(2) problem discussed above because, in general, when a party mails its brief to the court, it also mails the brief to opposing counsel, which would extend the 14-day period for filing the reply by three days. *See* FRAP 26(c). That is not always the case, however. In some of our cases, for instance, counsel for both parties are in Washington, D.C., and the briefs are hand served, while the court is in another city (say, New York), and the brief is "filed" by mail. Therefore, we also ask the Committee to consider amending Rule 29 to require amici to file their briefs no later than 7 calendar days from the date on which the principal brief that they are supporting is *served*. This change will not impose a burden on amici because an amicus can be expected to be in communication with the party it is supporting and obtain prompt service from that party, regardless of when that party's brief is actually filed with the court.

Thank you for considering this request.

Sincerely,

Brian Wolfman

Brian Wolfman

cc: Professor Patrick J. Schiltz, Reporter
Peter G. McCabe, Secretary

MEMORANDUM

DATE: March 24, 2006

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-06

Attached please find the opinion of the Second Circuit in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005), which Mark Levy brought to our attention. In footnote 2, Judge Leval says, with respect to Rule 4(a)(4)(B), that "[t]he Rule, the Advisory Committee Notes, and the observations of commentators, are riddled with ambiguities and contradictions."

For what it is worth, I believe that the dicta in footnote 2 (and footnote 2 is entirely dicta) is overstated. If (1) a judgment is entered; (2) a notice of appeal is filed; (3) a "tolling" post-trial motion is also filed; (4) the post-trial motion is decided; and (5) the appellant wishes to challenge the disposition of the post-trial motion (whether or not the motion was granted and whether or not the judgment was amended in response to the motion), then (6) the appellant needs to file an amended notice of appeal to include the disposition of the post-trial motion. The Wright & Miller treatise, the Moore treatise, the Advisory Committee Note, and, most importantly, the rule itself all seem clear on this point.

If the appellant does not wish to challenge the order disposing of the post-trial motion — because the order did not change the judgment, or changed it only insignificantly, or changed it in a way that favored the appellant — then the appellant does not need to file an amended notice of appeal. The previously-filed notice of appeal is sufficient to challenge the (bad) parts of the original judgment that were not changed (or changed only insignificantly) by the court on post-trial motion. This was settled law before the 1998 restyling, and, as Judge Leval notes, the Committee was clear that the restyling was not meant to change the meaning of the rule. I understand the point that Judge Leval makes in comparing the pre-1998 version of Rule 4 with the post-1998 version — and perhaps the Committee will conclude that the pre-1998 language should be restored — but, as far as I'm aware, no court has read the restyled rule in the manner suggested by Judge Leval.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004

Argued: February 25, 2005 Decided: June 29, 2005)

Docket No. 00-7076-cv

----------X

ANETTE SORENSEN,

Plaintiff-Appellant,

-v.-

THE CITY OF NEW YORK, GREGORY AJOSE and NEIL PERO,

Defendants-Appellees,

JOHN DOE 1-5, in their individual and official capacities, ANGELO BEVILACQUA, COLEEN GILLIS, MARIA RIOS, SHERYL WILLIAMS, JANE/JOHN DOES #7-10, in both their individual and official capacities,

Defendants.

----------X

BEFORE: LEVAL, CABRANES and KATZMANN, *Circuit Judges*.

Appeal from the judgment of the United States District Court for the Southern District of New York (Baer, *J.*). The court of appeals (Leval, *J.*) dismisses the appeal in part and otherwise affirms the judgment of the District Court.

MICHAEL Q. CAREY, Carey & Associates, New York, NY, *for Plaintiff-Appellant*.

JANET L. ZALEON, Assistant Corporation Counsel of the City of New York, (Michael

A. Cardozo, Corporation Counsel, *on the brief*, and Kristin M. Helmers, Patricia B. Miller, Eamonn Foley, William Fraenkel, and Genevieve Nelson, *of counsel*), New York, NY, *for Defendants-Appellees.*

LEVAL, *Circuit Judge*:

The principal question raised by this appeal is whether a notice of appeal from a judgment that, while adverse to the appellant on some claims, is favorable to the appellant on the particular claim in question, serves to appeal from a subsequent amended judgment, which vacates the prior favorable judgment on the claim, substituting an adverse judgment in its place. We rule that it does not. A new, or amended, notice of appeal must be filed after entry of the adverse judgment.

Plaintiff Anette Sorensen appeals from several partial judgments and a final judgment against her in the United States District Court for the Southern District of New York (Harold Baer, Jr., *J.*). Because Sorensen failed to file a timely notice of appeal after the final judgment, and because she failed to renew or amend an earlier notice of appeal so as to appeal a partial judgment newly rendered against her on the disposition of a post-trial motion, her appeal is in part dismissed. Insofar as plaintiff properly noticed her appeal, we reject her claims and affirm the judgment of the district court.

Background

In much abbreviated form, the basic facts are as follows: Sorensen, a citizen of Denmark, brought this action against the City of New York and various police officers, arising out of her

arrest on charges of recklessly endangering her child. Sorensen had left her baby in a baby carriage on the sidewalk outside the window of an East Village restaurant, while she and Exavier Wardlaw, the father of the child, ate in the restaurant, surveilling the carriage through the restaurant window, a practice Sorensen asserted was commonplace where she lived in Denmark. The police responded to a 911 call about an unattended baby in a carriage on the street. After Wardlaw argued with the police, he was arrested for disorderly conduct and endangering the welfare of a child. Sorensen was then also arrested for endangering the welfare of her child. The police did not advise Sorensen of any right to seek assistance from Danish consular authorities, as required by the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified Nov. 24, 1969) [hereinafter "Vienna Convention"]. Following her arrest, Sorensen was held in custody for almost forty-two hours, until her arraignment. A few days later, the case against her was adjourned in contemplation of dismissal, and subsequently lapsed without prosecution.

Sorensen and Wardlaw brought suit against the City of New York and several New York City police and correctional officers. Their complaint pursuant to 42 U.S.C. § 1983 asserted, *inter alia*, claims of false arrest, unconstitutional strip search, unlawful imprisonment, and violation of Sorensen's rights under the Vienna Convention. The case proceeded to a jury trial, which resulted in a verdict in favor of Sorensen on her Vienna Convention and strip search claims, awarding her compensatory damages. The jury also awarded punitive damages, although it is unclear whether they were for the Vienna Convention or strip search claim. The jury ruled against Sorensen and Wardlaw on all other claims. On December 29, 1999, the district court entered judgment, in favor of Sorensen on the Vienna Convention and strip-search claims, and

against her on all other claims. Sorensen filed a timely notice of appeal on January 25, 2000.[1]

After the trial, both sides made various post-trial motions. The defendants moved pursuant to Fed. R. Civ. P. 50(b) for judgment as a matter of law to set aside the judgment in favor of Sorensen on her Vienna Convention claim. Subsequent to Sorensen's filing of her notice of appeal, the district court granted this motion based on its conclusion that the Vienna Convention does not confer enforceable individual rights, and therefore does not furnish a basis for liability under 42 U.S.C. § 1983. *Sorensen v. City of New York*, 98 Civ. 3356, 2000 WL 1528282, at *2 - *7, 2000 U.S. Dist. LEXIS 15090, at *7 - *21 (S.D.N.Y. Oct. 16, 2000).

The district court also ordered a new trial on the unlawful imprisonment claim and on damages for the strip search. 2000 WL 15282, at *13 - *14, 2000 U.S. Dist. LEXIS 15090, at *41, *46. After the second trial, the jury returned verdicts in favor of defendants on both of these issues. The court entered judgment for the defendants on September 24, 2003. Sorensen filed post-trial motions following the second trial. These motions, however, were not timely filed, and the district court therefore dismissed them on December 16, 2003. Sorensen filed a second notice of appeal on December 31, 2003, seeking both to appeal the December 16, 2003 Order and to amend her January 25, 2000 notice of appeal. Sorensen also filed a motion for reconsideration of the December 16, 2003 Order, which the district court dismissed on March 15, 2004. Sorensen then filed a third notice of appeal on March 24, 2004, appealing the March 15, 2004 Order, and seeking to amend her two previously filed notices of appeal.

Discussion

Among Sorensen's numerous contentions on appeal is that the district court erroneously

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[1]Wardlaw is not a party to this appeal.

dismissed her claim under the Vienna Convention based on the mistaken view that the Convention is not enforceable by a private party's claim. The defendants contend Sorensen did not properly preserve that claim on appeal by filing a timely notice of appeal. Unless a timely notice of appeal was filed, her claim is not properly before us. Fed. R. App. P. 3(a)(1).

Because Sorensen did not file a timely notice of appeal following the entry of final judgment after the conclusion of the second trial, she cannot rely on such a notice to cover previously entered partial judgments. *See* 28 U.S.C. 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ."). Final judgment following the second trial was entered on September 24, 2003. Sorensen's notice of appeal was filed on December 31, 2003. This notice of appeal was therefore well outside the 30 days allowed by Fed. R. App. P. 4(a)(1)(A). Sorensen's filing of her post-trial motions would have tolled the time for filing a notice of appeal, but only if the motions were "timely" filed. Fed. R. App. P. 4(a)(4)(A) ("If a party *timely* files in the district court any of the following motions . . ., the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion . . . ." (emphasis added)). As the district court found in its December 16, 2003 Order, and Sorensen does not contest on this appeal, Sorensen's post-trial motions after her second trial were not timely filed. Their filing accordingly did not toll the time for filing the notice of appeal from the final judgment. We therefore conclude that Sorensen did not file a timely notice of appeal from the final judgment entered after the second trial. Her final two notices of appeal were timely to appeal from the denial of the post-trial motions following the second trial, but not to preserve an appeal from the final judgment or from any of the partial judgments previously rendered.

We next consider whether Sorensen's first notice of appeal filed on January 25, 2000, after the entry of judgment in the first trial, effectively preserved her appeal from the court's subsequent amendment of the judgment which resulted in the denial of her claim under the Vienna Convention. We find that it did not.

Sorensen filed her first notice of appeal after the district court entered judgment following the first trial (which was in her favor on her Vienna Convention claim), but *before* the district court granted the defendants' post-trial motion under Rule 50(b) and ordered judgment as a matter of law denying Sorensen's Vienna Convention claim. Rule 4, Fed. R. App. P., is somewhat ambiguous as to whether Sorensen's notice of appeal, though never properly amended, effectively appeals the district court's subsequent adverse rulings dismissing the Vienna Convention claim *after* that notice of appeal was filed. Rule 4(a)(4)(B)(i) might seem to suggest that the subsequent disposition of such post-trial motions should be deemed covered by the earlier notice. It says, "If a party files a notice of appeal after the court announces or enters a judgment–but before it disposes of any motion listed in Rule 4(a)(4)(A) [which list includes a "motion" for judgment as a matter of law under Rule 50(b)]–the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motions is entered." Rule 4(a)(4)(B)(ii), however, appears to suggest the opposite conclusion: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

The 1993 Advisory Committee Notes for Fed R. App. P. 4(a)(4) are helpful in resolving

the apparent ambiguity. The Advisory Committee Notes state, "[A] notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and *if a party wishes to appeal from the disposition of the motion*, the party must amend the notice to so indicate." (emphasis added). In the instant case, the district court's grant of the defendants' Rule 50(b) motion dismissing Sorensen's Vienna Convention claim clearly "altered" the judgment: it voided the judgment in Sorensen's favor under the Vienna Convention, which was in effect when the notice of appeal was filed, and substituted a judgment denying Sorensen all relief on that claim. Sorensen seeks to appeal from the adverse disposition of that motion. The facts thus fall squarely within the description of the last sentence quoted from the Advisory Committee Note. In order to appeal from the disposition of the motion, the Note asserts that "the party must amend the notice to so indicate," which Sorensen did not do. Accordingly, she has not effectively appealed the judgment denying her Vienna Convention claim.[2]

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[2]In interpreting the Rule (and the Advisory Committee Note) to mean that, in order to appeal from a newly adverse ruling entered pursuant to a post-trial motion decided after the filing of a notice of appeal, the appellant must file a new or amended notice, we do not mean to suggest that a new or amended notice is never needed unless the ruling on the post-trial motion alters the judgment *and* appellant seeks to appeal from that alteration. Different sorts of dispositions of different sorts of post-trial motions might conceivably bring about different conclusions. Where an appellant wishes to appeal from any aspect of a post-notice ruling or judgment, however, caution would certainly suggest the filing of a new or amended notice. *See, e.g.*, *Miles v. Gen. Motors Corp.*, 262 F.3d 720, 722-23 (8th Cir. 2001) (refusing to hear an appeal from the denial of a new trial motion based on newly discovered evidence, because the appellant failed to file an amended notice of appeal following the district court's denial of the post-trial motion). *But cf. Beason v. United Techs. Corp.*, 337 F.3d 271, 274-75 (2d Cir. 2003). Indeed, commentators take the view that "the early notice of appeal must be amended if the appellant wishes to challenge the disposition of any of the posttrial motions." 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3950.4, at 213 (3d ed. 1999);

As for Sorensen's remaining claims, some are barred by her failure to file a timely notice of appeal, and the others were either mooted by the conduct of the second trial or are plainly without merit. For example, Sorensen's claim that the district court erred with respect to the unlawful imprisonment claim is mooted by her failure to make timely appeal from the second trial.

Conclusion

The appeal from the judgment of the District Court is DISMISSED in part and the judgment of the District Court is hereby AFFIRMED.

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see also 20 James Wm. Moore, et al., *Moore's Federal Practice* § 304.13, at 304-38 & n.5 (3d ed. 2004).

The Rule, the Advisory Committee Notes, and the observations of commentators, are riddled with ambiguities and contradictions. Among the ambiguities are: whether the requirement of a new or amended notice to appeal the ruling on the post-trial motion arises only when the ruling on the post-judgment motion alters the judgment, as opposed to when the ruling declines to alter the judgment; and whether a new or amended notice is required when the ruling on the post-trial motion alters the judgment in a manner favorable to the appellant, or alters it only in an insignificant manner, or supersedes the original judgment without alteration, so that the merits of the appeal do not depend on differences between the earlier judgment and the later one. Discussion in the third paragraph of the Advisory Committee Notes to the 1993 Amendment for Fed. R. App. P. 4(a)(4) may suggest that no new notice is needed following a post-notice ruling favorable to the appellant. Nevertheless, litigants should be warned that these ambiguities open the possibility that the rule could be read strictly and onerously to require a new or amended notice in all such circumstances. Before a 1998 amendment, the Rule could not be read to support this strictest interpretation because it required a new or amended notice of appeal if a party "intend[ed] to challenge an *alteration or amendment* of the judgment," as opposed to the judgment being altered or amended. *See* Fed. R. App. P. 4(a)(4) (1997) (emphasis added). The 1998 amendment, however, introduced ambiguity by requiring a new or amended notice if a party "intend[ed] to challenge . . . a judgment altered or amended upon such a motion." Fed. R. App. P. 4(a)(4)(B)(ii). The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment. The 1998 Advisory Committee Note, however, explained that the change to the current language was "intended to be stylistic only." We make no ruling on any of these questions, as they are not before us, but set out this brief discussion only to warn litigants of a potential minefield.

MEMORANDUM

DATE: January 20, 2006

TO: Advisory Committees

FROM: Judge Mark R. Kravitz, Chair
Time-Computation Subcommittee

RE: Time-Computation Template

Last year, the Standing Committee created a Time-Computation Subcommittee and charged it with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. Judge David Levi asked me to chair the Subcommittee, and he asked Prof. Patrick Schiltz, the reporter to the Appellate Rules Committee, to serve as the Subcommittee's reporter. The Subcommittee's main task is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within eight days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than seven days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A)

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[1]*See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. The Subcommittee has spent the past four months working toward that goal. In early September, I circulated to the advisory committee chairs and reporters and then to the Subcommittee members a report drafted by Prof. Schiltz that listed all of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit attention. A copy of Prof. Schiltz's report is attached.

On October 4, the Subcommittee met via conference call, reviewed all of the issues identified by Prof. Schiltz, and made tentative decisions about what should be included in the template. In November, Prof. Schiltz circulated a draft template that attempted to implement the Subcommittee's decisions. On December 14, the Subcommittee met again via conference call (the advisory committee reporters joined us), reviewed the draft template, and decided on a number of changes. Prof. Schiltz then drafted a revised template that incorporated all of those changes. That template was favorably reviewed by the Standing Committee at its meeting earlier this month.

The template is attached. At this point, we are asking that the advisory committees review the template and share any concerns or suggestions that they have. That input can be communicated through the advisory committee reporters or directly to Prof. Schiltz (pjschiltz@stthomas.edu) or me (Mark_Kravitz@ctd.uscourts.gov). Following the spring advisory committee meetings, the Subcommittee will review any comments that we receive and prepare a final template. We hope to present that final template to the Standing Committee at its June 2006 meeting.

Assuming that the template is approved by the Standing Committee, the advisory committees will then have to draft amendments to their respective time-computation rules. The advisory committees will also have to review their deadlines and decide whether to propose changes to those deadlines in light of the new time-computation rules. Our hope is to publish both the proposed changes to the time-computation rules and the proposed changes to the deadlines in August 2007, so that the bench and bar can consider them as a package. The tentative schedule for the time-computation project is thus as follows:

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[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Late Spring 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves final template
June 2006	Standing Committee approves final template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect final template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

I wish to draw your attention to two additional issues. Both of these issues are identified in Prof. Schiltz's report, and both were discussed by the Subcommittee. For reasons that I will describe, though, the Subcommittee ultimately decided — and the Standing Committee agreed — that the issues should be addressed by other committees. At its January meeting, the Standing Committee indicated that it would appreciate guidance from the advisory committees on both of these issues.

1. *Accessibility of Clerk's Office.* Under both the template and the existing rules, "a day on which weather or other conditions make the clerk's office inaccessible" is treated like a Saturday, Sunday, or legal holiday for time-computation purposes. The question is whether the concept of "inaccessibility" should be rethought in light of the emergence of electronic service and filing. Should a clerk's office be deemed "inaccessible" if inclement weather closes the office, but the clerk's servers continue to operate, and thus electronic filing is possible? Alternatively, should a clerk's office be deemed "inaccessible" if the weather is fine but the clerk's servers go down and thus electronic filing is not possible? What if the servers go down for only an hour? Four hours? Eight hours?

This is a thorny problem raising important policy issues that will need to be discussed at length. This is also a problem that will benefit from the expertise of the members of the Subcommittee on Technology — the same Subcommittee that has in the past proposed rules governing electronic service and filing. For those reasons, this problem has been referred to that Subcommittee. It is likely, though, that this issue will eventually end up before the advisory committees, and, as I noted, the Standing Committee and the Subcommittee on Technology are now looking for guidance from the advisory committees on how to proceed.

2. *The "Three-Day Rule."* The "three-day rule" is found in Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c). It provides that, when a party is required to act within a prescribed period after a paper is served on that party, and the paper is served by any means except personal service, three days are added to the prescribed period.

Some have suggested that the three-day rule should be abolished. It complicates time computation by forcing parties to figure out whether they get three extra days to respond to a paper. In the past, parties have had difficulty grasping the fact that the three-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order. This difficulty, in turn, has caused parties to miss deadlines.

Another problem with the current version of the three-day rule is that it creates an incentive for parties to use mail service and to avoid other means of service. For example, when a party serves an opponent electronically, the opponent gets three extra days, even though, in the vast majority of cases, the opponent will receive the paper instantaneously. If the deadline is 10 days, the opponent will, as a practical matter, have 13 days to work on its response. If the party instead serves the opponent by U.S. mail, the paper will not be delivered for at least two or three days, giving the opponent only 10 or 11 days to work on its response.

The Subcommittee discussed the three-day rule and decided that it should not be abolished. The Subcommittee feared that, if it was abolished, parties would avoid personal service, electronic service, and service by commercial carrier, and opt instead for U.S. mail. The Subcommittee thought that it might make sense to apply the three-day rule only to service by U.S. mail, but the rules of practice and procedure were just amended in 2002 to extend the three-day rule to electronic service, reflecting a decision that the Standing Committee made on the recommendation of the Subcommittee on Technology. Our Subcommittee did not feel comfortable revisiting such a recent decision of the Standing Committee. However, at its January meeting, the Standing Committee indicated that it would like guidance from the advisory committees regarding whether its decision should be revisited.

Our Subcommittee was also reluctant to address the question of whether to modify the three-day rule because the question implicates several other issues. In many courts, electronic service and filing is now mandatory for most parties. Those parties will file and serve

electronically no matter what the three-day rule provides. The fact that mandatory electronic filing and service is likely to become pervasive within the next decade may have implications for whether the three-day rule should maintained. In addition, the three-day rule is necessary only because, under the rules of practice and procedure, service by U.S. mail is effective on mailing, service by commercial carrier is effective on delivery to the carrier, and service by electronic means is effective on transmission. If service were effective on some other event — such as *receipt* — then the justification for the three-day rule would disappear. The problems with the three-day rule may justify a reexamination of the rules regarding the effectiveness of service.

The Subcommittee determined, and the Standing Committee agreed, that this issue is best addressed, at least as an initial matter, by the advisory committees. If there is strong sentiment for change among the advisory committees, then either the Subcommittee on Technology or another subcommittee will likely be asked to coordinate work on this issue, as it is obviously important to maintain consistency among the rules of practice and procedure.

Thank you for your assistance with these matters.

I. SCOPE OF TIME-COMPUTATION RULES

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . .

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . .

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order . . . .

E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the Subcommittee may want to address this inconsistency.

II. EXCLUDING DAY OF EVENT

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only "restyling" to make the language consistent may be needed.

III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is

less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

E. Comment

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of "calendar days." (More about calendar days below.)

The "11-day rule" (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.[3] The Subcommittee should consider eliminating the 11-day rule and providing instead that "days are days" — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A "days are days" rule would also moot the

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[3] If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005). Ed Cooper points out that a 10-day deadline can actually extend to 17 days, if it begins running on a Friday, December 22.

inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

IV. CALENDAR DAYS

A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of "calendar days." Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then "days are days," and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."

In addition, Appellate Rule 26(c) — the "3-day rule" (discussed below) — is stated in calendar days: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in "days.")

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days." And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal "by third-party commercial carrier for delivery within 3 calendar days."

B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

C. Civil Rule

The Civil Rules do not refer to calendar days.

D. Criminal Rule

The Criminal Rules do not refer to calendar days.

E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if "days were days" — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the Subcommittee to consider eliminating the 11-day rule.

V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . . When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday . . . .

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only "restyling" to make the language consistent may be needed.

VI. LAST DAY OF PERIOD ON DAY CLERK'S OFFICE INACCESSIBLE

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk's office inaccessible.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a . . . day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the Subcommittee may wish to address it.

The Subcommittee may also wish to consider whether to address the myriad problems that will arise as electronic filing becomes pervasive. For example, suppose that the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system? Or because of problems with the filing attorney's or party's computer system? Or suppose the opposite: The clerk's office is physically closed, but electronic filing is possible 24 hours per day, 365 days per year. Should the rules provide that a paper that is filed electronically at 11:59 p.m. on the last day of a deadline is timely, even though it was filed after clerk's office had closed?

My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility. It may be that attempting to address these issues now would be premature, and that we should instead give courts and local rulemakers a few years to identify the issues that electronic filing will present and experiment with various means of addressing those issues.

VII. DEFINITION OF "LEGAL HOLIDAY"

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(I) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

(ix) Thanksgiving Day;

(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

E. Comment

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

A. Appellate Rule

Rule 26. Computing and Extending Time

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(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

B. Bankruptcy Rule

Rule 9006. Time

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(f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

C. Civil Rule

Rule 6. Time

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(e) ADDITIONAL TIME AFTER SERVICE UNDER RULE 5(b)(2)(B), (C), OR (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

D. Criminal Rule

Rule 45. Computing and Extending Time

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(c) **Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules[4] and the Criminal Rules[5]). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The Subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, "days are days." The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the Subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives already exist under the present rule. For example, a party might opt for mail rather than electronic service because,

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[4]*See* FED. R. BANKR. P. 7005.

[5]*See* FED. R. CRIM. P. 49(b).

although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals "take up and decide" the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The Subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

B. "Backward-looking" deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing." If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The Subcommittee may want to consider proposing template language that would address this issue.

C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would reduce the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem altogether (parties can be served on — and thus deadlines can run from — a Saturday or Sunday), nor reduce the problem of deadlines ending on legal holidays.

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.

(1) ***Period Stated in Days.*** When the period is stated in days,

(A) exclude the day of the act, event, or default that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(2) ***Period Stated in Hours.*** When the period is stated in hours,

(A) begin counting immediately on the occurrence of the act, event, or default that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end at a time on a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible, then continue the

period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period needs to be computed. They do not apply when a fixed time to act is set. If, for example, a rule or order requires that a paper be filed "no later than November 1, 2007," then the paper is due on November 1, 2007. But if a rule or order requires that a paper be filed "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. (It also applies to the rare time periods that are stated in weeks, months, or years. See, e.g., Fed. R. Evid. 901(b)(8).)

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of 10 days or less. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day — including intermediate Saturdays, Sundays, and legal holidays — is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. (When the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.) Thus, a paper that must be filed within 10 days after the entry of an order on Tuesday, August 21, 2007, is due on Friday, August 31, 2007. But a paper that must be filed within 10 days after the entry of an order on Wednesday, August 22, 2007, is not due until Tuesday, September 4, 2007, because the tenth day (September 1) is a Saturday and Monday (September 3) is Labor Day.

The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an act, event, or default. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an act, event, or default. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a paper is due within 10 days *after* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Monday, March 17. But if a paper is due 10 days *before* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Friday, March 14.

Periods previously expressed as 10 days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, see, e.g., 28 U.S.C. § 3771(d)(3), as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:00 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:00 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. (Again, when the act to be done is

filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.)

Subdivision (a)(3). New subdivision (a)(3) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

MEMORANDUM

DATE: March 24, 2006

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 06-02

Last year, the Standing Committee created a Time-Computation Subcommittee and charged it with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules and proposing amendments that would simplify those rules and eliminate inconsistencies among them. The Subcommittee (to which I serve as Reporter) has proposed a template that was favorably reviewed by the Standing Committee at its January meeting and that will be reviewed by the advisory committees at their meetings this spring. The work of the Time-Computation Subcommittee and the template that it has proposed appear behind Tab V-B-4 of the agenda book.

If the time-computation template is approved by the Standing Committee at its June meeting, this Advisory Committee will have a significant amount of work to do over the next year. The Committee will, of course, have to prepare an amendment to Rule 26(a) so that the rule will conform to the new template. The Committee will also have to remove references to "calendar" days from the Appellate Rules, as all days will be "calendar" days under the new template. This will involve amending Rules 25(a)(2)(B)(ii), 25(c)(1)(C), 26(c), and 41(b). Finally, and most importantly, the Committee will have to review all deadlines of 10 days or less and decide whether they should be changed in light of the new time-computation method.

Under the current version of Rule 26(a), intermediate Saturdays, Sundays, and legal holidays are excluded in computing deadlines of 10 days or less. Thus, a party faced with a 10-day deadline always has at least 14 "real" days to act. For example, a paper that is due within 10 days after Monday, March 6, would not be due until Monday, March 20, because the intermediate Saturdays and Sundays (March 11, March 12, March 18, and March 19) would not be counted. Under the proposed time-computation template, intermediate Saturdays, Sundays, and legal holidays will always be counted, regardless of the length of the deadline. Thus, a party faced with a 10-day deadline that begins to run on Monday, March 6, will have to act by Thursday, March 16. In other words, parties faced with 10-day deadlines will usually have 10 real days to act instead of 14 real days.[1]

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[1]Under the proposed time-computation template, as under the current version of Rule 26(a), a deadline that ends on a Saturday, Sunday, or legal holiday will be extended to the next

In short, under the new time-computation template, all deadlines of 10 days or less will, as a practical matter, be shortened by at least two real days and, in some cases, by four or more real days. In light of that fact, the Committee will have to review every such deadline and decide whether and how it should be adjusted to take into account the new time-computation method. That work will not begin in earnest until the Committee's fall 2006 meeting. But recognizing that some Committee members may want to start thinking about this issue before next fall, I have provided a list of all deadlines of 10 days or less found in the Appellate Rules. That list is attached.

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day that is not a Saturday, Sunday, or legal holiday. Therefore, under the proposed time-computation template, a party faced with a 10-day deadline may have more than 10 real days to act, just as a party who today is faced with a 10-day deadline may have more than 14 real days to act.

DEADLINES OF 10 DAYS OR LESS IN THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule	Subject
Rule 4(a)(4)(A)(vi)	Motion for relief under Civil Rule 60 tolls time to appeal only if motion is filed no later than 10 days after entry of judgment.
Rule 4(a)(5)(C)	Extension of time to appeal for excusable neglect or good cause may not exceed 30 days after prescribed time or 10 days after order granting extension is entered, whichever is later.
Rule 4(a)(6)(B)	Motion to reopen time to appeal for lack of notice of entry of judgment must be filed within 180 days after judgment is entered or 7 days after moving party receives notice of entry of judgment, whichever is earlier.
Rule 4(b)(1)(A)	Defendant's notice of appeal in criminal case due within 10 days after entry of judgment or filing of government's notice of appeal.
Rule 4(b)(3)(A)	Defendant's notice of appeal in criminal case due within 10 days after entry of order disposing of tolling motion or entry of judgment of conviction, whichever is later.
Rule 4(b)(3)(A)(ii)	Motion for a new trial under Criminal Rule 33 based on newly discovered evidence tolls time to appeal only if motion is made no later than 10 days after entry of judgment.
Rule 5(b)(2)	Party may file answer in opposition to petition for permission to appeal within 7 days after petition is served.
Rule 5(d)(1)	Appellant must pay fees and file bond within 10 days after entry of order granting permission to appeal.
Rule 6(b)(2)(B)	Appellant in bankruptcy case must file and serve statement of issues and designation of record within 10 days after filing notice of appeal. Appellee must file and serve designation of additional parts of record within 10 days after being served with appellant's designation.
Rule 10(b)(1)	Appellant must order transcript within 10 days after filing notice of appeal or within 10 days after entry of order disposing of last remaining tolling motion, whichever is later.

Rule 10(b)(3)	When only partial transcript is ordered, parties have 10-day deadlines for serving statements of issues and copies of orders for partial transcript.
Rule 10(c)	Appellee may serve objections or proposed amendments to appellant's statement of the evidence within 10 days after being served.
Rule 12(b)	Representation statement due from appellant within 10 days after notice of appeal is filed.
Rule 19	Party disagreeing with agency's proposed judgment must serve and file alternative within 7 days after being served.
Rule 25(a)(2)(B)(ii)	Brief or appendix is timely filed if, on or before last day for filing, it is dispatched to commercial carrier for delivery within 3 *calendar* days.
Rule 25(c)(1)(C)	Service may be made by commercial carrier for delivery within 3 *calendar* days.
Rule 26(c)	When deadline is triggered by service, 3 *calendar* days are added to deadline unless service was in person.
Rule 27(a)(3)(A)	Party may respond to motion within 8 days after service.
Rule 27(a)(4)	Party may reply to response to motion within 5 days after service.
Rule 29(e)	Amicus brief due within 7 days after filing of principal brief of party being supported.
Rule 30(b)(1)	Parties have 10-day deadlines for serving statements of issues and designations of parts of record for appendix.
Rule 31(a)(1)	Reply brief must be filed at least 3 days before oral argument.
Rule 39(d)(2)	Objections to bill of costs must be filed within 10 days after service.
Rule 41(b)	Mandate must issue 7 *calendar* days after time to file rehearing petition expires or 7 *calendar* days after entry of order denying rehearing petition, whichever is later.

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7513
Washington, D.C. 20530

DNL

Douglas N. Letter
Appellate Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

March 20, 2006

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Re: Proposed Amendments to FRAP Concerning Pro Se Briefs Filed by Represented Parties

Dear Patrick:

I am attaching a proposal approved by the Solicitor General for an amendment to the Federal Rules of Appellate Procedure. As you can see from the attachment, this proposal involves a problem faced by many of our United States Attorneys' Office when parties who are represented by counsel nevertheless file their own pro se briefs in addition to the briefs filed by their attorneys. The procedure in the Circuits varies on how to deal with this situation, with several of them barring the practice by rule. For the reasons stated in our proposal, we believe that a uniform federal rule is warranted to make clear that these briefs should not be accepted by the courts. To provide a 'safety valve,' we propose that the briefs should be forwarded by the clerks' offices to the counsel for the party involved. I look forward to discussing this proposal with you and the FRAP Committee.

I have included both a proposed new rule and an explanation for it.

Sincerely,

Douglas N. Letter

Douglas N. Letter
Appellate Litigation Counsel

Memorandum on Proposed Amendment 28(g) of the Federal Rules of Appellate Procedure, Regarding the Filing of Pro Se Briefs by Represented Parties

Proposed Rule 28(g):

> (g) **Pro Se Briefs**. A party represented by counsel may not file a pro se brief, motion, or other paper, except (1) in response to counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or (2) to seek the appointment of new counsel. The clerk shall forward any pro se brief, motion, or other paper sent to the court to the party's attorney of record.

In addressing pro se filings by those already represented by counsel, the federal courts of appeals have inconsistent and even contradictory policies. The discrepancies in Circuit practice demonstrate a need for a uniform policy regarding such filings. Because the majority of Circuits generally reject hybrid representation – such a policy has been established by rule in three Circuits and largely accepted in four more – the Federal Rules of Appellate Procedure would benefit from the proposed amendment above.

A. Three Circuits (the Third, Fifth, and Eleventh) have rules precluding the filing of pro se briefs by represented defendants. Specifically, Third Circuit Local Rule 31.3 states:

> Except in [*Anders cases*], parties represented by counsel may not file a brief pro se. If a party sends a pro se brief to the court, the clerk shall forward the brief to the party's attorney of record. Counsel may choose to include the

> arguments in his or her brief or may in the unusual case file a motion to file a supplemental brief, if appropriate.

The Fifth Circuit likewise prohibits the filing of pro se briefs by those already represented by counsel. Fifth Circuit Local Rule 28.7 states: "unless specifically directed by court order, pro se motions, briefs, or correspondence will not be filed if the party is represented by counsel." The Fifth Circuit's prohibition is further elaborated in case law. *See Myers v. Johnson*, 76 F.3d 1330, 1335 (5th Cir. 1996) (holding that there is no constitutional right to hybrid representation on appeal: "[b]y accepting the assistance of counsel the criminal appellant waives his right to present pro se briefs on direct appeal."); *United States v. Ogbonna*, 184 F.3d 447, 449 (5th Cir. 1999) ("allowing the submission of a pro se brief should be discouraged when the appellant is represented by counsel," because, in part, such briefs may contain "frivolous arguments," which "constitute sanctionable conduct."). Finally, the Eleventh Circuit states in Local Rule 25-1: "When a party is represented by counsel, the clerk may not accept filings from the party."

Beyond the three Circuits with established rules prohibiting pro se briefs from represented parties, four more (the Seventh, Eighth, Ninth, and Tenth Circuits) widely discourage the practice. Specifically, the Seventh Circuit has held that pro se briefs should not be accepted on appeal when a party already has counsel. *See United States*

v. Oreye, 263 F.3d 669, 673 (7th Cir. 2001) ("we don't allow representation on appeal * * * because hybrid representation confuses and extends matters."). In the Eighth Circuit, there is a general policy to "refuse to consider pro se filings when a party is represented by counsel." *Hoggard v. Purkett*, 29 F.3d 469, 472 (8th Cir. 1994). The Ninth Circuit has stated in particular cases that individuals may not file pro se briefs if they are already represented. *See, e.g., United States v. Messinger*, 2000 WL 959605, n.3 (9th Cir. 2000) ("Because Messinger is represented by counsel, we do not consider the contentions presented in his pro se brief"). Lastly, the Tenth Circuit has held in several cases that hybrid representation is impermissible. *See United States v. Pearl*, 324 F.3d 1210, 1216 (10th Cir. 2003) ("As Mr. Pearl is represented by counsel, we deny his motion to file an additional pro se supplemental brief which the court received but did not file"); *United States v. Guadalupe*, 979 F.2d 790, 795 (10th Cir. 1992) ("Defendant has brought before us a pro se motion for leave to file a supplemental brief. Because he is represented by thoroughly competent counsel, his motion is out of order and denied").

Although these four Circuits have case law prohibiting pro se filings by represented defendants, these courts recognize exceptions. *See, e.g., United States v. Boyd*, 208 F.3d 638, 641 (7th Cir. 2000), *cert. granted and judgment vacated in part on other grounds*, 531 U.S. 1135 (2001) ("It goes without saying that a

represented litigant has no right to file a pro se brief * * *, and although we can permit such a filing in appropriate circumstances * * *, given the lateness of the filing and the repetitive character of the motion the circumstances are not appropriate"); *Hayes v. Hawes*, 921 F.2d 100, 102 (7th Cir. 1990) ("nothing precludes an appellate court from accepting the pro se brief and considering the arguments contained therein for whatever they may be worth"); *United States v. Sanders*, 341 F.3d 809, 821, n.2 (8th Cir. 2003), *cert. denied*, 540 U.S. 1227 (2004), ("Sanders submitted his own pro se brief to supplement the work of his defense counsel * * *. Even though 'it is not the court's practice to consider pro se briefs filed by parties represented by counsel' * * *we have considered these claims and summarily reject them" quoting *United States v. Peck*, 161 F.3d at 1175 n.2 (1998)); *United States v. Clayton*, 1999 WL 1079627, **3 (10th Cir. 1999) ("We granted defendant's motion for leave to file a supplement pro se brief even though he is represented by counsel"). Despite the occasional exceptions, overall these four Circuits have generally adhered to their policies prohibiting hybrid representation.

While the majority of Circuits have restricted pro se filings by parties with counsel, some Circuits (the First, Second, Fourth, and Sixth Circuits) routinely, by contrast, allow such parties to file pro se briefs. Furthermore, these Circuits have permitted supplemental pro se filings even after the Government has filed its response

to the opening brief filed by counsel.

In short, the Circuits have varying rules and practices with regard to allowing or disallowing represented defendants to file pro se briefs. We believe that this type of conflicting procedural practice is inappropriate. We can see no legitimate reason for the Circuits to treat litigants differently on this type of matter. Therefore, we propose one uniform rule in the form of an amendment to FRAP 28(g). The optimal amendment would give deference to policies accepted by the majority of Circuits. Thus, the Federal Rules of Appellate Procedure should be amended to prohibit additional filings by an individual who is already represented by counsel, except to change or keep counsel, as stated in our proposal above.

B. Adopting such an amendment violates no constitutional rights and would help preserve our current adversarial system.

A defendant has "no right to hybrid representation" at the trial level. *United States v. Nivica*, 887 F.2d 1110, 1121 (1st Cir. 1989). *See also McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) ("A [pro se] defendant does not have a constitutional right to choreograph special appearances by counsel"). In reviewing claims that the district court erred in denying hybrid representation at trial, courts of appeals have recognized that the right to counsel and the corresponding right to proceed without counsel are "mutually exclusive," *Nivica*, 887 F.2d at 1121, and have held that a

district court should allow such representation at trial "sparingly." *Ibid.*

The Supreme Court's decision in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), suggests that hybrid representation, available in rare circumstances at trial, should not be available on appeal. In *Martinez*, the Supreme Court held that a defendant has no constitutional right to self representation on appeal. 528 U.S. at 163. In so ruling, the Court found that, at the appellate level, the Government's interest in ensuring the integrity and efficiency of the appellate process outweighs the defendant's interest in self-representation. 528 U.S. at 162. (We note that, in the federal system, there is a statutory right to self-representation (*see* 28 U.S.C. § 1654), which the Supreme Court assumed, without deciding, might extend to appeals. But the Court made the point that, if this statute does so apply, it allows the courts of appeals to limit pro se appearance by rule. 528 U.S. at 158.) Given *Martinez* and the case law on hybrid representation at the trial level, it seems logical to conclude that a defendant has no right to such representation on appeal.

Beyond there being no constitutional right to hybrid representation on appeal, there is a good reason to prohibit it: to protect the main goals of the adversarial system.

First and foremost, supplemental pro se submissions ignore the vital role that appellate counsel play in selecting the appropriate issues for appeal. *See Jones v.*

Barnes, 463 U.S. 745, 751-52 (1983). An appellate attorney has no duty to raise every possible claim. 463 U.S. at 751. Indeed, appealing a multitude of issues "runs the risk of burying good arguments * * * in a verbal mound made up of strong and weak contentions." 463 U.S. at 753. The "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986), quoting *Jones*, 463 U.S. at 751. Allowing represented defendants to file pro se briefs raising claims beyond those deemed appropriate by counsel interferes with counsel's ability to perform this vital winnowing role, dilutes counsel's arguments, and ultimately undermines counsel's ability to present an effective, coherent, and professional defense.

Second, a system that allows represented defendants to file supplemental briefs freely undermines the courts' efforts to maintain efficient functioning. With limited resources, appellate courts can best manage their massive case loads by focusing on the most important claims in each case, rather than being required to sift through numerous superfluous, unmeritorious, or repetitive claims. The practice already followed in seven Circuits means that counsel and clients must make efforts to resolve disputes prior to the filing of appellate briefs, while continuing to protect the rights of the defendant. Our suggested amendment still permits a party to seek

replacement counsel when counsel and the party are unable to reach agreement about the handling of the appeal, or when the attorney/client relationship otherwise fails. Furthermore, the proposed rule in no way prohibits appellate counsel from seeking leave to file a supplemental brief when, in an extraordinary circumstance, it becomes apparent that a viable argument has been missed; the rule is narrowly tailored to preclude only wasteful hybrid representation, while guarding party rights with regard to counsel.

Third, the necessity to respond to issues and arguments raised in pro se briefs unduly burdens counsel for the United States. Allowing a defendant to file his own separate brief often leads to improper supplementation of the issues, confusion, and evasion of page limits and legal requirements for preserving issues for proper appellate review.

C. Our proposed rule would also be beneficial to parties who might otherwise undermine their appeals. In every stage of our justice system – both in trial and on appeal – parties face numerous serious challenges when representing themselves. Regarding defendants acting pro se at trial, the Supreme Court stated that it is "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta v. California*, 422 U.S. 806, 834 (1975). The difficulties encountered by pro se litigants are only

exacerbated on appeal. According to the Supreme Court of Wisconsin, "rejecting * * * hybrid representation promotes orderly postconviction relief proceedings for several reasons." *State of Wisconsin v. Debra A.E.*, 188 Wis.2d 111, 138 (1994). Primarily, "the arguments raised in a pro se brief may contradict and undermine the issues advanced in the counsel's brief * * *." *Ibid.* And, as detailed in *Ogbonna*, "[t]he brief submitted by Ogbonna plainly demonstrates why allowing the submission of a pro se brief should be discouraged when the appellant is represented by counsel. The argument in Ogbonna's supplemental brief relies on [a] defunct holding * * *." *Ogbonna*, 184 F.3d at 449. Therefore limiting a defendant's ability to file pro se briefs when already represented by counsel would ensure that the defendant does not undermine the coherent set of arguments being presented on his behalf.

D. Finally, for a defendant's interest, it is critical that key safeguards remain in place during the appellate process. Because counsel do sometimes overlook viable issues on appeal, it is imperative that parties be able to file papers with the clerk to forward to counsel, which is provided for in our proposal.

* * * * * * * *

In sum, because of the current procedural conflict among the Circuits, a uniform national rule against hybrid appellate representation is warranted. Our proposed rule should help efficient court functioning, while protecting the interests

of parties, both when their attorneys have made appropriate professional judgments regarding the appeal, and when their attorneys have made mistakes.

Calendar for September 2006 - November 2006 (United States)

September 2006

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
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October 2006

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November 2006

Su	Mo	Tu	We	Th	Fr	Sa
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Holidays and Observances

Sep 4 Labor Day	Oct 31 Halloween	Nov 11 Veterans Day
Oct 9 Columbus Day	Nov 10 'Veterans Day' observed	Nov 23 Thanksgiving Day

Calendar generated on www.timeanddate.com/calendar