# ADVISORY COMMITTEE
# ON
# CRIMINAL RULES

**Amelia Island, FL**
**October 26-27, 2006**

# AGENDA
# CRIMINAL RULES COMMITTEE MEETING
## OCTOBER 26-27, 2006
## AMELIA ISLAND, FLORIDA

## I. PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of April 2006 Meeting in Washington, D.C. and Minutes of September 2006 Teleconference

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 for Transmittal to the Supreme Court (Memo)

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 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).

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))

5. Rule 49.1. Privacy Protections for Filings Made with the Court. Proposed amendment implements the E-Government Act.

**B. Proposed Amendments Approved for Publication (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 29. Motion for Judgment of Acquittal. Proposed amendment concerning deferral of rulings.

6. 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.

7. Rule 41. Search and Seizure. Proposed amendment authorizing magistrate judge to issue warrants for property outside of the United States.

8. 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.

9. Rule 61. Conforming Title.

## III. REPORTS OF SUBCOMMITTEES

**A. Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings; Proposed New Rule 11 – Professor Nancy King (Memo)**

**B. Rules 7 and 32.2, Criminal Forfeitures – Judge Mark Wolf (Memo)**

**C. Rule 41, Warrants for Electronically Stored Information (ESI) – Judge Anthony Battaglia (Memo)**

## IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

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

B. Rule 49.1. Redaction of the Grand Jury Foreperson's Name on the Indictment & Redaction of Arrest & Search Warrants (Memo)

C. Time Computation Template (Memo)

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

E. Procedures for Sealed Cases (Memo)

F. Rule 32.1 and Rule 46, Revoking Probation or Supervised Release & Revoking Pretrial Release

G. Rule 15, Permitting Deposition of a Witness Without Defendant's Physical Presence, Department of Justice Proposal (Letter)

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

A. Report on Forms.

B. Other Matters

## VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Spring Meeting

B. Other

# ADVISORY COMMITTEE ON CRIMINAL RULES

**Chair:**

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

**Members:**

Honorable Richard C. Tallman
United States Circuit Judge
United States Court of Appeals
Park Place Building, 21st floor
1200 Sixth Avenue
Seattle, WA 98101

Honorable Harvey Bartle III
Chief Judge
United States District Court
16614 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable James P. Jones
Chief Judge
United States District Court
180 West Main Street
Abingdon, VA 24210

Judge Mark L. Wolf
Chief Judge
United States District Court
5110 John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Honorable Anthony J. Battaglia
United States Magistrate Judge
United States District Court
1145 Edward J. Schwartz United States Courthouse
940 Front Street
San Diego, CA 92101-8927

Honorable Robert H. Edmunds, Jr.
Associate Justice of the Supreme Court of North Carolina
P.O. Box 1841
Raleigh, NC 27602

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Leo P. Cunningham, Esquire
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 04304-1050

Rachel Brill, Esquire
Mercantil Plaza Building, Suite 1113
2 Ponce de Leon Avenue
San Juan, PR 00918

Thomas P. McNamara
Federal Public Defender
United States District Court
First Union Cap Center, Suite 450
150 Fayetteville Street Mall
Raleigh, NC 27601

Assistant Attorney General
Criminal Division (ex officio)
Honorable Alice S. Fisher
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2107
Washington, DC 20530-0001

---

Benton J. Campbell
Counselor to Assistant Attorney General
Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2218
Washington, DC 20530-0001

**Reporter:**

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

**Liaison Member:**

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

**Secretary:**

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

# ADVISORY COMMITTEE ON CRIMINAL RULES

## SUBCOMMITTEES

**Subcommittee on Blakely**
(Open) Chair
Judge David G. Trager
Judge Anthony J. Battaglia
Professor Nancy J. King
(Open)
DOJ representative

**Subcommittee on E-Government Act**
Judge Harvey Bartle III, Chair
(Open)
DOJ representative

**Subcommittee on Extraordinary Writs**
Professor Nancy J. King, Chair
Judge David G. Trager
Thomas P. McNamara
DOJ Representative

**Subcommittee on Grand Jury**
(Open) Chair
(Open)
(Open)
(Open)
DOJ representative

**Subcommittee on Preliminary Proceedings**
Judge Anthony J. Battaglia, Chair
(Open)
DOJ representative

**Subcommittee on Rule 16/Brady**
(Open), Chair
Professor Nancy J. King
(Open)
Thomas P. McNamara
DOJ representative

**Subcommittee on Rule 29**
Judge David G. Trager
Professor Nancy J. King
DOJ representative

**Subcommittee on Rule 32.2**
Judge Mark L. Wolf, Chair
Judge James P. Jones
Professor Nancy J. King
Thomas P. McNamara
DOJ Representative

**Subcommittee on Rule 37**
Professor Nancy J. King, Chair
Thomas P. McNamara
DOJ Representative

**Subcommittee on Rule 41**
(Open) Chair
Judge Harvey Bartle III
Professor Nancy J. King
(Open)
DOJ representative

**Subcommittee on Victims Rights Act**
Judge James P. Jones, Chair
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ representative

October 4, 2006
Projects

# JUDICIAL CONFERENCE RULES COMMITTEES

## Chairs

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

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

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

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

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

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

## Reporters

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

Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

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

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

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

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

## ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

**Staff:**


John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Jeffrey N. Barr
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Timothy K. Dole
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

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

## FEDERAL JUDICIAL CENTER

**Staff:**


Joe Cecil (Committee on Rules of Practice and Procedure) — Phone 202-502-4084
Senior Research Associate
Research Division — Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <jcecil@fjc.gov>

Marie Leary (Appellate Rules Committee) — Phone 202-502-4069
Research Associate
Research Division — Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <mleary@fjc.gov>

Robert J. Niemic (Bankruptcy Rules Committee) — Phone 202-502-4074
Senior Research Associate
Research Division — Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <bniemic@fjc.gov>

Thomas E. Willging (Civil Rules Committee) — Phone 202-502-4049
Senior Research Associate
Research Division — Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <twillgin@fjc.gov>

Laural L. Hooper (Criminal Rules Committee) — Phone 202-502-4093
Senior Research Associate
Research Division — Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <lhooper@fjc.gov>

Tim Reagan (Evidence Rules Committee) — Phone 202-502-4097
Senior Research Associate
Research Division — Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <treagan@fjc.gov>

# ADVISORY COMMITTEE ON CRIMINAL RULES

## DRAFT MINUTES

**April 3 & 4, 2006**
**Washington, D.C.**

### I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Washington, D.C., on April 3-4, 2006. 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)
Professor Sara Sun Beale, Reporter

Also participating in all or part of 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
Judge Paul L. Friedman, Former Committee Member
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Paul J. McNulty, Deputy Attorney General
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office

Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate at the Federal Judicial Center

Judge Bucklew noted that the terms of three committee members were expiring on September 30, 2006: Judge Trager, Mr. Goldberg, and Mr. Fiske. Also, she welcomed former committee member Judge Friedman, who chaired the *Booker* Subcommittee during his tenure.

## II. APPROVAL OF MINUTES

Judge Tallman moved for approval of the draft minutes of the committee's October 24-25, 2005 meeting in Santa Rosa, California.

***The committee without objection approved the minutes of the October 2005 meeting.***

## III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

### A. Report From the Chief of the Rules Committee Support Office

Mr. Rabiej reported that the Supreme Court had approved all rule amendments submitted and that they would be physically delivered to Congress shortly. The criminal rule amendments include:

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

4. Rule 40. Arrest for Failing to Appear in Another District. The amendment authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who fails to appear or violates any other condition of release.

5. Rule 41. Search and Seizure. The amendment permits transmission of documents by reliable electronic means and sets forth procedures for issuing tracking-device warrants.

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

## B. Proposed Crime Victims' Rights Act Amendments Approved by Standing Committee for Publication in 2006

Judge Bucklew reported that the Standing Committee had approved for publication the following rule amendments, designed to implement the Crime Victims' Rights Act (CVRA):

1. Rule 1. Scope; Definitions. The proposed amendment defines "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed amendment governs the circumstances under which a victim's address and telephone number is disclosed to the defense.

3. Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

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

5. Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when a presentence report should include restitution-related information, clarifies the standard for inclusion of victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

6. Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

Judge Bucklew reported that the CVRA-related proposed rule amendments had been discussed at length at the Standing Committee's January meeting. Because proposed Rule 43.1 bears no relation to Rule 43, it was redesignated as Rule 60. Professor Beale noted that the Standing Committee's changes had been generally stylistic. One substantive issue raised in the discussion, however, was whether the presumption in Rule 12.1 should be reversed to require disclosure of a victim's address and phone number to the defense unless the court orders otherwise. The issue will be highlighted for public comment.

Judge Bucklew invited discussion of a suggestion by the Standing Committee that the committee consider adding the following provision to Rule 51, to reflect 18 U.S.C. § 3771(d)(4):

> (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.

Professor Beale noted that this was part of the broader question of how much substantive statutory content should be imported into the rules. Judge Tallman questioned whether a procedural rule should include a provision whose remedy would presumably be substantive: having the judgment and conviction vacated and the case remanded. Mr. Campbell stated that the Department considered the addition unnecessary. Professor Beale noted that the provision primarily affected the government, which was well aware of its statutory rights. Judge Jones moved that the committee not recommend publishing the proposed Rule 51(c). Professor King said that she thought that the proposed rule should be an appellate rather than a criminal rule, because it involves assertion of error on appeal. Professor Beale suggested referring the rule to the Appellate Rules Committee.

***The committee voted not to send proposed Rule 51(c) to the Standing Committee.***

## C. Proposed Amendments Published for Public Comment

Judge Bucklew noted that comments were received on the following proposed amendments:

1. Rule 11. Pleas. The proposed amendment would conform the rule to *United States v. Booker*, 543 U.S. 220 (2005), by revising the court's advice to a defendant during the plea colloquy to reflect the advisory nature of the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment would conform the rule to *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 would conform the rule to *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."

The committee discussed the public comments received on the proposed amendment of Rule 11, which governs the court's advice to a defendant during a plea colloquy. Professor Beale noted that the United States Sentencing Commission had recommended replacing "calculate" with the phrase "determine and calculate" in subparagraph (b)(1)(M) to give defendants a clearer picture of the judge's role in sentencing. Other comments suggested that the proposed amendment accorded the Sentencing Guidelines greater prominence than warranted under *Booker* and insufficiently emphasized the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). Professor Beale noted that she agreed with the suggestion of the Federal and Community Defenders that references to the Fifth Amendment requirement of proof beyond a reasonable doubt in the committee notes accompanying the CVRA-related proposed rule amendments should be deleted, because the Supreme Court rested its holding in *Booker* solely upon the Sixth Amendment.

Several committee members expressed concern that the proposed Rule 11 amendment appeared to require the judge to calculate the applicable sentencing-guidelines range even when doing so was unnecessary, such as when the range was clearly trumped by an applicable mandatory minimum. Judge Bartle suggested accommodating these situations by replacing "calculate" with the term "consider." But Ms. Fisher responded that "consider" would be too vague. Judge Trager suggested referring to "the court's obligation ordinarily to calculate the applicable sentencing-guideline range." Several members suggested that the qualifier "ordinarily" would be unhelpful and confusing to defendants. Following an extensive discussion and two initial votes, Ms. Fisher moved to send the proposed amendment to the Standing Committee as revised by Professor Beale (i.e., without the Fifth Amendment reference in the note), but retaining the phrase "the court's obligation to calculate," as originally published. Judge Wolf expressed concern that the proposed amendment might be misconstrued as undermining such post-*Booker* decisions as *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Ms. Fisher said that the Department would not object to acknowledging *Crosby* in the note.

***The committee voted 9-3 to send the proposed Rule 11(b)(1)(M) amendment to the Standing Committee as published, except for two changes to the note: deletion of the reference to the Fifth Amendment and the addition of a reference to* Crosby.**

The committee discussed the proposed Rule 32(d)(1) amendment. Professor Beale suggested adding "Advisory" to the heading to reflect *Booker*: "Applying the Advisory Sentencing Guidelines."

***The committee without objection approved the change to the proposed Rule 32(d)(1) amendment.***

Professor Beale noted that the public comments received with respect to the published draft of the proposed Rule 32(h) amendment identified several ambiguities. She recommended adopting the changes proposed by the Sentencing Commission and revising the rule to read 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 contemplating imposing such a sentence.

Following a brief discussion of the purposes served by providing counsel with advance notice, Judge Trager moved to adopt the revisions recommended by Professor Beale.

***The committee without objection approved the changes to the Rule 32(h) amendment.***

Professor Beale noted that recent legislation requiring courts to use the judgment form prescribed by the Judicial Conference may have made the proposed amendment to Rule 32(k) unnecessary. Specifically, § 735 of the USA PATRIOT Improvement and Reauthorization Act amended 28 U.S. C. § 994(w) to require submission to the Sentencing Commission of "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." Mr. Rabiej reported that the amendment had been requested originally by the Criminal Law Committee, but given the new statute, that recommendation had been withdrawn. Professor King moved to withdraw the proposed amendment.

***The committee without objection decided to withdraw the Rule 32(k) amendment.***

Professor Beale recommended against adopting the changes to the Rule 35 amendment suggested by the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL). The Commission suggested preserving the existing rule's explicit reference to the Sentencing Guidelines and questioned whether the *Booker* remedial opinion applied to post-sentencing proceedings. Meanwhile, NACDL wrote that, following *Booker*, the rule should no longer *require* a government motion, because even in its absence, a sincere effort at cooperation might constitute "powerful evidence of rehabilitation" under 18 U.S.C. § 3553(a).

***The committee without objection approved the Rule 35 amendment without change.***

Professor Beale noted that the only public comment received on the proposed Rule 45 amendment was from NACDL, which expressed appreciation to the committee for clarifying a rule that has "occasionally vexed and confused the most dedicated practitioner."

***The committee without objection approved the Rule 45 amendment.***

## IV. SUBCOMMITTEE REPORTS

### A. Rule 49.1. Proposed E-Government Rule

The committee discussed several changes to the proposed Rule 49.1 draft. Professor Capra, the lead reporter designated by the Standing Committee to coordinate the efforts of the advisory rules committees in developing a uniform E-Government rule, joined the meeting by telephone. Judge Bucklew noted that the E-Government Subcommittee, chaired by Judge Bartle, had met to consider the recently proposed changes, which fell into two categories: (1) changes affecting all E-Government rules; and (2) those affecting only Criminal Rule 49.1.

Professor Beale noted that changes of the first variety included, for instance, a request from the Bankruptcy Rules Committee that all references to "person" be changed to "individual" to distinguish from a different meaning of "person" as defined by a specific Bankruptcy Rule The reporters of the respective committees had additionally agreed to a few other minor style changes.

One proposed change affecting only Criminal Rule 49.1 was the suggestion of the Committee on Court Administration and Case Management (CACM) that subdivision (a) be amended to require redaction of the names of petit jury and grand jury forepersons on verdict forms and indictments, replacing them with their initials. Judge Levi raised concerns about how this proposal would work in practice, noting the legal importance of having an original, unredacted, signed version of these court documents. Judge Bucklew suggested that perhaps a foreperson could sign one form, which could be sealed, then initial a second, public form. Judge Battaglia expressed concern that the change might mean that, at arraignment, the court would no longer provide a defendant with an unredacted copy of the signed grand jury indictment. Judge Jones cautioned against creating an anonymous justice system, as exists in some foreign countries. Judge Wolf suggested that, absent specific findings, the public should be entitled to see any document filed in open court. Judge Bucklew asked whether the proposed change should be published first for public comment. Noting that this is a complicated issue being handled very differently in different districts, Judge Levi suggested that an empirical study might be beneficial to determine as a preliminary matter whether public disclosure of jury foreperson signatures has caused problems sufficient to justify a national rule requiring every court to redact them from every grand jury indictment and every petit jury verdict form.

***The committee without objection decided that proposed Rule 49.1 should not require redaction of identifying juror information at this time, pending further study.***

Professor Beale noted that the phrase "a party or non party making a filing" had been added to Rule 49.1(a) to make clear that the redaction obligation applies to all filers, not just parties. She also noted the Department of Justice's suggestion, agreed to by the other rules committee reporters, to move the phrase "in a forfeiture proceeding" to the end of paragraph (b)(1) to make clear that the redaction exemption also applies to forfeiture filings in related ancillary proceedings. The revised

rule would read as follows: "(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;"

Responding to a concern by CACM that applies most directly to bankruptcy cases, Professor Beale said that all the committee reporters as well as the E-Government Subcommittee had agreed to modify the redaction exemption in paragraph (b)(4) as follows to keep the rules parallel: "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed." Judge Jones asked whether this change obviated the need to exempt "the official record of a state-court proceeding" in paragraph (b)(3). Professor Capra acknowledged an overlap in the two rules. Professor Beale suggested, however, that this concern might not be worth pursuing at this late stage, given the need to coordinate all template changes across multiple committees.

Professor Beale noted that the words "pro se" had been added to the beginning of Rule 49.1(b)(6) and (b)(7) in the revised draft, thereby excluding from the redaction exemption all filings submitted by counsel in actions brought under 28 U.S. § 2254, § 2255, or § 2241. This change had been proposed by the E-Government Subcommittee chaired by Judge Bartle. Judge Tallman and Judge Jones recommended omitting both (b)(6) and (b)(7) entirely and requiring *all* litigants to redact their filings, as CACM had suggested in its comments, understanding that enforcement could be relaxed in pro se cases as appropriate. Judge Bartle and Professor King objected to this approach, citing potential legal consequences if a pro se petitioner's failure to redact sensitive information violated a rule. Professor Capra noted that the government could always seek a protective order if a pro se filing included unredacted information that raised security concerns.

Judge Bartle asked why the language of subdivision (d) could not parallel (c), thereby according judges greater discretion to determine when a protective order is appropriate. Subdivision (c) begins, "The court may order that a filing be made under seal without redaction." Subdivision (d) provides, "If necessary to protect private or sensitive information that is not otherwise protected under (a), the court may by order in a case . . . ." Professor Beale noted that subdivision (d) sets forth a standard for when protective orders are proper, a compromise between advocates of privacy and advocates of open government. By contrast, she said, the standard for sealing is already well established by case law. Judge Bartle moved that subdivision (d) be revised as follows to reflect the more flexible standard for issuance of protective orders set forth in Civil Rule 26(c):

> "**Protective Orders.** For good cause shown, 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 to a document filed with the court."

Professor Capra said he would advise the other rules committees of this change and asked the committee to authorize its chair and reporter to work with the chairs and reporters of the other committees to resolve any last-minute wording issues. Professor Capra noted that the phrase "in a case" in subdivision (d) should be retained to make clear that any protective orders of this nature must be issued on a case-by-case basis, not as a standing order.

***The committee without objection approved the change proposed by Judge Bartle and granted the chair and the reporter authority to work with the chairs and the reporters of the other rules committees to resolve any last-minute wording issues in the interest of uniformity.***

Professor Beale noted that the committee had given early approval to the redaction exemptions in paragraphs (b)(8), (b)(9), and (b)(10), as requested by the Department of Justice. Mr. Campbell stressed the importance of particularity and identification in such documents as arrest or search warrants and said that the public has a right to know with some specificity who was arrested or charged with a crime and where a search was executed. Judge Bucklew noted that CACM had expressed concern with the breadth of the exemptions. Judge Jones moved to retain the exemptions.

***The committee without objection decided to retain the exemptions in proposed Rule 49.1(b)(8), (9), and (10).***

Judge Bartle moved that the committee approve the entire text of Rule 49.1 as revised.

***The committee without objection approved the revised draft of Rule 49.1.***

### B. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information

Deputy Attorney General Paul McNulty attended the meeting for the committee's discussion of the proposed Rule 16 amendment. Judge Bucklew noted that, since the committee's last meeting, the Department of Justice had circulated two drafts of a proposed revision to the United States Attorneys' Manual (USAM) as an alternative to amending Rule 16. Ms. Fisher explained that the proposal was designed to address some of the concerns prompting the effort to amend the rule. She said that the revision of the Manual would promote prosecutorial uniformity and regularity nationwide, would allow for early disclosure of exculpatory and impeaching evidence, and would encourage prosecutors in most cases to exceed the disclosure requirements mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

Mr. Fiske raised several concerns with the Department's proposed USAM revision and asked whether the USAM revision would require a disclosure regardless of materiality. Ms. Fisher noted that subsection B of the proposed revision to the Manual "encourages prosecutors to take an expansive view of its disclosure obligations and err on the side of broad disclosure without engaging in speculation as to whether the evidence will be material to guilt or the outcome of a trial." Mr. Goldberg pointed out, however, that the proposed revision is merely hortatory and includes broadly defined exceptions. Under the proposal, it would be impossible to determine in a given case whether the government's disclosure of exculpatory and impeaching information was broad or narrow. Mr. Goldberg asked whether the USAM proposal was simply an alternative to a Rule 16 amendment or would be implemented regardless of how the committee chose to proceed.

Ms. Fisher responded that the USAM revision was proposed as an alternative to a rule change. Under its proposed revision standard, prosecutors would continue to weigh materiality before disclosing exculpatory or impeaching evidence, but would be encouraged to construe materiality broadly. She added that exceptions were important to protect witnesses and the national security. Judge Wolf suggested that, where witness safety or national security considerations required an exception, the Department could simply request a protective order. Ms. Fisher replied that Judge Wolf's concerns could largely be addressed in a further revision of the USAM draft. Mr. Goldberg suggested that a judge rather than a prosecutor should determine whether non-disclosure of exculpatory or impeaching information is warranted in a particular case. He warned that, without the rule amendment, which the committee had been working on for nearly three years, conflicting local rules would emerge. Ms. Fisher suggested that the USAM revision would promote national uniformity and regularity of practice. Mr. McNamara replied that only a rule could accomplish that.

Because the committee voted at the Spring 2005 meeting to amend the rule in concept, Judge Bucklew said that the issue could be revisited only upon the motion of a member who had previously voted to approve the amendment. She noted that the Department had invested significant time in drafting a new USAM section to address some of the committee's concerns and that the Department had indicated that it would vigorously oppose the proposed Rule 16 amendment at the Standing Committee and beyond, if necessary. Judge Tallman recommended against approving a rule that might well be rejected later in the rulemaking process. Rather, he suggested that the committee welcome the proposed USAM addition as incremental progress and afford it some time to work, with the understanding that if it did not, Rule 16 could be amended at some later date.

Mr. Fiske announced that, if the Department were willing to make the two main changes urged by members of the committee — eliminating the materiality test and providing notice of which disclosure standard is being used in each case — he was prepared to support the USAM proposal. It was moved that the proposed rule amendment be tabled until the following meeting. The committee's initial vote was split 6 to 6. As committee chair, Judge Bucklew broke the tie by voting in favor of the motion to table the proposed amendment.

***The committee voted 7-6 to table the proposed Rule 16 amendment until the next meeting.***

Concern was raised that the terms of Mr. Fiske and Mr. Goldberg, two Rule 16 Subcommittee members who had worked hard on the proposed rule amendment, would expire before the next committee meeting. It was suggested that the committee reconvene again before the expiration of their terms, perhaps by teleconference, to determine (1) whether the Department had added a new U.S. Attorneys' Manual section on disclosure of exculpatory and impeaching information, and (2) whether its wording adequately addressed the main concerns raised by Mr. Fiske and others. Judge Bucklew suggested resolving any wording questions so that the only issue left for the teleconference would be whether to send the proposed rule amendment to the Standing Committee. Following discussion of the changes made to the Rule 16 amendment since the October 2005 meeting, Mr. Fiske moved to table consideration of the Rule 16 amendment proposal until a special session of the committee could be convened on or before September 30, 2006.

***The committee without objection decided to table the proposed Rule 16 amendment until a special session of the committee could be convened on or before September 30, 2006.***

Mr. Fiske was unable to attend the remainder of the meeting.

### C. Rule 29. Proposed Amendment Regarding Motion for a Judgment of Acquittal

Professor Beale reported that the Rule 29 Subcommittee had addressed the concerns raised at the previous committee meeting. The changes clarified the defendant's waiver of double jeopardy rights, permitted courts either to deny or defer a mid-trial motion for a judgment of acquittal, and made the rule more user-friendly overall. Judge Bucklew noted that a majority of the committee had expressed support for the proposed amendment in a straw vote taken in a previous meeting.

Judge Friedman reported significant concern among judges with whom he had discussed the provision on the waiver of double jeopardy rights. Judge Tallman said that he welcomed the proposed amendment, which, in his view, would have positively altered the outcome of a recent Ninth Circuit *en banc* decision. Judge Jones said he opposed the proposal because erroneous preverdict judgments of acquittal were not a major problem, and the change would undermine the public policy underlying the double jeopardy clause. He predicted that it would also inadvertently create other problems, such as potentially depriving the district court of jurisdiction in an ongoing trial if, after the court granted a judgment of acquittal on fewer than all counts or to fewer than all co-defendants, the government appealed the ruling.

Mr. Campbell said that the Department had conducted an internal survey among U.S. attorney's offices nationwide to determine whether erroneous preverdict judgments of acquittal represented a major problem. The results, he said, showed that the problem is "more widespread than we thought," occurring in a significant number of cases. Mr. Campbell stressed the voluntary nature of the waiver of double jeopardy rights and predicted that Judge Jones's concerns about loss of jurisdiction during a partial appeal would not prove problematic in practice.

At Judge Trager's suggestion, the committee decided first to vote on the revised wording of the proposed amendment, then to vote as a policy matter whether to endorse the proposal for publication. Judge Trager moved to accept the current wording of the proposed amendment.

***The committee without objection approved the wording of the Rule 29 amendment.***

Judge Tallman moved to approve the amendment for publication. Judge Wolf expressed concern that the proposal took power away from judges. Judge Jones noted that many judges would oppose the proposal. Mr. Wroblewski said that the proposed amendment would simply transfer power from a single trial-level judge to a panel of three appellate judges.

***The committee voted 6-5 to send the proposed Rule 29 amendment to the Standing Committee with a recommendation that it be published for public comment.***

## V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

### A. Time Computation Subcommittee

Judge Kravitz briefed the committee on the time computation template, which abolishes the "10-day rule" and adopts the "days are days" principle. If the Standing Committee at its June meeting approves the Time Computation Subcommittee's proposal, he said, each Advisory Rules Committee will be asked to review their deadlines and consider how best to translate those time units into the new time computation framework. Judge Kravitz recommended that a subcommittee be appointed to begin work immediately following the Standing Committee's June meeting.

Judge Kravitz noted that the subcommittee had resolved the question of how to calculate an hour-based deadline that falls on a weekend or holiday by extending the deadline to the *same* hour — not the *first* hour — of the following business day. There were two issues that the subcommittee discussed but left unresolved. First, the group debated whether a definition of court inaccessibility was needed, given that physical access to the courthouse did not always coincide with electronic access to a court's computer servers. The second unresolved issue was whether to eliminate the three-day rule for any means of service other than postal mail. Judge Bucklew and Professor King recommended allowing districts to interpret court inaccessibility differently. Judge Jones said he would oppose abolishing the three-day rule for electronic filing, given an increase he has noticed in Saturday morning e-filings, which opposing counsel often does not learn about until Monday morning. Judge Kravitz noted that the subcommittee's overriding concern was to try to prevent such gamesmanship. Also, the subcommittee recommended that each committee consider using multiples of seven in calculating specific deadlines, but had decided against including this as a template requirement. Following discussion, Justice Edmunds moved to approve the time computation template for eventual publication with each committee's specific deadline changes.

***The committee without objection approved the template for eventual publication.***

### B. Rule 12. Challenges to Facial Validity of Indictment, Department of Justice Proposal

The committee discussed the Department's proposed amendment to Rule 12(b)(3)(B), which would prohibit defendants from challenging the facial validity of an indictment or information during or following trial. Mr. Campbell said that the proposed amendment would not affect challenges to the court's jurisdiction, but would simply require defendants to file motions alleging a failure to state an offense in a more timely fashion, at the pre-trial stage.

Judge Wolf asked what a court should do if, mid-trial, an element of the offense is found to be missing from the indictment. Judge Jones asked whether constitutional issues would be raised if a defendant were convicted of being a felon in possession of a firearm, despite the fact that the

interstate commerce nexus, though evidenced at trial, was never properly alleged. Judge Tallman said that, absent a due process notice problem, the case law indicated that the court had the inherent authority to continue the trial and allow a superseding indictment to be filed. The proposed amendment would simply set a procedural deadline for raising a facial attack, he said, and would not mean that failure to do so constitutes a waiver of constitutional objections. Mr. Goldberg said that the proposal was consistent with *United States v. Cotton*, 535 U.S. 625 (2002). Responding to a question by Mr. McNamara, Mr. Campbell said that he suspected that the situation addressed by the proposed amendment was actually "not that common." Judge Wolf moved to table the proposal until the October 2006 meeting. Judge Trager suggested that the committee needed a more detailed memorandum analyzing the Department's proposal before taking any action.

***The committee voted 9-2 to table the proposed amendment until the October 2006 meeting.***

### C. Rule 41. Warrants for Digital Evidence

There was a discussion of the proposal to amend Rule 41 to address concerns raised by George Washington University Law Professor Orin S. Kerr in his article, *Search Warrants in an Era of Digital Evidence*, 75 MISS. L. J. 85 (2005). Judge Battaglia explained that search warrants for computerized data are regularly causing problems for magistrate judges across the country. Computers are initially seized and transported to labs, and only later are the data stored on the computers searched. Rather than simply adopting Professor Kerr's suggested rule amendments, Judge Battaglia recommended appointing a subcommittee to study the issue and to draft a rule amendment proposal. Mr. Wroblewski suggested that the committee wait until the Supreme Court had clarified how particular a search warrant for computerized data needs to be. Judge Bucklew appointed a subcommittee to examine this issue, to be chaired by Judge Battaglia.

***The committee without objection decided to have a subcommittee study this issue further.***

### D. Rule 41. Authorizing Magistrate Judge to Issue Warrants for Property Outside of United States, Department of Justice Proposal

The committee discussed the Department's proposal to amend Rule 41(b) to authorize magistrate judges to issue warrants for property that lies within the jurisdiction of the United States but outside that of any state or federal judicial district. Mr. Campbell said that the proposed amendment would address, for instance, the Department's current inability to execute a search warrant in American Samoa, because the U.S. territory is not within the jurisdiction of any district court. Judge Jones asked why the proposed rule did not cover United States military bases or other areas abroad controlled by the United States. Mr. Campbell said that the proposal had undergone extensive review by such agencies as the Department of State and the Office of Management and Budget and that its scope was deliberately kept narrow to avoid any thorny international issues. Judge Trager moved to send the proposal to the Standing Committee with a recommendation that it be published for public comment.

Judge Battaglia said that, although he supported solving the problem illustrated by the American Samoa situation, he thought that any jurisdictional change would require Congressional action. He also raised concern about the proposal's creation of a hierarchy among magistrate judges by conferring jurisdiction for foreign warrants on the three magistrate judges in the District of the District of Columbia. Mr. Wroblewski said that the Department had considered seeking legislation, but thought that only forum, not jurisdiction, was at issue, and that it might be more respectful to come to the rules committees first. He and Mr. Campbell noted that Congress has already invested the District of Columbia court with default jurisdiction over several categories of extraterritorial and international matters. Judge Battaglia suggested designating the District of Columbia as the default forum when no other court had jurisdiction rather than as an alternative forum in every instance. Mr. Campbell said that the Department would not oppose that change. Judge Trager, however, recommended publishing the proposed amendment as drafted by the Department.

***The committee voted 10-1 to approve the Rule 41(b) amendment as drafted and send it to the Standing Committee with a recommendation that it be published for public comment.***

Professor Beale advised that she would draft a committee note and circulate it for committee approval before sending the note to the Standing Committee.

**E.Amending the Collateral Relief Procedures, Department of Justice Proposal**

The committee discussed the Department's proposal to invalidate the writs of *coram nobis, coram vobis, audita querela,* bills of review, and bills in the nature of review by adding a new Rule 37 and amending the Rules Governing Section 2254 and Section 2255 Proceedings. Mr. Wroblewski said that the proposal was designed to provide "one-stop shopping" for these collateral relief procedures as part of a decade-long effort by Congress and the federal rules committees to regularize federal habeas practice. He cited *Gonzalez v. Crosby*, 545 U.S. __, 125 S. Ct. 2641 (2005), where the Supreme Court held that petitioners could challenge irregularities in a habeas proceeding with a Rule 60(b) motion, but not the substance of a previous court habeas decision on the merits. The Department's proposal would authorize motions for reconsideration in actions brought under 28 U.S.C. §§ 2254 and 2255, Mr. Wroblewski said, but would restrict Rule 60 motions in accordance with *Gonzalez* and would also require certificates of appealability. Following discussion, Judge Jones moved to table the proposal for preliminary consideration by a subcommittee. Judge Bucklew indicated that she would appoint a subcommittee.

***The committee without objection decided to table the proposal until the next meeting.***

**F. Rules 7 and 32.2, Department of Justice Proposal**

As an informational matter, Judge Bucklew reported that the Department's proposal to amend Rules 7 and 32.2 with respect to criminal forfeiture had been referred to a subcommittee chaired by Judge Wolf. The subcommittee had met twice and determined that additional work was necessary before it could make a recommendation. Judge Friedman, who recently issued an opinion

denying the government a monetary judgment in a criminal forfeiture case, expressed concern about affording the government an independent source of authority for monetary judgments.

## VI. REPORT ON STATUS OF RELEVANT LEGISLATION

There was a brief discussion of legislation enacted after Hurricane Katrina authorizing courts to sit outside their jurisdiction under certain circumstances as well as of the Department's legislative proposal to reinstate a mandatory sentencing scheme, through "topless guidelines," in the wake of the Supreme Court's decisions in *Booker*, *supra*, and *Blakely v. Washington*, 542 U.S. 296 (2004).

## VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Before adjourning the meeting, Judge Bucklew reminded the members that the committee's next meeting is scheduled for October 26-27, 2006, in Amelia Island, Florida.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts

# ADVISORY COMMITTEE ON CRIMINAL RULES

## DRAFT MINUTES

**September 5, 2006 Teleconference**
**Special Session**

### I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in special session by teleconference on September 5, 2006. The following members participated:

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)
Professor Sara Sun Beale, Reporter

Also participating were:

Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

Judge Bucklew began by noting that this special session was convened strictly to discuss the Department of Justice's proposed revision to the United States Attorneys' Manual on disclosure of exculpatory and impeaching information and to decide whether, given the proposal,

the committee should still forward the draft Rule 16 amendment to the Standing Committee for publication. She recalled that the advisory committee had voted last April to postpone further consideration of the matter to afford the Department time to finish revising the Manual, but to revisit the issue in a special session sometime before September 30, 2006, to allow two members who had spent considerable time on this issue to participate before the end of their tenures. After describing the written materials distributed electronically in advance of the meeting, Judge Bucklew invited the Department to make an opening oral statement, to be followed by questions, comments, and, finally, a committee vote.

## II. DISCUSSION AND VOTE

Ms. Fisher reported that the Department had worked to improve the proposed Manual revision since the April meeting. She said that Mr. Fiske had met with her, Mr. Campbell, and Mr. Wroblewski to explore ways of addressing the concerns raised, and the Department was able to accommodate many, though not all, of them. Ms. Fisher said that the Manual revision had received final approval from all relevant Department officials, including Deputy Attorney General Paul McNulty, and would go into effect. She called the new Manual section real progress, noting that it exceeded the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Section D.4. was added, she said, to require supervisory approval before prosecutors could delay for any reason the disclosure of impeachment or exculpatory information. Also, following such supervisory approval, the defendant had to be notified. Ms. Fisher noted that the policy applied to the sentencing as well as the guilt-innocence phases. Although the Manual revision might not be everything that Mr. Fiske and others wanted, she said, it constituted a substantial step in the right direction.

Judge Wolf requested clarification of the current status of the Manual revision. Ms. Fisher replied that it had been fully approved, would be implemented, and could be added to the Manual as soon as tomorrow. The reason that it had not already been added, she said, was in case some last-minute wording adjustments were needed because of the telephone conference with the Committee. Judge Wolf inquired whether the Department saw any substantive differences between the proposed Manual revision and the draft Rule 16 amendment. Ms. Fisher replied that certain language differences obviously remained, particularly with respect to disclosure of impeachment evidence. Judge Wolf said that, even if the proposed provisions were identical, the fundamental question was whether the policy on disclosure of exculpatory and impeaching information should be solely an internal Department matter or should also be included in a rule.

Mr. Goldberg inquired whether the Manual revision was still being offered strictly as an alternative to the proposed Rule 16 amendment or whether it would go into effect regardless. Ms. Fisher stated that it was both her understanding and the Deputy Attorney General's intention that the Manual revision on exculpatory and impeaching information would go into effect following the current telephone call even if the proposed rule change were voted out of committee. She added, though, that if that occurred, the Department would continue its opposition to the Rule 16 amendment when the issue is taken up by the Standing Committee.

Returning to an earlier topic, Mr. McNamara inquired whether there were not differences between the Manual revision and the draft rule amendment with respect to materiality. Mr. Campbell said that materiality had been "eliminated as the construct," but acknowledged that differences between the two provisions remained. Judge Wolf voiced concern that prosecutors might find the phrase "make the difference between guilt and innocence" in part C of the Manual provision confusing, as it appeared to be stricter than the materiality requirement in *Brady* and *Kyles v. Whitley*, 514 U.S. 419 (1995). Ms. Fisher said that she considered the comment helpful.

Judge Jones inquired whether proposed Manual descriptions of prosecutorial obligations using the term "must" differed in meaning from instances where "should" appeared instead. Ms. Fisher said that this was merely a style issue involving how obligations are described elsewhere in the Manual, but that if this issue proved significant enough to change the committee dynamic, the Department could look at it more closely, because no difference in meaning was intended.

Following the questions period, Judge Bucklew offered each member in turn an opportunity to comment, beginning with either Mr. Fiske or Mr. Goldberg.

Mr. Fiske reported having had several conversations with Ms. Fisher, Mr. Campbell, and Mr. Wroblewski in search of an acceptable solution, and he applauded their conscientious efforts in pursuing what he considered an extremely worthwhile and productive process. The Department had significantly improved the language of the proposed Manual revision, he said, particularly with respect to the obligation to disclose exculpatory information. The revised language would eliminate any subjective analysis by the prosecutor and require prosecutors to disclose any information — bar none — that was inconsistent with any element of a crime. The biggest remaining problem, though, he said, was the proposed inclusion of the qualifier "substantial" and "significant" in the Manual section on disclosure of impeaching information, which creates the same kind of issue as the materiality element by calling for a subjective assessment by the prosecutor. Also, unlike a rule, a Manual provision would be unenforceable, Mr. Fiske noted.

Following the committee's April 2006 meeting, Mr. Fiske said, he had commented to Mr. Campbell that the Manual provision could only serve as an acceptable substitute for a Rule 16 amendment if it were made as effective as a rule. In other words, he explained, it could not allow any subjective assessment by the prosecutor, and it would have to be functionally enforceable by, for instance, possibly requiring prosecutors to affirm to the court at some point during the discovery stage that they had fully complied with their Manual obligations to disclose exculpatory or impeaching information. Mr. Fiske said that the latest draft of the Manual provision fell short of satisfying those two requirements and was therefore not an adequate substitute for the draft Rule 16 amendment. Consequently, he would vote to go ahead with the Rule 16 amendment.

Mr. Goldberg agreed. He characterized the Manual proposal as a noble effort, but said that it would defeat what the draft Rule 16 amendment was designed to achieve. He noted that the proposed Manual revision disclaims supersession of those sections of the Manual that discuss

*Giglio*, thereby retaining the materiality element. He said that prosecutorial subjectivity also lived on in the "substantial doubt" and "significant bearing" phrases used in the Manual revision.

Judge Tallman said that he favored an incremental approach. He applauded the Department's recent changes to the proposed Manual revision. As a former criminal defense attorney, he said, he understood the points made in support of the rule. But he recommended that the committee defer consideration of a Rule 16 amendment until the impact of the Department's proposed revision to the Manual could be assessed. He added that he would not vote for the rule amendment if the Department intended to oppose it at the Standing Committee.

Judge Bartle said he had no comments.

Judge Wolf said that, although the recent changes to the proposed Manual revision represented great progress, he still favored a judicially enforceable rule. He said that he shared the concerns regarding the persistence of the subjective materiality test on disclosing impeaching information, adding that his main concern was that revising the Manual would not alter current practices, at least not for long. Judge Wolf said that he was amazed that only now was a discussion of prosecutors' constitutional duty under *Brady* and *Giglio* being added to a multi-volume policy guide for U.S. Attorneys. Nevertheless, only the rule, he said, would provide an effective remedy for violations and actually reduce the number of problems in this area.

Judge Trager said that he agreed with Judge Tallman. His concern was that convictions might be overturned on appeal under the draft Rule 16 amendment simply because prosecutors or law enforcement agents had mishandled exonerating or impeaching evidence. Judge Jones replied that the rule amendment was never intended to change the substantive requirement for reversing a conviction. As long as the exonerating or impeaching material that should have been disclosed would not have affected the outcome, the conviction would stand, he said. What the rule *would* do, however, is subject the prosecutor to sanctions in the event of an unexplained violation of a rule, thereby promoting compliance with the policy, Judge Jones said. Judge Trager said that he did not recall reading any statement to that effect in the draft committee note.

Judge Jones said that, although he appreciated and applauded the Department's efforts, he continued to believe that it was best to proceed with amending Rule 16.

Judge Battaglia said that he had nothing to add to the points already made.

Justice Edmunds said that he tended to favor Judge Tallman's point of view.

Professor King requested clarification from the Department on the relationship between sections D.2. and D.4. of the Manual revision proposal. She asked whether supervisory approval and notice to the defendant would also be required where information was not promptly disclosed for reasons other than the classified nature of the material, such as witness security. Ms. Fisher said that yes, both provisions were intended to be parallel and that if a comma had to be moved to make that clear, the Department would do so. Professor King also requested

clarification on whether or not the Department had agreed, in response to Judge Jones' inquiry, to change all instances of "should" to "must" and to convert advisory language such as "this policy encourages" in section B.1 to "this policy requires" or a comparable phrase more suggestive of a compulsory policy. Ms. Fisher replied that the Department intended to do so, as it saw no difference in meaning between "should" and "must" in the context of the U.S. Attorney's Manual. Professor King asked what the Department intended to do with respect to the supersession language in section A that caused Mr. Goldberg concern. Ms. Fisher said the Department would change the other Manual provision dealing with *Giglio* to make it consistent with this new provision. Mr. Campbell added that the Department would be reviewing all other provisions in the Manual to see where changes were required to ensure consistency with this new provision. Judge Bartle inquired whether that meant that the Department would be deleting the sentence beginning, "Additionally, this policy does not alter or supersede the *Giglio* policy adopted in 1996[.]" Ms. Fisher said that was correct.

Mr. McNamara said that the failure of prosecutors to disclose exculpatory or impeaching evidence is a daily problem for public defenders. He applauded the proposed Manual revision, but suggested that the policy needed enforcement teeth that only a rule could provide. For that reason, he supported sending the Rule 16 amendment to the Standing Committee.

Mr. Rabiej noted that the committee's decision was subject to review by both the Standing Committee and the Judicial Conference, the latter of which in the past had indicated strong reluctance to making changes in this area. Mr. Fiske responded that he was unaware that either the Standing Committee or the Judicial Conference had ever considered this particular issue. Moreover, Mr. Fiske added, the committee should do whatever it believes is right without concern for whether others further up the line might disagree. Mr. Fiske suggested addressing the concerns regarding conviction reversal by adding a committee note clarifying that the rule is not intended to create a new standard for review of a conviction, but is simply designed to put teeth into the requirement that prosecutors turn over any exculpatory and impeaching information without subjective reflections on whether non-disclosure would alter the outcome. Mr. Fiske expressed concern regarding Judge Tallman's recommendation to postpone consideration of the draft Rule 16 amendment until the committee could determine whether or not the Manual revision had succeeded in improving prosecutorial practices. Given the nature of the problem, Mr. Fiske warned, even two years from now, there would be no data or other means of making such a determination for 90% of cases. He noted that several years of effort had gone into amending Rule 16 and suggested that the rule change was ripe for an up or down vote.

Judge Tallman predicted that, notwithstanding Mr. Fiske's point, at least some jurisdictions would interpret the Rule 16 amendment in a way that would affect the scope of review, particularly in habeas cases, and would affect the sustainability of convictions. Mr. Goldberg disagreed, reporting that he and Professor King had spent a great deal of time studying whether the draft rule amendment would affect the law of reversal and had concluded that it would not. To prevent any misinterpretation, he said, a statement could be added to the note, as Mr. Fiske had suggested.

Professor King explained that a rule amendment should have no effect on collateral review because it would not change the *constitutional* standard for reversal, which is the only type of issue reviewable in the habeas context. On direct appeal, a rule violation would be reviewed for harmless error and, although some courts of appeals currently place the burden of disproving prejudice on the government, others require the defendant to show prejudice from a rule violation to obtain relief on direct appeal. Consequently, revising the rule should have *no* effect on collateral review, and even on direct appeal it would not necessarily shift the burden in all circuits, she said. Judge Tallman remarked that the appellate standard was already difficult to apply and that a rule change would not ease that task. Judge Wolf commented that the only thing that *would* ease the job of appellate courts would be to reduce the number of these types of cases by promoting greater fairness and integrity at the trial level in what has proven to be a very problematic area. That was why, he added, he supported amending Rule 16 and providing a judicial role. Judge Wolf asked the Department whether it had given any consideration to how the Manual revision would be taught and implemented. Ms. Fisher responded that regular training programs were in place to educate prosecutors on changes to the Manual, but that the Department's focus in recent months had been on getting the new provision approved.

Judge Bucklew invited any final comments from the Department. Ms. Fisher said that the Manual revision represented a significant change and that its provisions were not that different from the draft Rule 16 amendment. She added that the Department was strongly opposed to amending Rule 16 and believed that these changes should be made incrementally.

Justice Edmunds inquired whether the problem prompting the Rule 16 amendment in the federal courts was limited to a few renegade prosecutors or whether it was, as Mr. McNamara suggested, widespread. Mr. McNamara said that the problems were across the board, and he predicted that the Manual revision would result in no appreciable improvement in compliance. Ms. Fisher disagreed, stressing the importance of the proposed Manual revision. The problem, she said, was limited to a few bad actors. Mr. Campbell suggested that bad actors who would violate a Manual provision would also disregard a rule. He stressed the seriousness of violating Manual policy, noting that it would subject a prosecutor to an Office of Professional Responsibility (OPR) investigation, possible dismissal, and even, as occurred in Detroit recently, criminal prosecution. Judge Wolf agreed that someone who wanted to disregard the policy would succeed. But he was skeptical of the effectiveness of OPR investigations, describing an "egregious" non-disclosure case he had in which an OPR investigation has still not concluded more than three years after it was initiated. What is worse, the subject of the investigation was just assigned to prosecution of police corruption cases, generating significant cynicism in Boston, he said. As someone who had worked for the Attorney General and served as a former prosecutor, Judge Wolf said he can appreciate the belief that a Manual revision will make a difference. But he has a principled view that there should be judicial review in this area and that, in the interest of the administration of justice, a rule was needed to sharply diminish the number of arguable violations of constitutional rights.

Judge Bartle said that he was convinced that the committee should send the draft Rule 16 amendment to the Standing Committee. Having an effective, objective prophylactic rule would

be in everyone's long-term best interest, including the Justice Department's. He agreed with Mr. Fiske that now was the time to amend Rule 16 and that no consideration should be paid to what others in the rulemaking process may or may not do.

Judge Trager warned the committee that defense counsel would try to use the draft Rule 16 amendment to try the prosecutor whenever they lacked a true defense, and that it would inevitably have implications for overturning convictions. He therefore recommended against going forward with the amendment. Mr. Goldberg recalled that, when the Rule 16 amendment had first been proposed, the Department denied that failure to disclose exculpatory and impeaching information was a big problem. Subsequent research, though, disclosed hundreds of cases that made clear that this was actually a huge problem, he said, and a "festering sore." Judge Trager said that the cases to which Mr. Goldberg referred were largely state cases and that there was no comparable problem in federal court.

Professor Beale said that she thought that the arguments had been well-stated both for and against proceeding with the Rule 16 amendment. However, she saw an inherent problem in the use of subjective standards and predicted that the inclusion of such qualifiers as "substantial" and "significant" in the Manual provision could lead to problems. She added that, at least in some circuits, the rule amendment could shift the burden to the government.

Judge Bucklew personally thanked Mr. Fisher for having successfully added a *Brady* provision to the Manual, something others before her had tried and failed to do.

Judge Jones moved to forward the draft Rule 16 amendment to the Standing Committee.

***The committee voted 8-4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.***

Mr. Fiske noted his support for adding a statement to the committee note clarifying that the rule amendment was not intended to affect the substantive rights of defendants during review of their convictions. The session was adjourned.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.
**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 Washington, D.C. on Thursday and Friday, June 22-23, 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
Deputy Attorney General Paul J. McNulty
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, Jeffrey N. Barr, and Timothy K. Dole, attorneys 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., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

Representing the advisory committees were:

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

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

## INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they

shepherded the style project through the advisory committee. Judge Levi also recognized the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2006.**

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report

emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

## REPORT OF THE TECHNOLOGY SUBCOMMITTEE

*Rules for Final Approval*

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

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules,

he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence, since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform "to the extent practicable." He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

**The committee without objection by voice vote agreed to send the proposed new rules to the Judicial Conference for final approval.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 6).

*Amendments for Final Approval*

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

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

*Informational Items*

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk

of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the "3-day rule" – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

(1) final approval of eight rules not related to the recent bankruptcy legislation;
(2) withdrawal of one rule published for public comment;
(3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
(4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
(5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
(6) publication of all the revisions in the Official Forms.

*Amendments for Final Approval*

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled. He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use

cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

**The committee without objection by voice vote agreed to send the proposed amendments and new rules to the Judicial Conference for final approval.**

FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term "entity," a defined term under the Bankruptcy Code, rather than "party" or "person." Entity includes a governmental unit under § 101(15) of the Code, while "person" excludes it in the definition section of the Code § 101(41).

*Withdrawal of an Amendment*

FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that

summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

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

*Amendments to an Interim Rule and the Official Forms*

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

**The committee without objection by voice vote agreed to send the proposed amendment to the interim rule to the Judicial Conference for final approval.**

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

| | |
|---|---|
| 1 | Voluntary petition |
| 5 | Involuntary petition |
| 6 | Schedules |
| 9 | Notice of commencement of a case, meeting of creditors, and deadlines |
| 22A | Chapter 7 statement of current monthly income and means test calculation |
| 22C | Chapter 13 statement of current monthly income and calculation of commitment period and disposable income |
| 23 | Debtor's certification of completion of instructional course concerning personal financial management |

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

**The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.**

*Amendments to the Rules for Publication*

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

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

*Amendments to the Official Forms for Publication*

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

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

*Informational Items*

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor

Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of June 2, 2006 (Agenda Item 12).

### *Amendments for Final Approval*

### FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

### STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

(1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
(2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
(3) the restyled civil forms; and
(4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules

or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. It also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

**The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.**

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the

project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

*Informational Items*

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Style Subcommittee, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

FED. R. CIV. P. 48(c)

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to "indicate" that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that if the court of appeals remands, the district judge "would" grant the motion. The other would allow the district judge to indicate that he or she "might" grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it "Indicative Rulings." Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization's legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case.

That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privilege matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that the final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading standard system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. Certainly, she recognized, it would be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney's fees) and 58(c)(2) (entry of judgment, cost or fee award) and Fed. R. App. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 20, 2006 (Agenda Item 7).

*Amendments for Final Approval*

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court's obligation to apply the sentencing guidelines. But, since *Booker*

has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines *(e.g., United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy

would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

**The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.**

**The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.**

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

*Amendments for Publication*

FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's

proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all

other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

**The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.**

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi's suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit's Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa's concerns were, but it appeared that

the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the

United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with oversees searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

**The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.**

MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the

regular rulemaking process. *i.e.,* approval by the committee and forwarding to the Supreme Court and Congress.

**The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.**

*Informational Items*

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

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 May 15, 2006 (Agenda Item 8).

*New Rule for Publication*

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,

2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and

3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure "ought in fairness" to be required.

2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

3. Selective waiver should be allowed.

4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.

5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong

opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

**The committee unanimously approved the new rule for publication by voice vote.**

*Informational Items*

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford,* but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

## REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues: (1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is

made on it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the "three-day rule," Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. So, the general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a "paper." But in the electronic age, he said, it makes sense to eliminate the word "paper."

Second, he pointed out that the template speaks in terms of a day in which "weather or other conditions" make the clerk's office inaccessible. He said that the advisory committee was concerned about the specific reference to "weather" because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk's office "is inaccessible." The committee note could explain, though, that elimination of the word "weather" is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that "virtual holidays" were not included in the template, *e.g.,* the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term "last day" in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the "last day" is midnight in the time zone where the court is located. For other types of filings, it is the normal business hours of the clerk's office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the advisory committee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.,* to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words "continuing in the same direction," which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a "virtual holiday," he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk's office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk's office is "inaccessible." Another member added that it should be made clear in the rule that "inaccessibility" applies only to problems arising at the courthouse, and not in a lawyer's office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template's mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge's report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

## LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

## NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,
Secretary

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

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

**RE: Rules Approved By Standing Committee and Judicial Conference For Transmission To the Supreme Court**

**DATE: September 29, 2006**

The Standing Committee and the Judicial Conference have approved for transmission to the Supreme Court the Committee's package of Booker rules (11, 32, and 35), Rule 45 (dealing with computing and extending time), and our E-Government rule (49.1). The text of these rules follows.

The rules submitted to the Supreme Court diverge in two respects from the proposals approved by the Rules Committee.

First, a change was made in the Committee Note to Rule 11. The Rules Committee decided at its April meeting to include language making it clear that the rule was not inconsistent with the Second Circuit's decision in *United States v. Crosby*, 397 F.3d 103, 111-12 (2nd Cir. 2005). Language making that point was added to the note before submission to the Standing Committee. It was deleted, however, on the ground that in some circuits the cases state that the district court is always required to do a guideline calculation.

Second, subdivision (h) of Rule 32 was not included in the rule approved by the Standing Committee. Subdivision (h) required notice of the court's intention to consider non guidelines factors (or "variances"), just as notice is required of the court's intention to rely on a departure that has not previously been identified. As you know, that subdivision of the rule generated substantial concern during the public notice and comment period, and it was redrafted by the Rules Committee in an effort to address those concerns. At the Standing Committee, however, new concerns were raised that the rule as drafted did not accord with some of the rapidly developing case law in various courts. After discussion, Judge Bucklew agreed to withdraw subdivision (h).

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

**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 Sentencing Guidelines, and the~~

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

~~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. 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 245-46. 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.

## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment. One change was made to the Committee note. The reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*.

* * * * *

**Rule 32. Sentence and Judgment**

* * * * *

**(d) Presentence Report.**

**(1)** ***Applying the Advisory 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

(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).

* * * * *

**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. 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 245-46. 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.

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**CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT**

The Committee revised the text of subdivision (d) in response to public comments. In subdivision (d), the Committee revised the title to include the word "Advisory" in order better to reflect the guidelines' role under the *Booker* decision. It withdrew proposed subdivisions (k) and (h).

Proposed subdivision (h) would have expanded the sentencing court's obligation to give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties' submissions. The amendment was intended to respond to the courts' expanded discretion under *Booker*. In light of a number of recent decisions in the lower courts considering the

proper scope of this obligation in light of *Booker*, the proposed amendment was withdrawn for further study.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of § 735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. § 994(w) to impose a statutory requirement that sentencing information for each case be provided on "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

Finally, here—as in the other *Booker* rules—the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

* * * * *

**Rule 35. Correcting or Reducing a Sentence**

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**(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. 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 245-46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here—as in the other *Booker* rules—the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

* * * * *

### Rule 45. Computing and Extending Time

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**(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.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No change was made in the rule as published for public comment.

* * * * *

**Rule 49.1. Privacy Protection For Filings Made with the Court**

**(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

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

(2) the year of the individual's birth;

(3) the minor's initials;

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

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

(b) **Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following:

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

(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, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

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

(c) **Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

**(e) Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

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

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

**(g) Option for Filing a Reference List.** A filing that contains redacted information 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 listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

**(h) Waiver of Protection of Identifiers.** A person waives the protection of Rule 49.1 (a) as to the person's own information by filing it 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, protection may be sought 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 party or nonparty making the filing.

Subdivision (e) 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 nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option 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 (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

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 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 (d) or a protective order provision of subdivision (e).

## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Numerous changes were made in the rule after publication in response to the public comments as well as continued consultation among the reporters and chairs of the advisory committees as each committee reviewed its own rule.

A number of revisions were made in all of the e-government rules. These include: (1) using of the term "individual" rather than "person" where possible, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed. Additionally, some changes of a technical or stylistic nature (involving matters such as hyphenation and the use of "a" or "the") were made to achieve clarity as well as consistency among the various e-government rules.

Two changes were made to the provisions concerning actions under §§ 2241, 2254, and 2255, which the published rule exempted from the redaction requirement. First, in response to criticism that the original exemption was unduly broad, the Committee limited the exemption to pro se filings in these actions. Second, a new subdivision (c) was added to provide that all actions under § 2241 in which immigration claims were made would be governed exclusively by Civil Rule 5.2. This change (which was made after the Advisory Committee meeting) was deemed necessary to ensure consistency in the treatment of redaction and public access to records in immigration

cases. The addition of the new subdivision required renumbering of the subdivisions designated as (c) to (g) at the time of publication.

The provision governing protective orders was revised to employ the flexible "cause shown" standard that governs protective orders under the Federal Rules of Civil Procedure.

Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

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

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

**RE: Amendments Approved for Publication**

**DATE: September 29, 2006**

The following rules have been approved for publication. There were two changes in the rules as approved by the Rules Committee.

First, concerns about the special status of American Samoa led to the insertion of brackets in the text of proposed Rule 41(b)(4). The brackets draw attention to the question whether to include American Samoa within the new authority for the issuance of warrants for property located outside of the United States. A footnote to the bracketed language states that the Committee is interested in receiving public comment on that issue. The Ninth Circuit's Pacific Islands Committee has now addressed the issue in a memorandum that will be considered with other comments on the proposed rule that are received during the public comment period.

There was also one change to the committee notes. In response to concerns raised by members of the Standing Committee, a sentence in the Committee Note accompanying Rule 29 was deleted. The sentence referred to the application of the rule to bench trials, which were not the focus of the proposal and had not been discussed by the Rules Committee.

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



**To:** **The Honorable David F. Levi, Chair**
**Standing Committee on Rules of Practice and Procedure**

**From:** **The Honorable Susan C. Bucklew**
**Advisory Committee on Federal Rules of Criminal Procedure**

**Subject:** **Report of the Advisory Committee on Criminal Rules**

**Date:** **December 8, 2005 (Revised August 1, 2006)**

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## I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure met on October 24-25 in Santa Rosa, California, and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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At that meeting, the Advisory Committee approved a package of proposed amendments to Rules 1, 12.1, 17, 18, 32, as well as new Rule 43.1,[1] which implement the Crime Victims' Rights Act. Part II of this report summarizes the Committee's consideration of these rules, which it recommends be published for public comment.

* * * * *

[1]At its January 6-7, 2006, meeting, the Committee on Rules of Practice and Procedure approved renumbering proposed new Criminal Rule 43.1 as Rule 60, and renumbering present Rule 60 as Rule 61.

## 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

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

of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

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

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**The advisory committee is interested in receiving comments on the question whether Rule 12.1(b)(1)(B) should provide that disclosure of the victim's address and telephone number will not be made unless the defendant establishes a need for this information, or should assume that a defendant will need this information to respond to the government's challenge to his alibi, and that disclosure should be limited only when a special need for the protection of the victim requires the court to fashion some other procedure to allow the preparation of the defense.

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:

(A) ~~(1)~~ the disclosing party learns of the witness before or during trial; and

(B) ~~(2)~~ 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

52 address of an additional victim witness must not be

53 disclosed except as provided in (b)(1)(B).

54 * * * * *

## 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 subsection (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 subsection (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 Rule of Evidence address 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 6160. Title**

These rules may be known and cited as the Federal Rules of Criminal Procedure.

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



**To:** **Hon. David F. Levi, Chair**
**Standing Committee on Rules of Practice and Procedure**

**From:** **Hon. Susan C. Bucklew, Chair**
**Advisory Committee on Federal Rules of Criminal Procedure**

**Subject:** **Report of the Advisory Committee on Criminal Rules**

**Date:** **May 20, 2006 (revised July 20, 2006)**

## I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006, in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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This report addresses a number of action items [, which include] approval of proposed amendments to Rules 29 and 41 for publication and comment[.]

* * * * *

## IV. Action Items–Recommendations to Publish Amendments to the Rules

### 1. Rule 29, Motion for a Judgment of Acquittal; Proposed Amendment Concerning Deferral of Rulings.

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. By a narrow vote of 6-5 the Committee

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

### 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 a 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

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

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. *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.

**Rule 41. Search and Seizure**

* * * * *

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

* * * * *

(5) 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[, except American Samoa];**

(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

(C) 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 advisory committee is interested in receiving comment on whether to retain the language in brackets.

## COMMITTEE NOTE

**Subdivision (b)(5).** Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.

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

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

**RE: Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings, Proposed New Rule 37**

**DATE: October 2, 2006**

In January, the Department of Justice proposed a series of amendments intended abolishing the writs of coram nobis, coram vobis, audita querela, and bill of review and bills in the nature of bills of review, and proposing amendments that take the place of these writs. Judge Bucklew appointed a subcommittee to review the Department's proposals. The committee is chaired by Professor King, and includes Judge Bucklew, Judge Trager, Mr. McNamara, and Mr. Campbell.

The subcommittee's draft amendments are reprinted below. Because of the schedule for the preparation of the agenda books, I asked the subcommittee to provide the materials at this time, although it had not yet completed its revision of the committee notes.

The Rule 11 proposals

There is general support on the subcommittee for the parallel amendments (reprinted below) to the Rules Governing 2254 and 2255 actions. These amendments are intended to provide, for the first time, a well defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under these rules. The efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Procedure 60(b) – have generated a good deal of confusion.

Proposed Rule 37

The subcommittee is divided, however, on the desirability of a proposal to create a new Rule 37 that would (1) provide for the writ of coram nobis that is available only to persons not in custody, (2) subject the coram nobis actions to timing limitations similar to those applicable to habeas actions, and (3) abolish all of the other ancient writs. A majority of the subcommittee favors the approach in the draft rule reprinted below. Mr. McNamara prefers alternative language for Rule 37 (also provided below), and additionally he expressed general concern about eliminating all of the ancient writs. Although they have seldom been used, they serve as a kind of insurance policy to provide needed flexibility in the future.

The only ancient writ used with any frequency is coram nobis. At the present time coram nobis actions are the principal mechanism for vacating wrongful convictions for defendants who have finished serving their sentences. For example, after the Supreme Court's decisions in *McNally* and *Bailey* the convictions of many defendants were vacated on the ground that the conduct for which they had been convicted was not a crime.

The Department's proposal was premised on its view that defendants who are no longer in custody should not have an unlimited opportunity to challenge their convictions. The principle of finality cuts off the claims of defendants who are subject to the far greater burden of continued incarceration, and the Criminal Rules should conform to the congressional policy judgment in AEDPA regarding the need for finality. Though these defendants have already served their sentences, the government also has an interest in preserving the collateral effects of the convictions, and it will often lack the means to respond effectively to long-delayed collateral attacks. The Department of Justice is not able to retain the records of individual cases indefinitely, and in the case of a challenge brought many years after conviction the government may no longer have the information that would have demonstrated the propriety of a conviction. (For example, after *McNally* many cases that had been based upon an intangible rights theory were sustained on the ground that the evidence also demonstrated the deprivation of a property right.) In the absence of a full file, the government will generally be unable to retry the defendant on the original charges, and equally unable to prosecute him on any related charges that it did not pursue initially.

On the other hand, there are reasons for allowing somewhat greater leeway for the small number of cases raised by persons who have completed their sentences and who by definition can establish that their conviction suffers from a fatal flaw. An individual who is no longer in custody and has completed all aspects of his sentence will generally no longer be in touch with defense counsel, and will not be plugged into the prison grapevine that alerts inmates to beneficial changes in the law. In a few cases the issue belatedly come to light when the conviction suddenly becomes a serious burden to the individual. (This can arise, for example, when an individual learns that he has been disqualified from employment or an immigration issue arises.) There was a shared sense that the writ of coram nobis had provided an important mechanism in such cases.

The attached draft is an attempt to balance these concerns. It provides as a general matter that actions under the new rule are subject to the one year limitation period imposed on actions under the AEDPA, but it also provides for exceptions to that limitation period. The draft rule requires a motion to be filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence, but provides that the motion will be dismissed if the government has been prejudiced by delay in filing the motion. There is also a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction. Mr. McNamara favors alternative language that would provide no set statute of limitations but allow for dismissal in some circumstances upon a showing of prejudice to the government as a result of delay.

Outstanding issues

The subcommittee is still working on the language for the committee note. One important point to be added is a list of examples of the kinds of serious consequences that would be sufficient to

warrant relief. Additionally, if the subcommittee's proposed rules are adopted, some conforming changes to Rule 1 and to the Federal Rules of Appellate Procedure will also be proposed.

## RULE 11 ELEMENTS OF THE PROPOSED AMENDMENTS TO COLLATERAL RELIEF PROCEDURES

**(1) Rule 11 of the Rules Governing Section 2255 Proceedings shall be amended to read as follows:**

**Rule 11. Certificate of Appealability; Motion for Reconsideration; Appeal**

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the § 2255 proceedings. [Federal Rule of Civil Procedure 60(b) may not be used in § 2255 proceedings.]

(c) 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

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2255 Proceedings 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. 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). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *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"). 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 successive habeas petitions 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.

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). [Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district 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.

**(2) 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. Certificate of Appealability; Motion for Reconsideration**

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] petitioner, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the [movant's] petitioner's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may raise only a defect in the integrity of the § 2254 proceedings.[Federal Rule of Civil Procedure 60(b) may not be used in § 2254 proceedings.]

Advisory Committee Notes

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2254 Proceedings 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. 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). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *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"). 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 successive habeas petitions 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.

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 § 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 amended 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). [Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court.] Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2254 and 2255 and the finality of criminal judgments.

## PROPOSED NEW RULE 37*

**Rule 37. Review of the Judgment.**

**(a) Exclusive Remedy.** The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by Rule 33 and 35 of these Rules, 18 U.S.C. § 3582 and § 3600, or 28 U.S.C. § 2255, by motion for writ of error coram nobis as authorized by this Rule, or by appeal as authorized by 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2253, and the Federal Rules of Appellate Procedure.

**(b) Writ of Error Coram Nobis.**

**(1) Requirements.** A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(A) at the time of filing of the motion, the moving party must *not* be in custody, within the meaning of 28 U.S.C. § 2255, as a result of the judgment for which relief is being sought; and

(B) the moving party must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment.

**(2) Exception to period of limitation.** A motion that does not meet the 1-year period of limitation in § 2255 may be considered if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence. A motion filed under this paragraph must be dismissed if the government has been prejudiced by delay in filing the motion. There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction.

**(3) Second or successive motion.** If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements for second or successive motions under 28 U.S.C. § 2255.

**(c) Other Writs Abolished.** Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished.

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*The language supported by Mr. McNamara is reprinted following the committee note.

Advisory Committee Notes to Rule 37

This Rule is designed to recognize the creation, refinement, and limitations of the appropriate methods of collateral review by Congress and the courts, and to further regularize collateral review practice in the federal courts.

The common law writs of error coram nobis, vobis, audita querela, bills of review, and bills in the nature of a bill of review, subsumed in the All Writs Act of 1791, 28 U.S.C. § 1651, predate and have been largely superceded by the development of remedies under federal statutes and the Federal Rules. Indeed, Civil Rule 60(b) 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, have similarly provided specific collateral remedies for the criminal defendant. See Carlisle v. United States, 517 U.S. 416, 429 (1996); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 235 (1985); United States v. Hayman, 342 U.S. 205, 218 (1952). The Criminal Rules and § 2255 have been refined over the years, including by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132 (April 24, 1996). That Act imposed limitations on § 2255 motions to bring uniformity and appropriate finality to the collateral review mechanism, by mandating prompt filing, restricting successive motions, and requiring a certificate of appeal ability to screen out inadequate claims. Id. §§ 101-106. Similar concerns for more consistent practice led to the amendment of Civil Rule 60(b), because, as the Advisory Committee made clear, "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. Civ. 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. Because it is best when the rules and statutes specifically – and comprehensively – address when collateral review is available, an amendment to address the common law writs was required. Carlisle, 517 U.S. at 429.

Under the current Criminal Rules, defendants can seek post-judgment relief as provided in Rule 33(b)(1) (new trial for newly discovered evidence) and Rule 35(a) (correcting clear error in the sentence). Rule 34, though entitled "Arresting Judgment," requires that the motion be filed within 7 days of the verdict or plea, and thus is not truly a post-judgment remedy. Defendants can also seek post-judgment relief 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 re-sentencing after exculpatory DNA testing), and 28 U.S.C. § 2255. Section 2255 in turn authorizes resort to the writ of habeas corpus under 28 U.S.C. § 2241 if a § 2255 motion is "inadequate or ineffective." Courts have held § 2255 motions inadequate and ineffective when a defendant wishes to file a successive motion on the grounds that his statutory offense has been reinterpreted to render the defendant's conduct non-criminal. See e.g., Christopher v. Miles, 342 F.3d 378, 382 (5th Cir. 2003). The Government can seek post-judgment relief under Rule 35(a) and (b) and under 18 U.S.C. § 3582(c)(2), and by appeal under 18 U.S.C. § 3731. Finally, defendants and the Government can both seek post-judgment relief by appeal where

authorized by 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2253, and the Federal Rules of Appellate Procedure. It better serves justice, the courts, and the litigants, especially *pro se* litigants, to comprehensively spell out when and how relief from judgments can be obtained, rather than continuing to invite the invocation of writs which are "shrouded in ancient lore and mystery." Fed. R. Crim. P. 60(b) Advisory Committee Notes (1946); Klapprott v. United States, 335 U.S. 601, 614 (1949).

Accordingly, subsection (a) makes clear the appropriate avenues of relief from a criminal judgment by providing that the sole procedures for obtaining relief are by a motion as authorized by Rules 33(b)(1) and 35 of these Rules, by 18 U.S.C. §§ 3582 and 3600, or by 28 U.S.C. § 2255, a motion for writ of error coram nobis as authorized by this Rule, or by appeal as authorized by specified statutes and the Appellate Rules. Subsection (a) does not alter the requirements of these other rules and statutory sections in any way. It also does not affect the alteration or termination of probation, supervised release, fines, restitution, or criminal forfeiture as elsewhere provided by these Rules or by statute. See, e.g.,18 U.S.C. §§ 3563, 3572, 3583, 3664.

Section (a) also makes clear that resort to any other mode of seeking relief, including writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review, is improper. These writs already had little, if any, validity or utility in modern federal criminal law. See United States v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005); Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004). Subsection (c) reinforces this by explicitly stating that writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished.

For much the same reasons, the Committee considered abolishing the writ of error coram nobis. Ultimately, though, the Committee concluded that if properly limited, coram nobis retains a useful if restricted role, namely to provide an avenue for collateral relief to defendants who are not "in custody" within the meaning of § 2255. Courts have agreed that coram nobis may not be sought by defendants in custody, for whom § 2255 is the appropriate remedy. Id.; Godoski v. United States, 304 F.3d 761, 762 (7th Cir. 2002); United States v. Monreal, 301 F.3d 1127, 1132 (9th Cir. 2002). This Rule provides an opportunity to seek collateral review to defendants who do not receive a custodial sentence, or whose custodial sentence is insufficiently long to permit a resort to both an appeal and collateral review, who can meet the other requirements imposed by this Rule.

One such requirement imposed by subsection (b) is that the defendant must show that he is subject to a continuing and serious adverse consequence from the judgment. Numerous courts have held that a person seeking coram nobis relief must show a concrete threat of serious harm arising from the judgment. Fleming v. United States, 146 F.3d 88, 90-91 (2d Cir. 1998); Howard v. United States, 962 F.2d 651, 654 (7th Cir. 1992); e.g., Morgan, 346 U.S. at 503-04 (conviction used to enhance subsequent sentence). Under subsection (b), the defendant must demonstrate that the defendant is actually being seriously harmed by his conviction; speculative harms, harms to reputation, harms not directly arising from his conviction are insufficient. The showing is necessary to preserve the finality of judgments and to avoid the diversion of judicial resources from more pressing matters without appropriate necessity. "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." Morgan, 346 U.S. at 511.

Subsection (b) also requires that a motion seeking coram nobis relief meet all the requirements applicable to a motion under § 2255 other than the "in custody" requirement, which is replaced by a requirement that the defendant demonstrate that he is subject to a continuing and serious adverse consequence from the judgment. The Committee concluded that making the § 2255 requirements equally and uniformly applicable to writs of error coram nobis is most consistent with, and best embodies, congressional intent as it relates to collateral review of criminal convictions. For example, under subsection (b)(1), a motion for coram nobis relief generally must be filed within one year of the triggering events specified in § 2255 ¶ 6. The practice of filing motions for coram nobis relief many years after conviction, when the evidence, witnesses, judge, prosecutor, and records from the case may be inaccessible, makes it difficult to respond to the motion or to retry the case. E.g., United States v. Dyer, 136 F.3d 417, 427-28 (5th Cir. 1998). Although at common law, coram nobis was "allowed without limitation of time," defendants were required to show "sound reasons for failure to seek earlier relief." Morgan, 346 U.S. at 507; Foont v. United States, 93 F.3d 76, 80 (2d Cir. 1996). Similar ~~[non-specific]~~ admonitions against delay were at first applied to motions under § 2255, but Congress ultimately decided that requiring that § 2255 motions be made within one year of specified triggering events was a clearer and better method to prevent abuses. If defendants subject to ongoing and often lengthy imprisonment are required to file within those one-year periods, the Committee believes defendants who are not currently subject to any form of custody but merely to collateral consequences generally should also have to file within those one-year periods. This will encourage defendants to be prompt in making such challenges, will allow such challenges to be resolved when the ability to respond, adjudicate and retry is least impaired, will end the evasion of this key § 2255 requirement, and will protect the finality of judgments. The only exception, embodied in subsection (b)(2) is if the defendant demonstrates that the motion was filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence. This exception is similar to § 2255 ¶ 5(4) and to former Rule 9(a) of the Rules Governing § 2255 proceedings. Elaborating on former Rule 9(a), subsection (b)(2) provides such a motion must be dismissed if the delay in filing the motion has prejudiced the government, either in responding to the motion, in retrying the case, or otherwise, and provides that prejudice is presumed if the motion is filed more than five years after the date of conviction.

Under subsection (b), a defendant may not appeal from the denial of a motion for coram nobis relief unless the district judge or a circuit justice or judge issues a certificate of appeal ability, as required in § 2255 cases. 28 U.S.C. § 2253(b); Fed. R. App. P. 22(b). To avoid undue waste of scarce appellate resources, and to restrict appellate review to the most serious collateral claims, Congress in AEDPA required defendants seeking appellate review to obtain such a certificate by making a substantial showing of the denial of a constitutional right. Id.; Slack v. McDaniel, 529 U.S. 473, 484 (2000). Further, a defendant's motion in the district court seeking either § 2255 or coram nobis relief must show either a constitutional error or an error "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid" and "inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185-87 (1979); Reed v. Farley, 512 U.S. 339, 353 (1994); Morgan, 346 U.S. at 504 (denial of counsel). The decision whether that error may be a factual error "material to the validity and regularity of the legal proceeding itself," Carlisle, 517 U.S. at 429, or "a fundamental error of law," United States v. Sawyer, 239 F.3d 31, 38 (1st Cir. 2001), is determined under the law applicable to § 2255 motions. Indeed, under subsection (b), a motion for writ of error coram nobis differs from a motion under §

2255 solely based on whether the defendant has to show that he is in custody or is subject to a continuing and serious adverse consequence from the judgment.

Subsection (b)(~~2~~3) provides that if a motion for coram nobis relief is filed after an earlier coram nobis motion or a motion under § 2255 has been filed seeking relief from that judgment, the motion is regarded as a second or successive motion and must meet the requirements of § 2255 ¶ 8. Courts have ruled repeatedly that "[t]he writ of coram nobis may not be used to circumvent the clear congressional directive embodied in the 'second or successive' provisions of § 2255," United States v. Noske, 235 F.3d 405, 406 (8th Cir. 2000), and have held that "the abuse of the writ defense applies to a writ of error coram nobis successively brought after a § 2255 motion." United States v. Swindall, 107 F.3d 831, 836 n.7 (11th Cir. 1997). Subsection (b)(~~2~~3) continues the Rule's goal of treating motions for coram nobis relief similar to motions for § 2255 relief by requiring that a defendant filing a motion for a writ of error coram nobis after the defendant has already collaterally challenged the judgment by filing a motion for § 2255 or coram nobis relief must first move in the appropriate court of appeals, make the showing required by § 2255 ¶ 8, and obtain a certification from the court of appeals. See 28 U.S.C. § 2244(b). Also like § 2255, subsection (b)(3) would allow also resort to coram nobis if the defendant is trying to file a successive motion arguing that his statutory offense has been reinterpreted to render the defendant's conduct non-criminal. Again, if defendants subject to ongoing and often lengthy imprisonment are required to make such a showing to the court of appeals before they can file a successive motion, defendants who are not currently subject to any form of custody but merely to collateral consequences should have to make the same showing before filing a successive motion.

Because a motion for a writ of error coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil Proceeding," Morgan, 346 U.S. at 506 n.4, the motion and all proceedings upon it should be docketed in the criminal case in which the challenged judgment was entered. Nonetheless, because this Rule subjects such motions to the same requirements that are applied to motions under § 2255, the Rules Governing Section 2255 Proceedings for the United States District Courts are equally applicable to motions for writs of error coram nobis.

## ALTERNATIVE VERSION OF PROPOSED RULE 37

**Rule 37. Review of the Judgment.**

**(a) Exclusive Remedy.** The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by Rule 33, [34?] and 35 of these Rules, 18 U.S.C. § 3582 and § 3600, or 28 U.S.C. § 2255, by motion for writ of error coram nobis as authorized by this Rule, or by appeal as authorized by 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2253, and the Federal Rules of Appellate Procedure.

**(b) Writ of Error Coram Nobis.**

**(1) Requirements.** A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(a) at the time of filing of the motion, the defendant must *not* be in custody within the meaning of 28 U.S.C. § 2255 [and]

(b) the defendant must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment [.]

[Alternate: and

(c) there is no statute of limitations for filing. A motion may be dismissed if the government has been prejudiced by delay in filing the motion, unless the movant shows that the motion is based on grounds he could not have had learned by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.]

**(2) Second or successive motion.** If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements of 28 U.S.C. § 2255, paragraph 8.

**(c) Other Writs Abolished.** Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished.

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

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

**RE: Proposals to Amend Rules 7 and 32.2**

**DATE: October 3, 2006**

Proposals to amend Rules 7 and 32.2 have been referred to a subcommittee chaired by Judge Wolf. The subcommittee and a smaller working group have been meeting by conference calls. The attached memoranda will be discussed in the subcommittee's October 23 conference call.

The subcommittee's work on these rules is on the agenda for the October meeting on Amelia Island as an information item.

**MEMO TO: The Forfeiture Subcommittee**

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

**RE: Proposals to Amend Rules 7 and 32.2**

**DATE: October 3, 2006**

Following the forfeiture subcommittee's conference call, a working group consisting of representatives of the Department of Justice, Mr. McNamara, and a representative of the NACDL have been working with me to seek to narrow the grounds of disagreement and to clarify the basis for the disagreements that remain. Although we have not yet been able to work through all of the issues, our working group feels that sufficient progress has been made that it would be useful to get feedback and direction from the subcommittee as a whole in the conference call that has been tentatively scheduled for October 23 at 4 p.m.

The Department of Justice produced a very helpful memorandum that our working group used as the basis for our last working group conference call. I have adapted and amended that document, so that it can serve as a basis for the subcommittee's discussions during the upcoming October 23 conference call.

The document is set up with commentary immediately after each proposal. The "Analysis" and "Purpose" sections were originally drafted by representatives of the Department (though in some cases I have edited them). My commentary regarding the areas of developing agreement and disagreement are in bold and prefaced by my initials (SSB). It would be particularly useful to the working group to get feedback on the areas of tentative agreement.

I am also enclosing my June memorandum, which sets forth additional information relevant to the proposals in question.

## Analysis of Proposed Revisions to Rules 32.2(a) and 7(c)(2)

**Rule 32.2(a)**

**(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 Notice to the defendant that the Government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The Notice should not be designated as a Count of the Indictment or Information.

***Purpose of the amendment:*** *Rule 32.2(a) provides that the defendant must be given notice of the Government's intent to seek forfeiture in the indictment or information. The Department of Justice suggests that the Rule be amended to make clear that the notice should not be designated as a substantive count.*

***Analysis:*** *NACDL does not object to this clarification of the Rule.*

(2) Bill of particulars. It is not necessary for the indictment or information to list the specific property subject to forfeiture or to specify the amount of any money judgment that the Government intends to seek as part of an order of forfeiture. However, in the event that the Government is seeking the forfeiture of specific property that is not described in the indictment or information, or is seeking the forfeiture of a sum of money, the Government must file a bill of particulars identifying such property and stating the approximate amount of money subject to forfeiture. The bill of particulars must be filed prior to trial or at such other time as the court may direct.

***Purpose of the amendment:*** *The commentary to the 2000 version of the Rule says that it is not necessary for the Government to itemize the property subject to forfeiture in the indictment. Case law interpreting the Rule uniformly adopts that view, but holds that the Government should provide more detail regarding the property subject to forfeiture in a bill of particulars. The Department of Justice proposes that the Rule be amended to codify the case law and to provide more detail on when the bill of particulars should be filed and what it should contain.*

***Position of NACDL:*** *NACDL does not oppose codifying the case law and does not object to amending the Rule to clarify when the bill of particulars should be filed and what it should contain. However, there is disagreement over the specific language.*

***Analysis:***

*The government proposed that the bill of particulars be filed "prior to trial or at such other time as the court may direct."*

*NACDL proposed that it be filed "as soon as practicable after the filing of the indictment but in no event later than 30 days prior to trial." (Judge Jones had made a similar proposal.)*

***SSB: After discussion, it appears that it may be possible to compromise by using the government's proposed language in the rule itself, and using the committee note to discuss the need for disclosure well in advance of trial. This would be consistent with the other provisions in the rules (such as Rule 16) which impose pretrial requirements but do not specify particular time limits. The committee note could make the point, stressed by NACDL, that a bill of particulars is particularly critical in the context of forfeiture because the indictment itself provides no notice of the nature of any forfeiture claims.***

*Further NACDL agrees that the Government should be able to file a supplemental bill of particulars if additional property is discovered, "but only if the court determines that the defendant has sufficient time and resources to prepare to defend the new property from forfeiture, or grants a continuance of trial for that purpose." The Department believes its language is sufficiently flexible to allow the court to set earlier deadlines on a case by case basis, and that NACDL's language is unnecessarily detailed.*

***SSB: This might also be addressed in the committee note.***

*NACDL also introduces a new issue: whether the Government should be required not only to list the property subject to forfeiture in the bill of particulars, but also to set forth the Government's theory of forfeiture as to each item. The Department strongly opposed this suggestion as inconsistent with current law, which uniformly holds that it is sufficient if the notice provision in the indictment tracks the language of the applicable forfeiture statute.*

***SSB: After discussion, there has been some movement. The Department may be willing to amend its proposal to require that the bill of particulars identify the statutory basis for forfeiture. This would provide the defendant with an indication whether the government was claiming that property was proceeds or had been used to facilitate the offense. However, in the case of a facilitation claim, the government strongly resists any requirement that it provide more specificity.***

***Despite the Department's objections, there is some appeal to the NACDL's claim that it may be difficult--if not impossible--to prepare to defend against a claim of facilitation when the same property might have been used in several very different ways. If the subcommittee sees merit in considering language to respond to this concern, it would be preferable to focus on the facts that allegedly warrant forfeiture, rather than the legal theory. This would make the information in the bill of particulars parallel to the requirement that the indictment contain "plain, concise ... statement of the essential facts constituting the offense charged."***

Conforming amendment:

**Rule 7(c)(2) is repealed.**

***Purpose of the amendment:*** *This is a housekeeping provision to delete an obsolete provision of Rule 7 that should have been deleted in 2000 when Rule 32.2(a) took effect.*

***Analysis:*** *NACDL has no objection to this provision.*

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**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 **[must]** 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.

***Purpose of the amendment:*** *Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change. Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, and that the court may conduct a hearing if the forfeiture is contested.*

*Subparagraph (C) expands the phrase "evidence or other information" in the current Rule, making it clear that evidence that would be inadmissible under the Federal Rules of Evidence at trial – i.e., hearsay – is admissible in the forfeiture phase if the court finds the evidence to be reliable.*

***Analysis:*** *NACDL does not oppose the clarifications to subparagraph (B).*

***SSB: After discussion, there was agreement on revising the "may" language in (B), which appeared to make holding a hearing in a contested case optional, even when requested by one of the parties.***

***There is a deep division of views on subparagraph (C). The reference to "evidence or information" does suggest that the court may consider material that would not be admissible under the Federal Rules of Evidence. The defense bar views this language as illegitimate, noting that it conflicts directly or implicitly with 21 U.S.C. § 853(e) which recognizes that the rules of evidence generally apply to criminal forfeiture. Moreover it would be somewhat anomalous to dispense with the rules of evidence in a jury proceeding.***

***The applicability of the rules of evidence is a policy issue that will ultimately have to be resolved by the full Committee.***

***As far as I can determine, the Committee has not previously focused on the interaction between the language in (b)(1) allowing the court to consider "evidence or information presented by the parties at a hearing after the verdict" and (b)(4), which provides for a jury determination of forfeiture at the request of the defendant (or the government). Subsection (b)(4) was added by the Rules Committee after the Standing Committee rejected an earlier draft of Rule 32.2 in large part because it abrogated the right to a jury determination of forfeiture.***

***I have reviewed the minutes of the Rules Committee and Standing Committee's discussion of Rule 32.2, and found only one mention of the applicability of the rules of evidence. At the April 1998 meeting the Rules Committee added the language in subdivision 32.2(c)(4) stating that the ancillary proceeding is not part of sentencing to make clear that the Rules of Evidence would apply in the ancillary proceeding. This is the same meeting at which the Committee decided to meet the concerns of the Standing Committee by providing for a jury right in the sentencing phase.***

***As noted in my memorandum of June 27, the resolution of this issue may turn on how the committee views its goals. It may (as the Department urges) seek only to clarify the existing rule and codify the procedures currently being followed by the courts. Alternatively, however, it might seek to enhance the fairness of forfeiture procedures, protect the role of the jury, or provide greater protection to the property interests of defendants and third parties.***

***It would be appropriate to coordinate the discussion of this aspect of the proposed rule with the Evidence Advisory Committee, and also to consider whether there is a supersession clause issue, since at least one statutory provision appears to rest on the assumption that the FRE are applicable to criminal forfeiture.***

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**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.

***Purpose of the amendment:*** *Current Rule 32.2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the Government has established the nexus between the property and the offense (or the amount of the money judgment). Subparagraph (A) carries forward the current Rule without change, except to clarify that the preliminary order may include substitute assets.*

*Subparagraph (B) clarifies that the court should issue the order "sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final."*

*Subparagraph (C) explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the Government will not have completed its post-conviction investigation to locate the forfeitable property before the date of sentencing. It provides that in that case, the court should issue an order of forfeiture in generic terms, and providing that the order will be amended pursuant to Rule 32.2(e)(1) when additional property is identified.*

***Analysis:*** *NACDL does not object to the amendment to subparagraphs (A) and (B). NACDL also says that it has no objection to subparagraph (C) provided it is satisfied that it understands how the generic order of forfeiture would work. It asked the Department of Justice to provide an example of such an order, and the Department has done so. Since this has the potential substantially to expand forfeiture, it's worth pursuing the question how far this provision would go.*

*NACDL does object to the last sentence of subparagraph (A) in the current rule (squiggle underline). NACDL argues that the present rule is fundamentally unfair and unwise because it initiates ancillary proceedings-- in which third parties must appear and assert their rights--before there has been any determination that the defendant has an interest in the property in question. This places a significant burden on those parties, and there is a significant danger that third parties who lack means or sophistication will fail to appear and lose their property.*

*DOJ argues that this matter was resolved in the 2000 amendment to the rules, and there is no occasion to reconsider the policy judgements that underlie the rule. The commentary discusses these issues at some length, and explains that the question of the extent of the defendant's interest was deferred to the ancillary proceeding to avoid duplication of effort and a waste of judicial resources. The commentary notes that once there has been a determination that property is subject to forfeiture (i.e., is proceeds, has been used to facilitate, etc.), then a defendant has no interest in litigating the question whether he does–or does*

*not–have any legal interest in the property. Accordingly, this issue is best resolved in the ancillary proceeding, when third parties have standing–and an incentive--to appear and contest the defendant's ownership.*

***SSB: Thus at present Rule 32.2 bifurcates the proceedings: (1) at the sentencing hearing, the only issue is the nexus of the property to the criminal violation, and the defendant is the only party who has standing to challenge the government, and (2) in the ancillary proceeding the only issue is the extent of the defendant's ownership of the property and only third parties claiming an interest in the property have standing to challenge the government. There is no forum in which the defendant can challenge the government's assertion that he has an interest in the property, and no forum in which the third parties can challenge the property's nexus to the crime. The Rules Committee did add one small safeguard following the period for notice and hearing. It added a provision to Rule 32.2(c)(2) stating that if no third party appears at the ancillary proceeding, the court is required to make a finding that the defendant had "an interest in the property that is subject to forfeiture under the applicable statute" before it orders final forfeiture. This finding is likely to be rather perfunctory, however, because the defendant is not permitted to contest the forfeiture on the ground that he has no interest in the property.***

***As a conceptual matter, the resolution of the issue in 2000 is somewhat problematic. If there has been no determination that the defendant has any interest in the property, it is unclear how there is jurisdiction to order an in personam forfeiture. It is not a fully satisfactory answer to say that any defect in this respect is cured in the ancillary proceeding that follows. That proceeding does not cure the defect from the defendant's point of view, for he is not allowed to raise the issue of the nature or extent of his own interest in the property. Nor does the ancillary proceeding convert the action to an in rem or civil forfeiture. From the perspective of the third parties, the ancillary proceeding is not the equivalent of either an in rem action or a civil forfeiture action, because they are not allowed to challenge the nexus finding. In truth, the rule does provide, as one of the Justice Department attorneys suggested, a hybrid that is not purely in personam nor purely in rem.***

***This dispute raises the question how broadly the subcommittee wants to define its agenda.***

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**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.

***Purpose of the amendment:*** *Currently, Rule 32.2(b)(3) describes the contents of the preliminary order of forfeiture, and provides that the order will become final as to the defendant at sentencing. The amendment carries forward the first part of the Rule without change (except to add language relating to property located abroad), and moves the second part of the Rule to new subdivision (b)(4).*

***Analysis:*** *NACDL has no objection to the language proposed by the Department of Justice, but it would change "may" to "shall" in the last sentence of the current Rule. The Department of Justice opposes the change.*

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**Rule 32.2(b)(4)**[2]

**(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.

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[2] If this provision is adopted, present Rule 32.2(b)(4) would be repealed or redesignated as Rule 32.2(b)(5).

***Purpose of the amendment:*** *Rule 32.2(b)(4) is a new provision that would expand on the language in current Rule 32.2(b)(3) requiring the court to make the forfeiture part of the sentence and to include it in the judgment. The current language has led to confusion as to exactly what the district court is required to do at sentencing, and to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new Rule would clarify the provision by adding considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the application of Rule 36, and the time to appeal.*

***Analysis:*** *NACDL has no objection to this proposal.*

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).**

***Purpose of the amendment:*** *The Department of Justice proposes that a conforming amendment be made to Rule 32(d)(2), making it clear that the presentence report should make an express reference to the forfeiture.*

***Analysis:*** *NACDL has no objection to this proposal.*

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**Rule 32.2(b)(5)**

(~~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.

***Purpose of the amendment:*** *Current Rule 32.2(b)(4) was added to the current Rule when the Standing Committee overruled the Advisory Committee's decision to eliminate the role of the jury in the forfeiture phase of the trial. It gives either party the option of asking that the jury that rendered the guilty verdict be retained to determine the forfeiture. The amendment re-designates this provision as subdivision (b)(5) and fleshes out how and when the provision applies.*

*Subparagraph (A) explains that the request for the jury must be made before the jury returns its verdict of guilty and that it must be made in writing.*

*Subparagraph (B) explains that "the Government must submit a proposed Special Verdict Form as to each asset subject to forfeiture."*

*Subparagraph (C) resolves a controversy over the jury's role in determining the amount of a money judgment. Presently, Rule 32.2(b)(4) says that the jury's role is limited to determining whether "the Government has established the requisite nexus between the property and the offense committed by the defendant." Some courts hold that this language allows the parties to request that the jury determine the amount of the money judgment, while others hold that the current Rule limits the jury's role to determining whether there is a nexus between specific assets and the underlying crime. Both of the reported decisions on this issue take the latter view. The proposed amendment would adopt the latter view as well.*

***Analysis:*** *NACDL opposes the suggestion that the request for the jury be made before the jury returns its verdict. It begins from the position that the defendant has a right to trial by jury, though that right can be knowingly and intelligently waived. NACDL is concerned that the Department's proposal would lead to inadvertent waivers. It favors a presumption that the jury would decide forfeiture issues unless the defendant affirmatively waived that right.*

*The Department of Justice takes the view that requiring the parties to make their election known to the court at an earlier point in the process is consistent with the orderly administration of the trial and the unanimous view of the circuit courts expressed in current case law.*

**SSB: After discussion, it appears that it may be possible to compromise on the idea that the court shall determine no later than the time that the jury retires whether either party will request a jury finding on forfeiture. This would avoid inadvertent defense waivers, but also give the court and the**

**jurors the ability to plan. It would also be useful to make the point in the committee note that courts like to be able to tell jurors what to expect at the time they are empaneled.**

*NACDL has no objection to the language regarding the special verdict in subparagraph (B).*

*NACDL and the Department of Justice take opposing views on subparagraph (C). NACDL believes that there should be a statutory right to have the jury determine the amount of the money judgment. The Department takes the view that this should be a question for the court, which must make the same determination in calculating the offense level under the sentencing guidelines and in issuing an order of restitution.*

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**Rule 32.2(b)(6) and (7)**

(6) Notice of the Order of Forfeiture.

(A) If the court issues an order directing the forfeiture of specific property, the Government must publish notice of the order and send such notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture of the property in the ancillary proceeding.

(B) The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and name the Government attorney to be served with the petition.

(C) Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any of the means described in Supplemental Rule G(4)(a)(iv). No publication of the notice is necessary if any of the exceptions in Supplemental Rule G(4)(a)(i) apply.

(D) Notice sent to potential claimants may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale.

At any time before entry of a final order of forfeiture, the court may order the interlocutory sale of property alleged to be forfeitable in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure.

***Purpose of the amendment:*** *These provisions were not part of the Department of Justice's original submission. The were added after the Supreme Court*

*approved virtually identical provisions for civil forfeiture in Supplemental Rule G of the Federal Rules of Civil Procedure. The proposals relate to such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties, and the interlocutory sale of property.*

***Analysis:*** *NACDL has not opined on these provisions, but it did not oppose their inclusion in Supplemental Rule G.*

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**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. . . .

***Purpose of the amendment:*** *The current version of Rule 32.2(d) appears to conflict with the applicable statute, 21 U.S.C. § 853(h), regarding the defendant's right to request a stay of the forfeiture pending appeal. The amendment would clarify that the statutory language controls.*

***Analysis:*** *NACDL opposes the amendment. In its view, the rule represents an important policy choice to preserve property during an appellate challenge.*

***SSB:*** *This issue merits further study. It's not clear to me at this point that the rule and the statute do conflict. If they do conflict, and if this is a matter of procedure, then the adoption of Rule 32.2 in 2000 would have superseded the statute. I would like to do some additional work on this issue.*

**To: The Forfeiture Subcommittee**

**From: Sara Beale**

**Date: June 27, 2006**

**Re: Proposals to Amend the Forfeiture Rules**

The subcommittee has now received the original proposal from the Department of Justice (DOJ), NACDL's responses (which include their own counter proposals), DOJ's response, and material provided by Professor King regarding the *Booker/Apprendi* issues. This memorandum recaps the issues and arguments, provides a framework for discussion, and offers my own conclusions and recommendations.

## I. Preliminary Observations

The Department's proposals build on the 2000 amendments, and seek to add clarity by filling in gaps in the rules. Some of the issues have been litigated extensively, and DOJ seeks to incorporate what it identifies as the majority position (or in some cases the better position). NACDL, in contrast, begins from the premise that the present rules provide insufficient protection to both the defendant and third parties. It seeks, in some cases, to roll back changes from 2000 at least in part. NACDL also opposes some of DOJ's proposals as further steps in the wrong direction, and NACDL
counters with its own proposals that would build in some added protections. DOJ responds that this is not an appropriate time to revisit issues encompassed in the 2000 reforms.

It might be useful for the subcommittee to tackle this issue in general terms before turning to specific issues. Is there, or should there be, any overarching theme to these amendments, other than enhancing clarity? Should there, for example, be any attempt to increase protections for either defendants or third parties? In considering that issue, it seems to me that there are two new elements that might affect the thinking of the subcommittee and subsequently the Rules Committee.

(1) The role of the jury. DOJ does not call for the elimination of the jury in forfeiture proceedings – though it notes that it has received feedback from some judges that they believe that the jury does not play a useful role in forfeiture cases – but the degree to which the jury's role should be protected or even strengthened is a common thread that weaves together several of the issues that divide DOJ and NACDL.

In *Libretti v. United States*, 516 U.S. 29 (1995), the Supreme Court held that because forfeiture is a part of sentencing -- rather than an element of the offense -- neither proof beyond a reasonable doubt nor a jury finding is constitutionally required. Although numerous commentators (including Professor King and her co-authors) have concluded that *Libretti* is fundamentally inconsistent with *Booker*, at present there is no judicial authority holding that the Sixth Amendment is applicable to

criminal forfeiture. To the contrary, Justice Breyer's remedial opinion in *Booker* states (in passing) that the sentencing statute governing forfeiture continues to be valid.[3] Post-*Booker*, many lower courts have concluded that *Libretti* is still good law, and that the right to jury trial under the Sixth Amendment has no application to criminal forfeiture. (See cases cited in DOJ letter of May 4, Appendix A).

That said, the subcommittee might still want to discuss whether the amendments should seek to maintain or even strengthen the jury's role in criminal forfeiture. The broad message of the *Apprendi-Booker* line of cases is that a majority of the Supreme Court (prior to the recent changes in membership) was concerned that the jury's role in criminal cases has been seriously eroded, and the Court's concern extended to at least some aspects of sentencing. Although the remedial majority in *Booker* indicated in passing that this concern did not reach forfeiture, there is some reason to think that may not be the Court's final word. There have been several twists, turns, and even reversals in the Court's recent Sixth Amendment cases (such as *Ring v. Arizona,* which overruled a recent decision, and the evolution of Justice Thomas's views between *Almandarez-Torres* and *Blakely*). The final curtain may not yet have come down on this line of cases. Moreover, as NACDL notes, the third parties whose rights are adjudicated in the ancillary proceedings may have Seventh Amendment rights. (See NACDL letter of March 7 at 2, noting that claimants in civil forfeiture proceedings had a "well established right to trial by jury at the time the Framers adopted the Seventh Amendment.")

This general issue could affect the subcommittee's resolution of several specific proposals, particularly the applicability of the rules of evidence, the time and means for requesting jury findings on forfeiture, and the availability of the jury for money judgment forfeitures.

(2) Congressional recognition of the need for more procedural protections in civil forfeiture. After the Rules Committee completed its package of amendments dealing with criminal forfeiture, Congress enacted the Civil Asset Forfeiture Reform Act of 2000, P.L. 106-185, 114 Stat 202 (CAFRA). CAFRA substantially strengthened the procedural protections afforded to both the parties from whom civil forfeiture was sought and third parties. These reforms, for example, increased the government's burden of proof and provided for assigned counsel to assist indigent or low income parties opposing forfeiture. CAFRA reflected a widespread belief that in the context of *civil* forfeiture the balance between the government and property owners had been struck with too little deference to property rights. But these reforms were limited to civil cases.[4]

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[3]The only reference to forfeiture states: "Most of the statute is perfectly valid. See, e.g., 18 U.S.C.A. § 3551 (main ed. and Supp.2004) (describing authorized sentences as probation, fine, or imprisonment); § 3552 (presentence reports); § 3554 (forfeiture)..." 543 U.S. at 258.

[4]Note, however, that CAFRA contains no indication that Congress was dissatisfied with the procedures for criminal forfeiture. Indeed, it provides generally for criminal forfeiture to be available as an alternative to a separate judicial proceeding civil forfeiture. Section 16 of CAFRA, 112 Stat. 202, 221, provides:

> SEC. 16. ENCOURAGING USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL FORFEITURE.
>
> Section 2461 of title 28, United States Code, is amended by adding at the end the following:

These developments raise the question whether the subcommittee wishes to go beyond enhancing clarity in the rules to protect (or even enhance) the right to jury findings, or otherwise to enhance procedural protections to defendants or third parties. In the alternative, the subcommittee might view these developments as cautioning against cutting back on jury rights, or cutting back on the procedural rights available to third parties. Considering these general issues may help the subcommittee as it addresses specific proposals.

## II. Specific Proposals

### A. Rule 32.2(a) and Rule 7 – notice of forfeiture

The issue is how notice of forfeiture is to be provided, how specific the notice must be, and when it must be given. At present, Rule 7(c) requires that the indictment or information give "notice to the defendant that the government will seek forfeiture of property as part of the sentence." The majority of courts have concluded that it does not require the government to itemize or describe the property with specificity. Bills of particulars are frequently used to provide greater detail. DOJ proposes (May 4 letter, Appendix B) to amend Rules 7 and 32.2(a) to provide that –

- the notice of forfeiture in the indictment should not be designated as a "count,"

- it is not necessary for the indictment or information "to list the specific property subject to forfeiture or to specify the amount of any money judgment,"

- when the government is seeking "the forfeiture of specific property that is not described in the indictment or information" or money forfeiture, it must "file a bill of particulars identifying such property and stating the approximate amount of money subject to forfeiture," and

- the bill of particulars must be filed "prior to trial or at such other time as the court may direct."

NACDL argues that merely giving notice that the government will seek forfeiture is insufficient to allow the preparation of the defense and fails to provide due process. (In contrast, Supplemental Rule E(2)(a), which governs civil forfeiture, requires great specificity in describing the property sought to be forfeited.) NACDL argues that the defendant needs to know not only *what* property the government will seek to forfeit, but also the *theory* upon which forfeiture is being sought.

However, rather than insisting that this information be provided in the indictment or information, NACDL's most recent letter (May 10, pages 3-6) takes the position that an amendment requiring

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"(c) If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.".

a bill of particulars would be acceptable, but that the government's proposed language does not provide sufficient notice to permit adequate pretrial preparation. NACDL seeks greater protections in two respects: the timing of the bill of particulars, and the contents of the bill. NACDL proposes that –

- the bill of particulars be filed at least 30 days before trial commences, provided that the government may file a supplemental bill naming newly discovered property only if the court determines that the defendant has sufficient time and resources to prepare to defend the new forfeiture allegation, or the court grants a continuation for that purpose,

- the bill of particulars must specify the amount of money sought to be forfeited in the case a money judgement forfeiture, and

- the bill of particulars must specify the basis on which forfeiture is being sought, e.g., that the car it seeks to forfeit was used to facilitate the crime by transporting drugs (or cash to buy drugs).

Finally, NACDL raises a new but related issue. It advocates that either the rule or the Committee Note be amended to clarify the procedure when *pretrial* restraint of assets is sought. It seeks the addition of language stating that the identification of specific property in the *indictment* is a prerequisite before the government can rely *on the indictment's finding of probable cause* as a basis for pretrial restraint of assets.

**Recommendations/conclusions:** The proposal to indicate that notices should not be designated as a count is not controversial, and there is agreement that the notice of forfeiture can be given in a bill of particulars rather than the indictment. Allowing the use of a bill of particulars recognizes that the government frequently discovers additional property during the period between indictment and trial. If that approach is taken, however, it seems appropriate to address NADCL's concerns with the timing and content of the bill of particulars.

**Timing:** NACDL's proposed period of 30 days before trial (NACDL, May 10, page 4) is similar to an earlier suggestion advanced by Judge Jones on March 10 ("no later than 30 days prior to trial or at such other time as the court may direct"). The government opposes setting an "arbitrary" date for filing the notice, arguing that it is necessary and appropriate for it to be able to continue its efforts to discover forfeitable evidence before, during, and after the trial. Moreover, setting a specific time for the bill of particulars would be an exception to the general pattern of the pretrial discovery rules, which do not specify the dates by which information must be provided.

Should the bill of particulars concerning forfeiture be treated differently? Perhaps, since it fills in gaps on basic information on the nature of the government's allegations that is not included in the indictment or information. The indictment gives the broad outlines of the charge against the defendant, and thus it gives the defendant an opportunity to begin preparation of his defense of the forfeiture. Note that there is a dispute between DOJ and NACDL on the interpretation to be given to Rule 32.2(e), which colors their positions on the issue of the bill of particulars. The Department reads the rule as giving more leeway for forfeitures after the conviction and final judgment, which suggests that it is inappropriate to place strict limits on forfeiture earlier, when the defendant would have more, rather than fewer procedural protections than he would at a post trial hearing without a jury. NACDL reads Rule 32.2(e) more narrowly, as allowing the government in post trial

proceedings to forfeit only property that fell within the original forfeiture order, though it could not at that time be located, and substitute property. This same tension exists when DOJ and NACDL talk about generic property descriptions in the preliminary forfeiture order.

**Contents of the bill of particulars:** It also seems reasonable to consider requiring the bill of particulars to address the basis for the forfeiture, as well as the property to be forfeited. As NACDL points out, there could be many different theories that might support the forfeiture of the same property, and it would be difficult to prepare to respond to the government's case without a further indication why the property is said to be forfeited. The subcommittee should discuss the language on page 6 of NACDL's May 10 letter. The subcommittee might also want to consider the model of Rule 7(c)(1) which refers to a "plain, concise, and definite written statement of the essential facts constituting the offense charged." In essence, NACDL could be understood as asking that the forfeiture allegations provide the same notice of the underlying factual predicate for forfeiture.

The question whether the amount of a money judgement should be specified raises both the question of adequate notice, and the question whether such judgements are authorized as part of "forfeiture," which is discussed below. At this point, it is sufficient to note NACDL's point that if money judgements are authorized, knowing at the pretrial stage how much money the government is claiming would be relevant to both the preparation of the defense and the defendant's determinatin whether he wishes to go to trial.

**Pretrial restraint of assets:** It's not clear whether Rule 32.2, which deals with sentencing, is the place to add any further restriction on the pretrial restrain of assets.

## B. Rule 32.2(b)(1)

DOJ proposes several related amendments to clarify the procedures for the forfeiture portion of a bifurcated trial. It provides explicitly for written submissions by the parties (proposed Rule 32.2(b)(1)(B)) and also for the receipt of evidence that would be inadmissable under the Federal Rules of Evidence if "the information has sufficient indicia of reliability to support its probable accuracy." Although the rule is presently silent on this issue, several courts (cited on page 6 of DOJ's January 3 memo and page 5 of its May 4 memo) have concluded that the Rules of Evidence, which do not otherwise apply at sentencing, are not applicable to the forfeiture phase. Current Rule 32.2(b)(1) refers to the court's consideration of "evidence *or information* presented by the parties at a hearing after the verdict or finding of guilt." This language supports the view that the current rule contemplates reliance on information that would not be admissible under the Federal Rules of Evidence. (Perhaps Committee members will recall whether the Rules Committee specifically focused on this issue.)

NADCL urges that the Rules of Evidence should be applicable at the forfeiture phase, noting that this was one of the reforms instituted by CAFRA, and that the statutory provisions regarding criminal forfeiture contemplate that the Rules of Evidence will be applicable. Specifically, 18 U.S.C. § 853(e) provides that the court may consider evidence and information that would not be admissible under the Federal Rules of Evidence in issuing protective orders and temporary restraining orders. In making an exception, this provision reflects the assumption that the Rules of Evidence are otherwise applicable. In NACDL's view, the reference in the current rule to "evidence *or information*" is inconsistent with the statutory scheme and bad policy, upon which the

amendments should not rely to further restrict the procedural protections applicable to persons opposing forfeiture.

**Recommendations/conclusions:** Rule 32.2(1)(b) can reasonably be read to indicate that the hearsay and other information that would not be admissible under the Federal Rules of Evidence may be considered in the forfeiture phase of the trial. Assuming this is so, the question is whether the rule should be amended to say so clearly, or whether there are any good policy reasons to rethink the issue. NACDL argues that this is a context in which confrontation is extremely important, since it may, for example, involve the loss of a family home on the basis of a hearsay statement by a co-conspirator or informant trying to curry favor with the government. It would be useful for the committee to discuss this issue.

Moreover, the issue of the rules of evidence is closely related to the jury issue. If this is a jury proceeding, the Rules of Evidence normally apply. DOJ argues, however, that the procedure should not vary depending on whether the forfeiture findings are made by a judge or jury.

Finally, there is a lurking supersession issue here. If, in fact, 18 U.S.C. 853(e) has the implication noted above (i.e., that the Rules of Evidence are generally applicable in the forfeiture phase), did the adoption of Rule 32.2(b)(1) override the statute? The interaction between Rule 32.2 and 18 U.S.C. § 853 are relevant to not only this issue, but to the question of the stay procedures, discussed below in section on page 11.

## C. Rule 32.2(b)(2)

DOJ's proposal fleshes out what the court should do once it has discovered that property is subject to forfeiture. At present, Rule 32.2(b)(2) provides that once the court has decided "the property is subject to forfeiture" it shall "promptly" issue a preliminary order. There are several elements to DOJ's proposal (January 3 page 7):

- new subdivision (A) incorporates most of the present rule and adds a reference to substitute property to the first portion of the rule,

- new subdivision (B) requires the entry of a preliminary order of forfeiture in advance of sentencing (unless it is not practical to do so) to permit the parties to suggest revisions and modifications before the order becomes final, and

- new subdivision (C), which applies to cases in which the court cannot identify all of the specific property subject to forfeiture or the total amount of a money judgement prior to sentencing, authorizes the court to enter an order describing the property in generic terms and stating that the order will be amended pursuant to Rule 32.2(e).

**Including substitute assets in the preliminary order:** As DOJ points out, the first mention of substitute assets in the current rule is in Rule 32.2(e). Yet it seems clear that the government's initial proof might, at the time of trial, establish that substitute property is forfeitable. In such a case there is no reason to defer consideration of these assets until after trial under Rule 32.2(e) (where indeed the procedural protections are quite different: the rule provides that there is no right to jury trial).

**The timing of the preliminary order:** DOJ proposes that the court be required to draft a preliminary order (if that can be done) in advance of sentencing, so that there is time for objections and modifications. This seems like a useful idea in light of the problem that Rule 35(a) severely restricts the court's ability to make corrections after sentencing. There is no good reason to require an appeal to make such a correction (or to test the outer boundaries of the district court's order to correct "arithmetic, technical, or other clear error" within the first seven days).

**Generic descriptions of forfeitable property:** Proposed new subdivision (C) would authorize the court to describe the property to be forfeited in "generic" terms. This would place the Rule's imprimatur on the procedure used in some cases (such as the very complex BCCI forfeiture). There is clearly an interaction between this proposal and Rule 32.2(e), which authorizes the court to amend its forfeiture order "at any time" to include property subject to forfeiture under the existing order that has subsequently been "located and identified" and "substitute property." NACDL does not oppose the proposed amendment in principle, but wishes to see examples of such generic orders. As noted above, NACDL reads Rule 32.2(e) more narrowly than does DOJ.

**Establishing the defendant' interest in property subject to forfeiture:** Rather than joining issue on any of the specific proposals for change, NACDL argues (March 9 at page 5 and May 10 at page 8 et seq) that current Rule 32.2(b)(2) is defective because it fails to require an initial determination by the court not only that the property is forfeitable, but also that the defendant has *some* interest in the property. NACDL argues that such a preliminary determination is crucial before third parties can be required to contest the forfeiture in order to protect their interests. Contesting a forfeiture requires a third party to initiate legal proceedings that can be costly and time-consuming. Yet many property owners whose rights may be at issue are indigent or persons with low income, and there is no provision for appointed counsel. DOJ responds that NACDL's proposal would be time-consuming and require a duplication of effort, and that the procedure that NACDL criticizes was one of the core reforms in the revision of the forfeiture rules.

NACDL argues that in a significant number of cases, the government forfeits the rights of third parties by default without ever having to establish the defendant's interest in the property. It asks the Committee to revisit the related provision in Rule 32.2(c)(2), which provides that if no third party contests a forfeiture, the preliminary order becomes final "if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in property that is forfeitable under the applicable statute." NACDL notes that the defendant is barred from participating in the third party proceeding, so it is not entirely clear how this provision is intended to work. The GAP report to Rule 32.2 indicates that the Committee was concerned about this issue. It states:

> The Committee amended the rule to clarify several key points. First, subdivision (b) was redrafted to make it clear that if no third party files a petition to assert property rights, the trial court must determine whether the defendant has an interest in the property to be forfeited and the extent of that interest. As published, the rule would have permitted the trial judge to order the defendant to forfeit the property in its entirety if no third party filed a claim.

Relatedly, NACDL urges (March 9 at 5) that the last sentence of present Rule 32.2(b)(2) be stricken. It provides: "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)." It sees that provision as objectionable because it requires third parties to defend their rights in ancillary proceedings even

though there has not yet been a determination that the defendant has any interest in the property that is the subject of the preliminary order of forfeiture.

**Recommendations/conclusions:**

**Substitute assets, the timing of the order, and generic descriptions.** It seems appropriate to include a reference to substitute assets in this subdivision, and to require the preliminary order of forfeiture to be made in advance of sentencing. It would be useful to get a better understanding of just how generic the generic descriptions of the property to be forfeited can be, and to discuss the related question of how far Rule 32.2(e) goes.

**Establishing the defendant's interest.** I think it would also be useful for the subcommittee to consider whether the rule (now or with the proposed revisions) adequately addresses the necessary finding of the defendant's interest in the property to be forfeited. We should distinguish between the determination whether the defendant has *any* ownership interest in property subject to forfeiture and the determination of the *extent* of the defendant's interest. At a minimum, the revisions in 2000 were intended to defer the determination of the extent of the defendant's interest, if any, to the ancillary proceeding. It still seems appropriate to do so in general, since that is where the third parties' interests will naturally come into play.

NACDL's strongest argument is that third parties should not have to go to the time, expense, and inconvenience of contesting forfeiture if there has been no determination that the defendant has any interest in the property. In light of the concerns that prompted CAFRA, it would be useful to have some discussion of the question whether it would be practical to make such a finding as a preliminary matter, at the same time when there is a determination that property is subject to forfeiture. At present, under Rule 32.2(b)(4) the jury determines only "whether the government has established the requisite nexus between the property and the offense committed by the defendant." Thus it could establish that an automobile was used to facilitate a drug offense because the defendant rode in it to deliver drugs. That finding would not, of course, establish that the defendant had any ownership in the car. If he borrowed it, the car might still be subject to forfeiture, but it would have to be a civil forfeiture. The question is whether that should be enough to justify the preliminary forfeiture order and trigger an ancillary proceeding in which the third party owner loses his car if he does not successfully contest the forfeiture. NACDL argues that this is the kind of concern that Congress found justified when it enacted CAFRA. Note that if the government has to proceed against the car via civil forfeiture, the owner will have a number of procedural protections not available (at present) in the ancillary proceeding.

One of the principal purposes of the 2000 amendments was to increase efficiency. Would requiring a finding that the defendant has *some* ownership interest before the issuance of the preliminary forfeiture order be inefficient or impractical? (DOJ asks why it would make sense for the defendant to contest this: why would he say "It doesn't belong to me.") Would requiring such a preliminary finding necessarily result in a substantial waste of judicial resources or duplication of the issues and evidence that would be introduced at the ancillary proceeding? Or would it be consistent with the intent, evinced in the GAP report, of requiring the court to determine that the defendant does in fact have an interest in the property to be forfeited. (I admit that I found the comments in the GAP report a bit puzzling. I could not answer the question posed by NACDL: how will the court address the question of the defendant's ownership if the defendant is barred from participation in the ancillary proceeding and there are no third parties who contest forfeiture?)

However this point is resolved, it should take care of NACDL's objection to the last sentence of the present rule. If there is a revision to indicate that the defendant must be found to have some interest before the preliminary order is issued, that removes NACDL's objection. If the subcommittee finds that no such change is warranted, it would presumably likewise reject the suggestion that the sentence in question should be deleted.

## D. Rule 32.2(b)(3)

DOJ proposes the addition of language authorizing the Attorney General to request the assistance of foreign governments in seizing or restraining property located abroad. I am not sure why this amendment would be necessary, but this does not seem to be very controversial.

DOJ also proposes deleting a sentence that determines when the order of forfeiture becomes final as to the defendant, which it says has proven to be difficult to apply. It proposes moving the treatment of this subject to new Rule 32.2(b)(4). (If this provision were adopted, current Rule 32.2(b)(4) would be renumbered (b)(5).)

## D. NEW Rule 32.2(b)(3) (see DOJ letter of Jan. 3 at 12)

This proposal regulates the time when an order of forfeiture becomes final, and when the time for a party to file an appeal begins to run. It also deals with the effect of a motion for reconsideration. NACDL has no objection (see letter of March 9 at 5). The effect of the changes is to resolve a circuit conflict precipitated by several Eleventh Circuit decisions.

## E. Present Rule 32.2(b)(4) (to be renumbered (b)(5))

The present rule deals with the jury, and it provides that when either party requests a jury finding the jury must determine whether the government has established the required nexus between the property and the defendant's offense of conviction. DOJ proposes either that this provision be repealed (on the grounds that the jury is not constitutionally required) or that it be revised substantially to provide:

- the request for a jury determination of forfeiture must be made in writing or on the record, "before the jury returns its verdict,"

- the government must submit a proposed special verdict form as to each asset subject to forfeiture, and

- there is no right to have the jury determine the amount of a money judgement or the forfeitability of substitute assets.

DOJ does not urge that the jury be eliminated from forfeiture proceedings, though it notes that under *Libretti* and *Booker* there is no impediment to doing so. As noted in the introductory section of this memo, this is consistent with existing decisional law, though many scholars think that ultimately *Libretti* and *Booker* cannot be squared with one another. The proposal that no jury finding be required regarding the amount of money to be forfeited rests primarily on what DOJ identifies as

current judicial practice. The government cites two cases, *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (jury must determine whether the government established nexus between property and offense but not amount of money judgment), and *United States v. Reiner*, 393 F. Supp. 2d 52, 54-57 (D. Me. 2005). It also notes (May 4 letter at 10) reports from federal prosecutors indicating that it is a common practice for courts to deny the request of either party to have the jury determine the amount of a money to be forfeited. DOJ states that courts consider this efficient because they must already make the same finding for purposes of the Guidelines.

NACDL strenuously opposes these changes on both constitutional and policy grounds. In its view, the default position should be to require the jury to determine forfeiture (especially if the jury heard the first portion of the trial), and to deprive the defendant of that right only if there has been a knowing and intelligent waiver. Therefore it is not appropriate to require a demand in writing for the jury, and certainly not to do so before the verdict is entered. NACDL reads the present case law as endorsing, at most, the requirement that the request be made before the jury is dismissed. DOJ, on the other hand, suggests that an earlier request for the jury to be involved in the last phase helps both the court and the jurors. In its view, the proper time to make this request is when the court and counsel meet at the close of trial to discuss jury instructions and other matters, or at the latest during deliberations -- not after the jury returns with its verdict and is mentally prepared to go home.

NACDL also strongly objects to the proposal that there be no right to have the jury determine the amount of a money judgment. (It also disputes the power of the courts to order money judgements as part of forfeiture, as discussed below.) It notes that even though it is common at present to deny the right to jury trial on this issue, there are also cases in which this issue has been submitted to the jury – including *Tedder*, the case upon which the government itself relies. NACDL argues that money judgement forfeitures, which often involve large sums, are subject to great abuse, and it sees no reason to deny the defendant the protection of a jury. If the same issue will also be determinative of other sentencing issues, duplication can be avoided by having the court rely on the jury finding, rather than denying the defendant the right to submit the issue to the jury.

**Conclusions/Recommendations:** Given the current state of the law, I see this as a policy issue rather than a constitutional issue. It goes to the question of the balance between efficiency and fairness, the degree to which the defendant's interests have been adequately protected, and the proper role of the jury in forfeiture proceedings. NACDL is correct in thinking that DOJ's proposals don't seek to afford any special protections or status to the jury trial right, though they do not object to retaining the jury. NACDL seeks to protect and perhaps even enlarge the jury's role. It's worth noting that the present judicial practice reflects the language of the current rule, which seems to indicate that the defendant has no right to have a jury determine the amount of money to be forfeited. It does not *necessarily* reflect the courts' views on the best practice.

## F. Rule 32.2(d)

The present rule gives the court discretion to stay the order of forfeiture if the defendant appeals from the conviction or order of forfeiture. (For examples of cases in which courts considered the question whether to grant such a stay, see the page 20 of the Department's letter of Jan. 3). DOJ notes that the rule appears to conflict with 21 U.S.C. § 853(h), which authorizes the court to grant a stay only upon the application of a person other than the defendant or someone acting on his

behalf. To resolve the conflict, DOJ proposes to amend the rule dealing with stays pending appeal to add the qualifying phrase "to the extent permitted by the applicable statute."

NACDL opposes this proposal, which it believes is neither justified on policy grounds nor required. As to policy, generally it is the defendant, and not third parties, who is benefitted by a stay, so it makes little sense to have a provision that allows *only* third parties to seek stays. (See NACDL letter of March 9 at 8 and n.3).

**Conclusion/Recommendation:** There are two issues here. One is whether there are situations where it is desirable for the district court to have discretion to grant a stay of the forfeiture order at the defendant's request. If so, then the question is whether it is necessary or appropriate nonetheless to approve the proposed amendment to bring the rule back into conformity with § 853(h). This seems to be a supercession issue. Of course the committee could decide to cut back on the right to a stay in conformity with the policy expressed in § 853(h), but if this is a procedural issue it would not be necessary to do so, since the 2000 amendment superceded the statute.

## G. Money Judgments

NACDL argues strenuously that DOJ's proposed amendments improperly presume the availability of personal money judgments in forfeiture proceedings. It argues that in personam money judgments fall outside of the concept of the "forfeitures" that are statutorily authorized. (See NACDL letters of March 9 at 8-11 and May 10 at 15-16). It discusses the recent district court decisions in *Croce* and *Day* which find that no statutory authority for money judgements, and it argues that it is improper to imply the remedy of money judgments in light of the detailed statutory scheme, particularly since it provides for forfeiture of substitute assets.

In response, DOJ provides a list of more than 30 published cases allowing forfeiture money judgments, including recent decisions rejecting *Croce*. It argues that money judgements are an effective way to ensure that criminals do not benefit from their crime, even in cases in which they dissipate the assets that would have been forfeitable.

**Recommendation/conclusion:** In 2000 the Rules Committee finessed the issue of the propriety of money judgments, stating in the Committee Note that it "takes no position on the correctness" of the decisions approving the use of money judgment forfeitures. That may still be the best course. The question is primarily one of substantive law, rather than procedure, and the decisional law remains unsettled. Since many courts have allowed such forfeitures, the rules appropriately provide the procedures for them. But there are two recent well-reasoned district court opinions concluding that such judgments are not authorized by statute. And, despite the long list of cases permitting forfeiture money judgements, there is considerable force to NACDL's argument that the concept of "forfeiture" seems intrinsically related to taking property that is presently in existence. Moreover, the statute itself provides a means – substitute assets – to deal situations when a forfeitable asset has been hidden or placed beyond the court's power. Under these circumstances, it is not clear that the courts should imply another form of forfeiture that has no clear statutory basis.

Given the resolution of this issue in 2000, there seems to be no need for the subcommittee to try to resolve it now.

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

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

**RE: Rule 41, Warrants for Electronically Stored Information (ESI)**

**DATE: September 29, 2006**

At the April meeting of the Rules Committee Judge Bucklew appointed a subcommittee, chaired by Judge Battaglia, to examine the issues raised by warrants for the seizure of electronically stored information. Judge Battaglia's report for the subcommittee is attached.

This item is on the agenda as an information item for the October meeting on Amelia Island.

# 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
Fax: (619) 702-9988


MEMORANDUM

TO: The Honorable Susan Bucklew

FROM: Judge Battaglia

RE: Subcommittee on Search Warrants for Electronically Stored Information

DATE: October 5, 2006

CC: Sara Beale

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The following is a status report on the progress of this subcommittee.

The subcommittee was created after a discussion at the April 2006 meeting of the Advisory Committee in Washington, D.C. The subcommittee's mission was to study Rule 41 in the context of current technology and assess potential amendments to embrace issues associated with search warrants of electronic storage devices for electronically stored information. The subcommittee includes, Judge Bucklew, Justice Edmonds, Judge Battaglia, (chair), Benton Campbell, Sara Beale, Peter McCabe and John Rabiej.

At an initial meeting on May 19, 2006, and following a review of some of the literature associated with "digital evidence," the subcommittee concluded that there was a need for further technical background to assist the subcommittee. It was determined that a more complete technical background in areas including standard imaging equipment and field technique, image search software and technique, would create a necessary insight for assessing warrant related issues.

Ben Campbell volunteered the services of the Department of Justice to design and present the program. Jon Wroblewski offered to assist Ben Campbell in this effort. At a further conference call on June 22, 2006, the agenda was approved, and the process of setting a date for the presentation commenced. It was also determined that since we were proceeding with purely a technical primer, as opposed to a legal discussion or drafting session, we would invite other individuals to attend as audience members, who, from a technical background, could help frame issues for future discussion.

The event was scheduled for August 16, 2006 at the Department of Justice facility at 1301 New York Avenue, N.W., in Washington, D.C. Attached is the agenda for the day's presentation.

A variety of invitations were extended to lawyers, law professors, and other judges. Those able to join in the session were:

Judge Barbara Major, U.S. Magistrate Judge Southern District of Ca;
Professor Nancy King, a member of the Advisory Committee;
Professor Orrin Kerr, noted author in the field;
Kevin West, Special Agent in Charge, North Carolina State Police;
and
Various members of the A.O. staff.

The presentation was well prepared and delivered by the Department of Justice personnel. It addressed the areas of concern of the subcommittee and provided a strong technical background for the subcommittee to proceed. The involvement of the invited guests lead well to the technical discussion and introduced a variety of concerns that will be included in the future discussions of the subcommittee.

The subcommittee owes a great debt to Ben Campbell and Jon Wroblewski for organizing the program and to the Department of Justice staff who prepared and presented the material. The program was so enlightening, that the attendees overwhelmingly endorsed the concept that the program be presented to all judges in a shortened format, due to it's high educational and practical value to judges. Discussions are underway with the FJC to accomplish that goal.

Following the meeting, Judge Bucklew is sent letters of appreciation to the D.O.J. personnel involved in the preparation, planning and presentation of the day long program.

Following the program, the chair of the subcommittee circulated a list of potential issues and possible amendments for consideration by the subcommittee as a whole. Those issues include addressing the two step process of a search for electronic information in the Rule, clarifying the 10-day execution requirement under the Rule, clarifying the inventory requirement, and a discussion on the benefits and burdens of time limits on return of the storage media or search of the actual stored data. The chair has also invited the other members to supplement the list of potential issues and considerations.

This process is continuing, and the subcommittee will meet soon, telephonically, to continue its work. This process which will lead to a further report, and potentially proposed amendments to Rule 41, at the Spring 2007 meeting of the full committee.

Respectfully Submitted,

Anthony J. Battaglia
Subcommittee Chair

DRAFT AGENDA FOR RULE 41 SUBCOMMITTEE

| | | |
|---|---|---|
| 09:30-09:40 | Welcome and overview | |
| 09:40-10:30 | Lecture: File Structures and Forensic Issues Encountered During Forensic Examinations | This lecture will explain basic file structures for hard drives. It will address file-structure related difficulties for forensic examiners, such as when information regarding a file's location has been overwritten and comprehensive drive encryption. |
| 10:30-10:40 | 10 minute Break | |
| 10:40-11:30 | Demo 1 - Forensic imaging | This session will demonstrate issues encountered during computer imaging, including the techniques used to image hard drives, the duration of imaging, problems that may arise during imaging, and RAM imaging. |
| 11:30-11:45 | 15 minute Break | |
| 11:45-12:45 | Demo 2 – Text and Image Searching and Examination | This session will demonstrate the capabilities and limitations of key word searches and image searches. |
| 12:45-14:00 | Lunch | |
| 14:00-14:40 | Demo 3 – Attributing User Actions | This session will demonstrate techniques helpful in establishing that a particular person was responsible for particular actions on a computer. (Such techniques may be particularly important when performing forensic analysis on a computer with many users.) It will include discussion of Internet cache files, registry files, and other log files. |
| 14:40-14:50 | 10 minute Break | |
| 14:50-15:40 (Carroll) | Demo 4 – Special Techniques in Forensics | This session will demonstrate additional forensic examination techniques, including analysis of restore points, hibernation files, and print spool files. |
| 15:40-15:50 | 10 minute Break | |
| 15:50-16:40 (Mandia) | Demo 5 – Volatile Data Collection & Analysis | This session will demonstrate techniques for collection and analysis of volatile data (data that is lost when a computer looses power or is turned off). |
| 16:40-17:30 | Question & Answer, Wrap-up | |
| | | |
| | | |

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

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

**RE:** **Rule 16, Proposed Amendment Concerning Exculpatory and Impeaching Information**

**DATE:** **September 30, 2006**

In a special teleconference meeting on September 5, the Rules Committee voted to approve the attached amendment to Rule 16 for transmission to the Standing Committee. Two issues related to the proposed amendment may warrant discussion at the October meeting.

(1) The Department will provide an update on the amendment to the United States Attorneys Manual. During the teleconference Ms. Fisher indicated that the USAM provisions under discussion had already received final Departmental approval, but their implementation had been delayed to allow for any last minute wording changes that might be desirable as a result of the Rules Committee teleconference. As noted in the minutes, various suggestions regarding wording were made, and as a result additional revisions are under consideration. If the final version of the USAM becomes available before the meeting, it will be included either in this agenda book or as a separate distribution.

(2) Another issue raised during the conference call was the possibility that the proposed amendment to Rule 16 would invalidate convictions (perhaps long after trial) because the prosecution had failed to meet the expanded disclosure requirements. Some proponents of the amendment stated that it was not their intention to create a means to upset convictions on appeal or collateral attack, and there were suggestions that it might be desirable to add a statement to this effect in the committee note. During this discussion, reference was made to research previously done by Professor King for the subcommittee on the question whether the amendment would change the results on appeal or collateral attack.

The text of the proposed amendment to Rule 16 and the accompanying committee note appear within, followed by Professor King's memorandum to the subcommittee and the version of the United States Attorneys Manual that was discussed during the teleconference.

As indicated during the conference call, the proposed amendment should have no impact on collateral attacks, since those must be grounded on constitutional claims and the proposed amendment is not constitutional in nature.

Professor King's memorandum explains that on direct appeal the matter is more complicated. Rule 52 generally provides the standards applicable to violations of the rules, and it distinguishes between errors that were brought to the trial court's attention and those that were not. In the case of errors brought to the trial court's attention, Rule 52(a) requires reversal unless the error did not affect the defendant's substantial rights. In *United States v. Vonn*, 535 U.S. 55, 62 (2002), and *United States v. Olano*, 507 U.S. 725, 733 (1993), the Supreme Court stated that this requires the government to bear the burden of establishing that the error in question was harmless. As indicated in Professor King's memorandum, notwithstanding these recent statements from the Supreme Court, the circuits are not in agreement on the standard to be applied when discovery violations are raised on appeal. Citing older circuit precedent many circuits continue to hold that a defendant seeking relief on appeal from a discovery violation carries the additional burden of showing prejudice from the violation.

The Committee may wish to discuss whether to add a statement concerning this issue to the committee note. It would be a relatively simple matter to indicate that the rule change would have no effect on collateral attack, by adding language such as the following:

> Because the rule is designed to go beyond the prosecution's constitutional obligations, it will not create any rights that can be asserted in collateral proceedings.

The impact of the proposed amendment on direct appeals could not be as readily summarized, and in at least some cases it would affect the validity of convictions. As noted above, in cases where the defendant objected in the trial court to the failure to provide exculpatory or impeachment material under the rule, some circuits (at least) would require *the prosecution* to demonstrate that any violation of Rule 16 was harmless in order to avoid reversal. Arguably that should be the case in all circuits in light of the Supreme Court's dicta in *Vonn* and *Olano*. This is a marked change from the standard applicable to claims of constitutional error based on *Brady* and its progeny, which requires *the defendant* to demonstrate a reasonable probability that the error affected the outcome. A different standard would apply to cases where the failure to disclose first comes to light during the appellate process. The defense would have to show plain error that "affects substantial rights," which may also be a less demanding standard than the showing required to demonstrate a *Brady* error.

This item is on the agenda for the October meeting on Amelia Island.

**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. 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.

Nancy J. King
Lee S. & Charles A. Speir Professor of Law
Phone (615) 343-9836
Fax (615) 322-6631
nancy.king@law.vanderbilt.edu

October 5, 2006

**Mr. Donald J. Goldberg**
**Ballard Spahr Andrews & Ingersoll, LLP**
**1735 Market Street, 51st Floor**
**Philadelphia, PA 19103-7599**

**Re: Appellate Review of proposed disclosure rule**

Dear Don,

You requested that I send to you, for the subcommittee, more information on the following specific question: Are the appellate standards presently applied to review Brady violations the same or different from the standards that would be applied to violations of a proposed rule requiring the disclosure of evidence favorable to the accused without regard to materiality? This question was raised during the last conference of the subcommittee.

**Short answer:**

The two standards are not the same. In order to secure relief for a violation of the constitutional obligation under Brady, the defendant must demonstrate a reasonable probability that had the favorable information been disclosed, the result would have been different. Once this is established there is no further harmless error analysis. Kyles v. Whitley, 514 U.S. 419, 435 (1995). In order to secure relief for the government's violation of its discovery obligations under Rule 16, once the defendant demonstrates a violation of the Rule, under Rule 52(a) relief is required unless the government shows that the violation had no substantial and injurious effect or influence in determining the verdict. See United States v. Vonn, 535 U.S. 55, 62 (2002).

**Explanation:**

The Brady standard is well-established. In order to demonstrate a violation of due process, the defendant must show that the government failed to disclose favorable evidence, and has the burden of demonstrating the "materiality" of that evidence. "[T]he materiality standard for Brady claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Banks v. Dretke, 540 U.S. 668 (2004) (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)). The defendant must show a "reasonable probability of a different result." Kyles, 514 U.S. at 434. See also United States v. Dominguez Betinez, 542 U.S. 74 (2004) (Brady requires the showing of "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different"). Once the due process violation is established, relief is required and there is no further harmless error analysis. Kyles.

The standard for harmless error review of Rule 16 violations is less well-established, but recent decisions of the Court discussing Rule 52 suggest that the government rather than the defendant carries the burden on the issue of effect on outcome. Violations of the Federal Rules of Criminal Procedure that are properly preserved are reviewed under Rule 52(a) for harmless error. Under Rule 52(a), the government carries the burden of showing that any error was harmless. See United States v. Vonn, 535 U.S. 55, 62 (2002) (noting that Rule 52(a) provides for consideration of error raised by a defendant's timely objection, but subject to an opportunity on the Government's part to carry the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights."). Those errors that are not objected to by the defendant in the trial court are reviewed on appeal for plain error under Rule 52(b), and the defendant carries the burden of showing that plain error affected his substantial rights. Id. at 58. See also United States v. Olano, 507 U.S. 725, 733 (1993) ("When the defendant has made a timely objection to an error and rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record – a so-called "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: *It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.*") (Emphasis added). See also United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) ("When an objection is properly preserved, we review that ground for error and may reverse only if the government is unable to demonstrate that the error was harmless, that is, that the error did not affect the defendant's substantial rights or influence the jury's verdict. See Olano, 507 U.S. at 734 (under the harmless error standard, the government 'bears the burden of persuasion with respect to prejudice.')").

Admittedly, the decisions in Olano and Vonn that referred to the government's "burden" under Rule 52(a) are both plain error cases, not harmless error cases. Also, other decisions of the Court

applying Rule 52(a) do not use "burden" language.[5] Still, the statements in Vonn and Olano are clear on this point, and other decisions of the Court do not contradict that position. In sum, the most recent pronouncements on harmless error review from the Supreme Court suggest that once the defendant demonstrates a violation of a rule, relief is required unless the government carries its burden under Rule 52(a) of showing that the error did not affect substantial rights.

Despite these statements from the Court, it appears that presently the above standard is not always applied when discovery violations are raised on appeal. Many circuits citing older circuit precedent continue to hold that a defendant seeking relief on appeal from a discovery violation carries the additional burden of showing prejudice from the violation. See e.g., United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999) (defendant has the burden of showing prejudice); United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) (defendant must demonstrate prejudice to substantial rights, a likelihood that the verdict would have been different had the government complied with discovery rules), cert. denied Javier v. United States, 531 U.S. 902 (2000); United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997) ("we will reverse a conviction based on the government's violation of a discovery order only if the defendant has demonstrated that the violation "prejudiced his substantial rights."), cert denied 523 U.S. 1012 (1998). See also United States v. Clark, 385 F.3d 609 (6th Cir. 2004) ("Assuming, arguendo, that a Rule 16 violation occurred, we also review said violation for harmless error. . . . An error, not of constitutional dimension, is harmless unless it is more probable than not that the error materially affected the verdict."). I doubt these cases can be squared with the

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[5] E.g., United States v. Lane 474 U.S. 438 (1986) ("Under Rule 52(a), the harmless-error rule focuses on whether the error "[affected] substantial rights." In Kotteakos the Court construed a harmless-error statute with similar language, and observed: "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S., at 765).

Other Supreme Court cases discussing the same standard on habeas review also dispense with burden language. See O'Neal v. McAnich, 513 U.S. 432 (1995) (finding "in cases of grave doubt as to harmlessness the petitioner must win," applying Kotteakos standard in habeas proceedings, stating "we note that we deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of "burden of proof." The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens."); Kyles ("Once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error enquiry were to apply, a Bagley error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," . . . necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict,'" Brecht v. Abrahamson, 507 U.S. 619 (1993), quoting Kotteakos, 328 U.S.at 776 (1946). . . . We held in Brecht that the standard of harmlessness generally to be applied in habeas cases is the Kotteakos formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal). Under Kotteakos a conviction may be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict.").

Supreme Court's recent pronouncements about the meaning of Rule 52(a). Should an amendment be adopted, and defendants raise properly preserved violations of that new rule on appeal, courts will undoubtedly revisit this authority.

Sincerely,

Nancy J. King

cc: Professor Sara Beale

**MEMORANDUM**

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: Office of the Attorney General

Alberto R. Gonzales
Attorney General

RE: Principles of Federal Prosecution

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected sections.

AFFECTS: 9-_____

PURPOSE: The Department of Justice is proud of the long record of federal prosecutors meeting or exceeding their obligation to disclose exculpatory and impeachment evidence. The purpose of this amendment to the U.S. Attorneys' Manual is to further develop the Department's guidance to federal prosecutors in fulfilling their obligation, pursuant to *Brady v. Maryland* and *Giglio v. United States*, to disclose exculpatory and impeachment evidence to criminal defendants. The policy embodied in this bluesheet asks prosecutors, in most cases, to go beyond the minimum

disclosure required by the Constitution. The goals of the policy are to ensure that all federal prosecutors are aware of their disclosure obligations, that prosecutors take the necessary and appropriate steps to fulfill such obligations, that witnesses are fully protected from harassment, assault, and intimidation, that disclosure occurs at a time and in a manner consistent with the needs of national security, and that disclosure is made in a manner and to an extent that promotes fair trials and expedites proceedings.

The policy embodied in this bluesheet is intended to be flexible yet produce regularity. As first stated in the preface to the original 1980 edition of the Principles of Federal Prosecution, "they have been cast in

general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility." The policy also recognizes the critical importance of fully protecting witnesses and safeguarding other vital interests. Through the use of circumscribed standards and principles outlined herein, federal prosecutors should exercise their judgment and discretion so as to build confidence in criminal trials, while protecting national security, keeping witnesses safe and allowing for efficient resolution of cases.

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The bluesheet creates a new section 9-27.___, dated ____, 2006, in your United States Attorneys' Manual.

**[NEW SECTION] USAM § 9-_____**

A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation to disclose exculpatory and impeachment evidence to criminal defendants. The policy is also intended to encourage timely disclosure of exculpatory and impeachment evidence so as to expedite trial procedures and ensure that trials are fair. The policy, however, recognizes that witness security is of critical importance, *see* USAM § 9-21.000, and that if disclosure prior to trial might jeopardize witness safety, disclosure must be delayed. This policy is not a substitute for researching the legal issues that may arise in an individual case, nor does it supersede the significant body of excellent training materials on this subject. Additionally, this policy does not alter or supersede the *Giglio* policy adopted in 1996, *see* USAM § 9-5.100, or the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, *see* USAM § 9-11.233.

B. **Constitutional obligation to ensure a fair trial.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Neither the Constitution nor this policy creates a discovery right for trial preparation or plea negotiations. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

C. **Disclosure of exculpatory and impeachment evidence.** The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). While materiality is the standard for the disclosure of exculpatory and impeachment evidence, as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), the Department encourages prosecutors to take an expansive view of its disclosure obligations and err on the side of broad disclosure without engaging in speculation as to whether the evidence will be material to guilt or the outcome of a trial. In cases where such broad disclosure is not appropriate,

prosecutors nonetheless must disclose exculpatory and impeachment evidence known to the prosecutor and agents of law enforcement involved in the investigation of the case – including state and local authorities where applicable – if such evidence is material to a finding of guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence.

1. **Materiality and Admissibility.** Recognizing that it is sometimes difficult to assess the admissibility and materiality of evidence before trial, prosecutors generally should take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. Exculpatory evidence is material to a finding of guilt, and thus the Constitution requires disclosure, when it is (1) favorable to the defendant; and (2) if disclosed and used effectively, may make the difference between conviction and acquittal. Impeachment evidence is material if (1) it relates to a key government witness; and (2) significantly impacts the reliability of such a witness in a way that may determine guilt or innocence. *United States v. Bagley*, 475 U.S. 667, 676 (1985). While ordinarily, evidence that would not be admissible at trial need not be disclosed, *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995), this policy encourages prosecutors not to engage in speculation as to whether particular evidence will be admitted by a trial court.

2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory or impeachment information from law enforcement agents investigating the criminal case against the defendant and all other members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers participating in the investigation and prosecution of the criminal case against the defendant. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

3. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g.*

*United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial. Exculpatory evidence, for example, must be disclosed promptly after it is discovered. Impeachment evidence is typically disclosed at a reasonable time to allow the trial to proceed efficiently. In some cases, however, the prosecutor may have to balance the goals of this policy against other significant interests and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

D. **Exceptions.** To the extent that this policy encourages disclosure of evidence or information beyond the requirements of the Constitution, exceptions to this policy may be made on a case-by-case basis. Such exceptions should be made infrequently and only after a supervisor has concluded that other measures, including protective orders, will be insufficient to protect the interests of the United States. Examples of cases in which it may be appropriate for a supervisor to limit the application of this policy include, but are not limited to, cases that involve the national security of the United States and cases in which the United States has reason to believe that early and broad disclosure of evidence will jeopardize the safety of a witness or lead to obstruction of justice or witness tampering.

E. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States*. As the Supreme Court has explained, disclosure is required when evidence in the possession of the prosecutor or prosecution team is material to guilt or innocence. This policy encourages adopting a broad view as to materiality and favors expansive disclosure well in advance of trial. Under this policy, in most cases, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera*. By doing so, prosecutors will ensure confidence in fair trials and

verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

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

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

**RE:** **Rule 49.1. Redaction of the Grand Jury Foreperson's Name on the Indictment & Redaction of Arrest & Search Warrants**

**DATE:** **September 29, 2006**

At the June 2006 meeting of the Standing Committee, Rule 49.1 was approved for transmittal to the Judicial Conference, but an issue was raised for further consideration by the Criminal Rules Committee. The Standing Committee was advised of the view of the Court Administration and Case Management Committee (CACM) that in accordance with CACM's strong policy of protecting juror privacy, Rule 49.1 should require redaction of the name of a grand jury foreperson from documents filed with the court. Such redaction, however, would pose significant practical problems for the district courts, and it was not immediately apparent how best to achieve this objective. The signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

In order to avoid any delay in the implementation of Rule 49.1, this issue was deferred for further study by the Rules Committee and the Standing Committee. There was agreement that before making a change in this traditional aspect of the indictment, we should seek to determine whether problems have arisen as a result of the inclusion of the grand jury foreperson's signature.

As indicated in the attached memorandum from Mr. Campbell, the Department of Justice has made initial efforts to determine what problems, if any, have arisen. The first information the Department received from the Marshal's Service was that in FY 2006 there had been 18 threats/inappropriate communications made to jurors of all kinds – grand and petit – in the federal system, and 16 of the 18 were related to a single tax case.

In a subsequent communication, Mr. Wroblewski indicated that the Department requested data for several additional years to confirm the general scope of the problem of threats/inappropriate communications toward jurors. The Marshals Service reported that in FY

2003 there was one report of a threat/inappropriate communication made to a juror; in FY 2004 there were two; and in FY 2005 there were none.

As noted at the Standing Committee, CACM is also concerned that Rule 49.1 exempts arrest and search warrants from the redaction requirements. Despite these concerns, this issue was also deferred for further study in order to avoid delay in implementing the rule.

This item is on the agenda for the October meeting on Amelia Island.

**U.S. Department of Justice**

Criminal Division

*Washington, D.C. 20530*

MEMORANDUM

TO: Judge Susan C. Bucklew
Chair, Advisory Committee on the Federal Rules of Criminal Procedure

FROM: Benton J. Campbell
Counselor to the Assistant Attorney General

SUBJECT: E-Government Rule and Redaction of Grand Jury Forepersons' Signatures

DATE: September 8, 2006

This is in response to our recent discussion regarding the E-Government Rule and your request for our assistance in preparing this issue for the Advisory Committee's October meeting.

As you know, at its June meeting, the Standing Committee approved the proposed E-Government Rule, but requested the Advisory Committee on the Criminal Rules to consider further whether the Rule should require the redaction of the name of the grand jury foreperson on indictments filed with the court. The Standing Committee was especially concerned with the competing interests of a public indictment which includes the grand jury foreperson's signature (and similarly with a jury verdict which includes the signature of a petit jury foreperson's signature) and the potential harm to forepersons from the disclosure of their names.

Back in the spring of this year, the Department was contacted by the Rules Support Office on behalf of the Standing Committee and asked if the Department maintains statistics on threats to grand jury forepersons. In response, we contacted the Executive Office of United States Attorneys, the U.S. Marshals' Service, and other Department components. What we learned is that the Department does not systematically collect statistics focused on threats to grand jury forepersons or even jurors more generally. As you might expect, the Department's criminal justice statistics are generally tied to specific statutory provisions, and thus the information the Department does collect relating to threats involving the administration of

justice encompass a variety of different victims – including public officials, witnesses, jurors, and others – and multiple forms of obstruction of justice – for example, the wide array of conduct that falls within the parameters of 18 U.S.C. §§ 1512 and 1513.

The U.S. Marshals' Service is generally responsible for responding to threats to jurors, and while it too does not keep detailed statistics broken down to the level of the grand jury foreperson, its information revealed that threats to grand and petit jurors are relatively few. The Marshals' Service indicated that in the last year, there were a total of 18 threats/inappropriate communications made to jurors of all kinds – grand and petit – in the federal system, although 16 of the 18 were related to a single tax case prosecuted in the District of Nevada.

Despite the small number of cases, we think the Committee should carefully examine this issue and determine whether there is a way – mechanical, technological, or otherwise – to ensure public confidence in the criminal justice system through an indictment which includes the grand jury foreperson's signature while at the same time minimizing the potential harm to forepersons from the disclosure of his or her name.

As I mentioned to you, we would be happy to survey U.S. Attorney's Offices on this issue. However, it is important that any set of questions be carefully crafted to elicit the specific information that will help the Committee with its consideration of this matter. Also, you should be aware that because data on threats to grand jury forepersons are not systematically collected, any survey will, by its nature, rely only on the collective memory of those questioned. It will also take us some time to complete any survey, since our experience is that giving the U.S. Attorney's Offices more time to respond leads to both a higher rate of response and more helpful responses.

We hope this information is useful. Please let us know if there is anything else we can provide. We look forward to the Committee's upcoming meeting in October.

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

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

**RE: Time Computation**

**DATE: September 29, 2006**

At the June 2006 meeting of the Standing Committee the time computation template was further refined, and since that meeting the Time computation committee – which is chaired by Judge Kravitz and on which Mr. Fisk has served as our liaison -- has continued its work. The current draft template is attached. Within the Criminal Rules Committee, Judge Bucklew has appointed a time computation subcommittee, and that subcommittee has had an initial meeting by conference call.

As described on pages 40-45 of the draft minutes of its June meeting, the Standing Committee discussed a variety of issues regarding the template, and then turned its attention to the issue of the application of the template to statutory time periods. At present, all of the rules except the Criminal Rules provide expressly that they apply to statutory periods of time as well as time periods set by the rules of procedure. There is general agreement on the desirability of having the new time computation rules cover the myriad of statutory time periods that relate to the federal courts, but it is not clear how best to achieve that objective. Although this might be approached as a matter of supersession, consideration is also being given to seeking a legislative solution. This issue does have ramifications for criminal practice. Despite the fact that Criminal Rule 45 does not explicitly apply to statutory time periods, there is a strong presumption that all of the new time computation rules will be uniform to the degree possible. Indeed, the different treatment of this issue in the Criminal Rules was apparently inadvertent, and it appears that many courts and practitioners assume that the Criminal Rules, like all of their counterparts, currently prescribe the method for computing statutory time periods.

Although they may also provide further feedback on the template, the major task of the advisory committees at this point is to determine what changes, if any, would be required in the rules under their jurisdiction if the template is adopted. For present purposes, the most significant change brought about by the template is the so called "days-are-days" approach. Unlike the present counting rule in Federal Rule of Criminal Procedure 45, the template does not exclude weekends or holidays from the computation. Since the objective is to simplify the process of time computation without decreasing the time available to the court and counsel, each

advisory committee must decide which time periods under its rules should be adjusted to offset the change to a days-are-days approach.

At the Standing Committee Judge Kravitz stated his recommendation that all of the advisory committees consider expressing all, or most, time periods in multiples of seven days, except that for periods of 30 days or more, there may be no need for adjustment, and longer periods now specified in the rules, such as 30, 60, or 90 days might be retained without change.

Attached for your review is a chart of the Criminal Rules, noting each rule that presently provides for a time period. The "Proposed Change" column indicates the result that would occur if we applied the 7/14/21/28 rule of thumb, which would presumptively convert time periods less than 30 days to increments of 7. The increments of 7 are presumptive only, and the main question is what exceptions (if any) are desirable.

One issue on which we would like your feedback concerns periods that are presently 7 days. Since this is already an increment of 7, it would not change under the presumptive approach. But under the days-are-days approach, weekends and holidays will be included, and thus the effective time would generally be 5 working days (or 4 working days if there were a holiday). Should some or all of these periods be lengthened (probably to 14 days)? Or would the court's ability to extend the time be sufficient to address any problems that might arise in specific cases? Although the subcommittee has not yet discussed this issue by conference call, one member of the subcommittee has indicated a tentative view that the 7 day periods should be extended. If the period is extended, it might be preferable to extend it to 14 days (rather than 10 days) to keep it a multiple of 7.

Discussion of the 7 day periods in Rules 29, 33 and 34 would be especially helpful. The Appellate Rules Committee has expressed interest in these rules in connection with its review of Appellate Rule 4(b)(3)(A).

More generally, it would be helpful to identify any other rules where you think there are significant issues raised by the combination of the "days are days" approach and the conversion to 7, 14, 21, or 28 days.

This item is on the agenda for the October meeting on Amelia Island.

| Rule | Summary of Current Rule | Proposed Change | Comment |
|---|---|---|---|
| 1 | No time provision | | |
| 2 | No time provision | | |
| 3 | No time provision | | |
| 4 | No time provision | | |
| 5 | No time provision | | |
| 5.1(c)<br><br><br><br>5.1(c) | Preliminary hearing for defendant in custody within a reasonable time but not later than 10 days after initial appearance.<br><br>Preliminary hearing for defendant not in custody within a reasonable time but not later than 20 days after initial appearance. | The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody. | |
| 6(g) | Grand jury tenure – Until discharged by court but more than 18 months only if court determines that an extension is in the public interest. Extensions may be granted for no more than 6 months except as otherwise provided by statute. | No change | |
| 7(f) | Motion for bill of particulars before arraignment or within 10 days after arraignment or at such later time as court may permit. | The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires. | |
| 8 | No time provision | | |
| 9 | No time provision | | |

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|---|---|---|---|
| 10 | No time provision | | |
| 11 | No time provision | | |
| 12 | No time provision | | |
| 12.1(a)(2)<br><br><br><br><br><br>12.1(b)(2) | Notice by defense of alibi – Defendant to serve within 10 days of written request from government, or at some other time the court sets. R. 12.1(a). Exceptions for good cause.<br><br>Disclosure by government - Within 10 days after defendant serves notice of alibi, unless the court directs otherwise, government to disclose witnesses government intends to rely upon to establish defendant's presence at scene of offense and rebuttal witnesses to the alibi defense. Disclosure must be made no later than 10 days before trial. R. 12.1(b). Exceptions for good cause. | Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:<br><br>Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial. | |
| 12.2 | No time provision | | |

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| 12.3(a)(3) | Response to notice of public-authority defense – Government attorney must serve response within 10 days after receiving notice, but no later than 20 days before trial. | An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice. | |
| 12.3(a)(4)(A) | Government attorney, no later than 20 days before trial, may request statement of names, etc. of witnesses relied upon to establish public-authority defense. | An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial. | |
| 12.3(a)(4)(B) | Within 7 days after request, defendant must serve statement disclosing witnesses establishing public-authority defense. | Query if this should be extended to 14 days. | |
| 12.3(a)(4)(C) | Within 7 days after receiving defendant's statement, government attorney must serve statement of witnesses upon which the government intends to rely. | Query if this should be extended to 14 days. | |
| 12.4 | No time provision | | |
| 13 | No time provision | | |
| 14 | No time provision | | |
| 15 | No time provision | | |

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|---|---|---|---|
| 16 | No time provision | | |
| 17 | No time provision | | |
| 17.1 | No time provision | | |
| 18 | No time provision | | |
| 20 | No time provision | | |
| 21 | No time provision | | |
| 23 | No time provision | | |
| 24 | No time provision | | |
| 25 | No time provision | | |
| 26 | No time provision | | |
| 26.1 | No time provision | | |
| 26.2 | No time provision | | |
| 26.3 | No time provision | | |
| 27 | No time provision | | |
| 28 | No time provision | | |
| 29(c)(1) | Motion for judgment of acquittal – Motion may be made or renewed within 7 days after guilty verdict or after court discharges jury, whichever is later | Query if this should be extended to 14 days. | |
| 29.1 | No time provision | | |
| 30 | No time provision | | |
| 31 | No time provision | | |

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| 32(e)(2) | Notice of presentence report at least 35 days before sentencing hearing, unless the defendant waives this minimum period, probation officer must give report to defendant, defendant's counsel, and an attorney for the Government. | No change | |
| 32(f)(1) | Objections to presentence reports within 14 days after receiving report, parties must state in writing any objections, and provide a copy of objections to opposing party and probation officer. | No change | |
| 32(g) | Submission to court of presentence report at least 7 days before sentencing, probation officer must submit to court and parties report and addendum containing unresolved objections, grounds for those objections, and officer's comments on objections. | Query if this should be extended to 14 days. | |
| 32.1 | No time provision | | |
| 32.2 | No time provision | | |
| 33(b)(1) | Newly discovered evidence – Only within three years after the verdict or finding of guilty. If appeal is pending, court may not grant motion until appellate court remands case. | No change | |
| 33(b)(2) | Motion for new trial for any reason other than newly discovered evidence must be filed within 7 days after verdict or finding of guilt. | Query if this should be extended to 14 days. | |
| 34 | Defendant must move for arrest of judgment within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere. | Query if this should be extended to 14 days. | |

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| 35(a) | Within 7 days after sentencing, court may correct sentence resulting from arithmetical, technical, or other clear error. | Query if this should be extended to 14 days. | |
| 35(b) | Assistance to government. Upon government motion made within one year of sentencing, if defendant after sentencing provided substantial assistance in investigating or prosecuting another person, and reduction accords with sentencing guidelines. If motion made more than one year after sentencing, if assistance involved information not known to defendant or not useful to government until one year or more after imposition, or was promptly provided to government after its usefulness was reasonably apparent to defendant. | No change | |
| 36 | No time provision | | |
| 38 | No time provision | | |
| 40 | No time provision | | |
| 41(e)(2)(A) | Search warrant must command officer to execute it within a specified time no longer than 10 days. | 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:<br>**(A)** execute the warrant within a specified time no longer than ~~10~~ 14 days; | |
| 42 | No time provision | | |
| 43 | No time provision | | |

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|---|---|---|---|
| 44 | No time provision | | |
| 45(a)(2)<br><br>45(c) | Intermediate Saturdays, Sundays, and legal holidays are excluded if the period is less than 11 days.<br><br>When a party is required or permitted to act within a prescribed period after service of a notice or a paper upon that party, three calendar days are added to the prescribed period. | *** See Standing Sub-Committee Template Addressing Time Computation *** | |
| 46(h)(2) | Attorney for government must report biweekly to court, listing witnesses held in excess of 10 days; shall state why each witness should not be released with or without a deposition being taken. | An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than ~~10~~ 14 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a). | |
| 47(c)<br><br>47(d) | Service of written motions (other than motions court may hear ex parte) with supporting affidavits, and any hearing notice: at least 5 days before hearing date, unless rule or court order sets a different period. For good cause, court may set a different period upon ex parte application.<br><br>Responding party must serve opposing affidavits to motion at least one day before hearing, unless court permits later service. | A party must serve a written motion--other than one that the court may hear ex parte--and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.<br><br>No change | |
| 48 | No time provision | | |
| 49 | No time provision | | |

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|---|---|---|---|
| 50 | No time provision | | |
| 51 | No time provision | | |
| 52 | No time provision | | |
| 53 | No time provision | | |
| 55 | No time provision | | |
| 56 | No time provision | | |
| 57 | No time provision | | |
| 58(g)(2)(A) | Appeal from magistrate judge's order or judgment – Interlocutory appeal to district judge within 10 days after entry of order or judgment. | Either party may appeal an order of a magistrate judge to a district judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party. | |
| 58(g)(2)(B) | Appeal from magistrate judge's order or judgment – Appeal from conviction or sentence to district judge within 10 days after entry of order or judgment. | A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government. | |

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| 59(a) | A party may file objections to a magistrate judge's order on a non-dispositive matter within 10 days after being served with the written order or after the oral order is stated on the record, or at some other time that the court sets | A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review. | |
| 59(b)(2) | Within 10 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may file specific written objections to the magistrate judge's proposed findings and recommendations regarding a dispositive matter. | Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review. | |
| 60 | No time provision | | |

**MEMORANDUM**

**DATE:** August 21, 2006

**TO:** Time-Computation Subcommittee
Advisory Committee Chairs and Reporters

**CC:** Judge David F. Levi
John K. Rabiej

**FROM:** Judge Mark R. Kravitz
Catherine T. Struve

**RE:** Additional Revisions to Time-Computation Template

Attached is a draft of the time computation template, redlined to show changes from the version circulated on July 26. If you have already reviewed the version that we circulated to some on August 10, then you need only review the changes discussed in items 1 through 4 below; the other items mentioned here were discussed in the August 10 memo. If you have not seen the August 10 memo, items 1 through 7 below reflect changes made since the July 26 version:

1. As in the August 10 draft, subdivision (a)(4)'s definition of "last day" has been revised (as has the Note), to reflect the fact that courts currently permit after-hours filing if the filer seeks out a court official and hands the filing to that official in person. Cathie's memo, attached, provides more details concerning this issue.

> The current template draft is designed to preserve the current possibility of after-hours filing by hand delivery to a court official. The draft is problematic, however, in that it might encourage lawyers (or pro se litigants) to seek court officials out at their homes – a possibility that poses security concerns. The following are some potential options (not currently reflected in the draft template) for addressing those concerns. One approach might be to specify that (a)(4)(B)(ii) sets a default rule that can be altered by a local rule that designates a specific means of filing after hours. Another way of addressing the problem might be to delete the current text of (a)(4)(B)(ii) and instead insert text that refers to 28 U.S.C. § 452's provision that the courts shall be deemed always open; the Note could then explain that some courts have read Section 452 to permit filing by personal delivery to a court official, and could point out that courts can instead designate by local rule an alternative method of after-hours filing that comports with Section 452.

2. Subdivisions (a)(1)(A), (a)(2)(A), and (a)(3) now refer to deadlines triggered by an "event," rather than by an "act, event, or default." "Event" is broad enough to encompass "acts" and "defaults." The Note to subdivision (a)(1) has been revised to make clear that this change, made for brevity's sake, is not intended to produce a change in meaning.

3. New subdivision (a)(3) defines "next day" in order to clarify how counting backward works. (N.B.: Subdivision (a)(3) has been altered since the August 10 version.) The proposed 'forward or backward' language in (a)(1)(C) and (a)(2)(C) has been deleted, and the Note's illustration of forward and backward counting now appears in the discussion of subdivision (a)(3).

4. The Note to subdivision (a)(1) previously referred to the counting of "every other day." To avoid the possibility of an argument that this means "alternating days," the Note has been changed to refer to the counting of "all other days."

5. Subdivision (a)(1) has been revised to reflect the fact that its time-computation approach applies to periods stated in units longer than days – e.g., weeks, months or years.

6. Subdivision (a)(2)(C) has been revised because Ed Cooper pointed out that under the prior formulation, a filing deadline of 11:17 a.m. on Day 1 would be extended until 11:17 a.m. on Day 2 if, for example, the court's system went down from 1:00 to 5:00 p.m. on Day 1 (after the deadline was to expire). The new language avoids that problem, but as Ed has noted it does raise another question: How would this provision treat the filer with a deadline of 11:17 a.m. who is unsuccessful in her attempts to file because the system is down from 9:00 to 11:15 a.m. on the relevant day? These problems may clear up, though, as we proceed to define "inaccessibility."

7. In subdivision (a)(5), the draft no longer deletes state holidays from the definition of "legal holiday."

We intend to make some further changes, which we will circulate as soon as possible. We will draft proposed language that would cover both physical and electronic inaccessibility of the clerk's office. We will also give further consideration to the possibilities for dealing with statutory deadlines. In the meantime, we welcome your comments on the attached.

**Rule 6. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.

**(1)** ***Period Stated in Days or Longer Unit.*** When the period is stated in days or a longer unit of time,

**(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 a filing in court — a day on which the clerk's office is 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 a filing in court — a time when ~~day on which~~ the clerk's office is inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) *"Next Day" Defined.* The "next day" for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count forward when the period is measured after an event and backward when the period is measured before an event.

(4) ***"Last Day" Defined.*** The last day concludes:

(A) (i) for electronic filing, at midnight in the court's time zone; and (ii) for filing by other means, at the closing of the clerk's office or the time designated by local rule, unless

(B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.

(5) ***"Legal Holiday" Defined.*** "Legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.

**Committee Note**

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, a ~~rule or order requires that a~~ filing is required to be made "no later than November 1, 2007," then the filing is due on November 1, 2007. But if a ~~rule or order requires that a~~ filing is required to be made "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 time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).~~)~~

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days ~~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~~ All other days — including intermediate Saturdays, Sundays, and legal holidays — ~~is~~ are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3). Where present subdivision (a) refers to the "act, event, or default" that triggers the deadline, new subdivisions (a)(1), (a)(2) and (a)(3) refer simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days ~~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].

When the act to be done is a filing 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. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

**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, 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, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. ~~[~~Periods stated in hours are not to be "rounded up" to the next whole hour.~~]~~ ~~(Again, w~~When the act to be done is a filing in court, and inaccessibility of the clerk's office occurs on the day the deadline ends and prior to the time

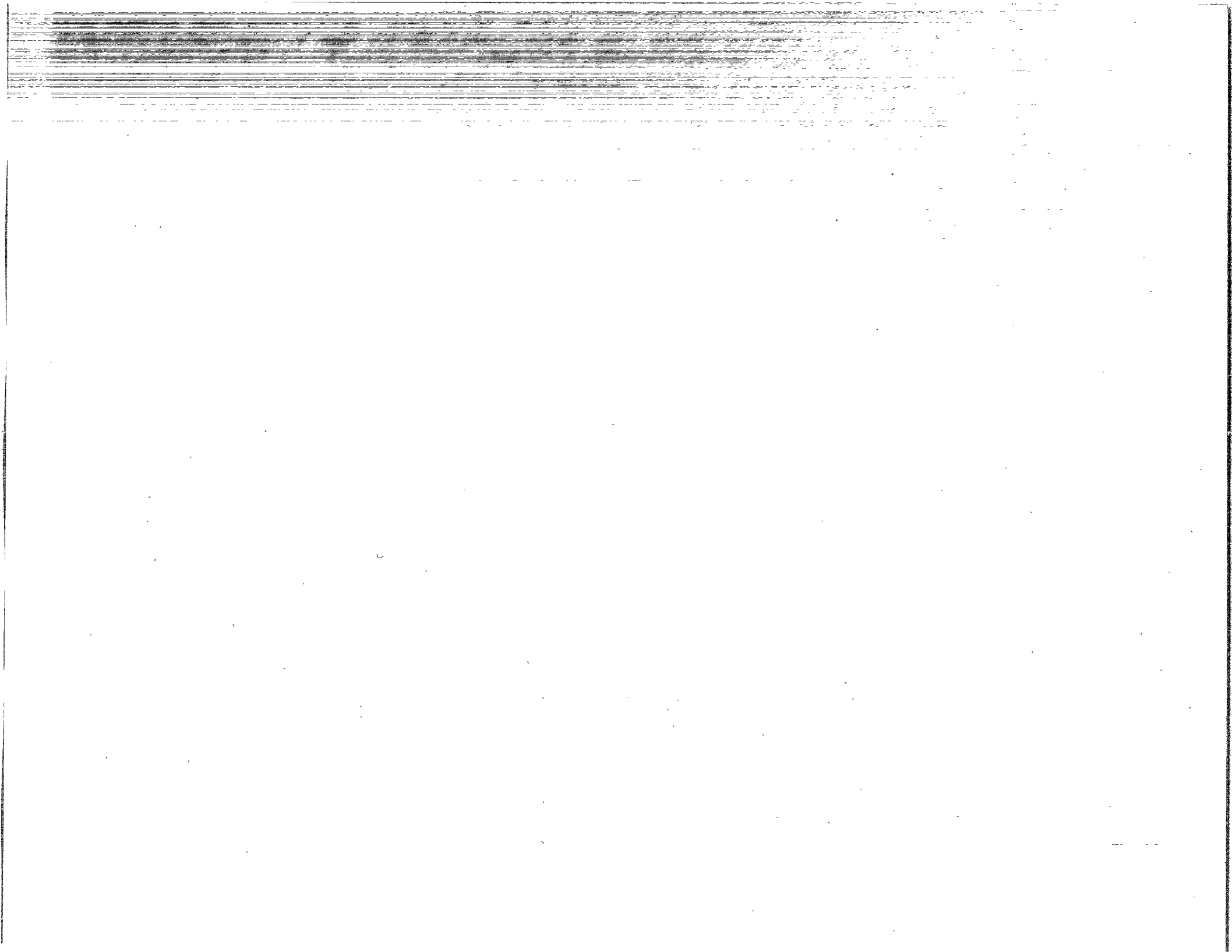
the deadline ends, that day ~~a day on which the clerk's office is not accessible because of the weather or another reason~~ is treated like a Saturday, Sunday, or legal holiday.~~)~~

**Subdivision (a)(3).** New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). 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 filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

**Subdivision (a)(4)~~(3)~~.** New subdivision (a)(4)~~(3)~~ defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4)~~(3)~~ does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer "may seek out the clerk or deputy clerk, or perhaps the judge"). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in an depository maintained by the clerk's office. *See, e.g., Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), methods such as time-stamped placement in a depository will be effective if a local rule so provides. Such local rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. *See, e.g.*, In re Bryan, 261 B.R. 240, 242 (9th Cir. BAP 2001).

**Subdivision (a)(5)~~(4)~~.** New subdivision (a)(5)~~(4)~~ defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).



**MEMORANDUM**

**DATE:** August 9, 2006

**TO:** Judge Mark R. Kravitz

**FROM:** Catherine T. Struve

**RE:** 28 U.S.C. § 452, cognate rules, and the definition of "last day"

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." Corresponding provisions exist in the Bankruptcy,[6] Civil[7], Criminal[8] and Appellate[9] Rules. During the time-computation subcommittee's July 31 conference call, the question was raised whether the "courts always open" provisions bear upon the time-computation definition of the end of the "last day."

A quick survey of treatises and caselaw discloses divided authority concerning the effect of such provisions on whether a litigant can timely file after the closing of the clerk's office, and if so, how. Cases that focus on this issue generally separate into two camps: those that require the after-hours filer to find a court official to whom to hand the papers, and those that permit the after-hours filer to place the papers in the court's night depository or even in another location within the court's custody. The majority of treatises (including Federal Practice and Procedure) take the former view, though Moore's argues that putting the papers in a designated depository should work. It is notable that none of these discussions grounds its conclusions in an argument concerning the intent behind Section 452; this is unsurprising, since there is no indication that the statute or its predecessors was designed to address the issue. This brief survey of authorities indicates that a time-computation provision defining the end of the "last day" could bring clarity to this murky area and would not contravene a discernable statutory purpose.

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[6] Bankruptcy Rule 5001(a) provides: "The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules."

[7] Civil Rule 77(a) provides: "District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

[8] Criminal Rule 56(a) provides: "In General. A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order."

[9] Appellate Rule 45(a)(2) provides in relevant part: "When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order."

The statutory and rules provisions. The predecessors of Section 452 date back to 1842.[10] In 19th-century treatises, predecessor provisions are mentioned sometimes in the course of discussions concerning the terms of court,[11] and sometimes during discussions of jurisdiction.[12] Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act.[13] This was the view taken in the House Report concerning the 1948 legislation that codified the present Section 452: "The phrase 'always open' means 'never closed' and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is 'always open,' there is no time when the court is without power to act."[14]

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[10] Section 5 of the Act of August 23, 1842, 5 Stat. 517, 518, provided in part:

> That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits.

This provision (a predecessor to Revised Statutes §§ 638 and 574) was mirrored in Equity Rule 1 of the Rules of Practice for the Courts of Equity of the United States, January Term 1842.

[11] See, e.g., Horace Andrews, Manual of the Laws and Courts of the United States, and of the several States and Territories 9 (1873) (in a section discussing the "terms of the courts of the United States," noting that "[t]he circuit courts, as courts of equity, are always open for the purpose of filing pleadings, issuing and returning process and commissions, and for interlocutory proceedings").

[12] See, e.g., Robert Desty, A Manual of Practice in the Courts of the United States 51 (5th issue 1881) (section on "Courts always open for certain purposes" listed under the topic heading "Circuit Courts – Jurisdiction"); George W. Field, A Treatise on the Constitution and Jurisdiction of the Courts of the United States 146 (1883) (discussing fact that "circuit courts . . . are always open" in chapter on jurisdiction).

[13] See John M. Gould and George F. Tucker, Notes on the Revised Statutes of the United States 89 (1889) (observing with respect to Rev. St. § 574 that "while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor's authority being personal . . . and capable of exercise equally in term time and in vacation"); cf. Horn v. Pere Marquette R. Co., 151 F. 626, 635 (C.C. E.D. Mich. 1907) ("The power of a United States judge to do chamber business is in large part ascribable to the statutory provisions of section 638, Rev. St. . . . , whereby Circuit Courts are declared to be always open for the transaction of certain business . . . .").

[14] H. Rep. No. 308, 80th Cong., 1st Sess., A52 (1947). The legislative history of the 1963 amendments to Section 452 corroborates the view that the provision was designed to address the question of when courts have the power to act. See S. Rep. No. 88-547, 1963 U.S.C.C.A.N. 996, 997 (1963) ("[T]he requirement [of] holding formal periodic terms by the district courts no longer serves a useful purpose and . . . those statutory requirements should be eliminated.").

The advisory committee notes to the relevant Rules generally do not indicate the purpose of the courts-always-open provisions, other than to say that the provisions correspond in substance to Section 452.[15]

The divided caselaw. Some caselaw indicates that "courts always open" provisions allow a litigant to file after the closing of the clerk's office[16] so long as the litigant can find an appropriate court official[17] to receive the papers after hours.[18] Thus, for example, the First Circuit cited Civil Rule 77(a) for the principle that "A person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge . . . , and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period." Casalduc v. Diaz, 117 F.2d 915, 917 (1st Cir. 1941); see also McIntosh v. Antonino, 71 F.3d 29, 35 n.5 (1st Cir. 1995) (citing *Casalduc* for proposition that "[a]fter hours, papers can validly be filed by in-hand delivery to the clerk or other proper official"; noting that "some clerks' offices reportedly have established so-called 'night

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[15] See Civil Rule 77, 1937 advisory committee note (rule states substance of Section 452); see also Bankruptcy Rule 5001, [1983] advisory committee note (rule is drawn from Civil Rule 77); Criminal Rule 56, 1944 advisory committee note (stating that relevant part of rule is drawn from Civil Rule 77, and noting "policy of avoiding the hardships consequent upon a closing of the court during vacations").

[16] One district court, though, suggested that reliance on such an interpretation would be risky. Holding that Civil Rule 6(a) applied to the statute of limitations for a Jones Act claim (so that the last day of the period, falling on a Sunday, should be extended to the following Monday), the court rejected the argument that Civil Rule 77(a)'s "courts always open" provision would satisfactorily address such a situation: "Theoretically, the putative litigant might hunt up a Judge of this Court or the Clerk at his residence or elsewhere and file with one of them. But I think it unfair that substantial rights should depend upon the doubtful contingencies which may arise in the attempt to do so." Rutledge v. Sinclair Refining Co., 13 F.R.D. 477, 479 (S.D.N.Y. 1953).

[17] An early case indicated that the judge is not such an appropriate official: In In re Gubelman, 10 F.2d 926, 929 (2d Cir. 1925), *modified on other grounds*, Latzko v. Equitable Trust Co. of New York, 275 U.S. 254, 257 (1927), the Second Circuit interpreted "filing" (for purposes of a statutory provision concerning bankruptcy) to require presentation to the court clerk: "A paper is not filed by presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case." But see, e.g., Civil Rule 5(e) ("The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. . . .").

[18] At least one early case applied this principle to determine whether a diversity action was filed within the relevant state statute of limitations. See Hagy v. Allen, 153 F.Supp. 302, 305 (E.D. Ky. 1957) (citing Civil Rule 5(e) and rejecting defendants' argument "that since the complaints we[re] filed [with the clerk at her home] and not at the office that they were not properly filed on December 31"). *Hagy*, of course, predates the Supreme Court's holding that Civil Rule 3 (providing that an action is commenced by filing complaint) is not "intended to toll a state statute of limitations." Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980).

depositories' to accommodate after-hours filings"; and declining to decide whether an item is filed at the time it is placed in such a depository after hours).[19]

Other cases are yet more liberal, and provide that the "courts always open" provisions mean that filing has been effected when litigants to leave the papers at the clerk's office (or another place designated by the clerk's office, such as a post office box) even if no one from the clerk's office is there to receive it at that time.[20]

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[19] Likewise, a district court considering a case in which the statute of limitations ran out on a Sunday and the litigant's representative "arrived at the office of the clerk of this court, as he says, at 12:15 P.M. [on Saturday] only to find it closed," observed that the suit "could have been filed on [that] Saturday . . . , with any judge of the court." Rose v. United States, 73 F. Supp. 759, 760 & n.1 (E.D.N.Y. 1947). See also In re Asher Development III, Inc., 143 B.R. 788, 788-89 (D. Colo. 1992) ("Although there is no explicit local bankruptcy rule on point, custom allows an attorney to make prior arrangements to file tardy pleadings with the clerk of a court at a convenient location outside of normal business hours."); In re Peacock, 129 B.R. 290, 291 (Bankr. M.D. Fla. 1991) (in rejecting argument that filing could not have been accomplished on a Sunday, citing Bankruptcy Rule 5001 for proposition that "that the clerk and the court are always available to accept filings, even at their homes"); Greeson v. Sherman, 265 F. Supp. 340, 342 (W.D. Va. 1967) (interpreting Civil Rules 3 and 5(e) and holding that filing was effective at the time that "plaintiff's complaint was delivered to the home of the Deputy Clerk on the night of December 30, 1966 by plaintiff's counsel"); Muse v. Freeman, 197 F. Supp. 67, 69-70 (E.D. Va. 1961) ("Irrespective of the validity of the order closing the Clerk's Office to the public on Saturdays, the evidence is clear that deputy clerks, whenever called upon to do so, will accept legal documents for filing on Saturdays. Moreover, the Judge is generally available in his office on Saturdays due to the congested docket prevailing in this area. That the present action could have been filed on Saturday, April 23, 1960, cannot be denied.").

[20] See, e.g., Greenwood v. State of N.Y., Office of Mental Health (OMH), 842 F.2d 636, 639 (2d Cir. 1988) (holding that time-stamped deposit of Section 1983 complaint in court's night depository box constituted filing for purpose of statute of limitations); Freeman v. Giacomo Costa Fu Andrea, 282 F. Supp. 525, 527 (E.D. Pa. 1968) (reasoning "that if plaintiff's messenger had deposited the complaint in the clerk's mail-slot or slipped it under the door of the clerk's office, as soon as he arrived at the courthouse, the action would have been 'commenced' during decedent's lifetime"); see also Johansson v. Towson, 177 F. Supp. 729, 731 (M.D. Ga. 1959) (holding that "the receipt by the Deputy Clerk of these complaints in his Post Office Box in the early morning hours of Saturday, August 23, constituted a sufficient filing of these suits prior to midnight of the following day, notwithstanding the fact that the Clerk did not open the box until 8:30 a.m. on Monday, August 25"); Johnson v. Esso Standard Oil Co., 181 F. Supp. 431, 433-34 (W.D. Pa. 1960) (finding that complaint "was . . . placed in the Clerk's post office box on November 24, 1958, after 2:30 p.m. and before 5:00 p.m., and . . . picked up by the Clerk's office the following day," and holding that "the delivery of this complaint to the Clerk in his post office box on Monday, November 24, 1958, constituted a filing of the complaint and commencement of plaintiffs' action on that day"). Another case relied on a "courts always open" provision to hold a 5:55 p.m. filing timely; since the court did not specify that the litigant sought out a court official at that hour, this may have been a case in which the litigant simply dropped off the papers at the clerk's office. See In re Warren, 20 B.R. 900, 902 (Bankr. D. Me. 1982).

The treatises. Almost all the treatises that I surveyed take the view that if the clerk's office is closed the litigant must find an appropriate court official and deliver the papers to that person. See, e.g., Wright, Miller & Marcus, 12 Fed. Prac. & Proc. Civ.2d § 3081 (as updated 2006) (courts-always-open provision "does not mean that the office of the clerk of the court must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e) papers may be filed out of business hours by delivering them to the clerk or deputy clerk or, in case of exceptional necessity, the judge").[21] Moore's Federal Practice notes that "[h]anding over papers to the clerk may take place at the clerk's office or home," and warns that "[l]eaving papers under the door of the clerk's office after the office is closed has, in the past, been held to be insufficient to constitute filing." Mary P. Squiers, 1-5 Moore's Federal Practice - Civil § 5.30. The treatise argues, however, that in light of Civil Rule 77(a), "the placement of papers in a night depository box maintained exclusively by the clerk" ought to be held "sufficient to constitute filing as of that date for statute of limitations purposes." Id.[22]

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[21] See also David G. Knibb, Federal Court of Appeals Manual § 7.3 (4th ed., updated through 2006) ("The desperate appellant can still meet the deadline after the clerk's office has closed on the last day by personally delivering the notice to the clerk, together with the prescribed filing fee."); 8 Federal Procedure, Lawyers' Edition § 20:330 (database updated through June 2006) ("There is some authority that, if a deadline is approaching and the clerk's office is closed, a party wishing to file a paper must seek out the clerk and place the paper in his actual custody.") (citing *Casalduc*); Lawrence R. Ahern, III & Nancy Fraas MacLean, Bankruptcy Procedure Manual § 5001:01 (2006 ed.) (citing Bankruptcy Rules 5001 and 5005(a) and stating that "[f]iling is accomplished during non-business hours by personal delivery to either the clerk or the judge of the court where the case under the Code is pending"); Suzanne L. Bailey et al., 36 C.J.S. Federal Courts § 488 (database updated May 2006) ("A notice of appeal may be filed on the last day after the closing hours of the clerk's office by seeking out the clerk or deputy clerk and delivering the notice of appeal to him or her . . . .").

[22] One treatise seems to go further than Moore's, suggesting that when an official cannot be found to receive the papers in person, the "courts always open" provision permits the litigant to deliver the papers to the closed office:

> The fact that the clerk's office is physically closed should not deter a party from taking steps to file papers either by slipping or sliding the papers under the door of the clerk's office, by leaving the papers in the clerk's mail slot or post office box, by delivering the papers to the clerk at his or her home, or by delivering the papers to the judge. And, if the clerk's office is open but there is no one present to receive the papers, the papers may be left in his or her office. . . . When papers are "filed" but are not physically handed over to the proper official, counsel should, at the earliest opportunity, call the clerk of court to inform him or her about such "filing" to insure that the papers are not lost or misplaced; otherwise the papers might not be considered "filed," at least in those jurisdictions where "filing" requires delivery of the paper into the actual custody of the proper official.

8A Federal Procedure, Lawyers' Edition § 22:24 (database updated June 2006).

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

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

**RE: Proposed Amendment to Rule 12(b)**

**DATE: September 29, 2006**

In April the Committee deferred until the October meeting consideration of the Department's proposal to amend Rule 12(b) to require the defense to raise a claim that the indictment or information fails to state an offense before trial.

After the Committee's meeting, on April 17, 2006, the Supreme Court granted review in *United States v. Resendiz-Ponce* (No. 05-98). In that case, the Court will be deciding whether a failure to include in an indictment an element of the crime can ever be excused as "harmless error." The Ninth Circuit ruled that the charges must always be dismissed if there is such an omission. *United States v. Resendiz-Ponce*, 425 F.3d 729, 732-33 (9th Cir. 2005).

Although *Resendiz-Ponce* decision does not directly impact the pending Rule 12 proposal, the Department–which had proposed the amendment–has suggested that the Committee defer its consideration of the proposal until after the case is decided.

The proposal will be deferred to a later meeting.

Westlaw.



126 S.Ct. 1776, 74 USLW 3476, 75 USLW 3018, 74 USLW 3584, 74 USLW 3579, 06 Cal. Daily Op. Serv. 3140, 164 L.Ed.2d 515
**(Cite as: 126 S.Ct. 1776)**

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Briefs and Other Related Documents

Supreme Court of the United States
UNITED STATES, petitioner,
v.
Juan **RESENDIZ-PONCE.**
**No. 05-998.**

April 17, 2006.

Case below, 425 F.3d 729.

Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States ***1777** Court of Appeals for the Ninth Circuit granted.

U.S.,2006
U.S. v. Resendiz-Ponce
126 S.Ct. 1776, 74 USLW 3476, 75 USLW 3018, 74 USLW 3584, 74 USLW 3579, 06 Cal. Daily Op. Serv. 3140, 164 L.Ed.2d 515

Briefs and Other Related Documents (Back to top)

- 2006 WL 2803783 (Appellate Brief) Reply Brief for the United States (Sep. 28, 2006) Original Image of this Document (PDF)
- 2006 WL 2506637 (Appellate Brief) Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent (Aug. 25, 2006)
- 2006 WL 2506638 (Appellate Brief) Brief of the National Association of Federal Defenders as Amicus Curiae Supporting Respondent (Aug. 25, 2006)
- 2006 WL 2619932 (Appellate Brief) Brief of Respondent (Aug. 24, 2006) Original Image of this Document (PDF)
- 2006 WL 2351844 (Appellate Brief) Brief of Amicus Curiae Paul Hardy in Support of Respondent Juan Resendiz-Ponce (Aug. 10, 2006) Original Image of this Document (PDF)
- 2006 WL 1732858 (Joint Appendix) (Jun. 23, 2006)
- 2006 WL 1794485 (Appellate Brief) Brief for the United States (Jun. 23, 2006) Original Image of this Document (PDF)
- 2006 WL 767865 (Appellate Petition, Motion and Filing) Reply Brief for the United States (Mar. 23, 2006) Original Image of this Document (PDF)
- 2006 WL 1002524 (Appellate Petition, Motion and Filing) Respondent's Brief in Support of Certiorari (Mar. 9, 2006) Original Image of this Document with Appendix (PDF)
- 2006 WL 304682 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Feb. 8, 2006) Original Image of this Document (PDF)
- 05-998 (Docket) (Feb. 8, 2006)

END OF DOCUMENT

Westlaw.



2006 WL 304682 (U.S.)

**(Cite as: 2006 WL 304682)**

Supreme Court of the United States.
UNITED STATES OF AMERICA, petitioner,
v.
Juan RESENDIZ-PONCE.
No. 05-998.
February 8, 2006.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

Paul D. Clement, Solicitor General, Counsel of Record.Alice S. Fisher, Assistant Attorney General. Michael R. Dreeben, Deputy Solicitor General. Kannon K. Shanmugam, Assistant to the Solicitor, General.Michael A. Rotker, Attorney, Department of Justice, Washington, D.C. 20530-0001, (202) 514-2217.

QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

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

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

**RE:** **Procedures for Sealed Cases**

**DATE:** **September 30, 2006**

In response to media reports publicizing the existence of sealed cases in certain federal district courts, Chief Judge Joel Flaum canvassed the district courts in the Seventh Circuit where five districts reported sealed cases. The canvass revealed that there was no uniformity in the docketing practices, and that the majority of sealed cases were criminal cases or qui tam actions. After discussion, the Seventh Circuit Judicial Council voted to request that the Standing Committee study the issue to determine whether it would be appropriate to have guidelines or procedures for the docketing of these cases.

Because the matter implicates docketing practices and the CM/ECF system, which is within the jurisdiction of the Committee on Court Administration and Case Management, Judge Levi referred the matter to that committee.

The letters of Judge Flaum and Judge Levi are attached.

This is an information item for the October meeting on Amelia Island.

United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604



06-CV-C
06-CR-E

Tel: 312-435-5626
Fax: 312-435-7539

Chambers of
Joel M. Flaum
Chief Judge

June 13, 2006

LRM
CALEE
BURCHILL
SELLERS
MINOR
AUGUSTYN
LOWNEY
MATTOS
MCCABE
RABIEJ

Chief District Judge David F. Levi
Chair of the Judicial Conference Committee
On Rules of Practice and Procedure
United States District Court
Eastern District of California
2504 Robert T. Matsui
United States Courthouse
501 I Street
Sacramento, California 95814-7300

Dear David:

In response to recent media accounts of sealed cases in certain federal district courts, I directed that a canvass be made of the seven district court clerks offices in our circuit regarding such cases. Five of the districts reported having sealed cases, however, there appeared to be no uniformity in the manner in which they were docketed. Little if any information is provided concerning the nature of the proceedings. Although the majority of the sealed matters were criminal or *qui tam* cases it appears that there may be other types of cases as well.

At the Seventh Circuit Judicial Council meeting on May 23, 2006, the issue of how sealed cases are handled was discussed. The Council voted to recommend that your committee study this issue with the thought that there may be some benefit to having guidelines and/or specific procedures for the captioning and docketing of sealed cases.

All the best,

Joel M. Flaum

JMF:dml

cc: Director L. Ralph Mecham
Collins T. Fitzpatrick
Gino J. Agnello

# United States District Court

Eastern District of California
Robert T. Matsui United States Courthouse
501 "I" Street, Suite 14-230
Sacramento, California 95814
(916) 930-4090

Chambers of
David F. Levi
Chief Judge

August 18, 2006

Honorable John R. Tunheim
United States District Court
13E United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Dear Judge Tunheim:

On behalf of the Seventh Circuit Judicial Council, Chief Judge Joel Flaum sent me the enclosed letter, requesting that the rules committees consider amending the rules to provide guidance to the courts on captioning and docketing sealed cases. Court practices on recording sealed cases in the docket vary, with some districts omitting entirely any references in the docket. Civil Rule 79 and perhaps Criminal Rule 55 authorize the Administrative Office, with Judicial Conference approval, to prescribe national docketing requirements. Presumably this authority would extend to the captioning and docketing of sealed cases.

The judicial council's request implicates docketing practices and the operation of the CM/ECF system, which lie within the jurisdiction of the Committee on Court Administration and Case Management. Because the rules probably already provide ample authority to the Judicial Conference to prescribe national docketing requirements, I would very much appreciate your views on whether the judicial council's request should be addressed by your committee. Of course, the rules committees will assist in any way that you deem helpful.

Thank you.

Sincerely,

Enclosure
cc: Chief Judge Joel M. Flaum
Mr. Peter G. McCabe, Secretary
Mr. Abel J. Mattos

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

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

**RE:** **Rules 32.1 and 46, Revoking Probation or Supervised Release & Revoking Pretrial Release**

**DATE:** **September 30, 2006**

As indicated in the attached memorandum from Judge Battaglia, the Rules of Criminal Procedure do not presently address the procedure required for the issuance of an arrest warrant for alleged violations of supervised release conditions, and there is a gap in the rules relative to warrants and charging documents.

Judge Battaglia has proposed amendments to Rules 32.1 and 46 that would fill this gap.

This item is on the agenda for the October meeting on Amelia Island.

# 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
Fax: (619) 702-9988


## MEMORANDUM

TO: Judge Bucklew

CC: Sara Sun Beale and John Rabiej

FROM: Judge Battaglia

RE: Possible Amendments to Rule 32.1 and 46

DATE: October 5, 2006

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A colleague called me recently searching for procedural guidance on the procedure required for the issuance of an arrest warrant for alleged violations of supervised release conditions. As demonstrated below, there is no current procedural rule addressing the issue, and in fact there is a "gap" in our constellation of rules relative to warrants and charging documents.

I did an informal survey of the judges serving on the Federal Magistrate Judge Association Board of Directors and the judges serving on the Executive Board of the Ninth Circuit Magistrate Judges. I have the pleasure of serving on both. Those judges feel that procedural guidance would be very useful. In fact, they pointed out that "we have same problem" associated with warrants for alleged violation of pretrial release conditions.

Rules 3 (complaint), 4 (warrant on a complaint), 9 (warrant on indictment or information), and 41 (search warrants), respectively, specify the necessary documentation and "showing" associated with the issuance of charging documents as well as warrants. They specify the necessary "written statement of essential facts constituting the offense charged . . . under oath . . ." Fed. R. Crim. P. 3, "one or more affidavits . . . establish probable cause" Fed. R. Crim. P. 4 and 9; or, "affidavit," Fed. R. Crim. P. 41(d)(2) required to obtain a warrant. There are no counter-parts for issuing a warrant, and none of the existing rules are broad enough to address warrants for proceeding in these circumstances.

I am therefore writing to propose amendments to Rules 32.1 and 46, respectively, and would ask that this matter be placed on the October, 2006 or April 2007 Agenda (as you determine best) for the committee's review.

As most judges will attest, in the normal course, petitions are brought by probation officers for the issuance of a warrant for alleged violation of probation or supervised release conditions. Probation officers and pre-trial services officers bring similar petitions related to pre-trial release conditions. These will be addressed separately below.

**Probation and Supervised Release Violation Warrants**

I would propose a new paragraph (a) to Rule 32.1 to address this issue. Language could be similar to the following:

> (a) **The Issuance of a Warrant.** After receiving an affidavit from a probation officer or an attorney for the government, a federal judge may issue a warrant to a person authorized to serve it, if there is probable cause to believe that a person has violated a condition of probation or supervised release. The judge may alternatively issue a summons, instead of a warrant, to a person authorized to serve it.
>
> ~~(a)~~(b) **Initial Appearance.** . . .

This amendment would then require relettering of the subparagraphs that follow.

**Discussion**

Currently, Rule 32.1 starts with "a person held in custody." Fed. R. Crim. P. 32.1(a). The predicate procedure to the arrest is absent. This amendment would satisfy a need for procedural guidance in seeking arrest warrants for proceedings under Fed. R. Crim. P. 32.1. As noted above, procedural guidance is provided for search warrants, complaints, arrest warrants on complaints, and arrest warrants on information. All require a finding of probable cause upon oath or affirmation, which is consistent with the Warrant Clause of the Fourth Amendment. See also, *United States v. Piccard*, 207 F.2d 472, 475 (9th Cir. 1953) (noting the Warrant Clause secures an individual's right "to be protected against the issuance of warrant for his arrest, except upon probable cause supported by oath or affirmation"). See also *ex parte Burford*, 7 U.S. (3 Cranch) 448, 453, 2 L. Ed. 495 (1806) ("warrant of commitment was illegal, for want of stating some good cause certain, supported by oath").

The proposed amendment would be consistent with 18 U.S.C. § 3606,[23] which requires probable cause, 18 U.S.C. § 3606, however lacks procedural specificity. The amendment would also conform to current practice as stated above. Finally, this would also be consistent with the "warrant or summons" requirement of 18 U.S.C. §3565(c) for delayed revocation of probation, as well as 18 U.S.C. § 3583(i), dealing with delayed revocation of supervised release. That section provides that a court ordered summons issued during the term of supervised release, extends the Court's jurisdiction to revoke beyond the expiration of the term. One court has recently concluded that the "warrant" mentioned in § 3583(i) must be based on a sworn statement establishing probable cause. *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004).

The use of the term "affidavit" is used intending the interpretation supplied by 28 U.S.C. § 1746.[24] In that regard, a declaration under penalty of perjury would suffice. In the normal

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[23] "If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation, he may be arrested, and, upon arrest shall be taken without unnecessary delay before the court having jurisdiction over him. . ."

[24] "Wherever . . . any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath or

course, these applications or petitions are signed under penalty of perjury. This interpretation and practical use has been upheld in *United States v. Bueno-Vargas*, 383 F.3d 1104 (9th Cir. 2004).

The proposed amendment is stated in permissive language, in the event the judge wants to take action other than the issuance of a warrant. The wording acknowledges the judges ability to issue a summons, instead of a warrant, similar to Rule 4. Rule 4 distinguishes a summons from a warrant in that "it must require the defendant to appear before a magistrate judge at a stated time and place" as opposed to being a subject of an arrest. (See, Fed. R. Crim. P. 4(b)(2).)

Additionally, the amendment would not preclude the Court's ability to *sua sponte* initiate proceedings based on information acquired from any source. *U.S. v. Davis*, 151 F.3d 1304, 1307-08 (10th Cir 1998).

In practice, there are occasions where the judge will choose to take no action beyond recommending the probation officer to continue to monitor and report if the suspect's conduct continues. The judge might otherwise chose a summons over a warrant under a particular set of circumstances. Leaving this in a permissive form would preserve that discretion and flexibility. In a mandatory form, then in every instance, where probable cause is shown, a warrant would have to issue. That may be the practice of many judges individually, but allowing for variation would appear consistent for judges who might have different local or personal practice.

**Pre-trial Release Violation Warrants**

Warrants for an alleged violation of a condition of pre-trial release are covered by 18 U.S.C. § 3148(b). This section provides in pertinent part:

> The attorney for the government may initiate a proceeding for revocation of an Order of Release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such persons arrest was ordered for a proceeding in accordance with this section.

There is no reference in the statute to the procedural requirements upon which the warrant should be supported. Additionally, in practice, probation officers or pre-trial services officers typically apply for the warrants. Clearly, probable cause would be the legal standard. I would therefore, recommend an amendment to Rule 46[25] as follows:

> **(f) Issuance of a Warrant on a Violation.** After receiving an affidavit from an attorney for the government, a probation officer

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affidavit in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established or proved by the unsworn declaration, certificate, verification or statement in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, . . ."

[25] Rule 46 covers release from custody, generally, including a reference to pre-trial release [Fed. R. Civ. P. 46(a)] but does not address pre-trial release violations. This would seem to be the logical place for the proposed amendment.

> or a pretrial services officer, a federal judge may issue a warrant if there is probable cause to believe that a person has violated a condition of pretrial release. The judge may alternatively issue a summons, instead of a warrant.

If adopted, this would require relettering current section (f), and those that follow for consistency. This amendment would make clear that current practice experience, that probation officers and pre-trial services officers bring forth the applications for these warrants. It also confirms the need to establish probable cause in a trustworthy format. In this case, the format would again be the "affidavit" as is interpreted in 28 U.S.C. § 1746. By retaining the ability of the "attorney for the government" to proceed, the rule would be consistent with current 18 U.S.C. § 3148(b) in that regard.

I trust that this brief summary adequately addresses the issue and a potential solution that would serve as a basis for discussion by the Advisory Committee on Criminal Rules.

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

**FROM:** **James Ishida**

**RE:** **Rule 15, Permitting Deposition of a Witness Without Defendant's Physical Presence, Department of Justice Proposal**

**DATE:** **October 5, 2006**

As described in the attached letter from Ben Campbell to Judge Bucklew, the Department of Justice proposes that Criminal Rule 15 be amended to permit the deposition of a prospective witness without the physical presence of the defendant where the trial court makes certain specific findings.

This item is on the agenda for the October meeting on Amelia Island.

**U.S. Department of Justice**

Criminal Division

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

October 5, 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 15 of the Federal Rules of Criminal Procedure be amended to permit depositions without the defendant's physical presence in cases where the trial court finds all of the following: (a) the deposition involves a witness whose testimony could provide substantial proof of a material fact; (b) the witness is beyond the government's subpoena power and is unwilling or unable to travel to the court to testify; (c) the secure transportation of the defendant to the witness's location cannot be assured or the country in which the witness is located will not permit the defendant to attend the deposition; and (d) the use of video teleconferencing or other reasonable means will permit the defendant to meaningfully participate in the deposition. We hope the Advisory Committee will consider this proposal at its April 2007 meeting.

As part of Department's efforts to prosecute transnational crimes, we have found, with increasing frequency, that critical witnesses live in, or have fled to, countries where they cannot be reached by the government's subpoena power. Although Rule 15 permits depositions of witnesses in certain circumstances, the current Rule does not specifically address cases where an important witness is not in the United States and where it would be impossible to securely transport the defendant to the witness's location for a deposition.

Recognizing that there are both important witness confrontation principles involved in such cases as well as vital law enforcement and public safety interests, we believe the Rule should be amended to authorize a deposition outside of the defendant's physical presence only in very limited circumstances. We recommend an amendment to Rule 15(c) that delineates these circumstances and the specific findings a trial court must make before permitting parties to

depose a witness outside the defendant's presence. We recommend the following changes to the Rule:

> "**(c) Defendant's Presence.**
>
> **(1) Defendant in Custody.** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless: ~~the defendant:~~
>
> (A) the defendant waives in writing the right to be present; ~~or~~
>
> (B) the defendant persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion~~.~~; or
>
> (C) the court finds all of the following: (a) the deposition involves a witness whose testimony could provide substantial proof of a material fact; (b) the witness is beyond the government's subpoena power and is unwilling or unable to travel to the court to testify; (c) the secure transportation of the defendant to the witness's location cannot be assured or the country in which the witness is located will not permit the defendant to attend the deposition; and (d) the use of video teleconferencing or other reasonable means will permit the defendant to meaningfully participate in the deposition.
>
> **(2) Defendant Not in Custody.** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court~~.~~, unless the court finds all of the following: (a) the deposition involves a witness whose testimony could provide substantial proof of a material fact; (b) the witness is beyond the government's subpoena power and is unwilling or unable to travel to the court to testify; (c) no reasonable set of conditions will assure the defendant's appearance at the deposition or any subsequent proceeding as required; and (d) the use of video teleconferencing or other reasonable means will permit the defendant to meaningfully participate in the deposition. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant – absent good cause – waives both the right to appear and any objection to the taking and use of the deposition based on that right."

The proposed amendment requires the trial court to make case specific findings that the testimony sought would provide substantial proof of a material fact and that there are reasons why the witness cannot travel to testify at court and why the defendant cannot be brought to the witness. Several courts of appeals have authorized depositions of foreign witnesses without the defendant being present in these limited circumstances. For example, in *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988), a witness held in custody in France was deposed while the defendant was in federal custody in the United States and could not be securely transported abroad. The deposition was completed through several rounds of submitting and translating

questions and answers, pursuant to French law, while the defendant was accessible by phone in the United States. *Id.* at 947-48. The Second Circuit found that taking the deposition in this manner did not violate Rule 15, because the Rule is intended "to facilitate the preservation of testimony." *Id.* at 949-50. The court suggested a dual approach to the application of Rule 15: "In cases involving depositions conducted within the United States – where it is within the power of the court to require the defendant's presence and within the power of the government to arrange it – a strict application of Rule 15(b) may be required." *Id.* at 949. By contrast, "[i]n the context of the taking of a foreign deposition, we believe that so long as the prosecution makes diligent efforts, as it did in this case, to attempt to secure the defendant's presence, preferably in person, but if necessary via some form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witness' testimony be preserved anyway." *Id.* at 950.

Similarly, the Third Circuit approved the government's deposition of two witnesses in Belgium who were unavailable for trial, where the defendant had one telephone line that allowed him to listen to the live proceedings and another telephone line that allowed him to speak privately with his attorney, and the proceedings were videotaped. *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990). The court held that an "absolute rule [requiring the defendant's presence] would transgress the general purpose of Rule 15, which is to preserve testimony 'whenever due to exceptional circumstances of the case it is in the interest of justice' to do so." *Id.* at 265 (quoting Fed. R. Crim. P. 15(a)).

Additionally, the Ninth Circuit held that "[w]hen the government is unable to secure a witness's presence at trial, Rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings." *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998). In that case, the court approved the deposition of Canadian witnesses without the defendant's presence, because the witnesses refused to voluntarily come to the United States to testify at trial and U.S. officials could not assure the secure transportation of the defendant to and from Canada for the deposition. *Id.*[1]

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[1]In a First Circuit case, a British witness refused to come to the United States to testify at trial, and the defendant could not be securely transported to the United Kingdom because the British authorities refused to take him into temporary custody and the U.S. Marshals Service lacked the authority to do so abroad. *United States v. McKeeve*, 131 F.3d 1, 7 (1st Cir. 1997). When the deposition took place in the U.K., the defendant in the U.S. was equipped with two telephone lines to listen to the proceedings and to consult with his attorney, respectively. *Id.* The court found that when "a foreign nation effectively preclude[s] the defendant's presence, furnishing the defendant with the capability for live monitoring of the deposition, as well as a separate (private) telephone line for consultation with counsel, usually will satisfy the demands of the Confrontation Clause." *Id.* at 8.

We believe the Rule should be amended to explicitly authorize the deposition of overseas witnesses without the defendant's presence in appropriate and limited circumstances to establish a uniform and proper means for obtaining witness testimony from overseas witnesses. For example, in *United States v. Yates*, 438 F. 3d 1307 (11th Cir. 2006), in a case charging defendants with various prescription-drug-related offenses arising from their involvement in an Internet pharmacy, the government sought the testimony of two essential witnesses in Australia, a processor of customer Internet payments and a doctor whose name defendants used on Internet drug prescriptions. After both witnesses refused to travel to the United States, the district court granted the government's motion to permit them to testify via live, two-way video teleconferencing that permitted the defendants, judge, and jury to see the witnesses and the witnesses to see the courtroom.

On appeal, the Eleventh Circuit, sitting *en banc*, held that obtaining trial testimony of these foreign witnesses through video teleconferencing violated the Confrontation Clause of the Sixth Amendment by failing to meet the "considerations of public policy and the necessities of the case" standard that warrants a departure from face-to-face confrontation. *Yates,* at 1312 (quoting *Maryland v. Craig*, 497 U.S. 836, 849 (1990)), 1316. The court held that the trial judge's dual findings that the government had asserted an important public policy of providing the fact-finder with crucial evidence and that the government had an interest in expeditiously and justly resolving the case were "not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face." *Id.* at 1316. *Craig* required case-specific findings based on an evidentiary record that explained why the defendant could not be placed in the same room as the witnesses.

In remanding the case for retrial, the court indicated that Rule 15 depositions would be a satisfactory alternative to video teleconferencing, since the rule provided for the defendant's presence. In addressing the government's observation that Rule 15 depositions occasionally occur outside the defendant's presence, the panel acknowledged that there may be the "rare, exceptional case" where a defendant is absent, but, only where there is "evidentiary support for a case-specific finding that the witnesses and Defendants could not be placed in the same room for the taking of pre-trial deposition testimony pursuant to Rule 15." *Yates* at 1317. The Eleventh Circuit previously upheld such a deposition in a case where the defendant listened to the live deposition of a foreign witness through a telephone line and was able to consult with his lawyer during the proceeding. *United States v. Mueller*, 74 F.3d 1152, 1157 (11th Cir. 1996).

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it relates to a significant and growing concern. As the district court noted in the *Yates* case, "in today's world of the Internet and increasing globalization, more and more situations will arise in which witnesses with material knowledge are beyond the subpoena power of the Court." *Id.* at 1316, fn. 7. Moreover, we believe this proposal embodies an appropriate balance of defendant rights with the need to obtain material witness testimony from persons beyond the subpoena power of the United States. As we describe above, appellate courts examining the issue have authorized depositions of such witnesses without the defendant's presence in certain limited circumstances. These ruling are consistent with the recent Supreme

Court decisions on the Confrontation Clause, including *Crawford v. Washington*, 541 U.S. 36 (2004), in that the depositions occurred only when the witnesses were unavailable and only where the defendant had an opportunity to cross-examine. *Id.* At 59. We are asking the Committee to codify the rulings of these courts and to explicitly authorize these depositions.

We appreciate your assistance with this proposal and look forward to working with the Committee on this proposal.

Sincerely,

Benton J. Campbell
Acting Chief of Staff

cc: Professor Sara Sun Beale
Mr. John Rabiej

**Advisory Committee on Criminal Rules**
**October 2006**
**Agenda Item Tab ___**
**Information Item**

This report briefs the Committee on the work of the Administrative Office and the District Court Forms Working Group in drafting and revising forms that implement the Federal Rules of Criminal Procedure.

The AO has issued approximately 450 standard forms, all of which are posted in the Forms area of the J-Net. Most of them deal with administrative matters, but several dozen implement criminal procedure, including arrest and search warrants, subpoenas, and complaints. The forms have been issued by the AO under the authority of Criminal Rule 55. Attached is a list of all the criminal forms — except for the judgment and commitment forms and the forms relating to probation and pretrial services, over which the Criminal Law Committee has traditionally exercised jurisdiction.

For the past 25 years, the District Court Forms Working Group has monitored the use of the forms in the courts and assisted the AO in maintaining and updating them. It has been chaired all this time by Judge Harvey E. Schlesinger, a former member of the Criminal Rules Committee and now a Senior Judge in the Middle District of Florida. It consists of six clerks of court and five magistrate judges. The group meets once a year and is staffed by Assistant Director Peter McCabe and others. It regularly solicits views from clerks and others in the courts on how to make the forms clearer and easier to use.

At its most recent meeting this July, the working group discussed revisions to the forms to implement the judiciary's interim privacy policy and the new privacy rules just approved by the Judicial Conference and expected to take effect on December 1, 2007. The rules, including Fed. R. Crim. P. 49.1, require redaction of personal identifiers such as home addresses, dates of

birth, and Social Security numbers from all publicly available case documents unless one of the limited exceptions applies. The working group asked the AO to review all existing AO forms and to minimize, where possible, instances where personal data are requested on forms that would normally be publicly available on PACER and consequently require redaction. They noted, for instance, that the appearance bond forms (AO-98, AO-98A, AO-99) call for the address of the defendant and that of the surety, which, if the address is residential, would normally require redaction. A copy of AO-98 is attached.

The working group and the AO welcome any suggestion from the Committee on revising existing forms or creating new forms.

Attachment: 1. List of Forms Relating to Criminal Matters.
2. Appearance Bond Form (AO-98).

# List of Forms Relating to Criminal Matters

(*Judgment forms and forms relating to probation and pretrial services omitted)

| AO Form No. | Name of AO Form |
|---|---|
| AO-0083 | Summons in a Criminal Case |
| AO-0086A | Consent to Proceed - Misdemeanor |
| AO-0089 | Subpoena in a Criminal Case |
| AO-0091 | Criminal Complaint |
| AO-0093 | Search Warrant |
| AO-0093A | Search Warrant Oral Testimony |
| AO-0094 | Commitment to Another District |
| AO-0098 | Appearance Bond |
| AO-0098A | Appearance and Compliance Bond |
| AO-0099 | Appearance Bond of Witness |
| AO-0100 | Agreement to Forfeit Property |
| AO-0106 | Affidavit for Search Warrant |
| AO-0108 | Application and Affidavit for Seizure Warrant |
| AO-0109 | Seizure Warrant |
| AO-0110 | Subpoena to Testify Before Grand Jury |
| AO-0190 | Record of Grand Jurors Concurring |
| AO-0191 | Report of Failure to Concur in Indictment |
| AO-0199A | Order Setting Conditions of Release |
| AO-0199B | Additional Conditions of Release |
| AO-0199C | Advice of Penalties/Acknowledgment |
| AO-0238 | Warrant of Arrest |
| AO-0241 | Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) |
| AO-0242 | Petitioner's Response as to Why His or Her Petition Under 28 USC § 2254 Should not be Barred Under Rule 9 |
| AO-0243 | Motion to Vacate/Set Aside Sentence (28 U.S.C. § 2255) |
| AO-0244 | Movant's Response as to Why His Motion Under 28 USC § 2255 Should not be Barred Under Rule 9 |
| AO-0246A | Order of Discharge and Dismissal/Expungement |
| AO-0249 | Reinstatement of Federal Benefits |
| AO-0252 | Criminal Docket Sheet |
| AO-0257 | Defendant Information Relative to a Criminal Action -- in U.S. District Court |
| AO-0442 | Warrant for Arrest |
| AO-0443 | Warrant for Arrest of Witness |
| AO-0455 | Waiver of Indictment |
| AO-0466 | Waiver of Rule 32.1 Hearings |
| AO-0466A | Waiver of Rule 5 & 5.1 Hearings |
| AO-0467 | Order That Defendant Appear in District of Prosecution or District Having Probation Jurisdiction and Transferring Bail |
| AO-0468 | Waiver of Preliminary Examination or Hearing |
| AO-0470 | Order of Temporary Detention Pending Hearing |
| AO-0471 | Order of Temporary Detention to Permit Revocation |
| AO-0472 | Order of Detention Pending Trial |
| JS-0045 | Criminal Case Cover Sheet |

# UNITED STATES DISTRICT COURT

_____ District of _____

UNITED STATES OF AMERICA
V.

## APPEARANCE BOND

_____
Defendant

Case Number:

☐ Non-surety: I, the undersigned defendant acknowledge that I and my . . .
☐ Surety: We, the undersigned, jointly and severally acknowledge that we and our . . .
personal representatives, jointly and severally, are bound to pay to the United States of America the sum of
$ _____ , and there has been deposited in the Registry of the Court the sum of
$ _____ in cash or _____ (describe other security.)

The conditions of this bond are that the defendant _____
(Name)
is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment, may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on _____ at _____
Date Place

Defendant _____ Address _____

Surety _____ Address _____

Surety _____ Address _____

Signed and acknowledged before me _____
Date

_____
Judge/Clerk

Approved _____

## JUSTIFICATION OF SURETIES

I, the undersigned surety, say that I reside at _____

_____ ; and that my net worth is the sum of

_____ dollars ($ _____ ).

I further state that

_____
Surety

Sworn to before me and subscribed in my presence on _____
Date

at _____ .
Place

_____ _____
Name and Title Signature of Judge/Clerk

---

I, the undersigned surety, state that I reside at _____

_____ ; and that my net worth is the sum of

_____ dollars ($ _____ ).

I further state that

_____
Surety

Sworn to before me and subscribed in my presence on _____
Date

at _____ .
Place

_____ _____
Name and Title Signature of Judge/Clerk

Justification Approved: _____
Judge