ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, DC
April 3-4, 2006

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 3-4, 2006
WASHINGTON, D.C.

I. PRELIMINARY MATTERS

A. Chair's Remarks, Introductions, and Administrative Announcements

B. Review and Approval of Minutes of October 2005 Meeting in Santa Rosa, California

C. Status of Criminal Rules: Report of the Rules Committee Support Office

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court (No Memo)

1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means.

2. Rule 6. The Grand Jury. Technical and conforming amendment.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means.

4. Rule 40. Arrest for Failing to Appear in Another District. Proposed Amendment to provide authority to matter where person was arrested for violating conditions set in another district.

5. Rule 41. Search and Seizure. Proposed amendment permits transmission of documents by reliable electronic means and authorizes warrants for tracking devices.

6. Rule 58. Petty Offenses and Other Misdemeanors. Proposed a amendment resolves conflict with Rule 5.1 concerning right to preliminary hearing.

B. Proposed Crime Victim Rights Act Amendments Approved by Standing Committee for Publication in 2006 (Memo)

1. Rule 1. Scope; Definitions. Proposed amendment defining "victim."

2. Rule 12.1. Notice of Alibi Defense. Proposed amendment provides that victim's address and telephone number should not be automatically provided to the defense.

3. Rule 17. Subpoena. Proposed amendment requires judicial approval before service of a post indictment subpoena seeking personal or confidential information about a victim from a third party and provides a mechanism for providing notice to victims.

4. Rule 18. Place of Trial. Proposed amendment requires court to consider the convenience of victims in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. Proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when presentence report should include information about restitution, clarifies standard for inclusion of victim impact information in presentence report, and provides that victims have a right "to be reasonably heard" in judicial proceedings regarding sentencing.

6. Rule 60. Victim's Rights. Proposed new rule provides for notice to victims, attendance at proceedings, the victim's right to be heard, and limitations on relief.

C. Proposed Amendments to Rules Published for Public Comment (Memos)

1. Rule 11. Pleas. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by eliminating the court's requirement to advise a defendant during plea colloquy that it must apply the Sentencing Guidelines

2. Rule 32. Sentencing and Judgment. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by: (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not identified in the presentence report; and (3) requiring the court to enter judgment on a special form

3. Rule 35. Correcting or Reducing a Sentence. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B), which is consistent with the *Booker* holding that the sentencing guidelines are advisory, rather than mandatory

4. Rule 45. Computing and Extending Time. Proposed amendment clarifies the computation of an additional three days when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D))

III. REPORTS OF SUBCOMMITTEES

A. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information (Memo)

B. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal (Memo)

C. Rule 49.1. Proposed E-Government Amendment (Memo)

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Rule 12, Challenges to Facial Validity of Indictment, Department of Justice Proposal (Memo)

B. Rule 41, Warrants for Digital Evidence (Memo)

C. Rule 41, Authorizing Magistrate Judge to Issue Warrants for Property Outside of United States, Department of Justice Proposal (Memo)

D. Proposed Amendments to Collateral Relief Procedures, Department of Justice Proposal (Memo)

E. Rules 7 and 32.2, Department of Justice Proposal (Memo)

F. Rule 51, Preserving Claimed Error (Memo)

G. Time Computation Template (Memo)

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

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

B. Other Matters

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Fall Meeting – October 26-27, 2006, Amelia Island, Florida

B. Other

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DOJ representative

Subcommittee on E-Government Act
Judge Harvey Bartle III, Chair
(Open)
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Subcommittee on Grand Jury
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March 16, 2006
Projects

ADVISORY COMMITTEE ON CRIMINAL RULES

			Start Date	End Date
Susan C. Bucklew Chair	D	Florida (Middle)	Member: 1998 Chair: 2004	---- 2007
Harvey Bartle III	D	Pennsylvania (Eastern)	2001	2007
Anthony J. Battaglia	M	California (Southern)	2003	2006
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2007
Alice S. Fisher*	DOJ	Washington, DC	----	Open
Robert B. Fiske, Jr.	ESQ	New York	2000	2006
Donald J. Goldberg	ESQ	Pennsylvania	2000	2006
James Parker Jones	D	Virginia (Western)	2003	2006
Nancy J. King	ACAD	Tennessee	2001	2007
Thomas P. McNamara	FPD	North Carolina	2005	2008
Richard C. Tallman	C	Ninth Circuit	2004	2007
David G. Trager	D	New York (Eastern)	2000	2006
Mark L. Wolf	D	Massachusetts	2005	2008
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open

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ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 24 & 25, 2005
Santa Rosa, California

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Santa Rosa, California, on October 24 and 25, 2005. The following members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Michael J. Elston, Counselor to the Assistant Attorney General
Professor Sara Sun Beale, Reporter

Also participating in the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee liaison to the Criminal Rules Committee
Lucien B. Campbell, Esquire, outgoing member of the Committee
Deborah J. Rhodes, Former Counselor to the Assistant Attorney General
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor David A. Schlueter, outgoing Reporter to the Advisory Committee
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office
James N. Ishida, Senior Attorney in the Administrative Office
Timothy K. Dole, Attorney Advisory in the Administrative Office (by telephone)
Laural L. Hooper, Senior Research Associate at the Federal Judicial Center

Judge Bucklew welcomed the new committee members, Judge Mark L. Wolf, who replaced Judge Paul L. Friedman, and Thomas P. McNamara, who replaced Mr. Campbell as the committee's Federal Defender representative. She also pointed out that this was Professor Sara Sun Beale's first meeting as the committee reporter. She noted that Professor Beale has served for the past year as consultant to the committee as Professor David A. Schlueter completed his service as reporter.

Judge Bucklew expressed the committee's gratitude to Judge Friedman for six years of distinguished service. Judge Friedman was unable to attend the meeting, but Judge Bucklew noted that he would attend the April 2006 meeting in Washington, at which time the committee would present him with a resolution of appreciation.

Judge Bucklew thanked Mr. Campbell, who had just completed six years of service as the committee's Federal Defender representative. She noted that he had participated in "practically every subcommittee" and would be greatly missed. She added that the committee would present Mr. Campbell with a resolution commending him for his service at the committee dinner.

Finally, Judge Bucklew thanked Professor Schlueter for his 17 years of service as the committee's reporter and presented him with a resolution of appreciation. Judge Bucklew noted that his "historic perspective," practicality, and wisdom had proven invaluable to the committee.

II. APPROVAL OF MINUTES

Judge Bucklew moved for approval of the draft minutes of the April 4-5, 2005 committee meeting in Charleston, South Carolina. Following minor corrections, the minutes were adopted.

III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

A. Report From Chief of the Rules Office

Mr. Rabiej reported that Senator Arlen Specter, chair of the Senate Judiciary Committee, was considering several grand-jury reform proposals. The scope of the issues currently under consideration was limited. Among other things, the proposals would allow the Congressional leadership to obtain information about a grand jury investigation upon a written request and would enhance the showing that prosecutors must make to extend a grand jury's term of service. Congressional review might eventually extend to other issues, however, including several proposals that had previously been considered and rejected by the Advisory Committee on Criminal Rules.

B. Proposed Amendments Approved by the Standing Committee and the Judicial Conference and Being Forwarded to the Supreme Court

Mr. Rabiej reported that the Administrative Office was preparing the package of rules amendments approved by the Judicial Conference at its September 2005 meeting for formal

presentation to the Supreme Court. The amendments include:

1. Rule 5. Initial Appearance. The proposed amendment permits transmission of documents by reliable electronic means.

2. Rule 6. The Grand Jury. The amendment is technical and conforming.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits transmission of documents by reliable electronic means.

4. Rule 40. Arrest for Failing to Appear in Another District. The proposed amendment expressly authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who not only fails to appear but also violates any other condition of release.

5. Rule 41. Search and Seizure. The proposed amendment permits transmission of documents by reliable electronic means. It also includes provisions setting forth procedures for issuing tracking-device warrants.

6. Rule 58. Petty Offenses and Other Misdemeanors. The proposed amendment resolves a conflict with Rule 5.1 concerning a defendant's right to a preliminary hearing.

C. Proposed Amendments Published for Public Comment.

Judge Bucklew noted that the following rules had been published for comment in August 2005. Mr. Ishida reported that only one comment had been received to date.

1. Rule 11. Pleas. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by revising the advice the court provides to the defendant during the plea colloquy to reflect the advisory nature of the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by: (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not previously identified; and (3) requiring the court to enter judgment on a special form prescribed by the Judicial Conference.

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B) and specifying that the sentencing guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies 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, or by electronic means under Civil Rule 5(b)(2)(B), C, or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

There was a brief discussion of the rules published for public comment. Three issues were raised to which the Advisory Committee will return at the conclusion of the comment period.

Judge Jones expressed concern regarding the amendment to Rule 32--which is designed to prevent parties from being blind-sided if the court intends to make a sentencing departure not recommended in a pre-sentence submission--might be worded too narrowly. The proposed rule might be interpreted to require no notice whenever a ground has been previously identified in *any* way, even for a reason other than "for departure." Judge Bucklew said that the concern had been raised at a recent Sentencing Institute, and that the committee recognized the problem.

Judge Bucklew noted another Rule 32 issue discussed at the Sentencing Institute involving the mandated use of a national Statement of Reasons form. The proposed rule states that, following signature by the judge, "the clerk must enter it." Some judges have understood this to mean that the Statement of Reasons must be "entered" in the public court record. Historically, the Statement of Reasons has not been a public document. Judge Wolf noted, however, that the Massachusetts District Court recently voted to adopt the national Statement of Reasons form but—absent a reason to seal it—to keep it a public court document so judges would remain accountable for their decisions. Judge Bucklew stated that the amendment was not intended to change the status quo regarding the inclusion of the Statement of Reasons in the public record. The Rules Committee was simply responding to the Criminal Law Committee's request that use of the form be nationally mandated.

There was also discussion of proposed Rule 11 amendment's reference to "the court's *obligation* to calculate the applicable sentencing guideline range ... and to consider that range, [and] possible departures under the Sentencing Guidelines...." Ms. Rhodes expressed concern that this language could have an impact on the appellate case law making discretionary departure unreviewable, because the proposed rule deletes the reference to "discretion to depart" and adds the phrase "obligation to consider." Professor Beale noted that the obligation was not to depart, but simply to "consider" departing, a term that by its nature presumes judicial discretion. Judge Levi urged the committee to bear in mind that this is simply the advice given to a defendant who pleads guilty to inform the defendant about the sentencing process. It is therefore important not to make the rule too complicated.

Judge Bucklew noted that each of the proposed amendments would be reconsidered in light of these comments, as well as all of issues raised during the public comment period.

IV. SUBCOMMITTEE REPORTS

A. Rule 29. Proposed Amendment Regarding Appeal of Judgment of Acquittal.

Judge Bucklew briefly recounted the history of the proposal to amend Rule 29. She noted that the Department of Justice in Fall 2003 recommended amending the rule to require that judges defer all rulings on Rule 29 judgments until after a jury has returned a verdict. The Advisory Committee, however, after discussions at several meetings, decided not to proceed with amending the rule. In January 2005, the Standing Committee, at the urging of the Department, referred the matter back to the Advisory Committee. At its April 2005 meeting, the committee approved the concept of revising the rule to require deferral of a Rule 29 ruling unless the defendant consents to waive his or her Double Jeopardy rights and permit the government to appeal an adverse ruling by the trial court. Professor Schlueter had drafted a revised rule and committee note, but the committee had identified a number of thorny problems with the draft. Drafting a rule was then referred to a Rule 29 subcommittee comprised of Judge Bucklew, Judge Trager, Mr. Campbell, Professor King, and Ms. Rhodes.

Professor Beale explained the new draft prepared by the subcommittee. She noted that the reference in the draft to "a defendant" and "an offense," using the singular, was a deliberate acknowledgment of multiple-defendant and multi-offense cases. And as a compromise among subcommittee members, language was added to expressly permit the court to "invite" a Rule 29 motion. The former language had barred the court from doing so "on its own."

Professor Beale explained that the subcommittee had devoted most of its attention to subdivision (b). Under (b)(1), the court's ruling on a motion for a judgment of acquittal is generally reserved until after the jury verdict. Section (b)(2) spells out what a defendant must understand for the waiver to be valid. Section (b)(2)(B) requires the waiver to be made personally in open court, not simply in writing. The rule is designed to take hung-jury cases into account, to give defendants a choice as to whether to have the judge rule on an acquittal motion, and to allow the government to appeal a judgment of acquittal.

Judge Bucklew said the subcommittee had discussed at length whether, absent a waiver, a judge must defer ruling on the motion in all cases until after the jury verdict, even if a judge decides to deny the motion. She added that the subcommittee was also concerned as to what to do when a jury does not reach a verdict.

A discussion of the proposed Rule 29 draft followed.

One member asked what the rationale had been for requiring mid-trial reservation in all cases, even when the judge plans to deny the motion. Ms. Rhodes said the Department of Justice had suggested this provision out of a concern for facial neutrality. If the court can rule mid-trial only if it rules in the government's favor, the rule would appear one-sided, she argued. On a practical level, she added, the revised rule avoids having to make unnecessary waivers.

One member said that the new rule might have the effect of requiring a Rule 11 hearing in every case. Ms. Rhodes disagreed, explaining that if the defendant makes a motion without merit, the court will simply reserve decision, and the trial will proceed. The defendant remains in control of whether to waive his or her rights. Another member wondered, though, whether, as a practical matter, a waiver will be made in every case, since nearly every defense lawyer will want to make the

motion. One member responded that, as a member of the subcommittee, he had accepted the proposed rule because it in no way prevents judges from preemptively informing defendants that they will not grant the motion and advising them not to waste their time on filing it. Ms. Rhodes predicted that the rule would not significantly change current practice.

One member wondered how the colloquy would proceed between a judge and defendant, and whether, if the rule were adopted, it would be entirely accurate for a judge to tell a defendant that he or she has a right under the Double Jeopardy Clause to prevent the government from appealing a judgment of acquittal. He suggested that the language of the rule was awkward and that it would be difficult for the court or a defense lawyer to explain clearly to the defendant his or her rights.

Ms. Rhodes remarked that she thought the subcommittee's language in (I) had been clearer before being restyled. Professor Beale said that the subcommittee had discussed "bar" or "prevent" and that the Style Consultant had changed the term "bar" to "prevent."

Professor King proposed an alternative solution, namely, to re-phrase subdivision (I) in the conditional: "that the Double Jeopardy Clause would bar the government from appealing a judgment of acquittal . . . ." Another member suggested that another sentence would need to be added, explaining that unless the defendant agrees, the judge will be barred from granting the motion. Professor Beale suggested explaining the details further in the committee note. One member said he thought that, while adding clarification in the note might assist attorneys accustomed to the earlier practice, it would not help defendants. Professor Beale said that the subcommittee would grapple with making the language more helpful to a defendant in reaching a decision. Another member suggested modifying Professor King's proposal to say "that the Double Jeopardy Clause would *otherwise* prevent the government from appealing a judgment of acquittal" and to change the word "right" to "protection" in (ii).

One member asked why, if the defendant makes a Rule 29 motion and the judge believes it to be wholly without merit, the judge cannot simply deny the motion outright. Ms. Rhodes said this was not a point the Justice Department felt strongly about. She suggested that the Department had simply sought facial neutrality in the rule.

One member wanted it to be clear that the waiver is only effective if the court *grants* a Rule 29 motion. He expressed concern that line 118 of the note, which states that "the court may rule on the motion for judgment of acquittal before the verdict," could be construed to mean the court can either grant or deny. Professor Beale said the issue remained open to discussion.

One member said there are really three choices on how a court can respond to a mid-trial Rule 29 motion. It can: (a) deny the motion, (b) reserve judgment, or (c) with a waiver, grant the motion. One member emphasized again that a waiver is only effective if the court grants the motion.

Professor Beale suggested the rule could clarify that the judge has the options mid-trial either to deny the mid-trial Rule 29 motion or to proceed to trial. Thus, subdivision (b)(2) might read: "Upon the defendant's request, the court may grant the motion . . . , but only if: . . . ." This formulation might better reflect the point that a judge cannot take a waiver and then deny the motion.

Professor Beale proposed changing line 25 to read that "the court *must* deny the motion or proceed with the trial," and having line 35 read that "the court *may* grant the motion *but only after* . . . ." One member argued that the "invite the motion" language in the rule is critical because a judge who thinks that a Rule 29 motion is meritorious should be allowed to tell the parties that there is the option to stop the case and go on to an appeal. That course might avoid an unnecessary trial.

One member said the statement in lines 122-124 of the note that "[t]he waiver process is triggered only upon request of a defendant" appeared to be inconsistent with the language in the rule saying "[t]he court may invite the motion." Professor Beale said she thought the language was factually correct, since the waiver itself was entirely under the defendant's control. But concern was expressed that the wording allowed an incorrect inference. Professor Beale explained the subcommittee's concern that defendants not feel coerced to waive a constitutional right, which is similar to the policy that courts not pressure defendants to plead guilty.

Judge Bucklew sought to summarize the posture of the committee. First, the amendment ought to be revised to allow a court to deny the motion prior to verdict. Second, the word "right" should be removed, and the waiver language should be made more "user-friendly." One member added that the committee should do more than simply remove the word "right." It should spell out the options clearly.

Judge Bucklew suggested that the subcommittee consider the committee's comments and revise the draft rule. Although she had originally told the Standing Committee at the June 2005 meeting that the Advisory Committee on Criminal Rules would have a final Rule 29 amendment and note by the January 2006 meeting, the rule would not be published before August 2006. Both the Criminal Rules Committee and the Standing Committee each have one more meeting before then. Judge Levi suggested that perhaps a draft could be presented to the Standing Committee in January. Then the Advisory Committee would have the benefit of the Standing Committee's comments and could re-consider the rule and note at its April 2006 meeting. A final rule could then be presented to the Standing Committee in June. Judge Levi's proposal was approved.

B. Rule 16(a)(1)(H). Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information.

Judge Bucklew briefly summarized the history of the proposed amendment for the new members of the committee. She reported that the American College of Trial Lawyers (ACTL) had first proposed amendments to the Criminal Rules to address disclosure of exculpatory and impeaching information in March 2003. The committee had discussed the proposal at its Spring 2004 meeting, and a Brady subcommittee was appointed, chaired by Mr. Goldberg. At the subcommittee's request, the Federal Judicial Center completed a survey of local rules, administrative orders, and relevant case law in October 2004. The subcommittee then drafted an amendment to Rule 16 for consideration by the committee at its April 2005 meeting. At that meeting by a vote of 8 to 3, the committee endorsed the amendment in principle and asked the subcommittee to continue its drafting efforts.

Judge Bucklew noted that, after further consideration, the subcommittee was now proposing the following amended language:

(H) *Exculpatory or Impeaching Information.* [Except as provided in 18 U.S.C. § 3500,] upon a defendant's request, the government must make available no later than the start of trial all information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant because it tends to be either exculpatory or impeaching. [The court may order disclosure earlier, but in no instance more than 14 days before trial.]

She also noted that the Department had prepared a new memorandum opposing the proposed amendment, which was included in the committee materials.

One member requested clarification as to whether the committee was simply discussing language changes or whether, given the scope of the latest revisions, the substance of the amendment should be revisited. Judge Bucklew responded that the committee had already approved the amendment in principle at its April 2005 meeting and that its task now was to complete work on the wording. Ms. Fisher said that the Department of Justice understood that the committee had already decided that an amendment was appropriate, that disclosure was important, and that the amendment should be designed not to create serious problems. She argued, however, that the pending proposal went much further than what was originally discussed and well beyond the constitutional standard identified by Supreme Court case law. Unlike the local rules surveyed in the Federal Judicial Center report, the proposed amendment was not merely codifying *Brady*.

Judge Bucklew inquired as to the status of the Department's effort, reported previously to the committee, to amend the U.S. Attorneys' Manual to address concerns raised by the amendment's proponents. Ms. Fisher assured the committee of her personal commitment to work to codify the disclosure obligations in the manual and to include a discussion of best practices. She requested an opportunity to address that task. Mr. Goldberg, the subcommittee chair, commented that although the Department had been talking about amending the manual for more than two years, it had not yet done so. He explained the subcommittee had not attempted to codify *Brady*, but rather to craft a rule of basic fairness that would require prosecutors to provide defense counsel with all exculpatory information—whether or not the prosecutors deemed such information to be material—in a timely manner.

The committee discussed the proposed amendment to Rule 16.

One member supported the rule in principle but expressed concern that the start of trial is too late in the process for exculpatory material to be meaningful, particularly in complex cases. On behalf of the subcommittee, Mr. Goldberg reported that the change reflected a compromise on this issue.

The committee discussed the advisability of omitting a "materiality" standard for information that must be disclosed. One member argued that omitting materiality was necessary to prevent prosecutors from disclosing exculpatory or impeaching information only when they predict that it might cause reversal of a conviction on appeal. Another member supported this view, commenting that, in his long experience as both a federal prosecutor and defense attorney, it was critical that the materiality test be eliminated from the rule.

There was some discussion of how the omission of a materiality standard would affect review on appeal and habeas corpus. On appeal, the addition of a discovery obligation under Rule 16 would allow the defendant to present the failure to provide exculpatory or impeachment information as a rules violation, rather than solely a constitutional violation. As a rules violation, however, the claim would be subject to Rule 52, and accordingly the impact of the failure to disclose would still be considered. However, the government would have the burden of demonstrating that the failure had no impact, instead of requiring the defendant to demonstrate materiality. The standard of review on habeas corpus would not be affected.

The committee discussed whether the language of the rule should refer to "information" or "evidence." Judge Levi noted that the *Brady* standard was "evidence and information that might lead to evidence." He suggested using "evidence or information" in the rule and clarifying the note to say that only information that might lead to evidence is implicated. Professor Beale said she thought "information" included all "evidence." It was noted that Rule 16's current language refers to "information subject to discovery."

Following a brief recess, Judge Bucklew reported that Ms. Fisher had proposed, as an alternative to proceeding with the amendment, allowing the Department to deliver draft language to the committee before its next meeting for possible inclusion in the U.S. Attorneys' Manual. One member asked whether the proposed draft would simply require compliance with *Brady* or do something more. Another asked whether it would retain the materiality standard. Ms. Fisher said she lacked authority to commit to exact language, but while the proposed language would not include every provision in the proposed amendment, it would be more definitive regarding prosecutors' obligations and best practices. After additional discussion, Judge Bucklew stated that the committee looked forward to a proposed change in the United States Attorneys' Manual. The committee then turned its attention to the language of the proposed rule.

Judge Bartle moved that the proposed reference to "information" be retained as drafted. Another member recommended adopting the language of the civil discovery rule, FED. R. CIV. P. 26(b), *i.e.*, "reasonably calculated to lead to discovery of admissible evidence." That is a standard with which courts and practitioners are familiar, unlike "information" that "tends to be exculpatory," whose application would be less clear. The committee discussed whether the language of the civil rule could work in the criminal context. One member suggested the rule would be too broad unless its scope were limited to "admissible evidence or information that could reasonably lead to such evidence." Another noted that the rule limits "information" to "exculpatory or impeaching" information. After further discussion, the committee voted 7 to 4 in favor of the motion to use the word "information" in the proposed rule.

The committee then considered whether the bracketed language "[Except as provided in 18 U.S.C. § 3500]" should be included. One member argued that it should be left up to judges to wrestle with the inherent tension between *Jencks* and *Brady*. Ms. Rhodes said the Department took no position on whether the language should be included. Judge Jones moved to omit the bracketed language. The committee voted in favor of the motion, without objection.

Professor Beale raised the issue in the final brackets, namely, whether to prohibit a court from accelerating disclosure more than 14 days before trial. One member asked why that would be problematic in the case of impeaching information. Ms. Rhodes said that the Department felt strongly that such a provision was necessary so the government could adequately protect lay witnesses during a fixed window of time under its control.

The committee discussed whether proposed language would conflict with local court rules. One member said that his district had a local rule requiring disclosure of evidence negating guilt within 28 days of arraignment. He did not believe that a defense attorney could properly prepare a case for trial if exculpatory evidence were received less than 14 days before trial. Ms. Rhodes said she thought they were only discussing impeaching evidence, and not exculpatory. One member noted that the bracketed language covered both. Another suggested expressly limiting the bracketed sentence to impeaching evidence. One member noted that virtually every court requires disclosure of exculpatory evidence within a certain number of days after arraignment.

Ms. Rhodes noted that since between 93 and 96 percent of federal cases resulted in a plea rather than a trial, it is critical that lay witnesses be exposed only in those cases that actually proceed to trial. One member noted that impeaching information that might be used to impeach a witness or to support a suppression motion clearly should be handled differently from exculpatory evidence, because the latter is critical whether or not the case proceeds to trial.

Professor King moved that the final proposed bracketed sentence (lines 11-12) be limited to apply only to impeaching evidence. The motion was approved by voice vote, without objection.

One member expressed concern that the phrase "no later than the start of trial" could be misinterpreted as setting the day of trial as the presumptive disclosure deadline, even for exculpatory evidence, which he considered too late in the process. Local court rules, as surveyed by the Federal Justice Center, typically require disclosure of exculpatory evidence a certain number of days after indictment or arraignment. Another member said he thought the deadline should also be earlier for information relating to a motion to suppress, because receiving that information on the day of trial is also too late. Ms. Rhodes responded that prosecutors often do not come across such evidence until they are actually preparing a case for trial, often about a month before the trial date.

A member moved that the phrase "no later than the start of trial" be deleted and that each court establish a timetable according to its own local culture. The committee approved the motion without objection and decided to amend the language in the final brackets to "The court may not order disclosure of impeachment information earlier than 14 days before trial."

Judge Levi noted that Standing Committee members had been emphasizing that the fundamental purpose of the federal rules is to achieve a level of national consistency. He predicted the committee would probably have concerns about a system where criminal defendants have significantly different procedural rights that could drive outcomes depending on the district in which they are prosecuted. Another participant agreed and suggested that this type of potential discrepancy among districts could prompt the Standing Committee to launch a criminal local rules project examining all local rules relating to criminal procedures in the federal courts.

The committee considered the phrase "information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant." Specifically, the members discussed whether references to "the government" should be changed to "the attorney for the government" and whether the provisions should be expressly limited to apply only to those persons directly involved in the government's investigation of the specific case at issue. One member argued it would be unreasonable for the rule to cover information that "through due diligence could be known to the government," because doing so would require federal prosecutors to verify every statement made by one law enforcement officer with every other officer at the scene. Ms. Fisher said that the Department would favor eliminating the "due diligence" language and adhering more closely to the standard articulated in the case law, namely, that which is known to the attorney for the government and to agents of the government involved in investigating the case. Ms. Fisher moved to change the amendment to read "all information that is known to an attorney for the government or to any law enforcement agent involved in the case." The motion was approved in a voice vote without objection. It was noted that the second use of the term "government" in line 11 should then probably be changed to "they."

Professor Beale requested committee discussion of the Department's contention that the combined effect of "may" and "tends to" in the proposed amendment produces too broad and amorphous a standard. One member moved to change "may be" and "tends to be" to "is" in the phrase "has reason to believe *may be* favorable to the defendant because it *tends to be* either exculpatory or impeaching." The committee approved the motion.

Judge Bucklew suggested that the approved changes be made in the rule and the committee note and that the revised rule and note be reconsidered by the subcommittee and then the full committee at its April 2006 meeting.

The committee discussed whether "exculpatory information" should be defined further in the note. One member moved that the note clarify that if information can reasonably be considered both impeaching and exculpatory, the timing rules governing exculpatory evidence should apply. A majority of the committee voted against the motion by voice vote. Another member moved to define "exculpatory" as any evidence that would negate a defendant's guilt as to any count. The committee voted in favor of the motion, without opposition.

C. Rules 1, 12.1, 17, 32, 43.1 (Crime Victims Rights Act package of rules)

Judge Bucklew gave a brief explanation of the background. She reported that the committee had approved an amendment to Rule 32 to enhance victim rights. It had been proceeding through the rules process, but the enactment of the Crime Victims Rights Act (CVRA) by Congress had caused the Judicial Conference to ask the Supreme Court to withdraw the proposed rule. The enactment of the CVRA prompted the committee to consider developing a broader package of changes. She noted that she had appointed an ad hoc subcommittee, chaired by Judge Jones, to evaluate suggestions on how best to amend the criminal rules in light of the new legislation. The other members of the subcommittee are Judge Battaglia, Justice Edmunds, Professor King, and Ms. Rhodes. The subcommittee, she noted, had carefully reviewed a set of proposals in a lengthy article prepared by Judge Paul Cassell.

Judge Jones reported that the subcommittee had reached two major decisions early on. First, they decided they should be somewhat conservative in their approach and not create rights beyond those provided by the Act. Second, the subcommittee decided to place most of the amendments in one major rule, Rule 43.1, rather than scatter the provisions throughout the rules. In addition to new Rule 43.1, the subcommittee was also proposing amendments to the following rules: Rule 1, Rule 12.1, Rule 17, Rule 18, and Rule 32.

Judge Jones explained that the subcommittee had decided to define "victim" in Rule 1 by referencing the statute itself. He added that an amendment to Rule 12.1 would still require government disclosure of the identity of a victim who is also a witness on the issue of alibi, but the victim's address and telephone number would be disclosed only if the court is satisfied that they are needed. Professor Beale reported that several non-substantive numbering changes to Rule 12.1 had been proposed by the Style Consultant after her memorandum of September 19, 2005.

Judge Jones described the proposed change to Rule 17 that would prohibit subpoenas for "personal or confidential information about a crime victim" absent a court order. The court would have the discretion to require that the victim be notified and given an opportunity to move to quash. There was a discussion about whether such a motion would be brought by the government or whether the victim would have to retain counsel. Judge Jones said he thought the government would have standing to represent the victim. Professor Beale noted that the rule does not address exactly what information the government needs to provide victims. Judge Jones said one option would be to place the bracketed material in the proposed rule in the note, given concerns over premature disclosure of the government's theory of the case and work product. Professor Beale noted that the rule says only that the court "may" require, letting the court decide whether to give notice and, if so, what such notice should include. Judge Jones explained that requiring notice in all cases would seem inappropriate in cases involving, for instance, national fraud, where there are balancing factors the court should consider.

Regarding Rule 32, Judge Jones explained the several changes. First, the definition was deleted as no longer applicable. The bracketed phrase "victims [of the crime]" was suggested for subdivision (d) to make clear that it only concerned victims of the crime in question, not victims of other crimes. Professor Beale stated that words such as "verified" and "nonargumentative style" had been deleted to make the wording of the rule more neutral. Judge Jones noted that language about the victim's right to be heard had been left in the "Sentencing" section because the current rule already contained language to that effect. Professor Beale commented that the subcommittee had tried to stick as close as possible to the statutory language and the congressional compromises reflected in the Act. She explained that the phrase "reasonably heard" had come directly from the statute and that courts would have to construe exactly what it meant as situations came before them. Judge Jones noted that future experience could well reveal the need for further victim-related provisions.

Judge Jones said that proposed Rule 43.1 was the main rule setting forth victims' general rights. The subcommittee's conclusion was that this should not be simply a restatement of legal rights, but should specify what needs to be done and when. Some decisions on what and when, though, had yet to be reached. For instance, the proposed rule requires notice of "any public court proceeding involving the crime" and it is not clear whose burden it would be to provide such notice. The Justice

Department, which is working with the Administrative Office on a system, is arguably in a better position to do that, since courts often do not know who the victims are, particularly early on. Because of the collaboration between the Department and the Administrative Office on designing a notification system and because certain statutes required other agencies to provide the notice, Professor Beale recommended retaining the passive phrasing. There was further discussion on who is responsible for notifying victims under the CVRA.

One member asked why the rule omitted reference to "parole proceeding" as mentioned in 18 U.S.C. § 3771(a). Professor Beale explained that parole proceedings were outside the scope of the criminal rules, as they take place before parole boards rather than the courts.

One member questioned the practice of restating statutes in the rules. He asked whether it is necessary, for instance, to restate the Jencks Act in the rules. Judge Jones said the subcommittee believes that it is important to clarify certain procedural aspects of the Crime Victims Rights Act in the rules. Professor Beale said there seemed to be a widespread expectation that the federal rules themselves covered all major court procedures. One participant noted that courts were being discouraged from restating federal rules in their local rules, because such restatements: (1) might not be accurate, and (2) might create an expectation that a procedure was less important if not restated in the local rules. Those same considerations might apply to restating federal statutes in federal rules. Professor Beale noted that certain victim rights had existed prior to the legislation, but had been buried in Title 42. The Act had raised the profile of victim rights, and there was a feeling that they should be accorded similar prominence in the rules.

One member asked about the phrase "[district] court" in subdivision (a)(3). Professor Beale said there was a desire to make clear that the rule does not apply, for instance, to a sentence-related hearing in the court of appeals. There was a discussion of whether these rights apply to a civil habeas corpus hearing. One member wondered whether the rules should make it clear that these rights do not apply to oral arguments before a court of appeals or in a civil forfeiture proceeding. Judge Jones responded that was precisely why some had suggested including the bracketed word "district." Professor Beale noted, though, that while victims have no right to be heard in an oral argument, they probably do have the right to be notified that the oral argument is taking place. Although the rule recognizes the right to notice in "any public court proceeding," it restricts the right to be heard to proceedings "involving release, plea, or sentencing involving the crime."

Professor Beale asked whether there was committee support for changing (a)(2) and (a)(3) and the Style Consultant's suggestion for titling subdivision (a) "Rights of Victims – In general." There was no objection to this suggestion.

Judge Levi expressed concern over the final phrase in Rule 43(1)(b)(3), which gives a victim the right to assert rights "if no prosecution is underway, in the court in the district in which the crime occurred." Judge Jones said the Crime Victims Rights Act affords victims certain rights even in the absence of a case. Judge Levi noted, however, that the criminal rules only apply to proceedings in filed cases. Judge Jones explained that the subcommittee had decided to include it because there might be a pre-prosecution proceeding of some sort to which the provision might apply. There was discussion as to whether a grand jury investigation might qualify as such. Professor Beale said that,

while the Act might give victims certain rights, such as being treated respectfully, Judge Levi was probably correct that the rights covered by the criminal rules could only be asserted with respect to a case being prosecuted. After further discussion, Judge Jones said the phrase would be deleted, as Judge Levi had suggested.

Several language change suggestions were discussed. One participant asked whether the subcommittee had considered excluding the criminal defendant for all purposes from the definition of victim. There was discussion over whether a victim accused of the crime or a victim co-defendant would be included. Professor Beale said she thought that a contradiction existed in the statute. Concern was also expressed about the numerous references to "rights" in the context of federal rules. One member suggested changing the beginning of Rule 43.1(b)(4)(A) to "the victim has asked to be heard." Another suggested that the reference to "right under this rule" in Rule 43.1(b)(4) should be changed to "right under these rules," because a few victim rights had been placed in rules other than Rule 43.1. Professor King expressed concern that such broad language might implicate other criminal rules that arguably include "rights" affecting victims—e.g., speedy trial, open trial, sequestration—which, if denied, might indeed "provide grounds for a new trial." It was suggested that the committee wait to see if others expressed this concern during the public comment period. Another member urged retention of the bracketed language "[which may be granted ex parte]" in Rule 17 (p. 6, line 10). There was also discussion about how the definition of "victim" in Rule 1(b)(11) and the note should be worded to exclude someone accused of the crime, so as to prevent a defendant from claiming to be a victim and trying to claim victim rights.

Returning to Rule 32, a participant suggested that the proposed addition to Rule 32(d)(2)(B) read "any financial" instead of "the financial" (line 29), and "any victims" instead of "victims" (line 30). He also recommended against including the bracketed phrase "[of the crime]" (line 31), because the definition of "victim" has already been limited to the relevant crime in Rule 1(b)(11). Several members voiced support for such changes. The participant also suggested replacing one of the two instances of the word "involving" in Rule 43.1(a)(3), possibly with "concerning."

There was a discussion whether deleting subdivision (a) from Rule 32 would require renumbering the remaining subdivisions of that rule or whether it should simply be "reserved." Support for the latter was expressed. Professor Schlueter suggested as an alternative that Rule 32(a) be revised to state: "The term 'victim' is defined in Rule 1."

Judge Bucklew set forth two options on how to proceed: (1) the subcommittee could make the changes just discussed and place the rule back on the next meeting's agenda; or (2) the changes could be circulated to the subcommittee and the committee could send a revised version to the Standing Committee with a recommendation to publish with the changes just discussed along with those proposed by the Style Consultant. Judge Jones moved that the latter option be pursued. The motion carried without objection.

V. PENDING RULES PROJECTS

Status Report on the Rules Time Computation Project

Judge Mark Kravitz, chair of the Standing Committee's Time-Computation Subcommittee, reported on the status of the Time Computation Project. The subcommittee, comprised principally of practicing lawyers, is focusing first on how time is computed (e.g., not counting weekends when a period is shorter than 11 days). Professor Patrick J. Schiltz, who serves as the subcommittee's reporter, had prepared a memorandum on the topic, which had been circulated to the reporters of the Standing Committee and the advisory committees. The subcommittee met and discussed adopting a "days are days" principle. They also discussed the "three-day rule" and instances of court inaccessibility in an electronic age (e.g., court servers down but courts up, or servers up but courts closed).

Judge Kravitz said that the subcommittee would try to craft a template that could be used across the rules, as recently done with the privacy rules. He hoped the time-computation principles would be considered by the Standing Committee in January 2006. The advisory committees would then be asked to comment in Spring 2006. If the Standing Committee adopted the proposed principles at its mid-2006 meeting, they would be placed on hold. Each advisory committee would be asked to consider "translating" deadlines determined under the old rules into new deadlines calculated under new time-computation rules. The subcommittee would serve only as a clearinghouse for evaluation of such deadlines. Deadline changes approved by the advisory committees would then be collectively evaluated by the Standing Committee in 2007. The public would be presented with both the revised time computation standards and the deadline changes at the same time.

One member advocated adopting a simpler, "multiple of seven" deadline system. Judge Kravitz said he thought the subcommittee might eventually recommend that approach, but that it was up to each advisory committee to decide. Another member wondered whether the three-day rule should be eliminated. Judge Kravitz said it might not, because of concerns that changing the rule might provide unwelcome incentives to use certain forms of service.

VI. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Rules 4 and 5, Professor Malone's Proposal

Judge Bucklew invited the committee's consideration of the proposal by Professor Linda Malone, Marshall-Wythe Professor and Director of Human Rights and National Security Law at William & Mary School of Law that Rules 4 and 5 be amended to provide that foreign citizens be advised of their right to contact the consulate of their country whenever they are either served with an arrest warrant or arraigned, in accordance with Article 36 of the Vienna Convention. The committee had tabled the proposal at its April meeting, given that a case examining the enforceability of the Vienna Convention was then pending before the Supreme Court. The Court later dismissed certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088 (May 23, 2005). A habeas corpus petition was then filed in a Texas court. The case is still pending.

Mr. Elston stated that the Department of Justice already has internal policies in place advising U.S. attorney's offices of how to proceed and making notification mandatory for defendants from certain countries. Although there are occasional mistakes and omissions, the Department believes that there is no problem that requires a rule, at least not in the federal courts. Judge Bucklew noted that the Texas court had not yet ruled in the *Medellin* case. One member suggested that a rule might indeed be warranted, because the United States had undertaken this obligation in a treaty and yet he had never heard anyone, either in state or federal court, report that they had read a defendant "his Miranda rights and his right to contact the consulate." One member said that he did not believe that the exclusionary rule applies—or should apply—and he did not think that the committee should spend too much time considering this rule, because it would not likely be adopted.

Judge Bucklew said that her district sees a lot of foreign nationals who arrive by boat. She wondered whether agents of the Federal Bureau of Investigation are in fact notifying all of them of their rights under the Vienna Convention. The Justice Department representatives responded that, depending on the country of origin, notification is mandatory. Actually, though, detainees sometimes ask U.S. officials *not* to notify their country of origin. Occasionally, it is not known that a defendant is a foreign national. The Department expressed concern over a federal rule's potential legal ramifications. The Department does not consider such notification discoverable and does not turn it over to defense counsel. One member asked how it would be known whether notification has taken place. The Department said that it kept a record and that, during counsel's interview through a translator, the client could confirm notification. The Department said that it already had every incentive to honor this right, because many Americans travel abroad and want this right honored by foreign governments.

Following discussion, the committee voted to table the proposal indefinitely. Judge Bucklew noted that the proposed amendments could be re-visited at a later date if new developments warranted.

B. Rule 10, Waiver of Arraignment, Judge McClure's Proposal

Judge Bucklew then invited consideration of a proposal by Judge James F. McClure, Jr. that Rule 10 be amended to permit waiver of arraignment, not just waiver of a defendant's *appearance* at arraignment. Such a waiver is reportedly allowed in state court in two counties of Pennsylvania. The issue had been tabled at the Spring meeting. Judge Bucklew noted that the arraignment was a triggering event for five other criminal rules, so waiving the arraignment might prove problematic. Judge McClure had suggested that the amendment would save both money and time for the courts.

One member argued that waiving the arraignment would save little court time in southwestern states with a majority of fast-track cases where prosecutions are filed by information rather than by grand jury indictments, because defendants would still have to be present to waive Rule 7 indictment. Another member reported that, in his court, arraignments always take place on the day of trial. One member noted that arraignments represent more than pro forma hearings, because it is often the first time lawyers meet with their clients. Following discussion, the committee voted to table the proposal indefinitely.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew reminded the members that the next committee meeting was scheduled for April 3-4, 2006, in Washington, D.C.

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

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

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, ~~a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

Subdivisions (c)(3)(C) and (D). The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Changes Made After Publication and Comment

The Committee made no changes in the Rule and Committee Note as published. It considered and rejected the suggestion that the rule should refer specifically to non-certified photocopies, believing it preferable to allow the definition of reliability to be resolved at the local level. The Committee Note provides examples of the factors that would bear on reliability.

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Rule 6. The Grand Jury

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(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

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(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule

6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal ~~Federal~~, state~~State~~, state~~State~~ subdivision, Indian

tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information ~~only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly~~

~~issue~~ only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

* * * * *

(7) ***Contempt.*** A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence ~~pursuant to~~ under Rule 6, may be punished as a contempt of court.

* * * * *

COMMITTEE NOTE

Subdivision (e)(3) and (7). This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

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(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

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COMMITTEE NOTE

Subdivision (a)(5)(B)(i). Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, the means used be

"reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Changes Made After Publication and Comment

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

* * * * *

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear — as required by the terms of that person's release under 18~~

~~U.S.C. §§ 3141–3156 or by a subpoena — the person must be taken without unnecessary delay before a magistrate judge in the district of the arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Subdivision (a). Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See,*

e.g., *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Changes Made After Publication and Comment

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

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Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) ***Definitions.*** The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved

outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ — with authority in any district in which activities related to the terrorism may have occurred~~,~~ ~~may~~ has authority to issue a warrant for a person or property within or outside that district~~.~~; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ~~***Probable Cause***~~ ***In General.*** After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means. ~~appropriate means, including facsimile transmission.~~

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or

property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly

authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~

magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modifications*. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

(D) *Signing the ~~Original Warrant and the Duplicate Original~~ Warrant.* Upon determining to issue the warrant, the

magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on it ~~its face~~ the exact date and time it ~~is~~ was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or

from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

~~(3)~~(C) *Receipt.* The officer executing the warrant must: ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ leave a copy of the warrant and receipt at the place where the officer took the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose

premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished

by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) ***Delayed Notice.*** Upon the government's request, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address three issues: first, procedures for issuing tracking device warrants; second, a

provision for delaying any notice required by the rule; and third, a provision permitting a magistrate judge to use reliable electronic means to issue warrants.

Subdivision (a). Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Subdivision (b). Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(a) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into an area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract

the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g., United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Subdivision (d). Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, and has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides

that if probable cause is shown, the magistrate judge must issue the warrant. And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Subdivision (e). Rule 41(e) has been amended to permit magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those

transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Subdivision (f). Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of

tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate judge designated in the warrant, within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person, or both by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further service of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime

Control and Safe Streets Act of 1968, *as amended* by Title I of the 1986 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to delay any notice required in conjunction with the issuance of any search warrants.

Changes Made After Publication and Comment

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d), regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note.

* * * * *

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(G). Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

Changes Made After Publication and Comment

The Committee no changes to the Rule or Committee note after publication.

* * * * *

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Crime Victims Rights Act Package (Rules 1, 12.1, 17, 18, 32, and 43.1)**

DATE: **March 13, 2006**

The Standing Committee approved the following amendments at its January 2006 meeting for publication and public comment.

The Standing Committee renumbered proposed Rule 43.1, which will be published for public comment as Rule 60. The Committee felt that since the new rule was not related to existing Rule 41, it should not be designated as Rule 43.1.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

(b) **Definitions.** The following definitions apply to these rules:

* * * * *

(11) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e). A person accused of an offense is not a victim of that offense.

COMMITTEE NOTE

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e). The statute also specifies the legal representatives who may act on behalf of victims who are under the age of 18, incompetent, or deceased. It provides:

> . . . 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

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

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.

The Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(1), also provides that "[a] person accused of the crime may not obtain any form of relief under this chapter." Accordingly, the final sentence of the rule makes it clear that a person accused of an offense is not a "victim" for purposes of the Rules of Criminal Procedure. This provision would apply, for example, if the accused in a fraud case claims that he too was misled, and should also be regarded as a victim of the fraudulent scheme.

Rule 12.1. Notice of an Alibi Defense.

* * * * *

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

(A) *In general.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) ~~(A)~~ the name~~, address, and telephone number~~ of each witness and the address

and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense, and

(ii) ~~(B)~~ each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests.

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness and the address; and telephone number of each additional witness – other than a victim – if:

~~(i)~~(A) the disclosing party learns of the witness before or during trial; and

~~(2)~~**(B)** the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim Witness.*** The telephone number and address of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

COMMITTEE NOTE

Subdivisions (b) and (c). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a

manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

Rule 17. Subpoena

* * * * *

(c) Producing Documents and Objects

* * * * *

(3) ***Subpoena for Personal or Confidential Information About Victim.*** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim

so that the victim has an opportunity to move to quash or modify the subpoena.

COMMITTEE NOTE

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

The amendment seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of a subpoena ex parte, because requiring the

defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government. The court may approve or reject the subpoena ex parte, or it may provide notice to the victim, who may then move to quash. In exercising its discretion, the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

COMMITTEE NOTE

By requiring the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district, this amendment implements the victim's right to attend proceedings under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(b). If the convenience of non-party witnesses is to

be considered, the convenience of victims who will not testify should also be considered.

Rule 32. Sentencing and Judgment

(a) [Reserved.] ~~**Definitions.** The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

~~(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or~~

~~(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.~~

~~(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.~~

* * * * *

(c) Presentence Investigation.

(1) ***Required Investigation.***

* * * * *

(B) *Restitution.* If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

* * * * *

(d) Presentence Report.

* * * * *

(2) ***Additional Information.*** The presentence report must also contain the following ~~information~~:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in

imposing sentence or in correctional treatment;

(B) ~~verified~~ information~~, stated in a nonargumentative style,~~ that assesses ~~the~~ any financial, social, psychological, and medical impact on any victim ~~individual against whom the offense has been committed~~;

* * * * *

(i) Sentencing.

* * * * *

(4) ***Opportunity to Speak.***

(A) *By a Party*. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim*. Before imposing sentence, the court must address any victim of ~~a~~ the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to be reasonably heard ~~speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:~~

~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~

~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.~~

COMMITTEE NOTE

Subdivision (a). The Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

Subdivision (c)(1). This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771. The amendment employs the term "victim," which is now defined in Rule 1. The amendment also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style"

because that language does not appear in the other subdivisions of Rule 32(d)(2).

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4).

Rule 60. Victim's Rights

(a) In General.

(1) ***Notice of a Proceeding.*** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. The court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) ***Right to Be Heard.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) ***Time for Decision.*** The court must promptly decide any motion asserting a victim's rights under these rules.

(2) ***Who May Assert Rights.*** The rights of a victim under these rules may be asserted by the victim or the attorney for the government.

(3) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subdivision (a), the court must fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings.

(4) ***Where Rights May Be Asserted.*** The rights described in subdivision (a) must be asserted in the district in which a defendant is being prosecuted for the crime.

(5) ***Limitations on Relief.*** A victim may make a motion to re-open a plea or sentence only if:

(A) the victim has asked to be heard before or during the proceeding at issue and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days of the denial and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) ***No New Trial.*** In no case is a failure to afford a victim any right under these rules grounds for a new trial.

COMMITTEE NOTE

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

Subdivision (a)(1). This subdivision incorporates 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

Subdivision (a)(2). This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rules of Evidence addresses the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for "a person authorized by statute to be present." Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims' Rights Act.

Subdivision (a)(3). This subdivision incorporates 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing...."

Subdivision (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims' Rights Act, and that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.

Rule ~~60~~ 61. Title

* * * * *

COMMITTEE NOTE

The number is changed to account for new Rule 60.

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rules 11, 32, and 35 (the *Booker* rules)**

DATE: **March 11, 2006**

The Committee's package of *Booker* rules, which contains draft amendments to Rules 11, 32, and 35, was published for public comment in August 2005. The period for public comment has now closed.

Comments were received from the Federal Public and Community Defenders, the U.S. Sentencing Commission, the Bureau of Prisons, a probation officer, four district court judges, and the Judicial Conference Criminal Law Committee. In addition to specific suggestions regarding the wording of the various amendments, there were strong objections from some judges to the requirement that all courts employ the Statement of Reasons form promulgated by the Judicial Conference. Following the close of the comment period, legislation was adopted as part of the USA Patriot Act reauthorization that requires the use of a single form. This legislation may make the proposed amendment unnecessary.

The comments related to each rule are described following the rule, with my recommendations. In the case of Rule 32, I have separated the comments and my recommendations according to the subdivision of the rule.

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate** the applicable sentencing-guideline range ~~apply the~~

**The Sentencing Commission recommends that this be revised to read "determine and calculate."

~~Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

* * * * *

COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial ~~and the Fifth Amendment requirement of proof beyond a reasonable doubt~~. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

SUMMARY OF PUBLIC COMMENTS ON RULE 11

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the proposed advice to the defendant at the time of a plea misstates the effect of the *Booker* decision by "strongly indicat[ing] that the Guidelines are the primary sentencing principle," and thus not "provid[ing] meaningful or accurate information to defendants about the potential penalties they face." Instead, the court should either advise the defendant of all of the sentencing factors under 18 U.S.C. § 3553(a), or alternatively Rule 11(b)(1)(M) should be stricken.

In addition, Mr. Sands suggested the deletion from the Committee Note to Rule 11 and the other *Booker* rules of any reference to the Fifth Amendment requirement of proof beyond a reasonable doubt, which he believes was not at issue in *Booker*.

The National Association of Criminal Defense Lawyers (05-CR-20) agrees that Rule 11 must be amended in light of *Booker*, but NACDL but argues that the change "does more than is required, and thus more than is appropriate." Instead of any reference to the guidelines, departures, and other sentencing factors, the rule should revert to its pre-guideline form and merely require the court to advise the defendant of the maximum penalty, whether any penalty is mandatory, and that the actual sentence cannot be predicted or promised. No more should be attempted. The proposed language is "misleading" and it "inappropriately" singles out the guidelines range and possible departures as factors the court must consider, "plainly implying these are of greater importance" than other factors under 18 U.S.C. § 3553(a), which are treated as an "afterthought." This seems to "inappropriately take sides in a developing controversy over the role the Guidelines should and do play in a post-*Booker* sentencing

system." NACDL argues that this is substantive--not procedural--issue.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) notes that the proposed amendment "tracks the three-step approach to sentencing that the Commission believes is implicit in *Booker*," and suggests changing the word "calculate" to "determine and calculate" to "better reflect the careful and multi-faceted factual and legal determinations made by a sentencing judge before arriving at the applicable sentencing range."

RECOMMENDATION

The amendment is intended to inform a defendant who pleads guilty of the manner in which the court will determine the defendant's sentence. It captures the approach taken by most courts under *Booker*, which is also the approach recommended by the Sentencing Commission. It does not, contrary to NACDL's suggestion, "take sides" in the debate on the question whether a within-guideline sentence is presumptively reasonable. Retaining this language is preferable either deleting it or listing all of the sentencing factors under 18 U.S.C. § 3553(a). The Committee may, however, wish to adopt the phrase "determine and calculate" on line 10 as suggested by the Sentencing Commission.

The published Committee Note refers not only to the Sixth Amendment but also to the requirement of proof beyond a reasonable doubt under the Fifth Amendment. Although Justice Stevens' opinion for the majority refers repeatedly to the Fifth Amendment requirement of proof beyond a reasonable doubt, I agree with Mr. Sands' point that the majority opinion states the question presented exclusively in terms of the Sixth Amendment. Accordingly I have suggested striking the language referring to the Fifth Amendment

from this Committee Note and those accompanying the other *Booker* rules.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) ***Applying Advisory*** *the Sentencing Guidelines.*

The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

***The insertion of the word "Advisory" would conform the rule to *Booker*.

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical

impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

* * * * *

(h) Notice of ~~Possible Departure From Sentencing Guidelines~~Intent to Consider Other Sentencing Factors. Before the court may ~~depart from the~~

~~applicable sentencing range~~ rely on a ground not identified ~~for departure~~ either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non guideline sentence ~~such a departure~~. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non guideline sentence.****

* * * * *

(k) Judgment.

(1) ***In General.*** The court must use the judgment form prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's

---

****Alternative language proposed by the Sentencing Commission is discussed infra.

findings, the adjudication, and the sentence, including the statement of reasons required by 18 U.S.C. § 3553(c). If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

* * * * *

COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial ~~and the Fifth Amendment requirement of proof beyond a reasonable doubt~~. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

Subdivision (h). The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial ~~and the Fifth Amendment requirement of proof beyond a reasonable doubt~~. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a "non-guideline" sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. *Compare United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to "non-Guidelines" sentence), *with United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term "variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

Subdivision (k). The amendment is intended to standardize the collection of data on federal sentences by requiring all courts to enter their judgments, including the statement of reasons, on the forms

prescribed by the Judicial Conference of the United States. The collection of standardized data will assist the United States Sentencing Commission and Congress in their evaluation of sentencing patterns following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial ~~and the Fifth Amendment requirement of proof beyond a reasonable doubt~~. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The *Booker* opinion cast no doubt on the continuing validity of 18 U.S.C. § 3553(c), which requires the sentencing court to provide "the court's statement of reasons, together with the order of judgment and commitment" to the Sentencing Commission.

SUMMARY OF PUBLIC COMMENTS ON RULE 32 AND REPORTER'S RECOMMENDATIONS

COMMENTS RE SUBPARAGRAPH (d)

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the amendment to Rule 32(d)(2)(F) should require Probation Officers to collect all information relevant to each of the sentencing factors under 18 U.S.C. § 3553(a). He recommends that these factors be enumerated in Rule 32(d), and that Rule 32(f)(1) be amended to facilitate the collection. Finally, he recommends that the heading of subparagraph (d)(1) be amended to read "Calculating the Advisory Sentencing Guidelines."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the amendment does not go far enough in responding to *Booker*, which "commands a fundamental change ... with respect to the information the court must consider in determining the sentence, and the importance of that information." The structure of the current rule "reflects the primacy the guidelines had prior to *Booker*," and by retaining that structure the amendment "will misleadingly convey and wrongly encourage the continued primacy of the guidelines...." The rule should be revised to address individually all of the factors specified under 18 U.S.C. § 3553(a). The terminology of the rule also requires or encourages special consideration of the guidelines. Alternative terminology might include referring to a sentence outside the guideline range as an "individualized sentence."

RECOMMENDATION RE SUBPARAGRAPH (d)

The Committee determined that an open-ended obligation to gather all information potentially relevant to the sentencing factors under 18 U.S.C. § 3553(a) was unworkable. The present amendment reflects that view. As discussed in connection with the amendment to Rule 11, it also reflects the procedural approach most courts are taking in post-*Booker* sentencing.

To adapt the rule to *Booker*, however, it would be appropriate to revise the heading of subparagraph (d)(1) on line 3 to read "Applying the Advisory Sentencing Guidelines."

COMMENTS RE SUBPARAGRAPH (h)

Chief U.S. Probation Officer Tony Garoppolo (05-CR-002) reads the proposed amendment to Rule 32(h) broadly, and objects that

it "effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing; he also notes that the term "departure" is outdated in light of the *Booker* decision and suggests the use of the phrase "non-guidelines sentence."

The Honorable Stewart Dalzell (05-CR-006) reads the amendment to Rule 32(h) broadly and expresses "strong opposition" on the ground that *Booker* requires the courts to consider all of the factors under 18 U.S.C. § 3553(a) in every case. In his view the amendment would delay the consideration of these factors and require a second sentencing hearing in most cases.

Judith Sheon on behalf of the U.S. Sentencing Commission (05-CR-017) supports the goal of the amendment, but expresses concern that the proposed language "may be overly broad and not fully comport with the spirit and intent of Rule 32(h)." The Commission suggests the modification of the language to clarify that the notice requirement applies only when the court contemplates a sentence based upon a ground "not earlier identified for departing or imposing a non-guideline sentence...."

The National Association of Criminal Defense Lawyers (05-CR-020) objects that the amendment "perpetuates the primacy of the guidelines" and "wrongly limits the circumstances in which notice is required." References to "departing" and "non-guideline sentence" should be eliminated. It would be preferable to refer to "Guideline" and "individualized" sentences.

RECOMMENDATION RE SUBPARAGRAPH (h)

As drafted, the rule may be interpreted as either overly broad or too narrow. As interpreted by Judge Dalzell, for example, it would require the court to give notice in each case when it intends to rely on

a non-guideline factor. This seems to be the interpretation of Mr. Garoppolo as well. On the other hand, if the language were construed narrowly it might not require notice to be given if a ground for a departure or non-guideline sentence had been identified for some other purpose.

Given the potential for misinterpretation, the Committee should consider the alternative language proposed by the Sentencing Commission. The Commission's language is shown in italics; if it is added, the bracketed phrase would be deleted.

> **Notice of ~~Possible Departure From Sentencing Guidelines~~Intent to Consider Other Sentencing Factors.** Before the court may ~~depart from the applicable sentencing range~~ rely on a ground not identified ~~for departure~~ *for departure or a non-guidelines sentence* either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence ~~such a departure~~. The notice must specify any ground not earlier identified *for departing or imposing a non-guideline on* which the court is contemplating *imposing such a sentence* [a departure or a non-guideline sentence].

COMMENTS RE RULE 32(k)

The Honorable Harry Lee Hudspeth (05-CR-003) "object[s] to any rule" requiring all district court judges to "use a 'one size fits all' form." The "overly long and complicated judgment form" promulgated by the Judicial Conference does not meet the needs of the border districts, where all judges have devised ways to streamline the judgment process.

The Honorable John McBryde (05-CR-005) "strongly oppose[s]" the proposed amendment on the grounds that each individual judge should have the discretion to develop a form that collects the required information, rather than requiring the "demeaning" use of a standardized form.

The Honorable Stephen M. McNamee (05-CR-007) comments that the form as presently constructed is "cumbersome." He recommends allowing the courts to use either the form prescribed by the Judicial Conference "or an alternative form which provides all of the elements of sentencing and sequencing of information contained in the form prescribed by the Judicial Conference...." Failure to allow such alternatives will slow the production of judgments, and be a particular burden in busy border districts that have designed more efficient judgment programs. He notes the program in his district has been "praised by the staff of the U.S. Sentencing Commission."

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, supports the collection of consistent data on sentencing, but expresses concern that the amendment could be interpreted to require that the statement of reasons be made public.

Kathleen M. Kenney on behalf of the Federal Bureau of Prisons (05-CR-013) expresses the concern that no amendments result in the Statement of Reasons portion of the criminal judgment becoming publicly available.

Judith Sheon on behalf of the U.S. Sentencing Commission (05-CR-017) supports the amendment and expresses the Commission's appreciation of the efforts to assist its data collection.

The National Association of Criminal Defense Lawyers (05-CR-020) states that the judgment form and SOR should not "use or

make reference to terms such as 'guideline sentence' or 'non-guideline sentence'" because those terms impede the development of post-*Booker* law.

The Judicial Conference Committee on Criminal Law reviewed the latest version of the Statement of Reasons (SOR) form approved by the Executive Committee of the Judicial Conference; it recommends that Rule 32(k) mandate the use of the SOR form, and that the SOR form remain confidential.

RECOMMENDATION RE SUBPARAGRAPH (k)

Despite the resistance from individual judges, the Judicial Conference and the Criminal Law Committee strongly support the use of a single SOR form in order to permit easy collection and analysis of sentencing data. That amended rule implements that policy determination.

After the close of the publication and comment period Congressional action settled the policy issue in favor of requiring a uniform SOR form. In § 735 of the USA Patriot Improvement and Reauthorization Act, Congress amended 28 U.S.C. § 994(w) to require that the chief judge of each district provide the Sentencing Commission with an explanation of each sentence including "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission."

The legislative requirement does raise the issue whether the rules need to require the use of the Judicial Conference form. Assuming that this remains an appropriate topic for inclusion in the rules, the amendment should be revised to eliminate any suggestion that the SOR becomes a public record. This can be accomplished by the

following language (new language in italics, and deletion of language from rule as published shown with both underline and strikeout):

> ***In General.*** The court must use the judgment form *and the statement of reasons* prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence~~, including the statement of reasons required by 18 U.S.C. § 3553(c)~~. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correcting or Reducing a Sentence

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

* * * * *

COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial ~~and the Fifth Amendment requirement of proof beyond a reasonable doubt~~. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

SUMMARY OF PUBLIC COMMENTS ON RULE 35

Judith Sheon on behalf of the U.S. Sentencing Commission (05-CR-017) recognizes that the purpose of the amendment is to delete a reference to the mandatory application of the Guidelines post *Booker*, but it believes that the amended rule "should reflect the continued requirement that courts consult and consider guidelines and policy statements before making any such sentence reduction." The Commission also notes that there is a "substantial legal question" whether the *Booker* remedial opinion is applicable in the post-sentencing context. The Commission supports an addition to the Committee Note to clarify that "the changes were not intended to enlarge the bases of what a court may consider before imposing a post-sentence reduction."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the proposed amendment is "largely right."

However, now that the guidelines are not mandatory, "it is no longer appropriate that the rule require that the motion be made by an attorney for the government." As a policy matter, a sincere effort at cooperation may be "powerful evidence of rehabilitation" that should be considered under 18 U.S.C. § 3553(a) even in the absence of a government motion.

RECOMMENDATION

As NACDL recognizes, the language in Rule 35 requiring a government motion was adopted by Congress in the Sentencing Reform Act. Assuming arguendo that the Committee has the authority to delete this requirement under the Rules Enabling Act and that it would favor deletion as a matter of policy in the wake of *Booker*, such a change would present significant issues not raised by the publication of the current amendment. Accordingly, it would not be appropriate to adopt that approach in the current amendment.

In light of the question of the applicability of *Booker's* analysis to the post-sentencing context, the Committee may wish to consider adding the following statement at the end of the Committee Note.

> The amendment is not intended to alter the factors a court may consider before imposing a post-sentence reduction.

This language is not intended to foreclose the kinds of substantive arguments made by NACDL, but only to indicate that by amending the rule the Committee takes no position on the scope of the court's authority to reduce a sentence under Rule 35.

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 45**

DATE: **March 12, 2006**

The amendment to Rule 45(c) was published and the comment period has concluded. Only one comment, noted below, was received.

The National Association of Criminal Defense Lawyers (05-CR-020) thanks the Committee for the clarification of a rule that had "occasionally vexed and confused the most dedicated practitioner."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may ~~to~~ act within a specified period after ~~a notice or a paper has been served on that party~~ service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~.

COMMITTEE NOTE

Subdivision (c). Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added

after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

2005 CRIMINAL RULES COMMENTS CHART

05-CR	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP
05-CR-001	Bruce Berg	9/22	49.1	9/26
05-CR-002	Tony Garoppolo	10/27	32(h)	10/31
05-CR-003	Hon Harry L. Hudspeth	11/07	32(k)	11/7
05-CR-004 05-CV-006 05-BK-002	Jack E. Horsley, J.D.	11/07	Preliminary Draft	11/08
05-CR-005	Hon. John McBryde	11/16	32(k)	11/22
05-CR-006	Hon. Stewart Dalzell	11/21	32(h)	11/22
05-CR-007	Hon. Stephen M. McNamee	12/7	35(k)	12/7
05-CR-008 05-AP-001 05-BK-003 **Testify 1/6/06 AZ**	Shay D. Stautz on behalf of NAPBS (National Association of Professional Background Screeners)	12/8	49.1 **Testimony Attached**	12/12
05-CR-009 **Testify 1/6/06 AZ**	Jon M. Sands, on behalf of the Federal Public and Community Defenders	12/7	Rules 11, 32, and 35 **Testimony Attached**	12/12
05-CR-010	Mark J. Golden on behalf of National Court Reporters Association	2/8	49.1	2/15
05-CR-011 05-AP-002 05-BK-006 05-CV-025	Hon. John R. Tunheim on behalf of CACM Committee	2/8	AP 25, BK 9037, CV 5.2, CR 49.1	2/15
05-CR-012 05-AP-007 05-BK-015 05-CV-034	Hon. William G. Young	2/6	CR 49.1, CV 5.2	2/15
05-CR-013	Kathleen M. Kenney	2/6	32	2/15
05-CR-014 05-AP-003 05-BK-008 05-CV-027	Peter A. Winn	2/15	AP 25, BK 9037, CV 5.2, CR 49.1	2/15
05-CR-015 05-AP-004 05-CV-029 05-BK-010	Gregory A. Beck on behalf of Public Citizen Litigation Group	2/15	AP 25, BK 9037, CV 5.2, CR 49.1	2/15

05-CR-016 05-AP-005 05-CV-030 05-BK-012	Chris Jay Hoofnagle on behalf of the Electronic Privacy Information Center	2/15	AP 25, BK 9037, CV 5.2, CR 49.1	2/15
05-CR-017	Judith W. Sheon on behalf of the U.S. Sentencing Commission	2/15	11, 32, 35	2/15
05-CR-018 05-CV-031	Peter D. Keisler on behalf of the U.S. Department of Justice	2/15	CV 5.2, CR 49.1	2/15
05-CR-019 05-BK-013 05-CV-032	The Reporters Committee for Freedom of the Press	2/15	BK 9037, CV 5.2, CR 49.1	2/15
05-CR-020	National Association of Criminal Defense Lawyers	2/17	AP 25, CV 5.2, CR 11, 32, 35, 45, & 49.1	

"Bruce Berg"
<bruce.berg@bergconsultinggroup.com>
09/22/2005 01:26 PM

To <rules_comments@ao.uscourts.gov>
cc
bcc
Subject Criminal Records redaction of personal identifiers.

This in reference to criminal records: The Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files published in March 2004 states in part that "parties shall refrain from including, or shall partially redact where inclusion is necessary.... **Dates of birth.** If an individual's date of birth must be included, only the year should be used."

This 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).

I represent the Pre-Employment screening industry. All companies that do these background checks are considered Consumer Reporting Agencies under the Federal Fair Credit Reporting Act. This Act requires that the potential employer obtain a signed release from the applicant before any background check is accomplished and then must report back to the consumer (applicant) any information obtained that may be adverse and to then report again to the consumer if adverse action was actually taken based on this information.

If a criminal record search is done on PACER and the system returns a criminal record, we see what the charges were and the disposition/sentencing, but before this is reported to the employer, the record must somehow be confirmed that this is the correct person (Date of Birth or SSN). This is why this information should be in the record. If it is judged by USCourts that this information should not be published on the internet, then it should be available for confirmation by either a phone call where a court clerk can confirm the DOB or by special access to companies in our industry that are certified by our National Association of Professional Background Screeners (www.NAPBS.com) so they can do this confirmation for their clients.

Why should we be more protective of the "rights" of the convicted criminal than we are the rights of those who do not break the law and have learned it is important to background check their prospective employees for the protection of their customers, suppliers and other employees? Why should my reputation be tarnished because someone else with my name has a criminal record and it cannot easily be determined that this criminal record does not belong to me?

Several state and local courts who have redacted the DOB from their websites have thought this through and have changed their policy back and do publish the entire record or only redact limited parts of the SSN or DOB.

Bruce Berg, President
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05-CR- 002 October 19, 2005

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Eastern District of New York

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Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
Washington, D.C. 20544

Re: Comments on Proposed Rule 32(h) of the Federal Rules of Criminal Procedure

Dear Secretary:

Regarding proposed Rule 32(h), I note that the title of the proposed rule, "Notice of Intent to Consider Other Sentencing Factors" is in conflict with both 18 USC 3553(a) and *Booker*. The proposed rule requires a judge to give notice if he or she is contemplating imposing a sentence that is a departure within the guideline system or a non-guideline sentence. This proposal effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing, but neither Section 3553(a) or *Booker* give the guidelines such primacy. Rather, *Booker* reiterates Section 3553(a)'s statement that the guidelines are one of seven factors that the judge is required to consider prior to imposing sentence. None of the seven factors at Section 3553(a) is statutorily, or via *Booker,* granted primacy.

Further, the title of the proposed rule is very misleading. It provides for the court to give notice that it is going to consider non-guideline factors for a pending sentence, but Section 3553(a) *mandates* that the Court consider at least six factors other than the sentencing guidelines in every case.

I also note that the term "departure" is outdated. Booker *excised* 18 USC 3553(b) in its entirety. That was the section that made the guidelines compulsory, but it also granted the court departure power. There is now no statutory departure power, as Section 3553(b) is no longer operative. One does not "depart" from something that is advisory, i.e., the guideline range after *Booker*. I note that *Crosby* in the Second Circuit recognizes this when it suggests the use of the term "non-guidelines sentence" instead of "departure".

Very truly yours,

Tony Garoppolo
Chief U.S. Probation Officer

P.S. I am also the author of *The Sentencing Reform Act, A Guide for Defense Counsel*, which has been published in three editions by the Federal Bar Council

HARRY LEE HUDSPETH
Senior Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
903 SAN JACINTO BLVD., SUITE 440
AUSTIN, TEXAS 78701

05-CR- 003

November 2, 2005

Mr. Peter G. MaCabe, Secretary
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed amendment to Rule 32(k), Fed. R. Crim. P.

Dear Peter:

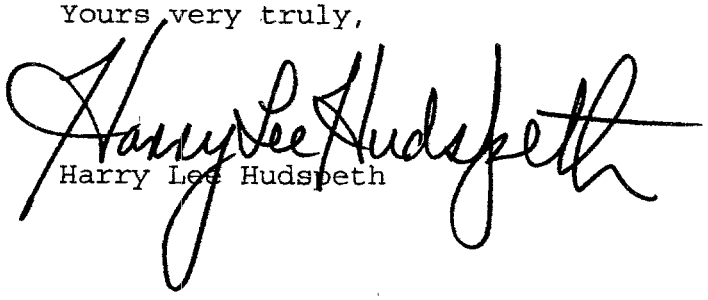
I appreciate the opportunity to comment on the Preliminary Draft of Proposed Amendments to the Criminal Rules. My comment is directed to the proposed amendment to Rule 32(k), Federal Rules of Criminal Procedure, which purports to require us to use a specific form of judgment in all criminal cases. This is a bad idea.

As you know, all of our border Districts are inundated with criminal cases (mostly drug related), and our judges generate a huge volume of criminal judgments. All of us have designed ways to make our judgment process more streamlined and more efficient. The overly long and complicated judgment form promulgated by the Judicial Conference / Administrative Office is not designed to meet our needs. To put it another way, a form which might be reasonable and appropriate for use in Vermont or New Hampshire may not be reasonable or appropriate in Texas, New Mexico, Arizona, or California. Therefore, I object to any rule which would require all of us to use a "one size fits all" form.

I do give the Rules Committee credit for admitting the real reason behind this proposed amendment, to-wit: to make it easier for the Sentencing Commission to compile statistics. However, in addition to disagreeing with the proposition that our judgment forms make life too difficult for the employees of the Sentencing

Commission, I would point out that the courts do not work for the Sentencing Commission. The Committee should reject the proposed amendment to Rule 32(k) because its positive aspects, if any, are outweighed by the negative aspects.

Yours very truly,



Harry Lee Hudspeth

HLH:jw

cc: Chief Judge Walter S. Smith, Jr.

William G. Putnicki, Clerk of Court

05-BK- 002

JACK E. HORSLEY, J.D.
LAWYER / AUTHOR
FELLOW AMERICAN COLLEGE OF TRIAL LAWYERS
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GENERAL, JAGD (HON. RES. [RET.])
SEE WHO'S WHO IN AMERICA AND
WHO'S WHO IN AMERICAN LAW
WHO'S WHO IN THE WORLD
CABLE: JALEY
EDITORIAL CONSULTANT
RN MAGAZINE AND
MEDICAL ECONOMICS

05-CR- 004

October 31, 2005

Peter G McCabe, Esquire
Secretary
Committee On Rules Of Practice and Procedure
of the
Judicial Conference Of The United States
Washington D C 20544

Dear Mr. McCabe:

Your letter of October 21st was thoughtful and kind and I thank you for it. It is an honor for me to be invited to participate in the excellent work of the Committee under your able handling as its Secretary.

Careful review of the August 2005 Preliminary Draft is a challenge because its contents are excellent as framed. However, I have some suggestions which it may be desired to consider. They are detailed in the enclosed summation.

Thank you for your courtesies and I extend best wishes to you and the members of your prestigious Committee.

Respectfully,

Jack E. Horsley

JACK E. HORSLEY, J. D.

JEH:bgg

SUMMATION OF SUGGESTIONS ADDRESSING
THE PRELININARY DRAFT OF
PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF PROCEDURE

By Jack E.Horsley, J. D.

On page 12, it may be supported to insert the following on line 6 after the word "destroyed:

", verified udner oath"

The same insert may be well taken if placed after the word "by" on line 17.

Likewise, it may be the Committee would look with favor on inserting the same statement on line 2, page 15 next after the word "writing".

On page 17, line 31, would it be well taken to specifiy in line (5) what the word "timely"means? I suggest " * * as within ten days before the authorized time" next after the word"filed". The "ten days" may be too short a time but it comes to me it is possible "timely" may be too lacking in specificity.

I look with favor upon pages 17 through 33 but it may be

you and the Committee might share my feeling that 100 days as stated in line 28 might be insuffient. I suggest perhaps 150 days would he a better time for the limitation of time expressed on line 28.

Passing to page 38, might it not be better to add paragraph (5) betwen lines 13 and 14 to state this addressing public employees: "The employee number if the person is a state or federal employee". It maybe the person involved would be such an employee and recording this should be something which would properly be within the ambit of the information required.

It may be the same information would be something to be inserted as (5) between 9 and 10 on page 45 if the Committee favors it as an insert be [illegible] these Moreover , the same material may be favorably looked upon as an insert between lines 13 and 14, page 150.

I read the substance of the current forms, pages 67 to 131. I look favorably upon these materials and have no suggestions for additional inclusions or modifications.

-2-

Furthermore,review of pages 132 through 141 evokes nothing about which I would have any recommendations but on page 142 something does occur to me. Is it not possible that "reasonable" at the close of line 48 may be inadequate to set the time intended? True, it gives a generous time aspect but might it not be better to be specific? If you and the Committee concur in my feeling perhaps this could be inserted immediately after "notice" on line 49", after deleting "reasonable" on line 48: "not less than 21 days prior to the prehearing and submission.

Passing to page 150, please refer to my suggestion about inserting (5) between lines 10 and 11 on page 45 and if the Committee and you favor the suggestion addressing page 45, the same suggestion is made with respect to an insert between lines 13 and 14 on page 150.

Careul study of all parts of this Preliminary Draft produces no other remarks except to speak favorably with respect to the Committee's superior work product.

-3-

United States District Court
Northern District of Texas

Chambers of
Judge John McBryde

501 W. 10th Street, Rm. 401
Fort Worth, Texas 76102
(817) 850-6650
Fax (817) 850-6660

November 7, 2005

05-CR-005

Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Please accept this as my comment on the proposed addition of the language "[t]he court must use the judgment form prescribed by the Judicial Conference of the United States" to Rule 32(k) of the Federal Rules of Criminal Procedure.

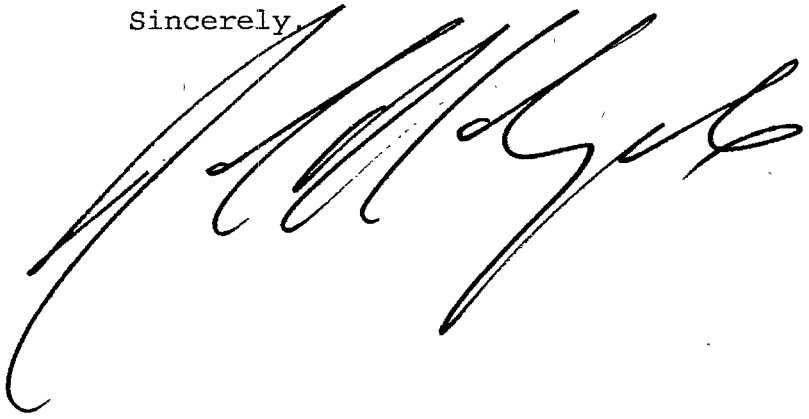
The Committee Note says that "[t]he amendment is intended to standardize the collection of data on federal sentences by requiring all courts to enter their judgments, including the statement of reasons, on forms prescribed by the Judicial Conference of the United States." There are few things that would be more demeaning of the members of the federal judiciary than a rule requiring judges to use a standardized form of judgment in connection with any matter so that an agency or administrative body might be more readily able to extract desired information from the document. If such a rule were to be adopted as to judgments signed by judges in criminal cases, similar rules could as logically be adopted in other situations whenever some agency or administrative body concludes that it would gain by having information concerning judicial actions more conveniently available.

I decided several years ago that I would prefer not to use the multiple choice, somewhat puzzling form for criminal judgments that had been recommended by someone. Instead, I worked with our computer people to create a format that makes sense to me and is consistent with my style of preparing judgments. The form I use has a statement of reasons in an attachment by which I provide the information called for by 18 U.S.C. § 3553(c). Moreover, my understanding is that our Probation Office provides a report to the United States Sentencing Commission as to each criminal judgment I sign, giving the Sentencing Commission the information it has indicated it needs. Presumably, the data to which the Committee Note refers

can be provided in the future the same way it is now being provided.

Summed up, I strongly oppose the proposed amendment to Rule 32(k), and I urge that it not be adopted. Each judge should be trusted to have good enough sense to prepare an appropriate judgment in a criminal case. We should not be told that we must use particular forms, whether multiple choice, check-the-blanks, or otherwise, for criminal judgments or any other kind of judgment or order we might sign.

Sincerely,



JM/lr

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

10613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PENNSYLVANIA 19106-1705

STEWART DALZELL
JUDGE

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FAX (215) 580-2156

November 15, 2005

05-CR-006

Honorable Susan C. Bucklew, Chair
Advisory Committee on
Federal Rules of Criminal Procedure
Administrative Office of United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Report of the Advisory Committee on Criminal Rules

Dear Judge Bucklew:

I write to express my strong opposition to the proposed amendment to Fed. R. Crim. P. 32(h) regarding notice as to "intent to consider other sentencing factors."

In the first place, the proposal fundamentally rewrites Justice Breyer's opinion for the remedial majority in Booker. That opinion not only gives the parties "notice" of "other sentencing factors," it obliges all sentencing judges in every case to consider all the § 3553(a) factors. The premise of the proposed amendment is that looking to these factors is somehow a "surprise" to the parties. To the contrary, it is nothing less than the sentencing judge's legal duty, no more, no less.

Secondly, the proposal assures that many, if not most, sentencing hearings will have to take place at least twice, with consequent costs to the parties, victims, and public, who all have a right to attend such important proceedings. In many cases, the sentencing judge does not have all the grounds to apply the § 3553(a) factors until the very end of the hearing. Indeed, the judge cannot discern the defendant's remorse, if any, until after the allocution, which must come as the last event before the imposition of sentence. As the proposal is written, the judge would, after the allocution, have to give notice of lack of remorse (with its powerful effect on the judge's appraisal of the need "to protect the public from further crimes of the defendant"), and then recess for a "reasonable" time . . . but to what end? Could any criminal law practitioner in federal court be "surprised" at a harsher sentence because the defendant remains indifferent to his crimes and victims?

Of course, we all know that many in the judiciary fear retribution from Congress if we really take Booker at its word. But surely our duty is exclusively to the law as the Supreme Court of the United States interprets it. Thus, Justice Breyer's remedial majority opinion in Booker constitutes sufficient "notice" of what sentencing judges must do.

Please withdraw this misbegotten and mischievous idea.

Respectfully submitted,

Stewart Dalzell

SD:jt

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
Sandra Day O'Connor United States Courthouse
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Stephen M. McNamee
Chief United States District Judge

Telephone: (602) 322-7555
Fax: (602) 322-7509

December 1, 2005

05-CR-007

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
OJP-RCSO
Thurgood Marshall Federal Judiciary Building
Suite 4-170
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Revision to Rule 35(k), "Proposed Amendment Regarding Use of Judgment Form Prescribed by Judicial Conference"

Dear Mr. McCabe:

I write to offer comments regarding the proposed change to Rule 35(k) of the Rules of Criminal Procedure. The proposal requires the Court to enter judgment using the form prescribed by the Judicial Conference because it will facilitate the collection of useful and accurate sentencing information by the U.S. Sentencing Commission. On the surface, such a proposal appears appropriate because it is important that the Commission is able to consistently identify and record all of the elements of the sentencing process. However, what the proposal ignores is the significant impact on a court's current automated procedures to produce the judgment. In the spirit of collegiality, I recommend an amendment to this proposal which would likely result in wider acceptance and better compliance with this rule change, if adopted.

The current judgment form, which I understand is in the process of revision, is extensive and covers every possible element and option for a criminal sentence, including the Statement of Reasons (SOR). However, the manner in which the form is electronically constructed is cumbersome and will slow the work of staff who produce the judgment. In short, while the judgment form is comprehensive, it is inefficient. The proposed judgment form is a series of individual forms through which the user must scroll, whether or not each page is necessary for the sentence. Forced use of this automation program as presently constructed will slow down the production of the judgment in each case. For a busy border court – such as Arizona, where more than 8,000 defendants are sentenced annually – this would substantially delay the processing of judgments and consuming additional precious staff resources.

The judgment program currently in use in this district addresses all elements and options in a criminal sentence. Identifying data regarding the defendant, assigned judge, docket number, etc., are fed directly from a database in order to avoid duplication of data entry. Our Statement of Reasons program is an automated version of the current Statement of Reasons form approved by the AO and the U.S. Sentencing Commission; however, rather than producing the document with all possible elements listed, we have automated the same data to a "pick list" format so following sentencing, only the element(s) of each section of the SOR that apply appear on the final product. Our program is clear, concise, easily readable, and has been praised by staff of the U.S. Sentencing Commission. With this information in mind, I offer an alternative revision to the proposed amendment to Rule 35(k), which would accomplish the same goal but not necessarily interfere with internal efficiencies within many courts.

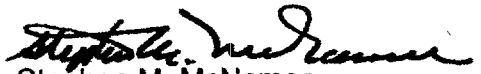
Instead of mandating courts use the judgment prescribed by the Judicial Conference, the rule could require *the courts to enter judgment using the form prescribed by the Judicial Conference, or an alternative form which provides all of the elements of sentencing and sequencing of information contained in the form prescribed by the Judicial Conference, as approved by the Administrative Office.* Using this approach, courts which provide all required data in the judgment to the Sentencing Commission in an easily identifiable format could continue to do so. The determination as to whether a local judgment program includes all of the required sentencing elements would not be within the purview of the local court; rather, the approval would rest with the Administrative Office. Accordingly, the Sentencing Commission could be assured of receipt of necessary data, presented in a consistent and predictable fashion, which would facilitate ease of collection and recordation by that office.

With this revision, courts would continue to operate with integrated automated programs which often populate data fields in the judgment. Otherwise, if forced to use the program created by the AO, courts would be running their integrated program for the production of documents and simultaneously the AO judgment program, which would run independently. Completion would be more time-consuming and require duplication of data entry at the local level.

Finally, there is another compelling reason for a simple and more efficient judgment form: reducing the time for prisoner designation by the Bureau of Prisons. For some time, the District of Arizona has been involved with the Department of Justice Office of the Detention Trustee in a pilot program to transmit documents electronically, thus reducing the time for designation by the Bureau of Prisons. This lends a material benefit to the U.S. Marshals Service by clearing bed space in the detention facilities quickly. It also streamlines administrative procedures for the Bureau of Prisons. The adoption of a process that would reduce productivity and add delay would undercut the tremendous benefits of the pilot project, which is being adopted as a national program.

Thank you for the opportunity to provide comments regarding the proposed amendments to the Federal Rules. If the committee would like additional information, please do not hesitate to contact me.

Sincerely,



Stephen M. McNamee
Chief United States District Judge

SMM/sp
cc: Honorable Ricardo H. Hinojosa, Chair, United States Sentencing Commission
Honorable Paul G. Cassell, Chair, Committee on Criminal Law
Ms. Stacia A. Hylton, Federal Detention Trustee

COLLINS
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Integrity and Competence in Government Relations

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05-CR- 008

05-BK- 003

05-AP- 001

December 8, 2005

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

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

--------DRAFT--------DRAFT--------DRAFT--------

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
January 9, 2006

I appreciate the opportunity to provide testimony to you today on behalf of the National Association of Professional Background Screeners (NAPBS), an association of nearly 500 firms nationwide who provide essential background screening services for employers and landlords across the nation. On their behalf, I would like to address 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 Conference's initiatives to increase the privacy protections of the nation's citizens. However, some of these proposed changes will severely affect the ability of background screeners to conduct their essential services, and we believe a slight change to the proposed rules can maintain the increased privacy protection to citizens while maintaining background screeners' ability to perform their services, which are so important for safety in the workplace and in the renting industry.

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 or 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, they are compelled to investigate the backgrounds of those they 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 applicants who are screened have criminal records. That 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 these kinds of background searches – 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 such 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 being increasingly 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 rule change of 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. 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 unwittingly make the public more vulnerable to criminals.

The removal of key identifiers from federal criminal court records is particularly disconcerting for two reasons: 1.) Those convicted in federal courts are often the most serious offenders. 2.) State courts often look to federal courts as a model. If federal courts fail to include adequate identifier information, state court systems are likely to follow suit.

It is also important to note that 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. We see no evidence to suggest a rule change stripping date of birth, while well-intentioned, will serve to protect either the individuals involved or the public at large.

However, for all the reasons I mentioned, failure to include full dates of birth in the filings and records for adults charged in criminal proceedings will almost certainly harm job seekers, employers and the public. In the face of this, the Committee must consider modifying Rule 49.1 to allow for full dates of birth.

On behalf of every member of NAPBS, 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.

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.

FEDERAL PUBLIC DEFENDER
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05-CR- 009

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December 7, 2005

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 Secretary McCabe:

I would like to testify at the hearing on January 9, 2006 on the proposed amendments to the Federal Rules of Criminal Procedure on behalf of the nearly one hundred Federal Public and Community Defender organizations across the country.

The proposed amendments to Rules 11, 32 and 35 seek to implement the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005). In my capacity as Chair of the Federal Defender Sentencing Guidelines Committee, I have closely followed developments in the caselaw and the practical aspects of sentencing under Booker, and believe I can provide valuable insight and comments for your Committee.

Please let me know if I may testify, and if so, if you would like to receive written testimony in advance of the hearing.

Thank you for your consideration.

Very truly yours,
Jon M. Sands by ABO
JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

05-CR-009-1
Testimony

TESTIMONY OF JON SANDS
CHAIR, FEDERAL DEFENDER SENTENCING GUIDELINES COMMITTEE
BEFORE THE
ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE
JANUARY 6, 2006

I wish to thank the Advisory Committee for this opportunity to testify regarding the proposed amendments to the Federal Rules of Criminal Procedure on behalf of the Federal Public and Community Defenders. I will address the proposed changes to Rules 11, 32 and 35, which seek to implement the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005).

I. The *Booker* Opinion

The first question presented in Booker was whether the Federal Sentencing Guidelines violated the Sixth Amendment. Booker, 125 S. Ct. at 746, 747 n.1, 756. In an opinion authored by Justice Stevens, the merits majority held that they did. Id. at 746, 748-50. The Court explained that "the Guidelines as written . . . are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases. . . . The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in Blakely itself." Id. at 750 (emphasis in original).

The second question presented was, if the Guidelines do violate the Sixth Amendment, whether or to what extent the Guidelines were inapplicable as a matter of severability analysis. Id. at 747 n.1, 756. In an opinion authored by Justice Breyer, the remedial majority concluded that had Congress known that mandatory Guidelines would violate the Sixth Amendment, it would have enacted a non-mandatory system. To effectuate congressional intent, the Court "severed and excised" 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, as well as 18 U.S.C. § 3742(e), the appellate review section that assumed the Guidelines' mandatory nature, id. at 756-57, thus leaving 18 U.S.C. § 3553(a) as the governing sentencing law. Id. at 764-66.

II. Rule 11

The objective of Rule 11(b) is to ensure that a plea of guilty or *nolo contendere* is voluntary and intelligent. To that end, subsections (H) through (M) direct the court to inform the defendant of the potential penalties s/he faces.

In 1989, following enactment of the Guidelines, the rule was amended to mandate that the district court inform the defendant of its obligation to apply the Guidelines and its discretion to depart in some circumstances. The objective was not to generally describe sentencing procedure, but to inform the defendant of the existence of the Guidelines and the importance they played in sentencing, as well as the possibility of a departure. See

Fed. R. Crim. P. 11, 1989 advisory committee's note. Since the Guidelines had the force of law, this was meaningful information in addition to the statutory maximum and any applicable mandatory minimum, i.e., in all likelihood, the outer limits of the sentence would be set by the Guidelines.

After Booker's excision of section 3553(b), "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing." Booker, 125 S. Ct. at 766. The first two sentences of section 3553(a) set forth the sentencing rules that remain mandatory: The court "*shall* impose a sentence that is sufficient, but not greater than necessary" to satisfy the purposes listed in subsection (a)(2), and in determining that particular sentence, the court "*shall* consider" the list of purposes and factors listed in subsections (1) through (7).[1] See also Booker at 764-65 (directing courts to consider the statutory factors and to impose sentences that reflect the purposes of punishment).

---

[1] **(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress

The proposed amendment to Rule 11(b)(1)(M) would direct the courts to very strongly indicate that the Guidelines are the primary sentencing principle, i.e., describing court's obligation as "to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Under the sentencing framework described in the preceding paragraph and which the courts are in fact applying,[2] the Guidelines do not have the force of law. For that reason, the number of sentences both below and above the guideline range has increased after Booker.[3] The proposed amendment would not provide meaningful or accurate information to defendants about the potential penalties they face.

We offer two alternative recommendations, depending on what the Committee wishes to accomplish.

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[2] Most courts of appeal, as well as district courts too numerous to mention, have explicitly recognized that after Booker, the sentencing court must impose a sentence sufficient but not greater than necessary to achieve the goals of sentencing after considering all pertinent statutory factors. E.g., United States v. Young, 2005 WL 3508315 (7th Cir. Dec. 22, 2005); United States v. Glover, 2005 WL 3159228 **6-8 (11th Cir. Nov. 29, 2005) (Tjoflat, J., specially concurring); United States v. Neufeld, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005); United States v. Soto, 2005 WL 281178 (3d Cir. Oct. 27, 2005); United States v. Simkanin, 420 F.3d 397, 416 & n. 20 (5th Cir. 2005); United States v. Spigner, 416 F.3d 708, 711 (8th Cir. 2005); United States v. Ameline, 409 F.3d 1073, 1098 (9th Cir. 2005); United States v. McDaniel, 398 F.3d 540 (6th Cir. 2005); United States v. Crosby, 397 F.3d 103, 107-08 (2d Cir. 2005); United States v. Acosta-Luna, 2005 WL 1415565 (10th Cir. June 17, 2005). While some courts are giving the guidelines presumptive weight or a presumption of reasonableness, this is a constitutionally dangerous position, as a review of the Booker majority opinions as well as Justice Scalia's dissenting opinion makes clear. Booker, 125 S. Ct. at 794 (Scalia, J.). Even Judge Cassell, the initial proponent of giving the guideline range presumptive weight, wrote in a case applying advisory guidelines before Booker was decided: "In imposing sentences in criminal cases, the court is required by the governing statute-the Sentencing Reform Act -to 'impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act].'" United States v. Angelos, 345 F.Supp.2d 1227, 1240 (D. Utah Nov. 16, 2004).

[3] See U.S. Sentencing Commission Special Post-Booker Coding Project (prepared December 1, 2005), http://www.ussc.gov/Blakely/PostBooker_120105.pdf.

If the objective is to describe what the court is obligated to consider in sentencing the defendant between the statutory minimum and maximum, the Rule should state the following:

> **(M)** the court's obligation to impose a sentence that is sufficient, but not greater than necessary, to satisfy the need to
>
> **(i)** provide just punishment in light of the seriousness of the offense,
>
> **(ii)** promote respect for the law,
>
> **(iii)** afford adequate deterrence to the defendant and others,
>
> **(iv)** incapacitate the defendant to the extent necessary to protect the public from further crimes of the defendant, and
>
> **(v)** provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> to determine that particular sentence after considering, in addition to the purposes just described,
>
> **(vi)** the nature and circumstances of the offense,
>
> **(vii)** the history and characteristics of the defendant,
>
> **(viii)** the kinds of sentences available,
>
> **(ix)** the advisory guideline range,
>
> **(x)** possible departures and any other relevant policy statements under the Sentencing Guidelines,
>
> **(xi)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and
>
> **(xii)** the need to provide restitution to any victims of the offense.

If the objective is only to ensure that pleas are knowing and voluntary, subsection (M) should be stricken. The Committee Note should then be revised to strike the last sentence and to explain that because the Guidelines are no longer mandatory, it would not be accurate to inform the defendant of the court's obligation to "apply the Sentencing Guidelines" or its "discretion to depart from those guidelines under some circumstances." The Note should state that while the purpose of Rule 11(b) is to ensure a knowing and voluntary plea, sentencing procedures are described in Rule 32 and 18 U.S.C. § 3553(a).

III. Rule 32

Information Relevant to § 3553(a)

The proposed amendment would revise Rule 32(d)(2)(F) to require that the presentence report contain "any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a)." The Committee Note

states that the rule contemplates that a request can be made by the court as a whole in all or a class of cases, or by an individual judge in a particular case.

We strongly object to the proposal as written. In order to save the Guidelines from unconstitutionality, the Supreme Court held that 18 U.S.C. § 3553(a) is the sentencing law. To implement that law, information made relevant by it must be included in the presentence report as a matter of course and not on a haphazard, optional basis.

We think that the concern (noted in the Memorandum dated May 17, 2005) about the difficulty Probation Officers may have in determining the scope of relevant information is unfounded. As with information relevant to guideline calculations and departures, information relevant under § 3553(a) will come to the Probation Officer's attention through the presentence interview, the Officer's own follow-up investigation, the parties' submissions, and the parties' objections. We understand that a change to Monograph 107 has been drafted that would add a section to the presentence report for information relevant under § 3553(a), which presumably provides guidance as to the scope of relevant information. The Rule, too, should provide guidance.

We recommend that Rule 32(d)(2) be amended to include a separate subsection (preferably subsection (A)) as follows:

> **(A)** any information which comes to the Probation Officer's attention through the presentence interview, the Officer's own investigation, or submissions or objections by the parties which is relevant under the statutory purposes and considerations listed in 18 U.S.C. § 3553(a), including **(i)** the nature and circumstances of the offense, **(ii)** the history and characteristics of the defendant, **(iii)** information concerning sentences actually imposed upon defendants with similar records who have been found guilty of similar conduct and factors which may have contributed to any apparent disparities among those sentences, **(iv)** losses by any victims of the offense that may be subject to restitution, **(v)** the relative seriousness of the offense, **(vi)** the need to promote respect for the law, **(vii)** information concerning the achievement and efficacy of deterrence of the defendant and of others in similar cases, **(viii)** information concerning the defendant's relative dangerousness and risk of recidivism as these factors may bear upon the need to protect the public from further crimes of the defendant, and **(ix)** any needs the defendant may have for educational or vocational training, medical care, or other correctional treatment, and information concerning the most effective manner of providing such treatment.

We believe that the statutory goals and factors should be spelled out so that their importance is understood. This is particularly important given the detailed instructions regarding the Guidelines in subsection (d)(1).

To facilitate the Probation Officer's collection of the relevant information, we recommend that Rule 32(f)(1) be amended as follows:

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to information relevant to factors under § 3553(a), such as the calculation of sentencing guideline ranges and the identification of pertinent policy statements, and other material information contained in or omitted from the report.

Deleted: material information,

We also recommend that the heading of subsection (d)(1) be changed from "Applying the Sentencing Guidelines," to "Calculating the Advisory Sentencing Guidelines." This would better conform to Booker.

Judgment/Statement of Reasons

Rule 32(k) would be amended to require the courts to use the judgment form prescribed by the Judicial Conference (which has been modified after Booker to include a detailed Statement of Reasons), and to specifically require the statement of reasons required by 18 U.S.C. § 3553(c) to be included on that form, to be entered in the public record.

Perhaps this was inadvertent, as the Committee Note to proposed Rule 49.1 states that the statement of reasons shall not be made available to the public at the courthouse or via remote electronic access. In any event, because of the safety and privacy issues this would raise for defendants and others, as noted in Rule 32(d)(3), the Statement of Reasons should not be a public document. Nor would a provision for sealing on a case by case basis be appropriate, as it would flag cooperators, would impose a burden on the courts and counsel, and may not be effectively carried out because of inattention or mistake.

We wholly support accurate and consistent data collection by the Sentencing Commission through the use of a standardized form. However, we recommend that the Committee make clear in Rule 32(k) that the Statement of Reasons is not to be made part of the public record. As always, it would still go to the Sentencing Commission, the Probation Office, and to the Bureau of Prisons if a term of imprisonment is imposed. See 18 U.S.C. § 3553(c).

IV. Committee Notes to Rules 11, 32 and 35

Our final recommendation is to correct a misstatement in a sentence that appears in the Committee Notes to Rules 11, 32 and 35, which is that Booker held that the provision of the federal sentencing statute that made the Guidelines mandatory violates "the Fifth Amendment requirement of proof beyond a reasonable doubt." The questions presented were stated solely in terms of the Sixth Amendment, Booker, 125 S. Ct. at 747 n.1, as were the holdings, id. at 746, 748-50, 756, 769. To avoid giving a misimpression that the Court addressed what standard of proof the Fifth Amendment requires, we suggest replacing that sentence with the following:

Booker held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. 2004), violates the Sixth Amendment.

Thank you again for this opportunity to provide our views on these important proposals.

05-CV- 028

05-BK- 009

05-CR- 010

February 8, 2006

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
1 Columbus Cir., Ste. 4170
Washington, D.C. 20544

Dear Mr. McCabe,

On behalf of the National Court Reporters Association (NCRA), I respectfully submit the following comments regarding the proposed privacy protection rules of the Federal Rules of Civil Procedure 5.2, Criminal Procedure 49.1 and Bankruptcy 9037. We applaud the efforts of the Advisory Committees to amend the rules of practice and procedure to comply with the mandates of the E-Government Act of 2002 to address privacy and security concerns relating to the electronic filing of court documents.

NCRA shares the Advisory Committees goals to increase the privacy protections of our nation's citizens in order to ensure the security of personal data. NCRA seeks to ensure that members of the court family will not be adversely affected by these new requirements to redact information. The Committee on Court Administration and Case Management adopted a policy that requires counsel/parties to identify the personal information to be redacted and protects reporters/transcribers from responsibility for failure to redact or errors associated with redaction. Furthermore, in each of the proposed new rules, the Committee Notes expressly state that the responsibility to identify the personal information to be redacted in filings rests solely with counsel and the parties. NCRA proposes that the following language be added to the Privacy Protection Rules to ensure that this intent is codified in the rules:

> *(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.*

Thank you for your consideration of our comments.

Sincerely,

Mark J. Golden, CAE
Executive Director & CEO

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

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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.

---

[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.

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

U.S. Department of Justice

Federal Bureau of Prisons

Washington, D.C. 20534

FEB 6 2006

05-CR- 013

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Bureau of Prisons' Comments on Proposed Amendments to the Federal Rules of Practice and Procedure

Dear Mr. McCabe:

This letter responds to your invitation to provide agency comments on the proposed amendments to the Federal Rules of Practice and Procedure.

The Bureau's only concern is that no amendments to Rule 32, Fed. R. Crim. P., result in the Statement of Reasons (SOR) portion of criminal judgments become publicly available. In recent years, the Bureau successfully worked with Administrative Office of the U.S. Courts staff, and the U.S. Judicial Conference's Committee on Criminal Law, to secure the SOR from public availability. We are informed that the proposed amendments do not jeopardize that goal and, therefore, have no further comments.

I want to personally thank you for your notice and invitation to review the proposed amendments and provide comments. We appreciate the opportunity and look forward to continued communication with your office in the future.

Sincerely,

Kathleen M. Kenney
Assistant Director/General Counsel

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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.

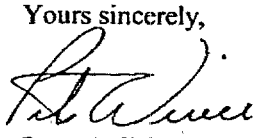
While I strongly support the attempt in the proposed rules to create an intermediate level of access, I would respectfully suggest that there may be a much simpler way to achieve it–one which takes advantage of the existing PACER technology. Instead of providing for "at the courthouse" access, the proposed 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

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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

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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).

UNITED STATES SENTENCING COMMISSION
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05-CR- 017

February 15, 2006

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

In re: Proposed Revisions to the Federal Rules of Criminal Procedure

Dear Chairman Levi and Committee Members:

The United States Sentencing Commission commends the Committee on Rules of Practice and Procedure for its work on the proposed amendments to the Federal Rules of Criminal Procedure in light of the United States Supreme Court's decisions in the companion cases *United States v. Booker* and *United States v. Fanfan*[1] (hereinafter "Booker"). The Commission respectfully submits the following comments on the proposed amendments. Overall, the Commission believes the proposed amendments are in keeping with the spirit and intent of the Sentencing Reform Act, as that Act has been modified by the remedial *Booker* opinion. With the suggestions noted below, the Commission supports the adoption of these rules.

Specific Comments

(1) Proposed Changes to Rule 11 (Pleas)

The Committee proposes to amend Rule 11(M) to read:

> in determining a sentence, the court's obligation to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);.

The proposed amendment tracks the three-step approach to sentencing that the

[1] _____ U.S. _____, 125 S.Ct. 738 (2005).

Commission believes is implicit in *Booker* and that has been more fully described by a number of appellate courts in post-*Booker* decisions.[2] We suggest changing the word "calculate" to "determine and calculate" to better reflect the careful and multi-faceted factual and legal determinations made by a sentencing judge before arriving at the applicable guideline range. The word "calculate", standing alone, suggests an overly mathematical approach to guideline application and depreciates the nuanced weighing of facts and legal judgments that a judge must employ in order to properly determine the applicable guideline range.

(2) Proposed Changes to Rule 32(h) (Notice of Possible Departures from Sentencing Guidelines)

The Commission supports the principle of fair notice before imposition of a sentence outside the applicable guideline range, whether that sentence is reached through traditional departures or post-*Booker*, 18 U.S.C. § 3553(a) variances. Rule 32(h) currently requires that a court give parties "reasonable notice" when it is contemplating a departure from the guidelines on a ground not identified in the presentence report or in a party's prehearing submission. The proposed amendment would expand the rule's coverage to require such notice also when a court is considering a "non-guideline sentence" based on its authority under 18 U.S.C. § 3553(a). The Committee defines a "non-guideline sentence" as one "not based exclusively on the guidelines".

The purpose of Rule 32(h) is to avoid unfair surprise and aid full development of the record in a case in which a court proposes to impose sentence outside the applicable guideline sentencing range based on a ground not previously noticed in the presentence documents.[3] This principle of fair notice is all the more important in view of *Booker's* authority for sentencing outside the guideline range. The Commission is concerned, however, that the proposed language may be overly broad and not fully comport with the spirit and intent of Rule 32. The Commission is concerned that, as presently drafted, the rule would allow for consideration of matters mentioned in the presentence report but not identified as grounds for departure or variance (*i.e.*, a non-guideline sentence) to then be considered for a departure or a variance (*i.e.*, a non-guideline sentence).

The Commission suggests that the language be modified to read substantially as follows:

> Notice of Intent to Consider Other Sentencing Factors. Before the court may rely on a ground not identified *for departure or a non-guidelines sentence* either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. *The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is*

[2] *See, e.g., United States v. Crosby*, 397 F.3d 107, 113 (2nd Cir. 2005); *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005); *United States v. Haack*, 403 F.3d 997 (8th Cir. 2005).

[3] *See, e.g., Burns v. United States*, 501 U.S. 129 (1991) (Rule 32 contemplates full adversary testing of the issues relevant to a Guidelines sentence and mandates that the parties be given an opportunity to comment on matters relating to the appropriate sentence).

contemplating imposing such a sentence. (emphasis added to denote text as modified per this suggestion).

(3) Proposed Changes to Rule 32(k) (Judgment)

The Committee recommends amending Rule 32(k) to state that a court "must use the judgment form prescribed by the Judicial Conference of the United States." It further states that in a judgment of conviction, the court must set forth the sentence "including the statement of reasons required by 18 U.S.C. § 3553(c)." The Commission appreciates efforts made by the Committee and the Judicial Conference to ensure that a uniform statement of reasons form is included with the courts' sentencing documentation. Use of the newly revised statement of reasons form, and inclusion of the statement of reasons form with the judgment and commitment order, will assist the Commission in its data collection and analysis efforts and ensure that Commission data remains timely, accurate, complete, and of the highest quality. We note that this proposed rules amendment appears consistent with pending legislation (Sec. 735 of H.R. 3199, Patriot Act Reauthorization).

(4) Proposed Changes to Rule 35(b)(1)(B)

Currently, Rule 35(b) permits a court to reduce a sentence for a defendant's substantial assistance based on motion of the government. That assistance must have resulted in the investigation or prosecution of another person, and the reduction must accord with the federal sentencing guidelines and accompanying policy statements. U.S.S.G. §5K1.1 sets forth a list of factors that the sentencing court should consider before granting a Rule 35(b) motion. Application notes accompanying §5K1.1 also advise courts to give "substantial weight" to the government's evaluation of the extent and value of the defendant' assistance. The proposed rule would eliminate the requirement that the sentence reduction "accords with the Sentencing Commission's guidelines and policy statements."

The Commission recognizes that the purpose of this amendment is to remove any Rules text that refers to mandatory application of the guidelines. While it may be somewhat anomalous to retain binding authority of the guidelines and policy statements in this Rule, there is a substantial legal question about whether the *Booker* remedial opinion requires this result in post-sentencing context. Because the Rule 35(b) determination involves no judicial finding of fact that would increase the sentence, it would not appear that a defendant's Sixth Amendment rights are jeopardized by, or that *Booker* requires modification of, the mandatory nature of the current rule.

This legal issue aside, the Commission is concerned that the amendment is overly broad and may result in consideration of factors other than the value of the defendant's substantial assistance or post-sentence cooperation. The Commission believes that Rule 35(b) should retain its pre-*Booker* focus on the substantial assistance offered by the defendant, as exemplified through consideration of the factors set forth in U.S.S.G. §5K1.1. We note that *Booker's* remedial opinion requires court consideration of applicable Commission policy statements.

Thus, at a minimum, the Commission believes that an amended Rule 35(b) should reflect the continued requirement that courts consult and consider the guidelines and policy statements before making any such sentence reduction. Furthermore, the Committee note accompanying the proposed amendment should clarify that the changes are not intended to enlarge the bases of what a court may consider before imposing a post-sentence reduction.

The Commission thanks the Committee for considering its comments on the proposed rules changes. The Commission appreciates the Committee's efforts and believes that overall these changes successfully incorporate *Booker* requirements into the sentencing process. The Commission looks forward to continuing to work with the Committee, the Judiciary, Congress, and other interested groups in crafting a federal sentencing system that remains fair and just.

Sincerely,

Judith W. Sheon

Judith W. Sheon
Staff Director

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

05-CV- 031

February 15, 2006

05-CR- 018

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

The Department of Justice appreciates this opportunity to comment on the proposed rules to implement the E-Government Act of 2002. The proposed rules are the result of a comprehensive and intensive effort over a period of several years, and we are grateful for the hard work that has gone into developing them. We offer a few suggestions below for your consideration.

The Department of Justice supports proposed Civil Rule 5.2, which represents a careful and thoughtful analysis of the best means of implementing the E-Government Act of 2002. In particular, the Department notes that subsections (d) through (g) provide the parties and the court with flexibility to protect the confidentiality of information not specifically addressed by the Rule. As the Department has stated in the past, we believe that the Committee should continue to monitor developments in this area to determine whether the Rule, in practice, strikes the appropriate balance between public access and privacy, or whether further amendments would provide the most effective means of ensuring the confidentiality of particular types of sensitive information, such as medical records or confidential business plans, that are not specifically addressed.

Monitoring the operation of the new Rule is also important in order to determine whether the redaction requirements of the Rule create an unexpected or undue burden on any particular type of litigation. For example, the Rule has the potential to create a significant burden in money laundering cases in which the government must trace proceeds through a complex chain of transactions involving multiple financial accounts. Based on that real-world experience, additional exemptions from the redaction requirement might be called for in the future.

The government also notes that trial exhibits not filed in the district court – and therefore not subject to the redaction requirement of Rule 5.2(a) – are with some frequency included as a

part of a joint appendix in an appellate court, where they may then be subject to a redaction requirement, depending on whether Rule 5.2(b)(4) treats those exhibits as part of the "record [that] was not subject to Rule 5.2(a) " when used in the district court. Although it would be consistent with the approach of paragraphs 5.2(b)(2), (3), and (4) for unredacted trial exhibits that are not filed in district court to be exempt from redaction when included in the appendix to the briefs filed in the court of appeals, the committee note states that redaction of such material when filed in an appellate appendix 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. We suggest that monitoring the operation of the Rule will be important to determine if there is an unwarranted or unexpected burden, mistake, or confusion that arises in connection with the redaction, upon inclusion in an appellate appendix, of trial exhibits that were not redacted because they were not filed in the district court. In the meantime, the Rule confers upon courts the authority to address and alleviate the burdens stemming from redaction discussed above, if they arise, on a case-by-case basis.

The Department recommends two changes with respect to the forfeiture exemption from the redaction requirement in the rules. First, we recommend making a clarification to the exemption language in Civil Rule 5.2 and Criminal Rule 49.1. Civil Rule 5.2(b)(1) states that the redaction requirement of Rule 5.2(a) does not apply to the following: "in a forfeiture proceeding, a financial account number that identifies the property alleged to be subject to forfeiture." Similarly, Criminal Rule 49.1(b)(1) states that the redaction requirement of Rule 49.1(a) does not apply to the following: "in a forfeiture proceeding, a financial account number or real property address that identifies the property alleged to be subject to forfeiture." For both Rules, the Department suggests moving the clause "in a forfeiture proceeding" to the end of each sentence. These corresponding changes will clarify that parties may, without a redaction requirement, raise issues bearing on particular identified assets subject to forfeiture not only in forfeiture proceedings, but also 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." Moreover, the revised criminal wording also would clarify that the exemption applies when a real property address is necessary to identify property seized from that address in a forfeiture notice.

Second, the Department recommends adding a forfeiture exemption to proposed Bankruptcy Rule 9037. Subject to various exceptions, proposed Bankruptcy Rule 9037 requires redaction of social security numbers, tax identification numbers, and other sensitive information. Unlike proposed Civil Rule 5.2 and proposed Criminal Rule 49.1, however, proposed Bankruptcy Rule 9037 presently contains no forfeiture exemption. Accordingly, the Department suggests that proposed Bankruptcy Rule 9037(b) incorporate a new subsection providing that the redaction requirements do not apply to the following:

(1) a financial account number that identifies property alleged to be subject to forfeiture in a forfeiture proceeding.

In many instances, the Department must present and explain forfeiture proceedings to the bankruptcy courts. When there are contests over whether particular assets will be forfeited or included in the bankruptcy estate, the bankruptcy rules should permit specific identification of property alleged to be forfeitable. Finally, such a bankruptcy forfeiture exemption would comport with the civil and criminal exemptions.

The Department appreciates this opportunity to comment on the Style Forms, and has no formal comments. The draft forms represent a careful and thoughtful analysis of the existing forms, and are the product of an intensive and comprehensive effort to update the forms. In our judgment, the revisions should help simplify and clarify the forms, so that they may continue to be useful in civil litigation. As the Committee is aware, the Criminal Rules and the Appellate Rules have experienced a similar restyling process, and the Federal Rules of Civil Procedure are at the final stages of such a restyling. From consultation with attorneys who have practiced under the restyled Criminal and Appellate Rules both before and after their restyling, we understand that the style changes have been positive and beneficial. The Department strongly supports the current initiative to restyle the civil forms and believes that Committee has done valuable work.

We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Peter D. Keisler
Assistant Attorney General

05-BK-013

Comments of The Reporters Committee for Freedom of the Press

05-CV-032

February 15, 2006

To: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
www.uscourts.gove/rules

05-CR-019

Re: Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Criminal Rules request for comments on proposed amendments to the federal rules and forms

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The Reporters Committee for Freedom of the Press submits these comments in response to the Request for Comments on proposed amendments to the federal rules and forms regarding proposed policies concerning privacy protection in court filings, issued by the Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Criminal Rules ("the Committees").

We appreciate the opportunity to be heard on this important issue.

General Interest of Signatory

The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee also has published a series of special reports on court secrecy, including Anonymous Juries in 2000, Gag Orders in 2001, Access to Terrorism Proceedings in 2002, Secret Dockets in 2003, and Grand Juries in 2004, and a series of reports on electronic access to court records, including Access to Electronic Records in 2003 and Electronic Access to Court Records: Ensuring Access in the Public Interest in 2002.

The Reporters Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It also produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, *The News Media and the Law*, and a biweekly newsletter, *News Media Update*.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing filings made in the federal courts.

Introduction

The Reporters Committee has a strong interest in the accessibility of *all types of information* currently available through public court records in civil, criminal, and bankruptcy cases. 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 trends. Journalists in the emerging field of computer-assisted reporting frequently use computerized court records to break stories of major public importance. To cite a few examples:

- In January 2004, *The Miami Herald* published a four-part series exposing problems in the Florida criminal justice system, including severe racial disparities and overuse of "adjudication withheld" determinations that erase convictions from people's records. The *Herald*'s reporting was based on a computer analysis of electronic court records in more than 800,000 cases. (*See* Manny Garcia & Jason Grotto, *Justice Withheld*, MIAMI HERALD, Jan. 25-28, 2004.)

- Also in January 2004, *The Denver Post* reported that, in 41 percent of Colorado's child abuse and neglect cases, including some resulting in deaths, social service agencies had missed warnings of problems. The story was based on a computer-assisted analysis of thousands of state records, including court documents. (*See* David Olinger, *The Loss of Innocents*, DENVER POST, Jan. 18, 2004.)

- In October 2003, *The (Louisville) Courier-Journal* used computer analysis of court records to report that more than 2,000 indictments in Kentucky had been pending for more than three years, and that hundreds of cases had been dismissed for lack of prosecution. (*See* R.G. Dunlop, et al., *Justice Delayed: Justice Denied*, LOUISVILLE COURIER-JOURNAL, Oct. 12-19, 2004 (four-part series).)

- In September 2000, *The Chicago Tribune* analyzed 3 million state and federal computer records, including court records, to determine that more than 1,700 people had been killed accidentally due to mistakes by nurses across the country. The paper traced the errors largely to cost-cutting measures that overburdened nurses in their daily routines. (*See* Michael J. Berens, *Dangerous Care: Nurses' Hidden Role in Medical Error*, CHICAGO TRIB., Sept. 10-12, 2000 (three-part series).)

All of these stories would have been far more difficult (if not impossible) to report in the absence of electronic access to various types of information in civil, criminal, and bankruptcy court records. There is factual information of interest and value to the public in all areas.

In addition, remote access improves the news media's coverage of individual cases. The depth and quality of news stories are enhanced when reporters can obtain court filings by remote access at all times, rather than just during weekday business hours. Journalists have also told us that remote access to judicial records helps them to be more accurate. These advances ultimately help make the judicial system more accountable to the public.

Because the Reporters Committee itself does not routinely gather or disseminate information from court records, we will devote the remainder of this comment to addressing the Committees' questions more pertinent to our role as a free press advocate, i.e., those that pertain to exemption or restriction of categories of information.

Comments re: Proposed Rules

Our response to several subdivisions of the proposed Civil, Criminal, and Bankruptcy rules concerning privacy protection for filings are the same. To avoid repetition, we group our responses to these provisions together.

I. Years of Birth and Minors' Names Should Remain Public; Redacted Information Should be Unsealed when there is Great Public Interest.

Proposed Fed. R. Civ. P. 5.2(a); Fed. R. Crim. P. 49.1(a); Fed. R. Bankr. P. 9037(a): Redacted Filings

We propose that years of birth and minors' names not be exempt from the right of access. Journalists use these personal identifiers to correctly identify the subjects of their stories. The full name of a minor child, for instance, is of legitimate interest to a journalist who is covering a case of alleged abuse or neglect and seeks to confirm that she has correctly identified the victim. Likewise, an investigative reporter may need the date of birth of a criminal defendant in the course of investigating the allegations against him.

We also suggest that the Committees consider adding a provision that acknowledges that members of the public may, under this policy, ask the judge to unseal the unredacted version of a pleading containing a redacted personal identifier (or require the litigant to disclose the information, if an unredacted version is not on file with the court).

We believe the provision also should specify the *standard* governing such a request – for example, by requiring release of the information if the public's interest in it outweighs the asserted interest in privacy.

This revision would not create a new right, because members of the public already may file a motion to intervene in a judicial proceeding for purposes of unsealing a court record. Rather, it would clarify that there may be circumstances in which the redacted information is of legitimate public interest, and should be released.

II. Remote Access Should Be Equivalent to Access at the Courthouse.

Proposed Fed. R. Civ. P. 5.2(c): Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases

We begin by setting out what we consider the correct presumption for any policy on remote access to court records: namely, that *remote electronic access to case files should be just as extensive as that available at the courthouse.* That approach is true to both the legal principles and the policy considerations underlying the public's right of access to the judicial system.

As a legal matter, providing co-extensive remote and paper access is the most faithful means of accommodating the public's established First Amendment and common-law rights. Indeed, courts across the country have repeatedly held that the public has a qualified right of access to judicial proceedings and records.[1] The purpose for which access is sought does not matter. In adult criminal and civil cases alike, a record filed with a court is presumed to be public unless the judge has sealed it on the basis of case-specific findings that explain why the presumption of access has been overcome.

Public policy considerations also justify remote access to court records. As the U.S. Court of Appeals for the Second Circuit has said, "Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring . . . the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial

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[1] *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (recognizing common-law right of access to judicial records); *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015, 1027-31 (11th Cir. 2005) (right of access to court dockets); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (long-standing presumptive public access to judicial records); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (presumptive public access to judicial proceedings); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (First Amendment and common law rights of access); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (presumptive right of access to court records); *In re Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (strong presumption of right of access).

proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). The public's capacity to monitor the justice system is greatly enhanced when records are available online.

By limiting remote access to social security appeals and immigration cases only to parties and their attorneys, the Committee indicates that certain data currently available to the public will not be accessible online. Such a policy would inflict a grave public disservice. Information found in documents filed in all court cases should be made available to the public electronically to the same extent they are available at the courthouse in paper form.

Presumably the Committee makes this distinction based on the notion that some information is of legitimate interest to the public, but too "sensitive" to be readily available.[2] Such a proposal promotes the theory of "practical obscurity" – a doctrine articulated in a case with which we are quite familiar, *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) – yes, these documents are public, but by forcing someone to travel to a courthouse and look up a file, they are, for all practical purposes, "obscure," if not exactly secret.

The phrase "practical obscurity" was coined by the government and used by the U.S. Supreme Court as part of its reasoning in the *Reporters Committee* decision. The case had nothing to do with the public's right of access to court records, but rather concerned FBI compilations of such records and the interpretation of the Freedom of Information Act. The *Reporters Committee* case is not germane to formulating a policy of electronic access to court records.

More importantly, institutionalizing "practical obscurity" does not truly serve the purpose of protecting privacy interests. The "obscure" information will still be compiled by private companies, used by businesses, and even compiled in commercial electronic databases. In addition, truly sensitive information that serves no public purpose and would cause harm if released can be sealed from public view – both online and at the courthouse – through a protective order.

Often information that is personal and of no public value in one context, can be critical to public understanding of the judicial process in another context. An immigration decision, for instance, may seem like a purely private matter, but investigating how factors like race, country of origin, or evidence of persecution affect immigration determinations, requires a close look at all the records in searchable, sortable form. The ability to investigate and monitor immigration

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[2]The "volume of filings" does not seem to justify lesser electronic access to these cases since many types of criminal and civil cases, such as class action or RICO litigations, involve a high volume of filings but the Committees have not chosen to exclude them from electronic access.

decisions is particularly important considering that immigration courts only rarely issue published opinions explaining the justifications for their decisions. Social security appeals provide another example. While there is private material in a social security appeal, the parties are only before the court because they seek official state action to establish their rights, and the public has a great interest in understanding what arguments parties made, and what evidence courts found persuasive. There is always a public interest in knowing how courts decide these issues, what they consider, and what they don't.

Recently, reporters at *The Miami Herald* discovered from an analysis of hundreds of thousands of computerized case records that white criminal offenders are almost 50 percent more likely than blacks to receive a plea agreement that erases felony convictions from their records, even if they plead guilty. (*See* Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004.) That is precisely the kind of reporting on racial disparities needed to draw public attention to the issue. Restricting online access to the data will make it far more difficult, if not impossible, for reporters to expose such problems.

Serving the public interest in knowing how the courts operate means that the records must be presumptively open, allowing problems to be addressed on a case-by-case basis, not by cutting off meaningful access to a broad swath of important information. Restrictions on access based on the nature of a case would be a gross disservice to the public interest.

Opponents of online access to court records typically protest that it threatens the privacy interests of litigants. Even assuming that such interests are legitimate,[3] experience in other jurisdictions has shown that this concern is overstated. States such as New York and Maryland, which have enacted liberal electronic access policies, have not suffered any adverse results. Nor have the federal courts. We urge the Committee not to strike entire categories of information from online availability until at least awaiting the results of actual practice, not unsupported fears.

As the Committee is aware, our legal system generally addresses the misuse of information through after-the-fact remedies, not through prior restraints on the information's availability. Under federal law, for example, identity theft is a felony with the potential for serious jail time. *See* 18 U.S.C. § 1028(a)(7) (identity theft is punishable by up to 15 years in prison, and more if used to facilitate terrorism). The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft.

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[3]The scope of litigants' "privacy" rights in documents that they file with a court is debatable, to say the least. The courts are a publicly financed institution, and litigants in civil disputes have availed themselves of the judicial process voluntarily.

Similarly, any concerns about the potential harms of non-meritorious allegations (for example) are best addressed through after-the-fact remedies, not prior restraints. Depending on the circumstances, abuse of such information might give rise to a claim for libel or defamation. Judges also have other remedies, such as entering sealing orders for particularly sensitive cases, at their disposal.

In short, existing law already provides remedies for the rare instances of abuse that might result, in isolated cases, from the widespread availability of court records over the Internet. We therefore encourage the Committee to give existing law an opportunity to address any problems that might arise, rather than rush to cut off electronic access to public information in advance.

We strongly urge the Committee to reject any attempts to make electronically accessible court records less available than those accessible at the courthouse.

III. The Standards for Sealing Filings and Entering Protective Orders Should be Explained.

Proposed Fed. R. Civ. P. 5.2(d); Fed. R. Crim. P. 49.1(c); Fed. R. Bankr. P. 9037(c): Filings Made Under Seal

Proposed Fed. R. Civ. P. 5.2(e); Fed. R. Crim. P. 49.1(d); Fed. R. Bankr. P. 9037(d): Protective Orders

For clarity, we suggest that the provisions for filings made under seal and protective orders specify the *standards* governing such requests – 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 show of good cause that the party would otherwise suffer an undue burden. *See Press-Enterprise Co. v. Superior Ct. of Calif.*, 464 U.S. 501, 510 (1984) (a party may only overcome the public's first amendment right of openness if it shows "that closure is essential to preserve higher values and is narrowly tailored to serve that interest."); Fed. R. Civ. P. 26(c) (on good faith and for good cause shown, a court may enter a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."). As we mentioned on page 4 regarding redactions, we also recommend adding a provision that acknowledges that members of the public may, under these policies, ask the judge to unseal sealed filings and remove protective orders when the public's interest in the information outweighs the asserted interest in privacy. Again, these revisions would not create new rights, but would clarify the circumstances under which information may be sealed or protected and when it should be released.

Conclusion

We appreciate the chance to weigh in on the proposed amendments to the federal rules issued by the Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Criminal Rules as the Committees reevaluate their policies concerning access to court records. Because a policy of broad remote access to court documents improves the quality of news coverage and enhances the public's capacity to monitor the judicial system, we ask the Committees to create a remote access system that is as extensive as paper access at the courthouse.

Respectfully submitted,

Lucy A. Dalglish, Esq.
Executive Director

Gregg P. Leslie, Esq.
Legal Defense Director

Susan K. Burgess, Esq.
McCormick Tribune Legal Fellow

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 15, 2006
Via E-Mail

05-AP- 006

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

05-CV- 033

05-CR- 020

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

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 16

DATE: March 14, 2006

At the October meeting in Santa Rosa the Rules Committee discussed the proposed Rule 16 amendment extensively before referring it back to the subcommittee chaired by Mr. Goldberg. Several points were tentatively resolved at Santa Rosa.

- The Committee decided to make it clear that the rule did not require "materiality" in the narrow sense that term is used in the *Brady* line of cases, since it is difficult to predict at the discovery stage what information would be sufficient to tip the balance at trial.[1]

- The Committee voted 7 to 4 in favor of phrasing the amendment in terms of exculpatory and impeachment "information" (rather than "evidence").

- References to material that was "known to the government–or through due diligence could be known to the government" were deleted. The Committee determined that the rule, like the *Brady* line of cases, should be limited to information known to the attorney for the government and agents of law enforcement involved in the investigation of the case.

- A good deal of the discussion related to timing questions. Two key decisions were reached. The Department of Justice's concern that requiring disclosure more than 14 days prior to trial would endanger witnesses relates largely if not exclusively to impeachment–rather than exculpatory–evidence. Accordingly, the Committee decided to provide specifically that the court may not order the disclosure of impeachment evidence more than 14 days prior to trial. Otherwise, the amendment, like the remainder of Rule 16, does not speak to timing. Thus the timing for the disclosure of exculpatory evidence will continue to be governed by local court rules or the court's order in each case.

- The language of the draft rule was edited to delete references to information that the attorney for the government believes "may" or "tends to be" exculpatory or impeaching, since this language was deemed to be too broad and amorphous.

- The Committee voted to define "exculpatory" as information that would negate the defendant's guilt on any count.

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[1] Judge Paul Friedman, a former member of the Rules Committee, recently authored an opinion that addresses this distinction. An excerpt from that opinion follows the subcommittee's draft rule.

The subcommittee has prepared the following draft rule and accompanying amendment to implement that decisions made in Santa Rosa.[2] In addition to revising the language to implement the decisions made in Santa Rosa, the subcommittee made one change to further narrow and clarify the disclosure obligation. It deleted references to information the attorney for the government and the law enforcement agents on the prosecution team "have reason to believe" is exculpatory or impeaching. In the subcommittee's draft, the duty to disclose applies to "information ... that *is* either exculpatory or impeaching" (emphasis added). The subcommittee also pared down the committee note considerably.

Department of Justice representatives participated actively in the subcommittee's work, though they noted that the Department continues to oppose amending Rule 16. As Ms. Fisher indicated in Santa Rosa, the Department believes that it would be preferable to amend the United States Attorneys Manual (USAM) rather than to address exculpatory and impeachment information and evidence in Rule 16. The Department circulated one proposed revision of the USAM to the subcommittee, received comments, and is preparing a revised draft. The Department intends to circulate a proposed revision of the USAM to the Committee in advance of the meeting in Washington.

This item is on the agenda for the April meeting in Washington, D.C.

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[2] In the course of discussion, several members of the subcommittee noted that they continue to favor limiting the amendment to "evidence" rather than information, though the Committee voted in favor of the term "information" in Santa Rosa.

March 15, 2006 draft

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

* * * * *

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

COMMITTEE NOTE

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the

defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information.

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's

identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial.[1] The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

[1] The subcommittee discussed the possibility of adding a sentence that would make it clear how the attorney for the government should treat information that is partly exculpatory and partly impeaching. The Department of Justice agreed to try to draft some language for the Committee's consideration.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 05-0370 (PLF)
DAVID HOSSEIN SAFAVIAN,	)	
Defendant.	)	

OPINION

* * * * *

The government and the defendant also have very different views concerning the government's Brady obligations. The government acknowledges that under Brady it has the affirmative duty to produce exculpatory evidence when such evidence is material to either guilt or punishment. But it contends that evidence is "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting Strickler v. Greene, 527 U.S. 263, 280 (1999)). The problem with this iteration of Brady and the government's view of its obligations at this stage of the proceedings, however, is that it permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial. Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed -- with the benefit of hindsight -- as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of "materiality" discussed in Strickler and other appellate cases is a standard articulated

in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial. United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198-1199 (C.D.Cal. 1999); see also United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005), and appended magistrate judge's decision, 357 F. Supp. 2d at 1237; United States v. Carter, 313 F. Supp. 2d 921, 924-25 (E. D. Wisc. 2004).

* * * * *

SO ORDERED.

/s/_____
PAUL L. FRIEDMAN
United States District Judge

DATE: December 23, 2005

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 29**

DATE: **March 12, 2006**

Following the meeting in Santa Rosa the Rule 29 subcommittee revised the rule and committee note. The subcommittee's draft is attached. The draft seeks to accommodate the suggestions of the style committee as well as the Committee discussion in Santa Rosa.

This item is on the agenda for the April meeting in Washington, D.C.

Rule 29. Motion for a Judgment of Acquittal

(a) Time for a Motion.

(1) ***Before Submission to the Jury.*** After the government closes its evidence or after the close of all the evidence, ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.~~ a defendant may move for a judgment of acquittal on any offense. The court may invite the motion.

(2) ***After a Guilty Verdict or a Jury's Discharge.*** A defendant may move for a judgment of acquittal, or

renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. A defendant may make the motion even without having made it before the court submitted the case to the jury.

(b) Ruling on a Motion Made Before Verdict. If a defendant moves for a judgment of acquittal before the jury reaches a verdict (or after the court discharges the jury before verdict), the following procedures apply:

(1) ***Denying Motion or Reserving Decision.*** The court may deny the motion or may reserve decision on the motion until after a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside a guilty verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

(2) ***Granting Motion; Waiver.*** The court may not grant the motion before the jury returns a verdict (or before the verdict in any retrial in the case of discharge) unless:

(A) the court informs the defendant personally in open court and determines that the defendant understands that:

(i) the court can grant the motion before the verdict only if the defendant agrees that the government can appeal that ruling; and

(ii) if that ruling is reversed, the defendant could be retried; and

(B) the defendant in open court personally waives the right to prevent the government from appealing a judgment of acquittal (and retrying the defendant on the offense) for any offense for

which the court grants a judgment of acquittal before the verdict.

(c) Ruling on a Motion Made After Verdict. If a defendant moves for a judgment of acquittal after the jury has returned a guilty verdict, the court must set aside the verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

~~**(b) Reserving Decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.~~

~~**(c) After Jury Verdict or Discharge.**~~

~~(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.~~

~~(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

~~(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.~~

* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), and (c) The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to

grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. This general rule requiring the court to defer its ruling applies equally to motions for judgments of acquittal made in bench trials. *Cf. United States v. Morrison*, 429

U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences"). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, *see United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 49.1**

DATE: **March 12, 2006**

The subcommittee chaired by Judge Bartle recommends the attached rule, which contains amendments reflecting the comments of the Style Committee, public comments, and issues raised by other reporters and by the Bankruptcy Committee. The public comments are described briefly at the end of this memorandum.

In brief, the subcommittee draft reflects the following determinations.

1. Style changes. The subcommittee accepted all of the Style Committee's changes. The reporters for the other committees concurred.

2. Use of the term "individual." The subcommittee was advised that the Bankruptcy Rules Committee had replaced the word "person" with "individual" throughout its draft. In order to preserve the uniformity of the rules, the subcommittee accepted this change. This change would, of course, be subject to review by the Style Committee.

3. Grand jury foreperson's name. CACM expressed strong concern that Rule 49.1 as published might not protect the confidentiality of the foreperson's name, because it exempts charging documents from the redaction requirements. This would be contrary to CACM's policy of protecting the privacy of jurors. Although the published draft includes the CACM policy in the Committee Note, that would require sealing on a case by case basis. The subcommittee agreed that it was appropriate to address this issue more specifically in the text of the rule, and accordingly it proposes new language in subparagraph (a) on line 7 to require redaction of the grand jury foreperson's name; as with a minor's name, the foreperson's initials will be retained. At Judge Bucklew's suggestion, I extended the new language to include petit jurors and their forepersons, since their names typically appear on the jury verdict forms.

4. Responsibility for redaction. Mark Golden's letter on behalf of the National Court Reporters Association recommends explicit language placing the responsibility for redaction on the parties. The subcommittee was advised that the new language on line 7 had been adopted by the Bankruptcy Rules Committee to respond to that concern. It places the responsibility for redaction on the party or non-party making the filing. In order to make the responsibility for redaction clear and to preserve the consistency of the e-government rules, the subcommittee accepted this amendment.

5. Social security numbers and date of birth. The request of background screeners that the public record include full identifying information, such as date of birth, was rejected. The

subcommittee explored the question whether redaction should go even further, concerned that disclosure of even the last four digits of an individual's social security number (see (a)(1) on line 9) could create a danger of identity theft or breaches of privacy. It concluded that the current rule reflects a careful balance of the competing interests. The CACM staff reported that disclosure of these numbers is useful "for private investigators, background searchers, employment reference checks, and other well-intentioned researchers." Although others without good intentions could also access this information, in CACM's view the disclosure is appropriate because without more it does not give certain identifying information for individuals. The judges on CACM chose to provide for disclosure of these four digits because the Social Security Administration uses that information in its public statements. Reporter Daniel Capra would oppose a change in Rule 49.1 regarding social security numbers.

6. Forfeiture. The subcommittee accepted the Department of Justice's request to revise the order of the wording in (b)(1) on lines 25-27 to make it clear that the full address of real property and account numbers need not be redacted when they are the subject of ancillary proceedings related to the forfeiture of the property in question. The reporters for the other committees concurred.

7. Exemption from redaction for judicial decisions. The subcommittee agreed to delete a phrase in (b)(4) on line 34 that CACM felt would create problems in bankruptcy proceedings. The reporters for the other committees concurred.

8. Exemption from redaction for filings in proceedings under 2254, 2255, and 2241. CACM and the National Association of Criminal Defense Lawyers expressed concern that the categorical exemption of these proceedings was unnecessarily broad. NACDL suggested that pro se litigants should be encouraged but not required to comply with the redaction requirement. The subcommittee agreed that the exemption could be narrowed, and on lines 38 and 40 it limited the exemptions under (6) and (7) to pro se filings.

9. Exemption from redaction for charging documents, affidavits in support of charging documents, arrest or search warrants, and filings prepared before the filing of a criminal charge that is not part of any docketed case. CACM expressed concern that the categorical exemption from redaction in subparagraphs (b)(8), (9), and (10), lines 42-48, is unnecessary because redaction would be sufficient to protect sensitive or private information. The subcommittee felt that this presents a policy decision for the full Criminal Rules Committee, which previously accepted the Department of Justice's recommendation that these categories of documents be exempt from redaction.

10. Filings under seal and protective orders. In light of several of the public comments (including Mr. Beck's letter for the Public Citizen Litigation Group) the subcommittee scrutinized our subsections (c) (filings under seal) and (d) (protective orders). The subcommittee noted that (c) and (d) are not parallel: (d) is limited to cases where it is "necessary to protect private or sensitive information that is not otherwise protected under Rule 49.1," but (c) contains no limiting language.

The subcommittee considered but ultimately rejected the suggestion that these provisions be redrafted to be parallel, either by drafting new language for (c) (such as "for good cause shown"),

or deleting the limitation in (d). As Mr. Beck recognizes, (c) contains no limiting language because it was not intended to alter the existing case law on when sealing is proper. It merely relates the existing power to seal to the new requirements of the E-Government Act. The limiting language in (d) would not summarize the decisional law on the power to seal. Moreover, the existing power to seal is not necessarily coextensive with the proper scope of protective orders under (d).

a. Filings under seal. Even if (c) and (d) should not contain precisely parallel language, Mr. Beck's larger point is that Rule 49.1 (and Civil Rule 5.2) might be read as enlarging the power to seal, thereby removing information from the public record. To respond to this concern, (c) could be revised to read:

> The court may order that a filing be made under seal without redaction when authorized by law.

The subcommittee concluded that no change in (c) is warranted. This accords with the consensus among the reporters. The Committee Notes make it clear that Rule 49.1 (and its counterparts) do not enlarge the power to seal. Moreover, adding this language could create confusion: the new language could be read as requiring specific authorization to seal in the context of filing under seal without redaction. Of course we could draft a note to say that is not what we mean, but that gets us right back to relying on a note rather than the text.

b. Protective orders. Mr. Beck also proposes that (d) and its counterparts in the other rules be redrafted to add a balancing test that would limit protective orders to cases in which the interests in protecting privacy and other sensitive information outweigh the interests in providing disclosure. After consideration, the subcommittee also rejected this suggestion. The consensus among the reporters was that the rule should not be amended. They felt that limiting the court's authority to issue a protective order might exceed the authority of the Rules Enabling Act, and they also worried about drafting the language of a new balancing test (which would, of course, not have been subject to public comment).

11. Trial exhibits. As published the Committee Note concerning trial exhibits states on lines 133-34 that the rule applies if trial exhibits have been "filed." The subcommittee explored Judge Young's concern that it is not clear when trial exhibits are "filed," since that term is not normally applied to exhibits. The subcommittee expressed some support for saying the rule applies to trial exhibits that have been "filed and retained by the court" (such as the exhibits included in the record on appeal), but was ultimately persuaded by Professor Capra not to add this language to the Note. Professor Capra explained that he believed the language is not necessary, and he opposed adding it to Rule 49.1:

> I think it pretty clear that an exhibit is not filed unless it is made part of the record for appeal. Think of it this way: if it is not made part of that record, what member of the public would expect to have access to it? How would that access even come about? Why redact if there is no public access to it?

Thus adding "and retained" is superfluous. Professor Capra also raised the question whether adding this language to the Committee Note would be seen as substantive. If so, it might be opposed by members of the Standing Committee, who are very opposed to putting new substance in the Committee Note.

12. Relationship between the CACM policy and the note. At Professor Capra's suggestion, I added a phrase on line 158 of the Committee Note to clarify that the CACM policy provides guidance on matters not addressed by the rule itself. Some matters, such as the protection of the names of jurors, are provided for in the text of the rule.

Summary of Public Comments

Bruce Berg (05-CR-001), who represents the pre-employment screening industry, requests that the rule be amended to require that individual's full date of birth and social security number be made part of the public record to facilitate background checks.

Mike Sankey (05-CR-002) presented written testimony and appeared in person to supplement his testimony on behalf of the National Association of Professional Background Screeners, in support of listing the full date of birth for adults in order to assist in criminal history searches for employers.

Jack E. Horsley (05-CR-006) suggests that the employee number of a person who is state or federal employee be exempt from redaction.

Mark Golden (05-CR-010), writing on behalf of the National Court Reporters Association, applauds the advisory committees' efforts to address the privacy and security issues and proposes that language be added to make clear that the duty to redact information in filings rests solely with the parties.

The Honorable John R. Tunheim, on behalf of CACM (05-CR-011), expressed concern about several points. (1) The language in all e-rules referring to the record of a court "whose decision is being reviewed" may cause problems in bankruptcy. (2) Rule 49.1's list of exemptions from redaction is unnecessarily broad, because it would be sufficient to redact personal identifiers from 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. (3) If the Rule does not require redaction of the grand jury foreperson's name, CACM opposes the rule. (4) The relationship between the CACM guidance and the new rule is not clear.

The Honorable William G. Young (05-CR-012) suggests that the portion of the Criminal (and Civil) Committee Note concerning trial exhibits is ambiguous because it is unclear when they are "filed with the court" and hence subject to redaction. He also believes that allowing the filing of an unredacted document under seal is unwise, though he recognized that it is based in haec verba on the E-Government Act. Finally, he raises several issues regarding the redaction required by

CACM's guidelines. Will redaction of residential street addresses from jury lists raise any constitutional concerns? Who will do that redaction? Are the CACM guidelines for transcript preparation so complex that they will unduly delay appellate proceedings?

Peter A. Winn (05-CR-014) believes the rules successfully balance the right of public access to court records against the need to prevent the misuse of sensitive personal and commercial information and implement the congressional directive to make court records available online; however, he recommends the use of the PACER system to create an intermediate system of courthouse only access, rather than achieving such intermediate access by protective orders.

Gregory A. Beck, Public Citizen Litigation Group (05-CR-15) expresses concern that allowing the court to order that a filing be made under seal without redaction will be interpreted--notwithstanding the committee note--to expand the authority to seal and thereby restrict public access to court records. He proposes that provision authorizing the filing of unredacted documents under seal be stricken from each of the e-government rules or limited by the phrase "as authorized by law."

Chris Jay Hoofnagle on behalf of the Electronic Privacy Information Center (05-CR-016) supports revisions to protect personal information by (1) minimization of the collection of personal information in court records, (2) further limiting access at the courthouse, (3) limitations on disclosure only for permitted uses, (4) reduction in unique identifiers, including the redaction of all digits of Social Security numbers, home addresses, telephone numbers, and mother's maiden names, (5) limitation on bulk downloads for commercial solicitations or profiling.

Peter D. Keisler on behalf of the Department of Justice (05-CR-018) recommends a clarification of the forfeiture exemption from redaction by reordering the clauses to make clear that parties may litigate regarding specific property without redaction in ancillary proceedings as well as in the main forfeiture proceeding.

The Reporters Committee for Freedom of the Press (05-CR-019) emphasizes the press's strong interest in the accessibility of all types of information in court records; it (1) opposes the redaction of years of birth and minors names from the right of public access, (2) proposes that the court have authority to unseal redacted information in the public interest, and (3) requests clarification of the standard for sealing filings and entering protective orders.

National Association of Criminal Defense Lawyers (05-CR-020) recommends that the exemption of habeas corpus and 2255 actions from the redaction requirements be replaced with a provision encourages–but does not require–pro se litigants to comply with the redaction requirements in all their filings, or in their habeas and 2255 filings.

Rule 49.1. Privacy Protection For Filings Made with the Court[2]

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing ~~made~~ with the court that ~~includes~~ contains a social-security number or an individual's tax-identification number, a name of a person known to be a minor, ~~a person's~~ an individual's[3] birth date, a financial-account number ~~or~~ the home address of ~~a person~~ an individual, or the name of a grand

[2] The proposed new material and deleted text is based on the proposed new rule published for comment in August 2005.

[3] The Bankruptcy Committee decided to use the term "individual" throughout rather than the term "person," because the latter includes corporations. The subcommittee concurred in this change to preserve the consistency of the rules.

or petit juror or foreperson,[4] a party or non-party making a filing[5] may include only:

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

(2) ~~the minor's~~ initials of a minor;

(3) the year of an individual's birth;

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[4] CACM's general policy guidance (reprinted at the end of the Committee Note) expressly states that documents containing identifying information about jurors should not become part of the public case file. In commenting on Rule 49.1, CACM indicated grave concern that (b)(1) could be interpreted to allow disclosure of the grand jury foreperson's signature on the indictment. CACM indicated that it would oppose the rule unless it were clarified to ensure that the grand jury foreperson's name would not be subject to disclosure. Judge Bucklew noted that jury verdict forms may state the names of jurors as well as forepersons, so this language and subparagraph (6) below was added to require redaction for the names of both jurors and forepersons.

[5] The language referring to a party or non-party making a filing was inserted in the Bankruptcy Committee in order to make it clear that the obligation of redaction rests on the parties, not on the clerk of court or the magistrate judge. Professor Capra recommends its inclusion in the other rules as well.

the last four digits of ~~the~~ a social security number ~~and~~ or tax identification number;

(4) ~~the minor's~~ initials of a minor;

(5) the year of an individual's birth;

(6) the last four digits of ~~the~~ a financial-account number; ~~and~~

(7) the city and state of the home address.; and

(8) the juror or foreperson's initials.[6]

(b) Exemptions from the Redaction Requirement. The redaction requirement ~~of Rule 49.1(a)~~ does not apply to the following:

(1) ~~in a forfeiture proceeding,~~ a financial-account number or real property address that identifies the property ~~alleged to be~~ allegedly subject to forfeiture in a forfeiture proceeding;

[6] See note 2 above.

forfeiture in a forfeiture proceeding;[7]

(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~~,[8] if that record was not subject to ~~(a)~~ the redaction requirement when originally filed;

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[7] The Department of Justice recommended the revision because the need to identify property by address or account number arises not only in the forfeiture proceeding proper, but also in ancillary proceedings such as those regarding third party rights. The subcommittee accepted this recommendation.

[8] This deletion responds to a concern raised by the Judicial Conference Committee on Court Administration and Case Management (CACM) that is most pertinent in bankruptcy cases. The other reporters have agreed that this is a valid concern, and thus recommend that we delete this phrase to keep the rules parallel. The subcommittee accepted this recommendation.

(5) a pro se filing covered by (c) of this rule;

(6) a pro se[9] filing ~~made~~ in an action brought under 28 U.S.C. § 2254 or § 2255;

(7) a filing ~~made~~ in an action brought under 28 U.S.C. § 2241 that does not relate to the petitioner's immigration rights;

(8) ~~a filing in any court in relation to~~ a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or

[9] CACM expressed concern with providing a blanket exemption from the redaction requirement for filings under §§ 2254, 2255, and 2241. The subcommittee addressed this concern by adding the language limiting both (6) and (7) to pro se filings. In those cases, it is appropriate to exempt pro se prisoners from the redaction requirements.

~~that~~ is not filed as part of any docketed criminal case;[10]

(9) an arrest or search warrant; and

(10) a charging document and an affidavit filed in support of any charging document.

(c) 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~~ individual who made the filing to file a redacted version for the public record.

[10] CACM also expressed concern that subparagraphs (8), (9), and (10) were overly inclusive, and suggested that it would be sufficient to redact personal identifiers from documents such as search warrants, charging documents, and the like. This presents a policy decision for the Criminal Rules Committee, which previously accepted the Department of Justice's recommendation that these categories of documents be exempt from redaction.

(d) Protective Orders. If necessary to protect private or sensitive information that is not otherwise protected under (a), ~~a~~ the court may by order ~~in a case~~:

(1) require redaction of additional information; or

(2) limit or prohibit a non-party's remote electronic access ~~by a nonparty~~ to a document filed with the court.

(e) Option for Additional Unredacted Filing Under Seal. A party making a redacted filing under (a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for Filing a Reference List. A filing that contains redacted information may include ~~redacted under (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~~ a listed identifier ~~in the reference list~~ will be construed to refer to the corresponding item of information.

(g) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information by filing it ~~to the extent that the party files such information not under seal and~~ without redaction and not under seal.

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 Criminal Rule 16(d) and 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 (d)[11] provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties 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 (e) 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 (f) 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 (f) of the rule 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 (g) 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.

[11] Subparagraph references in the Note have been corrected to correspond to the text.

Trial exhibits are subject to the redaction requirements of Rule 49.1 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.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

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).

To the extent that the Rule does not exempt these materials from disclosure, the ~~The~~ privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (c) or a protective order provision of subdivision (d).[12]

[12] The insertion of introductory phrase is desirable because the rule itself now addresses some of the issues in CACM's policy directly (e.g., the new language in (b)(1)). CACM's letter noted that the relationship between its guidance and the text of the rule was not entirely clear. The new phrase clarifies the relationship.

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 12(b) Challenges for Failure to State an Offense**

DATE: **March 10, 2006**

As described in the attached memorandum, the Department of Justice recommends that Rule 12(b)(3)(B) be amended to require the defense to raise a claim that the indictment or information fails to state an offense before trial. The Department argues that the defendant should not be permitted to raise claims of failure to state an offense belatedly, when the government's opportunity to amend the indictment or information has passed.

The following background to the present rule may be helpful. The original 1944 version of the Rule provided that "failure of the indictment or information to charge an offense shall always be noted by the court whenever and however brought to its attention." The 1944 explanation states:

> The provision that "lack of jurisdiction or the failure of the indictment or information to charge an offense shall always be noted by the court", is not in entire accord with the present practice in providing that an objection to lack of jurisdiction of the court may be presented at any time, since lack of jurisdiction of the court over the person is waived under present practice if the objection is note presented before any plea to the indictment or information."

Thus the 1944 Advisory Committee recognized that personal jurisdiction, unlike subject matter jurisdiction, is waivable. As a matter of policy, however, it provided lack of personal jurisdiction may nonetheless be raised at any time.

This item is on the agenda for the April meeting in Washington, D.C.

U.S. Department of Justice

Criminal Division

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

January 3, 2006

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that Rule 12(b) of the Federal Rules of Criminal Procedure be amended to remove an anomaly in the Rule that allows defendants to belatedly challenge the facial validity of an indictment or information during – and even after – trial. We hope that the Advisory Committee will consider and vote on this proposal at its next meeting in April 2006.

Although Rule 12(b) generally requires defendants to raise **before trial** any allegation of a defect in the indictment or information, by its terms the Rule creates an anomaly that permits defendants to claim **at any time** that the indictment or information fails to state an offense. Under this anomaly, courts have allowed defendants to raise this claim for the first time even after they have been convicted at trial, have pleaded guilty and/or are on appeal – often long after the government's opportunity to amend the indictment or information has passed.

This proposal would require defendants to raise this claim in a timely manner before trial. Defendants who fail to raise such a claim in a timely fashion must satisfy the requirements of plain error if they first raise the claim after trial or on direct review, just like any other claim. We have attached a proposed amendment to the Rule along with a proposed Committee Note that more fully explains the basis for the amendment. We believe this proposal warrants timely and thorough consideration by the Advisory Committee.

We appreciate your assistance with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej ✓

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including that it fails to state an offense --but at any time while the case is pending, the court may hear a claim that the district court lacks [indictment or information fails to invoke the court's] jurisdiction [or to state an offense];

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

Advisory Committee Note

When enacted in 1944, Rule 12(b) provided that a motion alleging a defect in the indictment or information had to be raised before trial, except that at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or "to charge an offense." The latter exception, rephrased "to state an offense," is now found in Rule 12(b)(3)(B). This exception has been interpreted to allow defendants to raise an indictment's alleged failure to state an offense for the first time during or after trial, after a plea of guilty, or on direct appeal. *E.g.*, *United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 682-86 (3d Cir. 2002).

This exception is inconsistent with Rule 12's general goal to require defendants to raise challenges to an indictment or information before trial, when the defect might be fixed, and before effort is expended in trials, pleas, sentencings and other proceedings based on an invalid indictment:

> Rule 12 sharply restricts the defense tactic of "sandbagging" that was available in many jurisdictions under common law pleading. Recognizing that there was a defect in the pleading, counsel would often forego raising that defect before trial, when a successful objection would merely result in an amendment of the

> pleading. If the trial ended in a conviction, he could then raise the defect on a motion in arrest of judgment and obtain a new trial. Federal Rule 12 eliminated this tactic as to all objections except the failure to show jurisdiction or to charge an offense.

United States v. Ramirez, 324 F.3d 1225, 1228 (11th Cir. 2003). Judges have called for Rule 12(b) to be amended to remove the exception for failure to charge an offense, which "reduces criminal defendants' incentives to raise defenses in a timely fashion in district court," "has led to strategic decisions by defendants to delay raising the defense," "undermines judicial economy and finality," fails to "respect[] the proper relationship between trial and appellate courts," causes "the waste of judicial resources," and "mak[es] it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole." *Panarella*, 277 F.3d at 686-88.

Indeed, the Supreme Court removed the justification and the need for the exception for failure to state an offense in *United States v. Cotton*, 535 U.S. 625 (2002). The Court rejected the assertion that the failure of an indictment to state an offense "was a 'jurisdictional' defect" which could be raised without regard to the rules for preservation of claims of error. Id. at 629. The Court explained that the source of this view, *Ex parte Bain*, 121 U.S. 1 (1887), was "a product of an era" in which "this Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error 'jurisdictional'", which "led to a somewhat expansive notion of 'jurisdiction' which was 'more a fiction than anything else.'" Cotton, 535 U.S. at 629-30 (citations omitted). The Court ruled that, given the subsequent authorization of review by direct appeal and the subsequent expansion of collateral review, "*Bain*'s elastic concept of jurisdiction" was neither needed nor valid, and the Court overruled *Bain* "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction." *Cotton*, 535 U.S. at 630-31. The Court held that a claim that an indictment which failed to allege an offense had to be timely raised, or it would be forfeited and would have to meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631. Courts, however, have considered themselves bound by the language of Rule 12(b)(3)(B), and have "urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending" the rule. *United States v. Hedaithy*, 392 F.3d 580, 586-89 & n.7 (3d Cir. 2004).

Accordingly, Rule 12(b)(3)(B) has been amended to remove this exception. The amended rule requires that claims that an indictment fails to state an offense be raised before trial as provided in Rule 12(b)(3), (c) and (e). A defendant who fails thus to raise such a claim forfeits it, and can obtain relief only by meeting Rule 52(b)'s plain-error test, or the "cause and prejudice" test if the claim is first raised under 28 U.S.C. § 2255. *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003).

The Supreme Court in *Cotton* did reiterate that defects in subject-matter jurisdiction -- "'the courts' statutory or constitutional power to adjudicate the case' .... can never be forfeited or waived," and can be corrected "regardless of whether the error was raised in district court." 535 U.S. at 630. The jurisdictional exception is therefore retained in Rule 12(b)(3)(B), and permits

the district court's subject-matter jurisdiction to be challenged at any time while the proceedings initiated by the indictment or information are pending in the district court or on direct appeal. *United States v. Wolff*, 241 F.3d 1055, 1057 (8th Cir. 2001).

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Search Warrants for Digital Evidence**

DATE: **March 10, 2006**

Professor Orin Kerr has published an article *(Search Warrants in an Era of Digital Evidence*, 75 MISS. L. J. 85 (2005)) arguing that Rule 41 is ill adapted for searches for digital evidence. Judge Anthony Battaglia has prepared the attached memorandum summarizing Professor Kerr's arguments.

This item is on the agenda for the April meeting in Washington, D.C.

United States District Court

Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
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MEMORANDUM

TO: **Judge Bucklew**

FROM: **Judge Battaglia**

RE: **Search Warrants for Digital Evidence**

DATE: **March 17, 2006**

I am going to briefly summarize Professor Kerr's article concerning proposed amendments to Rule 41. I will also offer several other subject areas that may require review. I hope this brief summary will assist our discussion in April. The issues presented by the Professor are as follows:

1. The premise is that Rule 41 is ill-equipped to deal with issues associated with computer searches. That is because a search and seizure of a computer is really a two staged process. Stage one is searching for and locating the computer itself and stage two is searching the stored computer data for information evidencing a crime. The second stage is typically done off site from where the computer was located. This is due to the complexity associated with forensic computer examinations and the need for specialized equipment. This second stage search is typically done in the laboratory of the investigating agency.

2. Professor Kerr suggests that since computer data is "information," and copying the data is not a seizure, Rules 41(b) and (d) should be amended to include "information" as a separate search subject. Rule 41(a)(2)(A) does refer to "information" in the definition of "property;"

3. Regarding the "particularity" requirement of Rule 41(e), the Professor suggests that the application for warrant and the warrant describe the two stage process. In other words, the authorization to search for the physical computers themselves and seize them on site and the search for the specific data sought and the subsequent electronic search. He proposes adding the following language to Rule 41(e):

> If the officer executing the warrant seeks permission to seize computers or electronic storage devices to retrieve computer data constituting evidence of crime, the warrant must identify both the physical computers

> or storage devices to be seized, as well as the computer data they are believed to contain that constitutes evidence of crime.

4. The question of the timing for execution is also problematic. Rule 41(e) says that execution should occur in no more than 10 days. As it relates to computer searches, does that mean just the onsite search for the computer itself, or does that include the off site search for the data? Professor Kerr suggests adding language to Rule 41(e)(2) as follows:

> In a case involving the seizure of computers and other electronic storage devices, the execution of the warrant refers to the seizing of the computers and storage devices rather than any subsequent search of their contents.

5. The fourth area addressed is a call for a uniform time limit for a search of the computer data to establish whether the computer contains the relevant material. In this way, there can also be timing associated with the early return of the computer, unless it is an instrumentality of crime.

6. The final issue highlighted relates to the inventory. Should the inventory on the warrant return simply indicate the physical hardware taken from the premises or, some description of the data and files including the numbers seized, file names, etc.

These are some basic issues that I submit warrant consideration by a subcommittee with an eye toward possible amendments to Rule 41. From the perspective of a magistrate judge, there are real problems fitting the proverbial "round peg in a square hole" and practical guidance in Rule 41 would be of great value.

Beyond Professor Kerr's assessment, there are other issues that are developing in day to day practice that would benefit from a study by a subcommittee. The first involves the requirement of stated search protocols and methodology in the application for the warrant, or perhaps some standardized protocol or methodology in the rule itself. We have done that for tracking devices. Next, the question of multiple searches (the agents reexamining the computer data over and over) exists, as does the extent to which there should be some duty to supplement the return where subsequent searches of the data occur.

I am sure there are other issues that a subcommittee could identify. So that it is clear, I am not advocating any of the changes suggested by Professor Kerr or otherwise at this time, only that the issue be studied in greater depth so that appropriate amendments can be proposed, as deemed necessary. I hope this short summary helps highlight basic issues now pending and the need for a considered study of Rule 41 in these regards. Please let me know if I can provide any other advance materials on this issue.

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*85 SEARCH WARRANTS IN AN ERA OF DIGITAL EVIDENCE

Orin S. Kerr [FNa1]

ABSTRACT

This Article contends that the legal rules regulating the search warrant process must be revised in light of the demands of digital evidence collection. Existing rules are premised on the one-step process of traditional searches and seizures: the police obtain a warrant to enter the place to be searched and retrieve the property named in the warrant. Computer technologies tend to bifurcate the process into two steps: the police first execute a physical search to seize computer hardware, and then later execute a second electronic search to obtain the data from the seized computer storage device. The failure of the law to account for the two-stage process of computer searches and seizures has caused a great deal of doctrinal confusion, making it difficult for the law toregulate the warrant process effectively. The Article concludes by offering a series of proposed amendments to Rule 41 of the Federal Rules of Criminal Procedure to update the warrant process for the era of digital evidence.

INTRODUCTION

Search warrants provide one of the basic tools for collecting evidence in criminal investigations. The history and text of the Fourth Amendment focus heavily on regulating their use. [FN1] ***86** In recent decades, the traditional Fourth Amendment standards governing the warrant process have been supplemented with comprehensive statutory rules such as Rule 41 of the Federal Rules of Criminal Procedure. [FN2] Today, the combination of statutory and constitutional rules creates a well-defined procedure for obtaining and executing search warrants familiar to every police officer, detective, and prosecutor.

This article argues that the warrant process must be reformed in light of the new dynamics of computer searches and seizures. In the last two decades, the widespread use of computers has led to a new kind of evidence in criminal cases: digital evidence, consisting of zeros and ones of electricity. In a recent essay, I argued that the rise of digital evidence will trigger the need for a "new criminal procedure"--a new set of procedural rules to regulate the acquisition of digital evidence in criminal investigations. [FN3] This article applies that framework to the warrant process. It explains how the new facts of computer searches and seizures require changes in the laws

governing the warrant process to update that law for the era of digital evidence.

The basic theory is a simple one. The existing law governing the warrant process presumes single-step searches common to the collection of traditional physical evidence. In these cases, the investigators enter the place to be searched, seize the property named in the warrant, and leave. With computer searches, however, the one-step search process is replaced by a two-step search process. The investigators enter the place to ***87** be searched; seize the computer hardware; take the hardware off-site; and then later search the equipment for data that may be evidence of crime. [FN4] Two searches occur instead of one. The physical search comes first and the electronic search comes second. Further, in most cases the two searches are quite distinct. They occur at different times, in different places, and are usually performed by different people.

The division of the traditional one-step warrant process into two distinct steps sets up four doctrinal puzzles for the law regulating the warrant process. First, what should the warrant describe as the property to be seized: the physical hardware seized during the first physical search, or the digital evidence obtained during the electronic search? Second, what should the warrant describe as the place to be searched: the location of the hardware, the hardware itself or the location where the electronic search will occur? Third, when must the electronic search occur: Is the timing governed by the same rules that govern the physical warrant execution, by some other rules, or by no rules at all? Finally, what record-keeping requirements apply to the electronic search and when must seized computer equipment be returned? All of these questions follow from an attempt to fit the one-step framework of existing ***88** law into the two-step framework of the new facts of computer searches and seizures.

This article urges legislatures and rules committees to update the statutory rules that govern the warrant process in response to the new challenge of digital evidence searches. It contends that warrant rules should be amended to recognize the two-step nature of computer searches and seizures and to regulate both steps adequately and directly. Existing law requires courts to try to squeeze the two-step digital warrant process into a one-step legal framework. The courts have struggled to answer the four doctrinal puzzles and often have failed to reach coherent or satisfactory answers. Statutory rule reform is needed to resolve these difficulties and directly address the considerable policy questions they raise.

Two proposed changes are the most important. First, the law should require warrants seeking digital evidence to state the items to be searched for at both the physical and the electronic search stages. That is, the warrant should state the physical evidence that the police plan to seize at the physical stage and the electronic evidence that the forensics analysts plan to search for at the electronic stage. Second, warrant rules should be amended to require that the electronic search step proceeds in a timely fashion. Specifically, the law should require investigators to limagem seized computers and return the equipment in a reasonable period of time (such as thirty days) when the hardware is merely a storage device for evidence. When the hardware is believed to becontraband or a fruit or instrumentality of crime, investigators should be required to begin the forensic process within a specific period of time (such as sixty days) to establish whether that belief is correct. If it is not, the hardware should be returned; if it is, investigators should be permitted to retain it.

I will develop my argument in four parts. Part I explores the factual differences between how investigators typically execute a search warrant for digital evidence and how investigators typically execute a warrant for physical evidence. In a traditional case, the police enter the place to be searched, and then locate and retrieve the items found in the warrant. Computer***89** searches follow a different model. Because the retrieval of digital evidence requires technical expertise and considerable time, the execution of a warrant for digital evidence generally involves two steps. The first is location and retrieval of the physical storage device that investigators believe contains the digital evidence, and the second is subsequent analysis of the storage device to locate the digital evidence. Instead of search and seizure, the process is more like physical search and seizure followed by

electronicsearch and seizure.

Part II explores the four doctrinal puzzles created by the bifurcation of the one-step warrant process into two distinct steps. Should the property to be seized be the physical evidence seized at step one, or the electronic evidence searched for at step two? What is the place to be searched: the location of the physical storage device, the storage device itself or the location of the electronic search? When must the search be executed? In particular, what timing rules govern the computer forensic analysisrequired to execute the electronic search? Finally, what record-keeping requirements apply to the electronic search, and when (if ever) must seized computer hardware be returned?

Part III explores how courts have attempted to resolve these puzzles using existing statutory and constitutional rules. It focuses on the two primary questions that courts have considered in detail: the proper description of the property to be seized, and the timing of the computer forensic process. Courts have struggled in both areas to fit the old law to the new facts. They have approved both physical and virtual descriptions of the property to be seized, but only by letting the practical considerations of the two-step search override what would otherwise be significant defects in computer warrants. They have also failed to settle whether existing statutory law permits judges to condition warrants on the timing of the forensic process.

Part IV offers a series of specific amendments to the legal framework regulating the warrant process. It explains why the primary changes needed are statutory, not constitutional. The solution to the problem lies in amending of the statutory ***90** rules regulating the warrant process, not in altering Fourth Amendment standards. It also offers specific changes to Rule 41 and their state equivalents, including changes in how computer warrants are written and explicit regulation of the timing of the electronic search process when undertaken pursuant to a warrant.

I. DIGITAL VERSUS PHYSICAL WARRANT PROCESSES

The premise of my argument is that the facts common in digital evidence searches are different from the facts common in traditional physical evidence searches. Changes in the facts demand changes in the legal rules. This section introduces those differences, focusing on the replacement of the search-and-retrieve mechanism of traditional searches with a two-stage process that adds an electronic search to the traditional physical search and seizure. In physical searches, the investigators seek permission to look through a particular physical space for a particular piece of evidence, and then to take that evidence away. Executing a warrant for digital evidence generally adds a step. The investigator seeks permission to search a physical space for computer storage devices, and then takes away the computer storage devices that are found for analysis off-site at a later date. Weeks or even months later, the computer forensic analyst performs what is, in a sense, a second search: an electronic search for digital evidence, occurring long after the physical search for physical evidence. The dynamic is physical search, physical seizure, and then electronic search.

The following hypothetical cases explains the dynamic. The first presents a traditional investigation for physical evidence; the second presents a typical investigation for digital evidence. The contrast helps reveal how the basic process of executing a warrant for physical evidence is different in a number of ways from the process of executing a warrant for digital evidence.

***91** A. Physical Searches and Physical Search Warrants

Fred Felony is low on cash, so he decides to burglarize the home of Mr. and Mrs. Smith at 123 Main Street. One night when the Smiths are away, Fred picks the lock to the front door using locksmith tools and starts looking around for valuable property. Fred finds and takes three valuable items: an expensive stereo system, a collection of Victorian gold jewelry, and a mink fur coat. Fred takes these items back to his apartment and hides them in his bedroom closet. Then he puts his locksmith tools in a storage area underneath his kitchen sink. Fred's plan is to

wait a few weeks until no one is looking for the stolen items and then to try to sell them at a local pawn shop.

The next day, the Smiths come back into town and realize that their home has been burglarized. They call the police. Imagine you are the police detective called to investigate the burglary at 123 Main Street. You arrive at the scene and quickly surmise that the front door was opened using locksmith tools. You speak to the Smiths, who report that three items have been stolen: a collection of gold jewelry, Mrs. Smith's mink coat and an expensive stereo system. You obtain detailed descriptions of these missing items, including the serial numbers of the stolen equipment and photographs of the stolen jewelry, and you then return to the police station.

Now imagine that you have good reason to believe that Fred Felony was behind the burglary, and that you also know that Fred Felony's last known address is 13 Prospect Avenue, Apartment B. You decide to apply for a search warrant to search Fred's apartment for the stolen goods. If you can find the stolen goods and the locksmith tools in Fred's apartment, you will have very strong evidence of Fred's guilt that can be used in court. You therefore apply for a warrant to search 13 Prospect Avenue, Apartment B for four items: locksmith tools, the mink fur coat, a stereo with the serial numbers of the stolen equipment, and Victorian gold jewelry matching the description that the Smiths gave you. In the affidavit to the warrant, you explain to the judge why you have probable cause to believe that evidence of the burglary will be located ***92** inside the apartment.

The judge finds probable cause and signs the warrant authorizing the search. The next morning, several officers join you in executing the search. You knock on Fred's door at 10:00 a.m. and announce, lThis is the police! We have a warrant--open up!m Fred is not home, so after a brief wait the door is forcibly opened. After ensuring that the apartment is empty, you begin to search the home for the evidence in the warrant. After about ten minutes, one officer finds a set of locksmith tools in the storage area under the kitchen sink. The tools are lbagged and tagged,m placed in an evidence bag and labeled appropriately. Twenty minutes later, you are looking through the bedroom and open the closet door. You immediately spot the fur coat and stereo equipment. You pick up the equipment and find the serial number to confirm the matching number on the warrant. You then look through the rest of the closet and find the collection of gold jewelry described in the warrant. You bag and tag the jewelry, coat and stereo equipment. With all of the evidence found, you leave a copy of the warrant on the front door so that Fred will know what happened when he returns home. The next day, you file a return with the judge who issued the warrant reporting everything seized from the apartment: the locksmith's tools, fur coat, jewelry, and stereo equipment.

B. Digital Searches and Digital Search Warrants

Now imagine a cyber version of the same crime. This time, Fred decides to commit his crime via his computer. Instead of breaking into the Smiths' home, he decides to hack into their home computer remotely to steal credit cards and other valuable financial information. Fred logs on to the Internet from his computer at home, hacks into the Smiths' home computer, and then locates and retrieves the Smiths' credit card numbers. Fred copies the files from the Smiths' computer, and later uses the Smiths' credit card number to purchase an expensive stereo, a mink coat and some gold jewelry. When the Smiths get their credit card bill weeks later, they see the extra charges and call the police. Once again, ***93** you are the investigator called to investigate the crime. Assume that you have reason to believe that Fred Felony is behind the scheme, and you suspect he hacked into the Smiths' computer to obtain the credit card information. Once again, you want to recover the fruits of the crime: the stereo, jewelry, and mink coat.

But this time you also want something else. You want to recover the digital evidence that can prove Fred hacked into the Smiths' computer. If Fred did hack into the Smiths' computer, the computer Fred used should have clues of the crime. Granted, you cannot be sure of exactly what evidence the computer will contain. Perhaps you will find hacker tools establishing Fred's ability to commit the crime. Perhaps you will find the file containing the

credit card numbers that Fred copied from the Smiths' computers. Or perhaps you will find a word processing file in which Fred wrote down the steps he took to hack into the Smiths' computer. At this point you cannot know. At the same time, there is a good chance that Fred's computer contains evidence of his hacking crime.The only way to find out is to look for Fred's computer and analyze it for evidence.

Once again, you apply for a warrant to search 13 Prospect Avenue, Apartment B. Once again you want to seize a fur coat, gold jewelry, and expensive stereo equipment. This time, however, you also request permission to take Fred's computer. You knock on Fred's door, enter the apartment, and quickly find the stereo equipment, fur coat, and jewelry. This time you also look for Fred's computer. To your surprise, however, you end up finding not one but several computers and storage devices. You find one laptop computer in the living room, a desktop computer in the bedroom, and a box of floppy diskettes and thumb drives next to the desktop computer. The number of computers and storage devices give you pause. You don't know which computer is Fred's,or which computers or diskettes (if any) may contain the evidence you are looking for. Given that you can't tell what is on the computers and storage devices without turning them on and looking through them, you decide out of an abundance of caution to call headquarters ***94** and ask to speak with a computer expert.

The computer expert tells you that, as a practical matter, you have no choice but to take all of the computers and storage devices with you and send them to a government lab for analysis. He explains that you should not turn the computers on: turning them on will alter the evidence they contain. [FN5] To avoid altering the evidence on the computers, he explains, a computer forensic analyst must copy each storage device using special forensic tools and conduct a sophisticated and generally time-consuming forensic analysis. [FN6] The computer expert also emphasizes that it can take many hours, or even days, to locate specific evidence on a computer hard drive. It is technically possible to send an expert to 13 Prospect Avenue and have him try to search the computers on-site, he explains, but it is likely to be quite time consuming. Outside of the controlled environment of a government forensic lab, he cannot guarantee that the evidence will be located properly. This won't do, you realize. You need to find the evidence, and you can't spend the next few days sitting in Fred's apartment with a technical expert looking through Fred's computers. The most practical option seems to be to bag and tag all of the computers and hard drives and let the technical experts figure it out later. You do that, and the next day you file a return on the warrant with the judge listing the evidence you seized: first, the stereo equipment, fur coat and jewelry; and second the laptop computer, desktop computer, and the box of floppy diskettes and thumbdrives.

While the search of Fred's apartment is now complete, you are not done. You now need to send the computers and disk drives to the local government forensic lab for analysis. You ship the equipment to the lab, and wait for a response. After you don't hear back for a few weeks, you call the laboratory ***95** and ask if they have looked at your computers yet. The lab technician explains that the forensic process is very time consuming and that there is a three-month waiting list before a computer brought to the lab will be analyzed. [FN7]

Several months later, you receive a call that the analysis has been completed. A computer forensic analyst performed an analysis of the various hard drives and storage devices, which required him to generate copies of each of the computer drives and perform various computer commands on the copies to try and locate the evidence they contained. [FN8] The technician's report informs you that the analyst found evidence of a hacking incident on one of the computers. The evidence includes hacker tools that could have been used to hack into the Smiths' computer, as well as a copy of the stolen file that contained the credit card numbers taken from the Smiths' computer. The other computer and the additional storage devices did not contain any evidence of criminal activity.

II. FOUR PUZZLES: DIGITAL EVIDENCE AND THE INADEQUACY OF EXISTING LEGAL RULES

With the basic differences between physical evidence and digital evidence searches in mind, let's next consider

how existing law regulates the two types of searches. This section illustrates how the law regulating the warrant process is attuned to the basic mechanisms of physical searches. Existing rules were designed to regulate the collection of physical evidence, and are naturally tailored to the search-and-retrieve dynamic. Application of the same rules to digital evidence cases reveals that the law no longer fits the facts. A series of doctrinal puzzles emerges, requiring investigators and judges to adjust the rules as best they can to come up with alternatives. This section explores the clash between the traditional rules and the new facts by exploring those existing rules and ***96** seeing how they apply to digital evidence warrants.

At the outset, it is important to understand the basic rules of the warrant process. The basic constitutional principle shaping the warrant process is that investigators must execute narrow warrants limited by the scope of probable cause. [FN9] Investigators can obtain a search warrant only if they have probable cause to believe that evidence, fruits of crime, contraband or instrumentalities of crime are located in a particular physical place. [FN10] The warrant must name the particular property that the police have probable cause to believe will be located in the particular place to be searched. [FN11] Investigators can then obtain a warrant authorizing them to go to the particular place named and search for and seize that particular property.

These constitutional rules are supplemented by statutory rules, such as Federal Rule of Criminal Procedure 41 . [FN12] Rule 41 specifies what judges can issue warrants; what form the warrants must take; what time of day warrants must be executed; how long the police have to execute the warrant; and for what kind of property warrants can be issued. Rule 41 is often quite specific. For example, Rule 41(d) contains relatively detailed rules that govern making an inventory of the property taken and informing the suspect and the court of what was taken:

> The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property ***97** taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. [FN13]Rule 41 also provides a mechanism by which a suspect can move for the return of property unlawfully seized. [FN14] The police have a right to retain the property permanently, however, if it is contraband, a fruit or instrumentality of crime. If the property is mere evidence, they generally can retain it so long as there is a plausible claim of law enforcement need.

These constitutional and statutory rules work quite naturally in the case of physical evidence. This is true for two basic reasons. First, the rules fit the facts of searches for physical evidence. Physical searches generally follow a search-and-retrieve dynamic. Physical evidence generally can be identified and retrieved from a physical place in a matter of minutes or hours. The warrant authorizes the police to enter the physical property, locate, and then retrieve the evidence named in the warrant. [FN15] In FredFelony's first hypothetical, for example, the police could enter Fred's apartment and look for the mink coat, stereo equipment, jewelry and locksmith tools. Once they found those items, the investigators could take them away but had to stop searching.

The second reason these rules work with physical evidence searches is that they ensure that the police obtain physical ***98** property in a relatively narrow way that minimizes the intrusion onto the suspect's property and privacy. Each of the basic rules attempts to limit and channel police conduct based on the facts of how physical searches for physical evidence work. The particularity requirement limits where the police can search. They can only search the physical premises named in the warrant, such as Fred's apartment. The probable cause requirement

and statutory rules on executing warrants limit when the search can occur; excessive delay may lead the warrant to become stale, and statutory rules govern the time windows in which the search can occur. The particularity requirement of what property is to be seized governs how the search occurs; general rummaging through the target's propertyis not permitted. Finally, a number of the statutory rules add record-keeping requirements designed to facilitate oversight and judicial review, such as the requirement that an inventory of the property be taken, the filing of a return with the court, and the allowance for motions to return physical property.

A very different picture emerges when we try to apply the existing law to the facts of digital evidence cases, such as the second hypothetical case involving Fred Felony's hack into the Smiths' computers. While the existing rules work well for physical evidence, they raise a number of puzzles when applied to digital evidence. Fitting the two-stage warrant process of digital evidence cases into the single-stage approach of existing law generates four distinct problems: defining the evidence to be seized; defining the place to be searched; regulating the timing of the warrant process; and facilitating judicial review of the warrant process.

A. What is the Evidence to Be Seized?

Consider the first puzzle: how can investigators draft the warrant so that it particularly describes the lthings to be seized?m It is a basic tenet of Fourth Amendment law that the lthing to be seizedm named in the warrant is the item that the police have probable cause to believe constitutes evidence, a fruit or instrumentality of crime, or contraband. If a piece of computer hardware is known to be contraband or an instrumentality ***99** of crime, this tenet may be easy to satisfy. For example, a computer used to hack into another computer is an instrumentality of crime; likewise, a computer used to store child pornography is both an instrumentality of crime and contraband. [FN16] ln these cases, the warrant can name the computer hardware itself. But what if the computer is merely a storage device for evidence, or the police do not know if a particular computer is in fact an instrumentality of crime or contraband? What should the warrant describe as the evidence to be seized?

There are two basic choices, corresponding to the two stages of the warrant process for digital evidence. The first choice is to describe the evidence to be seized as the physical storage devices--the computers themselves. Of course, investigators will not know exactly what those computers look like before they execute the search. In Fred Felony's case, for example, the most specific description the police likely could use would be something like lany computers, computer equipment, diskettes, CD-ROMS, or other electronic storage devices.m While not terribly particular, this approach does describe accurately the evidence to be seized in the initial physical search. If you focus on that initial stage, the warrant will be accurate; the police will execute the warrant by entering the place to be searched and looking for (and then retrieving) the physical computers and other storage devices.

The second choice is to describe the evidence to be seized as the digital evidence itself--the electronic data. In the case of Fred Felony's hack, the warrant could state that it authorizes the seizure of lfiles containing the Mastercard number 2626 2727 2838 1812, or other evidence relating to Mr. and/or Mrs. John Smith of 123 Main Street.m This approach does not describe accurately what the police will do on-site, but it does describe the evidence sought at the second stage of the warrant process--the off-siteelectronic search. If you focus on the latter ***100** stage instead of the former, the warrant will be accurate; a forensic expert will execute the warrant by looking through the computers for specific evidence.

Neither choice fits the traditional Fourth Amendment rules particularly well. Describing the things to be seized as the physical storage devices creates two problems. First, the warrant becomes overbroad. The police do not have probable cause to seize every computer storage device located on the premises. Rather, they have probable cause to believe that those computers contain some kind of digital evidence of the crime. Naming the items to be seized as the physical storage devices may be technically accurate at the first stage, but it also means that the warrant itself is no longer as particular as the scope of probable cause. Second, the warrant says nothing (either implicitly or

explicitly) about the later search through the computer for the digital evidence. When the forensic experts look through the computer for evidence described in the warrant, they will have nothing to guide them. The warrant will merely say it authorizes the seizure of computer storage devices.

Equivalent problems arise if the warrant describes the particular files as the things to be seized. On one hand, this approach cures the overbreadth problem; the warrant is now much more particular. On the other hand, focusing on particularity creates a new problem. The warrant no longer describes accurately how the initial stage of the warrant will be executed. The warrant authorizes the search and seizure of specific files and data, but the investigators plan to seize all the hardware they can find on-site and send it to a lab for analysis. The execution of the warrant will no longer track what the warrant itself authorizes. Another technical problem is that copying a computer file does not actually lseizem it. As a result, the seizure that occurs is of the device holding the data rather than the data itself. [FN17] In effect, the police face a choice about what Fourth Amendment error they want to introduce. If they list the evidence to be seized as the physical device, then the warrant will be overbroad; if they list the evidence to be seized as ***101** the digital evidence, then the warrant no longer authorizes the police to do what they plan to do.

B. What is the Place to be Searched?

Although this issue arises less frequently, similar problems can arise when investigators attempt to describe the place to be searched. Digital evidence may be stored on a network or located inside an already seized computer stored in government custody. When either of these situations occur, the police may not need authorization to enter the place where the evidence is located. In such cases, what is the place to be searched?

In traditional cases, investigators simply list the location of the physical search as the location where the warrant will be executed. For example, if the police plan to search Fred Felony's apartment at 13 Prospect Avenue, Apartment A, they will list Fred's apartment as the place to be searched. However, this is only the location of the physical search, not the electronic search. In some cases, however, the latter may be more important. For example, a number of decided cases involve warrants authorizing the search of computers already seized and in law enforcement custody. [FN18] In these cases, the physical search and seizure has already occurred. The police already have the computer, and the warrant is needed only to authorize the electronic search. In such a case, how can the police satisfy the Fourth Amendment's requirement that the warrant specify the place to be searched? Should they list the place to be searched as the physical location of the storage device, such as lstorage locker #7 in the Seventh Precinct?m Or, should they list the computer itself, such as la Dell personal computer with Serial Number X10-23533?m The former satisfies the traditional need to specify the physical location of the search, but in a purely formalistic way; the latter is more accurate, but does not attempt to name a lplacem to be searched.

The problem has particular importance in the case of data ***102** stored remotely on a computer network. Imagine that the police plan to execute a warrant to find a particular e-mail stored on a computer network by logging on to the network (or having an employee of the network operator do so) and retrieving the information remotely. Is the place to be searched the location of the police or the evidence? If the place to be searched is the location of the police when they log on to the network, police can engage in forum-shopping. Depending on how the network is configured, the police may be able to access it from anywhere. If the place is where the individual file is stored, on the other hand, it may stymie investigations. Investigators may be unable to know ahead of time where the evidence is located, and the retrieval of evidence may involvea search outside the United States where no warrant can be obtained. [FN19]

C. When Can the Search be Executed?

The third question concerns the timing of the second search. Statutory rules governing the warrant process generally lay out a specific time frame for executing the warrant. For example, Rule 41 states that the warrant must

be executed lwithin a specified period of time no longer than 10 daysm [FN20] after the warrant has been signed, and that the search must be executed only between the hours of 6:00 a.m. and 10:00 p.m. [FN21] It also states that the person who executes the warrant lmust enter on its face the exact date and time it is executed.m [FN22] These timing requirements appear reasonable and appropriate in the case of a search for physical evidence. The Rules ensure that Officers do not wait until the probable cause becomes stale, that they do not invade people's homes in the middle of the night, and that they leave a record of the exact time that the warrant was executed. The same requirements apply reasonably to the physical-search stage of the two-stage warrant ***103** process for physical evidence. But they leave open a question: what rules apply to the timing of the second stage, the electronic search?

The existing rule leaves open only two possibilities, neither of which is particularly appealing. The first possibility is that the timing requirements of Rule 41 also apply to the electronic search. Under this approach, the computer forensic process must be completed within ten days of the issuance of the warrant, and can be performed only between the hours of 6:00 a.m. and 10:00 p.m. This proves an impossible standard to meet in practice. As we saw in the hypothetical with Fred Felony's computers, the forensic process typically takes a number of days once started, and the backlog of cases in most jurisdictions means that weeks or months may pass before the analysis even begins. Nor does this approach make much sense. While it is desirable for electronic searches to occur quickly, staleness is not a concern after the container of evidence has been seized. In addition, there is no reason why a forensic examiner working in the laboratory at night has to stop at 10:00 p.m. or cannot come in to work before 6:00 a.m. [FN23]

However, the second possibility is also problematic. The electronic search process may simply be exempt from Rule 41's timing requirements. If Rule 41 is construed in this way, nothing requires government investigators to begin or complete the forensic analysis at any time. Investigators can take all of the target's computer equipment and hold them for months or even years, without even beginning the forensic process. This is particularly problematic given that some computers seized may not contain any evidence. In the hypothetical case of seizing Fred Felony's computer, the investigators found two computers and multiple additional storage devices. When the electronic search was executed months later, however, it turned out that only one of the computers contained evidence. This means that the other computer and storage devices ideally would not have been seized in the first place; a rule allowing the police to hold ***104** a target's computer until they get around to searching it (however long that may be) seems unfairly insensitive to the legitimate needs of computer owners. The existing Rule 41 is simply ill-prepared to handle the two-stage search process of digital evidence cases, as it forces the second step either to fit within the rules of the first or follow none at all.

D. What are the Oversight and Record-keeping Requirements,and When Must Property be Returned?

The final issues involve oversight and review of the warrant process, and include the rules that govern when seized property must be returned. Traditional rules require the officer who executes the warrant to create an inventory of the items seized and to provide the judge the inventory list of property seized. [FN24] The rules then place a burden on the aggrieved property owner to file a motion in court for return of the property. [FN25] Under Rule 41, the court generally will order the return of the property only if the police no longer have a legitimate claim that they need it for an investigation. [FN26]

These rules prove awkward in the case of digital evidence searches. First, it is unclear whether the record-keeping requirements refer only to the initial physical search or also include the subsequent electronic search. For example, should the required inventory list include only the physical evidence taken at the first stage, or should it include a list of the computer programs and files that the computers are later revealed to contain? Requiring investigators to generate a quick analysis of the files is impracticalgiven the time-consuming nature of the forensic process; further, owners of computer equipment ordinarily should know what files their computers

contain and should not need the police to tell them. If the inventory relates only to the physical evidence, however, then the existing rules do not require any record-keeping for the subsequent electronic search. Once again, applying the initial search rules to the ***105** electronic search proves difficult, while declining to apply them leaves an important step of the warrant process unregulated. Similarly, who should receive the inventory list in the case of a computer already in government custody? If the government has a computer in its custody and obtains a warrant to search it, does it need to find the owner of the computer and serve the inventory list on the owner?

The second difficulty concerns the return of property. Computer searches often require investigators to seize all of the computers and storage devices that they find on-site and remove them for subsequent analysis. In many cases, only some of those computers and storage devices will actually contain evidence of the crime; in some cases, none of them will. We saw this problem in the Fred Felony hypothetical. When the investigator entered Fred's apartment, he found several computers and did not know which one contained the evidence he needed. As noted earlier, the investigators often will not realize which computers contain the necessary evidence until many months later when the computers are finally analyzed. Under the current version of Rule 41,however, a property owner simply must wait until the government gets around to looking at the computer. Existing rules simply were not designed for a two-step search environment that begins with a broad seizure. As a result, the rules show little attention to the needs of property owners who may need equipment back for reasons unrelated to the investigation.

III. EXISTING LAW APPLYING THE WARRANT PROCESS TO SEARCHES FOR DIGITAL EVIDENCE

Courts have provided tentative answers to two-and-a-half of the four puzzles raised by the application of the warrant process rules to searches for digital evidence. The one puzzle that has not been addressed at all is how to define the lplace to be searched.m This issue simply has not yet come up in litigation. Also, only a small amount of litigation has focused on the record-keeping requirements and the rules governing the return of seized computers. Two other steps have been the subject of extensive litigation. The most frequently litigated issue relates ***106** to how to describe the evidence to be seized. In the last three years, there has also been a growing body of caselaw on the timing of the search. This section reviews the existing caselaw in order to frame the normative reform proposals that will be made in Part IV.

A. The Things to be Seized

Courts generally have deferred to the government's choice of whether to describe the property to be seized as the computer hardware or the digital evidence itself. Both approaches have been upheld, at least within limits; no court has required that the police use one approach or the other. This does not mean that courts have rubber-stamped the government's work. Rather, they have scrutinized both approaches and concluded that, within reason, the government can chose which approach to use. The courts' approval of both strategies owes in large part to a practice followed by many investigators (and recommended by the Department of Justice) of explaining the need for the two-stage search process in the warrant affidavit. This practice uses the affidavit as a way to communicate the details of the search process to the judge; by signing the warrant, the court in effect approves the two-step search process. At least some courts have suggested that this practice effectively cures what otherwise could be an inherent constitutional defect in the two-stage search for digital evidence.

The more common practice has been to describe the evidence to be seized as the physical computers. An example of a decision upholding such a practice is United States v. Upham. [FN27] In Upham, agents investigating a child pornography case obtained a warrant to seize l[a]ny and all computer software and hardware, . . . computer disks, [and] disk drives.m [FN28] Judge Boudin rejected the defendant's claim that the seizure of ***107** lall computersm was overbroad:

As a practical matter, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images. A sufficient chance of

finding some needles in the computer haystack was established by the probable-cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs. We conclude, as did the Ninth Circuit in somewhat similar circumstances, that the . . . [language] was not unconstitutionally overbroad.

Of course, if the images themselves could have been easily obtained through an on-site inspection, there might have been no justification for allowing the seizure of all computer equipment, a category potentially including equipment that contained no images and had no connection to the crime. But it is no easy task to search a well-laden hard drive by going through all of the information it contains, let alone to search through it and the disks for information that may have been ldeleted.m The record showsthat the mechanics of the search for images later performed off site could not readily have been done on the spot. [FN29] Note that Judge Boudin looked to the practical needs of law enforcement to determine whether the warrant was overbroad, rather than to the scope of probable cause. Because the government had made the case that it needed to seize all computers for practical reasons, it was not overbroad for the warrant to reflect this on its face. [FN30]

The willingness to approve seizures of equipment in many cases may owe in part to the fact that many of the existing cases involve computers used to store child pornography or, more rarely, obscenity. In such a case, the computer hardware itself technically is an instrumentality of crime and forfeitable. ***108**[FN31] As a result, seizure of the contraband equipment is legal even if some of the files contained in the equipment do not relate to the crime. The Tenth Circuit made this point explicitly in the case of Davis v. Gracey, which involved a warrant to seize equipment that contained obscenity. [FN32] The police seized two computer servers used to provide e-mail and digital images to about two thousand subscribers. [FN33] After the equipment was seized, its owners brought a civil action claiming that the seizure violated the Fourth Amendment. [FN34] In particular, the plaintiffs claimed that the seizure was overbroad because it seized a great deal of innocent material. [FN35] The court rejected this argument because the equipment was contraband that could be seized:

> In the typical case, the probable cause supporting seizure of a container is probable cause to believe that the container's contents include contraband or evidentiary material. Here, in contrast, the probable cause supporting the seizure of the computer/container related to the function of the computer equipment in distributing and displaying pornographic images, not to its function in holding the stored files. The fact that a given object may be used for multiple purposes, one licit and one illicit, does not invalidate the seizure of the object when supported by probable cause and a valid warrant. [FN36]

Even in Gracey, however, the court was influenced by the practical difficulties inherent in a contrary rule requiring the police to distinguish between the seizure of computer equipment and the seizure of individual files stored inside. The court explained:

> We . . . note the obvious difficulties attendant in separating the contents of electronic storage from the computer hardware during the course of a search. Perhaps cognizant of the ***109** potential burdens of equipment, expertise, and time required to access, copy, or remove stored computer files, plaintiffs have not suggested any workable rule. In short, we can find no legal or practical basis for requiring officers to avoid seizing a computer's contents in order to preserve the legality of the seizure of the computer hardware.
>
> . . . Even in the typical case, seizure of a container need not be supported by probable cause to believe that all of the contents of the container are contraband. The seizure of a container is not invalidated by the probability that some part of its linnocentm contents will be temporarily detained without independent probable cause. We will not hold unlawful the otherwise constitutional seizure of the computer equipment in order to prevent the temporary deprivation of plaintiffs' rights to the contents. [FN37]

In some cases, however, warrants that listed only the physical property seized during the physical search have been found inadequate because they failed to provide sufficient guidance to regulate the search at the electronic

stage. The most important example is United States v. Riccardi. [FN38] In Riccardi, the police executed a warrant to seize material relating to child pornography from the defendant's home. [FN39] During the initial search, they saw that the defendant had a computer. [FN40] The agents applied for a second warrant to allow them to go back and seize the target's computer. [FN41] The second warrant listed the items to be seized as the target's computer,

> and all electronic and magnetic media stored therein, together with all storage devises [sic], internal or external to the computer or computer system, including but not limited to floppy disks, diskettes, hard disks, magnetic tapes, removable media drives, optical media such as CD-ROM, printers, modems, and any other electronic or magnetic devises used as a peripheral to the computer or computer system, and all electronic ***110** media stored within such devises. [FN42]

The warrant did not explain that it was limited to computers used to store child pornography. [FN43] In an opinion by Judge McConnell, the court held that the warrant was insufficiently particular because it failed to give the police sufficient guidance as to what kind of evidence they could search for during the forensic analysis. [FN44] lBy its terms, the warrant thus permitted the officers to search for anything--from child pornography to tax returns to private correspondence. It seemed to authorize precisely the kind of 'wide-ranging exploratory search[] that the Framers intended to prohibit.'m [FN45] If the warrant had explained the type of evidence that the police were looking for, McConnell suggested, then it would have been sufficiently particular. [FN46] The inclusion of the type of evidence was not necessary at the initial physical stage because the police could not know which computers actually did store the evidence sought, but was needed at the second electronic stage to limit the search that the forensic specialists conducted.

United States v. Hunter [FN47] is somewhat similar. In Hunter, investigators searched an attorney's office for evidence that he had helped a client launder money. [FN48] The warrant authorized the seizure of l[a]ll computers . . . [a]ll computer storage devices . . . [and a]ll computer software systems.m [FN49] The district judge found that this description was overbroad because it did not mention lthe specific crimes for which the equipment was soughtm or incorporate by reference the affidavit's discussionof the search strategy that investigators planned to use in order to avoid interfering with innocuous files protected by the attorney-***111** client privilege. [FN50] Without this information, the court suggested, the warrant did not provide sufficient guidance to the officers. [FN51] As in Ricardi, however, the court did not suppress the evidence on the ground that the overall care that the officers showed in planning and conducting the search made the lgood faithm exception applicable. [FN52]

Another notable case rejecting a computer warrant as insufficiently particular is a civil decision, Arkansas Chronicle v. Easley. [FN53] In Easley, state investigators obtained a warrant to search a journalist's home for evidence relating to the Oklahoma City bombings. [FN54] The investigators sought a video and three still photographs believed to be located on the journalist's computer. [FN55] Instead of describing the property to be seized as the video and the photographs, the warrant focused only on the physical stage of the search: the warrant permitted the agents to seize l[a]ny and all computer equipment, hard disk drives, compact disks, floppy disks, magnetic tapes or other magnetic or optical media capable of storing information in an electronic, magnetic or optical format.m [FN56] As in Riccardi, the warrant was held invalid on the ground that it did not limit the scope of the electronic search: lIn these circumstances, such a warrant essentially amounted to a general warrant giving police the authority to rummage through every single computer file and document with no limitations on which documents could be seized.m [FN57] Judge Ellis also expressed concern that the warrant was too broad in terms of limiting the seizure at the initial physical stage, a problem made more severe by thefact that ***112** the role of the computer in the case was mere evidence rather than contraband or an instrumentality of crime. [FN58]

Warrants that list the evidence to be seized as the information sought are less common than warrants that list the evidence to be seized as the physical storage device. Nonetheless, warrants in such cases have been upheld as well. [FN59] In these cases, the defense challenge generally shifts ground: instead of arguing that the warrant was

overbroad, defendants claim that the execution of the warrant was in lflagrant disregardm of the warrant. [FN60] The lflagrant disregardm standard has been adopted by the courts of appeal to review the execution of a warrant; [FN61] if the evidence in question was within the scope of the warrant, that evidence is suppressed only if the search so grossly exceeds the scope of the warrant during execution that the authorized searchappears to be merely a pretext for a lfishing expeditionm through the target's private property.

This is a very difficult standard for defendants to satisfy, as it amounts to a requirement of large-scale bad faith. Proving bad faith is difficult in light of the significant body of caselaw in recent years emphasizing the practical reasons investigators may need to seize computers and subject them to an off-site search. Searching on-site for the evidence can be more disruptive than searching on-site; courts have found it lobviousm that searching a computer for evidence requires great skill, time and expertise. [FN62] In light of that it is generally more reasonable to allow officers to search off-site than park at the suspect's home for a few days while the search of his computer occurs. [FN63] ***113** As one district judge noted, l[t]he Fourth Amendment's mandate of reasonableness does not require the agent to spend days at the site viewing the computer screens to determine precisely which documents may be copied within the scope of the warrant.m [FN64] These precedents make it difficult to establish that a routine computer search was in lflagrant disregardm of the warrant.

The judicial focus on practical reasons why a warrant must be executed in a particular way has led to a new practice among prosecutors and law enforcement agents in the case of digital evidence searches. In traditional cases, the affidavit in support of the warrant explains the officer's probable cause to believe that evidence described in the warrant will be located in the place searched. In digital evidence warrants the affidavit is used to do much more. In many cases, the affidavit is used to explain the need for a two-step search to the magistrate judge. The affidavit informs the judge of what investigators plan to do when they execute the warrant, explaining the practical needs that they believe justify the two-step search process. The magistrate's decision to sign the warrant in effect lapprovesm the two-stage search ex ante. [FN65] With the search process approved before the search is executed, a defendant will have a hard time arguing that the search was executed in lflagrant disregardm of the warrant or that it was overbroad.

The idea of justifying the overbroad seizure through language in the affidavit derives in part from an early Ninth Circuit case involving paper documents, United States v. Tamura. [FN66] In Tamura, the government seized boxes of documents and took them offsite for review. The boxes contained some documents which were evidence of crime commingled ***114** with innocuous documents, and the government seized all of them because of the infeasibility to search through all boxes on site. [FN67] In an opinion by Judge Fletcher, the Ninth Circuit offered a suggestion for how the government could lgenerally . . . avoid violating [F]ourth [A]mendment rightsm in cases involving commingled documents: get prior permission to seize all of the documents and conduct an off-site search before actually doing so, in order that lwholesale removalm is lmonitored by the judgment of a neutral, detached magistrate.m [FN68] In other words, judges should sign off on the wholesale seizure of documents so overbroad seizures are not conducted unless they are required by practical concerns. [FN69]

The Justice Department has recommended something akin to the Tamura approach in its manual on Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations. [FN70] The DOJ Manual recommends the following practice when the physical storage device is only a storage container for evidence:

> The affidavit should . . . contain a careful explanation of the agents' search strategy, as well as a discussion of any practical or legal concerns that govern how the search will be executed. Such an explanation is particularly important when practical considerations may require that agents seize computer hardware and search it off-site when that hardware is only a storage device for evidence of crime. Similarly, searches for computer evidence in sensitive environments (such as functioning businesses) may require that the agents

adopt an incremental approach designed to minimize the intrusiveness of the search. The affidavit should explain the agents' approach in sufficient detail that the explanation provides a useful guide for the search team and any reviewing court. It is a good practice to include a copy of the ***115** search strategy as an attachment to the warrant, especially when the affidavit is placed under seal. [FN71]

Exactly what kind of detail is required in the affidavit presently remains an open question. As I explain in another article, a few courts have indicated that the search strategy should include the specific steps that will be undertaken when the forensic analyst conducts the electronic search. [FN72] That is, the affidavit should not only explain the need for a two-stage search, but should actually provide a detailed list of the steps that will be taken during the second stage. As I argue elsewhere, it is my view that such detail should not be required, especially ex ante, and that the reasonableness of the electronic search should be reviewed ex post using the same lflagrant disregardm standard used in physical searches. [FN73] But the present uncertainty of how much detail an affidavit should include does not alter the broad acceptance of the basic strategy: prosecutors can lcurem any defect caused by the two-stage warrant process by explaining the process in the affidavit. By signing the warrant, the judge in effect approves the two-stage search and cures what otherwise would be a technical defect raised by trying to force a two-stage process into a legal rule designed to handle a single-stage search.

B. When Can the Search be Executed?

The last five years have witnessed a considerable amount of litigation--not to mention a great deal of informal negotiations between prosecutors and magistrate judges--on when a search for digital evidence can be executed. The legal issues fall into two basic categories. The first set of issues concerns whether the timing restrictions of warrant rules such as Rule 41 apply to the subsequent electronic search. The second set of issues concerns the legality and propriety of judicially-imposed restrictions on the timing of the electronic search process. The ***116** first questions have a reasonably clear answer. The second do not.

The few courts that have addressed the first issue have held that statutory rules requiring the search to occur within a particular time window do not apply to the computer forensic process. For example, in Commonwealth v Ellis, [FN74] investigators seized a computer server at a law firm. [FN75] The defendant relied on a state supreme court decision that had interpreted the state warrant law to require that every search pursuant to a warrant must be completed within seven days of the warrant being issued. The Ellis court concluded that this did not apply to the computer forensic process. [FN76] According to the Court:

> [the state supreme court's interpretation of state law] was made before the advent of the computer age, and before the Supreme Judicial Court could envision a scenario where execution of a search could continue after the return of the warrant had been filed. And where computers are seized, that is precisely what occurs. . . . Courts have recognized that the search of computer data involves more preparation than an ordinary search and a greater degree of care in the execution of the warrant; and that the search may involve much more information. As such, computer searches are not, and cannot be, subject to the statutory requirement that the search be completed within seven days. [FN77]

Federal courts have reached the same conclusion in the context of interpreting the ten-day rule of Rule 41, which requires warrants to be executed within ten days of being signed. A handful of federal district courts have addressed the issue and held that the computer forensic process is not included within the ten day rule. [FN78] As one court explained in United ***117** States v. Hernandez:

> Neither Fed. R. Crim. P. 41 nor the Fourth Amendment provides for a specific time limit in which a computer may undergo a government forensic examination after it has been seized pursuant to a search warrant. In most cases the forensic examination of the computer will take place at a different location than that where the computer was seized. The same principle applies when a search warrant is performed for documents. The documents are seized within the time frame established in the warrant but examination of

these documents may take a longer time, and extensions or additional warrants are not required. The examination of these items at a later date does not make the evidence suppressible. [FN79]

The more difficult questions concern the second set of issues. First, are there any constitutional limits on when the electronic search must occur? Second, do magistrate judges have the statutory authority to condition the issuance of the warrant on the government's agreement to conduct the electronic search in a particular period of time? Two federal district courts have recently suggested that the Fourth Amendment's reasonableness standard requires the investigators to search the computer for the evidence before too much time has elapsed. The apparent idea is that an excessive delay before the second search renders the continued seizure unreasonable, requiring suppression of the evidence as fruit of an unreasonable seizure. [FN80]

The first of the two cases is United States v. Grimmett. [FN81] In Grimmett, officers seized computers pursuant to a state warrant ***118** that authorized a search for child pornography. [FN82] State law gave the officers ninety-six hours to execute the search. [FN83] The officers seized the computers from the defendant's home within the ninety-six-hour window, but then a few weeks passed before the government's computer expert searched the computer for child pornography. [FN84] The defendant claimed that the failure to search the computer for evidence within the ninety-six-hour window violated the Fourth Amendment. [FN85] The court rejected the claim, but did accept the basic idea that the timing of the computer search was governed by a reasonableness analysis:

> The conduct of law enforcement officers in executing a search warrant is governed by the Fourth Amendment's mandate of reasonableness. The Fourth Amendment does not provide a specific time in which a computer may be subjected to a government forensic examination after it has been seized pursuant to a search warrant. The court finds that the Fourth Amendment requires only that the subsequent search of the computer be made within a reasonable time . . . . The court finds that the subsequent search was conducted within a reasonable time since it was concluded within a few weeks of the execution of the warrant. [FN86]

The second case is United States v. Syphers. [FN87] The Syphers court held that a seven month delay in the forensic analysis of a computer was reasonable because it was justified by legitimate practical needs:

> Syphers asserts that the state acted unreasonably in detaining the CPU for seven months before completing the search. The government counters that the Fourth Amendment does ***119** not impose any limitation on the length of a forensic examination of a computer. lHowever, from the general prohibition against 'unreasonable searches and seizures' . . . it may be contended that there are some constitutional limitations upon the time when a search warrant may be executed.m . . .
>
> Based on the same reasons which support the finding that the state acted in good faith with respect to the warrant, the court concludes that the state did not overstep any constitutional boundaries in seizing the CPU for seven months under the circumstances presented. [FN88]

The Syphers court then cited a military court decision by the U.S. Navy-Marine Corps Court of Criminal Appeals in United States v. Greene. [FN89] In Greene, Special Agents of the Naval Criminal Investigatory Service (NCIS) obtained the target's consent to seize and search the suspect's computer for child pornography. [FN90] The consent form did not state the length of time that Greene agreed to allow the NCIS to seize his computer, but three months elapsed before the forensic process was undertaken. [FN91] The court concluded that the three month delay was not unreasonable:

> While the appellee did not expressly consent to a period of 3 months of NCIS seizure and retention of his property, the plain language of the consent form clearly states he agreed to allow the investigators to remove and retain his property for investigative purposes. In other words, the appellee consented to a seizure of his property. If the appellee believed that retention for 3 months was unreasonable, he never said so. We hold that, in this case, the consensual seizure and subsequent retention for 3 months was not unreasonable. [FN92]

In a footnote, however, the court warned that there were limits to when the search could be completed:

> ***120** Although we hold that 3 months is constitutionally permissible here, we also believe that an excessively long period of retention, following a lawful seizure, could be unreasonable. We decline to try to draw a lbright-linem that would apply in all circumstances. Each case must be considered on its own facts. [FN93]

While Grimmett, Syphers and Greene suggest that an excessive delay in the forensic process may render the seizure unreasonable, it is unclear whether this suggestion makes sense in light of existing law. First, the computers in all three cases were instrumentalities of the crime: they were used to possess illegal images of child pornography. Given that these items are forfeitable, it makes little sense to suggest that continued deprivation of the property renders the seizure unreasonable. Second, statements by prior courts and commentators that delay in the timing of a search may have constitutional limitations were made in the context of an initial physical search. In those circumstances, delay may allow the probable cause to become stale. The search is unreasonablebecause as time passes the case for probable cause begins to evaporate. In contrast, a seized computer stores its information permanently. The initial physical search and seizure has already occurred. The cause can no longer become stale.

Whether the framework suggested in Grimmett, Syphers and Greene will be adopted by other courts remains unclear. A large body of case law indicates that the amount of time that property or a person is seized factors into the reasonableness of the seizure. [FN94] Courts could therefore hold that a warrant authorizes a theoretically overbroad computer seizure, but that as time passes the overbroad seizure becomes less reasonable. One difficulty with this approach is that the vague standard gives little guidance to law enforcement. Most agents and prosecutors are at the mercy of forensic lab employees with regard to the timing of the electronic search. The timing of a search may ***121** be determined by the lab's resources, the forensic analyst's skills, the specific tools the lab uses, and the type of investigation. A general reasonableness requirement does not provide clear guidance to law enforcement and may end up punishing agents and prosecutors for factors beyond their control. A better approach would be to provide clear guidance using statutory warrant rules.

A related issue is whether magistrate judges have the statutory authority to condition the issuance of a warrant on the government's agreement to search the computers, or at least begin the search, within a specific period of time. As the DOJ Manual explains:

> Several magistrate judges have refused to sign search warrants authorizing the seizure of computers unless the government conducts the forensic examination in a short period of time, such as thirty days. Some magistrate judges have imposed time limits as short as seven days, and several have imposed specific time limits when agents apply for a warrant to seize computers from operating businesses. In support of these limitations, a few magistrate judges have expressed their concern that it might be constitutionally lunreasonablem under the Fourth Amendment for the government to deprive individuals of their computers for more than a short period of time. [FN95]

Do magistrate judges have the power to do this? The text of Rule 41 is not entirely clear, but suggests that judges may not. Rule 41(d)(1) is phrased as a command: la magistrate judge . . . must issue the warrant if there is probable cause.m [FN96] The rule appears to give the judge no power to withhold the warrant unless the government agrees to a special condition. As the DOJ Manual explains:

> the relevant case law is sparse, [but] it suggests that magistrate judges lack the legal authority to refuse to issue search warrants on the ground that they believe that the agents ***122** may, in the future, execute the warrants in an unconstitutional fashion. See Abraham S. Goldstein, The Search Warrant, the Magistrate, and Judicial Review, 62 N.Y.U. L. REV. 1173, 1196 (1987) ("The few cases on [whether a magistrate judge can refuse to issue a warrant on the ground that the search may be executed unconstitutionally] hold that a judge has a 'ministerial' duty to issue a warrant after 'probable cause' has been established."); In re Worksite

Inspection of Quality Prod., Inc., 592 F.2d 611, 613 (1st Cir. 1979) (noting the limited role of magistrate judges in issuing search warrants). As the Supreme Court suggested in one early case, the proper course is for the magistrate to issue the warrant so long as probable cause exists, and then to permit the parties to litigate the constitutional issues afterwards. See Ex Parte United States, 287 U.S. 241, 250 (1932) ("The refusal of the trial court to issue a warrant . . . is, in reality and effect, a refusal to permit the case to come to a hearing upone ither questions of law or fact and falls little short of a refusal to permit the enforcement of the law."). [FN97]

There are other perspectives, however. Susan Brenner and Barbara Frederiksen have argued that Rule 41 creates a lreservoir of inherent powerm to place time restrictions on the computer forensic process. [FN98] They note that courts have allowed federal judges to issue anticipatory warrants that are triggered when some future event happens. [FN99] For example, the police can obtain a warrant to search a house the moment a suspicious package is delivered and can condition the execution of the warrant on the arrival of the suspicious package at the location to be searched. Brenner and Frederiksen suggest that restrictions on the timing of the computer forensic process are similar and thus implicitly allowed by Rule 41. [FN100]

I am not sure I am convinced by this argument. Anticipatory warrants are generally justified by the timing of probable cause. The thinking is that probable cause to execute the ***123** search is contingent on the condition precedent, such as the arrival of the package, occurring. [FN101] The warrant can be executed only when the condition precedent occurs because until that point, no probable cause exists and no warrant can issue unless probable cause exists. Further, Rule 41 has been amended specifically to allow for anticipatory warrants. [FN102] In light of these differences, I do not see how the power to issue anticipatory warrants implies the power to control the timing of the computer forensicprocess. Making a police officer wait to execute a warrant until there is probable cause seems quite different from making an officer conduct a forensic analysis of a seized computer within a specific window of time. In any event, the magistrate's power to impose time limits on the forensic process presently remains unclear. [FN103]

As a practical matter, agents will have little choice but to follow time limits on the forensic process when judges decide to impose them. In United States v. Brunette, [FN104] a magistrate judge allowed agents to seize the computers of a child pornography suspect, but added the condition that the forensic analysis must occur lwithin 30 days.m [FN105] The agents seized two computers when they executed the search five days later. [FN106] A few days before the thirty-day period elapsed, agents obtained ***124** a thirty-day extension for review. [FN107] They examined one of the seized computers within the thirty-day extension period and found pornographic images of children. [FN108] However, the agents did not begin the review of the last computer until shortly after the extension period had elapsed. [FN109] Brunette argued that the evidence located on the last computer had to be suppressed because the search outside of the sixty-day period violated the terms of the judge's order. [FN110] The district court agreed, concluding that the failure lto adhere to the requirements of the search warrant and subsequent orderm meant that lany evidence gathered from the . . . computer is suppressed.m [FN111]

C. What Are the Oversight and Record-keeping Requirements, and When Must Property be Returned?

Finally, a few courts have touched on the record-keeping requirements of statutory warrant rules and the return of seized computers. The thrust of the caselaw on record-keeping requirements is that they do not apply to the data. For example, the return on the warrant is limited to the physical property taken. [FN112] The federal rule requires notice, but that notice need only be of the lproperty taken,m which presumably applies only to the physical equipment. [FN113] This is a sensible approach. The purpose of leaving a return is to inform the suspect of what property was taken, and this is best done by leaving a report of the physical property seized. After all, the suspect himself will know better than the police what files the storage device contains. It does not serve any interest of the warrant rules to require the police to search the computer, catalog its ***125** contents, and then notify the ower of

what data resides on his hard drive.

The caselaw on the return of physical property treats computers essentially like any other property. The basic rule is that if the government has a continuing need for the property, it can continue to hold it. As the DOJ Manual explains, this standard allows the government to hold on to seized computers throughout the forensic process:

> Rule 41(e) motions requesting the return of properly seized computer equipment succeed only rarely. First, courts will usually decline to exercise jurisdiction over the motion if the government has offered the property owner an electronic copy of the seized computer files.
>
> Second, courts that reach the merits generally find that the government's interest in the computer equipment outweighs the defendant's so long as a criminal prosecution or forfeiture proceeding is in the works. If the government does not plan to use the computers in further proceedings, however, the computer equipment must be returned. Further, a court may grant a Rule 41(e) motion if the defendant cannot operate his business without the seized computer equipment and the government can work equally well from a copy of the seized files. [FN114]

Notably, the current rule does not provide any mechanism to allow a suspect to get a copy of seized files unrelated to the investigation. While investigators may decide to generate copies of particular files on their own for suspects, no legal rule requires it. [FN115]

***126** IV. RETHINKING THE WARRANT PROCESS IN AN AGE OFDIGITAL EVIDENCE

What is the future of the warrant process? This section proposes a series of changes to the law governing the warrant process to update it for the era of digital evidence. It focuses specifically on changes to statutory warrant rules and, in particular, to Rule 41. The goal is to envision how Rule 41 and equivalent state rules might be changed to respond to the specific issues raised by the switch from physical evidence to digital evidence.

Before beginning, it may be helpful to understand why this section focuses on statutory warrant rules rather than the Fourth Amendment. The primary reason is that Fourth Amendment warrant rules are far more flexible than statutory commands. As the Supreme Court has stressed,

> the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. [FN116]

Courts generally have heeded this guidance on the case of computer searches and seizures. For the most part, judges have proved sensitive to the practical difficulties inherent in computer searches and seizures, and they have not imposed highly restrictive requirements that would not work for the two-step warrant process. [FN117] Given the presumption that searches pursuant ***127** to warrants are constitutionally reasonable, courts have generally approved two-stage searches within the reasonableness framework of the Fourth Amendment.

Statutory warrant rules are less flexible and more detailed, and therefore play a greater role in light of changing facts. Statutory warrant rules such as Rule 41 are designed to regulate the traditional physical search process. They are poorly equipped to fit the two-stage search warrant process needed in the case of most computer searches and seizures. The rules remain rigid and specific, and are therefore less able to accommodate the dynamics of digital evidence searches. As a result, legal reform must focus on statutory warrant rules. Of course,

constitutional and statutory rules have a symbiotic relationship. A revision of existing statutory warrant rules can help address the Fourth Amendment's reasonableness command. New statutory rules that better regulate the warrant process can permit a better fit between the new facts and the animating concerns of Fourth Amendment law.

A. The Thing to be Seized

The first change I propose is modifying Rule 41's current requirement that l [t]he warrant must identify the person or property to be searched, [and] identify any person or property to be seized.m [FN118] In digital evidence cases, more specific language should be used. The language should require the police to state what physical evidence they plan to seize on-site, and then indicate what kind of evidence they plan to search for in the subsequent electronic search. In other words, agents should be required to describe the property to be seized at both the physical search stage and the electronic search stage.

This could be achieved by amending Rule 41(e) to add an additional sentence. Something like this should work:

> If the the warrant authorizes the seizure of computers or electronic storage devices to retrieve computer data constituting evidence of crime, the warrant must identify both the ***128** physical computers or storage devices to be seized and the computer data that constitutes evidence of the crime.

Under this approach, a computer warrant would require the officers to name the specific evidence they are searching for twice, correlating with the two stages of criminal investigations. For example, the warrant form could authorize the police to seize (all computers and electronic storage devices believed to contain evidence of wire fraud(while on-site and then authorize a subsequent search for the specific files that the agents have reason to believe are located on the storage device. This approach would address both theparticularity concern and also ensure that the warrant is not executed in disregard of the warrant.

A second and related change should be made to Rule 41(b) and (d) to make clear that searches to retrieve information but not seize physical property are permissible. The current text of Rule 41 states that a warrant can be issued lto search for and seize a person or property located within the district.m [FN119] When computer information is copied, however, no seizure occurs; the owner is not actually deprived of his property. [FN120] It is well-settled that Rule 41 can be used to obtain a warrant for mere information; this was the apparent holding of United States v. New York Telephone Co., [FN121] and was reaffirmed in early cases holding that a Rule 41 warrant could be obtained to collect computer data. [FN122] However, this interpretation was reached through the meaning of lpropertym in Rule 41, [FN123] apparently without recognition that copying data does not seize it. In light of the meaning of seizure in the context of electronic evidence, it may be appropriate to modify Rule 41 formally to note that a seizure is not a prerequisite of a search.

***129** B. The Place to be Searched

Statutory warrant rules could also be amended to consider the case of computers in government custody. Alternatively, courts could simply approve warrants that describe the place to be searched in such cases as the computer itself. For example, imagine an FBI field office has a computer in its possession and needs a search warrant to search the machine. The lplace to be searchedm could be a particular description of the computer itself, held in the custody of the FBI field office. That is, the warrant would name the specific movable property to be searched, rather than the physical place where that movable property happens to be stored.

C. When Can the Search be Executed?

Significant changes should be made to Rule 41 and equivalent state provisions to specify when each stage of the two-step warrant process must be executed. Rule 41(e)(2) states that a federal search warrant lmust command the officer to: (A) execute the warrant within a specified time no longer than 10 days; (B) execute the warrant

during the daytime, unless the judge for good cause expressly authorizes execution at another time.m [FN124] One obvious change would be to amend this language to clarify that the ten-day and daytime rules do not apply to the subsequent electronic search, as the Hernandez court concluded. [FN125] Perhaps the easiest way to do this would be to include a definition of lexecute the warrantm in the case of computer searches. For example, the following addition to the definition section of the Rule 41(a)(2) could do the trick:

> In a case involving the seizure of computers and other electronic storage devices, the execution of the warrant refers to the seizing of the computers and storage devices rather than any subsequent search of their contents.

Rule 41 also should be amended to add clear guidance on ***130** when a computer must be searched and when it should be returned. Instead of leaving this to individual magistrate judges, a uniform standard should be used. The standard should consider two important practical points. First, backlogs and delays at government forensic laboratories are common, and they are almost always beyond the control of the individual agent or prosecutor who obtains the warrant. While we might hope that the relevant legislature funds such labs properly and they can be staffed competently, it would be inappropriate to punish agents if the forensic experts have a backlog and cannot search equipment quickly. Second, when a computer device is seized only for the evidence it contains, and is not itself contraband, a fruit, or an instrumentality of crime, the government's interest in the property can be satisfied by generating a bitstream copy of the storage device. It is relatively quick and easy for a government forensic analyst to generate a bitstream copy of the storage device. Indeed, it is a necessary first step of every forensic analysis: a computer normally is searched by generating a copy of its data, and then searching the copy instead of the original. [FN126] In cases where the computer is used only as a storage device, the computer itself can be returned after the governmenthas generated the bitstream copy.

In light of these practical concerns, my proposal would be to create two distinct rules to govern the timing of the forensic process. In cases where the computer is merely a storage device for evidence, the government should be required to seize the computer, create a bitstream copy of its files, and then return the property to its proper owner in a reasonable period of time, such as thirty days. The agents should be allowed to request an extension of this time period for additional thirty-day periods for good cause; this may be necessary because some computers may prove difficult to image. In addition, the rule could include provisos about ensuring that copies are recognzied to be equivalent to the original. For example, one option would be to give the defendant accessto the copy and conditioning return of the computer on the defendant's stipulation that the copy is accurate. ***131** I am not sure such a provision is necessary, as investigators need to establish the reliability of computer copies in any event. At the same time, such a provision could ensure that the need to return property to a suspect does not fuel defense challenges to the accuracy of the government's copy that would be avoided in cases where the government can keep the original computer hardware. [FN127]

Requiring investigators to copy the data and returning the equipment in thirty days would also address possible constitutional problems without imposing a terrible burden on investigators. Syphers and Greene suggest that retaining a target's computer hardware for an excessive period of time may eventually render the seizure unreasonable, even pursuant to a warrant. [FN128] A thirty-day rule could address this concern by forcing government action and return of the computer before the seizure becomes unreasonable.

When the computer hardware is believed to be a fruit, instrumentality of crime, or contraband, the warrant should contain a different set of requirements. In these cases, the key question is whether the physical computer storage device already seized actually is a fruit, instrumentality of crime, or contraband. Agents generally find this out by beginning the electronic search and identifying material such as child pornography or hacking evidence. If the material is discovered on the computer, then the person from whom the property was taken has no legal right to

the property; it need not be returned, and in fact will likely support legal forfeiture proceedings. In light of this, Rule 41 should require investigators to begin the forensic process and establish whether the computer contains at least some of the relevant material within a particular period ***132** of time, such as sixty days. [FN129] If agents locate the evidence on the computer, then they do not need to return it. However, if they cannot find any evidence showing that the computer itself is a fruit, instrumentality, or contraband, then agents should be permitted to retain the copy generated during the forensic process but should be required to and return the computer equipment. This would allow investigators to continue their search for evidence if needed, but without depriving the target of his property. As with the first set of rules, agents should be permitted to apply for extensions of time for good cause.

The goal of these rules would be to identify some kind of middle ground that recognizes both the difficulty of the computer forensic process and the competing interests of computer owners. A warrant to seize a computer that has a small amount of incriminating evidence on it should not provide a license for the government to seize the computer indefinitely. Instead, there should be set (if ultimately flexible) standards for when agents must generate copies of files and return the hardware in cases where the physical storage device is not independently seizable. Further, similar standards should be defined for when agents must begin the forensic process and identify whether the computer is independently seizable because the computer is contraband, a fruit, or aninstrumentality of crime.

D. What are the Oversight and Record-keeping Requirements, and When Must Property be Returned?

The final issue concerns oversight and record-keeping requirements, as well as the law governing when property should be returned. I think the latter question is best addressed by the rule just discussed on the timing of the forensic process. If the police are generally required to conduct enough of the forensic process at an early enough stage that the computer hardware must either be returned or the status of the property as contraband confirmed, then there is no need for a new rule specifically ***133** governing the return of property.

The question of what record-keeping requirements to mandate is difficult to answer at this time because the underlying Fourth Amendment rules remain unclear. As I detail in another article, courts have not settled on a uniform standard for reviewing the computer forensic process. [FN130] The record-keeping requirements of Rule 41 and analogous state rules should track the developing Fourth Amendment standards; extensive records should be kept if courts closely scrutinize the forensic process under the Fourth Amendment, but not otherwise. Until we know more about what Fourth Amendment standards apply, it is too early to settle on the proper Rule 41 standard.

One rule that does not need to be changed concerns the inventory requirement presently for the return of the warrant. The inventory requirement is presently limited to physical hardware, and in my view it should remain so limited. Susan Brennerand Barbara Frederiksen have taken a different view. They argue that the return on the warrant should include (a detailed inventory of the hardware that is seized and of the data and files that are seized.([FN131] They write:

> These inventories should be supplied in addition to the back-up copies of any seized data. The inventories are not substitutes for back-up copies. . . . For computer media or seized files the inventory should describe the type of media, capacity (if known), number seized, and a listing of the files contained on the media. This listing of files should detail, at a minimum, the file name, creation date, access date, file size, and the location of the file on the disk (either the full path of the file, or its absolute address on thedisk). [FN132]

I find this approach problematic. The inventory requirement is designed to facilitate judicial review of the warrant process. [FN133] The suspect needs to know what was taken if he wishes to challenge the seizure. Accessing computer storage ***134** devices and compiling a list of each device's contents does not serve this function. The owner of the computer knows what is on the storage device, and taking the physical device obviously takes all of its contents. Further, such an inventory requirement may have the perverse effect of expanding the

government's power to search the computer. Completing the inventory would enable the government to find out all the file names and sizes of the material on the hard drive, which might then provide clues to unrelated crimes. While such steps may or may not be acceptable under the Fourth Amendment, requiring them to be taken as part of Rule 41 allows the inventory task to serve an investigatory function. [FN134] On balance, I think that an inventory limited to physical storage devices should be sufficient.

CONCLUSION

Law enforcement's increasing need to collect digital evidence raises many challenges for the law of criminal procedure. The shift from physical evidence to digital evidence often leads to a shift in how investigators collect evidence; changes in how evidence is collected leads to pressure for new legal rules to regulate evidence collection. The warrant process is merely one part of a broader mosaic of the mechanisms of the investigative process that will be reformed. It is also a particularly clear example of how technology will require changes in law: computer technologies bifurcate the warrant process from its traditional one-step process to a two-step process, creating a need for legal rules to regulate the second step.

Reforming the warrant process also presents an unusual opportunity for the legal system to experiment with new legal rules in response to the shift to digital evidence. At the federal level, an advisory committee has the power to propose changes to the Federal Rules of Criminal Procedure. [FN135] In the case of ***135** Rule 41, the Rules Committee rather than the courts are best suited to address the problem; Rule 41 issues may occupy the time of judges and prosecutors, but they only rarely lead to litigation that can result in judicial rethinking of the legal standards. [FN136] The Federal Rules Committee should take the lead in this area and rethink Rule 41 for the era of digital evidence. Changes in Rule 41 can influence similar changes at the state level, and even provide an international standard that will guide other countries facing the same clash between new technologies and existing legal rules.

***136** APPENDIX

Federal Rules of Criminal Procedure 41.

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) lPropertym includes documents, books, papers, any other tangible objects, and information.

(B) lDaytimem means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) lFederal law enforcement officerm means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district--or if none is reasonably available, a judge of a state court of record in the district--has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might

move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge--in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)(having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) Probable Cause. After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c).

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if ***137** doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record mustbe signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) Contents of the Warrant. The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a (proposed duplicate original warrant(and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) Modifications. The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) Signing the Original Warrant and the Duplicate Original Warrant. Upon determining to issue the warrant, the magistrate judge must ***138** immediately sign the original warrant, enter on its face the exact time it is issued, and direct the applicantto sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Noting the Time. The officer executing the warrant must enter on its face the exact date and time it is executed.

(2) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(3) Receipt. The officer executing the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

(4) Return. The officer executing the warrant must promptly return it(together with a copy of the inventory(to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

[FNa1]. Associate Professor, George Washington University Law School. This paper was commissioned and underwritten by funds from the National Center for Justice and the Rule of Law at the University of Mississippi School of Law (National Center), which is supported by a grant from the Office of Justice Programs at the United

States Department of Justice (2000-DD-VX-0032). Thanks to Tom Clancy, Susan Brenner, and Christopher Slobogin for comments on an earlier draft.

[FN1]. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). For a history of the Fourth Amendment and its focus on regulating the warrant process, see NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

[FN2]. FED. R. CRIM. P. 41. Each state has equivalent state statutory warrant provisions. See, e.g., CAL. PENAL CODE §§ 1523-42; DEL. CODE ANN. tit. 11, §§ 2304-10 (2005).

[FN3]. Orin S. Kerr, Digital Evidence and the New Criminal Procedure, 105 COLUM. L. REV. 279, 308 (2005).

[FN4]. See, e.g., In re Search of 3817 W. West End, 321 F. Supp. 2d 953, 958 (N.D. Ill. 2004) [hereinafter West End] ("[I]t is frequently the case with computers that the normal sequence of 'search' and then selective 'seizure' is turned on its head. Because of the difficulties of conducting an on-site search of computers, the government frequently seeks (and, as here, obtains), authority to seize computers without any prior review of their contents."). As Susan Brenner and Barbara Frederiksen have written,

In conventional searches and seizures, the execution of a warrant typically involves two stages: a (search(for evidence that is followed by the (seizure (of evidence once it has been found. . . .

In off-site computer searches, the execution of a warrant involves four stages, not two: a search designed to locate computer equipment; the seizure of that equipment and its removal to another location; a thorough search of the contents of the equipment which is conducted at that location; and a seizure of relevant evidence located in the course of that search.

Susan W. Brenner & Barbara A. Frederiksen, Computer Searches And Seizures: Some Unresolved Issues, 8 MICH. TELECOMM. & TECH. L. REV. 39, 82 (2002)

[FN5]. See, e.g., U.S. DEPT. OF JUSTICE, FORENSIC EXAMINATION OF DIGITAL EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 24 (2004), available at http:// www.ncjrs.gov/pdffiles1/nij/199408.pdf.

[FN6]. See BILL NELSON, ET. AL, GUIDE TO COMPUTER FORENSICS AND INVESTIGATIONS (Thomson 2004).

[FN7]. Such delays are typical, although the actual delay may vary tremendously from case to case.

[FN8]. I explain the computer forensics process in detail in Orin S. Kerr, Searches and Seizures in a Digital World, 119 HARV. L. REV. (forthcoming Dec. 2005).

[FN9]. See Maryland v. Garrison, 480 U.S. 79, 84 (1987). Garrison explains:

By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is [] defined by the object of the search. . . .

Id. (footnote omitted).

[FN10]. Id.

[FN11]. Id. at 84-85.

[FN12]. FED. R. CRIM. P. 41 (reprinted in Appendix).

[FN13]. Id. 41(d).

[FN14]. Id. 41(g).

[FN15]. See Appendix.

[FN16]. See U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS app. F at 198-217 (2000), available at http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf [hereinafter DOJ MANUAL].

[FN17]. See Kerr, supra note 8 (citing Arizona v. Hicks, 480 U.S. 321 (1987)).

[FN18]. See, e.g., United States v. Gray, 78 F. Supp. 2d 524, 530-31 (E.D. Va. 1999) (involving a second warrant obtained to search a computer already in law enforcement custody).

[FN19]. Cf. United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026 (W.D. Wash. May 23, 2001) (remote search of Russian server from United States).

[FN20]. FED R. CRIM. P. 41(e)(2)(A).

[FN21]. Id. 41(a)(2)(B).

[FN22]. Id. 41(f)(1).

[FN23]. That is, other than the Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (2000).

[FN24]. See FED. R. CRIM. P. 41(f)(4).

[FN25]. Id. 41(g).

[FN26]. See infra note 116.

[FN27]. 168 F.3d 532 (1st Cir. 1999).

[FN28]. Id. at 535. The warrant in Upham also named the evidence itself: l[a]ny and all visual depictions, in any format or media, of minors engaging in sexually explicit conduct [as defined by the statute].m Id. However, the court resolved the challenge, by relying only on the first description. Id. at 536.

[FN29]. Id. at 535 (citations omitted).

[FN30]. Id.

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(Cite as: 75 Miss. L.J. 85)

[FN31]. See DOJ MANUAL, supra note 16, at 206.

[FN32]. 111 F.3d 1472, 1475-76 (10th Cir. 1997).

[FN33]. Id.

[FN34]. Id. at 1476.

[FN35]. Id.

[FN36]. Id. at 1480.

[FN37]. Id. at 1480-81 (citations omitted).

[FN38]. 405 F.3d 852 (10th Cir. 2005).

[FN39]. Id. at 858.

[FN40]. Id.

[FN41]. Id.

[FN42]. Id. at 862.

[FN43]. Id.

[FN44]. Id. at 863.

[FN45]. Id. at 863 (alteration in quoted text) (quoting Maryland v. Garrison, 480 U.S. 79, 84 (1987)). The court admitted the evidence, however, on the ground that it satisfied the good faith standard. Id. at 864.

[FN46]. Id. at 863.

[FN47]. 13 F. Supp. 2d 574.

[FN48]. Id. at 578.

[FN49]. Id. at 584 (citation omitted).

[FN50]. Id.; see also United States v. Clough, 46 F. Supp. 2d 84, 87 (D. Me. 2003) (finding computer warrant unconstitutionally broad when it permitted the seizure of ltext documents of any variety, including e-mail, websites, records of chat sessions, correspondence or shipping records; and . . . digital images of any variety, including still images and videosm without additional limitation) (citation omitted).

[FN51]. Hunter, 13 F. Supp. 2d at 584.

[FN52]. Id. at 584-85.

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(Cite as: 75 Miss. L.J. 85)

[FN53]. 321 F. Supp. 2d 776 (E.D. Va. 2004) (Ellis, J.).

[FN54]. Id. at 778.

[FN55]. Id. at 793.

[FN56]. Id. at 792.

[FN57]. Id. at 793 (citation omitted).

[FN58]. Id.

[FN59]. See, e.g., United States v. Gawrysiak, 972 F. Supp. 853, 866-67 (D.N.J. 1997).

[FN60]. See, e.g., United States v. Liu, 239 F.3d 138, 140 (2d Cir. 2000); United States v. Foster, 100 F.3d 846, 849 (10th Cir. 1996); Gawrysiak, 972 F. Supp. at 864.

[FN61]. See, e.g., Liu, 239 F.3d at 140; Foster, 100 F.3d at 851; United States v. Young, 877 F.2d 1099, 1105-06 (1st Cir. 1989). Notably, the Supreme Court has not addressed this issue directly.

[FN62]. Davis v. Gracey, 111 F.3d 1472, 1480 (10th Cir. 1997) (noting lthe obvious difficulties attendant in separating the contents of electronic storage [sought as evidence] from the computer hardware [seized] during the course of a search.m).

[FN63]. United States v. Henson, 848 F.2d 1374, 1383-84 (6th Cir. 1988) ("We do not think it is reasonable to have required the officers to sift through the large mass of documents and computer files found in the [defendant's] office, in an effort to segregate those few papers that were outside the warrant.") (citation omitted).

[FN64]. Gawrysiak, 972 F. Supp. at 866.

[FN65]. Cf. United States v. Hay, 231 F.3d 630, 634 (9th Cir. 2000) (upholding magistrate's authorization to both seize and search a computer).

[FN66]. 694 F.2d 591, 594-95 (9th Cir. 1982).

[FN67]. Id. at 595.

[FN68]. Id. at 595-96.

[FN69]. Id. at 596.

[FN70]. DOJ MANUAL, supra note 16, at 70, 72. In the interest of full disclosure, I should note that I wrote this manual under the auspices and with the guidance of others at the Department of Justice.

[FN71]. Id. at 219.

[FN72]. Kerr, supra note 8.

[FN73]. Id.

[FN74]. 10 Mass. L. Rptr. 464, 1999 Mass. Super. LEXIS 368 (Mass. Super. Ct. 1999).

[FN75]. Id.

[FN76]. Id.

[FN77]. Id. at *29-*30 (footnote and citations omitted).

[FN78]. United States v. Gorrell, 360 F. Supp. 2d 48, 55 n.5 (D.D.C. 2004) ("The warrant did not limit the amount of time in which the government was required to complete its off-site forensic analysis of the seized items and the courts have not imposed such a prophylactic constraint on law enforcement."); United States v. Hernandez, 183 F. Supp. 2d 468, 480 (D.P.R. 2002) (stating that Rule 41 does not lprovide[] for a specific time limit in which a computer may undergo a government forensic examination after it has been seized pursuant to a search warrant.m); United States v. Crim. Triumph Capital Group, 211 F.R.D. 31, 66 (D. Conn. 2002); United States v. Habershaw, 2001 WL 1867803, at *8 (D. Mass. May 13, 2001).

[FN79]. Hernandez, 183 F. Supp. 2d at 480.

[FN80]. See Ellis, 10 Mass. L. Rptr. at *29.

[FN81]. 2004 WL 3171788 (D. Kan. 2005).

[FN82]. Id. at *1-*2.

[FN83]. Id. at *1.

[FN84]. Id. at *2.

[FN85]. Id. at *3.

[FN86]. Id. at *5 (citation omitted).

[FN87]. 296 F. Supp. 2d 50 (D.N.H. 2003), aff'd, 2005 U.S. App. LEXIS 22527 (1st Cir. 2005) (the First Circuit affirmed, but relied on circuit precedent that did not directly address reasonableness).

[FN88]. Id. at 59 (citation omitted).

[FN89]. 56 M.J. 817 (N-M. Ct. Crim. App. 2002).

[FN90]. Id. at 820.

[FN91]. Id. at 821-23.

[FN92]. Id. at 823.

[FN93]. Id. at n.4.

[FN94]. See, e.g., United States v. Place, 462 U.S. 696, 703 (1983).

[FN95]. DOJ MANUAL, supra note 16, at 77.

[FN96]. FED. R. CRIM. P. 41(d)(1) (emphasis added).

[FN97]. DOJ MANUAL, supra note 16, at 77-78.

[FN98]. Brenner & Frederiksen, supra note 4, at 114.

[FN99]. Id.

[FN100]. Id.

[FN101]. See, e.g., United States v. Grubbs, 377 F.3d 1072, 1077-78 (9th Cir.), reh'g denied, 389 F.3d 1306 (9th Cir. 2004), cert. granted, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005).

[FN102]. United States v. Tagbering, 985 F.2d 946, 949 n.3 (8th Cir. 1993) (noting that a 1990 amendment to Rule 41(a)(1) 'permits anticipatory warrants' (quoting FED. R. CRIM. P. 41 advisory committee's note (1990 amendments))); see also FED. R. CRIM. P. 41(b)(2) ("[A] magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outsidethe district before the warrant is executed").

[FN103]. See also West End, 321 F. Supp. 2d at 961 (holding that the magistrate has the power to require the submission of search protocol to fulfill the requirements of particularity and probable cause before a computer can be searched pursuant to a warrant).

[FN104]. 76 F. Supp. 2d 30 (D. Me. 1999), aff'd, 256 F.3d 14 (1st Cir. 2001).

[FN105]. Id.

[FN106]. Id.

[FN107]. Id.

[FN108]. Brunette, 256 F.3d at 16.

[FN109]. Brunette, 76 F. Supp. 2d at 42.

[FN110]. Id.

[FN111]. Id.

[FN112]. See Ellis, 10 Mass. L. Rptr. at *9 (holding that the search of the files stored on the computer did not have to be finished within the time period required for return of the warrant).

[FN113]. United States v. Simons, 206 F.3d 392, 403 (4th Cir. 2000).

[FN114]. DOJ MANUAL, supra note 16, at 81 (citations omitted).

[FN115]. Id. The DOJ Manual recommends that agents should return linnocent filesm to suspects if the suspects can show a llegitimate needm for the files or hardware and the agents can return the files lwithout either jeopardizing the investigation or imposing prohibitive costs on the government.m Id. at 77 n.13.

[FN116]. United States v. Ventresca, 380 U.S. 102, 108 (1965).

[FN117]. See supra notes 27-64 and accompanying text.

[FN118]. FED R. CRIM. P. 41(e)(2).

[FN119]. Id. at 41(b)(1).

[FN120]. See Kerr, supra note 3, at 301.

[FN121]. 434 U.S. 159, 170 (1977).

[FN122]. See, e.g., United States v. Hall, 583 F. Supp. 717, 718-19 (E.D. Va. 1984).

[FN123]. See United States v. N.Y. Tel., 434 U.S. 159, 170 (1977).

[FN124]. FED. R. CRIM. P. 41(e)(2).

[FN125]. Hernandez, 183 F. Supp. 2d at 480-81.

[FN126]. See Kerr, supra note 8.

[FN127]. Susan Brenner and Barbara Frederiksen offer a somewhat similar proposal, focused on ensuring that targets have copies of seized files rather than hardware: Brenner & Frederiksen, supra note 4, at 79.

When a court issues a seizure and an off-site search authorization, it should require that the officers create at least one back-up copy of the information on the seized equipment and give this back-up copy to the owner of that equipment.

[FN128]. Syphers, 296 F. Supp. 2d 50; Greene, 56 M.J. at 817.

[FN129]. Cf. Brenner & Frederiksen, supra note 4, at 84.

[FN130]. See Kerr, supra note 8.

[FN131]. Brenner & Frederiksen, supra note 4, at 80.

[FN132]. Id.

[FN133]. See generally South Dakota v. Opperman, 428 U.S. 364, 369-71 (1976).

[FN134]. United States v. Flores, 122 F. Supp. 2d 491, 494-95 (S.D.N.Y. 2000); United States v. O'Razvi, 1998 WL 405048, at *6-7 (S.D.N.Y. July 17, 1998).

[FN135]. See 28 U.S.C. §§ 2072-74 (2000). Under federal law, an advisory committee created by the Judicial Conference makes recommendations to the Supreme Court, which then approves or rejects changes pursuant to a Congressional notice provision.

[FN136]. This is true for two reasons. First, a judge's refusal to sign a warrant application is not ordinarily an appealable final order. See United States v. Savides, 658 F. Supp. 1399, 1404 (N.D. Ill. 1987), aff'd in relevant part sub nom.; United States v. Pace, 898 F.2d 1218, 1230 (7th Cir. 1990). Second, violations of Rule 41 rarely lead to suppression of evidence. See generally United States v. Calandra, 414 U.S. 338, 341-42 (1974).

END OF DOCUMENT

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Search Warrants for Property Outside of United States

DATE: March 10, 2006

As discussed in the attached memorandum, the Department of Justice recommends that Rule 41(b) be amended to add a new paragraph authorizing magistrate judges to issue warrants for property that is within the jurisdiction of the United States, but outside of any judicial district. The principal application of the proposed provision would be to cases in which the government seeks material located overseas in offices or residences associated with a U.S. consulate or embassy. Although these locations are within U.S. control, they are not within any State or U.S. judicial district. The proposal would also be of assistance in American Samoa, a U.S. territory in which there is no district court.

This provision differs in several respects from a similar proposal that the Supreme Court declined to adopt in 1990, with the comment that the matter required further consideration.

First, the earlier provision contained more general language allowing the authorization of a warrant for material located outside of the U.S. "if that property is lawfully subject to search and seizure by the United States." In the place of this general provision, the current proposal states that the a warrant may issue for property that is outside the jurisdiction of a state or judicial district if it is within any of the following:

1. a territory, possession, or commonwealth of the U.S.

2. the premises of a U.S. diplomatic or consular mission in a foreign state, and buildings, parts of buildings, and land appurtenant or ancillary thereto, used for the purposes of the mission, irrespective of ownership

3. residences and land appurtenant or ancillary thereto, owned or leased by the U.S. and used by U.S. personnel assigned to U.S. diplomatic or consular missions in foreign states.

The Department notes that these are locations in which the U.S. has a legally cognizable interest or exerts lawful authority and control.

Second, the current amendment omits the nexus requirement, found in the 1990 proposed amendment. The 1990 amendment authorized warrants only for material that "is relevant to a criminal investigation in the district in which the warrant is sought."

Finally, the current amendment grants authority to a magistrate judge "in any district in which activities related to the crime under investigation may have occurred, *or in the District of Columbia.*"

This item is on the agenda for the April meeting in Washington, D.C.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

06-CR-D

January 3, 2006

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that Rule 41(b) of the Federal Rules of Criminal Procedure be amended to permit magistrates to issue warrants for property that is within the jurisdiction of the United States, but outside of any judicial district. We hope that the Advisory Committee will consider and vote on this proposal at its next meeting in April 2006.

As part of Department's national security mandate, our prosecutors work closely with the State Department's Bureau of Diplomatic Security to protect the integrity of our borders and immigration processes by investigating and prosecuting cases involving corruption in United States embassies and consulates around the world. The cases typically involve allegations that corrupt consular officers and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa.

These crimes take place overseas, and the most important evidence is often located in the offices or residences associated with a consulate or embassy. Unfortunately, although these locations are within U.S. control, they are not located within any State or U.S. judicial district, and, as currently written, Rule 41(b) does not provide magistrates with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F.Supp.2d 878, 882 (W.D.La. 2001) ("Clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti."). The USA PATRIOT Act amended Rule 41(b) to provide magistrates with the authority to issue warrants for property outside of the magistrate's district, but only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

Department prosecutors have faced this troubling limitation in their investigation of serious public corruption offenses involving United States embassies and consulates around the world and in American Samoa, a United States territory that is administered by the Department of the Interior and receives tens of millions of dollars in federal grants and assistance but which has no district court. Although American Samoa is fully within the control of the United States,

there is no express authority to issue warrants for evidence in the territory.

Prosecutors in these cases may attempt to persuade magistrates that they have the inherent power beyond Rule 41(b) to issue warrants for evidence that is relevant to a criminal investigation, but without an express provision in Rule 41(b), this is not a reliable or effective alternative. We thus recommend an amendment to Rule 41(b) that provides magistrates with the express authority to issue warrants for property that is located outside of any judicial district. We recommend that a new paragraph be added to Rule 41(b) which would read:

> "(4) a magistrate judge having authority in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any State or district, but within any of the following: (A) a territory, possession, or commonwealth of the United States; (B) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or © residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states."

The proposed amendment uses language from the existing paragraph (3) of Rule 41(b), which was added pursuant to the USA Patriot Act, and from the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes United States consulates and embassies. We include the District of Columbia because that is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar amendment was approved by the United States Judicial Conference in 1990, which recommended that the Supreme Court adopt the new rule. The Supreme Court did not adopt the new provision, however, and instead concluded that this matter required "further consideration." The 1990 amendment read as follows: "a magistrate judge [may issue a warrant] for a search of property that is located outside the United States if the property is lawfully subject to search and seizure by the United States and is relevant to a criminal investigation in the district in which the warrant is sought."

Like the proposed 1990 amendment, our current proposal does not include warrants for persons, which could be viewed as inconsistent with extradition requirements. As a substitute for the earlier proposal's phrase "lawfully subject to search and seizure by the United States," our proposal is limited to U.S. territories and possessions; embassy and consular offices; and certain residences used by embassy and consular employees. These are all locations in which the United States has a legally cognizable interest or exerts lawful authority and control.

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it relates to important matters of national security. We appreciate your assistance

with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposed Amendments to Collateral Relief Procedures**

DATE: **March 10, 2006**

As described in the attached memorandum, the Department of Justice proposes that a new rule be added to the Federal Rules of Criminal Procedure that would make it clear that the writs of coral nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review. In the Department's view, these collateral review procedures are inconsistent with the Antiterrorism and Effective Death Penalty Act of 1996.

This item is on the agenda for the April meeting in Washington, D.C.

U.S. Department of Justice

Criminal Division

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

January 3, 2006

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that the Federal Rules of Criminal Procedure and the Rules Governing Section 2254 and Section 2255 Proceedings be amended to address collateral review practices that are inconsistent with the collateral review provisions of the Antiterrorism and Effective Death Penalty Act of 1996. We hope that the Advisory Committee will consider and vote on our proposal to address these inconsistencies at its next meeting in April 2006.

Our proposal would create a new rule in the Federal Rules of Criminal Procedure that clarifies that outdated procedures for obtaining relief from a judgment – *i.e. coram nobis*, *coram vobis*, *audita querela*, bills of review, and bills in the nature of review – have been abolished. In addition, we are seeking amendments to the Rules Governing Section 2254 and 2255 Proceedings to create an exclusive mechanism by which a litigant can seek reconsideration of a District Court's ruling on an application under sections 2254 and 2255. This would create a limited new avenue of litigation under section 2254 and 2255 but at the same time eliminate the procedure to which some litigants now resort of relying on Rule 60(b) of the Federal Rules of Civil Procedure to relitigate old collateral review claims and raise new ones.

We have attached proposed amendments along with proposed Committee Notes that more fully explain the basis for our proposal. We have also included a conforming amendment to Rule 4 of the Federal Rules of Appellate Procedure that would be appropriately considered by the Advisory Committee on the Appellate Rules should this Committee enact the Department's proposal.

We believe this proposal warrants timely and thorough consideration by the Advisory Committee. We appreciate your assistance with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

PROPOSED AMENDMENTS TO COLLATERAL RELIEF PROCEDURES

(1) A new Rule 37 of the Federal Rules of Criminal Procedure is added as follows:

Rule 37. Exclusive Remedy

Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment in a criminal case shall be by motion as prescribed in these rules, by motion as prescribed by 18 U.S.C. §§ 3582 or 3600 or 28 U.S.C. § 2255, or by appeal.

Advisory Committee Notes

The language in this new rule is essentially identical to that in Civil Rule 60(b), which was amended in 1946 to make clear that these "old forms of obtaining relief from a judgment, i.e., coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of review, had been abolished," because the 1944 Civil Rules had provided specific remedies to civil parties. United States v. Beggerly, 524 U.S. 38, 45 (1998); Fed. R. Civ. P. 60(b) Advisory Committee Note (1946). The enactment of the Federal Rules of Criminal Procedure in 1944, and 28 U.S.C. § 2255 in 1948, similarly provided specific remedies for the criminal defendant. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 235 (1985); United States v. Hayman, 342 U.S. 205, 218 (1952). Although the Supreme Court initially held that the writ of coram nobis in criminal cases survived Civil Rule 60(b) and § 2255, United States v. Morgan, 346 U.S. 502, 505-12 (1954), the Court has since reiterated that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate." Carlisle v. United States, 517 U.S. 416, 429 (1996), *quoting* United States v. Smith, 331 U.S. 469, 475 n.4 (1947). Indeed, the Supreme Court has found no such situation in the fifty years since Morgan, which itself has been cast into doubt, *see* Spencer v. Kemna, 523 U.S. 1, 7-16 (1998).

Nonetheless, criminal defendants have been creative in frequently seeking to resurrect these writs, often trying to use them to evade the requirements of the Criminal Rules and § 2255. Some courts, moreover, have entertained coram nobis petitions, under varying standards and bases. Similar circumstances led to the amendment of Civil Rule 60(b), which rejected such efforts because "the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments." Fed. R. Crim. P. 60(b) Advisory Committee Notes (1946). This is equally true of the Criminal Rules and § 2255, which have been amended and improved over fifty years to provide remedies where appropriate from criminal judgments, and to protect the finality of such judgments where "relief" would be inappropriate. Under the current Criminal Rules, defendants can seek relief as provided in Rule 29 (Motion for a Judgment of Acquittal), Rule 33 (New Trial), Rule 34 (Arresting Judgment) and Rule 35(a) (Correcting Clear Error in the sentence). Defendants can also seek relief by motion as provided in 18 U.S.C. § 3582(c)(2) (Modification of an Imposed Term of Imprisonment based

on certain amendments to the Sentencing Guidelines), 18 U.S.C. § 3600(g) (motion for a new trial or resentencing after exculpatory DNA testing), and 28 U.S.C. § 2255 (Motion Attacking Sentence). Finally, defendants can seek relief by appeal where permitted under the Appellate Rules and by statute, *e.g.*, 18 U.S.C. § 3742(a), 28 U.S.C. § 1291, and 28 U.S.C. § 2253. It better serves justice, the courts and the litigants, especially *pro se* litigants, to spell out that relief can be obtained under these provisions, rather than continuing to allow their circumvention by invocation of writs which are "shrouded in ancient lore and mystery." Fed. R. Crim. P. 60(b) Advisory Committee Notes (1946).

Some defendants have been allowed to use coram nobis to challenge their convictions after they are no longer in custody, without having to meet the requirements of § 2255. It is poor policy, however, to allow defendants who are not in custody to escape the requirements that must be met by defendants who are still incarcerated. Abolishing coram nobis ensures that collateral challenges must be brought under the rules and statutes above in a timely manner, when the records, judge, witnesses and prosecutor are more likely to be available to resolve the claims more accurately and to participate in any resulting proceedings.

(2) Rule 11 of the Rules Governing Section 2255 Proceedings shall be amended to read as follows:

Rule 11. Reconsideration; Appeal

(a) Reconsideration. A motion for reconsideration of a final order entered under these rules shall be filed no later than thirty days after the entry of the order. Such a motion may not raise new claims of error in the movant's conviction or sentence, or attack the federal court's previous resolution of such a claim on the merits, but may only may raise a defect in the integrity of the § 2255 proceedings. Such a motion shall be the sole procedure for obtaining relief in the district court from such an order, notwithstanding any other provisions of law.

(b) Time for Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Advisory Committee Notes

These Rules have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. *See* Rule 12 of the § 2255 Rules. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). This confusion has arisen, in part, from the fact that Civil Rule 60(b) is not designed for use in post-conviction proceedings, and is not an appropriate method of relief because of its wide-ranging and inapposite nature. *See* Fed. R. Civ. P. 60(b) (allowing, *e.g.*, motions where "the judgment has been satisfied, released, or discharged"). Furthermore, the indeterminate and lengthy time periods for filing a motion under Civil Rule 60(b) are inconsistent with the set time period for filing a § 2255 motion, as added to § 2255 in 1996; indeed, if Rule 60(b) is applied, defendants would have the same or more time to file a motion for reconsideration than they have to file the § 2255 motion itself. *Compare* 28 U.S.C. § 2255 (requiring § 2255 motions to be filed within one year after the date on which the judgment of conviction becomes final, or on which certain specified events occur) *with* Fed. R. Civ. P. 60(b) (requiring a Rule 60(b) motion to made "within a reasonable time," and for certain grounds "not more than one year"). Moreover, the wide-ranging nature and indeterminate and lengthy time periods of Civil Rule 60(b) have led convicted defendants to invoke it abusively to evade the requirements of § 2255, especially by raising new claims to evade the one-year time period, the certificates of appealability requirement, and the limitations on second and successive § 2255 motions also added to § 2255 in 1996. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"); *e.g.*,

United States v. Vargas, 393 F.3d 172, 174 (D.C. Cir. 2004) (requiring certificate of appealability in appeal from denial of Rule 60(b) motion); Munoz v. United States, 331 F.3d 151, 152-53 (1st Cir. 2003) (treating Rule 60(b) motion as second or successive § 2255 motion); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2001) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions or other custody-creating or -enhancing punishments by styling their collateral attacks as motions for reconsideration under Rule 60(b)."). Such improper Rule 60(b) motions, even if treated as second or successive § 2255 motions, initiate successive litigation in the wrong way in the wrong court. *See* 28 U.S.C. §§ 2244(b), 2255 (requiring second or successive motions to be filed in the Court of Appeals pursuant to specified procedures); Gonzalez, 125 S. Ct. at 2648.

The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as a successive habeas petition if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651. The Court, however, in attempting to "limit the friction between the Rule and the successive-petition prohibitions of AEDPA," did not alter the lengthy and uncertain time period for filing a Rule 60(b) motion, and divided over Rule 60(b)(6)'s vague requirements. Id. at 2650-51 *and* 2652-55 (Stevens, J., dissenting).

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

Rule 4 of the Federal Rules of Appellate Procedure is being amended to ensure that timely filing of such a motion (within thirty days of the entry of the order) should be treated as postponing the running of the time to file a notice of appeal. *See* Fed. R. App. P. 4(a)(4) (treating the timely filing of specified motions as postponing the running of the time to file a notice of appeal), 4(b)(3) (similar); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 262-73 (1978).

(3) Rule 11 of the Rules Governing Section 2254 Proceedings shall be renumbered Rule 12, and a new Rule 11 shall be enacted to read as follows:

Rule 11. Reconsideration

A motion for reconsideration of a final order entered under these rules shall be filed no later than thirty days after the entry of the order. Such a motion may not raise new claims of error in the movant's conviction or sentence, or attack the federal court's previous resolution of such a claim on the merits, but may only may raise a defect in the integrity of the § 2254 proceedings. Such a motion shall be the sole procedure for obtaining relief in the district court from such an order, notwithstanding any other provisions of law.

Advisory Committee Notes

These Rules have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on an application under 28 U.S.C. § 2254. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. *See* Rule 11 (now 12) of the § 2254 Rules. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). This confusion has arisen, in part, from the fact that Civil Rule 60(b) is not designed for use in post-conviction proceedings, and is not an appropriate method of relief because of its wide-ranging and inapposite nature. *See* Fed. R. Civ. P. 60(b) (allowing, *e.g.*, motions where "the judgment has been satisfied, released, or discharged"). Furthermore, the indeterminate and lengthy time periods for filing a motion under Civil Rule 60(b) are inconsistent with the set time period for filing an application under § 2254, as added to 28 U.S.C. § 2244 in 1996; indeed, if Rule 60(b) is applied, defendants would have the same or more time to file a motion for reconsideration than they have to file the § 2254 application itself. *Compare* 28 U.S.C. § 2244(d) (requiring § 2254 applications to be filed within one year after the date on which the judgment of conviction becomes final, or on which certain specified events occur) *with* Fed. R. Civ. P. 60(b) (requiring a Rule 60(b) motion to made "within a reasonable time," and for certain grounds "not more than one year"). Moreover, the wide-ranging nature and indeterminate and lengthy time periods of Civil Rule 60(b) have led convicted defendants to invoke it abusively to evade the requirements of §§ 2244 and 2254, especially by raising new claims to evade the one-year time period, the certificates of appealability requirement, and the limitations on second and successive § 2254 applications, also added to § 2254 in 1996. *See*, Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"); *e.g.*, United States v. Vargas, 393 F.3d 172, 174 (D.C. Cir. 2004) (requiring certificate of appealability in appeal from denial of Rule 60(b) motion); Munoz v. United States, 331 F.3d 151, 152-53 (1st Cir. 2003) (treating Rule 60(b) motion as

second or successive § 2255 motion); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2001) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions or other custody-creating or -enhancing punishments by styling their collateral attacks as motions for reconsideration under Rule 60(b)."). Such improper Rule 60(b) motions, even if treated as second or successive § 2254 applications, initiate successive litigation in the wrong way in the wrong court. *See* 28 U.S.C. §§ 2244(b)(requiring second or successive applications to be filed in the Court of Appeals pursuant to specified procedures); Gonzalez, 125 S. Ct. at 2648.

The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as a successive habeas petition if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651. The Court, however, in attempting to "limit the friction between the Rule and the successive-petition prohibitions of AEDPA," did not alter the lengthy and uncertain time period for filing a Rule 60(b) motion, and divided over Rule 60(b)(6)'s vague requirements. Id. at 2650-51 *and* 2652-55 (Stevens, J., dissenting).

This new Rule 11 is added to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The new Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2244 and 2254 and the finality of criminal judgments.

Rule 4 of the Federal Rules of Appellate Procedure is being amended to ensure that timely filing of such a motion (within thirty days of the entry of the order) is treated as postponing the running of the time to file a notice of appeal. *See* Fed. R. App. P. 4(a)(4) (treating the timely filing of specified motions as postponing the running of the time to file a notice of appeal), 4(b)(3) (similar); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 262-73 (1978).

(4) Federal Rule of Appellate Procedure 4(a)(4)(A) is amended as follows:

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure or the Rules Governing 2254 and 2255 Proceedings, the time to file an appeal runs for all parties from the entry of the order disposing of the last remaining motion:

...

(v) for a new trial under Rule 59; [or]

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered[.]; or

(viii) for reconsideration under Rule 11(a) of the Rules Governing Section 2254 or 2255 Proceedings.

Advisory Committee Notes

Rule 11 of the Rules Governing Section 2255 Proceedings is being amended, and a new Rule 11 of the Rules Governing Section 2254 Proceedings is being added, to provide a procedure for motions for reconsideration in such proceedings. Resolution of such motions may obviate the need to appeal, or clarify the ruling of the court. Accordingly, subsection (viii) is added to delay the running of the time for appeal until entry of the order ruling on a motion for reconsideration under Rule 11.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rules 7 and 32.2

DATE: March 10, 2006

As described in the attached memorandum, the Department of Justice recommends amendments to Rules 7 and 32.2 to address a variety of procedural issues related to criminal forfeiture.

Judge Bucklew has referred these proposals to a subcommittee chaired by Judge Wolf. The other members of the subcommittee are Judge Jones, Mr. Campbell, Professor King, and Mr. McNamara. The subcommittee has had two conference calls.

The subcommittee has determined that these proposals will require additional work before presentation to the full committee. Accordingly, this item is on the agenda for the April meeting in Washington, D.C., for informational purposes only.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

January 3, 2006

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that Rules 7 and 32.2 of the Federal Rules of Criminal Procedure be amended to address various procedural issues related to criminal forfeiture. Our proposal, which is attached below, is intended to update the rules related to forfeiture proceedings first promulgated in 2000.

The proposal speaks to a host of issues that courts have grappled with over the past half decade and longer. For example, our proposal addresses the required notice to a defendant of forfeiture proceedings, the appropriate bifurcated trial procedures in forfeiture cases, and the scope of authorized government action following the issuance of a preliminary forfeiture order. Because of the complex nature of criminal forfeiture, we believe it may be appropriate, as has been done in the past, to convene a subcommittee to review the proposed amendments. It is our hope that the Advisory Committee will be able to consider and vote on this proposal at its next meeting in April 2006, and a subcommittee that can meet several times over the next few months will be able fully address these proposals and make recommendations to the full committee.

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it relates to important matters of law enforcement. If you would like, I would be happy to discuss with you, at your convenience, this proposal and how the Committee might best

address it. We appreciate your assistance with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

Proposed Revisions to Rules 32.2(a) and 7(c)(2)

(a) Notice to the Defendant.

(1) Indictment or Information. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains **a Forfeiture Allegation giving** notice to the defendant that the Government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(2) Money judgment. It is not necessary for the indictment or information to specify the amount of any money judgment that the Government intends to seek as part of an order of forfeiture. The court must determine the amount of the money judgment pursuant to subdivision (b)(1).

[(3) Bill of particulars. It is not necessary for the indictment or information to list the specific property subject to forfeiture. However, if the Government will be asking the jury to return a special verdict of forfeiture as to specific property that is not listed in the indictment or information, it must serve the defendant with a bill of particulars identifying such property prior to the forfeiture phase of the trial.][1]

Conforming amendment:

Rule 7(c)(2) is repealed.

Comment: Rule 32.2(a) provides that the indictment (or information) must put the defendant on notice that the Government will seek the forfeiture of his property as part of his sentence if he or she is convicted. The courts are virtually unanimous in holding, however, that the Rule is satisfied if the indictment tracks the language of the applicable forfeiture statute or statutes; it is not necessary for the indictment to list the specific property subject to forfeiture, or to set forth the amount of the money judgment that the Government will be seeking.[2] The defendant's right to know what specific property the Government is seeking to forfeit is satisfied if the Government serves him with a bill of particulars, and the amount of the money judgment is for the court to determine based on the evidence adduced at trial. This is consistent with the guidance set forth in the 2000 Advisory Committee Note. *See United States v. Iacaboni*, 221 F. Supp. 2d 104, 110 (D. Mass. 2002) (Rule 32.2(a) makes clear that itemized list of property need

[1]The bracketed language should be deleted if the statutory right to ask that the jury be retained to determine the forfeiture is stricken from current Rule 32.2(b)(4).

[2]The Government often includes a list of specific property subject to forfeiture in the indictment, but that is so that the grand jury's finding of probable cause for the forfeiture may be used to support the entry of a pre-trial restraining order, not because such a list is required by the Rule. *See United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden); *In re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) (same).

not appear in the indictment; tracking language of section 982(a)(1) was sufficient), *aff'd in part*, 363 F.3d 1 (1st Cir. 2004); *United States v. Davis*, 177 F. Supp. 2d 470, 484 (E.D. Va. 2001) (approving Government's naming automobile as subject to forfeiture in a bill of particulars where indictment used general language tracking the forfeiture statute), *aff'd*, 63 Fed. Appx. 76 (4th Cir. 2003); *United States v. Dolney*, 2005 WL 1076269, at *9 (E.D.N.Y. 2005) (following the Advisory Committee Note; there is no need to itemize the property subject to forfeiture; the Government need only inform the defendant that it will be seeking forfeiture in accordance with the statute); *Borich v. United States,* 2005 WL 1668411, at *2 (D. Minn. July 18, 2005) (forfeiture allegation stating that Government would seek forfeiture of proceeds of defendant's drug trafficking activity was sufficient; it was not necessary to name two vehicles as subject to forfeiture); *United States v. Lino*, 2001 WL 8356, at *5-6 (S.D.N.Y. 2001) (under Rule 32.2(a), Government need not detail property subject to forfeiture in the indictment; to the extent that a bill of particulars is required, Government's agreement to provide one is sufficient); *see also United States v. Tedder*, 2003 WL 23204849, at *2 (W.D. Wis. 2003) (forfeiture allegation need not make specific reference to the possibility that the forfeiture will take the form of a money judgment), *aff'd in part*, 403 F.3d 836 (7th Cir. 2005); *cf. United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002) (because forfeiture is part of sentencing, modification of amount Government is seeking as money judgment does not constructively amend the indictment). *But see United States v. Pantelidis,* 2005 WL 1320135, at *2 (E.D. Pa. 2005) (if the Government specifies an amount subject to forfeiture in the indictment, it is "stuck with the number it chose" and cannot seek a different amount following conviction); *United States v. Idriss*, 2004 WL 733977, at *8 (D. Minn. 2004) (dismissing forfeiture allegation that tracked the language of § 982(a)(2) but did not itemize the property to be forfeited).

The amendment clarifies the Rule by codifying the prevailing view. It also sets forth clear guidance as to when the bill of particulars must be filed, and makes clear that the notice provision in the indictment or information should be labeled a "Forfeiture Allegation" and not a "Count." This amendment resolves a split in the courts, some of which require that the forfeiture notice be identified as a "Count" even though it is clear that it does not set forth a substantive offense. *See Libretti v. United States*, 516 U.S. 29, 38-39 (1995) (holding that criminal forfeiture is part of the sentence, not a substantive element of the offense); *United States v. Ferrario-Pozzi*, 368 F.3d 5, 8 (1st Cir. 2004) (criminal forfeiture "is a part of the sentence rather than the substantive offense") *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004) (the Supreme Court's decision in *Libretti* makes clear that "forfeiture is not a separate substantive offense").

Rule 7(c)(2) should also be repealed. When Rule 32.2 was enacted in 2000, it was intended to replace all of the existing Rules relating to criminal forfeiture and to consolidate all of the applicable procedures in one place. Former Rules 32(d)(2) and 31(e) were in fact repealed, but due to a drafting error, Rule 7(c)(2), which was superseded by Rule 32.2(a), was left in place. A conforming amendment striking Rule 7(c)(2) would correct this oversight.

Proposed Revisions to Rule 32.2(b)(1)

(b) Entering a Preliminary Order of Forfeiture

(1) ~~In General.~~ **Forfeiture Phase of the Trial.**

(A) As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the Government seeks forfeiture of specific property, the court must determine whether the Government has established the requisite nexus between the property and the offense. If the Government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) The court's determination may be based on evidence already in the record, including any written plea agreement, ~~or~~ **and on any additional evidence or information submitted by the parties that the court finds to be relevant.** [I]f the forfeiture is contested, ~~on evidence or information presented by the parties at a hearing after the verdict of guilt~~ **the court may conduct a hearing.**

(C) In determining what property is subject to forfeiture, the court may receive and consider evidence and information that would be inadmissible under the Federal Rules of Evidence at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

Comment: Rule 32.2(b)(1) establishes that a criminal trial must be bifurcated into a guilt phase and a forfeiture phase. *See United States v. Dolney*, 2005 WL 1076269, at *10 (E.D.N.Y. May 3, 2005) (denying defendant's motion to combine guilt and forfeiture phases; Rule 32.2(b) makes clear that the trial must be bifurcated). In the forfeiture phase, the court determines whether the Government has established the forfeitability of specific property and the amount of any money judgment that the defendant will be ordered to pay.

Experience, however, has revealed several ambiguities in the Rule concerning the evidence that the court may consider in the forfeiture phase of the trial. The current Rule states that the court may consider "evidence already in the record" or "evidence or information presented by the parties at a hearing," if the forfeiture is contested. This appears to omit evidence not already in the record that the parties might submit in writing for the court to use in determining the forfeiture without a hearing. Such submissions are routine and aid the court in making the forfeiture determination. The rule is redrafted to authorize such written submissions.

Moreover, the current rule might be interpreted to require the court to consider *either* "evidence already in the record" *or* "evidence or information presented . . . at a hearing" but not both. By

changing "or" to "and", the amendment makes clear that these sources of evidence are not mutually exclusive.

It is also unclear whether the current Rule permits the court to consider hearsay in the forfeiture phase of the trial. Noting that forfeiture is part of sentencing, that hearsay is traditionally admissible at sentencing, and that Rule 32.2(b)(1) refers to "evidence *or information*" presented at a hearing, several courts have held that hearsay is admissible. *See United States v. Creighton*, 52 Fed. Appx. 31, 36 (9th Cir. 2002) (hearsay is admissible at sentencing and therefore may be considered in the forfeiture phase); *United States v. Merold*, 46 Fed. Appx. 957, 2002 WL 1853644 (11th Cir. 2002) (suggesting that hearsay is admissible in the forfeiture phase, but holding only that there is no error in admitting hearsay where non-hearsay evidence was sufficient to support the forfeiture); *United States v. Gaskin*, 2002 WL 459005, at *9 (W.D.N.Y. 2002) (in the forfeiture phase of the trial, the parties may offer evidence not already in the record; because forfeiture is part of sentencing, such evidence may include reliable hearsay), *aff'd*, 364 F.3d 438 (2d Cir. 2004). The amendment adopts those rulings.

Proposed Revisions to Rule 32.2(b)(2)

(2) Preliminary Order. **(A)** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, **and directing the forfeiture of any substitute assets as to which the Government has established the statutory criteria,** without regard to any third party's interest in all or part of it **the property.** Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Unless it is not practical to do so, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final as to the defendant pursuant to subdivision (b)(4).

(C) If the court is not able to identify all of the specific property subject to forfeiture or to calculate the total amount of the money judgment prior to sentencing, the court must enter an order describing the property to be forfeited in generic terms, listing any identified forfeitable property, and stating that the order will be amended pursuant to subdivision (e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

Comment: Rule 32.2(b)(2) describes what the court should do once it has determined that property is subject to forfeiture. As the Rule states, the court must "promptly" enter a preliminary order of forfeiture "setting forth the amount of any money judgment or directing the forfeiture of specific property." The Rule also makes clear that all issues regarding the ownership of the property must be deferred to the ancillary proceeding when third party claims to the property are resolved. The latter part of the Rule is non-controversial and has been applied routinely by the courts. *See United States v. Nava,* 404 F.3d 1119, 1132 (9th Cir. 2005) (district court properly instructed jury that questions of ownership "were not before them;" therefore jury's return of special verdict of forfeiture says nothing about the ownership of the property); *United States v. Cianci*, 218 F. Supp. 2d 232, 234 (D.R.I. 2002) (under Rule 32.2(b)(2), the determination of the nexus between the property and the offense is made without regard to any legitimate interest that a third party might have because "the Rule affords third parties the opportunity to assert such claims before a final forfeiture order is entered"); *United States v. Weidner*, 2003 WL 22176085 (D. Kan. 2003) (defendant cannot object to the entry of a preliminary order of forfeiture on the ground that the property really belongs to a third party; determination of the extent of the defendant's interest in the property is postponed until the ancillary proceeding); *United States v. Gaskin*, 2002 WL 459005, at *9 n.4 (W.D.N.Y. 2002) (ownership is a question for the court alone to determine in the ancillary proceeding), *aff'd*, 364 F.3d 438 (2d Cir. 2004); *United States v. Faulk*, 340 F. Supp. 2d 1312, 1315 (M.D. Ala. 2004) (Rule 32.2(b)(2) requires that the court order the forfeiture of property, including substitute assets, without regard to whether a third party has an interest in all or part of it).

Courts have encountered difficulty applying the first part of the Rule, however. First, the Rule makes no mention of including substitute assets in the preliminary order of forfeiture. All criminal forfeiture statutes provide for the forfeiture of substitute assets if certain criteria are satisfied. *See, e.g.,* 21 U.S.C. 853(p). The first reference to substitute assets in Rule 32.2 does not occur, however, until subdivision (e), which relates to amending the order of forfeiture to include newly-discovered property after the order has become final. To some, this implies that substitute assets can *only* be forfeited pursuant to subdivision (e). It is frequently the case, however, that the Government is able to identify substitute assets and satisfy the statutory requirements at the time the preliminary order of forfeiture is entered. As courts have held, in such cases there is no reason not to include the substitute assets in the preliminary order pursuant to Rule 32.2(b)(2). *See Faulk, supra.* The existing language in Rule 32.2(b)(2) is redesignated as Rule 32.2(b)(2)(A) and is amended to make that clear.

Moreover, by including the reference to substitute assets in Rule 32.2(b)(2)(A), the Rule makes clear that ownership issues regarding substitute assets must be deferred to the ancillary proceeding, just as ownership issues pertaining to other forfeited assets must be deferred. This resolves the confusion that has existed until now on that issue. *Compare Faulk,* 340 F. Supp.2d at 1315 (court must order forfeiture of substitute assets without regard to third party interests); *United States v. Weidner*, 2004 WL 432251 (D. Kan. 2004) (defendant cannot object to the forfeiture of a substitute asset on the ground that it belongs to a third party); *United States v. Saccoccia*, 62 F. Supp.2d 539, 541 (D.R.I. 1999) (defendant lacks standing to object to forfeiture of property as substitute assets on the ground that the property does not belong to him) *with United States v. Bennett*, 2003 WL 22208286, at *1 (S.D.N.Y. 2003) (to forfeit property held in third party's name as a substitute asset, court first finds, by a preponderance of the evidence, that the property belongs to the defendant and amends the order of forfeiture to include the property).

Second, notwithstanding the requirement that the preliminary order of forfeiture be entered "promptly," many courts have delayed entering the preliminary order until the time of sentencing. In such cases, the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant upon oral announcement of the sentence and entry of the criminal judgment. Pursuant to Rule 35(a), the district court lacks jurisdiction to correct a sentence, including an incorporated order of forfeiture, more than seven days after oral announcement of the sentence; even then, corrections are limited to those necessary to correct an "arithmetical, technical or other clear error." *See United States v. King,* 368 F. Supp. 2d 509, 512-13 (D.S.C. 2005) (holding that Rule 35(a) bars corrections to the forfeiture order in a criminal case except for those made within seven days of sentencing that are necessary to correct an "arithmetical, technical or other clear error"). For that reason, delaying the entry of the preliminary order until the day of sentencing often leaves the parties with no alternative but to file an appeal if the order contains an error or if the sentence mistakenly fails to include an order of forfeiture at all.[3] This is a waste of judicial resources and runs counter to the

[3]The Solicitor General has determined not only that Rule 35(a) requires that all corrections to an order of forfeiture incorporated in a criminal sentence be made within seven days after oral

well-established policy in favor of allowing district courts to correct their own errors. See *United States v. Ibarra*, 502 U.S. 1, 4-6 (1991) (reiterating the Court's decision in *Dieter* that noted the advantages of giving district courts the opportunity to correct their own alleged errors, and thus preventing unnecessary burdens from being placed on the courts of appeals); *United States v. Dieter*, 429 U.S. 6, 8 (1976). Accordingly, Rule 32.2(b)(2) is further amended by adding sub-paragraph (B), which provides that the court must enter the preliminary order in advance of sentencing, unless it is impractical to do so.

Finally, some courts have found the provision in Rule 32.2(b)(2) requiring the court to issue the preliminary order of forfeiture "promptly," and the companion provision in Rule 32.2(b)(3) making the forfeiture order "final as to the defendant" at sentencing, to be incompatible with the realities of complex cases in which the full schedule of the forfeitable property cannot be known until the Government has had the opportunity to conduct extensive post-conviction discovery and the court has considered the evidence discovered. *See, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 44 (D.D.C. 1999) (Government and district court require seven years to locate and forfeit $1.2 billion in forfeitable assets); Rule 32.2(b)(3) and 21 U.S.C. § 853(m) (authorizing post-conviction discovery to locate forfeitable property). In some cases, courts have attempted to deal with this situation by ignoring the Rule and postponing entry of the order of forfeiture until after sentencing; *see United States v. Ferrario-Pozzi*, 368 F.3d 5, 8-9 (1st Cir. 2004) (court delays entry of order of forfeiture until it can conduct post-sentencing hearing to determine the amount of money to be forfeited); but the courts appear to be unanimous in holding that this procedure is inconsistent with the Rule, and that a forfeiture order entered for the first time after sentencing is void. *See United States v. Bennett*, ___ F.3d ___, 2005 WL 2179839 (3d Cir. Sept. 12, 2005) (the order of forfeiture does not become final as to the defendant and become part of the judgment automatically; the court must comply with Rule 32.2(b)(3); a "final order of forfeiture" that is not entered until after sentencing is a nullity); *United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced, even though the judgment and commitment order said defendant "was subject to forfeiture as cited in count two"; the scheme set forth in Rule 32.2 is "detailed and comprehensive"); *United States v. Turcotte*, 333 F. Supp.2d 680, 682-83 (N.D. Ill. 2004) (denying Government's motion to issue preliminary order of forfeiture that should have been issued prior to sentencing but was not); *United States v. King*, 368 F. Supp. 2d 509, 512 (D.S.C. 2005) (same, following *Petrie*; where there was no mention of forfeiture either at sentencing or in the judgment, there is a clear violation of Rule 32.2(b) that cannot be corrected as a clerical error once 7 days have passed after sentencing).

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announcement of sentence, but also that the filing of a motion for reconsideration of the order of forfeiture suspends neither the seven day period under Rule 35 nor the time for filing an appeal under Appellate Rule 4. The Solicitor General's view is that one way of ensuring that the court has the flexibility to correct its own errors is to encourage the courts to enter the preliminary order of forfeiture in advance of sentencing so that errors may be identified before the time limits imposed by Rule 35(a) take effect.

Rule 32.2 anticipated the problem presented by complex cases by providing in subsection (e) that the order of forfeiture could be amended at any time to include property that was "subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered." Rule 32.2(e)(1)(A). For this to work, of course, there must be "an existing order of forfeiture" that was entered in accordance with Rules 32.2(b)(2) and (3). Thus, the drafters of the Rule anticipated that courts would harmonize Rules 32.2(b)(2) and (3) and (e)(1)(A) by entering a preliminary order in generic terms that would become final as to the defendant at sentencing, and would be amended as often as necessary to include specific property as it was identified. This was the procedure adopted by the court in *BCCI Holdings,* and was the procedure on which Rule 32.2 was modeled. *See* 2000 Advisory Committee Note (containing numerous citations to *BCCI Holdings*). The First Circuit has held that this procedure is implicit in Rule 32.2; *see Ferrario-Pozzi,* 368 F.3d at 10-11 (distinguishing *Petrie*; district court was free to sentence the defendant and to enter a forfeiture judgment in generic terms while leaving the determination of the amount to be forfeited until later); but most courts remain unaware of the procedure.

Accordingly, Rule 32.2(b)(2) is amended to include new sub-paragraph (C) expressly providing that a court may comply with the other provisions of the Rule by entering an order that describes the property subject to forfeiture in generic terms, and stating that the order will be amended pursuant to subdivision (e)(1) when specific property is identified or the amount of the money judgment has been calculated..

Revisions to Rule 32.2(b)(3)

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; **to request the assistance of a foreign Government in seizing or restraining property located abroad,** to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights. ~~At sentencing – or at any time before sentencing if the defendant consents – the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

Comment: Rule 32.2(b)(3) authorizes the Government to take certain actions upon the entry of a preliminary order of forfeiture. Most important, it permits the Attorney General "to commence proceedings that comply with any statutes governing third party rights." This means that the Government may commence the ancillary proceeding as soon as the preliminary order of forfeiture is entered and need not wait until after the order becomes final as to the defendant at sentencing. In practice, courts have had little difficulty in applying this part of the Rule, and the Government routinely commences ancillary proceedings as soon as the preliminary order of forfeiture is entered.[4] The only suggested addition to this part of the Rule is the language relating to property located abroad.

Another part of Rule 32.2(b)(3) has proven much more difficult to apply. For the reasons set forth below, the language making the preliminary order final as to the defendant is stricken from Rule 32.2(b)(3) and moved to new Rule 32.2(b)(4).

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[4]The Eleventh Circuit has held to the contrary, but that case was based on the predecessor to Rule 32.2 and would be directly contrary to the text of the Rule if applied to a current case. *See United States v. Pease*, 331 F.3d 809, 813 (11th Cir. 2003) (under Rule 32(d)(2), the Government could not commence the ancillary proceeding until the order of forfeiture became final as to the defendant at sentencing).

New Rule 32.2(b)(4)[5]

(4) Sentence and Judgment. (A) At sentencing – or at any time before sentencing if the defendant consents – the preliminary order of forfeiture becomes final as to the defendant. If the order directs the defendant to forfeit specific assets, it remains preliminary as to third parties until the ancillary proceeding is concluded pursuant to subdivision (c).

(B) The district court must include the forfeiture in the oral announcement of the sentence or otherwise ensure that the defendant is aware of the forfeiture at time of sentencing. The court must also include the order of forfeiture, directly or by reference, in the judgment. The court's failure to include the order in the judgment may be corrected at any time pursuant to Rule 36.

(C) The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If after entry of judgment the court amends or declines to amend an order of forfeiture to include an additional asset pursuant to subdivision (e), a party may file an appeal with respect to that asset within 30 days of the entry of the order granting or denying the amendment.

(D) If a party files a motion for reconsideration of the order of forfeiture before the time for filing an appeal expires, the notice of appeal must be filed within 10 days after the entry of the order disposing of the motion, or within the previously applicable time for appeal, whichever period ends later. A motion for reconsideration is not limited to the grounds for correcting the sentence set forth in Rule 35(a).

Conforming amendment to Rule 32:

Rule 32(d)(2) is amended as follows:

(1) Strike "and" at the end of (E);

(2) Insert new (F) as follows:

> **"(F) specify whether the Government seeks forfeiture pursuant to Rule 32.2 and any other provision of law; and"**

(3) Redesignate present (F) as (G).

Comment: Present Rule 32.2(b)(3) states that the order of forfeiture becomes final as to the defendant at sentencing, and must be made part of the sentence

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[5]Present Rule 32.2(b)(4) should be repealed, or if not repealed, redesignated as Rule 32.2(b)(5).

and included in the judgment. This provision has created much confusion in the courts and should be completely revised as new Rule 32.2(b)(4).

First, sub-paragraph (A) carries forward the provision in current Rule 32.2(b)(3) that the order of forfeiture becomes final as to the defendant at sentencing or earlier with the defendant's consent, but remains preliminary as to third parties until the court has concluded the ancillary proceeding if specific assets have been forfeited. This is consistent with the overwhelming majority of recent cases. *See United States v. De Los Santos*, 260 F.3d 446, 448 & n.1 (5th Cir. 2001) (preliminary order of forfeiture is final as to defendant and is immediately appealable; defendant cannot wait until court enters final order resolving rights of third parties) (collecting cases); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 43 (D.D.C. 1999) (preliminary order transfers defendant's interest to the United States and is final pertaining to the defendant at sentencing; it remains preliminary pertaining to third parties until the ancillary proceeding is concluded). *But see United States v. Croce*, 355 F. Supp. 2d 774, 778 (E.D. Pa. 2005) (*Croce III*) (preliminary order does not become final as to the defendant until after the ancillary proceeding).

Second, sub-paragraph (B) clarifies what is meant by the provision in current Rule 32.2(b)(3) that the forfeiture must be made "part of the sentence." Some courts hold that the judge must include the forfeiture in the oral announcement of the sentence while others routinely omit this. Accordingly, the Rule is amended to state expressly that the order of forfeiture must be included in the oral announcement of the sentence unless the record is clear that the court has ascertained that the defendant is aware of the forfeiture in some other manner (e.g., the forfeiture is part of the plea agreement). The requirement that the forfeiture be announced orally is not intended to overturn the case law holding that a fugitive waives his right to the oral announcement of the sentence.

At the same time, sub-paragraph (B) clarifies that the failure to include the order of forfeiture in the judgment is a clerical error that may corrected pursuant to Rule 36. This codifies the majority rule and overrules the position of the Eleventh Circuit which holds that the failure to comply with the letter of Rule 32.2(b)(3) is not clerical and renders the forfeiture void unless the Government files a timely appeal. *Compare United States v. Bennett*, ___ F.3d ___, 2005 WL 2179839 (3d Cir. Sept. 12, 2005) (if there was a preliminary order of forfeiture to which defendant did not object, the failure to include the forfeiture in both the oral pronouncement and the judgment and commitment order is a clerical error that may be corrected pursuant to Rule 36) (collecting cases); *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may amend the judgment pursuant to Rule 36); *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003) (if there was a preliminary order of forfeiture, the failure to include the forfeiture in the judgment at sentencing is a clerical error that may be corrected at any time pursuant to Rule 36); *United States v. Isaacs*, 88 Fed. Appx. 654,654 (4th Cir. 2004) (affirming district court's use of Rule 36 to correct its failure to make preliminary order of forfeiture part of the judgment) *with United States v. Pease*, 331 F.3d 809, 816-17 (11th Cir. 2003) (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule 36; if the district court does not

make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void); *United States v. Robinson,* 137 Fed. Appx. 273, 276-77 (11th Cir. 2005) (refusing to reconsider *Pease* and refusing to consider a preliminary order of forfeiture self-executing when it states that it will be made part of the judgment, but granting the Government's appeal and remanding with instructions to include the forfeiture in the judgment).

Sub-paragraph © clarifies when the time to appeal from an order of forfeiture begins to run. Most courts hold that the defendant's time to appeal begins to run when the order of forfeiture becomes final as to him at sentencing. *See United States v. De Los Santos*, 260 F.3d 446, 448 & n.1 (5th Cir. 2001) (preliminary order of forfeiture is final as to defendant and is immediately appealable; defendant cannot wait until court enters final order resolving rights of third parties) (collecting cases); *United States v. Derman*, 211 F.3d 175, 182 (1st Cir. 2000) (time for appeal runs from the time of sentencing—not from the time the preliminary order is entered); *United States v. Bennett*, 147 F.3d 912, 914 (9th Cir. 1998) (preliminary order of forfeiture is final pertaining to defendant and is immediately appealable); *United States v. Christunas*, 126 F.3d 765, 768 (6th Cir. 1997) (same, notwithstanding ongoing ancillary proceeding). But the Eleventh Circuit has rendered conflicting opinions, including one that holds that the defendant must appeal when the preliminary order is entered, even if sentencing has not yet occurred. *Compare United States v. Gilbert*, 244 F.3d 888, 925-26 (11th Cir. 2001) (preliminary order of forfeiture is not final as to defendant until sentencing, and is not immediately appealable; following *Derman*) *with United States v. Gross*, 213 F.3d 599, 600 (11th Cir. 2000) (preliminary order of forfeiture is final as to the defendant and is immediately appealable). Moreover, the Tenth Circuit holds that a defendant has no right at all to appeal from a money judgment, but must wait until the Government actually recovers some of his assets. *See United States v. Wilson*, 244 F.3d 1208, 1214 (10th Cir. 2001) (defendant has no right to appeal from a forfeiture order consisting only of a money judgment; because a money judgment does not immediately deprive a defendant of any property, an appeal would be premature).

The new Rule provides that, as to both parties, the time to appeal from an order of forfeiture begins to run when the defendant is sentenced. This includes forfeiture orders listing specific assets and orders consisting only of a money judgment. If the court later amends the order of forfeiture to include additional assets pursuant to Rule 32.2(e), the time to file an appeal *as to the additional asset* would begin to run again from the time when the order of forfeiture was amended.

Finally, prosecutors frequently find it necessary to file motions for reconsideration in criminal forfeiture cases to apprize the district court of an error in its application of forfeiture law. For example, in recent cases, the Government has asked the district court reconsider such issues as whether there is criminal forfeiture authority in mail and wire fraud cases, and if so, whether the court can order the forfeiture of substitute assets; whether criminal forfeiture is mandatory regardless of the defendant's ability to pay; and whether the court erred in making an ownership determination in the case-in-chief instead of deferring that issue to the ancillary proceeding.

These issues arise with some frequency because forfeiture law is evolving and complex, and courts and practitioners are therefore equally unfamiliar with the applicable law. Moreover, in such cases, the error may only come to light some time after sentencing.[6] Thus, a motion for reconsideration often provides the first and only opportunity for the Government to apprise the district court of the applicable forfeiture law, and for the court to correct its own error before it is necessary for the Government to file an appeal. But it highly uncertain that a motion for reconsideration is available for this purpose under current law.

The traditional rule is that a motion for reconsideration of a judgment or order may be filed at any time before the time to appeal has expired, and that the filing of such a motion suspends the time to file an appeal.[7] But Rule 35(a) provides that a motion to correct an "arithmetical, technical or other clear error" in the defendant's sentence must be filed, and ruled upon, within 7 days after sentencing.[8] Moreover, in 2002, Appellate Rule 4(b)(5) was amended to make clear that a motion filed under Rule 35(a) does not suspend the time for filing a notice of appeal. *See* Advisory Committee Note to 2002 Amendment. If, as appears likely, a forfeiture order is considered part of the sentence for the purposes of Rule 35, then motions for reconsideration of the kind the Government has traditionally filed in forfeiture cases may be barred entirely by Rule 35(a) (because they do not deal with arithmetical, technical or other clear errors), or have little practical value because they would have to be acted upon within 7 days to have any effect. In practice, courts often do not rule on motions for reconsideration of the type typically filed in criminal forfeiture cases until much more time has passed. Application of Rule 35(a) and

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[6]It is hoped that this situation is mitigated to a large extent by the amendment to Rule 32.2(b)(2)(B), *supra*, directing the district court to enter the preliminary order of forfeiture "sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order." But it is unlikely that the need for motions for reconsideration will be entirely eliminated by that improvement in the Rule.

[7]*See* 16A Charles A. Wright et al., Wright & Miller's Federal Practice & Procedure § 3950.10 (2005) ("It is not only those motions expressly listed in Rule 4(b) that stall the running of the time in which to appeal . . . A timely motion for reconsideration . . . postpones the appeal time."); 5 Am. Jur. 2d *Appellate Review* § 303 (2004) ("In an appeal from a District Court to the United States Supreme Court, the time for appeal does not begin to run until the court entering judgment disposes of a proper motion for . . . reconsideration."). *See United States v. Ibarra*, 502 U.S. 1, 6 (1991) (rejecting attempts to get around *Healy* and *Dieter*, a motion for reconsideration renders a final decision not final until the district court can rule on the motion, which suspends the time period for filing an appeal); *United States v. Dieter*, 429 U.S. 6, 8 (1976) ("consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending"); *United States v. Healy*, 376 U.S. 75, 77-78 (1964) (same); *United States v. Correa-Gomez*, 328 F.3d 297, 299 (6th Cir. 2003) (citing *Ibarra*, reiterating that a timely motion for reconsideration means that the period to file an appeal begins to run only after the district court has ruled on the motion for reconsideration).

[8]Rule 35(c) defines "sentencing" as the "oral announcement of the sentence."

Appellate Rule 4(b)(5) to motions filed in criminal forfeiture cases would thus make the correction of forfeiture orders by the district court impractical.

For these reasons, Rule 32.2(b) is amended to provide expressly for the right of either party to file a motion for reconsideration of the order of forfeiture. The conforming amendment to Rule 32(d)(2) is intended to ensure that the court does not overlook the forfeiture in imposing sentence in accordance with that Rule.

Repeal or Revision to Present Rule 32.2(b)(4)

Rule 32.2(b)(4) is repealed.

or

(4 5) Jury Determination. **(A)** ~~Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ **In a case in which a jury returns a verdict of guilty, either party may request that the jury be retained to determine the forfeitability of specific property. The request must be made in writing or on the record before the jury returns its verdict of guilty.**

(B) If a timely request to have the jury determine the forfeiture is made, the Government must submit a proposed Special Verdict Form as to each asset subject to forfeiture, asking the jury to determine whether the Government has established the requisite nexus between the property and the offense committed by the defendant.

(C) There is no right to have a jury determine the amount of a money judgment or the forfeitability of substitute assets.

Comment: When Rule 32.2 was first proposed in the 1990s, the Government suggested that in light of the Supreme Court's decision in *Libretti v. United States,* holding that there is no Sixth Amendment right to a jury determination of the forfeiture of property, the Rule should make no provision for the determination of the forfeiture by the jury. *See Libretti v. United States*, 516 U.S. 29, 49 (1995) ("the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection"). The Advisory Committee agreed, but the Standing Committee subsequently remanded the Rule with instructions to include a statutory right to have the jury retained to determine the forfeiture. That right is embodied in present Rule 32.2(b)(4). *See United States v. Gaskin*, 2002 WL 459005, at *9 n.3 (W.D.N.Y. 2002) (notwithstanding *Libretti*, which appears to make trial by jury on the forfeiture issue inappropriate, Rule 32.2(b)(4) gives the defendant the right to have the jury determine the forfeiture, if the case was tried before a jury), *aff'd*, 364 F.3d 438 (2d Cir. 2004).

Since Rule 32.2 took effect, the Supreme Court has substantially revised its Sixth Amendment jurisprudence in *Apprendi, Blakely* and *Booker.* Nevertheless, the courts unanimously hold that none of those holdings affects the Court's conclusion in *Libretti* that the Sixth Amendment right to a jury does not apply to forfeiture. *See United States v. Fruchter,* 411 F.3d 377, 382-83 (2d Cir. 2005) (*Booker* and *Blakely* do not apply to criminal forfeiture for two reasons: because the Supreme Court expressly stated in *Booker* that its decision did not affect forfeiture under 18 U.S.C. § 3554, and because *Booker* applies only to a determinate sentencing system in which the jury's verdict mandates a sentence within a specific range; criminal forfeiture is not a determinate system); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (*Booker* does

not apply to criminal forfeiture); *United States v. Hall*, 411 F.3d 651, 655 (6th Cir. 2005) (same, following *Tedder*; *Booker* merely extended *Apprendi* to the sentencing guidelines and redefined what constitutes the statutory maximum, but the guidelines do not apply to forfeiture, and the forfeiture statutes contain no statutory maximum; forfeiture is a form of indeterminate sentencing "which has never presented a Sixth Amendment problem"); *United States v. Washington*, 131 Fed. Appx. 976, 977 (5th Cir. 2005) (neither *Blakely* nor *Booker* overrule the holding in *Libretti* that there is no Sixth Amendment right to a jury on the forfeiture issues in a criminal case); *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004) ("The criminal forfeiture provisions do not include a statutory maximum; they are open-ended in that *all* property representing proceeds of criminal activity is subject to forfeiture. Therefore *Blakely*, like *Apprendi*, does not apply to forfeiture proceedings." Moreover, the reasonable doubt standard only applies to elements of the offense, and *Libretti* makes clear that "forfeiture is not a separate substantive offense."); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005) (following *Messino* and *Vera*; forfeiture and restitution do not fall within *Apprendi* because there is no statutory maximum); *United States v. Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003) ("forfeiture is not viewed as a separate charge, but as an aspect of punishment imposed following conviction of a substantive offense"; therefore, notwithstanding *Apprendi*, the preponderance standard applies); *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002) (like restitution, forfeiture has no statutory maximum; it is open-ended; thus, a forfeiture of property described by a criminal forfeiture statute can never exceed the statutory maximum in a way that makes *Apprendi* applicable); *United States v. Corrado*, 227 F.3d 543, 550-51 (6th Cir. 2000) (*Corrado I*) (*Apprendi* does not apply to criminal forfeiture; under *Libretti*, forfeiture is an aspect of the sentence, not a separate offense; therefore, forfeiture need not be submitted to a jury or proved beyond a reasonable doubt); *United States v. Corrado*, 286 F.3d 934, 939-40 (6th Cir. 2002) (*Corrado II*) (petition for rehearing denied).

In light of the unanimous case law, the Advisory Committee may want to revisit the suggestion that the statutory right to a jury in the forfeiture phase of the trial be repealed. The Department of Justice, however, does not object to the retention of the statutory provision. If the Advisory Committee determines that the statutory right to have the jury determine the forfeiture should be retained, the provision in Rule 32.2(b)(4) should be revised to clarify several issues identified in the case law.

First, the current Rule seems to limit the role of the jury to determining the forfeitability of specific assets, while leaving it to the court to determine the amount of a money judgment. *See* Rule 32.2(b)(4) ("the jury must determine whether the Government has established *the requisite nexus between the property and the offense*") (emphasis added). The Seventh Circuit has adopted that interpretation, *see Tedder*, 403 F.3d at 841 (the defendant's right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment); *United States v. Reiner*, ___ F. Supp.2d ___, 2005 WL 2652625 (D. Me. Oct. 12, 2005) (same, following *Tedder*; Rule 32.2(b)(4) applies only when the Government is required to establish a nexus between the property and the offense; when the Government is seeking only a money judgment, there is no nexus requirement and thus

no nexus for the jury to find). There are no other published cases on this issue, however, and courts remain uncertain as to the scope of the Rule. The amendment adopts the Seventh Circuit's interpretation, making it clear that the right to have the jury determine the forfeiture applies only to the forfeiture of specific property.

Second, courts have held that the right to have the jury determine the forfeiture is the right to have the jury that determined the defendant's guilt *retained*, not to have a new jury empaneled. Thus, if neither party makes its request for a jury trial on the forfeiture before the jury is dismissed, the jury right is waived. *See United States v. Anderson*, 2005 WL 1027174 (D. Neb. May 2, 2005) (defendant waived his statutory right to a jury when he remained silent while the jury was excused). Moreover, the request to have the jury determine the forfeiture must be specific to that issue; a general request for a jury trial at the time of arraignment is not sufficient. *See United States v. Davis*, 177 F. Supp. 2d 470, 482 (E.D. Va. 2001) (under Rule 32.2(b)(4), defendant must make a specific request to have the jury retained to determine the forfeiture; a general request for a jury trial at the time of arraignment is not sufficient; defendant, who stood silent while the jury was dismissed, waived his right to have the jury determine the forfeiture and could not request that a new jury be empaneled), *aff'd*, 63 Fed. Appx. 76 (4th Cir. 2003). The courts have not yet determined, however, "the more difficult question of what, at a minimum, would constitute a sufficient request and when, in the course of the proceedings, such a request would have to be made." *United States v. Davis,* 63 Fed. Appx. at 82.

As revised and re-designated, Rule 32.2(b)(5) would resolve these ambiguities by clarifying that a party must make a specific request, in writing or on the record, that the jury be retained to determine the forfeiture, and that the request must be made prior to the jury's return of the verdict of guilty.

Finally, sub-paragraph (B) is added to make clear that the Government should propose, and the court should submit to the jury, a Special Verdict Form asking the jury to determine whether the Government has established the required nexus between the asset and a crime of conviction to support forfeiture of the item.

Proposed Revision to Rule 32.2(d)

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may, **to the extent permitted by the applicable statute,** stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. . . .

Comment: Rule 32.2(d) authorizes the court to exercise its discretion to stay the disposition of the forfeited property pending the defendant's appeal. *See United States v. Riedl*, 214 F. Supp. 2d 1079, 1082-83 (D. Haw. 2001) (notwithstanding § 853(h), defendant has standing pursuant to Rule 32.2(d) to seek stay of forfeiture pending appeal; but authority to grant stay is discretionary and stay may be denied on equitable grounds, including wasting of property and burden on U.S. Marshals Service); *United States v. Hronek*, 2003 WL 23374653 (N.D. Ohio 2003) (stay pending appeal from a criminal forfeiture order will be granted only if it appears the defendant is likely to succeed on the merits); *United States v. Schulze*, CR. NO. 02-00090 DAE (D. Haw. April 18, 2005) (using 4-factor test to deny defendant's motion for stay pending appeal: (1) the likelihood of success on appeal; (2) whether the forfeited assets will likely depreciate in value over time; (3) the intrinsic value of the forfeited asset to the Defendant and the availability of substitutes; and (4) the expense and burden of maintaining the property).

As the *Riedl* court pointed out, however, the Rule appears to conflict with the forfeiture statute, 21 U.S.C. § 853(h). Under the statute, a stay of the forfeiture may be granted only "upon application of a person other than the defendant or a person acting in concert with him on or his behalf." The amendment recognizes that the Rule was not intended to override the applicable statute.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 51

DATE: March 12, 2006

The Standing Committee approved the Crime Victims Rights amendments for publication and comment at its January meeting. In the course of the Standing Committee's discussion, members of committee suggested that one further change, an amendment to Rule 51, might be appropriate to implement the following provision of the Crime Victim's Rights Act, 18 U.S.C. § 3771(d)(4):

> **(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.

A draft amendment to Rule 51 and accompanying committee note are attached. This item is on the agenda for the April meeting in Washington, D.C.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 51. Preserving Claimed Error

* * * * *

(c) **Government Assertion of Victim's Right.** 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.

COMMITTEE NOTE

Subdivision (c). The amendment incorporates the Crime Victim's Rights Act, 18 U.S.C. § 3771(d)(4), which permits the government to assert a denial of a crime victim's right on appeal in a criminal case.

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) 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

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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).

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:

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

[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

	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 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

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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.

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

* * * * *

(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

* * * * *

(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

* * * * *

(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

* * * *

(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

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[4]*See* FED. R. BANKR. P. 7005.

[5]*See* FED. R. CRIM. P. 49(b).

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, 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 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period ~~of time~~ specified in these rules~~;~~ or in any local rule, ~~or any~~ court order~~:~~, or statute.

~~**(1) *Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2) *Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3) *Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or 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.~~

~~**(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~~

(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.

~~(4)~~(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, ~~the~~ Congress, or the state where the district court is ~~held~~ 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).

H. R. 3199

One Hundred Ninth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and six

An Act

To extend and modify authorities needed to combat terrorism, 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.

(a) SHORT TITLE.—This Act may be cited as the "USA PATRIOT Improvement and Reauthorization Act of 2005".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

"CONSECUTIVE SENTENCE FOR MANUFACTURING OR DISTRIBUTING, OR POSSESSING WITH INTENT TO MANUFACTURE OR DISTRIBUTE, METHAMPHETAMINE ON PREMISES WHERE CHILDREN ARE PRESENT OR RESIDE

"SEC. 419a. Whoever violates section 401(a)(1) by manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine or its salts, isomers or salts of isomers on premises in which an individual who is under the age of 18 years is present or resides, shall, in addition to any other sentence imposed, be imprisoned for a period of any term of years but not more than 20 years, subject to a fine, or both.".

(b) CLERICAL AMENDMENT.—The table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by inserting after the item relating to section 419 the following new item:

"Sec. 419a. Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside.".

SEC. 735. AMENDMENTS TO CERTAIN SENTENCING COURT REPORTING REQUIREMENTS.

Section 994(w) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) by inserting ", in a format approved and required by the Commission," after "submits to the Commission";

(B) in subparagraph (B)—

(i) by inserting "written" before "statement of reasons"; and

(ii) by inserting "and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission" after "applicable guideline range"; and

(C) by adding at the end the following:

"The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission."; and

(2) in paragraph (4), by striking "may assemble or maintain in electronic form that include any" and inserting "itself may assemble or maintain in electronic form as a result of the".

SEC. 736. SEMIANNUAL REPORTS TO CONGRESS.

(a) IN GENERAL.—The Attorney General shall, on a semiannual basis, submit to the congressional committees and organizations specified in subsection (b) reports that—

(1) describe the allocation of the resources of the Drug Enforcement Administration and the Federal Bureau of Investigation for the investigation and prosecution of alleged violations of the Controlled Substances Act involving methamphetamine; and

(2) the measures being taken to give priority in the allocation of such resources to such violations involving—

(A) persons alleged to have imported into the United States substantial quantities of methamphetamine or scheduled listed chemicals (as defined pursuant to the amendment made by section 711(a)(1));

tion of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission may assemble or maintain in electronic form that include any information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

(Added Pub.L. 98–473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2019, and amended Pub.L. 99–217, § 3, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99–363, § 2, July 11, 1986, 100 Stat. 770; Pub.L. 99–570, Title I, §§ 1006(b), 1008, Oct. 27, 1986, 100 Stat. 3207–7; Pub.L. 99–646, §§ 6(b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub.L. 100–182, §§ 16(b), 23, Dec. 7, 1987, 101 Stat. 1269, 1271; Pub.L. 100–690, Title VII, §§ 7083, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4417, 4419; Pub.L. 103–322, Title II, § 20403(b), Title XXVIII, § 280005(c)(4), Title XXXIII, § 330003(f)(1), Sept. 13, 1994, 108 Stat. 1825, 2097, 2141; Pub.L. 108–21, Title IV, § 401(h), (k), Apr. 30, 2003, 117 Stat. 672, 674.)

[1] So in original. Probably should be "incidence".

Application of Sentencing Guidelines

See Blakely v. Washington, 124 S.Ct. 2531 (2004).

HISTORICAL AND STATUTORY NOTES

References in Text

Paragraphs (6) and (11) of section 3563(b) of Title 18, referred to in subsec. (a)(1)(E), were renumbered paragraphs (5) and (10), respectively, of section 3563(b) by Pub.L. 104–132, Title II, § 203(2)(B), Apr. 24, 1996, 110 Stat. 1227.

The Federal Rules of Criminal Procedure, referred to in subsec. (a)(2)(E), are set out in Title 18, Crimes and Criminal Procedure.

The Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), referred to in subsec. (h), is Pub.L. 96–350, Sept. 15, 1980, 94 Stat. 1159, as amended, which is classified generally to chapter 38 (section 1901 et seq.) of Title 46 Appendix, Shipping. For complete classification of this Act

Calendar for April 2007 (United States)

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Phases of the moon: 2:○ 10:◑ 17:● 24:◐
Holidays and observances: 1: Palm Sunday (Christian), 3: First day of Passover (Jewish), 5: Maundy Thursday (Christian), 6: Good Friday (Christian), 7: Holy Saturday (Christian), 8: Orthodox Easter (Orthodox), 8: Easter Sunday (Christian), 9: Easter Monday (Christian), 10: Last day of Passover (Jewish), 15: Yom HaShoah (Jewish), 24: Yom HaAtzmaut (Jewish)

Calendar generated on www.timeanddate.com/calendar