ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, D.C.
April 6-7, 2009

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 6-7, 2009
WASHINGTON, D.C.

I. PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of October 2008 Meeting in Phoenix, Arizona

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

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Time Computation Amendments Approved by the Judicial Conference and Transmitted to the Supreme Court (No Memo)

1. Rule 45. Computing and Extending Time. Proposed amendment simplifying time computation methods.

2. Related amendments proposed regarding the time periods in Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59; Rule 8 of the Rules Governing § 2254 Proceedings; and Rule 8 of the Rules Governing § 2255 Proceedings.

B. Other Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court (No Memo)

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.

2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.

3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.

4. Rule 41. Search and Seizure. Proposed amendments specifying procedure for warrants to search for or seize electronically stored information.

5. Rule 11 of the Rules Governing § 2254 Proceedings. Proposed amendments clarifying requirements for certificates of appealability.

6. Rule 12 of the Rules Governing § 2254 Proceedings. Proposed amendment renumbering provision regarding applicability of Civil Rules.

7. Rule 11 of the Rules Governing § 2255 Proceedings. Proposed amendments clarifying requirements for certificates of appealability.

C. Proposed Amendments Published for Public Comment (Memos)

1. Rule 5. Initial Appearance. Proposed amendment implementing the Crime Victims' Rights Act.

   Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

   Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the presence of the defendant in limited circumstances and after court makes case-specific findings.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment clarifies standard and burden of proof regarding the release or detention of a person on probation or supervised release.

D. Comments Submitted on Proposed Amendments Published for Public Comment

III. REPORTS OF SUBCOMMITTEES

A. Rule 12(b) Challenges for Failure to State an Offense; Rule 34 (Memo)

B. Use of Technology (Memo) and Electronic Signatures on Indictments (Memo)

C. Rule 32(h) and Procedural Rules for Sentencing (Memo)

D. Crime Victims (Memo Regarding Rule 12.4 and letter from Department of Justice)

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

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

B. Update on Work of Sealing Committee.

C. Criminal Forms.

D. **Memorandum from Judge Rosenthal Regarding Privacy Subcommittee**

E. **Criminal Law Committee's Proposed Authority Permitting Probation/Pretrial Services Officers to Obtain Search Warrants**

V. **DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS**

A. **Fall Meeting**

B. **Other**

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:	**Reporter:**
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Charles L.B. Lowndes Professor Duke University School of Law Visiting Professor NYU Law School Room 429 Vanderbilt Hall 40 Washington Square South New York, NY 10012-1099 --- Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
Members: 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	Rachel Brill, Esquire Mercantil Plaza Building Suite 1113 2 Ponce de Leon Avenue San Juan, PR 00918
Leo P. Cunningham, Esquire Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, CA 04304-1050	Honorable Robert H. Edmunds, Jr. Associate Justice of the Supreme Court of North Carolina Justice Building 2 East Morgan Street Raleigh, NC 27601
Honorable Morrison C. England, Jr. United States District Court 501 I Street – Suite 14-230 Sacramento, CA 95814-7300	Honorable James P. Jones Chief Judge United States District Court 180 West Main Street - Room 146 Abingdon, VA 24210
Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312	Professor Andrew D. Leipold Edwin M. Adams Professor of Law University of Illinois College of Law 504 E. Pennsylvania Avenue Champaign, IL 61820

ADVISORY COMMITTEE ON CRIMINAL RULES (CONT'D.)

Thomas P. McNamara Federal Public Defender United States District Court First Union Cap Center, Suite 450 150 Fayetteville Street Mall Raleigh, NC 27601	Honorable Donald W. Molloy Chief Judge United States District Court Russell E. Smith Federal Building 201 East Broadway Street Missoula, MT 59802
Mr. Bruce Rifkin Clerk United States District Court United States Courthouse, Lobby Level 700 Stewart Street Seattle, WA 98101-1271 Honorable James B. Zagel United States District Court 2588 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Rita M. Glavin Acting Assistant Attorney General Criminal Division (ex officio) Honorable Rita M. Glavin U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Rm 2107 Washington, DC 20530-0001 Jonathan Wroblewski Director, Office of Policy & Legislation Criminal Division U. S. Department of Justice 950 Pennsylvania Avenue, N.W. Rm 7728 Washington, DC 20530-0001 Kathleen Felton Deputy Chief, Appellate Section Criminal Division U. S. Department of Justice 950 Pennsylvania Avenue, N.W. Rm 1264 Washington, DC 20530-0001
Liaison Member: Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818	

ADVISORY COMMITTEE ON CRIMINAL RULES
SUBCOMMITTEES

Subcommittee on Sentencing Judge Donald W. Molloy, Chair Judge Morrison C. England, Jr. Thomas P. McNamara Justice Robert H. Edmunds, Jr. Rachel Brill, Esquire DOJ Representative	**Subcommittee on CVRA** Judge James P. Jones, Chair Judge Anthony J. Battaglia Justice Robert H. Edmunds, Jr. Leo P. Cunningham, Esquire DOJ Representative Thomas P. McNamara
Subcommittee on E-Government Rachel Brill, Chair Thomas P. McNamara DOJ Representative Judge James B. Zagel (Liaison to S/C Subcommittee on Sealing)	**Subcommittee on Technology** Judge Anthony J. Battaglia, Chair Judge Robert H. Edmunds, Jr. DOJ Representative Leo P. Cunningham, Esquire Professor Andrew Leipold
Subcommittee on Rule 12 Judge Morrison C. England, Jr., Chair Thomas P. McNamara Professor Andrew D. Leipold DOJ Representative	**Subcommittee on Rule 15** Judge John Keenan, Chair DOJ Representative Leo Cunningham, Esquire Professor Andrew Leipold

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADVISORY COMMITTEE ON CRIMINAL RULES

				Start Date	End Date
Richard C. Tallman Chair	C	Ninth Circuit	Member: Chair:	2004 2007	---- 2010
Anthony J. Battaglia	M	California (Southern)		2003	2009
Rachel Brill	ESQ	Puerto Rico		2006	2009
Leo P. Cunningham	ESQ	California		2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina		2004	2010
Morrison C. England, Jr.	D	California (Eastern)		2008	2011
Matthew W. Friedrich*	DOJ	Washington, DC		----	Open
James P. Jones	D	Virginia (Western)		2003	2009
John F. Keenan	D	New York (Southern)		2007	2010
Andrew Leipold	ACAD	Illinois		2007	2010
Thomas P. McNamara	FPD	North Carolina (Eastern)		2005	2011
Donald W. Molloy	D	Montana		2007	2010
James B. Zagel	D	Illinois (Northern)		2007	2010
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open

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

* Ex-officio

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Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

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ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 20-21, 2008
Phoenix, Arizona

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Phoenix, Arizona, on October 20-21, 2008. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morrison C. England, Jr.
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Matthew W. Friedrich, Acting Assistant Attorney General, Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Assistant Reporter

Judge Mark L. Wolf, whose term expired last month, also attended. Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Judge Rosenthal's law clerk, Andrea Kuperman, was also present. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director for Judges Programs
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
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — and two officials from the U.S. Sentencing Commission, General Counsel Kenneth P. Cohen and Assistant General Counsel Tobias A. Dorsey.

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

The Committee welcomed its newest member, Judge England, from the Eastern District of California, appointed by the Chief Justice to succeed Judge Wolf, whose term just expired.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2008 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court, Pending Before Congress, and Set to Take Effect on December 1, 2008

Mr. Rabiej noted that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, are set to take effect, absent Congressional intervention, on December 1, 2008.

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

Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

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.

Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

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

Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States, but still subject to

administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa.

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.

Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej observed that the Judicial Conference had approved the following proposed rule amendments, which the Rules Committee Support Office was proofreading for eventual submission to the Supreme Court:

Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.

Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.

Rule 32.2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Rule 41. Search and Seizure. The proposed amendment specifies procedure for executing warrants to search for or seize electronically stored information.

Rule 45. Computing and Extending Time. The proposed amendment simplifies time-computation methods. Related proposed amendments involve the time periods in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and Rule 8 of § 2254/§ 2255 Rules.

Rule 11 of the Rules Governing § 2254 Cases. The proposed amendment clarifies requirements for certificates of appealability.

Rule 11 of the Rules Governing § 2255 Cases. The proposed amendment clarifies requirements for certificates of appealability.

C. Other Recent Developments

It was noted that the Judicial Conference had also approved the two dozen or so proposed statutory changes that Congress is being asked to enact to account for the effect of the rule changes on certain statutory time periods. Congressional staff are reportedly optimistic about the

legislation's eventual prospects. Judge Rosenthal noted that chief judges will be alerted, probably in January 2009, about the need for conforming local rule adjustments. The Department of Justice offered to send Congress a letter supporting the statutory changes. Judge Tallman suggested that a similar letter from the Public Defenders would be helpful, so that the non-controversial nature of the proposed time changes is clear.

Judge Tallman noted that the proposed Rule 6 amendment on the use of video conference for the return of a grand jury indictment had not yet been forwarded to the Judicial Conference. It was felt that the Supreme Court should be given an opportunity first to weigh in on the proposed Rule 15 amendments permitting overseas depositions.

The Committee was informed that Congress had enacted Evidence Rule 502 as drafted — a significant accomplishment affecting white-collar criminal law cases, among others.

Professor Beale notified the Committee that Senator Jeff Sessions has requested committee background materials on the proposed amendment of Rule 29 permitting a judgment of acquittal to be appealed. She noted that the Committee had rejected the proposed amendment only after careful study and after weighing the public comments opposing it. Judge Tallman mentioned the Judicial Conference's long-standing policy against legislative efforts to bypass the Rules Enabling Act process. A participant suggested that the issue may involve substantive law outside the rulemaking process, which might call for further examination.

D. Proposed Amendments Approved by the Standing Committee for Publication

Judge Tallman noted that the following amendments were published in August 2008. Public hearings have tentatively been scheduled to take place on January 16 in Los Angeles, California, and on February 9 in Dallas, Texas.

> Rule 5. Initial Appearance. This proposed amendment implements the Crime Victims' Rights Act (CVRA) by directing a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant.
>
> Rule 12.3. Notice of Public-Authority Defense. The proposed amendment implements the CVRA by providing that a victim's address and telephone number should not be automatically provided to the defense. Courts remain free to authorize disclosure for good cause shown.
>
> Rule 15. Depositions. The proposed amendment authorizes a deposition outside the defendant's presence in limited circumstances if the court makes case-specific findings.

Rule 21. Transfer for Trial. The proposed amendment implements the CVRA by requiring that the convenience of victims be considered in determining whether to transfer the proceedings to another district for trial.

Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the evidentiary standard and burden of proof for releasing or detaining a person on probation or supervised release.

III. SUBCOMMITTEE REPORTS

A. Rule 32(h), Procedural Rules for Sentencing

Judge Molloy reported that the majority view of the Rule 32(h) subcommittee, which he chairs, was that the rule should be amended to require notice of a contemplated "variance" and the grounds for a variance from the U.S. Sentencing Guidelines similar to notification requirements governing sentencing "departures." He suggested, however, that the Committee first consult with the Sentencing Commission to learn how the rule has operated in the wake of the Supreme Court's decision in *Irizarry v. United States*, 553 U.S. ___ (June 2008), which held that Rule 32(h) does not apply to a variance from a recommended Guidelines range.

Mr. Wroblewski said that this was the rare situation when prosecutors and defense counsel are on the same side of an issue. Both parties in a criminal case are seeing surprises at sentencing and dislike the lack of predictability. Prior to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Reform Act provided litigants with transparency and an opportunity to be heard on all aspects of sentencing. Post-*Booker*, judges are free to impose sentences either longer or shorter than recommended by the guidelines based on grounds contemplated by neither party. Mr. McNamara agreed that this was a concern.

There was discussion about whether amending Rule 32(h) to *require* notice of a variance would create frivolous grounds for appeal, inviting claims that the notice was insufficiently specific or no notice was given about a given detail. Being specific regarding a Guidelines departure is much easier than regarding a variance. Ms. Felton pointed out that a technical failure of notice can be harmless error, reducing the problem of frivolous appeals. One member stated that lack of notice may be infrequent, but when it does happen, it has severe consequences. She raised concern about a broader issue, that in preparing the presentence report (PSR), probation officers too often rely on one-sided information.

Mr. Cohen from the Sentencing Commission observed that the Commission had sent a letter supporting the proposed expansion of Rule 32(h) to cover variances and would be trying to collect data relevant to the issue. Mr. McNamara expressed support for a rule amendment to increase the flow of information. Currently, he said, probation officers receive information that never makes it to the other side. Other participants at the meeting contended that a rule amendment was unnecessary, that the problem occurs infrequently, and that it had just been addressed by the Supreme Court. District judges almost always handle problems that arise

effectively on a case-by-case basis by granting additional time to respond or a continuance. One member suggested that the Committee continue to study the issue and obtain more data before taking action.

Professor Beale directed the Committee's attention to the related question whether the Committee can, and should, draft a disclosure provision similar to what has been proposed by the American Bar Association (see ABA report at p. 198 of the agenda book). Mr. Wroblewski reported that the Department of Justice was asking the ABA to consider modifying its proposal to include greater reciprocity. Judge Tallman explained that the ABA proposes giving access not only to the presentence report itself, but also to all the underlying documents and oral conversations that the probation officer relies on to prepare the report. The proposal would turn the drafting of the presentence report into an adversary discovery process. Mr. Wroblewski agreed, expressing concern that it would result in disclosure to the defense of confidential witness information in the Department's files, to which probation officers now have access.

One member said that the probation officer often injects the PSR with a lot of information that the defense has never seen. Mr. McNamara agreed, reporting that many times the prosecutor later apologizes and says, "We should have given you that." One member reported that, unlike the ABA proposal itself, none of the local rules cited by the ABA provide for disclosure of information provided to the probation officer by *third-parties*. Mr. McNamara said that probation officers do not share with the defense any information obtained from probation officers in other districts regarding prior crimes and charges against the accused. Ms. Brill added that, although the defense could ask the court to order its probation officer to share the information or could go to another court and read the record of any charges there, this is not an easy process.

Judge Raggi defended the present system, warning that the ABA proposal could turn preparation of a PSR into even more of an adversary proceeding, each party objecting to anything that it might disagree with. If the Committee did decide to adopt something akin to the ABA proposal, Judge Raggi recommended requiring the probation officer to attach the source documents directly to the PSR, thereby giving all parties access to the raw information. Judge Rosenthal recommended that the Committee obtain data to learn how the various local rules have played out in practice.

Further discussion focused on the effects of the proposed amendment. Mr. McNamara suggested that requiring probation officers to disclose all their information sources directly to the parties would obviate the need for judges to get involved in wrangling over the text of the PSR or having to deal with these issues at the sentencing hearing. Judge Wolf reported that First Circuit Judge Michael Boudin had wondered in a recent opinion whether Rule 32(h) should be rescinded completely post-*Booker*. Judge Tallman commented that if the ABA proposal is adopted, then there would be no need for Rule 32(h). The parties would already have all the information they could possibly obtain other than what is in the judge's mind.

Professor King reported that there was debate when the presentence report system was first instituted whether the parties should have access to it, given concerns about chilling the judge's access to all the data needed to make sound sentencing decisions. The Committee should consider whether a requirement that the probation officer disclose every source of information obtained in preparing the PSR would chill the provision of information to the probation officer or
create other problems — for instance, in cases where information has been provided upon a promise of confidentiality. Professor Beale observed that some version of this ABA proposal is now being road-tested in a number of districts. Mr. Cunningham reiterated that advocates on both sides have made it clear that they do not want surprises at sentencing, and they want to have the opportunity to address all of the evidence and issues that will determine the sentence.

Judge Wolf suggested that further study is necessary, recognizing that the Rule 32(h) issue is part of a broader set of issues. It was suggested that the Criminal Law Committee be consulted to determine how the proposed Rule 32(h) amendment might change the way probation officers do their work and that input be sought from probation officers themselves. Judge Tallman agreed that the issue requires further study. He asked the subcommittee to work with AO staff, Andrea Kuperman, and Laural Hooper at the FJC to contact and research the districts cited by the ABA, and any other district courts with similar rules. Meanwhile, he will contact Judge Julie E. Carnes, chair of the Criminal Law Committee, for additional input. After further discussion, Judge Tallman thanked the subcommittee for its substantial work.

B. Rule 12(b) Challenges for Failure to State an Offense; Rule 34

Judge Wolf presented the Rule 12(b) Subcommittee report. Under Rule 12(b)(3), certain pretrial motions must be raised before trial. All but one subcommittee member agreed with the Department of Justice to add the motion to dismiss for failure to state an offense to the pretrial motions listed in Rule 12(b)(3), particularly given that the Supreme Court has ruled that the defect is non-jurisdictional. However, additional considerations complicate the issue. "Good cause" under Rule 12(e) is generally defined in the case law as both "cause" and "prejudice." In other words, in addition to showing prejudice from being precluded from raising the issue at or after trial, the defendant must also show good cause for not having raised the matter earlier. As a result, a defendant who was prejudiced by errors of counsel might have no redress.

Judge Wolf observed that the bracketed language in the proposed Committee Note (pages 177-78 of the agenda book) says "Good cause may include injury to the substantial rights of the defendant." Preventing a party from raising a tardy motion to dismiss the case for failure to state an offense presumably affects the defendant's substantial rights, satisfying the good-cause requirement and vitiating any waiver. This could affect the definition of "good cause" in *other* Rule 12 contexts.

Judge Wolf also noted that there is a circuit split on whether failure to raise the claim that the indictment fails to state an element of the offense is a "forfeiture" of the issue, subject to

plain-error appellate review, or a "waiver" of the issue, not subject to appellate review. The subcommittee proposes leaving this matter to the case law, as explained in the draft Note.

Judge Tallman suggested that the bracketed language modifies the "good cause" requirement of "cause" *and* "prejudice" adopted in circuit case law by changing the conjunctive to the disjunctive. Instead of *both* cause and prejudice being required, only a showing of "prejudice" would be required. Another member agreed, suggesting that the Committee may want to omit the bracketed language and entrust the definition of "good cause" to case law.

One member asked whether the proposed rule amendment would prohibit a defendant from challenging at trial an indictment that failed, for instance, to charge a nexus with interstate commerce on the ground that this constitutes failure to invoke the court's jurisdiction. Failure to allege an element of the offense is covered by the proposed amendment, which would require the motion to dismiss to be filed *pretrial*, but this would also constitute a failure to allege the court's jurisdiction. Could the rule disallow a motion to dismiss filed during or after trial alleging that the indictment did not establish the court's jurisdiction? Another member agreed, suggesting that, if a charge fails to allege a crime, it must be dismissible even during or after trial.

Judge Wolf indicated that, if the standard for raising the issue during trial were to be "good cause equals 'cause' plus 'prejudice'," then he would oppose the rule amendment. Defendants should not lose rights simply because their lawyers dropped the ball. If the judge doesn't have discretion to fix a defective indictment where the defendant suffers prejudice, then the amendment is ill-advised.

Another member suggested that the proposed rule change would create a host of new issues while purporting to "solve" what is a rare occurrence, which he has never seen in his career and which the Department of Justice had relatively few reports of, namely, a defendant filing a motion to dismiss for failure to allege an element *during trial*. It was noted that the committee lacked empirical data on how often the issue is raised at trial and on what the defendant's reasons have been when it is raised at trial.

Another member suggested that, in the wake of *United States v. Cotton*, 535 U.S. 625 (2002), there is no reason to treat the failure to include an element of the offense differently from any other Rule 12 issue. If the Committee concludes, however, that it is necessary to recast the cause and prejudice standard to accomplish that objective, the proposed amendment could do more harm than good, all in an effort to solve a relatively small problem. The Department of Justice agreed that the cause and prejudice standard is all over the map and that the Committee should perhaps fix that someday. This amendment, however, tries only to bring consistency, in light of *Cotton*, to how different Rule 12 motions are handled.

Professor Coquillette suggested that the draft Committee Note might not want to refer to the current circuit split, as the split could change, whereas the Note could not unless the rule were subsequently amended and could easily become archaic and misleading.

One member objected that removal of the Note's bracketed language at page 178 would cause the rule to do what the Department of Justice said that it did not want, namely, force a defendant to lose substantial rights because of a bad attorney. Mr. Wroblewski disagreed, stating that in circuits where mistakes are analyzed as to whether they constitute substantial error, the proposed rule amendment might not alter much. Professor Beale observed that the Note could follow the format of the time computation notes and discuss the effect of the amendment in sample fact situations — which she considered a better option than redefining the good cause standard. Judge Tallman suggested that a vote on whether to amend the rule should precede a discussion about the Note.

Judge Jones moved to adopt the amendment as printed on page 176, conditioned upon a rewriting of the draft Committee Note. Judge Tallman said that the Note would be revised for presentation at the Committee's next meeting. One member argued against amending the rule if it requires both cause *and* prejudice to permit this issue to be raised at trial. Another member recommended leaving that question to the courts of appeals and suggested that the Committee need not resolve that question as a precondition to the rule change.

Concern was raised that, absent resolution of the Note's wording, it was unclear what the Committee was voting on. Judge Tallman clarified that this was a vote on whether, *in principle*, the rule needs amending. He expressed reluctance about creating a new definition of "good cause" strictly for one subsection of Rule 12, which would create a significant potential for mischief, and he warned against attempting to resolve a circuit split in a Committee Note. He then clarified that an affirmative vote would simply indicate a desire to continue the effort to fix the Note, not necessarily a commitment to amending Rule 12. The entire amendment, including the revised Note, would then become the subject of a new vote at the Committee Spring 2009 meeting.

The Committee voted 7 to 5 to continue working on the proposed Rule 12 amendment and accompanying Committee Note.

Judge Tallman appointed Judge England to chair the subcommittee, taking over for Judge Wolf, whose term expired. He welcomed further discussion of the good cause issue. After further discussion about the Note, Judge Tallman thanked Judge Wolf for his leadership on this issue and remarked that unless the subcommittee was able to address the circuit split and the other issues raised in a satisfactory manner, the rule amendment proposal could be rejected altogether.

C. Use of Technology

Judge Battaglia delivered the report of the Technology Subcommittee, which was tasked not only with reviewing the Rule 41 amendment proposal, authorizing law enforcement to apply for search warrants electronically, but also with reviewing the rules more broadly to determine which ones might be in need of amendments to reflect technological advances. The subcommittee came up with a list of 16 rules that it believed fit that description (page 2 of Tab

3C of the agenda book). Each subcommittee member has been asked to prepare an analysis of several of these rules, and a full subcommittee report will be presented to the Committee in April 2009.

Asked whether the CVRA might affect any of this — for instance, victims' right to participate at various stages, Judge Battaglia responded that the subcommittee would consider that. Asked how the appellate courts could review the existence of probable cause, when the warrant was applied for telephonically, Judge Battaglia responded that a written document would have to be produced at that time, which could then be read over the phone to the judge. The law enforcement agent could not obtain telephone approval and then subsequently draft an application.

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Letter from Judge Carnes on Amending Rule 41 to Authorize Pretrial Service and Probation Officers to Seek and Execute Search Warrants

Judge Battaglia noted that the Criminal Law Committee proposes authorizing probation officers to seek and execute search warrants and suggests conforming changes to Rule 41 (see Tab 4A-B of agenda book). Current policy requires probation officers, in the absence of consent, to withdraw and refer suspicions of illegal activity to a law enforcement officer, complicating their jobs. It was suggested that "probation officers" and "pretrial services officers" could be added to the Rule 41 list of employees authorized to seek search warrants.

John Rabiej stated that the Criminal Law Committee is surveying probation officers and has yet to develop new probation officer guidelines. Judge Tallman explained that there is consequently no action item on this yet. The Criminal Law Committee meets in December and hopes to be in a position to propose a Rule 41 amendment by this Committee's next meeting.

Mr. Friedrich of the Department of Justice expressed concern over what appeared to be a major policy change. Judge Tallman reported that the Criminal Law Committee shared those concerns and expressed initial reluctance. Probation officers, however, made the case by pointing out that if judges continue to order supervision conditions that require search, then probation officers must have the authority to enforce those conditions on the spot, without having to retreat and ask a law enforcement officer to apply for a warrant and return to the scene at some later time. It was noted that officers would need appropriate training to do this.

Noting that Rule 41 now refers to search warrants being sought by "officers authorized by the Attorney General," Professor King asked why the Attorney General could not simply add probation officers and pretrial service officers to the list, obviating the need for a rule change. Professor Beale suggested that further changes to Rule 41 would nevertheless be required; because the proposal expands the type of material subject to search and seizure, as well as the standard for suppression.

One member suggested that authorizing judiciary officers to apply to judges for warrants raised Separation of Powers concerns. Another member questioned the wisdom of having probation officers, who try to cultivate a rehabilitative relationship with the people they supervise, applying for search warrants themselves. Judge Rosenthal recommended waiting until the Criminal Law Committee had issued its new guidelines, which might assuage some concerns. Judge Tallman emphasized that the Criminal Law Committee had primary jurisdiction over the policy question. Mr. Rabiej observed that the Judicial Conference was the ultimate policymaker and that the Conference would likely take any concerns expressed by this Committee into account in evaluating the Criminal Law Committee's recommendation. Judge Tallman suggested that Judge Carnes, chair of the Criminal Law Committee, be invited to the next meeting.

Mr. Friedrich remarked that the Department of Justice has occasionally authorized officers not under its authority to apply for search warrants, but only executive branch officers. The Criminal Law Committee proposal could raise potential conflicts. For instance, a probation officer conducting a search could undermine an undercover investigation that the probation officer knows nothing about. Probation officers are *not* law enforcement officers, at least not in the way that FBI agents are, and searches can become dangerous in short order.

One member noted that probation officers in his district did not want to do searches. Mr. Rabiej said he believed the Criminal Law Committee's guidelines would be narrowly tailored, opposing broad search authority. Judge Tallman suggested that it was *judges* who were creating the problem at sentencing by tasking probation officers with enforcement of search conditions. It was noted that the guidelines could be written very narrowly, authorizing a probation officer to apply for a search warrant where he or she has first-hand information, for instance, but tasking someone else to execute it. Judge Tallman promised to relay the concerns to Judge Carnes.

B. Letter from Judge Weinstein on Amending Rule 11 to Authorize Discovery by Defendants

Judge Tallman invited discussion of the letter from Judge Jack B. Weinstein (NY-E), at page 230 of the agenda book, suggesting that Rule 11 be amended to include a reference to the defendant's right to compel the production of documents. He expressed reluctance to initiate the proposed rule change, suggesting instead a change to the Federal Judicial Center's Bench Book that would recommend a statement in the guilty-plea colloquy like, "You have the right to use the power of this court to bring in evidence and witnesses on your behalf." Judge Raggi agreed, warning that if this is in the rule, a guilty plea may not be considered voluntary if those words are not said. Judge Tallman said that he would respond to Judge Weinstein's letter.

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

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

John Rabiej reported that the bail bond bill had died in this Congress, although he predicted that it would be introduced again, as it has been in every Congress for years.

B. Update on Implementation of Crime Victims' Rights Act and Issues Arising Under the Act

Judge Jones provided an update on implementation of the Crime Victims' Rights Act (CVRA). He reported that no action had been taken in Congress on Senator Kyl's proposal to amend the rules by statute to incorporate various provisions implementing the CVRA that the Committee did not adopt. John Rabiej observed that, following a lengthy investigation that included a survey of judges, victims, and prosecutors, the U.S. Government Accountability Office (GAO) had issued a draft report on how the Act has been implemented. The draft report included no criticism of the courts and agreed that the CVRA's 72-hour provision was too short.

A few other issues were discussed. Judge Tallman asked whether courts were complying with the 72-hour limit. He said he thought all the parties usually sought extensions anyway, because no one – neither the court nor the parties – can do it in 72 hours. Mr. Wroblewski observed that the Department of Justice meets regularly with victims' rights groups, and could raise these questions with them. Professor Beale said that it would be helpful if the Department sent the Committee letters summarizing those meetings. Judge Tallman agreed, adding that it would be good for the Committee to have such feedback. Mr. Wroblewski agreed to do that. Judge Jones observed that the Committee could also meet with victims' representatives itself to discuss these matters.

C. Revision of the Search and Seizure Warrant Forms

Mr. McCabe requested the Committee's input on a proposed substantive change to national search warrant forms. As part of a recent revision of national forms to reflect the new privacy rules and to restyle the language in simple, modern English, AO staff and the Forms Working Group discovered that search warrant forms have long required law enforcement agents to swear before a judge to the warrant inventory even though this is not required in the rules. Agents have traveled 200 miles to appear before a judge and swear to the inventory. It appears that this form language is a holdover from a 1917 statute abrogated decades ago when the Federal Rules of Criminal Procedure were first adopted.

Judge Battaglia reported that his subcommittee is looking at whether this can all be done electronically, in which case it would be clear that the return of a warrant need not be presented to the judge in person. Referring to the warrant form on page 243 of the agenda book, Judge

Tallman suggested that nothing in Rule 41 prevents ending the form with the officer's sworn signature declaring under penalty of perjury that the inventory is correct. Although Rule 41(f)(1)(D) requires the agent to return the warrant and inventory to the magistrate judge, it was noted that the rule does not require that it be sworn before the judge, whether in person or by video.

Judge Tallman asked Mr. McCabe to convey the Committee's consensus to the Forms Working Group that the "sworn before me" signature section can be eliminated from forms AO 93, AO 93A, and AO 109. If the Forms Working Group or the AO has any additional questions involving national criminal forms, those can be transmitted to the Committee's reporter.

D. Proposed Amendment of Rule 12.4

The Committee discussed a request by Judge Gordon J. Quist on behalf of the Committee on Codes of Conduct that consideration be given to amending Rule 12.4 to require greater victim information disclosure. Rule 12.4, added in 2000, requires the Department of Justice to submit a disclosure statement on the holdings of organizational victims.

It was agreed that the central issue was whether a new provision should be added to Rule 12.4 that would require the government to disclose all victims, not just organizational victims and whether the rule should require all organizational victims asserting rights to disclose their affiliates. The present rule requires disclosure of information only by the government and non-governmental *parties*. And, the government must disclose only as to *organizational* victims. The government must do so at the defendant's initial appearance, and must supplement. So, if an organizational victim exercises CVRA rights, the organizational victim itself – as distinguished from the government – has no disclosure obligation. Requiring *individual* victims to disclose could raise privacy concerns, unless the disclosure was done to the judge under seal, strictly for recusal purposes. Judge Tallman noted that the rules now include a definition of "victim," drawn from the CVRA.

It was noted that, practically speaking, judges often do not know the identity of victims in a case until trial or even sentencing. Mr. Wroblewski said that he perceives no problem with respect to *individual* victims, since the judge would likely be aware of the conflict if a victim is a family member or the like, where recusal is required. And if the victim was not as closely related, recusal would not be required. The main problem was judges' stockholdings in organizational victims. One member agreed, but observed that if a non-organizational victim was the judge's neighbor or friend, the judge might not be aware of that fact, but would want to be promptly alerted to it. Another member pointed out that under the current rule, the government must do the disclosing even if it does not know a victim's affiliates. If the victim is asserting rights, the rules could instead require the victim to make the disclosure.

Judge Tallman observed that the Committee should only concern itself with whether the information needs to be disclosed to the judge, not whether or not the judge must recuse, which was not this Committee's concern. He suggested that the subcommittee begin drafting a Rule

12.4(a)(3) proposal for review at the April 2009 meeting. He said he saw no reason why the rule should exclude non-organizational victims. Where appropriate, disclosure could be made under seal so that the information is not made public. Mr. Rabiej reported that the Committee on Codes of Conduct is drafting a follow-up letter on this. Judge Tallman indicated that he would contact Judge Margaret McKeown, who has succeeded Judge Quist as chair of that committee.

E. Use of Subcommittees

Judge Tallman drew the Committee's attention to the memorandum from Judge Anthony J. Scirica, chair of the Executive Committee, requesting input from each committee chair on the use of subcommittees by Judicial Conference committees. Judge Tallman observed that he has pared down the Committee's list of standing subcommittees. His draft response is reproduced in the agenda book, although obsolete language about Rule 49.1 in the next-to-last paragraph on page 232 of the agenda book would be removed. Judge Tallman expressed doubt that anyone could seriously contend that the use of subcommittees by rules committees represents an inefficient use of resources, noting that the Committee as a whole could not possibly wordsmith every single proposed word change. The Committee would continue making appropriate use of subcommittees, he said.

Judge Rosenthal suggested that Judge Scirica's memorandum reflected concerns not applicable to the rules committees. In some committees, too much of the work is being done by staff and subcommittees with little committee supervision — which is not true of the rules committees. The rules committees need subcommittees to study specific issues in detail and to draft rule amendment language, a practice that would be threatened if the Executive Committee were to promulgate poorly designed rules that were then misapplied to the rules committees. For instance, the proposed requirement that subcommittee chairs communicate with outsiders only through the committee chair would not work in the context of mini-conferences, where the subcommittee chair must communicate directly with outsiders. Judge Rosenthal asked that each advisory rules committee send its responsive memo to her. She would then forward them to Judge Scirica with a cover memorandum.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman advised the group that the next meeting had been tentatively scheduled for April 6-7, 2009, in Washington, D.C., although April 27-28, 2009, had been identified as alternative dates. After thanking Judge Wolf for his years of service and contribution to the Committee, Judge Tallman adjourned the meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 2009
San Antonio, Texas
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at St. Mary's Law School in San Antonio, Texas, on Monday and Tuesday, January 12 and 13, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division, represented the Department of Justice. Professor Daniel J. Meltzer was unable to attend the meeting.

Also participating in the meeting were: Judge Anthony J. Scirica, former chair of the committee; Professor Geoffrey C. Hazard, Jr., consultant to the committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Vaughn R. Walker, Professor Steven S. Gensler, and Daniel C. Girard, Esquire, current members of the Advisory Committee on Civil Rules; and Professor David A. Schlueter, former reporter to the Advisory Committee on Criminal Rules.

In addition, the committee conducted a panel discussion in which the following distinguished members of the bench and bar participated: Judge Rebecca Love Kourlis; Gregory P. Joseph, Esquire; Joseph D. Garrison, Esquire; Douglas Richards, Esquire; and Paul C. Saunders, Esquire. Dean Charles E. Cantu of St. Mary's Law School greeted the participants and welcomed them to the school.

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, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery Lee	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

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 Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair

INTRODUCTORY REMARKS

Judge Rosenthal thanked Dean Cantu and St. Mary's Law School for hosting the committee meeting and Becky Adams, Coordinator to the Dean, for her help in planning the meeting, managing transportation, and providing meals and refreshments. She suggested that the committee consider holding more meetings at law schools in the future. She also recognized the outstanding contributions to the rules committees made by Judge Higginbotham and Professor Schlueter, both of whom currently teach at St. Mary's.

Judge Rosenthal thanked Mr. Tenpas for his active and productive involvement in the rules process over the last several years in representing the Department of Justice. She asked him to convey the committee's appreciation back to the many Department executives and career attorneys who have contributed professionally to the work of the committees. In particular, she asked the committee to recognize the important contributions in the last couple of years of James B. Comey, Paul J. McNulty, Robert D. McCallum. Jr., Paul D. Clement, John S. Davis, Alice S. Fisher, Greg Katsas, Benton J. Campbell, Deborah J. Rhodes, Douglas Letter, Ted Hirt, J. Christopher Kohn, Jonathan J. Wroblewski, Elizabeth Shapiro, Stefan Cassella, and Michael J. Elston.

Mr. Tenpas announced that the Department had arranged to have career attorneys support the work of the committees during the transition from the Bush Administration to the Obama Administration.

Judge Rosenthal welcomed Judge Scirica and thanked him for his distinguished leadership as the committee's chair. She also recognized Professor Gibson, professor of law at the University of North Carolina, as the new reporter of the Advisory Committee on Bankruptcy Rules. She noted that the advisory committee will have to move quickly to draft additional changes in the bankruptcy rules if pending legislation is enacted providing bankruptcy judges with authority to modify home mortgages.

Judge Rosenthal reported that all the rules amendments sent by the committee to the Judicial Conference at its September 2008 session had been approved on the consent calendar and are currently pending before the Supreme Court. The majority of the changes, she said, were part of the comprehensive package of time-computation amendments. She pointed to the draft cover letter that will be sent to Congress conveying proposed legislation to amend 29 statutory provisions affecting court proceedings and deadlines. She noted that the Department of Justice and a number of bar associations had also written Congress to support the changes.

She added that the new Congress is largely preoccupied at this point in getting organized, but she and others planned to visit members and their staff in February to

discuss the proposed legislation. She noted that a good deal of background work for the proposal had already been initiated in the last Congress.

Judge Rosenthal explained that the purpose of the proposed legislation is to coordinate the time-computation rules changes with appropriate statutory changes and make them all effective on December 1, 2009. She reported, too, that the committee will initiate efforts to have the courts amend their local rules to take account of the changes in the national rules and statutes. To that end, it will send materials to the chief judges. She suggested that it should not be difficult for the courts to comply, but it will take coordinated efforts to make sure that the task is completed on a timely basis in each court. She added that the chief judges should also be advised of the matter at various judge workshops and meetings and in articles in the judiciary's publications.

Judge Scirica reported that Chief Justice Roberts had complimented Judge Rosenthal at the September 2008 Judicial Conference meeting for her extraordinary efforts in securing legislative approval of the new FED. R. EVID. 502. Unfortunately, he said, Judge Rosenthal had not been able to attend the Conference in person because of the hurricane in Houston. But, he noted, the honor from the Chief Justice was greatly deserved and remarked upon by many members of the Conference. Judge Scirica then presented Judge Rosenthal with a framed copy of the legislation enacting Rule 502 signed by the President and a personal card from the President.

Judge Rosenthal noted that the 75th anniversary of the Rules Enabling Act of 1934 will occur on June 19, 2009. She said that she planned to speak with the Chief Justice about holding an appropriate program later in the year to mark the event. One possibility, she said, would be to combine a celebration at the Supreme Court with education programs on the federal rules process featuring prominent law professors.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 9-10, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the 111th Congress was just getting organized. The first legislative task for the rules office staff, he said, had been to prepare the cover letters to be sent to Congressional leadership in support of legislation to amend the time deadlines

in 29 statutes. The judiciary hopes that the legislation will take effect on December 1, 2009.

Mr. Rabiej reported that proposed legislation on gang crime would amend FED. R. EVID. 804(b)(6) (the hearsay exception for unavailable witnesses) to codify a decision of the Tenth Circuit and make it explicit that a statement made by a witness who is unavailable because of the party's wrongdoing may be introduced against the party if the party should have reasonably foreseen that its wrongdoing would make the witness unavailable. One version of the legislation would amend the rule directly by statute. But another would only direct the Standing and Evidence Committees to consider the necessity and desirability of amending the rule.

Mr. Rabiej noted that legislation was anticipated in the new Congress to authorize bankruptcy judges to alter certain provisions of a debtor's personal-residence mortgage. If enacted, he said, the legislation would likely require amendments to the bankruptcy rules and forms.

As for legislation that would affect the criminal rules, Mr. Rabiej reported that a bill likely would be introduced once again on behalf of the bail bond industry to prohibit a judge from forfeiting a bond for any condition other than the defendant's failure to appear in court as ordered. In addition, legislation may be introduced in the new Congress to add more provisions to the rules to protect victims' rights.

On the civil side, Mr. Rabiej reported that the main legislative focus will be on Senator Kohl's bill to amend FED. R. CIV. P. 26 by imposing certain limitations on protective orders. He said that the legislation had been introduced in the last several Congresses and had been opposed consistently by the Judicial Conference on the grounds that it is unnecessary, impractical, and overly burdensome for both courts and litigants. He noted that Judge Kravitz had testified against the legislation in the 110th Congress, and his written statement had been included in the committee's agenda materials. He added that Senator Kohl was expected to introduce the bill again in the 111th Congress.

Judge Kravitz explained that the legislation had two primary provisions. First, it would prevent judges from entering sealed settlement orders. He pointed out, though, that empirical research conducted for the committee by the Federal Judicial Center had demonstrated that these orders are relatively rare in the federal courts. Thus, the provision would have little practical impact.

The second provision of the legislation, though, would be very troublesome. It would prevent a judge from entering a discovery protective order unless personally assured that the information to be protected by the order does not implicate public health or safety. He pointed out that a judge would have to make particularized findings

attesting to that effect at an early stage in a case – when the judge knows very little about the case, the documents have not been identified, and little help can be expected from the parties.

He pointed out that he had been the only witness invited by the House Judiciary Committee to speak against the legislation. His testimony explained that the judiciary opposed the bill because empirical data demonstrates that protective orders typically allow parties to come back to the court to challenge the information produced or ask the judge to lift the order. In addition, protective orders have the beneficial effect of allowing lawyers to exchange information more readily and at much less expense to the parties. Many of the problems targeted by the legislation, he said, appear to have arisen in the state courts, rather than the federal courts. He also reported that he had emphasized at the hearing that Congress had established the Rules Enabling Act process explicitly to allow for an orderly and objective review of the rules. Accordingly, Congress should normally give substantial deference to that thoughtful process.

Judge Kravitz observed that the supporters of the proposed legislation clearly do not fully understand the rules process. Several members of Congress, he said, seemed surprised to discover that the Advisory Committee on Civil Rules had actually held hearings on the proposal, commissioned sound research from the Federal Judicial Center, and reached out to all interest groups. He suggested that the rules committees increase their outreach efforts to Congress. A participant added that the regular turnover of members and staff on Congressional committees results in little institutional memory. He said that several prominent law professors would be willing to help educate staff about the rules process by conducting special seminars for them. Judge Rosenthal added that the 75th anniversary celebration of the Rules Enabling Act would be a good time to have some prestigious academics conduct seminars to educate Congressional staff on the rules process. The programs, she said, should emphasize that the work of the rules committees is transparent, thorough, and careful.

Administrative Report

Mr. Ishida reported that the rules staff has continued to improve and expand the federal rules page on www.uscourts.gov. The digital recordings of the public hearings have now been posted on the site and are available as a podcast. He noted that the website had been attracting favorable attention among bloggers. Mr. McCabe added that the staff has continued to search for historical records of the rules committees. They traveled recently to Hofstra and Michigan law schools to obtain copies of missing records of the Advisory Committee on Bankruptcy Rules from the 1970s and 1980s.

Judge Rosenthal thanked both the advisory committees and the members of the Standing Committee for their helpful comments on the use of subcommittees. She said

that they will be incorporated in the committee's response to the Executive Committee of the Judicial Conference. Judge Scirica explained that the Executive Committee's request had been directed to concerns about the supervision by some committees over their subcommittees. He emphasized that the rules committees' use of subcommittees has always been appropriate and productive.

Judge Rosenthal reported that the newly re-established E-Government Subcommittee, which includes representatives from the Court Administration and Case Management Committee, will address a number of issues that have arisen since the new privacy rules took effect.

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 attachments of December 11, 2008 (Agenda Item 6).

Informational Items

FED. R. APP. P. 40(a)(1)

Judge Stewart reported that the advisory committee had voted to give final approval to proposed amendments to Rule 40(a)(1) (time to file a petition for panel rehearing). The proposed amendments would clarify the applicability of the extended deadline for seeking panel rehearing to cases in which federal officers or employees are parties. At this time Judge Stewart presented the proposed amendments to the Standing Committee for discussion rather than for final approval.

He explained that the proposal was one of two recommended by the Department of Justice and published for comment in 2007. The other would have amended Fed. R. App. P. 4(a)(1) to clarify the applicability of the 30-day and 60-day appeal time limits in cases in which federal officers or employees are parties. The Department, however, later withdrew the second proposal because the Supreme Court's decision in Bowles v. Russell, 551 U.S. 205 (2007), indicated that statutory appeal time limits are jurisdictional. Amending Rule 4's time periods for filing a notice of appeal might raise questions under Bowles because those time periods also appear in 28 U.S.C. § 2107.

Judge Stewart reported that the advisory committee at its November 2008 meeting had voted to proceed with the proposed amendment to Rule 40 because it involves a purely rules-based deadline. But he noted that there was no need to proceed at the January 2009 Standing Committee meeting because the matter could be taken up more

effectively at the June 2009 meeting. This would give the Department of Justice additional time to decide whether to pursue a legislative change of Rule 4's deadlines, rather than a rules amendment. He pointed out that there is no disadvantage in waiting another meeting because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

BOWLES V. RUSSELL

Judge Stewart noted that a number of issues are unresolved regarding the impact of *Bowles v. Russell* on appeal deadlines set by statute versus those set by rules. The Supreme Court, he said, has had other pertinent cases on its docket since *Bowles*, but has not provided additional guidance. Accordingly, the advisory committee decided to explore, in coordination with the civil, criminal, and bankruptcy advisory committees, whether a statutory change, rather than a rules amendment, might be appropriate to resolve these issues.

Professor Struve explained that although *Bowles* holds that appeal deadlines set by statute are jurisdictional, the implications of the decision for other types of deadlines are unclear. A consensus has developed, she said, that purely non-statutory deadlines are not jurisdictional. But there are also "hybrid deadlines," such as those involving motions that toll the deadline for taking an appeal. A split in the case law already exists among the circuits on this matter, and there may even be instances in which one party in a case has a statutory deadline and the other does not.

Professor Struve reported that the advisory committee was considering developing a propose statutory fix to rationalize the whole situation, and it had asked her to try drafting it. Obviously, she said, the advisory committee will consult with the other advisory committees and reporters, and it will appreciate any insights or guidance that members of the Standing Committee may have. She added that the Advisory Committee on Civil Rules has been particularly helpful in working with her on the matter.

COMPLIANCE WITH THE SEPARATE-DOCUMENT REQUIREMENT OF FED. R.CIV. P. 58

Judge Stewart reported that the advisory committee had voted to ask the Standing Committee to take appropriate steps to improve district-court awareness of, and compliance with, the separate-document requirement of FED. R. CIV. P. 58 (entering judgments), rather than seek rules changes. In particular, jurisdictional problems arise between the district court and the court of appeals in cases where: (1) a separate judgment document is required but not provided by the court; (2) an appeal is filed; and (3) a party later files a tolling motion – which is timely because the court did not enter a separate judgment document -- and the motion suspends the effect of the notice of appeal.

Judge Stewart emphasized that it is important for the bar to have the district courts comply with the rule. He reported that the advisory committee had asked the Federal Judicial Center to make informal inquiries. In addition, the advisory committee had asked its appellate clerk liaison, Charles Fulbruge, to canvass his clerk colleagues regarding the level of compliance that they have experienced in their respective circuits with the separate-document rule. Some clerks, he reported, had noted a fair degree of noncompliance, but others had not.

A member reported that a serious problem had existed in his circuit with district courts not entering separate documents, especially in prisoner cases. After judgment, prisoners who have already filed a notice of appeal file a document that can be construed as a Rule 59 motion for a new trial that tolls the deadline for filing a notice of appeal. The court of appeals then loses jurisdiction because a timely post-judgment motion has been filed in the district court, but the district court fails to act because it believes that the court of appeals has the case. He said that representatives of his circuit had spoken directly with the district court clerks in the circuit about the Rule 58 requirements, and compliance has now been much improved. He suggested that it would be productive for the rules committees also to work informally with the district courts on the matter. In addition, it would be advisable to place an automated prompt or other device in the CM/ECF electronic docket system to help ensure compliance with the separate-document requirement. Judge Rosenthal added that the committee should coordinate on the matter with the Committee on Court Administration and Case Management.

MANUFACTURED FINALITY

Judge Stewart reported that the advisory committee was collaborating with the other advisory committees on the issue of "manufactured finality" – a mechanism used in various circuits for parties to get a case to the court of appeals when a district court dismisses a plaintiff's most important claims but other, peripheral, claims survive. To obtain the necessary finality for an appeal, he said, the plaintiff may seek to dismiss the peripheral claims to let the case proceed to the court of appeals on the central claims.

Whether or not these tactics work to create an appealable final judgment generally depends on the conditions of the voluntary dismissal. The circuits are split on whether there is a final judgment when the plaintiff has reserved the right to resume and revive its dismissed peripheral claims if it wins its appeal on its central claims. A member added that her circuit does not allow dismissals without prejudice to create an appealable final judgment. The circuit will permit the appellant to wait until oral argument to stipulate to a dismissal with prejudice, but the appellant must do so by that time. Another member pointed out that manufactured finality may arise in several ways. In his circuit, some parties simply take no action after an interlocutory decision, and the district court ultimately dismisses the peripheral claims for failure to prosecute. A participant suggested that the case law on finality and the application of 28 U.S.C. § 1292(b) varies

considerably among the circuits, and many district judges use a variety of devices to get cases to the courts of appeal.

Judge Stewart pointed out that there are cases in which everybody – the parties and the trial judge – wants to send a case up to the court of appeals quickly. He suggested that manufactured finality is a real problem, and the circuits have taken very different approaches to dealing with it. Therefore, it may well be appropriate to have national uniformity. To that end, he said, the advisory committee will consider whether the federal rules should provide appropriate avenues for an appeal other than through the certification procedure of FED. R. CIV. P. 54(b) and the interlocutory appeal provisions of 28 U.S.C. § 1292(b).

OTHER MATTERS

Judge Stewart reported that the advisory committee had decided to remove from its active agenda a proposal to amend FED. R. APP. P. 7 (bond for costs on appeal in a civil case) to clarify the scope of the "costs" for which an appeal bond may be required. Professor Struve added that the advisory committee would collaborate with the Advisory Committee on Civil Rules on whether to amend FED. R. APP. P. 4(a)(4) (effect of a motion on a notice of appeal in a civil case) to refine the time and scope of notices of appeal with respect to challenges to the disposition of post-trial motions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of December 12, 2008 (Agenda Item 9).

Amendments for Publication

FED. R. BANKR. P. 6003

Professor Gibson reported that FED. R. BANKR. P. 6003 (relief immediately after commencement of a case) was adopted in 2007 to address problems typically arising in large chapter 11 cases when a bankruptcy judge is presented with a large stack of motions on the day of filing. The rule imposes a 21-day breathing period before the judge may actually rule on these first-day motions – largely applications to approve the employment of attorneys or other professionals and to sell property of the estate. The delay provides time for a creditors committee to be formed and for the U.S. trustee and the judge to get up to speed on the case.

Some judges and lawyers, she said, have read the rule to prohibit a debtor-in-possession from hiring an attorney during the first 21 days of the case. The current rule permits an exception on a showing of irreparable harm, but some parties resort to claiming irreparable harm in every case. The proposed amendment, she said, would make it clear that although the judge may not issue the order before the 21-day period is over, the judge may issue it later and make it effective retroactively, thereby ratifying the appointment of counsel sought in the motion.

Another, minor change to the rule, she said, would make it clear that even though a judge may not grant the specific kinds of relief enumerated in the rule – such as approving the sale of property – the judge may enter orders relating to that relief, such as establishing the bidding procedures to be used for selling the property.

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

Informational Items

Professor Gibson reported that several of the bankruptcy rules amendments published in August 2008 would implement chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, dealing with cross-border cases. She noted that only two comments had been received, and the advisory committee had canceled the scheduled public hearings.

OFFICIAL FORMS 22A and 22C

Professor Gibson explained that Forms 22A and 22C implement the "means test" provisions of the 2005 Act. The statute, she said, defines "current monthly income" and establishes the means test to determine whether relief for the debtor under chapter 7 should be presumed abusive. Chapter 13 debtors must complete the means test to determine the applicable commitment period during which their projected disposable income must be paid to unsecured creditors.

Under the Act, debtors may subtract from their monthly income certain expenses for themselves and their dependents. In determining these allowances, the forms currently use the terms "household" and "household size." The advisory committee believes, though, that "household" is not correct in light of the statute because it is both over-inclusive and under-inclusive. The Act allows deductions for food, clothing, and certain other items in amounts specified in IRS National Standards and deductions for housing and utilities in the amounts specified in IRS Local Standards. Both the national and local IRS standards are based on "numbers of persons" and "family," rather than "household." Moreover, the IRS bases these numbers on the number of dependents that

the debtor claims for federal income tax purposes. A person in the "household" may not be a "dependent."

Judge Swain explained that the policy of the advisory committee, whenever there are possible conflicting interpretations of the Act, is to allow filers to present their claims as they interpret the statute – and not have them precluded from doing so by restrictive language in the forms. She added that the revised forms focus on dependency without specifically adopting the IRS standard. Thus, Form 22C refers to "exemptions . . . plus the number of any additional dependents." This provides room for a litigant to argue that a member of the debtor's household could be a "dependent" for bankruptcy purposes even without entitling the debtor to an exemption under IRS standards.

Judge Swain stated that the advisory committee had planned to present the revisions to the Standing Committee at the current meeting as an action item. But another technical problem had just been discovered with the forms, and the advisory committee would like to consider making another change and return with the forms for final approval in June 2009. Accordingly, she said, the matter should be considered as an informational item, rather than an action item.

NATIONAL GUARD AND RESERVISTS RELIEF ACT

Professor Gibson explained that after the advisory committee meeting, Congress passed the National Guard and Reservists Relief Act, creating a temporary exemption from the means test for reservists and members of the Guard. The statute took effect on December 19, 2008, but it will expire in 2011. Thus, a permanent change to the rules is not advisable. But an amendment to Form 22A (the chapter 7 means test form) and a new Interim Rule 1007-I were approved on an emergency basis by email votes of the advisory committee, the Standing Committee, and the Executive Committee of the Judicial Conference. Thus, they were in place when the Act took effect in December 2008. She added that the interim rule has now been adopted as a local rule by all the courts.

She pointed out that the amendment to Form 22A had been particularly challenging to craft because the statute gives a reservist or member of the Guard a temporary exclusion from the means test only while on active duty or during the first 540 days after release from active duty. Thus, a temporarily excluded debtor may still have to file the means test form later in the case.

PART VIII OF THE BANKRUPTCY RULES

Professor Gibson said that the advisory committee was considering revising Part VIII of the bankruptcy rules governing appeals. Part VIII, she said, had been modeled on the Federal Rules of Appellate Procedure as they existed many years ago. The appellate rules, though, have been revised several times since, and they have also been restyled as a

body. Accordingly, the advisory committee concluded that it was time to take a fresh look at Part VIII and consider: (1) making it more consistent with the current appellate rules; (2) adopting restyling changes; and (3) reorganizing the chapter. She reported that the advisory committee at its October 2008 meeting had considered a comprehensive revision of Part VIII prepared by Eric Brunstad, a very knowledgeable appellate attorney whose term on the advisory committee had just expired.

She added that the committee decided that it would be very helpful to conduct open subcommittee meetings on Part VIII with members of the bench and bar at its next two advisory committee meetings, in March and October 2009. The committee, she said, will invite practitioners, court personnel, and others to address any problems they have encountered with the existing rules and to discuss their practical experience with two sets of appellate rules in cases that are appealed from the district court or bankruptcy appellate panel to the court of appeals. She said that the dialog at the open subcommittee meetings will help inform the advisory committee as to the worth of proceeding with the project.

ZEDAN V. HABASH

Judge Swain reported that Judge Rosenthal had referred to the advisory committee the concurring opinion of Chief Judge Frank Easterbrook in *Zedan v. Habash,* 529 F.3rd 398 (7th Cir. 2008), a case that raised two bankruptcy rules issues. In particular, he questioned whether FED. R. BANKR. P. 7001 (list of adversary proceedings covered by Part VII of the rules) should continue to classify proceedings to object to or revoke a discharge as adversary proceedings, termination of which constitutes a final decision that permits appellate review.

Zedan, she said, was a very unusual case involving a potential objection to discharge brought after the objection to discharge deadline had lapsed, but before a discharge had been entered by the court. Zedan, a creditor, claimed fraud with respect to an asset sale, and he tried to object to or revoke the debtor's discharge. Under the literal language of the Bankruptcy Code and Rules, however, he was barred from either type of relief. An objection to discharge was untimely because the deadline had passed, and an attempt to revoke the discharge was premature because no discharge had been entered. Moreover, even if Zedan had waited until the discharge was entered, an attempt to seek revocation would not have been possible because § 727(d)(1) of the Code requires that the party seeking revocation "not know of such fraud until *after* the granting of such discharge."

Judge Swain said that the advisory committee was considering the matter thoroughly and would consider a potential rules fix. It was also weighing whether the need for relief in this unusual situation outweighs the importance of finality in bankruptcy

cases. One possible amendment, she said, would be to permit an extension of the time for the creditor to file an objection based on newly discovered evidence.

Judge Swain explained that Judge Easterbrook in his concurring opinion had also asked whether objections to discharge should be treated as adversary proceedings or reclassified as contested matters because they are "core proceedings" under the Bankruptcy Code. She noted that the advisory committee had always considered objections to discharge as adversary proceedings, requiring application of the full panoply of the Federal Rules of Civil Procedure. She reported that the committee had conducted a lengthy discussion on the matter at its October 2008 meeting and concluded that it is appropriate to consider certain core proceedings as adversary proceedings, rather than contested matters. Moreover, a judge may deal with unusual problems, such as those arising in *Zedan,* by a variety of devices.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported on the advisory committee's project to analyze and modernize all the bankruptcy forms. She said that the committee was undertaking a holistic review of the forms both for substance and for practical usage in today's electronic environment. Among other things, she said, courts and other participants in the bankruptcy system have requested an expanded capacity to manipulate electronically the individual data elements contained on the forms.

She pointed out that the advisory committee had established two subgroups to tackle the project. An analytical group is analyzing for substance all the information contained on all the forms, *i.e.,* what pieces of information are truly needed by each participant, whether any of it is duplicative, and whether the information could be solicited in a more effective manner. At the same time, a technical group is looking at various ways to gather and distribute the information contained on the forms. It is working closely with the special group of judges, clerks of court, and AO staff just convened to design the next generation electronic system to replace CM/ECF.

HOME-MORTGAGE LEGISLATION

Professor Gibson reported that legislation had been introduced in Congress to authorize a bankruptcy judge to modify the terms of a debtor's home mortgage. (Since 1979, the Bankruptcy Code has prohibited modification.) As currently drafted, the legislation would allow a home mortgage to be treated in the same manner as other secured claims, and a bankruptcy judge would be able to "cram down" the mortgage to the current value of the house and allow repayment for up to 40 years. It would also let the judge reset the interest rate at the current market rate for conventional mortgages plus a premium for risk. Other provisions include dispensing with the credit counseling requirements, changing the calculation for chapter 13 eligibility, and requiring that home

owners be given notice of additional bank fees and charges. The legislation would be effective on enactment and would apply to mortgages originated before its effective date. The legislation would also require a number of changes to the bankruptcy rules and forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 9, 2008 (Agenda Item 5).

Discussion Items

Judge Kravitz reported that a great deal of interest had been expressed by the bench and bar in the published amendments to FED. R. CIV. P. 26 (expert witness disclosures and discovery) and FED. R. CIV. P. 56 (summary judgment). He noted that the public comments had been heavy, and many witnesses had signed up to testify at the three scheduled public hearings. He pointed out that the publication distributed to the bench and bar had asked for comments directed to the specific concerns voiced by Standing Committee members at the June 2008 meeting.

FED. R. CIV. P. 26

Judge Kravitz said that the proposed amendments to Rule 26 had been very well received on the whole, principally because they offer a practical solution to serious discovery problems regarding discovery of expert witness draft reports and attorney-expert communications. The great majority of comments from practicing lawyers, he said, had stated that the amendments will help reduce the costs of discovery without sacrificing any information that litigants truly need. On that point, he emphasized, extending work-product protection to drafts prepared by experts and to certain communications between experts and attorneys will not deprive adversaries of critical information bearing on the merits of their case.

Judge Kravitz noted, though, that opposition to the proposed amendments had been voiced by a group of more than 30 law professors. He suggested that their principal concern is that the amendments would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers. By way of contrast, experts in other countries are often appointed by the court or selected jointly by the parties.

He noted that the professors argue that by limiting inquiry into discussions between lawyers and their experts, the rule will lead to concealment of huge amounts of relevant information contained in draft reports and communications with experts. But, he said, the practicing bar has told the committee repeatedly that it will not in fact do so

because the information they seek presently does not exist. Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports. Therefore, the proposed amendments will not make unavailable information that is currently available. Experience in the New Jersey state courts, moreover, shows that few problems arise in the state systems that prohibit discovery of expert drafts and communications. The practicing lawyers say consistently that juries clearly understand that experts are paid by the parties, and they are not misled at trial.

Judge Kravitz said that the professors are concerned that the amendments would take the rules in a direction inconsistent with *Daubert* and the gate-keeping role that it imposes on the courts to protect the integrity of expert evidence. But, he said, the advisory committee has consulted regularly with judges and lawyers and has been informed that decisions applying *Daubert* really turn on the actual testimony of expert witnesses, not on their communications with attorneys.

Finally, Judge Kravitz noted that the professors claim that the amendments would create an evidentiary privilege that under the Rules Enabling Act must be affirmatively enacted by Congress. He pointed to an excellent memorandum in the agenda book by Andrea Kuperman on work-product protection. The advisory committee, he reported, is convinced that the amendments deal only with work-product protection and do not create a privilege. Essentially, he said, they really only modify a change made by the 1993 amendments to Rule 26. He recommended, though, that it may be advisable to dispel any notion that a privilege is being created by eliminating any reference in the proposed committee note regarding the expectation that the work-product protections provided during pretrial discovery will ordinarily be honored at trial. He suggested that the current language of the note may allow opponents to argue, incorrectly, that a privilege is being created at trial.

Judge Kravitz said that the advisory committee very much appreciated the comments from the law professors, and it had taken all their concerns very seriously. But it concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries. He noted, for example, that a law professor had informed the committee that the amendments will be very beneficial to him as an expert witness because he will now be able to take notes and have candid conversations with attorneys regarding the strengths and weakness of their cases.

A participant suggested that there is a wide gulf between practitioners and the professors on these issues. He attributed the difference to a lack of practical experience on the part of the latter and their focus on theory. He suggested that the professors tend to view experts under the current system as "hired guns." The nub of their opposition is their policy preference for a "truth-seeking" model versus the current "adversary" model. He conceded, though, that there are some cases in the state courts where there is

insufficient monitoring of experts, but there are few problems in practice in the federal courts and in most state courts. Several other participants endorsed these observations.

One member, however, expressed sympathy with the views of the law professors and argued that the proposed amendments are unwise. She suggested that the committee think carefully about whether the amendments in fact would create a privilege, or at least a hybrid between a privilege and a protection. In particular, she objected to the language in the committee note stating that the limitations on discovery of experts' drafts and communications will ordinarily be honored at trial. She suggested that the note should state explicitly that judges have discretion in individual cases to require more disclosure, especially when they suspect sharp practices. She noted, too, that in addition to the law professors, opposition had been expressed to the proposed amendments by the bar of the Eastern District of New York, which had argued for more discovery of communications between experts and attorneys.

Judge Kravitz responded that proposed Rule 26(b)(4)(C) explicitly allows discovery of communications between experts and attorneys if they: (1) relate to the expert's compensation; (2) identify facts or data that the attorney provided and the expert considered; and (3) identify assumptions that the attorney provided and the expert relied upon. He said that the advisory committee had concluded that these three exceptions to the work-product protection of the rule were sufficient.

A lawyer-member added that it is difficult for him to ask an expert to assess the weaknesses of his case because the expert's responses will be discoverable by the other side. For that reason, lawyers often hire two experts – one to testify and one to assess candidly. Other practitioners said that the rule will reduce costs and delays in many ways. Several participants added that juries know well that experts are advocates for the parties, but they believe an expert only if the expert is convincing on the stand.

Another lawyer pointed out that good lawyers regularly enter into stipulations to protect communications with their experts. He explained that experts are often unfamiliar with a case when they are hired. Therefore, they need a lawyer to give them information and directions. In fact, it is not unusual for experts to prepare reports that are not at all helpful – simply because they do not understand the case. This often leads to a sideshow during the discovery process, and potentially at trial. He said that it is important for the rules to specify that these preliminary communications between attorneys and experts are protected in order to allow experts to be educated at the outset of a case without having to risk sideshows from adversaries.

A judge-member stated that it is important for the rules to provide advice and direction to trial judges in this difficult area of discovery law. But, she suggested, the committee note should be amended to eliminate the controversial language on protecting information at trial. Another judge added that removing the note language would also be

advisable because issues at trial are much broader and also involve the rules of relevance. In short, she recommended, the committee should make it clear that discovery is discovery and trial is trial.

A member strongly supported the rule but suggested that the committee be very careful about the scope of its authority. It has clear authority, he said, to decide what information may be discovered, but no authority to create an evidentiary privilege governing what may be introduced at trial. He asked whether the states that have a similar rule, such as New Jersey and Massachusetts, have actually created an evidentiary privilege. Judge Kravitz responded that the advisory committee was convinced that the proposal was a discovery rule only, and it does not create a privilege.

A participant recommended that the committee note be revised to eliminate all language regarding information at trial. He also rejected the charge that experts are merely hired guns, noting that an expert's reputation and credibility are very important. Good experts, he said, value their reputation and are more than just advocates. Of course, they would not be called unless their testimony is helpful to the party calling them.

Another participant concurred and suggested that the concerns of the law professors appear to be less with the Rules Enabling Act than with their vision of experts as independent, learned truth-seekers, rather than paid advocates. He suggested that their opposition is based on theory and not real experience. He said that the best way for lawyers to challenge experts is by good cross-examination.

A member pointed out that there is a genuine risk for lawyers that the work-product protection that governs discovery will not continue to protect them at trial. As a result, he suggested, the amendments may not actually work in practice. Judge Kravitz responded, though, that his understanding is that practitioners believe that if the work-product information is protected during discovery, the remaining risk of disclosure at trial will not be significant enough for them to incur the costs of hiring two sets of experts or to resort to all the other artificial practices that the proposed amendments are designed to avoid. Several members agreed.

Another member suggested a parallel situation between the proposed amendments to Rule 26 and the recent development of FED. R. EVID. 502 (waiver of attorney-client privilege and work-product protection). The evidence rule, too, was devised specifically to allay the fear of lawyers that protection given to documents during discovery in a given case will not carry over to future cases. With Rule 502, the bar argued forcefully that if the protection against waiver does not carry over to future proceedings in the state courts, the rule would be useless as a practical matter in achieving its goal of reducing discovery costs. With the Rule 26 amendments, however, the bar has not suggested that confining the work-product protection to the discovery phase of litigation will undermine the practical value of the rule.

Judge Kravitz suggested that these problems should not occur very often at trial, and it may simply be necessary to let the rule play out in practice. He added that the rule cannot provide 100% protection, but the bar has been telling the committee that the amendments offer a practical solution to difficult and costly problems. Professor Cooper pointed out that the New Jersey state rule deals only with discovery, and the bar in that state has informed the advisory committee that it has caused no problems at trial. The rule's most important effect, they said unequivocally, has been to change the behavior and the very culture of the lawyers in dealing with experts' drafts and communications.

FED. R. CIV. P. 56

Judge Kravitz reported that public reaction to the proposed revision of Rule 56 (summary judgment) had been mixed. The great majority of comments, even those from judges and lawyers criticizing particular aspects of the rule, acknowledge that the revised rule is clearly organized and effectively addresses a number of problems arising in current practice. The objections to the rule, he said, fall into three categories.

First, many – but not all – plaintiff's lawyers and law professors criticizing the proposed rule appear to oppose summary judgment in general and are concerned that the revised rule may lead to additional grants of summary judgment. But, he said, research conducted by the Federal Judicial Center demonstrates that the amendments will not produce that result. Opponents also object to the rule's point-counterpoint procedure, claiming that it focuses exclusively on individual facts and obscures inferences, thereby preventing plaintiffs from telling their full story. Judge Kravitz suggested, though, that he – as a judge – looks first to the parties' briefs for a gestalt view of a case and to discover the lawyers' theory of the case. Later, he said, he consults the point-counterpoint to hone in on and confirm specific facts in the record.

Second, many – but not all – members of the defense bar support the point-counterpoint approach. They strongly urge, though, that proposed Rule 56(a) be revised to specify that a judge "must" – rather than "should" – grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The great majority of comments from the defense bar support using "must." In addition, the defense bar would like to have the rule provide sanctions for frivolous opposition to summary judgment.

A member said that the proposed rule will send an important reminder to the courts that they need to grant summary judgment when it is appropriate. Many cases have no material facts in dispute and should not go to a jury. Nevertheless, some judges announce that they will not decide summary-judgment motions until the moment of trial. So the lawyers have to prepare for trial, and their clients bear unnecessary and

unreasonable additional costs. A revised Rule 56 is needed, he said, if only to prod judges into acting on summary-judgment motions.

Third, many judges and some federal practitioners say that the point-counterpoint approach is not an effective procedural device. They recommend that the rule permit local discretion, rather than impose a national procedure. More importantly, many judges informed the committee that they have actually used the point-counterpoint procedure and have found it unsatisfactory for a variety of reasons. First, they say, it is not user-friendly and increases the cost of litigation. Second, they believe that it distracts from the merits of a case and encourages disputes over the statement of facts and motions to strike. Third, they say that the point-counterpoint process results in evasion of the page limitations on the briefs. Fourth, it lets moving parties dictate the facts, and it ignores inferences. Fifth, districts that have adopted the point-counterpoint procedure tend to have generated more paperwork, and the motions take longer to resolve.

Judge Kravitz noted that one lawyer had told the committee that the summary judgment papers in point-counterpoint districts are simply too long and require a good deal of unnecessary work by lawyers in dealing with immaterial facts and responses. Judge Kravitz explained that the advisory committee had struggled to confine the point-counterpoint procedure to essential, material facts and had heard from members of the bar that a numerical limitation should be imposed on the number of facts that a party may include in its statement.

Judge Kravitz said that these are substantial criticisms, especially because they come from people who have used point-counterpoint and have abandoned it. In defense of the proposal, though, he said that the rule allows a judge to opt out of it on a case-by-case basis. Nevertheless, he said, some judges do not want to use the point-counterpoint process in any cases.

Judge Kravitz reported that the advisory committee had initiated the project to revise Rule 56 for two reasons. First, summary-judgment practice around the country varies enormously, even within the same district. The committee concluded that there was substantial value in encouraging more national uniformity in the federal court system for a procedure as vital as summary judgment. Second, he said, summary judgment practice in the federal courts has deviated greatly from the text of the rule, and it is appropriate to update the rule to reflect the actual practice.

Judge Kravitz stated that the advisory committee would like to have the Standing Committee's input on the importance of national uniformity in summary judgment practice. He reported that several members of the bench and bar have told the committee that summary judgment today lies at the very heart of federal civil practice and should be relatively uniform across the federal system. Others, though, have said that local courts should be able to shape the procedure the way they want, in coordination with their local

bars. Moreover, they say, it is relatively easy for lawyers to ascertain what the practice is in each court and adapt to it. Therefore, procedural uniformity may not be very important.

Judge Kravitz said that some commentators have urged that Rule 56 not specify a particular procedural method for pinpointing material, undisputed facts. Judges or courts should be free to adopt the point-counterpoint procedure, but only if they wish. On the other hand, if national uniformity is deemed an important, overriding value, the advisory committee must decide what the national default procedure should be. On that point, the advisory committee believes that the point-counterpoint procedure specified in the published rule is the best approach to take. The local rules of some 20 districts require both parties to prepare summary-judgment motions in a point-counterpoint format, while roughly another third only require the movant to list all undisputed facts in individual paragraphs. Thus, if the advisory committee were to choose another approach, there would still be opposition to the rule from courts that have a point-counterpoint system. Therefore, the threshold question is whether national uniformity is truly needed in Rule 56.

One member argued that uniformity is important, and the advisory committee should continue trying to draft a national rule. But, she said, allowing an opt-out from the national procedure by local rule of court would be a good idea and would make the rule much more acceptable to the courts. Even allowing a broad opt-out would still be a marked improvement over the current rule.

A lawyer-member said that national uniformity is indeed important, but the fact that there is such strong dissent from the proposal by many judges argues for including a broad opt-out provision. He suggested that it would be helpful to have a national procedure specified in the rule, but courts should be allowed to deviate from it broadly.

A judge-member agreed that uniformity is the key question to focus on. She said that the point-counterpoint system works well in her experience, but the committee needs to respect the view of judges and lawyers who claim that it increases costs and disputes. It is hard in the end to be optimistic about achieving national uniformity because each court has developed its own system over time and is comfortable with it.

Another member agreed that uniformity is the critical question, but argued that it simply may not be achievable. The comments and testimony have indicated that the proposed rule will not be as successful as expected. In reality, imposed uniformity is likely to be ephemeral because judges will add their own requirements to whatever any national rule specifies.

Professor Coquillette pointed out that Congress over the years has urged more national uniformity and has expressed concern over the proliferation of local court rules.

The committee's local rules project, he said, had been successful in getting the courts to eliminate local rules that are inconsistent with the national rules. Nevertheless, the project avoided treading in two areas where enormous differences persist among the courts – attorney conduct and summary judgment. Many local rules, he said, are clearly better than the current FED. R. CIV. P. 56, but the differences of opinion among the courts are so deep that it is extremely difficult to achieve national uniformity.

He noted that the 1993 amendments to FED. R. CIV. P. 26 allowed individual district courts to opt out of the national disclosure requirements by local rule. Many districts opted out, in whole or in part. There was no uniformity even within many districts. The only way to restore uniformity was to dilute the national rule, a change that itself required considerable effort. He suggested that it would be better to have the national rule not specify any particular procedures than to have one that sets forth national procedures but authorizes wholesale opt-outs. Allowing a broad opt-out by local rule, he said, will not promote uniformity.

Judge Kravitz explained that the problem with summary judgment variations among the courts is not only that courts have a fondness for their own local rules and resist change, but it is also that many judges genuinely believe that the proposed national rule will add costs without making meaningful improvements.

Two members recommended that the committee proceed with the point-counterpoint proposal, but another suggested that the rule require that only the moving party state the material, undisputed facts in numbered paragraphs without burdening the opponent with having to respond to each fact in numbered paragraphs. Another member expressed support for the point-counterpoint process, but suggested that the committee impose a limit on the number of facts that may be stated and consider a different system for certain categories of cases.

A participant pointed out that his district had used the point-counterpoint system for more than a decade, but had abandoned it because it was not helpful to judges in resolving summary-judgment motions. They discovered that in reality there are not many disputed facts after discovery. Rather, cases turn largely on inferences drawn from the facts, rather than the facts themselves.

A member related that the point-counterpoint procedure is currently used in his district, and all the judges follow it. But a visiting judge from a district without the procedure has criticized it strongly, and the district court is taking a fresh look at the matter.

Several participants said that they liked the point-counterpoint process because it adds structure to the rule and forces attorneys to focus on the facts, but they recognized that it may add costs. They emphasized that the briefs or memoranda of law, which argue

the inferences drawn from the facts, are more important than the statements of facts themselves. One lawyer-member said that he had practiced in both courts that have the process and those that do not have it, and he has no problem in adapting to the requirements of each court or allowing courts considerable latitude to structure their own process.

Judge Scirica pointed out that the proposed changes in Rule 56 will have to be approved by the Judicial Conference. It is a virtual certainty, he said, that they will be placed on the discussion calendar for a full debate.

Two other members suggested that the key problems are not so much with the mechanics of the procedure, but the fact that some district judges are simply not deciding summary-judgment motions. Judge Kravitz noted that the advisory committee had learned from the Federal Judicial Center's research that summary judgment motions remain undecided until trial in many districts. But that problem will not likely be cured by any rule.

Professor Cooper pointed out that the Federal Judicial Center's research had shown that there is more likelihood that summary-judgment motions will be decided in the point-counterpoint districts. The figures show that more motions are granted in these districts, but largely because a higher percentage of motions are actually ruled on. There simply are more rulings in the point-counterpoint districts. On the other hand, the courts' time to disposition is longer in these districts, in part because it may take more judicial time to resolve summary judgment motions presented in this detailed format. The numbers may not be not reliable, though, because there may be other reasons for delays in some districts, such as heavy caseloads.

Judge Kravitz mentioned that some sentiment had been expressed that the point-counterpoint system may favor defendants and the well-heeled. The advisory committee, he said, had tried to address that perception by allowing an opponent of a summary-judgment motion to concede a particular fact for purposes of the motion only. This provision would save the opponent the expense of having to respond in detail to each and every fact asserted to be undisputed.

Judge Kravitz emphasized that a fundamental principle for the advisory committee has been to produce a rule that does not favor either side. The committee, he said, had succeeded in that objective, despite certain criticisms from both sides. He suggested that the opposition from some plaintiffs' lawyers is really a proxy for their opposition to summary judgment per se. He pointed out that other plaintiffs' lawyers support the proposal, though they favor a cap on the number of facts that may be stated.

A member added that the perception that the point-counterpoint process is favored by defendants and opposed by plaintiffs makes no sense. He suggested that defense

counsel normally want to have as few disputed facts as possible when seeking summary judgment. Plaintiffs, on the other hand, want to raise as many facts as they can.

One participant pointed out that summary judgment is the key event in many federal civil cases, either because it disposes of a case or, if denied, leads to settlement. He emphasized that summary judgment must be seen as interconnected with several other procedural devices specified in the Federal Rules of Civil Procedure – such as Rule 8 (pleading), Rule 12 (defenses), Rule 16 (pretrial management), and Rules 26-37 (disclosures and discovery). The numbering and organization of the rules imply that these are separate stages of litigation, rather than essential components of an interconnected process. He suggested that the committee consider bringing those rules physically closer together, instead of having them spread out as they are now. He also suggested that the committee consider looking at all the rules as a whole and examining how all the parts work together.

He added that faux uniformity may not be a bad idea. There are clear differences among regions, judges, and types of cases. There are also great differences among the bar, both as to the culture of the bar and the quality of individual lawyers. There are differences, too, in the abilities and preferences of individual judges. And it must be recognized that judges have to work hard to grant a motion for summary judgment.

Judge Kravitz reported that the advisory committee had decided to conduct a two-day conference in 2010 at a law school to conduct a holistic review of all these interrelated provisions and how well they work in practice.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering potential revisions to FED. R. CIV. P. 45 (subpoenas). The rule, he said, is long, complicated, and troubling to practitioners. Practical issues have been raised, for example, regarding: whether Rule 45 issues should be decided by the court where the action is pending or the court where a deposition is to be taken or production made; the use of the rule to conduct discovery outside the normal discovery process; the adequacy of the modes of service; use of the rule to force corporate officers to come to trial; and the continuing relevance of the territorial limits of subpoenas, such as the 100-mile radius that dates from 1789. He noted that Judge David G. Campbell's subcommittee will take the lead on this issue, and Professor Richard L. Marcus will serve as the principal Reporter.

Professor Cooper added that the Federal Rules of Appellate Procedure intersect with the Federal Rules of Civil Procedure in several ways, and the advisory committee is working on joint projects with the appellate advisory committee. He noted, for example, the suggestion that FED. R. APP. P. 7 (bond for costs on a civil appeal) include statutory attorney fees as costs on appeal. The civil advisory committee, he said, has been

considering changes to FED. R. CIV. P. 23 (class actions) for several years, and the problem of objectors to class settlements is a long-standing and difficult one. The civil advisory committee would be interested, for example, in whether it is appropriate to require a cost bond for objectors who appeal from approval of a class-action settlement, especially in fee-shifting cases. He added that some appeals by objectors are on solid grounds, but some clearly are not.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman presented the report of the advisory committee, as set forth in his memorandum and attachments of December 15, 2008 (Agenda Item 8).

Informational Items

FED. R. CRIM. P. 32

Judge Tallman reported that the advisory committee is considering a possible revision to FED. R. CRIM. P. 32(h) (notice of possible departure from sentencing guidelines). Under the current rule, a sentencing court must notify the parties if it intends to depart from the sentencing guidelines range on a ground not identified in the pre-sentence report or the parties' submissions. There has been litigation, he said, over whether the rule also applies to variances from the guidelines under *United States v. Booker,* 543 U.S. 220 (2005). Recently, the Supreme Court held in *Irizarry v. United States*, 553 U.S. ___ (2008), that the rule does not apply to variances. So the committee may wish to amend the rule to cover both. Alternatively, though, it may also consider eliminating Rule 32(h) altogether.

Judge Tallman reported that the American Bar Association had approved a resolution to mandate disclosure to the parties of all information used by probation officers in preparing their pre-sentence reports. The proposal is designed to increase transparency, and both the defense and the government argue for greater openness in the sentencing process.

The advisory committee, he said, had discussed the proposal and was concerned that it could compromise sources who give confidential information to probation officers, including victims and cooperating witnesses. It would also impose additional burdens on probation offices and make the process of preparing reports more adversarial than it is now. He explained that the committee was relying heavily on the Federal Judicial Center and the Administrative Office to canvass those district courts currently following a regime similar to the ABA model to ascertain what their practical experience has been. In particular, the staff will explore with the courts whether there is merit to the concerns that

sources will be compromised if all communications to probation officers must be disclosed.

Professor Beale added that there is a relationship between FED. R. CRIM. P. 32(h) and the ABA proposal to require disclosure of all materials presented to the probation officer. If more information were disclosed to the parties earlier, more would be on the record at the time of sentencing, and notice of planned departures or variances would not be needed. A member suggested that many judges are concerned that the ABA proposal will add another layer of litigation. Another pointed out that defendants in her district have asked for access to information given to probation officers regarding earlier cases in a defendant's criminal history. That information, though, may reveal information about victims, cooperating witnesses, and other sensitive matters.

FED. R. CRIM. P. 12(b)

Judge Tallman reported that the Supreme Court held in *United States v. Cotton,* 535 U.S. 625 (2002), that omission of an essential element in the indictment does not deprive the court of jurisdiction. Under the current rule, a motion alleging a failure to state an offense can be made at any time. In light of *Cotton,* the advisory committee is exploring an amendment to FED. R. CRIM. P. 12(b) (motions that must be made before trial) to require that a challenge for failure to state an offense, like other defects in an indictment or information, be made before trial. Under FED. R. CRIM. P. 12(e), a party waives the defense or objection if not made on time, but the court may grant relief from the waiver for "good cause shown."

He explained that the proposal raises a number of difficult issues, particularly relating to the breadth of the "good cause" that the defendant must show to obtain relief. Some courts, for example, interpret the rule to require both "good cause" and "prejudice." The requirement to show "good cause" may result in a defendant forfeiting substantial rights merely because of an error of counsel in failing to raise the defect earlier. In addition, the committee is concerned about the relationship between the proposed amendment and cases holding that the Fifth Amendment precludes a court from constructively amending an indictment. He said that the advisory committee had voted 7 to 5 to continue working on the proposed amendment and will consider the issue again at its April 2009 meeting.

TECHNOLOGY

Judge Tallman reported that the advisory committee had formed a technology subcommittee, chaired by Judge Anthony J. Battaglia, to conduct a comprehensive review of all the criminal rules to assess whether amendments are desirable to sanction the use of new technologies. He pointed out that several rules already permit the use of technology, such as the use of video teleconferencing to conduct certain proceedings. But more

amendments may be needed to let judges, lawyers, and law enforcement agents take full advantage of technology in performing their jobs. The subcommittee, he said, was expected to complete its report in time for the advisory committee's April 2009 meeting.

AUTHORITY OF PROBATION OFFICERS TO SEEK AND EXECUTE SEARCH WARRANTS

Judge Tallman reported that the advisory committee was considering a preliminary proposal referred by the Criminal Law Committee that would authorize probation officers (and pretrial services officers) to seek and execute search warrants. The proposal, he said, was controversial and would represent a major change of policy for the federal courts. Among other things, it raises questions of separation of powers because probation officers are part of the judiciary. In effect, judiciary employees could be asking a court for a search warrant to obtain evidence that might lead to criminal charges, a decision entrusted to the executive branch. Professor Beale added that the Department of Justice had expressed concern about the proposal because of the possibility of probation officers, who are not law enforcement officers, interfering with investigations and other prosecution efforts.

Judge Tallman pointed out that committee members had expressed concern that seeking and executing search warrants could interfere with the relationship between probation officers and their clients and impede the effectiveness of the officers. They were also concerned about the training and safety of probation officers if they will be placed in dangerous situations that may arise when conducting a search.

Judge Tallman reported that he had sent a letter to Judge Julie E. Carnes, chair of the Criminal Law Committee, advising her of the advisory committee's initial concerns and inviting her to participate in the April 2009 meeting. In response, he said, she advised that members of the Criminal Law Committee share some of the same concerns.

VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor a number of issues arising under the Crime Victims' Rights Act. He noted that the General Accountability Office had just published a comprehensive report on implementation of the Act, which gave the judiciary a clean bill of health for its efforts. The report also noted that the Act's 72-hour limit on the time for a court of appeals to act on mandamus review appeared to be too short. Professor Beale added that the advisory committee did not pursue amending that particular statutory deadline as part of the judiciary's time-computation legislation because it raised significant policy issues, which were not appropriate for the package of proposed technical changes to accommodate the new time computation rule.

Judge Tallman reported that the advisory committee has been receiving written reports of the regular meetings that the Department of Justice holds with victims' rights

organizations. In addition, he said, the advisory committee anticipates that additional legislative proposals on victims' rights might be introduced in the new Congress.

FED. R. CRIM. P. 12.4

Finally, Judge Tallman reported that the advisory committee had received a request from the Codes of Conduct Committee to consider an amendment to FED. R. CRIM. P. 12.4 (disclosure statement) to require additional disclosures that could help courts screen for potential conflicts of interest. The proposal would assist courts in ascertaining whether an organization, including its subsidiary units or affiliates, that was a victim of a crime is one in which a judge holds an interest.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 2008 (Agenda Item 7).

Amendments for Publication

RESTYLED FED. R. EVID. 501-706

Judge Hinkle reported that the advisory committee had now completed restyling two-thirds of the Federal Rules of Evidence. The final third of the rules, he said, will be more difficult to restyle because it includes the hearsay rules. He pointed out that, for the first time, the committee's reporter, Professor Daniel J. Capra, could not attend a Standing Committee meeting due to a conflict with essential teaching duties. He also regretted that Professor R. Joseph Kimble, the committee's style consultant, could not attend the meeting because of winter snows and transportation difficulties. He said that both will participate in the June 2009 meeting.

Judge Hinkle pointed out that Judge Hartz had discovered a glitch in the restyled draft of FED. R. EVID. 501 (privilege). It could be read to suggest that if testimony relates to both a federal and state claim, only state law will apply. Case law, however, suggests that federal law applies.

The advisory committee, he said, intends no change in the law. Accordingly, it recommends substituting the following language for the last sentence of FED. R. EVID. 501: "But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege." A corresponding change will also be made in FED. R. EVID. 601 (competency to testify).

A member praised the work of the advisory committee, but expressed concern over some of the style conventions, including the use of bullets rather than numbers in some lists, the use of dashes rather than commas, and beginning sentences with "but," "and," or "or." A member pointed out, however, that these conventions are fully consistent with widely accepted contemporary style. Judge Hinkle promised to bring these concerns back to the advisory committee for consideration at its next meeting.

The committee by a vote of 10 to 2 approved the restyled FED. R. EVID. 501-706 for publication, including the substitute language for FED. R. EVID. 501 and 601. The dissenting members explained that their negative votes were motivated solely by what they regard as some inelegant and inappropriate English usage in the restyled rules. Judge Rosenthal added that the committee's action will be subject to an additional, final review of the entire body of restyled evidence rules at the June 2009 committee meeting.

Informational Items

Judge Hinkle reported that only one public comment had been received in response to the proposed amendment to FED. R. EVID. 804(b)(3) (hearsay exception for a statement against interest), and the scheduled public hearing had been cancelled because there had been no requests to testify.

He added that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's holding in *Crawford v. Washington,* 541 U.S. 36 (2004), that admission of "testimonial" hearsay violates an accused's right to confrontation unless given an opportunity to cross-examine the declarant. He said that case law developments to date suggest that amendments to the hearsay exceptions in the rules may not be necessary.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had prepared an excellent report on the use of standing orders and general orders in the district courts and bankruptcy courts. In addition, a survey of the courts had been conducted asking judges for their advice in identifying matters that belong in local rules versus those that may be addressed appropriately in standing orders. The survey results, she said, had shown that the courts do not want federal rules to regulate standing order practices, but they do favor the committee distributing guidelines to help them decide what matters should be included in their local rules and standing orders.

To that end, she said, Professor Capra had prepared draft Guidelines For Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and For Posting Standing Orders on a Court's Website.

Judge Rosenthal emphasized that the proposed guidelines were not an attempt by the Standing Committee or the Judicial Conference to dictate particular binding rules that the courts must follow.

Several members endorsed the guidelines and said that they were very well-written and helpful. But one expressed reservations about the specific language of Guideline 4 on the grounds that it appears to give too much encouragement to individual judges to deviate from court-wide standing orders. He suggested that it may also be internally inconsistent with Guideline 8, specifying that individual-judge orders may not contravene a court's local rules.

Another member suggested, though, that Guideline 4 had an inappropriately negative tone because it appeared to fault district judges for having orders different from their own district court rules and standing orders. She said that it is perfectly appropriate to accommodate some individual-judge preferences, such as those dealing with courtesy copies of papers and courtroom etiquette. In fact, the committee may not have authority to address the orders of individual judges. She recommended that the guidelines focus on court-wide orders and say nothing about the orders of individual judges.

Judge Rosenthal agreed that the guidelines will be more successful if they are not openly negative as to the preferences of individual judges. But some members cautioned that individual-judge orders can be a serious problem. Some are very beneficial, they said, but others are not. Some, in fact, are contrary to the national rules and may contain matters that should be addressed in local rules, rather than orders. Moreover, the orders of individual judges are not readily accessible, may not be posted on a court's website, and can create a trap for litigants. The point of the proposed guidelines, she said, was not to make judges change their procedures, but to make them aware of the effects of their actions.

Professor Coquillette pointed out that the current standing orders project should be viewed in the context of the local rules project and the 1995 amendments to FED. R. CIV. P. 83. As revised, the rule specifies that no sanction or other disadvantage may be imposed on a party for noncompliance with a procedural requirement unless the requirement has been set forth in a national or local rule or the party has received actual notice of it in the particular case.

Judge Rosenthal explained that there are two kinds of standing orders – court-wide standing orders and the standing orders of individual judges. The committee, she said, can address court-wide standing orders, but an individual judge's ability to include the judge's own preferences, particularly on such matters as courtroom practices, is a much more delicate matter. She said that she agreed with Professor Capra's view that it would be a more successful approach if the committee were to focus on court-wide standing orders.

Judge Rosenthal added that if an order affects lawyers and litigants on a district-wide basis, it should be set forth in a local rule of court. But it is appropriate to let individual judges continue to include variations and innovations in their own standing orders. In addition, she said, judges normally send specific orders and detailed written instructions to the parties at the outset of each case. The parties, thus, receive actual notice of what the judge expects from them. The committee, she said, should not attempt to police the orders of individual judges. Its goal should be simply to provide helpful advice to the courts and urge them to make all orders readily accessible and easily searchable.

Members suggested some specific edits for the guidelines. Judge Rosenthal said that the document would be amended to take account of these concerns and re-circulated to the members after the meeting.

Judge Swain asked whether the committee would like comments from the Advisory Committee on Bankruptcy Rules. Judge Rosenthal responded that comments would be very welcome, and the advisory committee should explore whether any changes in the guidelines would be appropriate for the bankruptcy courts. At this point, though, the focus should be on sending the guidelines to the district courts.

SEALED CASES

Judge Hartz, chair of the Ad Hoc Subcommittee on Sealed Cases, reported that the Federal Judicial Center has been examining all cases filed in the federal courts since 2006 to ascertain for the subcommittee what types of cases are sealed. The Center's initial review has now been largely completed. The results show that many of the sealed cases on the civil docket are filed under the False Claims Act. By statute, they must be sealed until the government decides whether or not to proceed. It often takes a long time for the government to make its decision. Moreover, some of these cases are later dismissed, but not unsealed.

The largest number of sealed cases are on the districts' magistrate-judge dockets, and many of them involve the issuance of warrants. It appears that many were never formally unsealed after the warrants were executed, an indictment filed, and a district-court criminal case opened. Only one bankruptcy case has been identified among the sealed cases. The subcommittee learned later that the courts' CM/ECF case management system now provides an electronic reminder to unseal a filing after a certain period of time has elapsed.

Judge Hartz said that the initial research by the Center for the subcommittee seems to reveal that there are few, if any, systemic problems with sealed cases in the courts. He noted that the procedure in his circuit has been for the court of appeals to carry over the status of a case from the district court. Thus, if a case has been sealed by a district court, it

will remain sealed in the court of appeals, and sometimes the circuit judges are unaware of the sealing. Another judge reported that the court of appeals in her circuit effectively orders that all cases be unsealed at filing but asks the parties to petition the court if they wish to have the cases remain sealed.

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION

Mr. Joseph chaired the panel discussion and announced that it would focus on the ideas set forth in the draft report on the civil justice system prepared by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. He pointed out that the report is not yet final, but would likely be endorsed by the College. It sets forth a series of broad principles and recommendations to improve civil litigation in the federal and state courts, addressing such areas as pleading, discovery, experts, dispositive motions, and judicial management.

Professor Cooper opened the discussion by referring to recent reform efforts by the Advisory Committee on Civil Rules. He noted that the committee had been looking at pleading for years. It has explored fact pleading or substance-specific pleading rules, but it has not been prepared to pursue that path. Recently, the committee has considered reinvigorating motions for a more definite statement under FED. R. CIV. P. 12(e) to support the disposition of motions to dismiss, for judgment on the pleadings, and to strike under FED. R. CIV. P. 12(b), (c), and (f). More ambitiously, a more definite statement might promote more effective pretrial management. The concept was endorsed by the lawyer members of the advisory committee, but all the judges cautioned that it would result in the lawyers filing motions for a more definite statement in every case.

The advisory committee has also made some progress in drafting a set of simplified procedures that include fact pleading and much reduced discovery, but that project has been placed on indefinite hold. The committee's next effort will be to solicit ideas for improving the civil process at a major conference next year with members of the bench and bar.

Professor Cooper said that hope springs eternal for rulemakers in their efforts to make procedural rules "just, speedy, and inexpensive," in the words of FED. R. CIV. P. 1. He noted, for example, a new rule in New South Wales specifies that resolution of cases should be "just, quick, and cheap," parallel to FED. R. CIV. P. 1. The 1848 Field Code had a standard that a complaint should be a statement of the facts constituting a cause of action in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. In 1916, Senator Root proclaimed that procedure ought to be based on common intelligence of the farmer, the merchant, and the laborer. There is no reason why a plain, honest man should not be permitted to go into court to tell his story and have the judge be permitted to do justice in that particular case. In 1922, Chief Justice Taft addressed the American Bar Association

and argued that the plan should be to make procedure so simple that it requires no special knowledge to master it. Indeed, a plaintiff should be able to write a letter to the court to make his case.

Professor Cooper pointed out that good rules often do not work in practice, even though they may be sound in principle and expertly crafted. The 1970 amendments to the Federal Rules of Civil Procedure, for example, were good rules, but they do not function as anticipated. There may be a variety of reasons to explain the phenomenon. It may be because the rules are trans-substantive or govern the litigation of topics that are just not well suited to resolution through our adversary dispute system. They may be focused too much on ordinary, traditional litigation. Or perhaps the system is no longer effective for the general run of claims.

The problem, in part, may lie with the lawyers. We may have developed a world of litigators and associates who understand discovery well, but few actual trial lawyers. The fault may be attributable in part to adversary zeal run amok, the structure of law firms, and the realities of hourly billings and law practice as a business. Judicial overload and the lack of judicial resources, too, may be part of the problem. Sound pretrial management is needed, and some pretrial and discovery problems need to be addressed quickly. But the judges may not be available or willing to oversee cases or resolve problems in a timely manner.

Professor Cooper suggested that inertia is a major obstacle to reform, as lawyers generally do not like change. He noted, by way of example, that a bar committee had objected recently to the proposed revision of FED. R. CIV. P. 56 (summary judgment) because the current Rule 56 has a long history of interpretation, and it would be impossible to predict the unintended consequences if the rule were changed. The fear of doing something different, he said, is prevalent.

In addition, the rules committees have been told to make no changes in the rules without first having sound empirical support behind them. As a result, the committees turn regularly to the Federal Judicial Center to provide them with excellent research support. The Center's resources, though, are limited. Its research can identify associations in the data between specific procedures and specific outcomes, but it cannot often prove actual causation. Therefore, it is difficult to predict with certainty the impact that proposed amendments will have.

Finally, Professor Cooper noted that a critical issue for reform of the civil justice system is which body should initiate it. The rules committee process, he said, unlike the legislative process, provides balance and careful discussion and deliberation. But sometimes there is political resistance to certain rules changes based on partisan or financial interests. Note, for example, the opposition to proposed changes in FED. R. CIV. P. 11 (sanctions) and FED. R. CIV. P. 68 (offer of judgment) in the past, and to certain

aspects of proposed FED. R. CIV. P. 56 (summary judgment) now. Getting even modest changes through the system can be difficult if certain segments of the bar and their clients oppose them strongly. As a result, the advisory committee treads carefully and strives for consensus, when feasible.

Discovery, for example, has been on its agenda for over 30 years, and there appears to be no end in sight. Notice pleading, for example, has been brought back to the table by the Supreme Court's decision in *Bell Atlantic v. Twombly,* 550 U.S. 554 (2007). The package of notice pleading, discovery, and summary judgment, though, lies at the very heart of the revolutionary 1938 Federal Rules of Civil Procedure. They represent the very soul of the current civil justice system. Therefore, making significant changes in these basic components of the rules – as the proposals of the College and Institute appear to recommend – may have consequences that are profoundly political. As a result, it is natural to ask whether a change of this sort should be made through the Rules Enabling Act process.

Judge Kourlis suggested that the ideas and recommendations embodied in the report are not new. They respond to a pervasive belief that the civil justice system is just too costly and laden with procedures. In many ways, she said, the report's recommendations mirror the proposed Transnational Principles and Rules of Civil Procedure drafted, in part, by the American Law Institute, the new civil rules of the Arizona state courts, and the simplified rules developed a few years ago by the advisory committee.

For some time, she said, there has been a variety of opinions about whether the rules should be substantially revised, merely tweaked, or left untouched. But a great many observers, including legislators, have come to the conclusion that substantial changes in the civil justice system are needed.

She pointed out that the Federal Rules of Civil Procedure cast a long shadow over the civil justice system and set the standard for litigation throughout the nation. The federal rules committees occupy a unique leadership position. Among the states, 23 follow the federal rules closely, and 10 more apply them relatively closely. Eleven states rely on factual pleading, and 4 have hybrid systems.

Judge Kourlis said that lawyers and judges tend to cleave to consensus. But the search to achieve consensus can impede the sort of innovation that is needed. Therefore, the report declares that it is time to answer the growing voice for change. To that end, it is time for the federal system to lead the way. The federal rules committees can take advantage of the expertise of the Federal Judicial Center and the Administrative Office, and they enjoy a great electronic case management and data collection system that can provide the sorts of empirical data that the reform effort requires. State courts, unfortunately, just do not have those resources.

Judge Kourlis emphasized that the report does not advocate wholesale revision of the rules. Rather, it recommends carefully designed pilot projects that can provide critical empirical information on how to reduce costs, increase customer satisfaction, and perhaps increase the number of trials. She said that innovative pilot programs are easier to establish in the state courts than in the federal courts, but the states are not good at collecting data from them.

She recognized that federal law does not readily accommodate pilot programs. Nevertheless, the committee might wish to reexamine FED. R. CIV. P. 83 (local rules) or seek legislation to establish appropriate pilot projects. Clearly, she said, the language and intent of the Rules Enabling Act would support the suggested reform efforts.

She recommended, though, that the courts proceed carefully. The civil justice system is tarnished in the eyes of the public, lawyers, and litigants alike. Some of the criticisms may be unjustified, but some are clearly justified. The plea to rulemakers is that they remember whom they are serving and that their charge is to provide a civil justice system that is as good as they can make it.

Mr. Saunders reported that the drafters of the American College-Institute report had not been constrained by the Rules Enabling Act or by precedent. The group, he said, was composed of trial lawyers and two judges, but no scholars. They were liberated to write on a blank slate. They started by considering the existing civil discovery system and examined a number of proposals for reform made since the federal rules were adopted. But the group was not looking just at the federal system. Its proposals are meant to apply across the board to all systems, federal and state.

Mr. Saunders reported that the participants had read many articles and examined a great deal of data. After doing so, they reached the conclusion that much of the available data are simply counter-intuitive. The 1990 Rand study, for example, showed that there are few problems with civil discovery. But that conclusion clearly did not seem correct to the members of the group. So they asked for more data and administered a survey to all 3,000 fellows of the College and received a good response. One of the first conclusions they drew from the responses was that discovery cannot be considered in a vacuum. Several other parts of the civil rules, such as pleading, intersect with it.

The survey encompassed 13 different areas of civil litigation. In 12, there was widespread agreement among all segments of the bar. Only one area – summary judgment – produced any differences between the responses from lawyers representing plaintiffs and those representing defendants. For that reason, the group refrained from making recommendations regarding summary judgment.

The goal of the group, he said, was only to identify principles – not to write actual rules. It attempted to reach agreement on a set of basic principles that could be applied

across the board to civil litigation. The principles set forth in the report were then adopted unanimously by all 20 members of the task force.

The first principle, he said, is that there should be different sets of rules for different kinds of cases. In essence, "one size does not fit all" in civil litigation. Judge Kourlis added that both the task force and the Institute agree that one set of rules cannot handle all kinds of civil cases effectively. Instead, there should be either be separate rules for different kinds of cases or separate protocols within the same set of rules for different kinds of cases.

Mr. Joseph pointed out that the federal rules already sanction deviations from the trans-substantive provisions of the rules. For example, FED. R. CIV. P. 26 exempts certain categories of civil cases from its mandatory disclosure requirements. FED. R. CIV. P. 9 (pleading special matters) imposes separate requirements of particularity for pleading fraud or mistake, and there is a separate set of supplemental rules for admiralty cases. In addition, certain kinds of civil cases, such as social security appeals, are handled very differently by the courts from other cases, even though they are governed by the same civil rules. The report recognizes these differences and recommends that rulemakers create different sets of rules for certain types of cases.

Mr. Richards agreed that it would be constructive to consider adopting specific procedures for different types of cases. He noted that he had argued *Twombly,* and he emphasized that antitrust cases are truly different from other kinds of cases. Nevertheless, the lawyers in that case cited securities cases and other types of cases to the Supreme Court as precedent, assuming – incorrectly – that the concerns and principles discussed in those cases must be applicable in antitrust cases.

Judge Kravitz pointed out that patent lawyers come to him in every case and suggest how they want to handle the case. He works together with them to craft specific procedures for each case. But they are the only category of lawyers to do so. He pointed out that mechanisms currently exist in the Federal Rules of Civil Procedure to have a court fashion special rules, at least on an individual-case basis.

Mr. Saunders reported that the study group agreed that if discovery is to be tailored in different kinds of cases, the specialty bars – such as the patent, admiralty, and employment discrimination bars – should be called upon to fashion the special discovery rules for those types of cases. In a patent case, for example, discovery should focus on the history of the patent and the patent holder's notebooks. Other specialty bars could do the same for their cases. Mr. Garrison added that this concept would include standard document requests and standard interrogatories for the special categories of cases. He said, though, that it is very difficult to get judges to do this under the current rules.

Mr. Joseph pointed out that a defense lawyer's focus is normally on two matters – dismissal and summary judgment. There is a fear of juries that causes many cases to settle if summary judgment is denied. Consideration might be given, he said, to conducting a small mini-trial in appropriate cases to see whether it is worth going forward with the case.

A member suggested that the central concern being expressed by the panel appeared to be that judges are not taking sufficient charge of their cases, and lawyers are not working together with the court to fashion the direction of each case. Mr. Joseph responded that law firms are conservative by nature. No lawyer wants to try an alternative procedure and be second-guessed after the fact. Lawyers need to be assured that certain procedural alternatives are fully authorized and encouraged. Accordingly, it would be much easier for lawyers to get together and agree if there were specific alternatives set forth in the rules, or recognized protocols that they can rely on. Mr. Saunders added that the task force was unanimous in its conclusion that judges need to be more involved at the outset of each case – much earlier and much more directly than most judges are today.

A member suggested that model procedures could be devised by each specialty bar. Lawyers could then tell the court that they wish to follow the appropriate model in their case. Mr. Joseph agreed that the model procedures could well be developed by the bar itself, rather than through the rules. Mr. Richards added that the key point is that the specialized procedures need to be enshrined somewhere, either in the rules or in authorized models that can be considered by the lawyers and the judges. In either case, it would provide legitimacy for procedural options that should be considered in specific areas of the law.

Mr. Joseph concurred with a member that the task force was in effect asking the rules committees to formalize rules that would sanction different tracks for different kinds of cases. Judge Kourlis pointed out that recent reforms in the United Kingdom have led to protocols that govern disclosure requirements. Each segment of the bar was asked to develop a set of protocols, and if there are no protocols in a given area, the lawyers must follow the standard protocols.

Mr. Richards addressed the second principle in the draft report, which calls for fact-based pleading. He pointed out that there is now some sort of fact pleading in the federal courts as a result of *Bell Atlantic v. Twombly,* holding that a complaint must provide "enough facts to state a claim to relief that is plausible on its face." He said that discovery clearly imposes excessive costs in certain cases, and some cases settle because of the high costs of discovery. The Federal Rules of Civil Procedure, he said, do not deal adequately with the problems of discovery.

But, he said, there is no showing that a systemic problem of that sort exists in antitrust cases. Nevertheless, the Supreme Court in *Twombly* threw out the traditional foundations of the civil rules system in an antitrust case on the theory that the cost of

discovery forces settlement. He said that the underlying debate in *Twombly* was indeed over the costs of discovery, but the Court had no data to support its view. He suggested that a whole myth has been developed by industry and the defense bar that defendants are forced to settle cases that have no merits just because it costs too much to defend them. Antitrust cases, he said, are inherently expensive, but there is no indication at all that frivolous antitrust cases are settled because of attorney fees.

Mr. Saunders reported that some Canadian provinces have developed a procedure in which the bar may ask a court for an "application" and obtain relief very quickly based on affidavits and without full discovery. Accordingly, he said, rather than apply the full panoply of the federal or state procedural rules to each case, exceptions to the federal rules could be carved out for certain types of cases to provide relief quickly.

Mr. Saunders reported that 80% of the respondents in the American College survey agreed that the civil justice system is too expensive, 68% said that civil cases take too long to decide, and 67% said that costs inhibit parties from filing cases. He added that the report states that pleadings should "set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." Discovery would be limited to what is pleaded.

Mr. Garrison replied, however, that employment lawyers would take issue with the College's recommendations. Mr. Richards added that in both antitrust and employment discrimination cases, the plaintiff simply does not know all the facts at the time of filing.

Mr. Saunders explained that the task force had spent a great deal of time discussing discovery, including electronic discovery, and it has two fundamental suggestions to offer to the rules committee. First, the federal rules should retain and slightly modify the existing initial disclosures by eliminating the option for a party merely to identify categories of documents. Rather, a party should be required to turn over all the actual documents reasonably available that support its case.

Second, he said, after the initial disclosures, only limited discovery should be allowed. The existing system of wide-open, unlimited discovery should be ended. Instead, the rules should provide an initial set of discovery limited to producing documents or information that enables a party to prove or disprove a claim or defense. After that, a party should not be entitled to additional discovery unless the parties agree to it or the court approves it on a showing of good cause and proportionality.

This fundamental recommendation of the report, he said, represents a major change from current civil practice. In essence, the task force wants to fundamentally change the current mind set of litigants, under which they seek as much discovery as possible and keep asking for documents and depositions until somebody stops them. The task force, he said, had concluded that the current default in favor of unlimited discovery increases

discovery costs and delays without producing corresponding benefits. Instead, parties should be entitled as a matter of right only to specified, limited disclosures. Additional discovery should be permitted only if there is an agreement among the parties or a court order authorizing it.

One way to achieve this result, he said, would be for the specialty bars, such as the patent and employment discrimination bars, to specify the kinds of discovery and documents that they need and typically receive in a typical case. In addition, the task force identified – without comment and for further consideration – several other ways in which discovery might be limited, such as by changing the definition of "relevance," limiting the persons from whom discovery may be sought, and imposing discovery budgets approved by clients and the court.

Mr. Saunders added that he knew of no case in which a district judge has been reversed for allowing too much discovery. But judges may be reversed for allowing too little. Therefore, the safest course for a judge under the current regime is to allow discovery. That reality has created the mind set of entitlement that has led to the excessive costs and delays caused by discovery.

He reported that the College survey shows that electronic discovery is an extremely costly morass, and some fellows responded that it is killing the civil justice system. He said that it is essential for lawyers and litigants to work together with the court early in a case to decide how much discovery is truly needed and what the appropriate costs of it should be. To that end, perhaps the most important recommendation in the report, he said, is to change the default on discovery.

A member reported that the rules that limit discovery in the Arizona state courts have worked very well. The required disclosures in Arizona are much more elaborate than those in the federal system. But additional discovery is much more limited. Third-party depositions, for example, are not allowed without court approval. Moreover, the state court system has an evaluation committee, and there are empirical data demonstrating the effectiveness of the Arizona regime. In general, cases move through the Arizona state court system quickly and at less cost. The state has also established a complex-case division that has its own discovery rules under which all discovery is stayed until the judge holds an initial conference and determines how much discovery to allow.

Mr. Saunders said that the data from the survey of College fellows show that the costs of litigation must be addressed. Those costs are causing cases to settle that should not be settled on the merits. He said that 83% of the respondents to the survey agreed with this observation, and 55% said that the primary cause of delay in civil cases is the time to complete discovery.

Mr. Garrison said that certain discovery costs can be reduced, but he argued that the College's recommendations are too broad. He offered a range of other, alternative suggestions to improve efficiency and reduce costs. Most importantly, he said, there is a need to improve early judicial case management under FED. R. CIV. P. 16(a) because lawyers simply will not take the initiative on their own. In employment cases, for example, the court should enter a standard protective order at the Rule 16 conference. There could also be model protective orders that would work for most civil cases. The courts could require the plaintiff and defendant bars, or a special task force appointed by the court, to craft standard interrogatories that, once adopted, would not be subject to objections. The process of developing the standards could follow that used by the bar to draft pattern jury instructions.

The court and the bar could also adopt standard discovery requests to produce documents early in the case. They, too, would not be subject to objection. He added that the initial disclosures currently required by FED. R. CIV. P. 26(a) do not work because plaintiffs simply do not obtain the disclosures they need from defendants, and they have to proceed straight to discovery. He suggested that the proposed standard documents should be an alternative to initial disclosure.

He also suggested that a court should conduct a second conference at the end of the initial round of discovery. At that point, no more discovery will be needed in many cases. But if more is required, the judge could refer the case to a magistrate judge to handle the second stage of discovery. Judges could also get rid of the voluminous and duplicative paper produced in discovery by just requiring final documents. Courts could also consider alternate ways to deal with discovery disputes, such as by asking for letters, rather than motions, and holding telephone conferences to resolve disputes.

Mr. Garrison said that electronic discovery is really not that much of an issue for him, as he obtains the electronic information that he needs without difficulty. He cautioned against drafting procedural rules based on experience in heavy commercial litigation. Discovery problems in those cases, he said, are completely different from what occurs in most other cases.

Mr. Richards said, though, that there are indeed major problems with electronic discovery in antitrust cases and other big cases. The participants run search terms against electronic databases and come up with many hits. Then, it takes enormous attorney and paralegal time just to review all the hits. Nevertheless, he said, the College's proposal is not the right way to go. Courts, rather, should focus on the costs in each individual case and manage the discovery in reference to the anticipated costs of the discovery and the benefits it will produce in the case. That goal, he said, could be accomplished in three ways.

First, courts could require that discovery requests be more focused, directed, and limited to key areas. The broad requests seen today are very harmful. Discovery demands should be limited and based on specific details and events.

Second, courts should apply a triage system. Nothing, he said, focuses the mind of a plaintiff's lawyer more than costs. For example, the 7-hour limit on depositions has worked very well. Other kinds of limits, such as on interrogatories and discovery demands, would also work very well. Judges could ask lawyers at the outset of a case how many hits they expect to get on electronic discovery searches and then tailor the request to the anticipated results.

Third, courts could require phased discovery in many cases. At the outset of a case, the lawyers normally know that there really are only a handful of key issues. Resolution of those issues will determine the case as a whole. In antitrust cases, for example, it may be whether there was or was not a conspiracy.

The plaintiffs should be made to focus on the issues they really care about. Unfortunately, though, there now is simultaneous, unlimited discovery on all issues. Plaintiffs want to receive all the key information as quickly and as cheaply as possible, and they should be made to cut to the chase. To that end, phased discovery is the preferred way to go to narrow the scope of discovery. On the other hand, throwing a case out because of defects in the pleadings makes no sense at all.

A participant stated that one problem with phased discovery is that parties are not willing to move quickly to do it. Instead of allowing nine months or so for all discovery in a case, they want nine months for just the first phase of discovery. In addition, with phased discovery, key witnesses may get deposed three separate times, instead of only once. In reality, he said, one side often wants discovery, and the other does not. Mr. Richards agreed as to depositions, but said that it is the documents that are the main causes of unnecessary costs and delays.

Mr. Saunders pointed out that the obligation to preserve electronic information begins on the first day of a case. The parties, however, do not see a judge for some time after that. During the hiatus between filing and issuance of a pretrial order, parties incur large costs just to preserve electronic information before they are relieved of that responsibility by the court. Therefore, judges should take immediate action at the outset of a case to address preservation obligations, and no sanctions should be imposed on the parties other than for bad faith. The current rules, he said, do not adequately address this point.

A member recommended that the advisory committee obtain more information from the state courts in Arizona and Massachusetts to see how well they are controlling discovery. Judge Kravitz agreed to pursue the matter.

NEXT MEETING

The committee agreed to hold the next meeting in Washington, D.C., in June 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, June 1 and 2, 2009.

Respectfully submitted,

Peter G. McCabe
Secretary

2-A

Proposed Time Computation Amendments Approved by the Judicial Conference and Transmitted to the Supreme Court

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 45. Computing and Extending Time[2]

~~**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:~~

~~**(1) *Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2) *Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3) *Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's~~

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

[2]Incorporates amendments approved by the Supreme Court that are scheduled to take effect on December 1, 2008, unless Congress acts otherwise.

~~office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~(4) *"Legal Holiday" Defined.* As used in this rule, "legal holiday" means:~~

~~(A) the day set aside by statute for observing:~~

~~(i) New Year's Day;~~

~~(ii) Martin Luther King, Jr.'s Birthday;~~

~~(iii) Washington's Birthday;~~

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

~~(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.~~

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the

end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"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;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by 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 statute that does not specify a method of computing time, a Federal Rule of Criminal Procedure, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

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. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

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 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(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 the 10-day period not infrequently 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 event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — 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)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, the new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days 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.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

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 Criminal

Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires 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. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, 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. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period

of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

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. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

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 56(a). Some courts have held

that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal 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 event. *See, e.g.*, Rule 35(a) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 14 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 7 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (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. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure,

including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods — *i.e.*, periods that are measured after an event — subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday — no earlier than Tuesday, April 22.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Standing Committee changed Rule 45(a)(6) to exclude state holidays from the definition of "legal holiday" for purposes of computing backward-counted periods; conforming changes were made to the Committee Note to subdivision (a)(6).

Rule 5.1. Preliminary Hearing

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(c) **Scheduling.** 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.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information[3]

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(f) Bill of Particulars. 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.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

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[3]Additional proposed amendments to Rule 7(c) are on page 33.

(2) ***Defendant's Response.*** 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:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

* * * * *

(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~~ 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.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

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(3) ***Response to the Notice.*** 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.

(4) ***Disclosing Witnesses.***

(A) *Government's Request.* 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.

(B) *Defendant's Response.* Within ~~7~~ 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name,

address, and telephone number of each witness.

(C) *Government's Reply*. Within ~~7~~ 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

* * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(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~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) ***Other Grounds.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within ~~7~~ 14 days after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 34. Arresting Judgment

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(b) Time to File. The defendant must move to arrest judgment within ~~7~~ 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within ~~7~~ 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * * * *

Committee Note

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Rule 41. Search and Seizure[4]

* * * * *

(e) Issuing the Warrant.

* * * * *

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

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device

[4]Additional proposed amendments to Rule 41(e) and (f) are on pages 53-56.

warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than ~~10~~ 14 days;

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 47. Motions and Supporting Affidavits

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(c) Timing of a Motion. 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.

* * * * *

Committee Note

The time set in the former rule at 5 days, which excluded intermediate Saturdays, Sundays, and legal holidays, has been expanded to 7 days. See the Committee Note to Rule 45(a).

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) Appeal.

* * * * *

(2) ***From a Magistrate Judge's Order or Judgment.***

(A) *Interlocutory Appeal.* 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.

(B) *Appeal from a Conviction or Sentence.* 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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Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. 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.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. 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.

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Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

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Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

2-B

Other Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Rule 7. The Indictment and the Information[5]

* * * * *

(c) Nature and Contents.

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~~**(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.~~

~~(3)~~(2) **Citation Error.** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

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[5]Additional proposed amendments to Rule 7(f) are on page 15.

Committee Note

Subdivision (c). The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 7.

Rule 32. Sentencing and Judgment[6]

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(d) Presentence Report.

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

(A) the defendant's history and characteristics,

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[6]Incorporates amendments approved by the Supreme Court that are scheduled to take effect on December 1, 2008, unless Congress acts otherwise.

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) information that assesses any financial, social, psychological, and medical impact on any victim;

(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); and

(G) specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law.

* * * * *

Committee Note

Subdivision (d)(2)(G). Rule 32.2 (a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 32.

* * * * *

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains 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. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) ~~***In General.***~~ ***Forfeiture Phase of the Trial.***

(A) *Forfeiture Determinations.* 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) *Evidence and Hearing.* 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 and accepted by the court as relevant

and reliable. If ~~if~~ the forfeiture is contested, on either party's request the court must conduct a hearing ~~on evidence or information presented by the parties at a hearing~~ after the verdict or finding of guilt.

(2) ***Preliminary Order.***

(A) *Contents of a Specific Order.* 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, ~~or~~ directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria ~~without regard to any third party's interest in all or part of it~~. The court must enter the order without regard to any third party's interest in 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) *Timing.* Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) *General Order.* If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general

terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(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 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.

(4) ***Sentence and Judgment.***

(A) *When Final.* At sentencing — or at any time before sentencing if the defendant consents — the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2 (c).

(B) *Notice and Inclusion in the Judgment.* The court must include the forfeiture when orally announcing the sentence or must otherwise

ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal.* The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date

when the order granting or denying the amendment becomes final.

(~~4~~ 5) ***Jury Determination.***

(A) *Retaining the Jury.* ~~Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property

subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) ***Notice of the Forfeiture Order.***

(A) *Publishing and Sending Notice.* If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) *Content of the Notice.* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and

state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication; Exceptions to Publication Requirement.* 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 means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) *Means of Sending the Notice.* The notice 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 forfeiture order, the court, in accordance with

Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

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Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

Although forfeitures are not charged as counts, the federal judiciary's Case Management and Electronic Case Files system should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought if necessary to enable the defendant to prepare a defense or to avoid unfair surprise. *See, e.g.*, *United States v. Moffitt, Zwerdling, & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the

indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941, 944 (N.D. Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully). *See also United States v. Columbo*, 2006 WL 2012511 * 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

Subdivision (b)(1). 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, which may be necessary even if the forfeiture is not contested. Subparagraph (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subparagraph (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. *Cf.* Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary forfeiture order once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated forfeiture order, within seven days after oral announcement of the sentence. During the seven-day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the forfeiture order 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 by the time of sentencing. In that case the court is authorized to issue a forfeiture order describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue discovery necessary to identify and trace those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the forfeiture order becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable

detail regarding the oral announcement of the forfeiture at sentencing, the reference to the forfeiture order in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the forfeiture order in the judgment and commitment order, and the time to appeal.

New subparagraph (C) clarifies the time for appeals concerning forfeiture by the defendant or government from two kinds of orders: the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. This provision does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c).

Subdivision (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subdivision (b)(5)(B) explains that "the government must submit a proposed Special Verdict Form listing each property subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment to Rule 32.2 was modified to use the term "property" throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. The term "forfeiture order" was substituted, where possible, for the wordier "order of forfeiture." Other small stylistic changes (such as the insertion of "the" in subpart titles) were also made to conform to the style conventions.

In new subpart (b)(4)(C), dealing with the time for appeals, the words "the defendant or the government" were substituted for the phrase "a party." This portion of the rule addresses only appeals from the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. Only the defendant and the government are parties at this stage of the proceedings. This portion of the rule does not address

appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c). This point was also clarified in the Committee note.

Additionally, two other changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

Rule 41. Search and Seizure[7]

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(e) Issuing the Warrant.

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

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(B) *Warrant Seeking Electronically Stored Information.* A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information.

[7]Additional proposed amendments to Rule 41(e) are on page 23.

Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(~~B~~C) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a

reasonable period not to exceed 45 days each. The warrant must command the officer to:

* * * * *

(f) Executing and Returning the Warrant.

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

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(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic

storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

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Committee Note

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and

to encompass future changes and developments. The same broad and flexible description is intended under Rule 41.

In addition to addressing the two-step process inherent in searches for electronically stored information, the Rule limits the 10 [14][8] day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or review of the media or electronically stored information would take place, the practical reality is that there is no basis for a "one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the "person aggrieved" requires access to the storage media or the electronically stored information earlier than anticipated by law enforcement or ordered by the court, the court on a case by

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[8]The 10 day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

case basis can fashion an appropriate remedy, taking into account the time needed to image and search the data and any prejudice to the aggrieved party.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the "paper world." In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e., the cabinets, on the inventory, as opposed to making a document by document list of the contents.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The words "copying or" were added to the last line of Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol are presently working their way through the courts. *Compare United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999) (finding warrant authorizing search for "documentary evidence pertaining to the sale and distribution of controlled substances" to prohibit opening of files with a .jpg suffix) *and United States v. Fleet Management Ltd.*, 521 F. Supp. 2d 436 (E.D. Pa. 2007) (warrant invalid when it "did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity") *with United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085 (9th Cir. 2008) (the government had no reason to confine its search to key words; "computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files"); *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

Minor changes were also made to conform to style conventions.

PROPOSED AMENDMENTS TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA), identifying 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 COAs more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Cases in the United States 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. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The new subdivision is designed to direct parties to the appropriate rule governing the timing of the notice of appeal and make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were

added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

Finally, a new subdivision (b) was added to mirror the information provided in subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings, directing petitioners to Rule 4 of the appellate rules and indicating that notice of appeal must be filed even if a COA is issued.

Minor changes were also made to conform to style conventions.

Rule ~~11~~ 12. Applicability of the Federal Rules of Civil Procedure

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Committee Note

The amendment renumbers current Rule 11 to accommodate the new rule on certificates of appealability.

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the

district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a COA, identifying 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 for the United States 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. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The amendment is designed to make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal. Finally, a sentence indicating that notice of appeal must be filed even if a COA is issued was added to subdivision (b).

Minor changes were also made to conform to style conventions.

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2-C-1

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

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

RE: **Rules 5, 12.3, and 21**

DATE: **March 1, 2009**

There were four comments on one or more of the rules making up the Committee's second package of rules related to crime victims during the period for public notice and comment. The Federal Defenders and the National Association of Criminal Defense Lawyers oppose each of the rules, sounding some general themes as well as specific themes addressed to each proposal. The Federal Magistrate Judges Association opposes the amendment to Rule 5, but supports the amendments to Rules 12.3 and 21. In addition, one other comment opposing Rule 21 was received.

The arguments raised in the comments are discussed in this memorandum, a summary of each comment is included at the end of the memorandum, and the full comments are included in the agenda book. The full text of the proposed amendments and Committee Notes follow this memorandum. We anticipate that one witness (Thomas Hillier, representing the Federal Defenders) will testify concerning the amendment at the Committee's April meeting.

The Crime Victims' Rights Act subcommittee chaired by Judge Jones discussed the comments briefly during a teleconference and reiterated its general support for the amendments

General Comments Applicable to All Three Rules

In considering the proposed amendments, some of the comments urged the Committee to remain consistent with its own policy of (1) incorporating, but not going beyond, the requirements of the Crime Victims' Rights Act (CVRA), (2) leaving other issues to case-by-case development that may provide a basis for later rule making, and (3) continuing to monitor developments in the lower courts. In that connection, they note that the recent comprehensive review of the implementation of the CVRA by the Government Accountability Office (GAO) found no problems with the judicial implementation of the Act, and that review provides no evidence of a need for any of the proposed amendments. The GAO study did report, however, on the difficulties encountered in attempting to

resolve disputes under the 72 hour time limit applicable to mandamus actions to enforce the CVRA. Some comments expressed concern that the promulgation of rules not necessary to implement the CVRA might provide the basis for mandamus actions that would tie up the courts, or alternatively might cause district courts to bend over backwards to avoid rulings that could generate a mandamus action, and by so doing prejudice the rights of the defendant, the government, or witnesses in ways not amendable to appellate correction.

Finally, the comments urge that the proposed amendments are premature. The Committee's first victim-related rules have just gone into effect, and the Committee should wait to observe the experience under these rules before making further changes. Although this argument applies to some degree to all three of the rules, it has the greatest bite in connection with the proposed amendment to Rule 12.3, which parallels an amendment to Rule 12.1 that went into effect December 1, 2008.

Rule 5

The proposed amendment as published provides:

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

* * * * *

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant.

The proposed amendment draws the court's attention to "the right of any victim to be reasonably protected from the defendant" at the time of making the decision to detain or release the defendant at the initial appearance. The Committee recognized that the courts are already required to consider the victim's safety under both the Bail Reform Act and the Crime Victims Rights Act when deciding whether to release or detain a defendant. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4) requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." Finally, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused." Since Rule 5 now states that the court must detain or release the defendant "as provided by statute," the Committee acknowledged that Rule 5 already incorporates these statutory requirements in general terms. The Committee concluded, however, that it would be desirable to highlight the victim's right to reasonable protection in the text of Rule 5.

In general the public comments take the position that the amendment is unnecessary and that it is undesirable to single out only one of the many factors that courts must consider under the Bail Reform Act. Moreover, the comments express concern that the amendment could be read to change the standard to be applied, implying a different or greater duty on the court than that already imposed by the Bail Reform Act and the Crime Victim's Rights Act. So viewed, the proposed amendment would run afoul of the Rules Enabling Act, since it would create a new substantive right, rather than merely establishing a procedure.

The comments express concern that the amendment might be read to conflict with the carefully circumscribed limits Congress placed on preventive detention in the Bail Reform Act, which allows preventive detention only when necessary to satisfy a compelling need to protect individuals or the community from a particularly dangerous class of defendants (see 08-CR-005 at 10-11). The Bail Reform Act allows preventive detention only when the court finds that "no condition or combination of conditions . . . will reasonably assure the appearance of the person required and the safety of any other person and the community." 18 U.S.C. § 3143(e) & (f). The proposed amendment, however, does not reflect those limitations.

The public comments throw into sharp relief the question whether, on balance, it is desirable to amend the rule at this time in order to draw attention to the court's duty to consider the victim's right to be "reasonably protected from the defendant," since that obligation is already stated in the CVRA itself, and is one of the factors that the courts are required to consider under the Bail Reform Act. If the Committee does recommend that the amendment be approved, the comments also raise the issue whether the text should refer to the Bail Reform Act as well as the standard derived from the CVRA. The Committee could address this concern by revising the proposed amendment to read:

> In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant and the requirements of the Bail Reform Act.

Rule 12.3

The proposed amendment to the rule concerning the public authority defense (reproduced at the end of this memorandum) parallels the amendment to Rule 12.1 concerning alibi defenses that took effect on December 1, 2008. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for their 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 a public authority 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. The same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

The Federal Magistrate Judges Association endorses the proposal, which is opposed by the

Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL). The comments of Federal Defenders and NACDL parallel the arguments made in opposition to the amendment to Rule 12.1. The central concern is that the amendment requires the defendant to disclose the names and addresses of the witnesses who will support his public authority defense without any guarantee of reciprocal discovery of all of the government's rebuttal witnesses. The opponents claim the amendment has two separate constitutional defects.

First, the Federal Defenders argue that the amendment would violate due process under *Wardius v. Oregon*, 412 U.S. 470 (1973), which requires discovery to be a two-way street. (See 08-CR-005 at 15). The defendant must first provide the names and addresses of his witnesses, and then seek to convince the court of his "need" for the same information relating to any witness who is deemed to be a victim. Even if the defendant is successful in persuading the court of his "need," he is still not guaranteed that he will receive the names and contact information, since the court may instead fashion some other procedure to allow the defendant to prepare for trial while also protecting the victim-witness. These alternatives, however, may not be fully adequate from the defendant's perspective. If the court determines that the defendant did not establish a sufficient need, or it provides only an alternative form of disclosure the defendant deems inadequate, the defendant has no means of withdrawing the information he has already provided to the government, which obtains an unfair advantage.

Second, the Federal Defenders urge that amendment has the same constitutional defect as restrictions on cross examining a government witness concerning his real name and address, In *Smith v. Illinois*, 390 U.S. 129, 131 (1968), the Supreme Court held that the state had violated due process in prohibiting cross examination asking a government witness his real name and address. In discussing this issue, the Court recognized that the name and address of a witness open up many avenues of *out-of court* investigation, and the Federal Defenders argue that taken as a whole the cases cited in its memorandum (08-CR-005 at 16) establish that the defendant is presumptively entitled to examine a witness on these matters. In the Defender's view, the proposed amendment–in effect–conflicts with the presumption and in fact reverses it.

Additionally, NACDL argues that this provision makes two unwarranted assumptions: first that defendants generally pose a threat to victims who would testify concerning the defendant's claim of a public authority defense, and second, that defense counsel also pose a threat. NACDL observes that relatively few victims are likely to testify concerning a public authority defense, and that there has been no showing that defendants generally or frequently pose a threat to such witnesses (08-CR-009 at 3). Since defendants will ordinarily need the names and telephone numbers of the government's rebuttal witnesses to prepare their defense, NACDL urges that the rule should require the government to establish a need to withhold this information, rather than requiring a defendant to establish his need to receive the information. NACDL also urges that the proposed amendment implicitly assumes that not only the defendant, but also defense counsel pose a threat to the witnesses, since it bars disclosure not only to the defendant, but also to defense counsel. In NACDL's view, the rules already offer ample means to provide protection in the unusual case where it is warranted. If the rule is to be amended, however, NACDL proposes that the Committee follow

California's lead in allowing disclosure to defense counsel, but prohibiting counsel from disclosing the address or telephone number to the defendant, his family, or anyone other than counsel's employees or persons designated by the court. *See* 08-CR-009 at 4 & n.1 (citing Calif. Penal Code § 1054.2).

NACDL also notes that the "privacy" interests of a victim-witness do not "justify protecting that person from even being approached, in a lawful manner, for purposes of pretrial investigation and preparation." Since nothing in the CVRA requires the proposed amendment, and there are ample means to protect witnesses (see 08-CR-009 at 5), NACDL contends that proposed amendment should be withdrawn.

The Committee heard and wrestled with similar constitutional and practical arguments when it considered, and voted by a narrow margin, to recommend the approval of the parallel amendment to Rule 12.1. Recommending that the Standing Committee approve the amendment to Rule 12.3 would be consistent with the Committee's action on Rule 12.1 and its recommendation of the publication of the proposed amendment. However, as noted in some of the comments opposing the amendment, there is some justification for deferring final action, to allow some additional time to observe the operation of Rule 12.1. The defense under Rule 12.3 is invoked only infrequently, and the Committee is not aware of any problems that have arisen under that rule concerning victim-witnesses.

Rule 21

The proposed amendment as published provides:

Rule 21. Transfer for Trial

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(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). The Committee Note states that the court has substantial discretion to balance any competing interests in determining the appropriate venue. The amendment does not apply to Rule 21(a), which governs transfers for prejudice.

The Federal Magistrate Judges Association endorses the proposal because the rule now specifically requires consideration of the convenience of parties and witnesses, and "it is prudent to include victims' entitlement to the same consideration." The remaining comments by the Federal

Defenders, the National Association of Criminal Defense Lawyers (NACDL), and Mr. Alex Zipperer oppose the amendment.

The comments opposing the amendment correctly observe that nothing in the CVRA compels the adoption of the amendment. Although the CVRA restricts the court's authority to exclude victims who are otherwise able to attend proceedings, the Act does not give non-testifying victims a right to have the proceedings held at a place convenient for them.

NACDL argues that the proposed amendment in effect creates such a substantive right, and in so doing exceeds the authority of the Rules Enabling Act as well as the policy judgment expressed in the enactment of the CVRA. NACDL, the Federal Defender, and Mr. Zipperer all express concern that the proposed amendment improperly equates the convenience of the non-testifying victims with the convenience of the defendant, the prosecution, and the witnesses. This could result in holding the trial in a location that requires substantial travel, or imposes other significant costs, on the parties and witnesses who are required to attend. Concern was expressed that as a practical matter the convenience of non-party witnesses might become the paramount consideration because any ruling against the claims of victims may be challenged in mandamus litigation. In order to avoid such a time consuming challenge, the district court might actually give greater weight to the convenience of those who claim the status of non-testifying victims than to the interests of the defendant, the government, or the witnesses, since none of them has the ability to seek mandamus to enforce their preferences. Mr. Zipperer expressed concern that given the large number of persons who might consider themselves victims of certain federal offenses, the proposed amendment might be construed to allow a transfer to accommodate voluntary public attendance despite imposing substantial costs on parties, witnesses, and government lawyers.

In drafting the proposed amendment, the Committee used the Note to emphasize that "[t]he court has substantial discretion to balance any competing interests." This was intended to make it clear that the court has substantial discretion, thereby allaying fears that mandamus would be a realistic concern. The opponents of the amendment found this insufficient to address their concerns, noting that if anything it seemed to treat the convenience of the non-witness victims as one more "competing interest" that was now on a par with those of the parties and witnesses whose attendance at trial is required. Although they did not stress this point, it is also fair to note that a comment in the Committee Notes may be overlooked, and certainly does not have the same authority as the text of the rule.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

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(d) Procedure in a Felony Case.

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(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant.

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COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims' Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the

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

safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4), requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." In addition, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused."

PUBLIC COMMENTS CONCERNING RULE 5.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on the ground that making the victim's right to be reasonably protected from the accused "a mandatory and primary consideration in every decision regarding pretrial release or detention ... is not required by the CVRA, would conflict with the Bail Reform Act and the Due Process Clause, and would directly compromise judicial neutrality."

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association opposes the amendment as "unnecessary and superfluous" and notes "some concern that adding this provision to the rule would imply a different or an even greater duty on the court than that already imposed by the Bail Reform Act and the Crime Victim's Rights Act."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego argue that (1) the amendment exceeds the authority granted by the Rules Enabling Act because it is substantive rather than procedural; (2) it is unnecessary to require consideration of a factor mandated by law; and (3) it is inappropriate

to single out only one of many factors that the court must consider in determining whether to grant pretrial release.

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

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(4) ***Disclosing Witnesses.***

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(C) *Government's Reply*. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of 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 oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense 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 for preparing the defense and also protects the victim's interests.

* * * * *

(b) 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 any additional witness — and the; address, and telephone number of any additional witness other than a victim — if:

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

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

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COMMITTEE NOTE

Subdivisions (a) and (b). 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 a public-authority 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.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

PUBLIC COMMENTS CONCERNING RULE 12.3

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on several grounds: (1) it forces the defendant to provide the names and addresses of his witnesses without any guarantee of reciprocal discovery of the same information regarding the government's rebuttal witnesses; (2) it violates the defendant's right to due process and compromises the judge's neutrality; (3) any alternative to the provision of this information will be insufficient to satisfy due process; (4) when the

defendant does not receive full reciprocal discovery he will be unable to retract his disclosures and the government will receive an unfair advantage; (5) the rule reverses the constitutionally required presumption that the defendant is entitled to investigate a witness's background to discover avenues for impeachment. Since the amendment tracks the recent amendment to Rule 12.1, the Committee should defer this proposal until the constitutionality of Rule 12.1 has been litigated, particularly since there has been no showing of any need for the amendment.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on several grounds: (1) the rule should reflect the reality that defendants will always have a need for this information and will seldom pose any threat to the witnesses against him and should require a special need for secrecy to justify withholding this information, (2) this information is critical not only to make it possible to contact the witnesses but also to conduct an investigation, and (3) even when the information may properly be withheld from the defendant, there is no justification for withholding it from counsel if disclosure to the defendant is prohibited.

Rule 21. Transfer for Trial

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(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

PUBLIC COMMENTS CONCERNING RULE 21.

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment to Rule 21 on the grounds that it would subordinate the convenience of parties and witnesses to those of non-witness victims, and it might even be construed to allow a transfer to accommodate voluntary public attendance despite imposing substantial costs on parties, witnesses, and government lawyers.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on the grounds that (1) the CVRA does not give non-testifying victims a right to have the proceedings held at a place convenient for them, (2) the interests of the non-testifying victims should not be placed on an equal footing with the convenience of the defendant, the prosecution, and the witnesses, and (3) the victim's ability to file a mandamus action might as a practical matter mean that the convenience of an alleged victim would be given greater weight than that of the parties and witnesses.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association supports the amendment because the rule now specifically requires that the convenience of parties and witnesses must be considered, and "it is prudent to include victims' entitlement to the same consideration."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego argue that (1) the amendment exceeds the authority granted by the Rules Enabling Act because it creates a substantive right not included in the CVRA; (2) the amendment would allow the court to "allow the convenience of a would-be spectator to override the combined interests of the defendant, the government, all the witnesses, and the interests of justice;" and (3) the amendment is unnecessary, because the "interest of justice" already allows the courts to consider the interest of non-witness victims.

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

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

RE: **Rule 15**

DATE: **March 4, 2009**

The proposed amendment (reproduced at the end of this memorandum) provides for depositions at which the defendant is not physically present if the court finds that a series of stringent criteria are met. The amendment, which applies only to depositions taken outside the United States, addresses the growing frequency of cases in which important witnesses — both government and defense witnesses — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition. The proposed amendment is intended to fill that gap by allowing such depositions to be taken in a small group of cases that meet stringent criteria.

Four comments were received in response to the publication of the proposed amendment, and we anticipate that one witness (Richard Anderson, representing the Federal Defenders) will testify concerning the amendment at the Committee's April meeting. The Magistrate Judges Association endorses the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers oppose the rule and urge that it be withdrawn, or, at a minimum, substantially redrafted.

The main arguments in the comments are discussed in this memorandum, and a summary of each comment is included following the text of the amendment. The Rule 15 subcommittee chaired by Judge Keenan held a teleconference on March 3 to discuss the issues raised by the comments. The subcommittee's views are also summarized.

Constitutional concerns.

The principal arguments in the lengthy submissions from the Federal Defenders and NADCL concern the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment.

Federal Defender Richard Anderson (08-CR-007) argues that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. At the least, the proposed rule is of questionable constitutionality, because there is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. In this regard, Anderson notes that the cases cited in the Committee Note predate *Crawford*. Moreover, Mr. Anderson expresses concern that the proposed amendment will not be confined to a small number of exceptional cases. *See United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) (recognizing danger that "*every prosecutor* wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of two-way video conference") (emphasis added). The amendment in its current form is not, in Anderson's view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009) (two-way live video feed, one defense lawyer with defendant and another at the deposition, frequent opportunities for private conversations between defendant and counsel at the deposition, and split screen display at trial allowing jury to see reactions of both defendant and witness during deposition).

Mr. Anderson argues the amendment is over broad because (1) it is not limited to transnational cases, (2) it is not limited to felonies, (3) it does not require a showing that the evidence sought is "necessary" to the government's case, and (4) it imposes no obligation on the government to secure the witness's presence. It also impairs the defense because there is simply no substitute for the defendant's contemporaneous participation in a deposition.

For all of these reasons, Mr. Anderson urges that the proposed amendment be withdrawn, but if it is not he proposes a variety of changes that are discussed below.

In their comments on behalf of NACDL (08-CR-009), Messrs. Goldberger and Genego also focus on the constitutional issues raised by the amendment. They argue that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. Indeed, they argue that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urge that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view,

"meaningfully participate ... through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they note there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The subcommittee discussed the constitutional issues raised in these very thoughtful comments, and all agreed that they must be considered carefully. Recognizing that this issues should be discussed by the full Committee after the hearings in April, the subcommittee reaffirmed its support for the proposed amendment (with some changes noted below). The lower courts are grappling with these issues, and in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009), have held that the Confrontation Clause does not prohibit the introduction of deposition testimony taken under procedures similar to those outlined in the proposed amendment. In the subcommittee's view, it is now appropriate to distill the analysis in those cases and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure. The proposed amendment is intended to meet the criteria developed in the lower court decisions, as well as the relevant Supreme Court's Confrontation Clause decisions. (In this regard, it will be useful to add a citation to the *Ali* case to the Committee Note, since it is a post-*Crawford* case in which very substantial efforts were made to provide the defendant with the means to participate, the deposition testimony was admitted at trial, and the conviction was upheld on appeal after full consideration of the Confrontation Clause issues. The other cases drawn to the Committee's attention and cited in the Committee Note were decided prior to *Crawford*.) At the same time, the subcommittee noted that there are two distinct issues: whether a deposition may be taken, and whether the resulting deposition may be introduced at trial. Although the proposed amendment is intended as a general matter to produce admissible evidence, compliance with the procedures set forth in the rules will not–and cannot–fully resolve the specific Confrontation Clause issues that will arise if and when the government seeks to introduce the deposition at trial. To take one clear example, the need for the evidence cannot be fully determined until the time for trial. After the deposition, the government may discover additional witnesses or documents that would make the introduction of the deposition testimony less critical. This might affect the constitutional calculus. At present, the Committee Note addresses this point with the following language:

> The Committee recognizes that a request to admit testimony obtained under the new foreign deposition procedure may give rise to potential challenges. The Committee left the resolution of any such challenges to the development of case law.

Some members of the subcommittee felt that it might be helpful to supplement this statement, to make it even clearer that the rule itself does not seek to foreclose later constitutional challenges.

Constitutional concerns also underlie many of the specific drafting issues raised in the public comments.

Issues Concerning Specific Requirements.

The public comments also raised a series of issues concerning the definition of the circumstances under which depositions could be taken, and the procedures for the defendant's participation. The subcommittee concurred in one suggested change: adding a requirement that the Attorney General or his designee approve an application for a deposition under the new procedure. It considered but did not endorse the other changes proposed in the comments.

1. Excluding Defense Witnesses. Federal Defender Richard Anderson (08-CR-007) proposed that the amendment be limited to government witnesses, on the grounds that "the problem of codefendant witnesses is not widespread enough to require special treatment by this rule, especially given the possible alternatives of limiting instructions and severance of counts." The subcommittee supports the proposed rule's even handed treatment of government and defense witnesses, even though there may not be not a large number of cases.

2. Reference to "in the United States" in (c)(1) & (2). Mr. Anderson (08-CR-007) also proposes striking the phrase "in the United States"– which was being added to distinguish the new provision for depositions outside the United States – and replacing it with a cross reference ("except as authorized in subsection (3)"). This change would make it clear that a defendant who attended a deposition outside the United States and became disruptive could be removed under (c)(1)(B), and it is incorporated in the attached draft.

3. Approval by the Attorney General or his designee. Mr. Anderson (08-CR-007) proposed the following addition to the proposed amendment, which would limit depositions to cases in which:

> the Attorney General or his designee certifies that the deposition will provide necessary evidence as to a federal felony offense, the prosecution of which advances important public policy interests....

The Department of Justice agreed that a requirement of administrative approval by a senior official in the Department of Justice would be appropriate, and the subcommittee concurred. The inclusion of a requirement of approval by a senior official within the Department is regarded as a desirable means of limiting wiretaps, see 18 U.S.C. § 2516(1), and a similar limitation would be appropriate here.

Several issues were raised, however, about the precise language proposed by Mr. Anderson. It requires the Attorney General or designee to "certify" that the deposition will provide "necessary evidence" for a prosecution that "advances important public policy interests." This language raised an issue that is common to several of the changes proposed by Mr. Anderson on behalf of the Federal Defenders. In their view, it is critical to narrow the proposed rule to cases in which the deposition is "necessary," there is "a substantial likelihood... that it will provide substantial proof of a material fact," and "no other government witness is likely to provide similar proof at trial or at a deposition in the United States...." The Department expressed concern that it is not possible at the deposition

stage to know whether the testimony of the deponent will be necessary, and that no other witness will be able to provide it. Continued investigation may produce other witnesses or documents that could be introduced at trial. Accordingly, the Department proposed that the Attorney General or designee be required only to find that "the deposition is sought for the purpose of providing material evidence...." The subcommittee recognized the difficulty of determining prior to a deposition whether evidence would be "necessary," and for that reason it proposes the Department's language (see infra lines 52-61 of the proposed rule).

The Federal Defender and the Department also used different language to describe the action to be taken by the Attorney General or designee. The Federal Defender's proposal uses the term "certify." The Department's proposal provides that the official must "authorize[] the request." The subcommittee did not focus on this issue, and the full Committee may wish to discuss it. Because the subcommittee felt it would be desirable to follow the precedent of the Title III wiretap authorization, 18 U.S.C. § 2516(1), the attached draft (see infra lines 52-61 of the proposed rule) uses the word "authorizes."** Similarly, 18 U.S.C. § 3742(b) also requires that a sentencing appeal be authorized by the Attorney General, the Solicitor General, or a designated Deputy Solicitor General. There are, however, many other provisions that use the terms "certify" or "certification,"including 18 U.S.C. § 3651 (Attorney General must certify that adequate treatment facilities are available); 18 U.S.C. § 3731 (U.S. Attorney must certify to the district court that an appeal from a suppression ruling after jeopardy has attached is not being taken for purposes of delay and that the evidence is substantial proof of a material fact); 18 U.S.C. § 5032 (Attorney General must certify that state juvenile court does not have jurisdiction, refuses to take jurisdiction, or does not have available programs/services and there is a substantial federal interest in the prosecution); 18 U.S.C. App. § 6 (Attorney General must certify that public proceeding may result in disclosure of classified information); and 50 U.S.C. § 1861 (Attorney General must certify that disclosure may endanger national security or interfere with diplomatic relations). Some of these certifications seem designed to establish a predicate fact, or provide the basis for a finding of some nature. In contrast, in the context of the wiretaps, the purpose is to make the Attorney General responsible for screening applications, but not to require the Attorney General to certify some particular fact or finding to the court.

The placement of the new provision was also an issue. Although the Federal Defender proposal inserted this provision at the beginning of the proposed amendment, as the first subdivision, the proposed draft places it instead at the end of the section. Because the rule applies to both defense and government witnesses,*** it did not seem appropriate to begin the rule with a provision that

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** 18 U.S.C. § 2516(1) provides that the designated officials "may authorize an application to a Federal judge... and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . ."

*** As noted above, the Defenders proposed that the rule be revised to apply only to government witnesses, but the subcommittee did not endorse this suggestion.

would be applicable to only a subgroup of cases. Additionally, the Defender proposal (which in this respect follows 18 U.S.C. § 2516(1)) states that certification is required, but it does not expressly require the court to make any finding concerning the Attorney General's approval of the application. Because it would be desirable for the court to determine that the required authorization has indeed occurred, I have included this as one of the requirements on which a judicial finding is required.

4. "Diligent efforts". Federal Defender Richard Anderson (08-CR-007) proposed new language in multiple subdivisions requiring that the government have exercised "diligent efforts" to obtain (a) the witness's presence at a deposition in the United States, (b) the witness's presence at trial, or (c) the defendant's presence at the deposition outside the United States. The subcommittee expressed support for the view that the government must use its resources to avoid the necessity for taking a deposition under the new procedure, but it does not support the proposed language. We are unable to predict how the phrase "due diligence" would be construed, and are not certain whether it would have the desired effect. Indeed, it might be counterproductive from the defense perspective, making it easier, rather than more difficult, for the government to justify taking depositions. For example, as published, the proposed rule requires the court to find that the witness's presence in the United States "cannot be obtained." Arguably it would be easier to show that the government had made some diligent efforts but not secured the witness's presence, than to show that the witness's presence "cannot be obtained."

5. Unavailability of other proof. Mr. Anderson (08-CR-007) proposed a new subsection that would require the court to find that "no other witness is likely to provide similar proof at trial or at a deposition in the United States." Although it agreed with the goal of limiting depositions to cases where similar evidence would not be obtained in a setting where the defendant would have full face-to-face confrontation, the subcommittee did not endorse this proposal. As noted above, The Department argues persuasively that it is not possible to predict accurately at the at the deposition stage whether another witness or other evidence might later be found.

6. Defense participation. Both the Federal Defender (08-CR-007) and NACDL (08-CR-009) comments contend that the proposed subdivision (c)(3)(C) does not provide adequate safeguards to ensure the fullest possible participation by the defendant. The Defenders propose that the language be amended to require not only that the defendant be able to "meaningfully participate," but also that the limitations his participation "are the least restrictive means reasonably available."

The very general language in the proposed rule ("meaningfully participate through reasonable means") was chosen because the technology that will be available is likely to vary depending on the location of the witness in question, and also to develop over time. The question is whether the rule as drafted is adequate to ensure the greatest level of participation possible under the circumstances, and ultimately to meet the constitutional requirements of the Confrontation Clause. Although the subcommittee was sympathetic to the idea that the rule should signal that every effort should be made to allow meaningful participation, it did not feel that the proposed language (which focuses on restrictions on participation) was very helpful. In the cases brought to the committee's attention, the focus has been on the positive steps taken to provide means of participation (such as defense

lawyers both at the deposition and with the defendant, and effective communication among the defense team during the deposition) rather than on eliminating restrictions on the defendant's participation. Accordingly, the subcommittee did not recommend a change in this language.

7. Assuring the defendant's appearance. Ms. Goggin, representing the DEA, questioned whether it was desirable to limit the availability of the new deposition procedure to cases in where no reasonable conditions would assure an out-of-custody defendant's appearance not only at the deposition, but also "at trial or sentencing." The subcommittee reaffirmed that the reference to trial and sentencing is desirable. It authorizes depositions when allowing an out-of-custody defendant to attend a deposition outside the U.S. would create too great a risk that the defendant would not or could not return for trial. This might be true if, for example, the country to which the defendant traveled for the deposition was expected to take him into custody and not return him for trial, or the defendant would pose a risk of flight once outside the U.S.

Ms. Goggin also questioned how a party would meet its burden of establishing both that no reasonable conditions would assure the defendant's presence at the deposition and that the defendant could meaningfully participate. These conditions are consistent. The government must establish that no reasonable conditions could assure the defendant's physical participation at the site of the foreign deposition, and the defendant must be provided with the means of participating in the deposition via technology from within the United States.

8. Style changes. At the request of the Style Consultant, on line 13 the word "because" has been substituted for "for one of the following reasons."

9. Changes to the Note. As noted above, a citation has been added to *United States v. Ali*. Additionally, the Judge Tallman received and concurred in an informal suggestion that it would be preferable to cite *Lego v. Twomey*, 404 U.S. 477, 489 (1972), for the proposition that the government must general show by a preponderance that evidence is constitutionally admissible.

Conclusion.

The subcommittee recommends approval of the proposed amendment to Rule 15, with the addition of a requirement of approval by the Attorney General or his designee. The text of the proposed amendment and committee note appears below. All new or amended material appears in bold.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[****]

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) *Defendant in Custody.* **Except as authorized by Rule 15(c)(3), the** ~~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) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

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

(2) ***Defendant Not in Custody.*** **Except as authorized by Rule 15(c)(3),** a ~~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. 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.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all of the following:

(A) the witness's testimony could provide substantial proof of a material fact;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present **because**:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an

appearance at the deposition or at trial or sentencing;

(E) the defendant can meaningfully participate in the deposition through reasonable means;

(F) for the deposition of a government witness, the Attorney General or his designee authorizes the request for disclosure, after having determined that the deposition is sought for the purpose of providing substantial proof of a material fact in the prosecution of a federal felony, and that the prosecution advances an important public policy interest.

* * * * *

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by

the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court of significant need and public policy justification. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e.g.*, ***United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (U.S. Feb. 23, 2009);** *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g.*, ***Lego v. Twomey*, 404 U.S. 477, 489 (1972).** Here too, the party requesting the deposition, whether it be the government or a

defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supercede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

It is not the intent of the Committee to create any new rights by enactment of this rule, which establishes procedures to procure testimony from foreign witnesses who may be located beyond the reach of federal subpoena power. The Committee recognizes that a request to admit testimony obtained under the new foreign deposition procedure may give rise to potential challenges. The Committee left the resolution of any such challenges to the development of case law.

PUBLIC COMMENTS ON RULE 15

08-CR-004, Wendy H. Goggin, Chief Counsel, DEA. Ms. Goggin questioned whether the rule (1) should be limited to cases where no reasonable conditions can assure the defendant's presence at trial or sentencing, and (2) should require both that there be no conditions that can assure the defendant's presence and that the defendant be able meaningfully to participate in the deposition.

08-CR-007, Richard Anderson, Federal Public Defender. Mr. Anderson urges that the amendment be withdrawn because it creates a process which "strikes at the core of the Confrontation Clause, by denying face-to-face confrontation" and "threatens . . . to significantly impair the defense function, which relies on the defendant's presence with counsel when confronting and cross-examining a witness." He also proposes several changes be made if the amendment is not withdrawn, including requiring authorization of the Attorney General or his designee, heightening the standard to be made by the government, and requiring that the defendant be able to participate by the least restrictive means available.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association "believes that this rule is reasonable and necessary in those few cases where a foreign deposition is necessary, and the defendant cannot be physically present."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on the grounds that (1) it exceeds the authority of the Rules Enabling Act, (2) it would effectively deprive the defendant of his constitutional right to confront the witnesses against him, thus achieving the purpose of the failed 2002 proposed amendment to Rule 26, (3) it is not limited to a narrow class of transnational crimes or critical witnesses, and (4) its safeguards are insufficient, and do not even guarantee that the defendant would be allowed to view and listen in real time and consult confidentially with counsel.

2-C-3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32.1(a)(6)

DATE: March 3, 2009

The proposed amendment (reproduced at the end of this memorandum) is intended to clarify the procedure applicable to proceedings for the revocation of parole or supervised release by stating that (1) only 18 U.S.C. § 3143(a)(1) is applicable in this context and (2) the burden of proof is by clear and convincing evidence. The proposed amendment follows the analysis of *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007), and other decisional law.

Four comments were received in response to the publication of the proposed amendment, and we anticipate that one witness (Thomas Hillier, representing the Federal Defenders) will testify concerning the amendment at the Committee's April meeting. The Magistrate Judges Association endorses the proposal, but the other three comments were critical. Each comment is discussed briefly in this memorandum, and a summary of each is included following the text of the amendment.

Although one comment criticized the standard of clear and convincing evidence as "impossibly high," this standard is mandated by statute. The current rule requires the court to follow 18 U.S.C. § 3143(a), subsection (1) of which requires detention unless "the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released ...."

Federal Public Defender Thomas Hillier– whose comments (08-CR-005) are also endorsed by the National Association of Criminal Defense Lawyers–does not challenge the clear and convincing evidence standard, but he opposes the rule as drafted and seeks two significant changes:

(1) a preliminary requirement that the court find probable cause before detaining an individual under this provision, and

(2) a requirement that the government bear the burden of proof in cases in which the Sentencing Commission's policy statements provide for modification of the term or conditions of supervised release (rather than imprisonment).

1. Requiring a Preliminary Finding of Probable Cause

Mr. Hillier's proposed alternative language (08-CR-005 at 2) would impose a new requirement of a probable cause finding at the initial appearance before a decision to detain could be made. Hillier argues that a preliminary finding of probable cause to believe a violation has occurred is necessary to satisfy due process under *Morrisey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). These cases recognize the constitutional liberty interest of persons on probation or parole, and they hold that there must be an adversarial hearing and a finding of probable cause in order to hold a person pending a final decision. In effect, the Court holds that due process requires a preliminary hearing before the administrative hearing on the revocation of probation or parole.

Rule 32.1(b)(1)(A) currently addresses these concerns by providing that in any case in which a person is in custody for violating the conditions of probation or supervised release, a magistrate judge "must promptly conduct a preliminary hearing to determine whether there is probable cause to believe that a violation occurred." Rule 32.1(b)(1)(B) sets forth the procedural requirements for the preliminary hearing. As reflected in the 1979 Committee Note. These provisions were intended to incorporate the requirements set forth in *Morrisey v. Brewer* and *Gagnon v. Scarpelli.*

It appears that the present rule satisfies due process by requiring a finding of probable cause at a preliminary hearing which must be held "promptly," and that it was the Committee's intention to use Rule 32.1(a)(1)-(6) to set forth a procedure for an initial appearance that would occur before–and not duplicate the function of–the preliminary hearing. Rule 32.1 was amended in 2002 to add the provisions concerning the initial appearance. The 2002 Committee Note indicates the Committee's awareness that some districts were not conducting an initial appearance. The Note states that under the new language an initial appearance is required, although a court may combine the initial appearance with the preliminary hearing if that can be done within the accelerated time requirement of Rule 32(a)(1) ("without unnecessary delay"). The purpose of the initial appearance is to provide the defendant with the advice required in Rule 32.1(a)(3), and to make an initial decision on release or retention under Rule 32.1(a)(6). As noted below, under Rule 32.1(a)(6) the person has the burden of establishing that he is not a flight risk or a danger to any other person or the community. Unless an individual court chooses to combine the initial appearance with the preliminary hearing, they serve distinct purposes.

Additionally, 18 U.S.C. § 3606 provides another important safeguard that occurs even earlier in the process. This section provides the authority for the arrest a probationer or person on supervised release if there is probable cause to believe that he or she has violated a condition of the

probation or release. Where the arrest of a person on probation or supervised release is made pursuant to a warrant, a judicial officer will have made a finding of probable cause pursuant to § 3606 (and the Fourth Amendment) before the arrest is made.

2. Shifting the Burden of Proof In Cases Where the Commission Does Not Recommend Imprisonment

Mr. Hillier's second proposal is based upon the underlined portion of the text of 18 U.S.C. § 3143(a)(1), which provides:

> **(a) Release or Detention Pending Sentence.** – (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

As Hillier explains, the purpose of the underlined language is to prevent the detention of persons for whom the Guidelines do not recommend a sentence of imprisonment. Hillier advocates the addition of similar language in Rule 32.1(a)(6) in order to prevent detention when the Sentencing Commission's policy statements do not provide for incarceration. He argues that placing the burden of proof on the government to show a flight risk or danger to any person or to the community would serve the congressional policy that disfavors detention for persons not realistically facing imprisonment.

The text of 18 U.S.C. § 3143(a)(1) refers only to the applicable "guideline" promulgated by the Sentencing Commission. The Commission has not promulgated any guidelines concerning supervised release, though it has promulgated policy statements. The Commission determined that policy statements rather than guidelines "provided greater flexibility to both the Commission and the courts." U.S.S.G. Ch. 7, Pt.A.3 (a). The court in *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007), found that the language of § 3143(a)(1) was not applicable in the absence of a guideline, but Hillier argues that this is clearly wrong in light of the congressional policy that disfavors detention for persons who do not realistically face a risk of imprisonment (098-CR-005 at 4-6).

One way to interpret the Federal Defenders' argument is to consider this a question of statutory interpretation: in providing that the defendant must bear the burden of proof except in cases in which "the applicable guideline" does not provide for imprisonment, did Congress mean to encompass a policy statement as well as a guideline? For some purposes, the courts treat policy statements like guidelines. *See, e.g., Williams v. United States*, 503 U.S. 193, 201 (1992) (holding that failure to follow the policy statement resulted in a sentence "imposed as a result of an incorrect application of the sentencing guidelines" under 18 U.S.C. § 3742(f)(1) that should be set aside on appeal unless the error was harmless).

There is, however, a difference between guidelines–to which 18 U.S.C. § 3143(a)(1) refers–and the policy statements concerning revocation. At least seven circuits have held that the Commission intended the policy statements of Chapter Seven to be only recommendations that are not binding on the courts. *See, e.g. United States v. O'Neill*, 11 F.3d 292, 301 n.11 (1st Cir. 1993) (noting that the policy statements of Chapter 7 "are prefaced by a special discussion making manifest their tentative nature" and "join[ing] six other circuits in recognizing Chapter 7 policy statements as advisory rather than mandatory"); *United States v. Hooker*, 993 F.2d 898, 901 (D.C. Cir. 1993) (stating "it seems contrary to the Commission's purpose to treat Chapter VII policy statements, which were adopted to preserve the courts' flexibility, as binding."). Second, as noted by the Department of Justice in a February 20, 2009 letter responding to Mr. Hillier's comments, courts have employed their discretion to order imprisonment for lower grade offenders even when the policy statements would provide only for lesser alternatives. *See, e.g., United States v. Redcap, 505* F.3d 1321 (10th Cir. 2007) (supervised release revoked for violation of drinking alcohol, and sentence imposed exceeded that recommended in the policy statement); *United States v. Moulden,* 478 F. 3d 652 (4th Cir. 2007) (probation revoked for defendant who argued that his violations were "technical" and "only" Grade C violations); *United States v. Crudup,* 461 F.3d 433 (4th Cir. 2006) (supervised release revoked and maximum sentence imposed for Grade C violations). Accordingly, the Department argues, it would not be appropriate to rely upon the policy statement in Chapter 7 to define a class of cases in which the government would have to bear the burden of proving risk of flight or danger under Rule 32.1(a)(6).

One point not noted in the Hillier letter or the Department's response is that a parallel issue arises in connection with Rule 46(c), which provides:

> **(c) Pending Sentencing or Appeal.** The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

Thus at present, despite the limiting language in 18 U.S.C. § 3143, Rule 46(c) makes no special provision for cases in which the guideline does not provide for imprisonment. The Rule places the burden in every case on the defendant to establish that he will not flee or pose a danger. The Committee may wish to consider amending Rule 46(c) to add language carving out persons for whom the applicable guideline promulgated pursuant to 28 U.S.C. § 994 does not recommend a term of imprisonment.

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

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

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * * * *

Committee Note

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

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

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g.*, *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

PUBLIC COMMENTS ON RULE 32.1(a)(6)

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment on the ground that it requires the person seeking release to prove a negative and sets an impossibly high standard of proof by clear and convincing evidence, which will result in imprisonment for even the most minor infraction of release conditions.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier agrees that an amendment is needed, but argues that it should (1) require a preliminary finding of probable cause, and (2) place the burden of proof on the government when the applicable

policy statement would provide for a modification (rather than imprisonment) for the alleged violation.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal to clarify the burden of proof.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego endorse Mr. Hillier's comments in 08-CR-005.

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September 25, 2008

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

08-CR-002

Re: Proposed amendments to the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I appreciate your invitation to comment on the proposed amendments. In my opinion, two of these proposals are both unnecessary and unwise.

Rule 32.1

Under the existing rule, when a person on supervised release or probation is arrested for some infringement of the applicable conditions of his release, in order to be released from custody he has the burden of proving that he will not flee or pose a danger to anyone. The proposed amendment would raise the standard of proof in such situations to "clear and convincing evidence."

Federal judges already have full authority to incarcerate persons for violating the conditions of their probation or supervised release. Given that the existing rule creates a presumption that the person should be incarcerated, and requires him to prove a negative– an often impossible task no matter what the standard of proof– the effect of the change will be to set an impossibly high standard for release, resulting in imprisonment for virtually every infraction of release conditions no matter how minor.

I submit that there is no rational basis for the proposed change.

Rule 21

The proposed change apparently seeks to subordinate the convenience of parties and witnesses to that of non-witness "victims." Since the persons to whom this change would apply are not witnesses, the amendment would authorize a court to change venue in order to make it more convenient for interested persons to attend the proceedings as observers. Often the public at large is considered to be the "victim" of certain federal offenses. The proposed amendment could therefore be construed to allow a federal judge to move the venue of a particular case in order to accommodate voluntary public attendance even if such a move required parties, witnesses and government lawyers to travel great distances and incur significant expenses.

Again, I suggest that there is no rational basis for the proposed amendment.

Thank you for allowing me the opportunity to comment on these proposals.

Sincerely,

Alex L. Zipperer

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08-CR-004

Peter G. McCabe, Secretary
Committee on Rules and Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

SUBJECT: *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure*

Dear Mr. McCabe:

Thank you for your letter of August 31, 2008, in which you invite the Drug Enforcement Administration (DEA) Office of Chief Counsel to comment on the subject proposed amendments. We have three observations or questions which we would like to bring to your attention.

Proposed Amendment to FED. R. CRIM. P. 15

Proposed FED. R. CRIM. P. 15(c)(3)(D)(iii) provides in part that a witness outside the United States may be deposed without the physical presence of the defendant if the court makes a number of case-specific findings. Where the defendant is not in custody, one of the required judicial findings is that "no reasonable conditions will assure an appearance [of the defendant] at the deposition or at trial or sentencing[.]" Since the proposed amendment addresses the circumstances under which the deposition may be taken of a witness who will be unavailable for trial, it is unclear why the defendant's availability for the trial or sentencing would be a factor. If the defendant is available for the trial but the proposed witness is not, the deposition testimony of the witness would be precluded under the proposed revision. This language would substantially restrict the trial court's ability to preserve testimony of a witness outside the United States..

It is also unclear how a party would meet its burden to establish both the requirements of FED. R. CRIM. P. 15(c)(3)(D)(iii) that no reasonable conditions will assure the appearance at the deposition (or at trial or at sentencing) of an out-of-custody defendant, and of FED. R. CRIM. P. 15(c)(3)(E) that the defendant can meaningfully participate in the deposition through reasonable means. For example, under the circumstances where a defendant is not in custody and is also unlikely to appear at the deposition (for example, a defendant who has absconded), it seems extremely unlikely that the government could establish that the defendant can still participate

meaningfully through reasonable means. Such a case might still be one where a trial court would favor preservation of testimony of the non-U.S.-based witness. The Rule would seem to prohibit the court from ordering a deposition under these circumstances. While this may reflect the primacy of a defendant's right to confrontation, it may also be an unintended consequence of the amended Rule's language.

Proposed Amendment to FED. R. CIV. P. 26

The Committee states that it has been assured by many attorneys that the amendment to Fed. R. Civ. P. Rule 26(a)(2)(C)(ii) requiring a summary of facts/opinions to which an expert witness is expected to testify will provide an adequate basis for examination at trial without incurring the expense of a deposition. We anticipate that many attorneys will still want to conduct a deposition and therefore question whether the requirement will meet the goal of reducing litigation costs.

If you require additional information on this matter, please contact me at (202) 307-8030/FAX -4041.

Sincerely,

Wendy H. Goggin
Chief Counsel

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W Hillier, II
Federal Public Defender

08-CR-005

January 9, 2009

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

Re: Comment on Proposed Amendments to Rules 5, 12.3, 21 and 32.1 of the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

This letter provides public comment on behalf of the Federal Public and Community Defenders on the proposed amendments to Rules 5, 12 3, 21 and 32.1 of the Federal Rules of Criminal Procedure. We will be submitting comments on the proposed amendment to Rule 15 by separate letter next week.

I. Rule 32.1(a)(6)

The proposed amendment to Rule 32.1(a)(6) would clarify that only subsection (1) of 18 U.S.C. § 3143(a) applies in the decision whether to release or detain a person pending further proceedings concerning revocation or modification of probation or supervised release. It would also state that in all such cases, the defendant bears the burden of establishing "by clear and convincing evidence" that he will not flee or pose a danger.

We agree that the current rule, including its interaction with § 3143(a), is confusing and should be amended. However, the proposed amendment fails fully or correctly to solve existing problems with the rule, in part because it is based on a flawed decision, *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The *Mincey* court proposed this particular rule change based on a re-writing of § 3143(a)(1) which ignored the text and legislative history of § 3143 and Rule 32.1 and the constitutional and policy considerations upon which they were based. It substituted the phrase, "a person who is alleged to have violated probation or supervised release," for the statutory phrase, "a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U S.C. 994 does not recommend a term of imprisonment." *Id.* at 164-65. In doing so, it wrote out of existence Congress's intent that persons who are not realistically facing imprisonment upon the final decision not be detained at all, S.

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Rep. No. 98-225 at 185-86 (1983), and instead placed the burden of proof by clear and convincing evidence on all persons who are merely "alleged" to have committed a violation, even when prison is not the likely outcome upon final decision.

A. Alternative Proposal

We propose the following alternative, which we believe best resolves the various sources of confusion in the rule and comports with congressional intent and constitutional principles. We recommend that the *Mincey* decision not be relied upon or cited, as it does not comport with congressional intent and would create further confusion.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

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(6) ***Release or Detention.*** If probable cause is found to exist, the magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to the community rests with the person, unless the applicable policy statement promulgated pursuant to 28 U.S.C. § 994(a)(3) provides for modification of the term or conditions upon a finding of a violation, in which case the burden of establishing by clear and convincing evidence that the person will flee or pose a danger to the community rests with the government.

Committee Note

This amendment is designed to clarify the standards for release or detention decisions involving persons alleged to have violated the terms of probation or supervised release pending further proceedings. First, it clarifies that before the magistrate judge may consider release or detention under 18 U S.C § 3143(a)(1), a finding of probable cause that the violation occurred is required. Second, it clarifies that only subsection (1) of § 3143(a) applies in proceedings involving an alleged violation of the terms of probation or supervised release because subsection (2) is not suited to this context. Third, it clarifies that the standard of proof is clear and convincing evidence. Fourth, it clarifies that the person bears the burden of proof if the applicable policy statement provides only for a term of imprisonment, but that the government bears the burden if the applicable policy statement provides for modification of the term or conditions. The amendment recognizes the liberty interest at stake, *see Gagnon v Scarpelli*, 411 U.S. 778 (1973), *Morrissey v. Brewer*, 408 U.S. 471 (1972), as well as the congressional policy disfavoring detention for persons who are not realistically facing imprisonment at the conclusion of further proceedings, *see* 18 U.S.C. § 3143(a)(1), and employs the relevant statutory terminology in doing to. *See* 28 U S C. § 994(a)(3), 18 U.S.C. § 3565, 18 U.S.C. § 3583(e).

B. Reasons for Alternative Proposal

In the Bail Reform Act of 1984, Congress enacted stringent procedural safeguards and narrow standards for the detention or release of defendants pending trial, *see* 18 U.S.C. § 3142, in recognition of their constitutional liberty interest in remaining free pending trial. S. Rep. No. 98-225 at 7 (1983). Congress also retained the possibility of release pending imposition or execution of sentence that existed under prior law. However, because "there is clearly no constitutional right to bail once a person has been convicted," and the "conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law," *id.* at 26, Congress reversed the presumption in favor of release pending sentence under the prior version of § 3143 to a presumption in favor of detention. It did so by requiring detention unless the judicial officer "finds by clear and convincing evidence" that the person is not likely to flee or pose a danger to others, and "intend[ed] that in overcoming the presumption in favor of detention the burden of proof rests with the defendant." *Id.* at 26-27. Importantly, Congress "except[ed] from detention defendants for whom the guideline does not recommend a term of imprisonment (new 18 U.S.C. 3143(a))," *id.* at 185-86, with the phrase, "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C 994 does not recommend a term of imprisonment." Pub. L. No. 98-473 Sec. 223(f) (Oct 12, 1984).

Congress did not include procedures for revocation or modification of probation or supervised release in the Bail Reform Act itself, but left those procedures, including release or detention pending final decision, to Rule 32.1, so that they could be periodically revised as necessary, citing *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) *See* S. Rep. No. 98-225 at 102 & n.352 (1983). Those decisions had held that a person on parole (*Morrissey*) or probation (*Scarpelli*) is entitled to retain his liberty as long as he abides by the imposed conditions, that due process requires a preliminary hearing and a final hearing in which procedural protections are accorded, *Scarpelli*, 411 U.S. at 781-82, 786, *Morrissey*, 408 U.S. at 479, 482, 485, 487-89, and that there must be a finding of probable cause in order to hold the person pending the final decision. *Morrissey*, 408 U.S. at 487. Rule 32.1 was promulgated in 1979 in order to satisfy the constitutional requirements of *Morrissey* and *Scarpelli*.[1] *See* Fed. R. Crim. P. 32.1, 1979 & 1993 advisory committee notes.

[1] Rule 32 1 originally applied only to persons on probation because there was no supervised release until the Sentencing Reform Act of 1984. Further, the 1984 supervised release statute did not allow supervised release to be revoked; it provided for either a hearing on modification, reduction or enlargement of conditions, or treatment as a contempt of court; minor violations would not result in imprisonment and new offenses would be charged as a new offense and/or a contempt of court, with detention or release decided under § 3142. *See* S. Rep No. 98-225 at 124-25 (1983) In 1986, § 3583 was amended to permit revocation of supervised release upon a finding by a preponderance of the evidence that the person had violated a condition and pursuant to the Rules of Criminal Procedure applicable to probation revocation *See* Pub L No. 99-570, sec. 1006 (Oct 27, 1986). Supervised release was incorporated into Rule 32 1 in 1989 *See* Fed. R Crim P 32 1 1989 advisory committee note.

At the time Congress enacted these statutes and entrusted the procedures for revocation or modification of probation or supervised release to Rule 32.1, three things were clear with respect to release or detention pending the final decision. First, Rule 32.1(a)(1) provided that *if*, at the preliminary hearing, probable cause was found to exist, the person could either be held for a revocation hearing or released pursuant to Rule 46(c) pending the revocation hearing. Second, Rule 46(c) provided that "[e]ligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3143," and § 3143(a) excepted from detention altogether those persons for whom the applicable guideline did not recommend a term of imprisonment. Third, *if* probable cause was found to exist *and* a term of imprisonment was recommended, Rule 46(c) provided that "[t]he burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant."[2]

The minimum requirement of a finding of probable cause before detention may be imposed seems to have been inadvertently removed from the rule in 2002, when a provision for initial appearance was added and the provision for release or detention was moved from the preliminary hearing section of the rule to the initial appearance section of the rule. In most cases, the government moves for detention at the initial appearance and the decision is made at the preliminary hearing when a finding of probable cause is required. However, the current rule suggests that a decision to detain the person could be made at the initial appearance absent any finding of probable cause. This would violate the person's right to due process, *see Morrissey*, 408 U.S. at 487, and should be remedied.

The current rule would also benefit from clarification of how the statutory phrase, "a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," applies pending further proceedings on revocation or modification of probation or supervised release Such clarification must take account of the policy Congress sought to promote, which was that persons who are not realistically facing prison upon the final outcome not be detained. S. Rep. No. 98-225 at 185-86 (1983). And it should do so by employing the applicable statutory terms as implemented by the Sentencing Commission.

When, in 1984, Congress added the language to § 3143(a) precluding detention for persons awaiting imposition or execution of sentence for whom the applicable guideline did not recommend imprisonment, which it intended to apply to persons facing revocation or modification of probation or supervised release through Rule 32.1, it had instructed the Commission, in 28 U.S.C. § 994(a)(3), to promulgate "guidelines or general policy statements regarding the appropriate use of the probation revocation

[2] The substance of Rule 46(c) was moved to Rule 32 1(a)(6) in 2002. *See* Fed. R Crim P 32.1, 2002 advisory committee note

provisions set forth in section 3565 of title 18, and the provisions of modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18." *See* Pub L. No. 98-473 sec. 217(a) (Oct. 12, 1984). The supervised release statute did not provide for revocation at all, *id.*, sec 212(a), until two years later. Pub. L. No. 99-570, sec. 1006 (Oct. 27, 1986). Thus, Congress undoubtedly expected the Commission to use "guidelines" for sentencing upon revocation of probation and "policy statements" for modification of the conditions of probation or supervised release. As it turned out, the Commission promulgated no "guidelines" but only "policy statements" for both purposes. Moreover, just as the Commission promulgated "guidelines" recommending only prison for sentencing defendants in Zones C and D, and either prison or probation for defendants in Zones A and B,[3] these "policy statements" recommend only prison for persons found to have committed a Grade A or B violation, and either prison or modification of the term or conditions for persons found to have committed a Grade C violation.[4]

The *Mincey* court failed to engage in any analysis of legislative history, but simply concluded, based on the fact that the Commission had not promulgated "guidelines," that no one could be detained pending further proceedings unless the entire phrase, "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," was deleted and revised such that every "person who is alleged to have violated probation or supervised release" may be detained pending final decision, and must be detained unless they establish by clear and convincing evidence that they will not flee or pose a danger.[5] This extreme solution is not only unnecessary, but is clearly wrong in light of congressional policy disfavoring detention for persons unlikely to be facing imprisonment if a violation of probation or supervised release is found at the final hearing. *See* S. Rep. No. 98-225 at 185-86 (1983).

To effectuate congressional intent, the rule should first construe the statutory phrase, "applicable guideline promulgated pursuant to 28 U.S.C. 994," to mean

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[3] USSG § 5C1.1

[4] USSG § 7B1 3(a) and (b) (upon a finding of a Grade C violation, the court "may (A) revoke probation or supervised release; or (B) extend the term . and/or modify the conditions", upon a finding of a Grade A or B violation, the court "shall revoke probation or supervised release" and impose a term of imprisonment)

[5] The cases cited in *Mincey* do not support its reading of the statute, as they did not involve or address the limitation on detention set forth in§ 3143(a)(1) In *United States v Loya*, 23 F.3d 1529 (9th Cir 1994), the violation was distribution of marijuana, for which the Commission's policy statement recommends prison In *United States v Giannetta*, 695 F Supp 1254 (D. Me. 1988), the violations were repeated instances of criminal activity constituting fraud, for which the policy statement recommends prison Further, these cases hold that a supervised releasee or probationer is to be treated like a defendant convicted and awaiting sentence Such a defendant, if his applicable guideline does not recommend imprisonment, is exempted from detention altogether The *Mincey* court's solution fails to take account of this limitation in the context of proceedings on alleged violations of probation or supervised release.

"applicable policy statement promulgated pursuant to 28 U.S.C. § 994(a)(3)." Further, it should use the relevant terminology from the applicable statutes by distinguishing between policy statements that recommend only prison and policy statements that provide for modification of the term or conditions.[6] Pursuant to these statutes, the Commission's policy statements recommend only prison for Grade A and B violations, and either prison or modification of the term or conditions for Grade C violations,[7] just as the guidelines recommend only prison for defendants in Zones C and D, and either prison or probation for defendants in Zones A and B.[8]

The rule should then clarify what should occur when the applicable policy statement does not recommend only prison but provides for modification of the term or conditions. A strict construction would exempt all such persons from the possibility of detention. *See* 18 U.S.C. § 3143(a)(1); S. Rep. No. 98-225 at 185-86 (1983). Any person charged with a Grade C violation, *see* USSG § 7B1.3(a)(2), which includes the most minor offenses (punishable by one year or less) and violations of conditions that are not a crime at all, *see* USSG § 7B1.1(a)(3), could not be detained.

The solution we propose is more moderate It would construe § 3143(a)(1) in this context as providing that the judicial officer shall order the person to be detained unless the judicial officer finds by clear and convincing evidence that he or she is not likely to flee or pose a danger to the community if released under § 3142(b) or (c), *unless* the applicable policy statement promulgated pursuant to 28 U.S.C. § 994(a)(3) provides for modification of the term or conditions, *in which case* the judicial officer shall order the person detained if the judicial officer finds by clear and convincing evidence that the person is likely to flee or pose a danger to the community if released under section 3142(b) or (c). This would permit detention for any kind of violation, but would honor the statutory text and congressional policy disfavoring detention when imprisonment is unlikely. It would simply specify the circumstances under which the person *can* be detained if the policy statement provides for modification of the term or conditions, *i e*, the government must establish by clear and convincing evidence that the person will flee or pose a danger.

II. Rules Relating to Alleged Victims

[6] *See* 18 U.S.C. § 3565 (court may either modify the term or conditions, or revoke the sentence of probation and resentence the defendant to prison), 18 U S C § 3583(e) (providing for either revocation with a term of imprisonment, or modification of the term or conditions); 28 U.S C § 994(a)(3) (Commission to promulgate guidelines or policy statements regarding the "provisions" for "revocation" or "modification of the term or conditions" of probation set forth in § 3565, and the "provisions" for "revocation" or "modification of the term or conditions" of supervised release set forth in § 3583(e))

[7] *See* note 4, *supra.*

[8] *See* note 3, *supra.*

The Committee has published for comment three amendments that reflect a "continuing focus on the Crime Victims Rights Act (CVRA)." We urge the Committee not to adopt these amendments, and to refrain from adopting any new rules for crime victims unless and until the rules that went into effect December 1, 2008 have proven to be inadequate in some way that is actually required by the CVRA, that does not deprive defendants of their rights, and that is not prohibited by the Constitution or the Rules Enabling Act. "The Supreme Court shall have the power to prescribe general rules of practice and procedure," which "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. *See also Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States.").

A. Background and General Principles

When the Committee first considered the CVRA, there was a question as to whether any rules were necessary or appropriate, in light of the fact that the CVRA is self-executing. *See* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 23, September 2007 ("September 2007 Report"). Once the decision was made to promulgate at least some rules, the Committee resolved to incorporate, but not go beyond, the rights expressly stated in the CVRA, not to create rights based on the general right "to be treated with fairness" or "with respect for dignity and privacy," and not to use the rules to resolve questions of statutory interpretation but to leave that to the courts on a case-by-case basis.[9] Adherence to those principles would have ensured that the rules stayed within the bounds of the Rules Enabling Act and the Constitution.

In our view, the Committee has already departed from these principles in certain respects in the Rules effective December 1, 2008. For example, Rules 12.1 and 17, which are based on the right to be treated with "respect for dignity and privacy," instruct judges to deny reciprocal discovery and subpoenas under circumstances that would abridge defendants' constitutional rights to prepare for trial and to confront and cross-examine adverse witnesses. Rule 18, which is not based on any language in the CVRA and is inconsistent with its legislative history, requires judges to set the place of trial within the district with regard to the convenience of alleged victims who are not witnesses but wish to attend as spectators. These rules appear to "have inserted into the criminal procedure rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act " September 2007 Report at 23.

The three new proposals would continue on the same hazardous and unnecessary path. The proposed amendment to Rule 5(d)(3) is in direct conflict with the carefully

[9] *See* Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept 19, 2005), Memorandum to Standing Committee on Rules of Practice and Procedure from Criminal Rules Advisory Committee at 2 (Aug. 1, 2006)

drafted provisions of the Bail Reform Act designed to avoid constitutional violations. The proposed amendments to Rules 12.3 and 21 would spread the problems in Rules 12.1 and 18 to additional contexts. Each of the proposals would require judges to vindicate alleged victims' interests in ways that are not expressly required by the CVRA, to do so at the expense of defendants' rights, and to engage in this conflicted activity at a time when the defendant must be presumed innocent. They would essentially require the judge to act as the victim's advocate and the defendant's adversary, rather than the protector of the defendant's rights as the Constitution requires, thus depriving the defendant of a neutral judge to resolve potentially adverse rulings. *See* Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 Duke L. J. 237, 261, 265, 269-70 (2008) (arguing that the CVRA should be interpreted narrowly in order to avoid these problems and preserve the structure of the adversary system).

When victim advocates pressed these and numerous other rule changes last year,[10] the Committee stated that "such proposals not only could create new substantive rights," but that adopting them without a sufficient basis in case law or judicial experience "is premature and invites error." *See* September 2007 Report at 23-24. The Committee determined to "(1) gather more information on precisely how the proposals would operate in specific proceedings and what effects they might have; (2) obtain empirical data substantiating the existence and nature of problems that could be addressed by rule; and (3) provide additional time for courts to acquire experience under the Act and to develop case law construing it." *Id.* at 24. Because the new rules have yet to be applied or tested, and there is no case law or empirical evidence to support the new proposed amendments, they should be withdrawn.

The Government Accountability Office (GAO) has now completed its report on the CVRA, and nothing in it supports a need to single out alleged victims' interests in the decision whether to release or detain a defendant, a need to deny reciprocal discovery to defendants in furtherance of alleged victims' interests, or a need to consider non-testifying alleged victims' convenience in a decision to transfer the place of trial. Indeed, contrary to alarmist warnings that the CVRA is not being implemented, the GAO reports that most victims who responded to its survey were satisfied with the provision of all of the CVRA rights except the right to confer with the government, with which just under half were satisfied. *See* United States Government Accountability Office, *Crime Victims' Rights Act* at 83-84 (Dec. 2008) (hereinafter "GAO Report"). The general perception among criminal justice participants was that the treatment of victims had improved under the CVRA, though many believed that victims were already treated well before the CVRA. *Id.* at 13, 86. The vast majority of victim-witness professionals reported that judicial attentiveness to victim rights had increased and a large minority (40%) reported that it had greatly or very greatly increased. *Id.* at 85

[10] The proposals were first made to the Committee by then Judge Cassell, who has since left the bench to litigate on behalf of victims and to teach about victim rights In June 2007, Senator Kyl introduced the same proposals as direct amendments of the rules in S. 1749, a bill that had no cosponsors which died in committee

While the Report makes several recommendations to DOJ, and one recommendation to Congress,[11] it makes no recommendations to the Judiciary in general, or to the Rules Committee in particular. It does make at least three observations that should counsel restraint in adopting rules that would expand on the statute's specific terms. First, both Federal Defenders and judges expressed concerns that certain provisions of the CVRA, or certain interpretations of it, conflict with the rights of defendants. *Id* at 13, 87-88. Second, a number of district court judges said that because the Rules are mandatory and regularly consulted by judges, they will be "most helpful in increasing awareness of CVRA rights." *Id.* at 85-86. Thus, the new rules effective December 1, 2008 will increase awareness among judges to the extent any increase in awareness is needed. Further, some judges may too readily accept an interpretation of the CVRA simply because it appears in a rule when in fact it expands on the statute and conflicts with the defendant's rights. Third, judges and others expressed concern that the 72-hour mandamus timetable does not provide enough time to decide complex issues, produce well-thought-out opinions, or allow the parties to respond, and that the time limit would interfere with the handling of other cases of equal or greater importance if the number of petitions were to increase.[12] *See* GAO Report at 50-51. When a rule exceeds the express terms of the CVRA, it invites mandamus actions that would not otherwise be filed.

B. Rule 5(d)(3)

The proposed amendment of Rule 5(d)(3) would make the general right to be reasonably protected from the accused under § 3771(a)(1) a mandatory and primary consideration in every decision regarding pretrial release or detention. This is not required by the CVRA, would conflict with the Bail Reform Act and the Due Process Clause, and would directly compromise judicial neutrality

Current Rule 5(d)(3) provides that the judge "must detain or release the defendant as provided by statute or these rules." As the Committee recognizes, the current rule "already incorporates" an alleged victim's right to be reasonably protected from the accused. As the courts have recognized, this right does not add to or change the substantive bases upon which an accused may be released or detained under 18 U.S.C. § 3142. *See United States v. Turner*, 367 F Supp.2d 319, 332 (E.D.N.Y. 2005), *United*

[11] GAO recommends that DOJ notify victims of their rights to file complaints against DOJ personnel and to file motions in court (while acknowledging that this is not required by the CVRA), improve the impartiality of its complaint investigation procedure, and adopt further measures of the performance of its employees in implementing the CVRA. *Id* at 88-91. It recommends that Congress clarify whether the CVRA applies to local offenses prosecuted in D.C Superior Court. *Id* at 91

[12] The Report also notes that court personnel reported that it is difficult to assemble a panel of judges and provide them with the necessary case documents during the weekend when a petition is filed on a Friday GAO Report at 51 As noted in our letter of December 15, 2008 regarding the Committee's Proposed Legislation Extending Statutory Deadlines, the proposed legislation would exacerbate this problem.

States v. Rubin, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008). Nonetheless, the amendment would add that "[i]n making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant." While the Committee Note asserts that "[t]his amendment draws attention to a factor that the courts are to consider under both the Bail Reform Act" (citing the "safety of any person" and/or "the community" under § 3142(b), (c) and (g)), "and the Crime Victims' Rights Act" (citing the right to be "reasonably protected from the accused" under § 3771(a)(1)), in fact the rule would mandate consideration only of an alleged victim's right to be protected, and says nothing about any, much less all, of the factors that must be considered under § 3142. Because § 3142 and the current rule already incorporate an alleged victim's right to reasonable protection from the accused, the proposed amendment is unnecessary. If, instead, the amendment adds something that is not already incorporated in § 3142 and the current rule, as it clearly indicates, it conflicts with the preventive detention provisions of the Bail Reform Act of 1984, which were carefully drafted to comply with the Due Process Clause.

Before the Bail Reform Act of 1984, the primary purpose of the bail laws was to assure the appearance of the defendant at judicial proceedings. The Bail Reform Act of 1984 marked a significant departure from this basic philosophy by adding, as an additional consideration, the safety of other persons and the community. S. Rep. No. 98-225 at 3, 8-9 (1983). This preventive detention concept was controversial because it would permit imprisonment of a person accused of one crime, presumed to be untrue, on the basis of a prediction of future crimes, in derogation of the person's liberty interest pending trial.

Congress, however, was satisfied that the statute was "not per se unconstitutional," based on *United States v Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), a decision from the District of Columbia Court of Appeals regarding a similar provision in the D.C. code. *See* S. Rep. No. 98-225 at 8 (1983). Congress recognized, as the *Edwards* court did, that a preventive detention statute "may nonetheless be constitutionally defective" if it either "does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" or "fails to provide adequate procedural safeguards." S. Rep. No. 98-225 at 8 (1983) The Bail Reform Act was "carefully drafted with these concerns in mind," *id.*, to ensure that it was "appropriately narrow in scope," and provided "necessarily stringent safeguards to protect the rights of defendants." *Id.* at 7.

Thus, the Bail Reform Act allows preventive detention only when necessary to satisfy a "compelling" need to protect individuals or the community from a "limited group" of "demonstrably" and "particularly dangerous" defendants. *See* S. Rep. No. 98-225 at 5-10, 18-21. It limits the possibility of detention to persons charged with or previously convicted of particularly serious crimes. *See* 18 U S.C. § 3142(e) and (f). Before ordering a defendant in this category to be detained, the judicial officer must first consider, on a case-by-case basis, whether any condition or combination of conditions set forth in § 3142(c) will assure the safety of another and the community, in light of all of

the mitigating and aggravating factors set forth in § 3142(g). The judicial officer may detain the person only if clear and convincing evidence establishes that the most stringent conditions or combination of conditions will not reasonably assure the safety of others. 18 U.S.C. § 3142(e). The person is entitled to a full blown adversary hearing, 18 U.S.C. § 3142(f), immediate review by the district court judge of a magistrate judge's detention order, and immediate appeal to the court of appeals. 18 U.S.C. § 3145.

The Supreme Court upheld the preventive detention provisions of the Bail Reform Act against a facial substantive due process challenge because, under "these narrow circumstances" -- where detention may be sought only for "individuals who have been arrested for a specific category of extremely serious offenses," and may be imposed only when the government "proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" -- the government's interest in preventing crime is "compelling." *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). The Act survived a facial procedural due process challenge because the determination of future dangerousness is subject to "extensive" procedural safeguards "specifically designed to further the accuracy of that determination," including the right to counsel, to testify, to cross-examine, to a neutral judge guided by statutorily enumerated factors, to proof by clear and convincing evidence, to written findings, and to immediate appellate review. *Id* at 751-52.

The proposed amendment would directly conflict with this careful constitutional balance. First, while preventive detention may not be considered unless the person is charged with or was previously convicted of certain enumerated crimes or if there is a serious risk of obstruction or witness or juror intimidation, 18 U.S C. § 3142(f)(1) & (2), and the Bail Reform Act was upheld on that basis, *see Salerno*, 481 U.S. at 750, the proposed amendment states that the judge "must" consider the right of an alleged victim to be reasonably protected from the accused in *every* case.

Second, the proposed amendment omits all of the other factors the Supreme Court relied on to uphold the Bail Reform Act Congress acknowledged that there was no empirical evidence or experience upon which predictions of future crime could be based, but believed that judges could make such predictions "with an acceptable level of accuracy" based on all of the factors enumerated in 18 U S.C. § 3142(g).[13] *See* S Rep.

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[13] Section 3142(g) currently provides:
The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning –
(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive or destructive device or involves a narcotic drug;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including –
(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

No. 98-225 at 9. Congress intended that these factors would be weighed on an individualized case-specific basis, to set conditions to reasonably assure the safety of others, or, as a last resort, to determine that no set of conditions can reasonably assure the safety of others. *See* S. Rep. No. 98-225 at 14, 18-19 (1983). The Bail Reform Act survived a facial due process challenge because it could be constitutionally applied by a judge, guided by these statutory factors on a case-specific basis, to at least some persons charged with crimes. *See Salerno*, 481 U.S. at 745, 751-52. Thus, the right of an alleged victim to protection from the accused cannot be the sole or overriding consideration, as the proposed rule would indicate.

Third, while the Bail Reform Act explicitly preserves the presumption of innocence, 18 U.S.C. § 3142(j), the proposed amendment would emphasize, to the exclusion of all else, a finding that the defendant is likely to be guilty of future misconduct, without explicitly preserving the presumption of innocence.

Fourth, the right of an alleged victim to be reasonably protected from the accused necessarily imports with it the procedural provisions of the CVRA, which fail to provide adequate, much less stringent, procedural safeguards to the accused. After the judge "denies the relief sought" by the alleged victim, he or she has ten days to file a petition for a writ of mandamus, to which the accused (and the district court judge and the prosecutor) must respond in time for the court of appeals to issue a decision within 72 hours. *See* 18 U.S.C. § 3771(d)(3), (5)(B). This is not a procedure designed to ensure fair or accurate review, *cf Salerno*, 481 U.S. at 746; *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), but one that encourages error to the detriment of the accused. *See* GAO Report at 50 ("judges and others said that it may not provide enough time to decide on complex issues, produce well-thought-out opinions, and allow parties to respond"); *In re Antrobus*, 519 F.3d 1123, 1128 (10th Cir. 2008) (attributing contrary holdings of two other circuits regarding the standard of review for mandamus actions to "the time pressures under which they operated.")

In addition to upsetting the constitutional design of the Bail Reform Act, the proposed amendment would encourage frivolous and even abusive petitions for mandamus, thus creating unnecessary burdens and unfairness for the parties, judges and courts of appeals. An alleged victim's view of what is required for his or her "reasonable protection" may well include the prevention of conduct that is not a crime and that does not threaten his or her safety at all. For example, alleged victims of securities fraud in *United States v. Rubin*, 558 F.Supp.2d 411 (E.D.N.Y. 2008) claimed that the government's failure to freeze the defendant's assets before he was charged with any crime, the court's allowing the defendant to travel to Israel for the impending death and

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(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release

funeral of a family member, and "even [to] walk 'freely' on bond . . . represented an affront to their right to be protected from the accused." *Id.* at 413, 419-20; *see also id.* at 420 ("movants fasten on this first enumerated right as a wellhead of boundless authority to fashion protection for victims in the guise of 'protecting them from the accused.'"). The alleged victim may then file a petition for mandamus, to which the district court judge, the parties and the court of appeals must scramble to respond within 72 hours, no matter how specious.

C. Rule 12.3

The proposed amendment of Rule 12.3 is not based on any specific right found in the CVRA, would compromise the judge's neutrality, and would violate the Due Process Clause. For the same reasons, we believe that new Rule 12.1 will be invalidated if and when it is applied to force a defendant to provide his alibi witness's address and telephone number without reciprocal discovery of the same information regarding the government's rebuttal witness. The Committee should await the development of case law on Rule 12.1 before adopting proposed Rule 12.3.

Denial of reciprocal discovery of a rebuttal witness's address and telephone number interferes with the defendant's ability to investigate in preparation for trial and to cross examine the witness at trial, and it confers an unfair advantage on the government. Yet no provision of the CVRA requires this. When Congress meant to confer a right on victims that upset the adversarial balance and threatened the defendant's right to a fair trial, it did so explicitly, *see* 18 U.S.C. § 3771(a)(3), (b)(1) (specifying that victim witnesses have a right not to be excluded from a public court proceeding unless the court finds by clear and convincing evidence that their testimony would be materially altered by hearing the testimony of other witnesses and there is no reasonable alternative to exclusion), and this has created grave concerns among judges. *See* GAO Report at 87 (judges said that it would be very difficult, if not impossible, to provide this evidence in advance of the victim's testimony). Congress did not expect that such a right would simply flow from undefined and inherently subjective rights, such as the right to "dignity and privacy," or the right "to be protected from the accused" without any showing that protection is needed.

The Committee Note states that the amendment implements a victim's right to be "reasonably protected from the accused," but the rule is *un*reasonable because it does not require any showing that there is a need for protection, but rather presumes such a need in all cases without empirical evidence to support it. The Note states that the rule also implements the right to be "treated with respect for the victim's dignity and privacy " Given that all witnesses are treated with respect for dignity and privacy within the constraints and demands of the adversary system, the proposed amendment entitles alleged victims to special treatment and it does so to the detriment of defendants' rights. This is entirely unnecessary, as Rule 12.3(d) already encourages appropriate protective orders and filings under seal when warranted by the facts of the individual case.

The proposed rule would compromise the judge's neutrality and violate the defendant's due process right to reciprocal discovery. Under, the proposed amendment, the defendant would be required to disclose his public authority defense along with his witnesses' names, addresses and telephone numbers, on pain of having the witnesses excluded, for the government's unfettered use in preparing its case against him and cross-examining his witnesses. After having done so, the defendant would then be required to make a showing of need for any victim rebuttal witness's address and telephone number. The judge would be required to deny disclosure of the information or any "reasonable alternative procedure" if the defendant did not make a sufficient showing of need, perhaps because, as the rule suggests, a showing of ordinary need is not enough when the rebuttal witness is an alleged victim.

If the judge concludes that the defendant has made the requisite showing of need, he has two choices. He can order the information disclosed, in response to which the alleged victim can file a mandamus action if, in her wholly subjective view, this would harm her interests in dignity, privacy or protection. Or, the judge can order a "reasonable alternative procedure" that somehow "allows" preparation of the defense but must "protect" the alleged victim's "interests" and denies disclosure of the information itself This instruction, by telling the judge to give at least as much weight to a victim's "interests" as to the defendant's constitutional rights, is itself unconstitutional and places the judge in an untenable position. An alleged victim may well insist that her interest in dignity and privacy can be maintained only by being interviewed in the presence of the government, but such a procedure would violate the defendant's rights to effective assistance of counsel and due process of law.[14] Even if a victim agreed to a private interview by defense counsel at some neutral location, the defense would still be deprived of the address and telephone number, information which is often critical to investigation and cross examination. The witness's address is needed in order to interview the witness's neighbors. Telephone numbers are often essential to corroborate or refute the government's allegations, for example, to determine whether alleged conversations actually took place, whether there were calls the government did not disclose, or whether the witness was where he says he was at relevant times.

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[14] *See Shillinger v Haworth*, 70 F.3d 1132 (10th Cir 1995) (Sixth Amendment violated when sheriff in whose presence defense attorney was forced to prepare client for trial passed attorney work product on to prosecutor), *Williams v Woodford*, 384 F 3d 567, 585 (9th Cir. 2004) ("Substantial prejudice results from . the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial "); *Hickman v Taylor*, 329 U S 495, 510-11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel Proper preparation of a client's case demands that he prepare his legal theories and plan his strategy without undue and needless interference "); *Ake v Oklahoma*, 470 U.S. 68, 82-83 (1985) (indigent defendant has a right to make an *ex parte* showing of relevance of expert testimony), *Weatherford v. Bursey*, 429 U S 554, 558 (1977) ("communication of defense strategy to the prosecution" would violate Sixth Amendment)

Under the current rule, the judge appropriately is not involved in whether or not or under what circumstances the government's rebuttal witnesses can be interviewed by the defense, or in whether or how the defense otherwise uses an address or telephone number in its investigation or cross-examination The proposed rule would squarely involve the judge in these matters and place her in the conflicted position of vindicating victims' "interests" against defendants' constitutional rights. This is "precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to . . . the only true parties." *United States v Rubin*, 558 F. Supp.2d 411, 428 (E.D.N.Y. 2008)

Once reciprocal discovery of the witness's address and telephone number is denied, the defendant cannot retract his disclosure to the government, and the government receives an unfair advantage. This can occur in the complete absence of any case-specific showing for the denial, but instead on the basis of a presumption that all alleged victims need protection from all defendants and that their dignity and privacy are threatened by defense trial preparation. This presumption is empirically baseless, is not required by the CVRA, and is unconstitutional under applicable Supreme Court law:

> [W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. . . . Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. . . . It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius v Oregon, 412 U.S. 470, 475-76 & n. 9 (1973) A presumption that alleged victims are in need of protection and that their dignity and privacy are threatened by ordinary trial preparation, rather than a case-by-case showing, is not a "strong showing of state interests." *See, e.g., Maryland v. Craig*, 497 U.S. 836, 845 (1990); *Globe Newspaper Co. v Superior Court*, 457 U.S 596, 608-09 (1982).

It is no answer that the court *might* order reciprocal discovery after the defendant disclosed his information

> [I]t is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his . . . defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

Id. at 477.

The proposed rule is also unconstitutional under Supreme Court cases holding that witnesses are not entitled to a presumption that their addresses may be withheld at the expense of the defendant's rights to effectively investigate, to cross-examine, and to call witnesses in his own behalf. The law presumes the opposite. In *Smith v Illinois*, 390 U.S. 129 (1968), the Supreme Court reversed a conviction where the trial court prohibited questions of a government witness regarding his real name and address, stating:

> When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination *and out-of-court investigation.* To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131 (internal quotation marks and citations omitted) (emphasis supplied). *See also Alford v. United States*, 282 U.S. 687, 693 (1931) ("The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face without any declaration of purpose as was made by [defense] counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed."). Disclosure of a key witness's name and address before trial is often even more important than eliciting it in open court because it assures that the defendant can investigate the witness's background to discover avenues for impeachment. *Martin v. Tate*, 96 F.3d 1448 (Table), 1996 WL 506503 *6 (6th Cir. 1996).

Smith and *Alford* made clear that to require the defendant to establish that elicitation of the identity and address of a key government witness would necessarily lead to discrediting the witness is itself "to deny a substantial right and to withdraw one of the safeguards essential to a fair trial." *Alford*, 282 U.S at 692; *Smith*, 390 U.S. at 132 (same). "*Alford* and *Smith* thus make it clear that a defendant is presumptively entitled to cross-examine a key government witness as to his address and place of employment." *United States v Navarro*, 737 F.2d 625, 633 (7th Cir. 1984) To overcome that presumption, the government or the witness must make a specific showing that disclosure would endanger the witness' safety, or would *merely* harass, annoy, or humiliate the witness. *See Smith*, 390 U.S. at 133-34 (White, J., Marshall, J., concurring), *Alford*, 282 U.S. at 694; *see also, e g , United States v. Hernandez*, 608 F.2d 741, 745 (9th Cir. 1974); *United States v Dickens*, 417 F.2d 958, 961-62 (8th Cir. 1969); *United States v Palermo*, 410 F 2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969); *United States v. Barajas*, 2006 WL 35529 **7-9 (E.D. Cal. 2006); *United States v. Fenech*, 943 F. Supp. 480, 488-89 (E.D. Pa. 1996). The proposed rule would reverse these presumptions and would therefore be unconstitutional

D. Rule 21

The current rule requires the court to consider the convenience of witnesses, including any alleged victim who is a witness, in a decision to transfer for convenience on the defendant's motion. The proposed rule would require the court to also consider the convenience of non-testifying alleged victims in such a decision.

The Committee Note cites no source in the CVRA for this rule, and there is none. While non-testifying alleged victims have a general right to attend public court proceedings like any other member of the public, they have no right to have the judge ensure that the proceeding is held at a place where it is convenient for them to attend or to otherwise ensure their attendance. This is clear from the absence of any such right in the plain language of the CVRA and from the explanation in the legislative history of the right of a testifying victim not to be excluded from public proceedings *See* 150 Cong. Rec. S10910 (Oct. 9, 2004) ("This language [in § 3771(a)(3)] was drafted in a way to ensure that the government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings" and "is not intended to alter" laws or procedures excluding the public from grand jury or court proceedings).

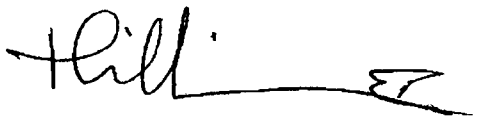
The Committee Note's reference to "competing interests" is not helpful as it suggests that the convenience of a non-testifying alleged victim is on an equal footing with the convenience of the defendant, the prosecutor and the witnesses. Indeed, the alleged victim's convenience may, as a practical matter, have greater weight than that of the parties and witnesses, as only the victim would have the ability to file a mandamus action. Suppose the defendant moves for transfer to a district where the relevant witnesses are located, but an alleged victim who is not a witness objects because it would be too costly and time-consuming for him to travel. If the judge declines to transfer the trial in light of the alleged victim's objection, the defendant may not be able to secure the attendance of his witnesses. If the judge transfers the trial as the defendant requested, the non-testifying alleged victim can file a mandamus action. Absent the proposed amendment, such an action would surely fail because it would find no support in the CVRA, but with the proposed amendment, the action may succeed because it would find support in the rule, and this alone should give the Committee pause. Regardless of final outcome, the rule would invite mandamus actions that would not otherwise be filed, to which the judge, parties and court of appeals would have to respond.

The GAO Report discusses situations in which victims live at a distance from the proceedings, but it does not recommend that the rules be amended to address these situations. It notes that it has been difficult to notify victims who live on Indian reservations of their rights when they do not have access to a mailbox, telephone or Internet, and that it is difficult to notify and allow participation by victims who live outside the United States. *See* GAO Report at 30-31. In response to these challenges, victim-witness professionals have driven to reservations, prosecutors and agents have coordinated with officials in foreign countries, and courts have used teleconferencing to allow victims who live outside the United States or live in the United States but may not

be able to travel to court to "participate in court proceedings." *Id.* These measures, while not required by the CVRA, have been sufficient to facilitate rights that are required by the CVRA, *i e.*, the right to notice and to be reasonably heard. The rules should not suggest that more is required, particularly by involving judges in ensuring that it is convenient for alleged victims to attend proceedings in which they are not testifying.

We appreciate the opportunity to comment on these proposed amendments, and respectfully urge the Committee to adopt our proposed alternative to Rule 32.1(a)(6), and to withdraw the proposed amendments to Rules 5(d)(3), 12.1, and 21.

Very truly yours,



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February 17, 2009

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

Re. Comment on Proposed Amendments to Rule 15 of the Federal Rules of Criminal Procedure

Dear Mr McCabe:

This letter provides public comment on behalf of the Federal Public and Community Defenders on the proposed amendments to Rule 15 of the Federal Rules of Criminal Procedure [1]

In promulgating rules of procedure, courts must ensure that they are "not inconsistent with the statutes or Constitution of the United States." *Sibbach v Wilson & Co*, 312 U S 1, 9-10 (1941); *cf* 28 U.S.C § 2072 (Supreme Court has power to prescribe general rules of practice and procedure, which "shall not abridge, enlarge or modify any substantive right") The proposed amendment to Rule 15 seeks to preserve testimonial evidence, obtained in the absence of the defendant, if the testimony "could provide substantial proof of a material fact," presumably for use at trial if the witness remains unavailable. Such an aim is of doubtful constitutionality, as it strikes at the core of the Confrontation Clause, by denying the right to face-to-face confrontation The rule also threatens, as a practical matter, to significantly impair the defense function, which relies on the defendant's presence with counsel when confronting and cross-examining a witness. In light of these constitutional doubts and practical problems, we urge the Committee to withdraw the proposed amendment, even accepting the government's view that the proposed rule is necessary for the prosecution of important transnational crimes Alternatively, we suggest that

[1] By separate letter, we have previously provided comment on proposed amendments to Rules 5, 12 3, 21, and 32 1

the Committee amend the proposed rule to narrow its scope, ensuring that it is utilized only when there is no reasonable alternative to a deposition in the defendant's absence, and when the government demonstrates that the deposition will truly serve important public policy interests beyond the mere prosecution of an individual crime.

I. The Proposed Rule Is of Doubtful Constitutionality

The proposed rule amendment contemplates taking testimony—testimony that will be presumably offered at trial—outside the defendant's presence and without the defendant's consent. This denial of face-to-face confrontation raises serious constitutional questions that are not addressed by the proposed rule's provisions.

The Supreme Court has long recognized that the Sixth Amendment's Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v Iowa*, 487 U.S. 1012, 1015 (1988) (citations omitted) (tracing the right back to Roman law), *see also Maryland v Craig*, 497 U.S. 836, 845-47 (1990) [2] Such confrontation of adverse witnesses is an "essential" component of a fair trial. *Coy*, 487 U S. at 1019-20. A witness may be less likely to lie about the defendant if he must do so in front of the defendant *Coy*, 487 U S. at 1019-20. And, if the defendant knows the witness, as is often the case, the defendant may be able to pick up on nonverbal cues to assist counsel in formulating questions for cross examination and making a record regarding the witness's demeanor *Cf. Coy*, 487 U.S. at 1019-20 (witness may "studiously look elsewhere," but trier of fact can draw conclusions from that fact). For these reasons, the "explicit" right to face-to-face confrontation is a distinct constitutional guarantee from that of cross-examination, though it serves much the same purpose *Coy*, 487 U.S. at 1019-20.

In *Craig*, the Supreme Court permitted the government to avoid its obligation to provide face-to-face confrontation only when doing so (1) was "necessary to further important public policy"

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[2] Blackstone saw face-to-face confrontation as an essential right

> This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken

2 William Blackstone, Commentaries on the Laws of England 373-74, *quoted in* Natalie Kijurna, Lilly v Virginia: *the Confrontation Clause and Hearsay--"Oh What a Tangled Web We Weave* ," 50 DEPAUL L. REV 1133, 1144 & n.67 (2001).

and (2) "only when the reliability of the testimony [was] otherwise assured " *Craig*, 497 U.S. at 850.[3] Subsequent to *Craig*, however, the Court has abandoned precedent upon which it was based, emphasizing that the touchstone of the Sixth Amendment is the right to actual confrontation of one's accusers, not reliability Given this significant development in the Court's precedent, *Craig* provides a doubtful basis upon which to draft a rule denying confrontation rights.

Craig was a five-to-four decision, from which Justice Scalia, the author of *Coy*, dissented. The *Craig* majority opined that the "central concern of the Confrontation Clause is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." 497 U.S. at 845. Although it recognized that "face-to-face confrontation forms 'the core of values furthered by the Confrontation Clause,'" 497 U.S. at 846 (citation omitted), the Court, relying on *Ohio v Roberts*, 448 U S 56 (1980), concluded that the Sixth Amendment right to confrontation was not absolute. Instead, it read its precedent merely as establishing a "preference" for face-to-face confrontation. 497 U.S. at 63

Justice Scalia, joined by three members of the Court, sharply disagreed. His dissent emphasized that, contrary to the majority's view, the text of the Sixth Amendment is absolute:

> The Sixth Amendment provides with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court

497 U.S. at 860 (Scalia, J. joined by Brennan, Marshall, and Stevens JJ. dissenting) Setting forth reasoning that would later be adopted by a majority of the Court, Justice Scalia explained that the "Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." *Id.* at 862 (emphasis in original) He explained that a defendant's right to confrontation at trial is not a "preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed." *Id.* at 863. Justice Scalia was particularly concerned about the majority's willingness to limit face-to-face confrontation because the witness herself was unwilling to testify in the presence of the defendant After all, it is the requirement that the accuser look the defendant in the eye as she makes the accusation that is the essence of face-to-face confrontation *Id.* at 866-67.

In *Crawford v Washington*, 541 U.S 36 (2004), a seven-member majority of the Court adopted the reasoning of the *Craig* dissent regarding the purpose of the confrontation right. Overruling *Roberts* with respect to testimonial statements,[4] the Supreme Court held

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[3] In that case, the Court permitted the one-way video testimony only because the trial court had made individualized findings that the child witnesses needed special protection *Id* at 845.

[4] Roberts was subsequently overruled in toto *Whorton v Bockting*, 549 U S 406, ___, 127 S Ct 1173, 1182-83 (2007).

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner· by testing in the crucible of cross-examination The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined

541 U.S. at 61.[5] The Court added· "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62

In light of the ruling in *Crawford*, the *Craig* majority's reliance on reliability as the basis for permitting denial of a defendant's right to confrontation appears no longer sound. It remains to be seen whether the Court will continue to balance important public policy concerns against what Justice Scalia described as the "absolute right" to confrontation In any event, the proposed rule amendment does not even meet this standard Nothing in the proposed rule limits its denial of confrontation to those cases in which it serves an important public policy. For this reason alone, the Committee should be extremely cautious in going forward the proposed amendment.

In its note to the proposed amendment, the Advisory Committee cites a number of circuit cases in support. It cites *United States v Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998), *United States v Gifford*, 892 F 2d 263, 264 (3d Cir. 1989), and *United States v. Salim*, 855 F 2d 944, 947 (2d Cir 1988), as examples where courts have permitted foreign depositions in the defendant's absence These cases cannot support the rule, at least not as proposed. All of the cited cases predate *Crawford* The seminal case, *Salim*, predates *Craig* and relies on *Roberts* in concluding that the interrogatory procedure conducted in France was permissible. *Salim*, 855 F.2d at 954-55 It is inconceivable that the approved French procedure, under which both parties propounded interrogatories and neither the defendant nor defense counsel were present, would pass constitutional muster after Crawford.[6]

Medjuck provides better support for foreign depositions than *Salim*, but it likewise fails as a basis for the rule as proposed In that case, the defendant was charged with participation in a "far-flung" conspiracy involving shipment and distribution of some 70 tons of hashish from Pakistan to Canada and the United States 156 F.3d at 917 The Ninth Circuit allowed videotaped depositions

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[5] While *Crawford* concerned itself with the procedural right of cross-examination, the *Craig* dissent presented virtually identical reasoning regarding face-to-face confrontation. Indeed, Justice Scalia's dissent explained that cross-examination is simply an "implied and collateral right[ ]" to the explicit right of confrontation. 497 U S at 862

[6] In *Gifford*, the Third Circuit simply followed *Salim* in permitting depositions taken in Belgium.

taken in Canada where the trial court had applied *Craig* to require that the government demonstrate that it had diligently tried to secure the defendant's presence and a live video feed enabled the defendant to participate in the deposition. Significantly, it appears that the defendant himself did not wish to travel to Canada, where there was a outstanding warrant for his arrest *Medjuck*, 156 F 3d at 920-21. *See also United States v Gigante*, 166 F.3d 75, 80-81 (2d Cir. 1999) (defendant's poor health prevented his attendance).

Contrary to *Craig*, *Medjuck* imposed no requirement that the deposition serve an important public purpose beyond the prosecution of an individual case. This renders it doubtful precedent upon which to premise an amendment to the proposed rule In any event, the proposed rule in its current form is far less stringent than the procedure *Medjuck* approved, in that it requires government diligence neither in procuring the witness's testimony at trial nor in obtaining the defendant's presence at the deposition. (This issue is addressed further in part II of this comment). Accordingly, none of the cases cited in the Advisory Committee Note resolve doubts as to the constitutionality of the proposed rule, even if one assumes that *Craig* is still viable precedent after *Crawford*

Two post-*Crawford* circuit decisions have illustrated the problems raised by the proposed rule's approach to deposing government witnesses in a foreign country in the defendant's absence In *United States v Yates*, 438 F 3d 1307 (11th Cir 2006) (en banc), the Eleventh Circuit concluded that witness testimony presented on a television monitor at a criminal trial. by live, two-way video conference with witnesses in Australia, violated the defendants' Sixth Amendment right to confront the witnesses against them 438 F 3d at 1315-18 Hewing to the standards set forth in *Craig*, the court of appeals emphasized that denial of face-to-face confrontation at trial is permissible only if "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured " *Id* at 1312—14 (citing *Craig*, 497 U S at 850). The court noted that the current version of Rule 15 requires the defendant's presence precisely because of the need to satisfy the Constitution. *Id* at 1314-15 The Eleventh Circuit recognized that the "simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation " *Id* at 1315

Because the trial court failed to conduct an evidentiary hearing to determine whether the video depositions served an important public policy interest and were sufficiently reliable, the Eleventh Circuit held that the trial court should not have permitted the introduction of the depositions at trial *Yates*, 438 F 3d at1316-17. Of significance to concerns raised by the proposed amendment to Rule 15, the Eleventh Circuit deemed inadequate the government's claim that the evidence was crucial to its case.

> [T]here is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of two-way video conference

438 F.3d at 1316 The Eleventh Circuit was willing to permit depositions taken in the defendant's

absence only in the "rare, exceptional case." 438 F.3d at 1317.

Yates involved an otherwise typical conspiracy to distribute prescription drugs illegally and money laundering. In contrast, the Fourth Circuit affirmed a trial court's decision to admit depositions of Saudi Arabian officials taken in Saudi Arabia in a defendant's trial on charges of conspiracy to commit acts of terrorism *United States v Ali*, 528 F.3d 210 (4th Cir. 2008), *petition for cert. filed*, 77 USLW 3242 (U.S Oct. 6, 2008) (Nos 06-4334 & 06-4521). Ali contended that his confession in Saudi Arabia had been obtained through torture. The government demonstrated that it had diligently attempted to secure the testimony of the foreign officials but the Saudi government would not permit them to attend the trial in the United States. In fact, this was the first time the Saudi government had permitted depositions at all *Id.* at 539 As in *Medjuck*, the United States Marshal could not maintain custody of the defendant in Saudi Arabia, and, the defendant himself had reason not to travel there as he was subject to prosecution. Ali, 528 F.3d at 239. At oral argument, the government noted, without correction, that Ali had never asked to attend the depositions *Id* Instead, the two governments set up a live two-way video feed. Two defense attorneys attended the depositions in Saudi Arabia while a third stayed with the defendant, where the trial judge also presided. The depositions could be interrupted at any time for private telephone conversation with the defendant. *Id* at 239–40.

In allowing the use of these depositions at trial, the Fourth Circuit emphasized that the case involved a potential threat to national security, i.e., one of the most critical public policy concerns. 528 F.3d at 240-41. Thus, Ali's case contrasted sharply with the run of the mill money laundering and conspiracy charges faced by the defendants in *Yates*. *Ali*, 528 F 3d at 242 n 12. Nevertheless, the Fourth Circuit noted: "None of this diminishes the fact that face-to-face confrontation is a critical component of the defendant's Sixth Amendment right." *Id* at 243 The Court of Appeals affirmed only because the case was "certainly unusual," the officers were beyond the court's subpoena power, and the defendant himself was not eager to travel to Saudi Arabia *Id.*[7]

[7] In a previous terrorism case, the Fourth Circuit authorized the defendant to use substitute exculpatory affidavits but noted that use of the affidavits by the government to bolster its case with inculpatory statements would violate the defendant's Sixth Amendment right to confrontation. *United States v Moussaoui*, 365 F.3d 292, 316 (4th Cir. 2004).

II. The Proposed Amendment to Rule 15 Is Overly Broad and Does Not Meet Even the Requisite Craig Standards

Assuming that, while limited, *Craig* has not been overruled, its remaining prong requires at a minimum a showing that denial of a defendant's right to confrontation is "necessary" to further an "important public policy " 497 U.S. at 850. The professed "important purpose" behind the proposed rule is to assist the United States in prosecuting "transnational" crimes The rule is written so broadly, however, that it sweeps in prosecutions that cannot possibly satisfy this "important purpose." Nothing in the language of the proposed rule limits these depositions to "transnational cases," let alone cases of national or transnational significance. Nor does it impose any requirement about the severity of the offense. Instead, it authorizes depositions in all cases, even misdemeanor cases and cases that have little or no import beyond their own circumstances. If it is to justify denying face-to-face confrontation, a deposition's "important purpose" must be more than the government's desire to prosecute an individual crime. Otherwise, the proposed rule would threaten to swallow the standards of *Craig* and *Coy*. As the Eleventh Circuit has noted, "[a]ll criminal prosecutions include at least some evidence crucial to the government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial." *Yates*, 438 F.3d at 1316. This cannot be the basis for denial of the defendant's right to confront the witness. *Id.*

The proposed rule is overbroad for a second reason: it does not require a showing that the evidence sought is "necessary" to the government's case. As drafted, the rule permits depositions if the district court finds merely that the sought-after testimony "could" provide proof of a material fact. It does not require any showing that the witness is the only source of that proof. Without such a requirement, the rule would allow depositions out of the defendant's presence even though the government can obtain the same or similar proof from a different source without abridging the defendant's rights.

Finally, the proposed rule amendment fails confrontation requirements regarding witness unavailability to testify at trial. Out-of-court testimony may be admitted at trial consistently with the Sixth Amendment only if the defendant had an adequate opportunity to cross-examine the witness and the witness is unavailable to testify at trial *Crawford*, 541 U.S. at 54 Before out-of-court testimony may be admitted at trial, the government must demonstrate that the witness is truly unavailable *Barber v Page*, 390 U.S. 719, 724-25 (1968). To make this showing, the government must make "good faith" attempts to secure the witness's presence. *Id* This is clear even under the more-lenient standards in *Roberts*: if there is a "possibility, albeit remote, that affirmative measures might produce the declarant," the government must show that it would have been unreasonable to undertake those affirmative acts. 448 U.S at 74.

Contrary to these requirements, the proposed rule imposes no obligation on the government to make any effort to secure the witness's presence. It requires only that the court find a substantial likelihood that the witness's attendance at trial cannot be obtained The mere fact that a witness is not likely to be available does not fulfill the government's obligation to attempt to secure her presence. *Cf United States v Guadian-Salazar*, 824 F.2d 344, 346–47 (5th Cir 1987) (reversing conviction for admission of depositions when government did not demonstrate sufficient efforts to

secure attendance of deported witnesses)

Because the proposed rule does not address the standards of the Confrontation Clause, it will result in avoidable litigation over the admissibility of testimony taken under questionable circumstances.[8] This departs from the current rule, which, by guaranteeing the defendant's presence, avoids Sixth Amendment concerns. *See Yates*, 438 F 3d at 1317 (current Rule 15, which provides for defendants' presence at depositions, guarantees defendants' right to face-to-face confrontation); *see also Don v Nix*, 886 F.2d 203, 206 (8th Cir. 1989) (Sixth Amendment guarantees defendant's presence at depositions), *cited in Yates*, 438 F.3d at 1317.

Preventing trial by deposition testimony was "the primary object" of the Confrontation Clause. *Mattox v United States*, 156 U.S. 237, 242—43 (1895). Yet the rule contemplates the use of deposition testimony, without face-to-face confrontation, when doing so is not necessary to serve an important government interest, and even if the government has failed to make adequate efforts to bring the witness to the courtroom. To avoid the serious constitutional issues raised by permitting such depositions, we urge the Committee to reject the amended rule

III. The Proposed Rule Will Impair the Defense Function

The importance of the defendant's presence at depositions is not limited to his Sixth Amendment right to face-to-face confrontation. The defendant is an integral component of the defense team. In many instances, there is no substitute for his contemporaneous participation in the deposition. This is shown by a number of cases in which foreign depositions have been used in which the defense was impaired by the defendant's absence or aided by the defendant's presence.

For example, attorneys in the Eastern District of Michigan represented a defendant in a multi-defendant case involving numerous charges of bank and wire fraud. Witnesses were deposed around the world, including in the Cayman Islands, Switzerland and London. While some defendants elected not to attend the depositions, the lead defendant was present, and her assistance was essential to effective cross-examination of the government witnesses. The case involved numerous documents in various languages, and the depositions took a number of days. Each evening, the defense team, including the defendant, pored over the documents and prepared for the next day's questioning. This would not have been possible to do over the telephone or through the use of other electronic communication.

It is no answer to this problem for the defense attorney to remain with his client and attend the deposition by alternate means. In a five-defendant case arising out of the Northern District of Texas, for example, the government took depositions of its witnesses in Malta. Four of the defendants were incarcerated, and the fifth was not permitted to leave the country, so none of the

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[8] For this reason, the Committee should not go forward on the theory that the proposed rule addresses only the taking of the deposition, not its use at trial Indeed, in addressing past issues regarding the defendant's presence for deposition, the Committee has expressly addressed the later use of the depositions Cf. FED. R. CRIM. P. 15(c)(2) (discussing not only taking deposition upon defendant's waiver of right to be present, but also using it).

defendants were present at the depositions Defense attorneys remained with their clients at the detention facility in Texas and were forced to participate by video or telephone The video feed was sporadic, the sound was abysmal, and the secure telephone line worked only intermittently Such procedures were not a substitute for face-to-face confrontation.

IV. If Endorsed, the Current Proposal Should Be Amended to Limit Its Scope

If the Committee should decide to endorse an amendment to Rule 15 despite its doubtful constitutionality and its detrimental impact on the defense, we suggest that changes be made to limit the scope of the rule, so that depositions are taken in the defendant's absence only when truly necessary and when truly in the national interest. Such changes may increase the chance the proposed amendment will be accepted by the Supreme Court and Congress.

The changes we propose are set out in a blacklined revision of the rule, attached to this letter. They include:

(1) adding a requirement that the Attorney General or his designee authorize the deposition Such an authorization is familiar to the courts and federal criminal litigants, it would put the deposition on the same footing as an interception of wire communications, or a government sentencing appeal.

(2) requiring the court to find not only that the foreign witness will provide material testimony, but also that no other witness could provide sufficiently similar proof at trial or at a deposition in the United States; and

(3) requiring not only that the defendant be able to participate in the deposition, but also that the means of participation are the least restrictive means reasonably available.

In addition to the changes noted above, the redline removes some awkward language and clarifies a few points of ambiguity Each proposed change is explained by the notes that follow

Finally, the proposed language below limits the taking of foreign depositions in the defendant's absence to government witnesses The Criminal Rules Subcommittee had discussed the use of the proposed rule by codefendants, but we suggest that such a rule would be unnecessary, given the alternative means available to address the problem (e g , limiting instructions, severance, etc.)

We appreciate the opportunity to comment on this proposed amendment to Rule 15. We respectfully urge the Committee to withdraw the proposed amendment, or instead to adopt our proposed alternative.

Very truly yours,

Richard A. Anderson
Federal Public Defender

DEFENDERS' PROPOSED ALTERNATIVE RULE 15 AMENDMENT [Redline]

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by subsection (3) of this section,[1] [t]~~T~~he officer who has custody of the defendant must produce the defendant at the deposition ~~in the United States~~ and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by subsection (3) of this section, [a] ~~A~~ defendant who is not in custody has the right upon request to be present at the deposition ~~in the United States~~, subject to any conditions imposed by the court. 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 the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions of Government[2] Witness Outside the United States Without the Defendant's Presence.*** The deposition of a government witness who is outside the United States may be taken without the defendant's presence if:

(A) the Attorney General or his designee certifies that the deposition will provide necessary evidence as to a federal felony offense, the prosecution of which advances important public policy interests;[3]

(B) the court makes case-specific findings ~~of all of the following~~ that:

~~(A)~~(I) there is a substantial likelihood that the witness's testimony ~~could~~ will provide substantial proof of a material fact;

(ii) no other government witness is likely to provide similar proof at trial or at a deposition in the United States;[4]

~~(B)~~(iii) there is a substantial likelihood that the witness's attendance at trial cannot be obtained through diligent efforts;[5]

~~(C)~~ (iv) the witness's presence for a deposition in the United States cannot be obtained through diligent efforts; and

~~(D)~~ (v) Despite the diligent efforts of the government, the defendant cannot be present for one of the following reasons:

~~(i)~~ (I) the country where the witness is located will not permit the defendant to attend the

deposition;

~~(ii)~~ (II) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

~~(iii)~~ (III) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

~~(E)~~ (C) the defendant ~~can~~ meaningfully participates in the deposition, ~~through reasonable means~~ and the limits placed on participation are the least restrictive means reasonably available.[6]

NOTES

1. In subsections (1) and (2), the underlined language replaces "in the United States," which is stricken as awkward. As drafted, the amendment would mean that a defendant who was disruptive in a foreign country would not waive his right to be present at the deposition.

2. New subsection (3) is limited to government witnesses; the problem of codefendant witnesses is not widespread enough to require special treatment by the rule, especially given the possible alternatives of limiting instructions and severance of counts or defendants.

3. The requirement that the deposition advance an important public policy interest is taken directly from *Maryland v. Craig*. *See* 497 U.S. 837, 850 (1990). *See also* Order of the Supreme Court, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.) (discussing Supreme Court's rejection of proposed rule 26). The language is framed to ensure that the policy interests in seeking a deposition is more than simply the interest in prosecuting any individual crime. *Cf. United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) (in rejecting two-way video testimony, court of appeals notes that district court made no findings that the cases "was different from any other criminal prosecution in which the government would find it convenient to present testimony [in this manner]").

Requiring specific authorization by the attorney general or his designee will help ensure that depositions are taken in the absence of the defendant only in the most important cases. *Cf.* 18 U.S.C. § 2516 (requiring attorney general authorization for wiretaps); 18 U.S.C. § 3742(a) (requiring attorney general authorization for sentencing appeals).

4. This provision makes clear that foreign depositions should be taken only when necessary to obtain testimony that would not otherwise be available.

5. Three provisions are amended to require that the government show good faith efforts to secure the witness for trial or U.S. deposition, and alternatively to allow the defendant to be present at the foreign deposition. *See, e.g.*, *United States v. Salim*, 855 F.2d 944, 950 (2d Cir. 1988) (allowing foreign deposition in defendant's absence "so long as the prosecution makes diligent efforts . . . to attempt to secure the defendant's presence"); *cf. Barber v. Page*, 390 U.S. 719, 724–25 (1968) (prosecution must make good faith effort to obtain witness's presence at trial).

6. Subsection (E) is promoted and rewritten to make clear that not only must the court find that reasonable means *can* be used to ensure the defendant's participation, but also that such means are *in fact used* at the deposition. The subsection was also amended to make clear that the means used must place the least reasonable restrictions on the defendant's participation.

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE (Class of 2010)

08-CR-008
08-CV-161
08-EV-003

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE:

A. PROPOSED RULE 5(d)(3) – Initial Appearance; Crime Victim's Rights

COMMENT: The Federal Magistrate Judges Association considers the proposed amendment unnecessary and superfluous because the court is already required by the Bail Reform Act to consider the safety of any person or the community when deciding whether a defendant should be released pending trial.

DISCUSSION: In light of the court's obligation under the Bail Reform Act, to consider the safety of any person in deciding whether to release a defendant and under what conditions, the FMJA believes that the proposed amendment is redundant and unnecessary. The present rule specifically states that the court's decision is to be made "as provided by statute or these rules," and the new language could be construed as elevating the rights of victims over the other considerations which the Bail Reform Act articulates. Moreover, there is some concern that adding this provision to the rule would imply a different or an even greater duty on the court than that already imposed by the Bail Reform Act and the Crime Victim's Rights Act (CVRA).

B. PROPOSED RULE 12.3(a)(4)(C) & -(D) – Disclosing Witnesses

COMMENT: Rule 12.3 applies when a defendant is charged with a crime he allegedly committed while acting in an undercover capacity for a "law enforcement agency or federal intelligence agency." The FMJA endorses the proposed changes.

C. PROPOSED RULE 15 – Depositions held outside the United States

COMMENT: The FMJA endorses the proposed change, which would expressly permit the taking of depositions in a foreign country without the presence of the criminal defendant.

DISCUSSION: This procedure would only be employed when the witness could not be brought to the United States for a deposition and where it was impractical for certain specified reasons to have the defendant taken to the foreign country to be present at the deposition. Before such a procedure could be employed, the court would have to make "case specific findings" that the deposition was "necessary for further and important public policy" and there would have to be means for the defendant to meaningfully participate in the deposition. The FMJA believes that this rule is reasonable and necessary in those few cases where a foreign deposition is necessary, and the defendant cannot be physically present.

D. PROPOSED RULE 21 – Transfer for trial

COMMENT: The FMJA endorses the proposed change, which makes clear that the court must consider the convenience of victims in deciding whether to transfer a proceeding to another district for trial.

DISCUSSION: The proposed change merely assures that considerations of a victim's rights under the CVRA are addressed along with the interests of the parties and witnesses in a decision on whether to transfer all or part of a proceeding. The FMJA believes that because the rule specifically enumerates that the convenience of parties and witnesses must be considered, it is prudent to include victims' entitlement to the same consideration.

E. PROPOSED RULE 32.1 – Release or detention pending revocation hearing

COMMENT: The FMJA endorses the proposed change, which clarifies the standard to be applied in release or detentions relating to a person on probation or supervised release pending a revocation hearing.

DISCUSSION: The proposed revision would specifically provide that to obtain release pending a revocation hearing, a defendant who has been found guilty of an offense and is arrested on a petition to revoke must establish "by clear and convincing evidence" that the defendant will not flee or pose a danger to the community. The proposed amendment by adding the words "by clear and convincing evidence" ends the confusion of what burden of proof is applicable in this situation. The FMJA believes that this clarification is appropriate.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. PROPOSED RULE 26(a)(2) and (b)(4) – Expert Trial Witness Discovery

COMMENT: The proposed changes extend work product protections to preliminary drafts of expert reports. The FMJA generally endorses the proposed changes, but suggests that it would be helpful to address questions related to preservation of draft expert reports and the necessity for filing privilege logs when a party seeks protection of this sort of work product material either in the Rule or the Committee Note.

DISCUSSION: The proposed changes in Rule 26 serve a number of needed purposes in both the conduct of expert discovery and in its oversight by the courts. Many districts have local rules or standing orders which incorporate these changes in one form or another, while others rely on the body of decisional authorities developed in their districts or circuits to mediate principles which are set forth in the proposed amendments. By the same token, there are multi-judge districts where the practices relating to expert disclosures and evidence acquisition may vary from judge to judge.

The FMJA believes the proposed changes bring needed national uniformity to discovery practices relating to experts which will establish brighter lines for counsel's decision-making in the discovery process and reduce the number of areas over which there could be a dispute. Thus, considerable litigation expense to all parties could be reduced. Although some counsel may see many of the detailed disclosure requirements as more burdensome than currently experienced in their districts, others will recognize that a greater degree of clarity is being brought to the way expert

discovery is conducted.

The proposed changes are lengthy and rather detailed. Except as to the provisions of Rule 26 (b)4(B) and (C), no one on the FMJA Rules Committee could recommend a better way to both prescribe and circumscribe the conduct of expert discovery than the proposed changes offered. The language for each provision chosen by the rule makers establish a useful template for courts in resolving conflicts. They essentially codify a collection of practices developed over the course of administrating the discovery rules and provide a single, uniform source for the trial courts in making the initial decisions and for the courts of appeal in reviewing those decisions.

However, neither Rule 26(b)4(B) and (C) nor the Committee Note addresses questions related to preservation of draft expert reports and the necessity for filing privilege logs when Rule 26 is asserted to protect the disclosure of this sort of work product material. Although these two subjects currently are covered by various circuit authorities, it would be helpful to set forth some clarification, either in the Rule or in the Committee Note, regarding whether the changes in the Rule were intended to alter any of those authorities .

In short, the FMJA believes the proposed changes to Rule 26(a) and (b), though lengthy and rather detailed, and with the clarification requested, will offer uniformity where there has been significant inconsistency among districts, will narrow issues over which parties can have legitimate disputes and provide substantial guidance to the courts should disputes arise.

B. PROPOSED AMENDMENTS TO RULE 56 – Summary Judgment

COMMENT: The proposed changes to Rule 56 would substantially re-write that rule. The drafters' stated intention is not to change the standard for summary judgment, but to make the procedure for filing and considering motions for summary judgment more uniform across the country.

The major change is to require the point-counterpoint approach to statements of fact supporting or opposing summary judgment. Many districts have experimented with that approach. While some have adopted it as part of their local rules, other districts have tried it and discarded it. The drafters have concluded that national uniformity trumps local policy with the approach. While the FMJA thinks that conclusion should be debated nationally as a policy issue, these comments proceed from the assumption that the point-counterpoint approach will be adopted in the Federal Rules, and will deal with the specific proposals.

The FMJA believes that many of the changes will be beneficial, but has concerns about others.

DISCUSSION:

1. **Rule 56(a):** The proposed Rule would add "or Partial Summary Judgment" to the title. It would also change "genuine issue as to any material fact" (current Rule 56(c)) to "no genuine dispute as to any material fact." It would require the court to state on the record the reasons for granting or denying the motion.

   The FMJA agrees with those changes. The drafters'

comments invite views on whether "should grant" ought to be "must grant." The FMJA believes that "should grant" is the appropriate phrase. It reflects the current law. Additionally, using "must grant" along with an explicit endorsement of motions for "partial summary judgment" might suggest that the court "must" entertain motions that address the case in a piecemeal fashion.

2. **Rule 56(b):** Proposed Rule 56 (b) sets out a timetable for motions for summary judgment "unless a different time is set by local rule or the court orders otherwise in the case." In contrast, Rule 56(c), which sets out the point-counterpoint procedure, can be varied only if "the court orders otherwise in the case." In the "Detailed Discussion and Questions, the drafters state that authority to depart "in the case" does not authorize local rules inconsistent with the national rule and does not authorize departure from the national procedures by a standing order.

3. **Rule 56(c):** The FMJA has concerns about the "in the case" requirement of Rule 56(c). Many districts now have local rules developed over long experience with the point-counterpoint procedure, which, for example, set out a presumptive limit on the number of statements of fact, or require a responding party to state or summarize the statement to which it is responding (so that the judge has only one document to look at), and the like. Under the proposed 56(c), presumably those procedures would have to be ordered in each case. Each judge across the country would decide his or her own procedure and impose it by order in each of his or her cases. This would not only impose a burden on the judge, but, in the absence of local rules, would also create more uncertainty about procedures even within a single district, defeating the drafters' goal of more uniformity. The FMJA suggests that the rule permit districts and judges to *supplement* the procedures in Rule 56(c) by local rule or standing order.

4. **Rule 56(c)(3):** The proposed change would allow a party to accept or dispute a fact either generally or for purposes of the motion only.

   The FMJA agrees that change would be beneficial. A particular fact may not be relevant to the motion at hand but may become relevant if the motion is denied. For example, in a motion for summary judgment based on the statute of limitations, the plaintiff would be able to admit some of the moving defendant's stated facts, while reserving the right to contest them if the motion is denied.

5. **Rule 56(c)(4)(A)(ii):** This amendment would permit a statement of fact or the disputing of a statement of fact to be supported by either "a showing that the materials cited do not establish the absence or presence of a genuine dispute" or "a showing . . . that an adverse party cannot produce admissible evidence to support the fact."

   The FMJA has a number of concerns about this subsection. First, it invites legal argument into the statement of facts, which should ideally be a straightforward presentation of evidence. Although the drafters state that a "showing" is not an argument, in practice it will become argument. Secondly, the subsection is confusing and unclear.

The first "showing" apparently relates to a response to "materials cited" in the moving party's statement. It is unclear why that is necessary. If the non-moving party believes that the fact stated is established by the materials cited but the fact is irrelevant, the party can admit the fact for purposes of the motion only (pursuant to Rule 56(c)(3)), and argue the irrelevance in the brief. If the non-moving party believes that the materials cited do not support the fact because the materials are inadmissible, the party may so state pursuant to 56(c)(5).

The second "showing" is apparently intended to be used in a situation in which the moving party does not have the burden of production, although the rule is not limited to that situation. A plaintiff cannot obtain summary judgment simply by showing that the defendant cannot produce evidence to contest a fact. But the rule does not make that clear. Furthermore, as a drafting matter, the relationship of this "showing" to Rule 56(c)(4)(A) is confusing. "A statement that a fact cannot be genuinely disputed" cannot be supported by "a showing that the adverse party cannot produce admissible evidence to *support* the fact." Presumably, the second showing would only be applicable to "A statement that a fact . . . is genuinely disputed."

The FMJA recommends that proposed Rule 56(c)(A)(4)(ii) be revised to make it clearer.

6. **Rule 56(f)(2):** The proposed amendment would require the court to give notice and reasonable time to respond, presumably by oral argument or written briefs, before the court grants or denies a motion for summary judgment on grounds not raised in the motion, the response, or the reply. This proposed new subsection, however, must be read in conjunction with proposed Rule 56(c)(4)(B) which also requires the court to give notice under subsection (f)(2) before granting a motion for summary judgment, but not before denying a motion for summary judgment, on the basis of materials in the record not called to the court's attention under subsection (c)(4)(A). According to the Committee Notes, the purpose of proposed subdivision (f)(2) is to incorporate into Rule 56 a number of procedures that have developed in practice.

   The FMJA agrees that notice and opportunity to be heard should be provided to the parties before the court rules on a summary judgment motion on a ground not raised by a party. The parties should be allowed time to research and brief the new issue, if necessary. If the parties are not allowed to do so, the court would more than likely face numerous motions to reconsider or renewed summary judgment motions.

The FMJA believes the distinction between subsection c(4)(B)'s limitation on giving notice only if the motion is granted and subsection f(2)'s requirement for giving notice if the motion is granted or denied is confusing. The distinction is so subtle that failing to give notice under c(4)(B) would give rise to further argument as to whether notice should have been given. The FMJA is of the opinion these two subsections should be consistent.

III. PROPOSED AMENDMENTS TO RULE 804(b)(3) OF THE FEDERAL RULES OF EVIDENCE

COMMENT: The FMJA does not oppose the proposed changes to Fed. R. Evid. 804(b)(3), but offers the following comments and suggestion for a slight modification to the language of the proposed amendment.

DISCUSSION: The Committee Note indicates that the purpose of the amendment is to make clear that the corroborating circumstances requirement applies to all declarations against penal interest in criminal cases, regardless of which party, the prosecution or the defendant, offers the declaration. The FMJA is in agreement with that general principle.

The FMJA believes, however, that adding the words "or proceeding" to the proposed amendment would render it more consistent with other pertinent rules of evidence. More particularly, Fed. R. Evid. 1101(b) provides that the Federal Rules of Evidence "apply generally . . . to criminal cases and proceedings." Adding the words "or proceeding" so that the proposed amendment would read "in a criminal case or proceeding" would render the amended Rule 804(b)(3) consistent with Rule 1101(b).

Furthermore, the FMJA believes that adding the words "or proceeding" would render the amended Rule 804(b)(3) more consistent with the Federal Rules of Criminal Procedure. The word "proceeding" is used repeatedly throughout the Federal Rules of Criminal Procedure. For example, Fed. R. Crim. P. 1(a)(1) states: "These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." See also, by way of example, Rules 2, 12(a), 12.1(f), 12.2(e), 21.

Finally, adding the words "or proceeding" would also remove any ambiguity concerning whether the proposed amended rule is intended to apply only to criminal trials (*i.e*, cases?) as opposed to being applicable to all criminal proceedings to which the rules of evidence would otherwise be applicable.

National Association of Criminal Defense Lawyers

February 16, 2009

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

08-CR-009

08-EV-005

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Federal Rules of Criminal Procedure and Federal Rules of Evidence Published for Comment in August 2008

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal Procedure and of Evidence. Our organization has more than 12,500 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of more than 35,000 private and public defenders. NACDL, which recently celebrated its 50th Anniversary, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

In the following pages, we address the proposed amendments to implement the Crime Victims Rights Act, the proposed amendment to Fed.R.Crim.P. 15, and the proposed amendment to Fed.R.Evid. 804(b)(3). In addition, we endorse the views of our colleagues at the Federal Public and Community Defenders, previously submitted with respect to the proposed amendment of Fed.R.Crim.P. 32.1.

VICTIMS' RIGHTS AMENDMENTS

The proposed amendments to Rules 5, 12.3 and 21 "reflect the Advisory Committee's continuing focus on the Crime Victims' Rights Act ('CVRA'), codified as 18 U.S.C. § 3771." Report of the Advisory Committee on Criminal Rules, December 12, 2007 (revised June 16, 2008) ("Report"), at 1.

The proposed amendment to Rule 5, "Initial Appearance," would add the following sentence to subdivision (d)(3): "In making th[e] decision [whether to detain or release a defendant in a felony case], the judge must consider the right of any victim to be reasonably protected from the defendant." The proposed Committee Note explains that "[t]his amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims' Rights Act."

This proposed amendment is outside the legal authority conferred on the Judicial Conference by the Rules Enabling Act, 28 U.S.C. § 2072(b). A directive to a judge as to what he or she must "consider" is not procedural; it is plainly substantive in nature. For this reason alone, the proposal must be withdrawn. It would hardly be possible to incorporate into the Rules governing various proceedings and stages of proceedings all the substantive matters which a judge is required by law -- not to mention by common sense or prudence -- to "consider." Articulation of this one consideration in this one place would have no effect other than to trigger reasonable arguments of "*expressio unius est exclusio alterius.*" The published proposal should simply be dropped.

From a pragmatic perspective, the amendment would have little consequence other than to create the unfortunate public perception that the Committee's work is biased and value-driven, thus legitimately subjecting it (and ultimately the Judicial Branch, if the proposal were adopted) to counterproductive and harmful criticism. The amendment would "draw[] attention to a factor that the courts are [already] required to consider" to the exclusion of all the other factors a court must or should consider. The only suggested justification given for why this one factor should receive singular attention is that the "Committee concluded ... it would be desirable to highlight the victim's right to reasonable protection in the text of Rule 5." The Committee acknowledges that the Rule already incorporates this requirement and does not suggest there is any evidence, anecdotal or otherwise, that judges need to have this factor highlighted. In our experience, judicial officers are highly solicitous of victims' and witnesses' safety in determining whether to detain or release a defendant and in setting the conditions of release, as they should be whenever that factor is made relevant by law, as under 18 U.S.C. § 3142(c)(1),(e), and do not need to have that factor highlighted to the exclusion of all others. Amending a rule that already incorporates what the amendment would require and singles out one factor to the exclusion of all others in the absence of any indication or claim that the singular emphasis on that factor is necessary would undermine the respect and authority the Rules receive, and deserve, for their neutrality. For these reasons, the proposed amendment should be withdrawn.

If the Committee goes forward with the proposed amendment, it should be modified to include within the text of the Rule all the factors a court must consider, and a reminder that release not detention is mandatory unless "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety and the safety of any other person or the community." Id.(e). That statutory mandate, which implements the fundamental right guaranteed by the Eighth Amendment, is the factor which judicial officers at arraignments and detention hearings most often need to be reminded to "consider," and not a single, subsidiary factor to the exclusion of all others.

The proposed amendment to Rule 12.3, "Notice of a Public-Authority Defense," would alter the government's reciprocal discovery obligation by not requiring it to disclose automatically the address and telephone number of a witness on whom it intends to rely to oppose a public authority defense if the witness qualifies as a "victim." If the defendant establishes "a need for the victim's address and telephone number," the amended Rule would allow, but not require, a court to order the government to provide that information "to the defendant or the defendant's attorney," or "fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests." According to the Committee Note, the amendment would implement the provisions of the CVRA that state "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 amendment would have little practical impact, because it is unlikely the government would rely on a person who qualifies as a "victim" to rebut a public authority defense. Proof of a public authority defense will generally consist of evidence showing that a person in a position of governmental authority approved certain conduct, and evidence offered to rebut the defense is unlikely to come from "a person directly and proximately harmed as a result of the commission" of the offense. 18 U.S.C. § 3771(e). While the amendment would accomplish little from a practical perspective, its adoption and existence would further endorse and legitimize the view reflected in the corresponding amendment to Rule 12.1, Notice of an Alibi Defense, that information necessary and helpful in preparing for trial must be withheld from lawyers who represent accused persons in order for a victim to be "reasonably protected" from the defendant.

Most accused persons pose no threat to any witness against them, including victims. Thus, in all but a few cases, withholding a victim's address and telephone number from the defendant is unnecessary for a victim to be reasonably protected from the accused. The rule should reflect that reality. Moreover, access to a witness's address and telephone number is needed not only to contact that person in hopes of obtaining a statement -- and certainly not to harass or intimidate that person -- but rather to conduct essential investigation of relevant facts in order to ensure fairness and accuracy in the verdict at trial. The Rule should not provide for withholding the address and telephone number of a victim-witness when other witnesses' addresses and numbers are disclosed, unless the "victim" or the attorney for the government can establish a special need for secrecy.

A procedure that placed the burden on the government to justify the need for secrecy in any particular case would be more than sufficient to ensure that an alleged victim was protected in the rare case where such protection might be needed. The opposite procedure set up by the proposed Rule -- in which a defendant must establish a need for the information -- is cumbersome and addresses the wrong issue. The need for the information is established by its nature -- investigation of a witness the opposite party is going to rely upon to oppose an affirmative defense. The defense will always have a need for the address and telephone number of the rebuttal witness to conduct that investigation. (In many instances, that information is publicly available, or could be obtained by reasonable and lawful investigation. But it cannot be that to establish "need" for the information, the Committee intends that the defense be required to show it has been unable to deduce the information from other sources. That would imply that the purpose of the proposed amendment is to ensure that defense investigation is not made easy, and would in no way constitute a "procedure" to implement any right created by the CVRA.) The real question of course is whether that information, otherwise disclosable, must be withheld in order for an alleged victim to be "reasonably protected from the accused." The prosecution is in a position to make that showing, not the defense.

Even if the amendment could be justified on grounds that not automatically disclosing the information to defendants is necessary for an alleged victim to be "reasonably protected" from the accused, that would not justify automatically withholding the information from defense counsel. Disclosure of the information to defense counsel can be allowed without any consequence to any victim's right to be reasonably protected by requiring defense counsel not to disclose the details of the information to the accused without obtaining prior authorization, premised on a constitutional right, such as effective assistance of counsel or the right to compulsory process and otherwise to present a defense.[1]

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[1] See, e.g., Calif Penal Code § 1054.2 ("Disclosure of address or telephone number of victim or witness; prohibition; exception"), which provides as follows:

> (a)(1) Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause.
>
> (2) Notwithstanding paragraph (1), an attorney may disclose or permit to be disclosed the address or telephone number of a victim or witness to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by an attorney shall be informed by the attorney that further dissemination of the information, except as provided by this section, is prohibited.
>
> * * * *

Nor does section 3771's vaguely articulated protection for "privacy" entitle a victim-witness to be free from professionally conducted efforts at defense investigation. Of course, no witness is required to speak with any investigator before trial, whether the investigator be a government agent or a member of the defense team. But the mere fact that a witness is also a designated "victim" does not justify protecting that person from even being approached, in a lawful manner, for purposes of pretrial investigation and preparation. As noted in the comments of the proposed amendment to Rule 5, there is already a statutory provision allowing the government to obtain a TRO to bar harassment of any victim or other witness. See 18 U.S.C. § 1514. It is a crime to threaten or harm any witness, id. § 1512(a), or to attempt to "corruptly persuade" a witness to withhold testimony or absent themselves from the proceedings. Id. § 1512(b). Nothing in the CVRA specially requires an amendment to Rule 12.3. Instead, to apply the rather general terms of the Act in the manner proposed will cause more issues to arise than is justified by any slight good that might be accomplished. This amendment should also be withdrawn.

The proposed amendment to Rule 21(b), "Transfer for Trial," would, add the word "any victim" to paragraph (b) of Rule 21, which presently provides that upon the "defendant's motion," the court may transfer the case, or one or more severed counts, to another district "for the convenience of the parties and witnesses, and in the interest of justice." The Committee Note states that this amendment would "require[] the court to consider the convenience of victims ... in determining whether to transfer all or part of the proceeding to another district for trial."

The Committee does not cite any provision of the CVRA that the proposed amendment is intended to implement, and there is none. The CVRA does not purport to establish a victim's right to attend the proceedings, much less a right to do so without inconvenience. The only right of an alleged "victim" conferred by the CVRA in regard to attending court is conferred by subsection (a)(3), and as stated there, it is only a right not be excluded. Accordingly, the amendment would create a novel substantive right, not establish a procedure, and is thus invalid under the Rules Enabling Act.

In addition, the proposed amendment would not change the fact that a motion of this kind can only be made by the defendant. (The reason for this is clear: the government has already selected the district in which to bring the charges in the first instance, subject to the limitations of the Article III and Sixth Amendment venue clauses. If, as a matter of law, venue was not proper in that district, the defendant could and would move to dismiss, not to transfer. Thus, this Rule applies only when venue might lie in more than one district or where the defendant elects to waive his/her venue right, and in either case seeks transfer in order to obtain a more convenient forum.) Under the wording of the Rule, however, although the defendant makes the motion, the court may not grant the motion simply because it finds the defendant's motivating reasons persuasive. Rather, the defendant's motion may be granted only if the court concludes that doing so would, in the judge's view, be "in the interests of justice" and in the collective interests (presumably, on balance) of the parties and the witnesses. As worded, and notwithstanding the Advisory Committee Note, the

amendment would appear to require a great deal more than the committee suggests. The court would have to do more than merely consider the convenience of victims in determining whether to transfer the proceeding. Instead, the motion could be granted, or so a court might well read it, only if transfer were not only convenient to the parties and in the interest of justice, but also if the transfer was also "convenient" for any alleged victim, even one who will not appear as a witness.

Since the convenience of witnesses is already covered in the Rule, this amendment would apparently require the trial court to allow the convenience of a would-be spectator to override the combined interests of the defendant, the government, all the witnesses and the "interests of justice." Such an amendment could only make the Judiciary look foolish.

A court's authority under existing Rule 21(b) to consider the "interests of justice" in deciding whether to grant a defendant's motion to transfer the proceedings already adequately enables the court to take into account the convenience (or inconvenience) to a non-witness victim. The potential for mischief implicated in this proposal can be readily seen when one contemplates even a moderately complex financial fraud case, or a child pornography downloading case, either of which may involve dozens if not hundreds of non-witness "victims," each of whose asserted preferences as to the place for trial would become a mandatory consideration for the judge addressing a defendant's motion for transfer of venue under Rule 21. The Committee itself acknowledges that a court already "has substantial discretion to balance any competing interests in determining the appropriate venue" and does not suggest that this discretion has proved insufficient to insure the convenience to a victim is properly considered. In sum, the proposed amendment exceeds the scope of the Rules Enabling Act, is poorly drafted, and is unnecessary. It should not be adopted.

FOREIGN DEPOSITIONS IN ABSENCE OF DEFENDANT

The proposed amendment to Rule 15, "Depositions," would add a new subdivision (c)(3) entitled "Taking Depositions Outside the United States Without the Defendant's Presence." The subdivision would allow a deposition to be taken without the defendant being present where the person to be deposed is outside the United States and is either unwilling to be deposed in the United States or unable to travel to the United States, and the defendant is either not allowed to travel to the location of the deposition by the court or is prevented from entering the country where the deposition is to occur. In addition, the court would have to find the person's testimony "could provide substantial proof of a material fact," that "there is a substantial likelihood that the witness's attendance at trial cannot be obtained," and "the defendant can meaningfully participate in the deposition through reasonable means." Proposed Rule 15(c)(3)(A),(B)&(E).

The Committee views the amendment as merely establishing "procedures to procure testimony from foreign witnesses who may be located beyond the reach of the federal subpoena power," and adds that "[i]t is not the intent of the Committee to create any new rights by enactment of this rule ...." (Proposed) Committee Note, at 5. If by "rights" the

Committee means governmental power, the Note is incorrect. (So far as actual rights are concerned, the only impact would be to restrict the defendant's rights, not to create any.) The effect of the amendment is plainly to create new governmental authority, not merely to describe and regulate the procedure for implementing an existing power authorized by statute or treaty. Moreover, the amendment would create a novel opportunity to obtain and introduce testimony that is presently unavailable and inadmissible, all while working a fundamental, even revolutionary change in the purpose of the Rule. Such a change is substantive in nature, not procedural, again in violation of the Rules Enabling Act.

The purpose of Rule 15 as currently drafted is to preserve the testimony of a witness who may be unavailable at the time in the future when the trial occurs. It assumes the witness is presently available to testify at trial. See Rule 15(a)(1) ("A party may move [to depose a witness] ... in order to preserve testimony for trial."). If amended as proposed, the Rule would no longer simply provide a means of preserving the testimony of a witness who is currently available to testify, but would also provide a means of obtaining testimony for use at trial of a witness who is currently unavailable to testify (as unavailability is defined by Fed.R.Evid. 804(a)), and is expected to remain unavailable when the trial occurs.

Moreover, by virtue of authorizing trial depositions without the defendant being present, the amendment would, in conjunction with Criminal Rule 26 and Evidence Rule 804(b)(1), create a new opportunity to admit testimony at trial against the accused that has not been subject to confrontation.[2] The real significance of the amendment is not that it would expand the circumstances in which depositions may be taken, as the Committee Note suggests, but that it enables the prosecution to present testimony at trial that has not been subject to confrontation. Because the amendment would establish a means and a corresponding opportunity (what the Committee calls a "right") to introduce testimony that is presently inadmissible, the amendment exceeds the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and is properly within the jurisdiction of Congress. See, e.g., 18 U.S.C. § 3509 (authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses).

The practical effect of the amendment would be to accomplish indirectly what the proposed amendment to Rule 26 in 2002 sought to accomplish directly -- dispense with the constitutional right of the accused to confront any witnesses who are unwilling or unable to

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[2] Criminal Rule 26 requires that "[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077," and Fed.R.Evid. 804(b)(1) provides that former testimony is not made inadmissible by the rule against hearsay if, inter alia, the testimony "at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law" (emphasis added). Rule 15 currently requires that the defendant be present at any deposition. Absent the proposed amendment to Rule 15, testimony at a deposition at which the defendant was not present would thus be inadmissible, because it would not have been given "in a deposition taken in compliance with law . " Any attempt to have this testimony admitted would of course also be subject to a clear challenge on Sixth Amendment Confrontation Clause grounds

testify in person at trial. The current amendment goes even further, as it does not even require "virtual" confrontation as did the failed 2002 proposed amendment to Rule 26.

The Committee grudgingly acknowledges that if the amendment were approved, it "may give rise to potential challenges" to the admissibility of any testimony secured pursuant to its provisions. (Proposed) Committee Note. It not only "may" be challenged, but will be challenged, and there is not merely a "potential" for challenge, at least not insofar as that expression suggests that the grounds for the challenge are speculative or unknown. The framework and foundation for the challenge are already clear, and they are powerfully supported by the Supreme Court's landmark decision in Crawford v. Washington, 541 U.S. 36 (2004). The likelihood as to whether the challenge will succeed may be subject to reasonable debate, but it can hardly be disputed that the constitutionality of this proposal is at best doubtful. See Letter of Federal Public Defender Richard A. Anderson on behalf of the Federal Public and Community Defenders, January 13, 2009, with which we wholeheartedly agree. See also Giles v. California, 554 U.S. --, 128 S.Ct. 2678 (2008) (government's burden to justify overcoming Confrontation Clause rights is heavy).

Given the certainty that the admissibility of any testimony the amendment would authorize will be challenged on constitutional grounds, and the undeniable potential that challenge has to succeed, the Committee should await "the development of case law" under § 3509, under any similar state-law innovation, or under judge-granted authority (as in the cases cited in the Committee's Note) before amending the Rule. To amend first, and then allow "the development of case law" to see if the entire exercise was a costly mistake with irremediable harm, as the Committee Note proposes to do, seems much less desirable, given the deliberate pace that the Rules Enabling Act imposes on any future corrective amendment. Awaiting the development of extra-Rule case law is also more appropriate for institutional reasons. To approve the amendment at this time, when the continued viability of the case law authority on which it rests is subject to vigorous dispute, would be to take a position on the constitutional debate.

In addition to being outside the scope of the Rules Enabling Act, and facilitating the procurement of evidence that is quite possibly constitutionally inadmissible, the amendment offers a solution that is worse than the problem it is intended to solve. It also far broader than necessary, the safeguards it proposes are practically unenforceable and it would encourage the use of depositions at trial.

The amendment is intended to address "problems arising in the prosecution of transnational crimes" which the government has reportedly encountered when "critical witnesses lived in, or had fled to, other countries," and are thus "beyond the subpoena power of the federal courts." But nothing in the words of the proposed amendment would limit its application to transnational crimes, or to critical witnesses, or to evidence without which the government would be unable to prove an element of its case. The amendment does not even attempt to provide a partial substitute for the Constitutional right of confrontation it trades away for this enhancement of prosecutorial power to obtain substantial proof of a material fact, such as virtual confrontation with two-way transmission. The requirement that the defendant be able

to "meaningfully participate in the deposition through reasonable means" does nothing to address the lack of confrontation, and its terms are so vague and subjective that it does not even insure the defendant would be allowed to view and listen in real-time and consult confidentially with counsel.

Similarly, the requirement that "there is a substantial likelihood that the witness's attendance at trial cannot be obtained," and that "the witness's presence for a deposition in the United States cannot be obtained," are both satisfied by the request itself -- every covered witness is outside the United States and is thus beyond the subpoena power of the court. While counsel may be required to ask the witness to voluntarily appear in the United States, the simple truth is that the nature and extent of the effort that will be made to persuade a witness to agree to voluntarily appear in the U.S. for a deposition or a trial will vary dramatically if it is not necessary for the evidence to be obtained and admitted. The ease with which this requirement can be satisfied instead will encourage the use of depositions for witnesses outside the U.S. and may even encourage the deportation of noncitizen witnesses presently inside the United States, whenever a prosecutor believes the United States might gain an advantage by deposing that witness away from a courtroom, perhaps with the aid of some other government's coercive influence, and outside the defendant's presence.

The lack of safeguards and limitations are all the more troubling given the witnesses who are to be deposed -- witnesses who are only willing to provide testimony if they can do so outside the U.S., including witnesses who have fled from justice in this country. The willingness of witnesses to provide testimony only under those circumstances raises obvious and legitimate questions about their credibility and the reliability of their testimony. That is especially so given that the oath is likely to have no practical significance as a result of the conditions the witness places on giving testimony, which give that same witness impunity from punishment for any perjury.

If the government's real concern is obtaining essential evidence from critical witnesses in order to prosecute transnational crimes, it should direct its efforts at securing reciprocal subpoena power through mutual legal assistance treaties, similar to the interstate compact which allows the same sort of "extraterritorial" power to be exerted for state cases. That would avoid setting up a false dichotomy, already resolved by the Framers in the Bill of Rights, between the government's interest in obtaining evidence and the constitutional rights of the accused.

EVIDENCE RULES: STATEMENTS AGAINST PENAL INTEREST

The proposed amendment to Evidence Rule 804(b)(3), the "statement against interest" exception to the rule against hearsay, would extend the provision in the current Rule that precludes admission of a statement against penal interest that is "offered to exculpate the accused ... unless corroborating circumstances clearly indicate the trustworthiness of the statement," to all statements against penal interest offered in a criminal case. The purpose of the amendment is to guard against "unreliable hearsay ... [being] admitted against an accused." Report of the Advisory Committee on Evidence Rules, at 2.

We commend the Committee for recognizing the need to protect against unreliable hearsay being admitted against an accused under the penal interest exception, and support amending the Rule to achieve that objective. We supported that same objective in 2003 when the Committee proposed amending the Rule to make the additional showing of trustworthiness a condition of admission for all statements against penal interest in both criminal and civil proceedings. We believe, however, as we did in 2003, that the stated purpose of the amendment -- that of guarding against unreliable hearsay being admitted against the accused -- is not best achieved by subjecting all statements against penal interest in criminal cases to the additional showing of reliability now required only if they are offered to exculpate the accused.

The admissibility of a statement against penal interest offered to exculpate an accused should not depend on satisfying any additional requirements beyond those necessary to come within the traditional hearsay exception. Those requirements are sufficiently rigorous to provide an adequate guarantee of reliability for such statements to be received by the jury, and no legal reason or factual basis supports subjecting this defense-favorable evidence to a more stringent standard. Due process requires a verdict in favor of the criminal defendant when there is reasonable doubt about guilt. Excluding evidence favorable to the defendant which our common legal history has treated as admissible runs counter to that Constitutional norm. Admission of statements against penal interest offered by the prosecution to inculpate an accused, on the other hand, should be conditioned upon a showing of reliability beyond what is required to meet the general hearsay exception. Conditioning the admission of such statements on a specific showing of reliability is warranted as a matter of fact by the inherently suspect nature of self-incriminating statements (those who speak ostensibly against penal interest) implicating others in wrongdoing, given the powerful incentives that exist for making such statements in today's federal criminal justice system. Such statements, by definition, must have been made outside the courtroom but not as a co-conspirator. In other words, they will be the sort of bragging, self-aggrandizing, and merely narrative statements that are made by criminals about others but not during and in furtherance of joint criminal activity. (Otherwise the statement would come in under Rule 801(d)(2)(E).) The need for this additional guarantee of trustworthiness is especially important now, given that as the Committee notes, the requirements of the penal interest exception mean that such a statement will be nontestimonial (otherwise, it would be excluded under the Confrontation Clause) and thus quite likely the product of an informal setting where the demands of the

criminal culture may outweigh any impulse to truthfulness, or else will be blameshifting statements made by a confidential informer to an agent in casual conversation. After Crawford, "the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial." Report, p.2, citing Whorton v. Bockting, 549 U.S. 406 (2007).

For these reasons, the kind of asymmetry seen in the present Rule should be maintained, but the direction of the asymmetry should be reversed. Statements against penal interest offered by the prosecution to inculpate the accused should be subject to the additional showing of reliability that the Rule now applies to statements against penal interest offered to exculpate the accused. Statements favoring the accused should be admissible if they meet the ordinary requirements of Rule 804(b)(3).

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these important and difficult issues. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,

s/Peter Goldberger
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3A

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

FROM: **Professor Nancy J. King, Assistant Reporter**

RE: **Rules 12 & 34**

DATE: **March 4, 2009**

Rule 12 presently exempts motions raising the failure to state an offense from the general requirement that defects in the indictment must be raised prior to trial. In 2006, the Department of Justice asked the Committee to consider amending Rule 12(b)(3)(B) to eliminate this exemption, noting that the Supreme Court held in 2002 that the omission of an essential element from an indictment did not deprive the court of jurisdiction to review a conviction or sentence. The Committee discussed the matter and referred it to a subcommittee in October 2007. The subcommittee, Chaired by Judge Wolf, drafted a proposal for amending Rules 12 and 34, which was forwarded to the Committee along with a detailed memo setting out several issues for consideration at the October 2008 Committee meeting. See Attachment C.

The Committee discussed the proposal at length at the October 2008 meeting. Among other issues, members expressed concern about when, under the proposed amendment, a trial court would be able to grant relief if a defendant did not raise the failure to charge an offense until after the trial had started. Specifically, some members of the Committee were opposed to requiring "cause" as well as prejudice before a judge could grant relief in such a situation, particularly if requiring "cause" would bar relief for a defendant who was caught off-guard about what charge he was facing because his counsel failed to spot the error before trial. The Committee decided to refer the matter back to the subcommittee with instructions to address this issue in the Note.

The subcommittee, with Judge England as Chair, met twice by phone to respond to the concerns of the Committee, and produced the amended proposal that appears below. The subcommittee decided that including illustrations in the Note would not accomplish what the Committee intended, which was to permit a judge to grant relief whenever a defendant's substantial rights are prejudiced by the government's failure to charge an offense, but to retain the "cause" requirement for cases involving other types of error waived under Rule 12(e), such as motions to suppress evidence or obtain discovery.

Accordingly, the proposal that the subcommittee now submits to the Committee includes an amendment to the text of Rule 12(e) creating two separate standards for relief from waiver. Proposed new subsection 12(e)(B) contains a new standard for granting relief from belated failure-to-state-an-offense claims. This new standard allows the judge to grant relief if the failure to state an offense "has prejudiced a substantial right of the defendant." The existing standard, which permits a court to grant relief from the waiver for "good cause," is retained as Rule 12(e)(A), and would apply to all other errors waived under the Rule. The subcommittee majority concluded that the proposed language best accomplishes the goal of ensuring that defendants will

raise this problem before trial, while at the same time avoiding unfairness to defendants who fail to do so. Mr. McNamara opposes any amendment to the Rule.

The Federal Defenders and the Department of Justice each requested an opportunity to provide a supplemental memorandum to the Committee. Those memos follow as Attachments A & B to this memo. Attachment D is a June 10, 2008 memo from the Department of Justice (referenced in the Defenders' memo of February 2009), and Attachment E is a chart summarizing possible pros and cons of the amendment.

Office of the Federal Public Defender
Eastern District of North Carolina

MEMORANDUM

DATE: February 25, 2009

TO: Judge Richard C. Tallman, Chair
Members of the Advisory Committee on Criminal Rules and Reporters

FROM: Thomas P. McNamara, Federal Public Defender, EDNC
Marianne Mariano, Federal Public Defender, WDNY
Geremy Kamens, Assistant Federal Public Defender, EDVA

SUBJECT: Federal Public Defenders' Opposition to Department of Justice's Proposal to Amend Rule 12(b)

The Justice Department's memorandum and comments regarding the proposed amendment to Rule 12(b) argue that a problem exists in its United States Attorney's Offices around the country with drafting and submitting defective indictments to the grand jury, and defendants raising challenges to the resulting defects at trial. The Department suggests that the problem is widespread, although it concedes it has no data to support its position.[1] Instead of taking internal remedial action to rectify what is, at best, carelessness and, at worst, incompetence, within its offices, it is asking this Committee to support an amendment to Rule 12. This amendment is unnecessary, inconsistent with Federal Rule of Criminal Procedure 30(d), and unconstitutional to the extent it would prevent a defendant from challenging at trial jury instructions arising from defective indictments.

The proposed amendment to Federal Rule of Criminal Procedure 12 is designed to require defendants to raise challenges to indictments pretrial rather than at trial. The basic and intractable problem with the proposed amendment is that, for the amendment to be effective, defendants would

[1] Since the vast majority of indictment errors are due to carelessness by assistant U.S. attorneys, it seems that the Department would have a vested interested in keeping track of such information.

necessarily be prevented from objecting to jury instructions that either (a) incorporate defects from the indictment or (b) correct those defects in a manner that expands the basis for conviction. Either way, as a general matter, such instructions would be objectionable and constitutionally unsound because jury instructions that either alter the elements of an offense beyond those found by the grand jury or fail to include all of the elements of that offense violate basic constitutional rights. In other words, amending Rule 12 such that an implied waiver—arising from a defendant's failure to challenge errors in the indictment pretrial—prevents the defendant from challenging *future* constitutional violations that occur *at trial* related to jury instructions given by the judge would present serious constitutional problems.

The Fifth Amendment to the Constitution requires felony prosecution by a grand jury indictment that "must set forth each element of the crime that it charges."[2] Moreover, the Sixth Amendment guarantees a defendant the right to be informed of the nature of the accusation against him. U.S. Const. amend. VI. Incident to these fundamental constitutional principles, the Supreme Court has held that "charges may not be broadened through amendment except by the grand jury."[3] Likewise, a jury must "decide each and every element of the offense with which [the defendant] is charged."[4]

Jury instructions that broaden the basis for conviction beyond the terms of the indictment violate these cornerstone constitutional principles.[5] Similarly, jury instructions that are materially different from the terms of the indictment issued by the grand jury constitute error.[6] Errors arising from jury instructions implicate constitutional rights distinct from the right to a grand jury indictment, occur during

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[2] *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

[3] *Stirone v. United States*, 361 U.S. 212, 215-16 (1960); *accord United States v. Cotton*, 535 U.S. 625, 631 (2002) (reaffirming "this settled proposition of law"); *Russell v. United States*, 369 U.S. 749, 770 (1962); *see also Schmuck v. United States*, 489 U.S. 705, 717 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him.").

[4] *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995); *accord Ring v. Arizona*, 536 U.S. 584, 609 (2002).

[5] *Stirone*, 361 U.S. at 215; *see, e.g., United States v. Gomez-Rosario*, 418 F.3d 90, 104 (1st Cir. 2005); *United States v. Rivera*, 415 F.3d 284, 287 (2d Cir. 2005); *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994) (en banc); *United States v. Jones*, 418 F.3d 726, 729 (7th Cir. 2005); *United States v. Johnston*, 353 F.3d 617 (8th Cir. 2003); *United States v. Castro*, 89 F.3d 1443, 1452-53 (11th Cir.1996).

[6] *United States v. Miller*, 471 U.S. 130, 144-45 (1985); *see also United States v. Milestone*, 626 F.2d 264, 269 (3rd Cir. 1980) ("any amendment that transforms an indictment from one that does not state an offense into one that does" is prohibited).

trial, and are subject to objection at trial pursuant to Federal Rule of Criminal Procedure 30(d).[7] Aside from the tension with Rule 30(d), amending Rule 12 such that a defendant is precluded from challenging unconstitutional jury instructions at trial would violate the basic principle that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure," but that those rules "shall not abridge, enlarge or modify any substantive right."[8]

A simple example illustrates how the proposed amendment would infringe a defendant's right to challenge jury instructions that implicate basic constitutional protections: (1) an indictment purports to charge a violation of 18 U.S.C. § 924(c), but transposes elements from the two offenses contained in the statute by alleging that the defendant "carried" a firearm "in furtherance" of a drug transaction; (2) the defendant fails to challenge the indictment pretrial; (3) at trial, the judge either (a) instructs the jury in accordance with the defective indictment; (b) alters the charge and instructs the jury in accordance with the statutory language with "possessing" a firearm "in furtherance" of a drug transaction; or (c) alters the charge and instructs the jury in accordance with the statutory language with "carrying" a firearm "during and in relation to" a drug transaction.

Under such circumstances, the defendant ordinarily would be permitted to object to the instructions as violating the Fifth Amendment right that "charges may not be broadened through amendment except by the grand jury," *Stirone v. United States*, 361 U.S. 212, 215-16 (1960), the Sixth Amendment right "to have a jury decide each and every element of the offense with which he is charged," *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), the Sixth Amendment right that "a defendant cannot be held to answer a charge not contained in the indictment brought against him," *Schmuck v. United States*, 489 U.S. 705, 717 (1989), or, in the event the judge seeks to instruct the jury in accordance with the defective indictment, the basic due process right "against conviction except upon proof beyond a reasonable doubt of every act necessary to constitute [a] crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

If the proposed amendment precludes a defendant from challenging the instructions, a pretrial implied waiver would prevent the defendant from objecting to future errors at trial made by a judge that

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[7] Federal Rule of Criminal Procedure 30(d) provides:

> **Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

[8] 28 U.S.C. § 2072(b); *see also Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States.").

implicate distinct constitutional rights beyond the right to an indictment by a grand jury. Alternatively, if the proposed amendment does not preclude such challenges, the rule simply would encourage defendants to wait until the conclusion of a trial, at the jury instruction stage, to raise challenges arising from defects in the indictment. In other words, the proposed amendment would have precisely the opposite of the intended effect.

The Department's suggestion that *United States v. Cotton*, 535 U.S. 625 (2002), supports this amendment is wholly misplaced. Cotton addressed a challenge raised *for the first time on appeal* that an indictment failed to specify drug weight that increased the maximum penalty under 21 U.S.C. § 841. *Id.* at 627. Emphasizing that the "error was never objected to at trial," *id.* at 634, the Court held that defects in an indictment are not jurisdictional, and may be subject to plain error review if the defendant fails to object to the error at trial. Moreover, the Court carefully reaffirmed in *Cotton* the "settled proposition" that "an indictment may not be amended except by resubmission to the grand jury," and that any such amendment is subject to proper objection at trial. *Id.* at 631. In other words, *Cotton* in no way supports restrictions on the defendant's ability to raise objections to an indictment at trial.

The cases cited by the government in its letter dated June 10, 2008, far from supporting its claim that a serious problem exists with respect to challenges at trial to defects in indictments, establish the opposite. The vast majority of these rulings would remain unaffected by the proposed amendment.

First, in several of the cases cited by the Department, the inadequacy of the indictment was actually raised pretrial rather than after trial had begun, and therefore these authorities fail to support its claim.[9] In several others, the missing element was required to confer federal jurisdiction.[10] Even under the proposed amendment, Rule 12 would continue to permit a motion for lack of jurisdiction at trial, so these authorities also do not support the Department's proposal.

Likewise, two of the cited cases explicitly deal with serious constitutional deficiencies in an indictment and thus would be unaffected by the proposed amendment.[11] In *Hathaway*, a post-*Cotton* decision, for example, the Tenth Circuit was little concerned that the defendant's challenge came post-

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[9] *United States v. Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001); *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999); *United States v. Daniels*, 973 F.2d 272 (4th Cir. 1992).

[10] *United States v. Sinks*, 473 F.3d 1315 (10th Cir. 2007); *United States v. Gibson*, 409 F.3d 325 (6th Cir. 2005); *United States v. Rosa-Ortiz*, 348 F.3d 33 (1st Cir. 2003); *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001); *United States v. Spinner*, 180 F.3d 514 (3rd Cir. 1999).

[11] *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (Court of Appeals upheld post-verdict challenge to indictment that failed to include essential element distinguishing assault from misdemeanor rather than felony offense); *United States v. Murphy*, 762 F.2d 1151 (1st Cir. 1985) (indictment for false statement failed to provide adequate notice where it neglected to specify in which official proceeding the statement was made).

verdict since the "indictment suffered from much more than a technical deficiency, as it simply did not contain any words to suggest that a felony was charged . . . [and] utterly failed to put Mr. Hathaway on notice that he faced the felony charge . . . ." *Id.* at 1010 (citation omitted). And in one case, *Ramirez*, the defendants conceded that the indictment stated an offense but argued that it was issued outside the applicable statute of limitations.[12] Because the defendants failed to raise this affirmative defense pretrial, the court held that the defendants waived the defense. Far from establishing that courts have difficulty dealing with arguments raised at trial that should have been raised earlier, *Ramirez* supports the opposite conclusion.

Finally, the Department cites to several post-*Cotton* decisions where the appellate courts applied the appropriate post-*Cotton* standard of review, plain error, and denied the defendants' appeals.[13] It also cites a pre-*Cotton* decision, *Cabrera-Teran*, involving a challenge raised for the first time on appeal, that was overruled by *Cotton*.[14] Such outcomes, again, would be unaffected by the proposed amendment.

In sum, the concerns raised by the Department are unfounded, unsupported, and fail to establish that any problem exists. Moreover, the proposed amendment is not consistent with, much less mandated by, the Supreme Court's decision in *Cotton* and raises significant constitutional concerns. Under these circumstances, we respectfully urge the Committee to deny the Department's request to amend Rule 12.

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[12] *United States v. Ramirez*, 324 F.3d 1225, 1227 & n.7 (11th Cir. 2003).

[13] *United States v. Carr*, 303 F.3d 539 (4th Cir. 2002); *United States v. Carrington*, 301 F.3d 204 (4th Cir. 2002); *United States v. Anderson*, 280 F.3d 1121 (7th Cir. 2002).

[14] *See United States v. Longoria*, 298 F.3d 367, 372 n.6 (5th Cir. 2002) ("To the extent that [*United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999)] holds that a defective indictment deprives a court of jurisdiction, [it is] overruled by" *United States v. Cotton*, 535 U.S. 625 (2002).).

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 26, 2009

MEMORANDUM

TO: Judge Morrison England
Chair, Subcommittee on Rule 12(b)

Professor Nancy J. King
Special Reporter to the Subcommittee

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

Kathleen A. Felton
Deputy Chief, Appellate Section

SUBJECT: Proposed Amendment to Rule 12(b) of the Federal Rules of Criminal Procedure

I. Introduction

Per your request, this memorandum provides additional information about the pending proposal to amend Rule 12(b) to require challenges to the sufficiency of an indictment to be made pre-trial.[1] We summarize here a sample of cases, decided after the Supreme Court's

[1]Rule 12 of the Federal Rules of Criminal Procedure concerns pleadings and pretrial motions. Rule 12(a) sets out the pleadings in criminal proceedings as "the indictment, the information, and the pleas of guilty, not guilty, and nob contendere." Pretrial motions are addressed in Rule 12(b), which sets out motions that "may" be made before trial and those that "must" be made before trial.

Rule 12(b)(2) describes motions which "may" be made before trial: "A party may raise by a pretrial motion any defense, objection, or request that the court can determine without a trial on the general issue." Rule 12(b)(3)

decision in *United States v. Cotton*, 535 U.S. 625, 630 (2002), which address Rule 12(b) motions brought for the first time after trial has begun. In doing so, we also provide examples of the kinds of charges around which these motions have been raised.

As we have previously stated, the Department does not look to eliminate the Rule's provision permitting jurisdictional challenges to be made at any time, since defects in subject matter jurisdiction speak directly to "the courts' statutory or constitutional power to adjudicate the case. . . [which] can never be forfeited or waived," and which must be corrected "regardless of whether the error was raised in district court." *Cotton*, 535 U.S. at 630. The pending amendment seeks only to revise the Rule to reflect the Supreme Court's holding that a defective indictment is not such a "jurisdictional" defect.

At our meeting last October in Phoenix, the full Committee tentatively voted in favor of an amendment that would require defective indictment challenges to be made before trial, so long as untimely motions can nonetheless be considered if the defendant is prejudiced by the defect. Ultimately, the pending proposal seeks only to provide appropriate guidance to the courts and to avoid the negative consequences of allowing motions at any time in cases where the defendant is not prejudiced. These consequences include the reduction of "criminal defendants' incentives to raise defenses in a timely fashion in district court," "strategic decisions by defendants to delay raising the defense," "undermin[ing] judicial economy and finality," failure to "respect[] the proper relationship between trial and appellate courts," "waste of judicial resources," and "making it more difficult for defendants and prosecutors to enter plea agreements that benefit both parties and society as a whole." *United States v. Panarella*, 277 F.3d 678, 686-8 8 (3d Cir. 2002).

In the absence of a Rule specifically addressing late-filed challenges to indictments, the courts have been grappling with these situations under the existing framework of the Rules. The decisions we describe below, as well as those summarized in earlier memos, illustrate various solutions the courts have devised. For example, in *United States v. Teh,* 535 F.3d 511 (6th Cir. 2008), the defendant did not challenge the sufficiency of the indictment prior to trial, but raised such a claim for the first time on appeal. Dr. Teh was charged with fraudulently importing counterfeit DVDs in violation of 18 U.S.C. § 545, which requires that the merchandise be imported "contrary to law." Dr. Teh claimed, for the first time on appeal, that because the indictment did not specify which law his actions were "contrary to," the indictment did not state an offense. 535 F.3d at 516.

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describes those motions which "must" be made before trial, including those alleging a defect in instituting the prosecution, those seeking to suppress evidence, and those claiming a defective indictment or information. Importantly, Rule 12(b)(3)(B) ("the Rule") has two important exceptions to the requirement that certain motions must be filed before trial, and, if they are not, the issues will be waived: "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense."

The Sixth Circuit, citing Rule 12(b)(3)'s exception permitting a challenge to the sufficiency of the indictment at any time while the case is pending, considered Teh's claim that the indictment failed to state an offense. However, citing *United States v. Cotton*, 535 U.S. 625 (2002), the court reviewed the claim under a plain error standard. This required a finding of "(1) error, (2) that is plain, (3) and that affects substantial rights." 535 F.3d at 516, quoting *Cotton,* 535 U.S. at 631. The court held that where a challenge to the sufficiency of an indictment is first made post-trial, any error in such an indictment, if it is to be remedied, must affect the outcome of the case, and the indictment must be reviewed liberally in favor of its sufficiency. *Id.* Under this rigorous test, Teh's claim did not survive plain error review, despite the fact that the court found the indictment sloppily drafted.

Similarly, the defendant in *United States v. Pimentel*, 539 F. 3d 26, 31 (1st Cir. 2008), raised for the first time on appeal a claim that the indictment charging him with violating 21 U.S.C. § 841(a)(1) was insufficient. He claimed that while the indictment alleged importing heroin with the intent to distribute, it did not allege importation of a specific weight of heroin. The First Circuit, relying on Rule 12(b)(3) and *United States v. DiGregorio*, 605 F. 2d 1184 (1st Cir. 1979), held that the claim was waived because it was not properly raised in the district court and therefore, relief could only be granted for good cause. Citing *United States v. Cotton*, 535 U.S. 625 (2002), the panel noted that the Supreme Court determined that indictment defects are not jurisdictional, and, thus, "the omission of specific drug quantities in a 21 U.S. C. § 846 drug conspiracy, even if not cognizable, was not a jurisdictional defect." 539 F.3d at 31. In any event, the panel found, the indictment was not defective because drug quantity is not an element of a Section 841 offense.

These ad hoc solutions, and those described below, demonstrate that the present form of Rule 12 has failed to provide needed guidance to the courts. The decisions are a recognition that the Rule as presently formulated is outmoded in light of more recent developments in the law. A uniform solution can come only from a revised Rule that attempts to strike the balance between competing interests and offers more guidance to the courts on how to treat claims of deficient indictments raised during or after trial. Absent such a rule, courts will not achieve a uniform solution to this problem. And if a conflict does develop, the Supreme Court may be then required to address the matter under the existing outmoded structure of the rules, which have never squarely sought to balance the competing interests now that it is clear that a defective indictment does not deprive the district court of power to act. For that reason, the Committee's attention to the matter would greatly assist the fair and consistent resolution of late-filed motions to dismiss a defective indictment.

II. Other Cases

The following additional cases provide further illustrative examples of Rule 12(b)(3) challenges for failure to state an offense raised for the first time either at the district court after the start of trial or after a jury verdict, or at the appellate court level. We collected these case examples, along with many others, through an email request to a small sample of U.S. Attorneys

Offices. These are just illustrative examples and do not represent all of the responses we received.

A. Objections Raised in the District Court After the Start of Trial or Plea

In *United States v. Sharpe*, 438 F. 3d 1257 (11th Cir. 2006), the government appealed from the district court's post-trial order dismissing an indictment pursuant to Rule 12(b)(3)(B). The indictment charged the defendants with mail fraud and conspiracy to launder proceeds of mail fraud arising out of their involvement to conceal funds the defendants were ordered to relinquish to a court-appointed receiver as part of a plea agreement in an earlier case. Initially, the defendants filed Rule 29(c) motions after trial. These motions were found to be untimely because they were made more than seven days after the verdict. However, the trial court converted the motions for judgment of acquittal into Rule 12(b) motions to dismiss the indictment for failure to state an offense, a motion which could be raised at any time. The trial court found that the indictment did not sufficiently allege mail fraud because the funds allegedly concealed were a legitimate commission.

The Eleventh Circuit initially noted that Rule 12(b)(3)(B) permitted it and the trial court to consider the claim that an indictment failed to state an offense at any time while the case was pending. But, viewing the indictment in the light most favorable to the government, it concluded that the factual allegations in the indictment were sufficient to charge the offense, and that the trial court erred in considering the sufficiency of the evidence in determining whether the language of the indictment properly alleged a violation of the mail fraud statute. The court reversed the district court.

In *United States v. Littlewind*, 2:08-cr-6 (D. ND, Judge Rodney Webb), the defendant was charged, under the Major Crimes Act, with felony child abuse resulting in life-threatening injury. The case resulted in the victim-infant being blinded. The federal indictment incorporated the state definition of child abuse, referenced the state statute, but inadvertently omitted the term "knowing" as required under the applicable state law. The defendant waited until after the jury was sworn and then immediately moved to dismiss the indictment based on the missing element. The court recognized that such a motion could be made at any time under Rule 12(b)(3) and asked the parties for briefing. The prosecutor researched the matter, recognized the error, and believed it was too late to fix the indictment. The next day, the defendant pleaded guilty to a lesser charge, with the result that the sentence imposed under the applicable statute and guidelines was reduced by more than two-thirds.

The defendants in *United States v. Kay*, 513 F. 3d 432, 451 (5th Cir. 2007), raised a defective indictment allegation for the first time after the verdict in a motion for a new trial. The defendants in that case were charged with violations of the Foreign Corrupt Practices Act. The defendants argued that the indictment omitted the element of "willfulness" from the charge and also that the indictment failed to allege that the defendants sent their bribes through interstate

commerce. The Fifth Circuit did not preclude the argument, but found that the indictment was not defective.

In *United States v. Georgacarakos*, 138 Fed.Appx, 407 (3rd Cir. 2005), the defendant was charged with first degree murder arising out of a prison homicide. At the conclusion of the government's case in chief, the defendant for the first time challenged the sufficiency of the indictment, claiming it was defective because it failed to include the term "unlawfully" from 18 U.S.C. § 1111. The trial judge denied relief and the defendant renewed the claim in a post-trial motion. The court again denied relief in a written order. Because of Rule 12, the court did not deny the claim as untimely but rather reached the merits, finding that if there were any error, the defendant had not been prejudiced. The court found the defendant had been given adequate notice and that the jury was properly instructed.

In *United States v. John Chu et al.*, Crim. Action No. 04-10156-WGY (D. MA), the defendant waited until after the jury was empaneled to file a Rule 12 (b)(3) motion on one of the two counts. The defense motion correctly noted that the indictment contained a technical error. The defendant was charged with conspiracy and attempt to export a defense article without first obtaining a license from the U.S. Department of State, in violation of the Arms Export Control Act, 22 U.S.C. § 2778. One of the charges failed to allege the essential element of "willfulness." The court dismissed the one count and proceeded to trial on the second count. The defendant was acquitted of the second count, and the government determined that it was precluded from further proceedings.

In *United States v. Ramirez*, 324 F.3d 1225 (11th Cir. 2003), after opening statements, the defendants moved for a judgment of acquittal, pursuant to Rule 29, alleging that the indictment was faulty. The defendants argued that the charges were brought beyond the statute of limitations because the indictment failed to allege the necessary elements of first degree murder, a capital crime which could be brought at any time. The trial court construed the Rule 29 motion as one brought pursuant to Rule 12(b), and held that it was untimely, and, even if it were not, the indictment was sufficient. On appeal, the Eleventh Circuit also construed the motion as a challenge based upon the sufficiency of the indictment, and affirmed the trial court's ruling, noting that Rule 12 was designed to prevent such "sandbagging" tactics. *Id.* at 1228.

B. Objections Raised for the First Time on Appeal

As we have indicated earlier, some courts of appeals have construed the indictment liberally when the defective indictment argument is raised for the first time on appeal. In *United States v. Frias*, 521 F. 3d 229, 235 (2d Cir. 2008), the panel reviewed Frias's challenge to the sufficiency of the indictment which he raised for the first time on his second appeal. Following his first appeal, Frias' case was remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005). The Second Circuit noted that consideration of the issue was required even though first raised in the second appeal by Rule 12(b)(3)(B), which provides that a challenge may be heard "at any time while the case is pending." Relying on *United States v. Davila*, 461 F. 3d

298, 308 (2d Cir. 2006), however, the panel employed a liberal construction of the indictment, concluding that it was "sufficient to invoke the district court's jurisdiction and to state an offense." *Frias* at 236. The indictment in *Frias* tracked the language of 21 U.S.C. § 848(e)(1)(A) and charged Frias with murder in furtherance of a drug conspiracy. It is unclear from the Second Circuit opinion the nature of the defendant's specific challenge.[2]

There are several pending cases in courts of appeals where defendants have raised deficiency of the indictment arguments for the first time on appeal. In *United States v. Jenkins-Watts, et al.*, Nos. 08-228, 08-2291 and 08-2295, appeal pending, 8th Circ., Jenkins-Watts raised insufficiency of the indictment for the first time on appeal. Relying on *United States v. White*, 241 F. 3d 1015, 1021 (8th Cir. 2001), the government's brief acknowledges that under Rule 12, the court of appeals may consider failure to state an offense at any time, but argues that the reviewing court must construe the indictment liberally in favor of sufficiency.

The defendants in *Watts* were convicted of various identity theft charges following a joint trial. The indictment tracked the wording of 18 U.S.C. § 1028A, and charged that the defendants committed identity theft "during and in relation to a predicate felony, that being access device fraud, as defined by Chapter 47, Title 18, United States Code, Section 1029(a)(5) . . ." The defendants are arguing for the first time on appeal that the indictment was insufficient because it did not adequately define "access device fraud."

In *United States v. Gemmill*, No. 07-1970, appeal pending, 3d Cir., the defendant challenged for the first time on appeal the sufficiency of the indictment, which charged her with conspiracy to make false statements to the United States Department of Housing and Urban Development and to commit mail fraud. The defendant's claim is that the conduct at issue did not violate HUD rules and that therefore her statements to HUD were not false. The government is arguing that the indictment sufficiently provided notice to the defendant of the crime charged and that the Rule 12 challenge is in essence a sufficiency of the evidence challenge. Relying on *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979), the government is also arguing that where the challenge to the sufficiency of the indictment is raised for the first time on appeal, the reviewing court must construe the indictment liberally in favor of sufficiency.

See also, United States v. Glen, 418 F.3d 181, 183, fn.1 (2nd Cir. 2005) (defendant's challenge to the sufficiency of the indictment was rejected; the charge of "possession of cocaine and cocaine base (crack) necessarily constitutes possession of a substance containing cocaine or cocaine base); *United States v. Harvey*, 484 F.3d 453 (7th Cir. 2007) (after pleading guilty to a count charging 18 U.S.C. § 924(c), the defendant claimed on appeal that the count failed to charge a federal offense because it was poorly crafted and mixed language from different parts of the statute; the court rejected the claim).

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[2]This case was tried before Judge Keenan, and perhaps he can shed additional light on it at our meeting in April.

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We hope these examples are helpful. Please let us know if you need any further information or if you have any questions. We look forward to discussing these issues further with the full Criminal Rules Committee in April in Washington.

DRAFT

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

FROM: **Professor Nancy J. King, Assistant Reporter**

RE: **Rules 12 and 34**

DATE: **September 17, 2008**

In April 2006 the Department of Justice asked the Committee to consider amending Rule 12(b)(3)(B) so that motions claiming that the charge fails to state an offense would be required before trial. Rule 12 has exempted motions raising this defect from the general requirement that defects in the indictment be raised prior to trial, because the failure to state an offense was considered a "jurisdictional" defect. In 2002, however, the Court decided *United States v. Cotton*, 535 U.S. 625, and rejected this characterization. The Court held that the omission of an essential element from the defendant's indictment did not deprive the court of jurisdiction to review the conviction or sentence, and remanded the case to the court of appeals to consider the indictment error under Rule 52(b). *Id.* at 630-31.

The Department has maintained that *Cotton* removes any justification for continuing to allow this particular charging defect to be raised after trial begins. The exemption of this challenge from the timing requirements of Rule 12, it argues, reduces the incentive of defendants to raise the objection before trial, may lead to "strategic decisions by defendants to delay raising the defense," *United States v. Panarella,* 277 F.3d 678, 686-8 8 (3d Cir. 2002), wastes judicial resources, and undercuts the finality of criminal judgments.

Consideration of the proposal by the Committee was deferred when the Supreme Court agreed to consider during its October 2006 term whether the failure to state an offense could be considered harmless error. The Court never reached that question, however, see *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), and the Committee revisited the proposal at its October 2007 meeting. Committee members expressed concerns about how the proposal might change the way that trial judges respond to these claims, and Judge Tallman referred the proposal to a

subcommittee. That subcommittee (Chief Judge Wolf, chair, with Mr. McNamara, Professor Leipold, and Mr. Wroblewski) has completed its deliberations and presents the proposal for Committee approval.

The subcommittee focused its deliberations upon four issues regarding the amendment to Rule 12. (The amendment to Rule 34 raised no separate concerns). The first issue was whether or not there was a need for the amendment at this time. The second issue concerned how the proposal would affect the availability of relief on appeal for a claim that a charge failed to state an offense. The final two issues concerned how the proposal would affect relief in the trial court for this type of claim. The subcommittee's discussion of each issue is summarized below.

1) Justification for amendment.

Members of the subcommittee asked the Department for any information it could provide about the frequency of successful motions claiming that the charge failed to state an offense. The Department responded that there was no source that would answer this question, but that it believed that "a significant number of such motions" for relief on this basis are granted each year. It provided over a dozen case examples, and stated that "the omission of an element from an indictment may occur for a variety of reasons, including an intervening clarification of the law by an appellate court as well as a mistake by a prosecutor in drafting the indictment." Memo to Chief Judge Wolf from Jonathan Wroblewski, June 10, 2008. Some of the courts that have considered delayed challenges on this ground have urged the Committee to amend the Rule. *See United States v. Hedaithy*, 392 F.3d 580, 586-89 (3d Cir. 2004); *Panarella*, 277 F.3d at.686-88. The subcommittee concluded that further consideration of the proposal was warranted.

2) Appellate review of an untimely challenge that a charge fails to state an offense.

Under the existing rule, a reviewing court must consider a claim that the charge fails to state an offense, even if the claim was not raised before appeal. Other defects in instituting the prosecution, as well as improper joinder of charges or defendants, the admission of illegally obtained evidence, and discovery violations are "waived" if not raised prior to trial under Rule 12(e). Rule 12(e) also provides that for "good cause," a "court may grant relief from the waiver."

The proposed amendment would presumably require appellate courts to review a delayed claim that the charge failed to state an offense using the same rules that they presently use to review other claims of error "waived" under Rule 12. The subcommittee's research, however, found that there is no consensus among appellate courts about what those rules are. Some courts have concluded that the failure to raise a claim in accordance with Rule 12(b) bars appellate review entirely absent a showing of "good cause" under Rule 12(e). *See United States v. Rose,* 538 F. 3d 175 (3d Cir. 2008) (collecting authority). Other courts have applied plain error review under Rule 52(b) to such claims, just as they do to any other claim that a defendant failed to raise on time in the trial court. *See United States v. Stevens*, 487 F.2d 232, 242 (5th Cir. 2007). Some decisions employ both "good cause" and "plain error" analysis. Several circuits have indicated

that this remains an open question. See *United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008); *United States v. Caldwell*, 518 F.3d 426, 430 (6th Cir. 2008); *United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006). The subcommittee concluded that it was unnecessary to take a position on this question, but that some mention of it in the Committee Note may be appropriate.

3) Responding to a deficient charge raised during trial.

The remainder of the subcommittee's discussions addressed how the amendment would affect the handling of this particular objection in the district courts. Under the existing rule, even if a defendant waits until trial has begun to raise his claim that an indictment fails to state an offense, the trial judge must consider that claim and dismiss the charge if it indeed omits an essential element. (This dismissal does not bar subsequent prosecution for the same offense. *See United States v. Scott*, 437 U.S. 82, 98-99 (1978) (holding that a defendant who "deliberately choos[es] to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant."); *Lee v. United States,* 432 U.S. 23, 30-34 (1977) (retrial after dismissal of a defective information at defendant's request not a violation of the Double Jeopardy Clause)). The judge has no option other than dismissal because the defendant's Fifth Amendment right to grand jury review prevents the judge from either 1) allowing an amendment to the indictment to include the missing element, or 2) instructing the jury on an element not in the indictment (constructive amendment). The subcommittee was concerned about what effect, if any, the proposed amendment to Rule 12 would have on these options for trial judges.

The Department's position is that under the proposed amendment, when a defendant "waives" the claim that a charge fails to state an offense by delaying that objection until the trial has started, a trial judge could proceed with the trial and instruct the jury on every element of the offense. The defendant's failure to object to the missing element waives his right to claim that providing complete jury instructions is a constructive amendment of the indictment, the Department contends. Both the failure to include an element initially and the mid-trial addition of that element implicate the very same constitutional guarantee - review of every element by the grand jury.

Other members of the subcommittee expressed concern that even under the amended Rule, courts may interpret the Fifth Amendment to continue to bar a trial judge from constructively amending an incomplete indictment, and may instead require mid-trial dismissal. The argument here is that a waiver of the right to object to the defect itself may not necessarily waive the right to object to the trial court's choice of cure for that defect. If courts should adopt this approach, then the amended Rule would have no effect on the need for trial judges to dismiss incomplete indictments even when the objection is raised after trial begins.

The subcommittee decided to recommend that the Committee Note mention, but not

resolve this uncertainty about the prospective operation of the amended rule in the trial courts. Although there is some uncertainty about the consequences of the proposed amendments for mid-trial objections, the subcommittee concluded that further consideration of the proposal was warranted by the potentially beneficial effects of the amendments in encouraging timely objections.

4) When "good cause" warrants relief from waiver prior to verdict.

The Subcommittee also considered how the "good cause" language in Rule 12(e) would apply to a delayed motion challenging the indictment for failure to state an offense. Of specific concern to some members of the subcommittee was the possibility that a defendant may be prejudiced by a trial judge's decision to proceed with an incomplete indictment after trial had commenced. For example, if defendant lacked notice of the charge he was facing before the elements of that charge were clarified mid-trial, would this constitute "good cause"?

The Department maintains that the proposal should not prevent defendants from raising a late-filed claim if there are serious concerns about due process, adequate notice of the offense charged, or the ability of the defendant to prepare a defense. It has advanced *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003), as an illustration. In that case a Rule 12 objection was raised in the district court following a jury verdict but before sentencing. The motion was made when the defendant learned he was being sentenced as though convicted of a felony assault on a federal employee. The indictment contained no language to suggest that a felony was charged. As a result, the motion was granted to the extent that it prevented the defendant from being sentenced as a felon. 318 F.3d at 1009-10.

The subcommittee drafted language attempting to capture this concern about prejudice to the defendant and added it to the Note in two places - in the bracketed sentence following the first mention of "good cause," and in the bracketed material discussing the effect of the amendment on the options of trial judges in responding to delayed motions. The subcommittee placed this language in brackets anticipating further discussion of this point by the Committee. Subsequent research determined that when considering whether to grant *appellate or collateral* relief for a claim that should have been raised prior to trial under Rule 12, courts have interpreted the "good cause" requirement to mandate both showing of prejudice from the error as well as cause for the failure to challenge it on time. *See Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963); *United States v. Crowley*, 236 F.3d 104 (2d Cir. 2004). There is very little authority addressing the meaning of "good cause" when a court is considering *prior to verdict* whether to overlook Rule 12 waiver of an untimely claim.[1] As with the prior open questions

[1]The Second and Sixth Circuits have both stated that under Rule 12, relief for claim raised only after trial begins requires a showing of prejudice as well as cause for the failure to raise the claim prior to trial, but in each case the court ruled there was no cause shown. See *United States v. Howard*, 998 F.2d 42, 52 (2d Cir.1993) (holding that district court did not err in rejecting late raised suppression argument); *United States v. Fantroy*, 146 Fed. Appx. 808 (6th Cir. 2005) (unpublished) (affirming district court's rejection under Rule 12 of challenge to the venire). In some cases, trial courts have overlooked the Rule 12 waiver of a claim raised after trial began but prior to verdict, but

raised by the proposed amendments, the Committee may decide that it would be best to recommend that the Note not take a position on this issue, and instead leave it to future case development.

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these cases did not indicate whether or not a defendant must first show prejudice as well as a reason for failing to raise the claim prior to trial, and all rejected the underlying claim after reaching the merits. See *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (holding that the trial court's denial of defendant's request to file for suppression hearing out of time was clear error where the request was made almost two weeks prior to trial and day after defense counsel received grand-jury transcript and the government had not turned over evidence directly relevant to the suppression issue until one day before the filing; rejecting fourth amendment claim on its merits and affirming conviction); *United States v. Cathey*, 591 F.2d 268 (11th Cir. 1979) (finding cause had been established for failure to file pretrial motion to dismiss due to knowing use of perjured testimony in grand jury when defendant did not receive a transcript of grand jury testimony until after the trial began, but "made his motion at the earliest possible time"; rejecting perjury claim on its merits, and reversing conviction on a different ground); *United States v. Campbell*, 999 F.2d 544 (9th Cir. 1993) (table case, unpublished) (approving of district court's decision to address (and deny) insufficient indictment claim on its merits although it had been waived under Rule 12 and raised only at the end of the government's case, finding that counsel's statement to the district judge at trial that he did not recognize a possible indictment insufficiency argument until researching jury instructions established "cause"); *United States v. Davis,* 598 F.Supp. 453 (S.D.N.Y. 1984) (holding sufficient cause to excuse late filing of motion to dismiss indictment was established when defense counsel had recently recovered from serious illness and had not become aware of death of one of two allegedly exculpatory witnesses until after deadline for filing motions; denying motion on merits).

Proposed Amendments to Federal Rules of Criminal Procedure 12 and 34

Rule 12. Pleadings and Pretrial Motions

. . .

(b) Pretrial Motions.

. . .

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

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

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

. . .

Advisory Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and for this reason was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). [See Wayne R. LaFave, et al., Criminal Procedure §19.3(e) (3d ed. 2007).] The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before

trial that the charge does not state an offense now "waives" that objection under Rule 12(e). For good cause the court may grant relief from the waiver. [Good cause may include injury to the substantial rights of the defendant.]

The amendment does not address the present division in the courts of appeals over whether untimely challenges "waived" under Rule 12(e) are considered forfeited and thus subject to plain-error review on appeal, or rather are considered waived so that appellate review is unavailable. [*Compare, e.g.*, *United States v Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) (conducting plain error review of an issue waived under Rule 12(e)), *with United States v. Ramirez*, 324 F.3d 1225 (11th Cir. 2003) (unlike the forfeiture of an objection or defense, a waiver under Rule 12(e) precludes plain error review). *See also United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006) (declining to join debate).]

The amendment also leaves to case law development whether, under the amended rule, any option other than dismissal may be open to a trial judge should a defendant wait until after trial has started to object that an indictment fails to state an offense. [Under the former rule, which permitted a defendant to raise the failure to state an offense at any time, dismissal of a deficient charge was required, even if the error was not raised until after trial began. Instructing the trial jury on an essential element missing from an indictment has been considered an impermissible constructive amendment of the indictment by the court, depriving the defendant of his right under the Fifth Amendment to grand jury review of every element. *See Stirone v. United States*, 361 U.S. 212, 216-219 (1060) (stating, "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment."); *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (explaining that "a defect of a completely missing essential element cannot be cured by a later jury instruction because there is nothing for a petit jury to ratify . . . "); *United States v. Opsta*, 659 F.2d 848, 850 (7th Cir. 1981) (holding that a defective indictment cannot be cured by proper jury instructions). Under the amended rule, dismissal of an incomplete charge remains an appropriate mid-trial remedy if there is good cause for the failure to raise the error before trial, see Rule 12(e), or if a substantial right of the defendant would be prejudiced by proceeding upon the deficient charge. *E.g., United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (granting relief when indictment failed to include essential element of felony charge and failed to put defendant on notice he was facing felony; challenge raised after verdict but prior to sentencing).]

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if: ~~(1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

. . .

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 now requires that such a defect be raised before trial.

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

June 10, 2008

MEMORANDUM

TO: Chief Judge Mark L. Wolf
Chair, Subcommittee on Rule 12(b)

Professor Nancy J. King
Special Reporter to the Subcommittee

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

Kathleen A. Felton
Deputy Chief, Appellate Section

SUBJECT: Proposed Amendment to Rule 12(b)

This memorandum responds to your request for additional information concerning the Department's proposal to amend Rule 12(b). Specifically, you requested additional case examples where trial courts addressed Rule 12(b) motions to dismiss an indictment, based on the indictment's failure to state an offense, raised for the first time after trial had begun. This memo discusses cases illustrative of this situation and briefly examines the elements missing from the indictments, why the omissions did not surface before trial, and the trial courts' responses.

You also requested information concerning the magnitude of the problem, *i.e.* how often these issues arise. Unfortunately, there is no data source we are aware of, in either the Executive or Judicial Branches, that captures the number of Rule 12(b)(3)(B) motions filed or granted. However, based on our research of relevant case law and discussions with United States Attorneys' Offices around the country, we believe there are a significant number of such motions granted each year. Whether that number is in the several dozens or few hundreds we are not certain. However, we do know that the omission of an element from an indictment may occur for a variety of reasons, including an intervening clarification of the law by an appellate court as well as a mistake by a prosecutor in drafting the indictment.[1]

[1]*See, e.g., United States v. Sinks*, 473 F.3d 1315 (10th Cir. 2007) (indictment charging knowingly possessing stolen explosive materials, in violation of 18 U.S.C. § 842(h), failed to charge interstate commerce element); *United States*

I. BACKGROUND

A. The Relevant Rules of Criminal Procedure

Rule 12 of the Federal Rules of Criminal Procedure concerns pleadings and pretrial motions. Rule 12(a) sets out the pleadings in criminal proceedings as "the indictment, the information, and the pleas of guilty, not guilty, and nolo contendere."

Pretrial motions are addressed in Rule 12(b), which sets out motions that "may" be made before trial and those that "must" be made before trial.

Rule 12(b)(2) describes motions which "may" be made before trial: "A party may raise by a pretrial motion any defense, objection, or request that the court can determine without a trial on the general issue."

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v. Gibson, 409 F.3d 325 (6th Cir. 2005) (indictment charging the concealment of willful violations of the Mine Safety and Health Act, in violation of 18 U.S.C. § 1001(a), failed to allege conduct falling within scope of the statute, as there was no duty to disclose violations of the Act, only current hazardous conditions); *United States v. Rosa-Ortiz*, 348 F.3d 33 (1st Cir. 2003) (indictment charging conspiracy to violate the Federal Escape Act, in violation of 18 U.S.C. § 751(a), failed to allege conduct that properly falls within the ambit of the statute); *United States v. Ramirez*, 324 F.3d 1225 (11th Cir.) (indictment charging witness tampering, in violation of 18 U.S.C. § 1512(a)(1)(C), in connection with participation in a conspiracy to murder drug prosecution witnesses, failed to charge necessary elements of first-degree murder, "malice aforethought" and "premeditation"), *cert. denied*, 540 U.S. 881 (2003); *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (indictment charging forcible assault of a federal officer, in violation of 18 U.S.C. § 111(a), failed to distinguish between simple and non-simple assault); *United States v. Carr*, 303 F.3d 539 (4th Cir. 2002) (indictment for intentionally setting fire to an apartment building and causing the death of an occupant, in violation of 18 U.S.C. § 844(i), failed to charge essential element of offense that building was damaged or destroyed "by means of fire or an explosive"), *cert. denied*, 537 U.S. 1138 (2003); *United States v. Carrington*, 301 F.3d 204 (4th Cir. 2002) (indictment charging conspiracy to possess with intent to distribute and to distribute a mixture or substance containing cocaine base, in violation of 21 U.S.C. § 841(a)(1), failed to allege drug quantity); *United States v. Anderson*, 280 F.3d 1121 (7th Cir. 2002) (indictment charging possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(b), failed to allege that defendant's hard drive actually produced images of child pornography rather than stating only that the computer contained the images), *cert. denied*, 537 U.S. 1176 (2003); *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (*en banc*) (*per curiam*) (indictment charging arson in Indian Country, in violation of 18 U.S.C. §§ 81 and 1152, failed to allege Indian and non-Indian status of victim and defendant); *United States v. Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) (indictment charging attempted entry into the United States following deportation, in violation of 8 U.S.C. § 1326, failed to allege specific intent element); *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (indictment charging interference with commerce by extortion, in violation of 18 U.S.C. § 1951, failed to allege that defendant acted knowingly or willfully); *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999) (indictment charging access device fraud, in violation of 18 U.S.C. § 1029(a)(5), failed to allege that transactions affected interstate commerce); *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999) (indictment charging entry into the United States following deportation, in violation of 8 U.S.C. § 1326, failed to allege that defendant previously had been arrested); *United States v. Daniels*, 973 F.2d 272 (4th Cir. 1992) (indictment charging unlawful transfer of firearm, in violation of 26 U.S.C. § 5861(e), failed to allege that firearm was transferred in violation of Chapter 53 of title 26), *cert. denied*, 506 U.S. 1086 (1993); *United States v. Murphy*, 762 F.2d 1151 (1st Cir. 1985) (indictment charging use of threats to influence testimony of witness in a judicial proceeding, in violation of 18 U.S.C. § 1512(a)(l), failed to identify the judicial proceeding in which the defendants sought to influence testimony).

Rule 12(b)(3) describes those motions which "must" be made before trial, including those alleging a defect in instituting the prosecution, those seeking to suppress evidence, and those claiming a defective indictment or information.

Rule 12(c) establishes that the trial court may set a deadline for filing pretrial motions and schedule a motion hearing.

Rule 12(e) establishes that a "party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under rule 12(c) . . . ."

Importantly, Rule 12(b)(3)(B) ("the Rule") has two important exceptions to the requirement that motions must be filed before trial, and, if they are not, the issues will be waived: "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." The Subcommittee is considering amending the latter of the two exceptions.

B. The Department's Suggested Change to Rule 12(b)(3)(B)

The Department does not look to eliminate the Rule's provision relating to the lack of jurisdiction since defects in subject matter jurisdiction speak directly to "the courts' statutory or constitutional power to adjudicate the case . . . [which] can never be forfeited or waived," and can be corrected "regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 625, 630 (2002). The proposed amendment does, however, seek to revise the Rule to reflect the Supreme Court's recent holdings making clear that a defective indictment is not such a "jurisdictional" defect.

It is the Department's position that the Rule should be amended to require that such challenges be made in a timely manner before trial. Ultimately, the Department's proposal seeks to avoid the negative consequences of allowing motions at any time, including the reduction of "criminal defendants' incentives to raise defenses in a timely fashion in district court," "strategic decisions by defendants to delay raising the defense," "undermin[ing] judicial economy and finality," failure to "respect[] the proper relationship between trial and appellate courts," "waste of judicial resources," and "making it more difficult for defendants and prosecutors to enter plea agreements that benefit both parties and society as a whole." *United States v. Panarella*, 277 F.3d 678, 686-88 (3d Cir. 2002).

It is important to note that the Department's proposal does not seek to prevent defendants from raising a late-filed claim if there are serious concerns about due process, adequate notice of the offense charged, or the ability of the defendant to prepare a defense. For example, in *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003), a Rule 12 objection was raised in the district dourt following a jury verdict but before sentencing. The motion was made when the defendant learned he was being sentenced as though convicted of a felony assault on a federal employee. The indictment contained no language to suggest that a felony was charged. As a result, the motion was granted to the extent that it prevented the defendant from being sentenced as a felon. 318 F.3d at 1009-10. The Department does not challenge or seek to change such situations.

II. CASES

The following cases are illustrative examples of Rule 12 objections raised at the trial court level, either after the start of trial or after the deadline for pre-trial motions has passed. It is important to note, however, that because the current Rule can be used "at any time while the case is pending," Rule 12 motions are raised in a number of procedural settings, including after a guilty plea has been entered,[2] a jury verdict has been returned,[3] or on appeal.[4]

A. Objections Raised Immediately after the Start of Trial

Though objections raised after the start of trial elicit concerns of "sandbagging" and are generally "at odds with the basic principle of" Rule 12, trial courts must hear such objections "at any time while the case is pending." *United States v. Hosseini*, 506 F.Supp.2d 269, 269-70 (N.D. Ill. 2007). In *Hosseini*, the defense sought to dismiss a count of the indictment just after jeopardy had attached with the swearing in of the jury. Had the motion been filed earlier, the defect, "a matter of careless draftsmanship," could have been cured by resubmission to the grand jury. 506 F.Supp.2d at 270. Indeed, the indictment fatally diverged from the applicable statute, 18, U.S.C. §§ 1956(a)(2)(B)(I) and (ii), by failing to state that the defendant had knowledge that the transfer of funds had prohibited design. The indictment instead ("and inexplicably") stated that there was knowledge that the funds themselves had prohibited design. *Id.* As a result, there was "no question that [the challenged count did] not properly charge each of the elements of an offense under the statute" and the count was dismissed. *Id.*

Several decades earlier, *United States v. Mercer*, 133 F.Supp. 288 (N.D. Cal. 1955), reached the same result. There, the defendant objected that several counts of his indictment were insufficient. The counts were, in fact, deficient for failure to describe the scheme to defraud required by 18 U.S.C. §§ 1343 and 2314 (wire fraud and interstate transportation of property obtained by fraud). The motion to dismiss was made on the day of trial, preventing the government from amending the indictment and leading to allegations of "delaying tactics." As in *Hosseini*, however, the court considered the motion because the "failure of the indictment to charge an offense may be raised at any time, and shall be noticed by the court at any time during the pendency of the proceeding." *Mercer*, 133 F.Supp. at 291. As a result, the challenged counts were dismissed.

B. Objections Raised After Government Rests its Case

In several cases, defendants have sought to challenge an indictment for failure to state an offense after the government has rested its case. When objections are brought at this stage, courts generally construe the indictment liberally and employ a stronger presumption of validity.

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[2] *United States v. Hedaithy*, 392 F.3d 580, 587 (3rd Cir. 2004) (the appellate court "felt compelled" to hear the defendant's Rule 12 argument, even after an unconditional guilty plea).

[3] *United States v. Vitillo*, 490 F.3d 314 (3rd Cir. 2007) (the defendants filed a Rule 12 motion in the district court seeking to dismiss the indictment for failure to state an offense some six months after a jury had convicted them. The motion was considered, though ultimately denied).

[4] *United States v. Davila*, 461 F.3d 298 (2d. Cir. 2006) (the defendant had been convicted by a jury and waited until the case was in the appellate court to make the claim that the indictment failed to state an offense), *cert. denied*, 127 S.Ct. 1485 (2007).

The seminal case in this regard is *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), in which an indictment charged the defendants with kidnapping, in violation of 18 U.S.C. § 1201. The indictment "inexplicably and inexcusably" fell short of a model pleading of a conspiracy offense under section 1201, since it failed to reference the interstate transportation of a victim, a necessary element of the substantive offense. 544 F.2d at 360-61.

Though this was a serious omission, the objection was not raised until "after all the evidence had been received in an extensive jury trial . . . [rather than] at the earliest possible moment . . . ." *Id.* at 361. The Ninth Circuit held that while such defects are never waived, indictments which are tardily challenged, including those challenged after trial has started, are "liberally construed in favor of validity . . . [because a] delay in raising the issue suggests a purely tactical motivation of incorporating a convenient ground of appeal in the event the jury verdict went against the defendant." *Id.* Trial judges may apply this deferential review because the delay in the defendant's objection tends to negate the possibility of prejudice in the preparation of a defense. *Id.*

More recently, *United States v. Chesney*, 10 F.3d 641 (9th Cir. 1993), affirmed the use of a liberal standard of review. There, the defendant objected to an indictment for conversion of public funds under 18 U.S.C. § 641, claiming it lacked a showing of specific intent element. 10 F.3d at 643. The court, however, did not have to consider whether the indictment's sloppily-drafted use of "knowingly," rather than the statutory language of "willfully" or "unlawfully," sufficiently described the requisite intent element. *Id.* Indeed, because Chesney did not challenge the indictment until after the end of the government's case, the court construed the indictment liberally, as fears of tactical maneuvering and preventing the government from remedying the alleged defect were ripe. *Id.* The court held that given a liberal interpretation, an indictment that tracks the language of a statute can be read to give a defendant adequate notice of the charge against him. *Id.*

Other circuit courts have instructed judges to employ a deferential reading of indictments that go unchallenged until the close of the government's case. For instance, the Eighth Circuit in *United States v. Lucas*, 932 F.2d 1210 (8th Cir. 1991), adopted a form of review similar to that for Rule 12 objections raised for the first time on appeal. An objection raised after the close of the government's evidence, when jeopardy has attached and both the government and the court have committed a great deal of resources towards the trial of the case, will be deferentially reviewed "unless [the indictment's counts] are so defective that by no reasonable construction can they be said to charge the offenses." 932 F.2d at 1218-19 (internal quotations omitted). The *Lucas* court considered an objection to money laundering charges that seemingly failed to allege any nexus between the defendant's conduct and interstate commerce. When a liberal standard was applied, however, a nexus with interstate commerce could reasonably be found. *Id.*

The Third Circuit in *United States v. Turley*, 891 F.2d 57, 59 (3d Cir. 1990), liberally interpreted late-challenged indictments, reading the indictments in their entirety when the objections were raised after the government presented its case-in-chief. By employing this more-deferential standard, the *Turley* court found that the indictment sufficiently alleged a scheme to use the mails to commit fraud in violation of 18 U.S.C. § 371, even though no specific conspiracy agreement was alleged. *Id.*

Even Rule 12 motions brought prior to the close of the government's evidence are liberally construed in many circuits. The fact that a defendant's "challenge to the indictment was not raised until well into the trial does require that the indictment be examined more liberally by [the] Court, and the presumption of validity in favor of the indictment is stronger." *United States v. Edmonson*, 962 F.2d 1535, 1541-43 (10th Cir. 1992) (reading several counts together allows the court to find all the essential elements of 21 U.S.C. § 841(a)(1), though the defendant alleged that the "crime of conspiracy was referred to only generally and by citation to statutes").

Similarly, the Seventh Circuit's opinion in *United States v. Gironda*, 758 F.2d 1201, 1209-10 (7th Cir. 1985), established that while a trial court must hear late-filed objections, "a stricter standard of review should be used in evaluating an objection to the sufficiency of an indictment made during trial rather than before trial." Reading the challenged count as a whole, the court held, made up for the omission of the statutorily required value for stolen property under 18 U.S.C. § 2113(b).

It is important to note, however, that the liberal interpretations of objections raised during trial, or even after the close of a government's case, are not universally adopted. The Fourth Circuit, for example, has "held that such a challenge is timely and entitled to the same standard of review as a challenge brought prior to trial." *United States v. Bridges*, 1994 WL 687301, at *2 n.3 (4th Cir. Dec. 9, 1994); see also *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir.)(only challenges brought post-verdict deserve deferential review), *cert. denied*, 488 U.S. 842 (1988).

C. Objections Raised After the Deadline to File Pre-Trial Motions

Rule 12 motions raised after the deadline established for pre-trial motions are treated in a variety of ways. The defendant in *United States v. Pirro*, 96 F.Supp.2d 279 (S.D.N.Y. 1999), filed a motion under the Rule seeking to dismiss a count of the indictment for failure to state an offense. The motion was filed after the deadline set for pre-trial motions. The district court granted the motion, explaining that the challenge was properly before the court since such objections "shall be noticed by the court at any time during the pendency of the proceedings." 96 F.Supp.2d at 282. The court further noted that the late-filed motion was not a tactical effort on the part of the defendant. Instead, the defendant requested that the government particularize the nature of the alleged ownership interest required for the alleged offense under 26 U.S.C. § 7206(1). By the time the defendant received satisfactory additional information, the motions deadline had passed. *Id.*

Conversely, a post-deadline motion made in *United States v. Johnson*, 377 F.Supp.2d 686 (N.D. Iowa 2005), was flatly rejected. Charged with an offense under 21 U.S.C. § 848(e)(1)(A), the defendant contended that the indictment failed to charge the essential statutory element of a "substantive connection" between an alleged killing and a drug conspiracy or a continuing criminal enterprise. The district court held that the challenge was fatally flawed: "The defendant has known that 'substantive connection' is an element of the § 848 offenses charged here at least since [2002], she has asserted other challenges to the [offense] without raising this issue, and she now attempts to raise the issue well after the deadline for pretrial motions set by the undersigned in this case." 377 F.Supp.2d at 687. Also noting that the defendant had not asserted any "good

cause" for the failure to raise the argument earlier, the court deemed the claim waived. *Id.* The court went on to hold that, in any event, the indictment sufficiently charged the connection between the murder and the enterprise. *Id.* at 688.

III. CONCLUSION

The cases discussed above are intended to aid the Subcommittee in its consideration of the Department's amendment proposal. They offer an illustrative look at late-filed Rule 12 motions and both the reasons for and responses to such motions. Per your request, this memo has focused on motions in which a trial court has addressed a Rule 12 objection raised for the first time after the start of trial. The discussion is certainly not exhaustive; yet we hope it will be helpful to the Subcommittee's work.

To: Rule 12 Subcommittee
From: Nancy King
Re: Proposed amendment to Rule 12 (dated 12/19) advantages and disadvantages
Date: December 19, 2008

To accompany the latest version of the proposed amendment to Rule 12 I have circulated today, revised following the subcommittee's phone conference on December 17, I have drafted below a brief summary of the advantages and disadvantages of the amendment as it now stands. If I have omitted or misrepresented a concern or argument, or you think of additional items to add to one side or the other, please let me know and I will circulate a revised chart.

ADVANTAGE OF PROPOSED AMENDMENT	DISADVANTAGE OF AMENDMENT
States clearly the expectation that a defendant must raise this problem prior to trial, when it can be remedied most efficiently.	Arguably the defendant should not ever have to bear any cost as a result of the government's error in drafting in this situation; the error here is prosecuting the defendant for conduct that is not a federal crime at all. The amendment reduces the incentive for the government to be scrupulously careful to charge a federal offense.
The amendment eliminates the "waste of judicial resources" required when an reviewing court is required to dismiss a charge and vacate a conviction for this reason, see *United States v. Panarella,* 277 F.3d 678, 686-8 8 (3d Cir. 2002), regardless of whether the error made any difference to anybody.	The cost of the current rule is somewhat mitigated by case law that provides there is no double jeopardy bar to reprosecuting the defendant after dismissal of the charge for this reason, even after trial begins; dismissal is without prejudice to retrial.
The amendment should reduce the frequency with which such errors are raised only after trial begins, or after conviction. DOJ memo attached to 6/10/08 email collects numerous cases, and states, "Unfortunately, there is no data source we are aware of, in either the Executive or Judicial Branches, that captures the number of Rule 12(b)(3)(B) motions filed or granted. However, based on our research of relevant case law and discussions with United States Attorneys' Offices around the country, we believe there are a significant number of such motions granted each year. Whether that number is in the several dozens or few hundreds we are not certain."	Without more certainty about how often this type of error occurs, and how often it surfaces only after trial, or after conviction, we can't be sure that the benefits of the amendment will be worth its potential costs.

By specifying a standard for relief from waiver of this particular error, separate from and more generous to the defendant than the standard provided by Rule 12(e) for all other untimely claims, the amendment both recognizes the unique importance of this sort of error and avoids increasing or influencing ongoing litigation over the standard for relief for other claims under Rule 12(e).	There is no certainty that the amendment will succeed in closing off litigation about its effect on other claims of error under Rule 12(e). For those who would prefer that the Rule be amended to settle these ongoing disputes about other claims, this amendment will not do that.
By specifying that relief is available for prejudice alone, rather than "for good cause," the amendment allows courts to respond whenever the failure to state an offense disadvantages the defendant, regardless of when the objection is raised, even if the defendant is unable to show a good reason for failing to object to the deficient charge prior to trial.	Would this affect collateral review under 2255 and 2241 as well? Providing for relief upon a finding of prejudice alone may be inappropriate for a collateral challenge to the conviction, even if it makes sense when the error is raised for the first time on appeal.
The Note gives an example of what is meant by prejudice to a substantial right (denial of an adequate opportunity to prepare a defense), but indicates there may be additional situations where relief would be appropriate. For example, assume a judge decided that defense counsel should have understood what offense was charged from the surrounding circumstances, and thus the defendant had an adequate opportunity to defend. Relief is still available if defense counsel dropped the ball, prepared to defend against the wrong charge, and had compromised trial strategy as a result. The standard avoids the loaded term "plain error" and questions that may be raised about application of the *Olano* test to this sort of error. "substantial right" is a term well understood in federal courts. See Rule 52, Rule 7. The court has held that the failure to submit an element to a trial jury for proof beyond a reasonable doubt can be harmless, certainly this means that the failure to submit an element to a grand jury can be harmless as well. *Cotton* held that an omitted element should be reviewed for plain error, this standard is even more generous, because it does not require the defendant to meet the fourth prong of the *Olano* test.	The standard for relief under new 12(e)(2) remains somewhat vague, requiring interpretation and likely litigation. What does "prejudiced" mean? What is a "substantial right"? 1) Must the error have made a difference in the outcome (charge or sentence)? How might this be applied following a guilty plea? 2) Who has the burden under 12(e)(2) – must defendant demonstrate prejudice or must the government disprove prejudice? Can prejudice ever be presumed? 3) could the " good cause" concept be imported into the term "prejudice" if courts determine that a defendant whose counsel is aware of the error could never be "prejudiced" thereby? 4) Doesn't it always prejudice a defendant's substantial rights whenever the defendant is denied grand jury review of an essential element? The Court has yet to pass on whether omission of an element can be harmless error under Rule 52.

Rule 7(e) already limits amendments of informations based on a determination of whether a substantial right of the defendant would be "prejudiced" – the application of the prejudice standard in Rule 7 should provide guidance for trial judges considering whether the defendant is prejudiced here. For example, if the defendant would have prepared differently had he known what offense was being charged, Rule 7 would not permit amendment; and the amended rule would require a judge to relieve the defendant from waiver under 12(e).	The analogy to Rule 7 is incomplete – that rule addresses only prejudice to substantial rights that could arise from amendments to informations, it does not address the prejudice that might arise from omitting an essential element from an indictment, including the lack of a grand jury decision on an essential element.
Neither the amendment nor the Note says anything about what options would become available to a trial judge under the amended rule, should this error be raised after trial begins before conviction. This leaves for case development 1) whether a judge who determines midtrial that the defendant has NOT been prejudiced by the error may allow amendment of an indictment, or instruct the jury on an essential element missing from an indictment without running afoul of the Fifth Amendment (constructive amendment); or whether Rule 7(e) would allow the judge to permit amendment of an information 2) whether a judge who determines the defendant HAS been prejudiced by the deficient charge could take any action other than dismissal, say, granting a continuance along with permitting the government to file an amended charge.	These issues do not arise under the present rule, because dismissal of the charge is the only option open whenever it is determined that the charge fails to state an offense – the error is never waived, and perpetually subject to relief. In addition, Rule 7(e) forbids amendment if "an additional or different offense is charged." Arguably substituting an information that charges an offense for an information that does not is charging an "additional" or "different" offense. Would this proposed amendment require a corresponding amendment to Rule 7(e) as well?

Rule 12. Pleadings and Pretrial Motions

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

(b) Pretrial Motions.

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

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

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

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

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

(C) a motion to suppress evidence;

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

(E) a Rule 16 motion for discovery.

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

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

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

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

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

(e) Waiver of a Defense, Objection, or Request.

(1) Generally. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides.

(2) Relief from Waiver. ~~For good cause,~~ The court may grant relief from the waiver:

(A) for good cause; or

(B) when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.

(f) Recording the Proceedings. . . .

Advisory Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to

state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

3B

MEMORANDUM FROM THE SUBCOMMITTEE

ON TECHNOLOGY

TO: The Advisory Committee on Criminal Rules

FROM: Judge Battaglia, Chair-Use of Technology Subcommittee

RE: Status Report

DATE: February 23, 2009

This subcommittee was created at the April 2008 meeting of the Advisory Committee on Criminal Rules. In addition to myself as chair, the subcommittee includes, Judge Tallman, Sara Beale , Andy Leipold, Leo Cunningham, and Nancy King. John Rabiej and Peter McCabe have also participated.

The Subcommittee has been assigned three tasks:

1. To generally review all the rules and to consider which rules might be appropriate for amendments embracing technological advances.
2. To consider the letter from Judge Gold suggesting that the rules be amended to allow judges to receive and grant applications for orders and warrants, including arrest warrants, pen registers and trap and trace orders, by telephone or other reliable electronic means.
3. To consider an amendment to Rule 41 to authorize probation and pretrial officers to apply for search warrants. This amendment was advanced by the Criminal Law Committee on recommendation of the Probation and Pretrial Services Chiefs Advisory Group and the Search and Seizure Working Group.

Since its inception, the Committee has worked vigorously on these tasks. A number of telephone conferences, research projects , and a survey of the U.S. magistrate judges regarding their experience with video teleconferencing already allowed by the rules were utilized. As part of this report, the subcommittee is advancing amendments to nine Rules (Rules 3, 4, 9, 32.1, 40, 41, 43, 47, and 49) for review by the full Committee. These amendments [with stylistic changes - NK] are individually

addressed below.

Judge Gold's suggestions, and corresponding amendments, with regard to using telephone or other reliable electronic means for arrest warrants have been included in the package presented. Judge Gold's request to consider rule amendments with regard to pen registers and trap and trace orders are matters of statue, without Rule counterparts, and have not been addressed.

The Criminal Law Committee's proposed Rule 41 amendments (authorizing probation and pretrial services officers to apply for search warrants) have been tabled. This is a result of the fact that the Criminal Law Committee has done some further work on the issue, and will be proposing newer language for the Subcommittee's review. As of the date of this writing, the updated proposals have not been received.

Ultimately, we respectfully remind the Committee, that should any of these proposed amendments meet with the approval of the Judicial Conference of the United States, they should be joined with the previously approved amendment to Rule 6(e). That proposed amendment provides for the taking of a grand jury return by video teleconference. The amendment to Rule 6(e) was held back from transmission to the Supreme Court to allow it to be part of an overall package of technology related amendments.

Rule 3

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge [or, if none is reasonably available, before a state or local judicial officer]. **The [magistrate] judge may consider a complaint submitted by telephone or other reliable electronic means. The oath must be taken in person or by telephone.**

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means, however, the Rule requires that the judicial officer administer the oath in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic

communication, warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permit electronic applications for search warrants, support a comparable process for arrests.

Discussion Note

The Subcommittee has bracketed the phrase "or, if none is reasonably available, before a state or local judicial officer" to raise a discussion point. We discussed, but did not resolve, whether this option would still make sense if expanded electronic access to a magistrate judge were provided through the proposed amendment. The DOJ has reached out to law enforcement U.S. Attorney community for comments on whether eliminating state and local courts as venue to swear out a complaint would present any problems in the field (even if the use of telephone or other reliable electronic means becomes available). Any feedback on this effort will be provided to the full Committee. If the state or local option is dropped, then the bracketed term "magistrate" should be inserted as shown to be consistent with the first line of the rule. In addition, for consistency, "magistrate" should be similarly inserted (as shown) in Rules 4 and 9 if the state and local option is removed.

Rule 4

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the **[magistrate]** judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the **[magistrate]** judge must issue a summons, instead of a warrant, to a person authorized to serve it. A **[magistrate]** judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a **[magistrate]** judge may, and upon request of an attorney for the government must, issue a warrant.

(b) Form.

(1) Warrant. A warrant must:

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and

(D) be signed by a **[magistrate]** judge.

(2) Summons. A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(c) Execution or Service, and Return.

(1) By Whom. Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.

(3) Manner.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return.

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. **The officer may do so by reliable electronic means.** At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge [or, if none is reasonably available, by a state or local judicial officer].

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a **[magistrate]** judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

(d) Warrant by Telephonic or Other Means. A [magistrate] judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means. The procedures in Rule 41(d)(3) and 41(e)(3) govern the application for and the issuance of such a warrant or summons.

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the [magistrate] judge to satisfy the requirement that the

defendant be shown the warrant at or soon after an arrest. Cf. Rule 41(e)(3)(A) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule [41(f)],Rule 4(c)(4)(A); permits an officer to **make** a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a [magistrate] judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a [magistrate] judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 41(d)(3) and 41(e)(3).

Rule 9

E. Rule 9

Rule 9. Arrest Warrant or Summons on an Indictment or Information

(a) Issuance. The court must issue a warrant--or at the government's request, a summons--for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.

(b) Form.

(1) Warrant. The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information.

(2) Summons. The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(c) Execution or Service; Return; Initial Appearance.

(1) Execution or Service.

(A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3).

(B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. A warrant or summons must be returned in accordance with Rule 4(c)(4).

(3) Initial Appearance. When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.

(d) Warrant by Telephonic or Other Means. The court may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means. The procedures in Rule 41(d)(3) and 41(e)(3) govern the application for and the issuance of such a warrant or summons.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

Rule 32.1

Rule 32.1(f) Videoteleconferencing.. Upon a defendant's request, the court may allow the defendant to participate in proceedings under this rule through video teleconferencing.

Committee Note

Subdivision (f). New subdivision (f) of Rule 32.1 allows a defendant to participate in revocation proceedings via video teleconferencing on the defendant's request and the court's approval. This option may be especially useful in a case in which the defendant is arrested in one district and would otherwise have to be transported to another district where the original sentence was imposed.. If this option is exercised, the court should be mindful that counsel should be in the same location as the defendant to preserve the defendant's opportunity to confer freely and privately with counsel, unless the defendant requests otherwise. The amendment does not address whether victims, witnesses, or others may participate in any hearing under Rule 32.1 through video teleconferencing or other means. The same standards and procedures for the use of video teleconferencing that were suggested in the Committee Note accompanying the 2002 amendment to Rule 5 are applicable here.

Rule 40

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

* * *

(d) Video teleconferencing. If the defendant consents, video teleconferencing may be used to conduct an appearance under this rule.

Committee Note

The amendment provides for video teleconferencing, in order to bring the rule into conformity with Rule 5(f).

Rule 41

Rule 41. Search and Seizure

* * *

(d) Obtaining a Warrant.

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

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

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

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

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

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

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing, except that a written summary or order memorializing the conversation suffices if the conversation is limited to attesting to the contents of a written affidavit submitted by reliable electronic means.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record, written summary or order memorializing an attestation of a written affidavit must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

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

(2) Contents of the Warrant.

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

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

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

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

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

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

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

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

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

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

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and either transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant. The magistrate judge keeps the original warrant.

(f) Executing and Returning the Warrant.

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

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

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

(D) Return. The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The officer may make do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

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

(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(C) Service. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

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

Committee Note

The amendments make several changes to the Rule to better facilitate the issuance and return of warrants by telephone or other reliable electronic means. Under the amended Rule, when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to the written documents, a verbatim record of the conversation is no longer required. Rather, the magistrate judge can simply prepare a written summary or order memorializing the conversation. The written summary or order must be signed by the magistrate judge and filed with the clerk. This process will maintain the safeguard of

documenting the warrant application process. The amendment also permits any warrant return to be made by reliable electronic means. Finally, the amendment clarifies that when the telephone or other reliable electronic means are used to issue the warrant, the magistrate judge retains the original warrant.

Rule 43

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, ~~or~~ Rule 10, or Rule 32.1 provides otherwise, the defendant must be at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconference or in the defendant's absence.

Committee Note

This rule currently allows proceedings in a misdemeanor offense to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment

would allow an alternative between appearing in person, or not appearing, by participation through video teleconference. Written consent would remain necessary, as would the court's permission.

Rule 47

Rule 47. Motions and Supporting Affidavits

(a) In General. A party applying to the court for an order must do so by motion.

(b) Form and Content of a Motion. A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.

* * *

[**(e) Electronic Filing**. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.]

Committee Note

[**Subdivision (e).** Filing motions by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a motion filed electronically in compliance with the Court's local rule is a writing.]

Discussion Note

The Subcommittee has bracketed the amendment and Committee Note. The change to Rule 47 may

be unnecessary if the amendment to Rule 49 is adopted since "Motions" are papers as defined under Rule 49(d).

Rule 49

Rule 49. Serving and Filing Papers

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

* * *

(e) Electronic Service and Filing. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference or the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

Committee Note

Subdivision (e). Filing papers, other than the complaint, information, or indictment by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper. **(Two points. First, courts already accept electronic filings of criminal papers under the last sentence of the existing rule, so the need for the first two sentences of the proposed amendment is uncertain. Second, should the complaint, information, or indictment be included as papers that can be filed electronically?)**

The subcommittee will be happy to entertain questions about the process leading to these proposals

or the proposals themselves at the April 2009 meeting.

Respectfully submitted.

Anthony J. Battaglia
Technology Subcommittee Chair

Rule (1) . . .

(b) . . .

(11) "Telephone","telephonic" or "telephonically" mean any form of live electronic voice communication.

Committee Note

The added definition clarifies that the terms "telephone", "telephonic" or "telephonically" include new technologies enabling live voice conversations that have developed since the traditional "land line" telephone. Calls placed by cell phone or from a computer over the internet, would be included, for example. The definition is limited to live communication in order to ensure contemporaneous communication and exclude voice recordings. Live voice communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

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

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

RE: **Electronic Signatures on Indictments**

DATE: **March 9, 2009**

The following memorandum was prepared by the Office of General Counsel of the Administrative Office of the Courts. It is provided as a discussion item, in connection with the discussion of technology.

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

LEGALITY OF ELECTRONIC SIGNATURES ON INDICTMENTS

The question presented is whether an electronic signature on an indictment, made by the grand jury foreperson is valid. The short answer is that it is appropriate and proper. Moreover, even a non-signature is generally not grounds to invalidate an indictment.

I. Indictments Containing Non-Physical Signatures Held as Valid

Indictments containing non-handwritten signatures have been consistently upheld by a multitude of courts. *See, e.g., United States v. Hardy*, 92 F. App'x. 958, 959 (4th Cir. 2004) (Stamped name of grand jury foreman accepted by the court as valid); *Wiltsey v. United States*, 222 F.2d 600 (4th Cir. 1955) (typewritten name of the attorney for the government did not affect the indictment when the question was not raised before trial); *In re Cardwell*, 256 F.2d 576 (9th Cir. 1957) (type-written signatures of the grand jury foreperson on indictments accepted as valid); *United States v. Henderson*, 2007 WL 5263457 (D.S.C. Sept. 20, 2007) (electronic signatures of grand jury foreperson and prosecuting attorney accepted as valid). This is because the substance of an indictment can only be challenged if there was no crime charged in the indictment. *In re Cardwell*, 256 F.2d 576; *United States v. Pleasant*, 469 F.2d 1121, 1125 (8th Cir. 1972). When challenged, indictments are viewed with "common sense" and not for technical error. *Pleasant*, 469 F.2d at 1125. The duty of the foreperson to sign the indictment has been deemed as "essentially clerical in nature", *Hobby v. United States*, 468 U.S. 339, 344 (1984), and the signature of the prosecuting attorney is not part of the indictment but is only used to establish the validity of the document. *Wheatley v. United States*, 159 F.2d 599, 600-601 (4th Cir. 1946). The US Attorney's manual states "the manner in which [an

indictment] is signed is therefore not such a defect as would invalidate the indictment". U.S.A.M. tit. 9, Crim. Res. Manual § 217.

In *U.S. v. Hardy,* the Fourth Circuit upheld an indictment which did not contain the signature of a prosecuting attorney and only the stamped name of the foreman for the grand jury. In so doing, the court stated, "Even if the two signatures were missing from the indictment in violation of Fed. R. Crim. P. 6(c) and 7(c), such defects were not jurisdictional". *Hardy*, 92 F. App'x. at 959 (citing *Frisbie v. United States*, 157 U.S. 160, 163-165 (1895)). Following this reasoning, two federal district courts have recently upheld the validity of electronically signed indictments. In *United States v. Henderson*, the District of South Carolina relied on the Fourth Circuit's decision in *Hardy* to uphold the electronic signatures of the prosecutor and the grand jury foreperson on an indictment. *United States v. Henderson*, 2007 WL 5263457 (D.S.C. Sept. 20, 2007). In *Henderson* the court concluded that the fact that the indictment contained electronic signatures instead of handwritten signatures did not warrant the dismissal of the indictment because such an issue is not jurisdictional. 2007 WL 5263457, *3. Further, in *U.S. v. Pegross,* a defendant who had been provided with an electronically signed copy of his indictment failed to convince the judge that the electronically signed document was invalid per se. While the court did order an in camera review to allow the defendant's counsel to compare the electronically signed copy with the original indictment contained in the sealed court file, the court was not so much concerned with the validity of the electronic signatures as it was with confirming that the copies matched each other. 2007 WL 1771542, *3-4 (E.D. Mich. June 15, 2007). The court noted that the electronically signed indictment had been filed pursuant to a judicial conference policy which required documents containing identifying information about jurors or potential jurors not be included in the public

case file. It ordered the in camera review in order to uphold the policy and to allay the defendant's concerns.

II. Electronic Signatures

a. Use of Electronic Signatures Within the Federal Government

Within the last 15 years, there has been a progression toward a paperless society. In all aspects of the government, the use of computers has been encouraged to reduce inefficiency and provide better communication as well as transparency to the people. Congress has included electronic signatures within the definition of "signature" in both the Paperwork Reduction Act and the E-Government Act in order to address the creation and storage of electronic documents. Paperwork Reduction Act of 1998 (Note under 44 U.S.C. § 3504) PL 105-277 § 1702, 1707, 1710; 112 Stat. 2681-749 through 2681-751 and E-Government Act of 2002 (Note under 44 U.S.C. § 3501) PL 107-347 § 203; 116 Stat. 2899 § 203. Electronic signatures are used routinely within Commerce (15 U.S.C. § 7001), Immigration (8 U.S.C. 1324a), Internal Revenue Service (26 U.S.C. § 6061), Social Security (42 U.S.C. § 1320d-2), Transportation (49 U.S.C. § 60109), and countless other government agencies.

b. Use of Electronic Signatures Within the Judicial System

Electronic signatures are commonly accepted within the judicial system. Judges may issue search warrants through electronic means without violating due process. Fed. R. Crim. P. 41 (d)(3)(A); *United States v. Johnson*, 2008 WL 53775 (E.D. Mich. Jan. 3, 2008). Judges in the District of Kansas currently may file all orders, decrees, judgments and other proceedings of the court through the electronic filing system by using their electronic signature in the same

effect as a physical signature. D. Kan. Rule CR 49.4; D. Kan. Rule 5.4.4. Through the creation of the CM/ECF system, lawyers sign and file all motions, pleadings, memoranda and other court documents electronically. 10th Cir. Rule 46.5. Electronic signatures on such documents, given by the user's sign-on and password, are held equally valid as their physical signature counter-parts. 10th Cir. Rule 46.5(c). According to the District of Kansas Court rules, lawyers, judges, clerks and other officers of the court may be registered to use the CM/ECF system. D. Kan. Rule CR 49.7. The court has been given discretion to decide who may be deemed a "registered user" for the purposes of electronic filing as well as filing procedures for documents requiring more than one signature. D. Kan. Rule Cr 49.2, 8.

c. The Proposed Method Uses An Actual Signature

The method being proposed, however, is even more likely to be upheld. The signature is made by the foreperson on an electronic pad. Thus, unlike our current procedural rules, the signature is actually a true signature—albeit electronic. This procedure precludes the arguments made above that there is no signature. And there is no reason to believe that a signature placed on a document by hand is not a valid signature.

III. Conclusion

The Office of General Counsel of the Administrative Office of the Courts believes that this method is acceptable and appropriate. The Court is free, therefore, to adopt this procedure.

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

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

RE: **Rule 32(h) and Procedural Rules for Sentencing**

DATE: **March 5, 2009**

A proposal to amend Rule 32(h) has been under consideration since the initial efforts to conform the rules to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). At its October meeting, the Rules Committee had before it not only the proposal to amend Rule 32(h) to extend the notice requirement of that rule to "variances" as well as "departures," but also an American Bar Association proposal to amend other portions of Rule 32 to ensure that the parties receive the information provided to and relied upon by the probation officer writing the presentence report (PRS).

Both of these proposals generated widely varying reactions at the October meeting. The proposal to amend Rule 32(h) to extend the judicial notice requirement to variances has strong support from the prosecution and defense representatives on the Rules Committee, and from the Sentencing Commission, but many other Committee members expressed strong reservations or opposition. From the parties' perspective, an amendment would provide a mechanism to ensure transparency and an opportunity to be heard on all important issues bearing on the sentence. But concerns were expressed that amending the rules to require notice was unnecessary, since the parties now receive this information as needed on a case-to case basis, could in some cases delay sentencing, and would generate frivolous appeals. The American Bar Association proposal for disclosure to the parties of materials used in the preparation of the PSR also generated diverse views. Again, the proposal was viewed very favorably by the practicing lawyers on the Committee, while other members expressed concerns that it would fundamentally change the character of the probation officer's task in drafting the PSR, turning it into an adversarial discovery process, increasing the probation officer's workload, and possibly reducing the flow of information to the sentencing judge.

Accordingly, the matter was referred for further study to the Subcommittee on Sentencing, chaired by Judge Donald Molloy. There was general agreement that it would be beneficial to have the assistance of the Federal Judicial Center and the Administrative Office to learn more about the effects of local rules that include some of the proposed requirements, and in eliciting the views of probation officers, as well as additional information from the Sentencing Commission.

The Subcommittee on Sentencing held a teleconference on February 4, at which it heard a preliminary report on a study being done by the Administrative Office. The Subcommittee was also advised that an FJC report on the views of probation officers was being prepared, but it was not yet available. Subsequently, on February 10-11, the Sentencing Commission held the first of a series of regional hearings, at which it received some pertinent testimony.

During its teleconference the Subcommittee discussed an alternative proposal submitted by the Justice Department, which was intended to achieve some of the same purposes as the ABA's more far- reaching proposal, but to avoid many of these concerns raised at the October meeting. In contrast to the ABA proposal, which requires the probation officer to provide various kinds of information to the parties, the DOJ proposal would give the parties the right to request the *underlying basis* of any material information included in the PSR. It also seeks to address the parties' concern about receiving adequate notice of potential variances by requiring the PSR to include possible variances and requiring the parties to provide notice of any possible variances 14 days after receiving the PSR. Mr. McNamara requested the opportunity to consult with other Federal Defenders and then to provide a written response to the Department's proposal. He has now submitted that response, which responds to the Department's proposal, and also proposes an additional amendment to Rule 32(e)(3).

The materials provided infra are:

(1) the ABA proposal,
(2) the Department of Justice proposal,
(3) the Federal Defender response,
(4) the Administrative Office's report concerning the views of probation officers,
(5) the Administrative Office's research report on the views of chief district judges, and
(6) a research memorandum on cases decided under Rule 32(h).

Additional material from individual probation officers has also been provided to the Subcommittee, but is not included here.

As this brief summary indicates, a great deal of additional work has been done to develop more information that sheds light on the various proposals. Because new information is accumulating so rapidly (and will continue to accumulate as the Sentencing Commission holds other regional hearings), it was not possible for the Subcommittee to bring forward a final recommendation at this time.

If time permits, however, it would be helpful for the Subcommittee to hear the full Committee's views on core issues that will need to be resolved in order to move forward with one or more specific proposals.

The first question is one that the Committee confronts each time it considers a modification of the rules: whether there is a sufficient showing of a need for change. The proposals in question are intended to increase the fairness and accuracy of the sentencing process by (1) increasing the opportunity for adversarial testing of the PSR, and (2) ensuring an opportunity for adversarial testing of unanticipated variances. In general, the proposals addressing disclosure of materials incorporated in the PSR are related to the accuracy of the factual basis for the sentence. The proposals to require advance notice of unanticipated variances wold allow both factual and legal testing of proposed variances.

In essence, the ABA's recommendation, the Department's proposal, and the proposed amendment to Rule 32(h) can be seen as providing different approaches to achieving these two core goals. If there is sufficient support for amendments to address one or both of these goals, it would be helpful to have the Committee's views on which approach or approaches are most promising.

In order to provide a basis for discussion, I have set forth below a brief statement of the general goals that the proposals are intended to serve and the general approach taken in each proposal. (Note that the Federal Defender's new proposal to amend Rule 32(e)(3) has not yet been considered by the Subcommittee and is not discussed below. The Defenders recommend that the PO's recommendation be disclosed in every case. Like the other proposals discussed below, this would increase the transparency of the process and allow the parties to address themselves to either factual or legal assumptions underlying the recommendation.)

ISSUES AND OPTIONS

(1) GOAL: increasing the availability of the information necessary for the parties to challenge the factual underpinnings of the PSR, thereby increasing the fairness and accuracy of sentencing.

- ABA's proposal: gives the parties automatic access to the underlying documents & summaries of all oral information provided by both the opposing party and third parties

  - parties must provide documentary evidence submitted to PO to opposing party as well unless excused by the court for good cause

  - PO charged with providing parties with written summaries of oral information and with documents received from third parties

- DOJ's proposal: gives the parties the right to request the basis or source of any information included in the PSR, with certain exceptions

Concerns with ABA proposal: would increase workload of PO, promote excessive adversarialism in sentencing, and potentially reduce the information available to the PO and the court, particularly in districts where the US gives the PO open file access. It may also in some cases conflict with laws precluding disclosure.

The DOJ proposal: is intended to achieve some of the same purposes as the ABA's more far-reaching proposal, but to avoid many of these concerns because the probation officer is not required to prepare detailed summaries or copies of documents. **Federal Defender** argues the DOJ proposal gives the parties insufficient information and provides it too late.

The AO and FJC reports make it clear that the proposal to require the parties to serve one another with documentary evidence stand on a far different footing–and raise fewer concerns--than proposals that would require the probation officers to assume entirely new duties. The AO report also notes that it might be desirable to emphasize that the PSR should note the source(s) of information.

(2) GOAL: increasing the fairness and accuracy of sentencing by providing parties with an adequate opportunity to respond to any potential variances as well as departures.

- The committee's published amendment to Rule 32(h) required the court to give the parties the same notice for any sentence outside the guideline range, whether it would be characterized as a departure or a variance.

- DOJ proposal: instead of requiring the court to give notice, seeks to address this indirectly by requiring the probation officer preparing the PSR and the parties in reviewing the PSR to raise any claims that the court should sentence outside the guideline range by a variance. This is intended to reduce the number of times the parties are surprised by the court's action.

Concerns with amending Rule 32(h): feasibility of giving notice in advance of sentencing given the range of possible grounds for non guideline sentences, difficulty of determining whether defendant received notice, potential to delay sentencing and/or require continuances, potential for many appellate claims of procedural sentencing error, and argument that notice requirement is incompatible with truly advisory sentencing system where parties have no expectations of a certain sentence and statute gives notice of all possible considerations.

The DOJ proposal raised new concerns, including concern that PO could not foresee possible variances, and that an omission from the PSR would become a new claim of procedural sentencing error. There were also concerns about the timing requirements DOJ proposed. The **Federal Defenders** oppose DOJ's proposal as unworkable and likely to lead to inadvertent waivers and new procedural battles.

The AO report notes that the chief district judges generally believe no change is warranted, because the parties generally are given adequate notice.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that Rule 32 of the Federal Rules of Criminal Procedure be amended to require that:

(a) Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer;

(b) a probation officer who receives oral information from a party other than through the interview of the defendant, unless excused by the Court for good cause shown, provide a written summary of the information to the parties.

(c) a probation officer who receives documentary information from a non-party in connection with a pre-sentence investigation, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties; and

(d) a probation officer who receives oral information from a non-party, unless excused by the Court for a good cause shown, provide a written summary of the information to the parties.

REPORT

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The American Bar Association Criminal Justice Section supports the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. *See Recommendations for Federal Criminal Sentencing in a Post-*Booker *World*, available at **http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf**.

Specifically, the ABACJS endorses the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report. The proposed amendments to the Rule would ensure that both the government and the defense have an opportunity to review the information to be considered by the sentencing court in determining the appropriate punishment. *Cf. United States v. Hamad*, Case No. 05-4196 (6th Cir. July 19, 2007) (vacating sentence based on information not disclosed to defendant). As the Constitution Project Report noted:

> Prior to the Federal Sentencing Guidelines, district courts had discretion to sentence defendants anywhere between the statutory minimum (if any) and maximum sentences. Courts were not required to state any reasons for their sentences or make any particular factual findings to support their decisions. Under this discretionary regime, the courts utilized probation officers to conduct pre-sentence investigations regarding the defendant, but these reports were not used to make factual findings regarding disputed matters because no such factual findings were required in the sentencing process.
>
> Under the Guidelines, in contrast, narrow sentencing ranges are determined through very specific factual findings regarding the factors enumerated in the Guidelines. Given the number and importance of the factual determinations to be made under the Guidelines, the rules of procedure should ensure that the process of litigating these factual issues is balanced and designed to produce the most reliable results possible.
>
> The pre-existing practice of pre-sentence investigations conducted by probation officers is inconsistent with the principles underlying an adversarial system of justice and should be revised to account for the new importance of fact finding at sentencing. There are presently no rules governing the process by which such investigations are conducted. In practice, the parties and other interested persons submit factual information to the probation officer on an *ex parte* basis. The probation officers do not share the information submitted to them with the parties. Indeed, probation officers are authorized to promise confidentiality to sources of information and to present information without revealing its source. Even in the absence of a probation officer's grant of confidentiality to information sources, pre-sentence investigation reports do not typically cite or reference the sources of information upon which their proposed factual findings are based.

104A

Dueling *ex parte* submissions, followed by reports without citations, do not result in the level of reliability in the fact-finding process that would result though the ordinary adversarial process. There do not appear to be any countervailing considerations to suggest that an adversarial process would be unduly burdensome or unworkable in the litigation of sentencing facts, so long as provision is made for the protection of sensitive information upon good cause shown.

An adversarial process in litigating sentencing facts could be accomplished by amending Rule 32 of the Federal Rules of Criminal Procedure to require that any party wishing to provide information regarding sentencing to the probation officer writing the pre-sentence investigation report, must, absent good cause shown, provide that information to the other party.

Specifically, new subsections (c)(3) and (c)(4) should be added to Rule 32:

> **(3) Availability of Information Received from Parties**. Any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer.
>
> **(4) Availability of Information Received From Non-Parties.** Where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties.

This Rule would substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer. A "good cause" exception is made where information, if revealed to other parties, may compromise an ongoing investigation or result in physical or other harm to a confidential source, the defendant, or others. Existing rules limiting *ex parte* communications should suffice to limit submissions of information directly to the Court without serving opposing parties.

It may also be necessary to repeal or amend subsection (d)(3)(B), which directs probation officers to exclude from the pre-sentence investigation report "any sources of information obtained upon a promise of confidentiality." Probation officers should not be empowered to promise confidentiality to sources of information to be used to sentence

defendants in the absence of good cause.

As the Criminal Justice Section Council studied this issue, one matter of interest was whether any of the various federal district courts had enacted local rules addressing these issues. Accordingly, we reviewed the local rules for each of the ninety-four districts to determine how many districts address sentencing procedures by local rule and the manner in which they do so. The results of this survey were quite interesting. Seventy-five of the ninety-four districts have promulgated local rules regarding presentence investigation reports (PSRs) and sentencing procedures. The local rules vary widely from one district to another. A number of districts have local rules which are very similar to the proposed Recommendation.

1. The Northern District of California

The Northern District of California has enacted Criminal Local Rule 32-3, which provides in pertinent part:

> **Initiation of the Presentence Investigation.**
>
> * * *
>
> **(b) Sentencing Information in Government's Possession.** Within 7 days after receiving a written request from the Probation Officer for information (e.g., indictment, plea agreement, investigative report, etc.), the attorney for the government shall respond to the request and may supply other relevant information. The attorney for the government shall serve a copy of the material on defense counsel, except material already in the possession of defense counsel.
>
> **(c) Deadline for Submission of Material Regarding Sentence.** Any material a party wishes the Probation Officer to consider for purposes of the proposed presentence report shall be submitted to the Probation Officer at least 45 days before the date set for sentencing. The party shall serve a copy of the material on opposing counsel, except for material already in the possession of opposing counsel.

This Rule, like the proposed Recommendation, thus requires the parties to serve one another with the information submitted to the court through its probation officer for use in the preparation of the PSR.

2. The District of Connecticut

The District of Connecticut has enacted Local Rule of Criminal Procedure 32, which provides in pertinent part:

> **SENTENCING PROCEDURES**

104A

(l) The Role of Defense Counsel

* * *

2. Defense counsel may submit a "Defendant's Version of the Offense" to the Probation Officer and, in that event, shall serve a copy on the attorney for the government. Subject to the restrictions of Fed. R. Crim. P. 32 and D. Conn. L. Cr. R. 32(g), the attorney for the defendant shall promptly make available to the attorney for the government all documents provided to the Probation Officer that were not provided to the government in discovery, unless otherwise excused by the Court for good cause shown.

(m) The Role of the United States Attorney

* * *

3. The attorney for the government may submit a "Government's Version of the Offense" to the Probation Officer and, in that event, shall serve a copy on counsel for the defendant. Subject to the restrictions of Fed. R. Crim. P. 32 and D. Conn. L. Cr. R. 32(g), the attorney for the government shall promptly make available to the attorney for the defendant all documents provided to the Probation Officer that were not provided to the defense in discovery, unless otherwise excused by the Court for good cause shown.

This Rule, like the proposed Recommendation, thus requires the parties to serve one another with the information submitted to the court through its probation officer for use in the preparation of the PSR.

3. The District of Nebraska

The District of Nebraska has enacted Criminal Local Rule 32.1, which provides in pertinent part:

(a) Initiation of the Presentence Investigation.

(1) **Government's Information.** Within five (5) business days after receiving a written request from the probation officer for information (*e.g.*, indictment, plea agreement, investigative report), the government shall respond to the request and may supply other relevant information. The government shall serve defense counsel with a copy of any material provided to the probation officer that is not already in the possession of defense counsel.

This Rule is similar to the proposed Recommendation in that it would require the government to serve the defense with information submitted to the court through its probation officer. The Nebraska Rule differs from the proposed Recommendation in that it is one-sided and does not require the defense to serve the government with materials it provides to the probation officer. On the other hand, the Nebraska local rule further provides that after the PSR has been finalized, any party wishing to offer documentary evidence in support of or in opposition to an objection to the PSR must submit such evidence to the court and opposing parties in advance of the sentencing hearing. Neb. Cr. R. 32.1(b)(6)(C). Thus, under the Nebraska Rule the parties will at least obtain copies of opposing parties' evidence prior to the sentencing hearing itself.

4. The District of Hawaii

The District of Hawaii has enacted Criminal Local Rule 32.1, which provides in pertinent part:

> (g) Not less than eleven (11) calender days prior to the sentencing date, the completed presentence report shall be submitted to the court and to all parties. This report shall be accompanied by an addendum setting forth any objections raised by counsel that are unresolved, and any written materials provided by counsel in support of their respective positions. Any earlier proposed presentence reports furnished to counsel shall be returned to the probation officer.

Under this Rule, the parties submit their evidence to the probation officer on an *ex parte* basis, but the probation officer then discloses all evidence relating to disputed issues to both parties prior to the sentencing hearing.

5. The Northern and Southern Districts of Illinois and the District of Colorado

These three districts have adopted local rules requiring the government to submit a written "version of the offense" to the probation officer within a short period of time after a determination of guilt and to serve the defense with the document. The two Illinois districts require the defense to submit its own "version of the offense" and to serve the government with it. The Colorado Rule applies only to the government. *See* N.D. Il. LCrR32.1(e), S.D. Il Cr32.1(d), and D. Colo. General Order 2002-3. Under these rules, the parties will have access to at least the overall positions submitted to the probation officer, although perhaps not the documentary evidence later submitted to support these positions.

6. The Northern and Southern Districts of Iowa and the Northern District of Ohio

These three districts have adopted local rules requiring the parties to submit to the court and serve on opposing counsel five to seven days in advance of the sentencing hearing all information

and exhibits the parties intend to rely on at the hearing. *See* N.D. Ohio LCrR 32.2(c), Iowa LCrR32a4. Under these rules, the parties will not see each other's evidence until after the PSR has been completed, but they will at least obtain opposing parties' evidence in advance of the sentencing hearing.

7. The District of Rhode Island, the Eastern District of Tennessee, and the District of The Virgin Islands

These three districts have adopted local rules that highlight the disadvantages to the defense of probation officers preparing PSRs based on *ex parte* submissions by the government. In the District of Rhode Island, submissions to the probation officer are made ex parte, but the defense – and *only the defense* – must notify the court and the government at least seven days prior to the sentencing hearing regarding any witnesses the defense intends to call at the hearing. R.I. LR Cr 32(b). In the Eastern District of Tennessee there is no requirement that evidence submitted for use in the drafting of the PSR be either sworn or served on opposing parties, but any party wishing to object to a factual assertion made in the PSR must support the objection with a sworn affidavit. E. Tenn. LR83.9(c). The local rule enacted by the District of the Virgin Islands is similar in effect to the Eastern District of Tennessee. Under the Virgin Islands local rule, the parties need not serve each other with information submitted to the probation officer for use in the drafting of the PSR, but any party wishing to object to a factual assertion made in a PSR must file a memorandum in advance of the sentencing hearing stating "what evidence, including written submissions or witnesses, the aggrieved party wishes to present at the sentencing hearing." V.I. LRCrP 32.01d. There is no requirement under the Virgin Islands rule for the party defending the factual assertion in the PSR to reveal any information prior to the sentencing hearing.

The variety of local rules and the existence of a number which are very similar to the proposed recommendation supports the sense of the Criminal Justice Section that a uniform Rule is needed. Moreover, after considerable study and debate, the Section supports the rule changes outlined by the Sentencing Initiative of the Constitution Project, and believes these changes would provide a needed and valuable improvement in the procedural fairness of the federal sentencing process.

Respectfully Submitted,

Stephen A. Saltzburg
Chair, Criminal Justice Section
August 2008

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D C 20530*

November 25, 2008

MEMORANDUM

TO: Judge Donald W. Malloy
Chair, Subcommittee on Sentencing

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

Kathleen A. Felton
Deputy Chief, Appellate Section

SUBJECT: Possible Amendments to Rule 32 to Address Changes in Sentencing

It was good talking to you the other day.

As we discussed, at the meeting in Phoenix in October, a majority of the Criminal Rules Committee seemed disinclined to amend Rule 32(h) to require judges to provide notice before sentencing outside the guidelines range for a reason not identified in the presentence report. The Committee seemed more open to addressing the concerns raised by the ABA and the Department of Justice surrounding the transparency of the sentencing process.

Everyone seemed to agree in the benefit of giving the parties notice of issues to be considered at the sentencing hearing – whether those issues are categorized as "guideline," "departure," or "variance" considerations – as well as ensuring that the parties have an opportunity to evaluate the basis of the information relied on by the probation officer in preparing the presentence report. Several members of the Committee, however, expressed concern about creating a new discovery process, like the kind embodied in both the ABA and the Department's earlier proposals, which might discourage parties from disclosing all relevant sentencing information to the court, require probation officers to summarize all information received from third parties regardless of the ultimate relevance, and put the probation officer in the middle of discovery disputes.

Since the October meeting, we have tried to develop an alternative proposal that would try to identify all issues for the parties before the sentencing hearing, continue to encourage all parties to share relevant information with the court – through the probation office – avoid any complex discovery process, while at the same time giving all parties an opportunity to learn from the probation officer the underlying basis of the information to determine whether an objection to the information might be warranted. Our latest draft proposal is included below; our hope is that it might assist the Subcommittee in its consideration.

The proposal would amend Rule 32(d) to ensure the presentence report identifies not only any basis for departing from the applicable sentencing range, but also any basis for otherwise sentencing outside the applicable guideline range (*i.e.* a variance). The proposal would also amend Rule 32(f) to require that after reviewing the preliminary draft of the presentence report, the parties not only file objections to the guideline information identified in the draft report, but also identify any basis for a departure or sentence otherwise outside the guideline range contained in or omitted from the report. Finally, the proposal would amend Rule 32(e) to require the probation officer, upon request of either party, to disclose the underlying basis of any material information contained in the report, unless such disclosure might endanger any person or disclose personal or confidential information about a victim, or there is otherwise good cause not to disclose it. We think this amendment will adequately address the concerns the Committee discussed: that in some districts, the parties are not made aware of the basis for conclusions made in the presentence report and thus are unable to intelligently decide whether or not to object to such conclusion. Our Subcommittee may want to develop a Committee Note that spells out further the scope of the disclosure that would be required under the amended Rule.

We hope all this is helpful and we look forward to discussing this draft with you and the Subcommittee soon. Let us know if you have any questions about this, need any additional information, or would like to discuss this further.

Have a great Thanksgiving.

Rule 32. Sentencing and Judgment

(a) 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.

(b) Time of Sentencing.
(1) ***In General.***
The court must impose sentence without unnecessary delay.
(2) ***Changing Time Limits.***
The court may, for good cause, change any time limits prescribed in this rule.

(c) Presentence Investigation.
(1) ***Required Investigation.***
(A) *In General.*
The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.
(B) *Restitution.*
If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.
(2) ***Interviewing the Defendant.***
The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(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; and
(F) identify any basis for sentencing outside the applicable guideline 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).

(3) ***Exclusions.***

The presentence report must exclude the following:
(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;
(B) any sources of information obtained upon a promise of confidentiality; and
(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.***

Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.***

The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sources of Information in Presentence Report. Upon request of either party, the probation officer shall disclose the underlying basis of any material information contained in the report, unless such disclosure might endanger any person or disclose personal or confidential information about a victim, or there is otherwise good cause.

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~~(3)~~**(4)** ***Sentence Recommendation.***

By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) ***Time to Object.***

Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, ~~and~~ policy statements, and any basis for departure or sentence otherwise outside the guideline range contained in or omitted from the report.

(2) ***Serving Objections.***

An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) ***Action on Objections.***

After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report.

At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines.

Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) ***In General.***

At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of -- or summarize in camera -- any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) ***Introducing Evidence; Producing a Statement.***

The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) ***Court Determinations.***

At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must -- for any disputed portion of the presentence report or other controverted matter -- rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(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 crime of violence or sexual abuse who is present at sentencing and must permit the victim to 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.
(C) *In Camera Proceedings.*
Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) Defendant's Right to Appeal.
(1) ***Advice of a Right to Appeal.***
(A) *Appealing a Conviction.*
If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction
(B) *Appealing a Sentence.*
After sentencing -- regardless of the defendant's plea -- the court must advise the defendant of any right to appeal the sentence.
(C) *Appeal Costs.*
The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.
(2) ***Clerk's Filing of Notice.***
If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(k) Judgment.
(1) ***In General.***
In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.
(2) ***Criminal Forfeiture.***
Forfeiture procedures are governed by Rule 32.2.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Oct. 12, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, eff. Nov. 1, 1987; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, eff. Dec. 1, 1994;

Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1996; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002.)

M E M O R A N D U M

DATE: **February 11, 2009**

TO: **Judge Donald W. Molloy**
Chair, Subcommittee on Sentencing

Members of Subcommittee on Sentencing

FROM: **Thomas P. McNamara**
Federal Public Defender, EDNC

SUBJECT: **Possible Amendments to Rule 32**

Judge Molloy, as you requested during our February 4, 2009 Subcommittee on Sentencing telephone conference call, I am submitting the Federal Public Defenders' position regarding the proposal to amend Rule 32 (e). This document is found under Attachment A.

As you know, we also discussed the Department of Justice's proposal to amend Rule 32(f)(1). You asked Jonathan Wroblewski and I to discuss this proposal to see if we could come up with some compromise language. After our February 4, 2009 telephone conference call, I surveyed the Federal Defenders to obtain some guidance on this issue and was told that our position should be as described in Attachment B. I will also talk to Jonathan to see if there is any possibility of a compromise.

While we are on the subject of Rule 32, the Federal Defenders asked me to submit a proposal to the Advisory Committee on Criminal Rules to amend Rule 32(e)(3) Sentence Recommendation. The Federal Defenders propose that this section be revised to require the probation officer's recommendation be disclosed in every case, absent good cause shown. A memorandum stating our position is found below under Attachment C. I respectfully request that this proposal be discussed at such time as you and Judge Tallman think it appropriate.

I am unclear whether the Subcommittee on Sentencing will meet again before the April 6-7, 2009 meeting of the full Committee and, if it will not do so and DOJ's proposals to amend Rule 32 will be discussed during the Washington, DC meeting, I ask that Professor Sara Beale include my Attachment A and B memos in the Agenda Book with the Rule 32 material so that the members of the full Committee will be able to read them before the meeting.

Thank You.
Tom McNamara

(See attached file: Attachment A - Rule 32(e).pdf)
(See attached file: Attachment B - Rule 32(f)(1).pdf)
(See attached file: Attachment C - Rule 32(e)(3).pdf)

Attachment A

Rule 32(e) Disclosing the Report & Recommendation

In some districts (including the Eastern District of North Carolina), probation officers include in the pre-sentence report factual assertions based on documents obtained from the government or from a non-party, such as law enforcement reports or letters from victims, which defense counsel is unable to obtain and therefore unable to effectively rebut. In other districts, disclosure is either standard practice or required by local rules. Disclosure has improved fairness and efficiency, and has caused no problems to anyone. Disclosure should be required in every case, to ensure that every defendant has the ability to address the reliability of the information upon which he is being sentenced and to avoid hidden and unwarranted disparity.

The Federal Public and Community Defenders therefore support, and ask the Subcommittee on Sentencing to support, a change to Fed. R. Crim. P. 32(e) as follows:

1 Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer.

2 Where documentary information is submitted by a non-party to the probation officer in connection with a pre-sentence investigation, the officer shall, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties.

The above-proposed amendment has been endorsed by the American Bar Association and the Constitution Project's blue-ribbon panel on sentencing reform. The Defenders do not support the portion of that proposal that would apply a similar requirement to oral information. The presentence report already contains a summary of oral information, and we believe that any additional requirement as to oral information would be too burdensome for probation officers and the parties.

DOJ's Alternative Proposal. The Defenders oppose, and believe the Subcommittee on Sentencing should oppose, an alternative proposed by the Department of Justice which would require the "probation officer," "[u]pon request

of either party," "shall disclose the underlying basis of any material information contained in the report, unless such disclosure might endanger any person or disclose personal or confidential information about a victim, or there is otherwise good cause."

The Department's proposal is an unacceptable substitute for the ABA/Constitution Project's proposal for a variety of reasons. Rather than requiring automatic disclosure of "documentary information," it would embroil probation officers in discovery battles over vaguely defined terms, and result in delays and extra work. What is worse, important documentary information would not be disclosed at all, thus perpetuating the problem of probation officers' considering information from the government and victims that defense counsel may never learn.

First, the terms are vague at best and designed to avoid disclosure. What do "underlying basis," "material information," "might endanger" any person, "personal," or "confidential" mean? Who decides? The probation officer? The government or a victim through instructions to the probation officer? In fact, the "might endanger" language would be used to deny information from informants and family members. Information from victims would always be deemed "personal or confidential." The defendant has no similar protection against disclosure to the government. The purpose of the ABA/Constitution Project's proposal would be defeated.

Second, how would the rule be enforced? It does not say that the probation officer must disclose that she intends to withhold some part of the "underlying basis" or her reason for doing so. If not, there is no opportunity to file a motion to compel.

Third, the proposal would cause delay and create extra burden on all concerned. Within the two weeks between disclosure of the draft PSR and filing of objections, the parties would have to discern which "underlying bases" they needed to request, make the request, and, even assuming all went smoothly, it might be disclosed a week later, leaving one week to investigate the information and write the objections. This would frequently not be enough time, and sentencing would have to be delayed. If disclosure was refused, a motion would have to be filed and heard, and sentencing postponed. Further, the proposal is not limited to documentary information, and so would apply to oral information as well, thus creating additional burden for probation officers and litigation opportunities for the parties.

Attachment B

DOJ's Proposal to Amend Rule 32(f)(1) to Require Written Notice of Bases for Departure or Variance to be Filed with Objections to PSR

DOJ has proposed a rule change that would require the parties to provide written notice of "any basis for departure or sentence otherwise outside the guideline range" as part of objections to the pre-sentence report.

The Defenders oppose this proposed change because it would be unworkable, unfair, and is unnecessary. The final pre-sentence report is generally not disclosed until seven days before sentencing. We usually do not file sentencing memoranda, or provide grounds for a sentence outside the guideline range, until receiving the final report, because the arguments often cannot be known or made until the guideline application issues and factual disputes are resolved. Further, probation officers sometimes disclose the report less than seven days before sentencing. And sometimes a basis for a sentence outside the guideline range is not known until even closer to sentencing.

DOJ's proposal would create new battles over what is and is not proper notice, with the parties (most often the government) seeking to have grounds for a sentence outside the guideline range deemed waived, and raising this as an issue on appeal. The possibility of depriving a defendant of a sentencing argument should not be encouraged by the rule. We understand that a few districts have local rules to this effect, which only force the defense to file boilerplate notice stating that they may move for a sentence outside the guideline range based on § 3553(a) to protect against claims of waiver.

The solution to DOJ's concern about notice is simple. If either party is truly surprised, they may seek a continuance and the judge should grant it. *See Irizarry v. United States*, 128 S. Ct. 2198, 2203 (2008).

Attachment C

Federal Defenders' Proposal to Amend Rule 32(e)(3)

Rule 32(e)(3) should be revised to require that the probation officer's recommendation be disclosed in every case, absent good cause shown. As amended in 1994, the Rule establishes a "presumption that a probation officer's sentencing recommendation be disclosed to the parties," *see* 154 F.R.D. 433, 461 (1994), but it still permits the court to direct the probation officer, by local rule or by order in a case, not to disclose the recommendation to anyone other than the court. *See* Fed. R. Crim. P. 32(e)(3). This has resulted in widely disparate practices. For example, the recommendation is disclosed in neither the Northern District of Georgia nor the Eastern District of North Carolina, yet it is disclosed in the Middle District of North Carolina, as well as many other districts. In the District of Arizona, the recommendation is disclosed with both the draft and final pre-sentence report, and this has caused no problem, despite the heavy caseload. Disclosure should be the rule in all districts.

The recommendation contains both a "recommendation" as to the length and conditions of sentence and a "justification" consisting of factual allegations, legal interpretation, and subjective opinions. As described by U.S. Probation:

> The sentencing recommendation and justification are critical components of the presentence report. The process of making a recommendation begins with a careful assessment of all of the facts pertaining to the defendant and the case, followed by a determination, based on the applicable statutes and guidelines, as to what the officer believes to be an appropriate sentence. The justification is the officer's explanation of the facts and laws that shaped the recommendation.

Publication 107 at II-70, Office of Probation and Pretrial Services, Administrative Office of the United States Courts, Revised March 2005. In addition to "facts and laws," this "explanation" may include the probation officer's opinion on such matters as whether the defendant has "been cooperative," what his "attitude toward the system" is, and whether there are "positive or negative influences" in his support network. *Id.* at II-72-73.

Judges generally follow the probation officer's recommendation. *See* Stephen A. Fannell and William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1617 (1980). Depriving the defendant of the opportunity to challenge the probation officer's conclusion, supporting facts, legal analysis, and subjective opinions is fundamentally unfair to the defendant and deprives the court of accurate information. *See, e.g., United States v. Christman*, 509 F.3d 299 (6th Cir. 2007) (vacating and remanding for re-sentencing where judge relied on probation officer's undisclosed belief, contrary to information disclosed in the pre-sentence report, that defendant had molested children); *United States v. Baldrich*, 471 F.3d 1110 (9th Cir. 2006) (affirming because judge did not credit officer's belief that defendant was a "danger," and noting that analysis and opinions should be disclosed); *United States v. Duley*, 2007 WL 752167 (D. Utah Mar. 07, 2007) (court disclosed to the defendant the fact and substance of probation officer's conversation with defendant regarding medical condition without counsel present).

Changes in probation practices have obviated the original justification for withholding the recommendation. The policy that the recommendation "should not be disclosed" originated at a time when the officer who wrote the report was the same officer who supervised the defendant, and it was thought that disclosure "may impair the effectiveness" of the supervisory relationship. *See* Fed. R. Crim. P. 32, 1974 advisory committee's note. After the guidelines went into effect, however, some probation officers began specializing in the writing of pre-sentence reports and others focused on case management. As the number of defendants sentenced to prison greatly increased under the guidelines, the smooth transition between sentencing and supervision became less important. At the same time, the complexity of the guidelines created a need for officers who would focus solely on writing pre-sentence reports. Further, as the Judicial Conference foretold in 1989, Rule 32's provision that the recommendation need not be disclosed "may well create tensions when juxtaposed with other requirements of the Sentencing Reform Act," *i.e.*, the nature of the recommendation may be relevant if it affected the guideline determination and/or was indicative of bias. *See* Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary at 437, reprinted in Hutchison & Yellen, *Federal Sentencing Law & Procedure*, Appendix 8 (1989).

ABA's Proposed Amendments to Rule 32 of the F.R.Crim.P.:
Summary of Teleconference with Probation Officers

On January 21, 2009, OPPS staff conducted a teleconference with 13 probation officers (one from each circuit and an at-large member representing the Federal Probation and Pretrial Services Officers Association (FPPOA)). The officers are recognized as experts in the sentencing guidelines and presentence practices generally, which made them well suited to weigh in on the ABA's proposed rule. In addition, the proposal was shared with the chiefs who serve on the Chief Probation and Pretrial Services Officers Advisory Group to the Administrative Office of the U.S. Courts (AO).

After reviewing the recommended amendments, the groups were asked to provide any feedback that they thought might be helpful in considering the proposal. Although there was less concern over subsection (3), there was unanimous opposition to subsection (4). They identified four potential problems with the amendments: (a) conflicts with state laws, federal regulations, and Judicial Conference policies on the treatment of certain confidential information; (b) impact on officers' workload; (c) impact on the availability of information for inclusion in the presentence report; and (d) change to the historical role of the officer serving as an independent agent of the court.

As a preliminary observation, the groups noted that the proposal is not coupled with a factual showing there is a problem with current presentence practices. No cases are cited where a probation officer refused to consider relevant information during a presentence investigation, suppressed – intentionally or negligently – important facts from a presentence investigation, or lied to the court at a sentencing hearing. Nor is there any evidence that probation officers have impeded the parties' ability to gather information on their own or make submissions directly to the court. While it is common for the parties to disagree with the factual conclusions and opinions of probation officers, there is no evidence of systemic bad faith by officers or institutional incentives to conceal, fabricate, or misrepresent sentencing information.

The proposal seems aimed at strengthening the adversarial process and promoting transparency. By design, however, probation officers lie outside the adversarial process and serve as independent fact gathers and advisors to the court. And while transparency is desirable, there may be ways to achieve it without requiring a change to the Federal Rules of Criminal Procedure and generating the problems described below.

Conflicts with State Law, Federal Laws and Regulations, and Judicial Conference Policy

The requirement in paragraph (4) – that officers make the source material available to the parties for inspection and copying – may conflict with certain state laws or federal regulations designed to protect personally identifiable information from redisclosure. For example, probation offices are deemed to be "criminal justice agencies" under 28 C.F.R. §20.3(g)(2), and as such, are authorized to access the criminal records contained in the F.B.I.'s Criminal Justice Information Systems (CJIS). Under the regulations (28 C.F.R. §20.33(b)), probation offices are

prohibited from redisclosing the records, and may lose access rights to CJIS if any unauthorized disclosure is made. Similarly, many probation offices access local police and court records under state laws (or pursuant to local agreements) which prohibit the probation office from redisclosing the records.

Similarly, records relating to a person's participation in drug or alcohol treatment are protected by 42 C.F.R. Part 2. Although the probation officer (or anyone) may obtain copies of the records using a consent form signed by the defendant, the officer is prohibited from redisclosing the records per 42 C.F.R. §2.32. If the records are from a treatment provider to whom the defendant was referred by the court, the probation office may share the records with the court per 28 C.F.R. §2.35, but further dissemination is prohibited.

Additionally, the probation officer may obtain financial records from the defendant's banks, credit card company, brokerage and pension accounts, or other financial institutions using a signed release from the defendant; however, under 12 U.S.C. § 3412, the probation officer would be prohibited from redisclosing the records to the attorney for the defendant. Redisclosures to the Attorney General are authorized under § 3412(f).

Finally, most states have enacted laws protecting the confidentiality of records related to a person's testing for, diagnosis of, or treatment for HIV/AIDS. While the probation officer may obtain medical records related to HIV/AIDS by using an appropriate release form, most states prohibit the officer from redisclosing the information. In addition, the Judicial Conference has approved "Guidelines for U.S. Probation and U.S. Pretrial Services Officers Supervising Persons Who Have Been Exposed to the Human Immunodeficiency Virus (HIV) or Who Have Acquired Immune Deficiency Syndrome (AIDS)." Under these guidelines, the probation officer is authorized to only make a confidential disclosure of a defendant's diagnosis of HIV/AIDS to the court.

The above examples represent a non-exhaustive list of the state and federal laws and regulations under which probation officers must maintain the information that they collect during their investigations. The proposed rule contains no exception for information that must not be redisclosed under law, and places the probation officer in the position of having to balance between compliance with the rule and compliance with other laws or regulations.

Workload

The chiefs and officers concluded that the proposed amendments would require officers to expend more time and resources to complete their reports. The requirement in subsection (3) – that the parties share with each other any information provided to the probation officer – may result in changes in how probation officers obtain offense-related information from the government. In many districts, the probation office and the U.S. Attorney's Office have agreements that give probation officers open access to the government's case file material and to speak with the case agents whenever it is necessary. Because officers are not waiting to arrange

meetings or interviews with or through the AUSAs, they can complete their work more efficiently and timely.

This is especially true in multiple-defendant cases. In such cases, the AO has recommended that the office appoint a lead officer – someone who will be responsible for the collection of all offense-related material from the government, and for the drafting of a comprehensive offense conduct narrative covering all of the defendants. As the co-defendants plead guilty or are convicted, officers conduct interviews, gather criminal records, and verify personal information; however, the offense conduct information (including the guidelines calculations) is taken from the lead officer. This practice spares probation officers, AUSAs, and case agents from having to duplicate efforts as additional cases reach adjudication. The proposed amendment in paragraph (3) may impact this process by causing the government to withhold from the probation officer information on co-defendants who are awaiting trial in order to limit certain disclosures to the attorney for a defendant who has already pleaded guilty.

Subsection (4) would introduce even greater workload demands on probation offices. That proposal would require officers to summarize, copy, and disclose information that the probation officer collected from third parties. In a comprehensive investigation, officers might contact ten to twenty different individuals or agencies to collect and verify information about a defendant's personal history and background. Any relevant information collected is summarized and included in the presentence report. Requiring officers to reproduce this written material or prepare written summaries of interviews would not only be duplicative of the information contained in the report, but would require the probation office to expend additional time and resources.

The most recent workload formula developed by the AO reflects that it takes an average of 34.86 hours to complete a guideline presentence report. Included in this average are the efficiencies realized by the practice of assigning lead officers in multiple defendant cases and the local practices designed to facilitate the free flow of offense-related information from the government to the probation officer. It is difficult to estimate the cost of the additional workload that would be required under the rule, but below are a few scenarios and their associated costs:

Estimated average increases in workload requirements	Average # of hours needed to complete one guideline presentence report	# of guideline presentence reports completed in FY 2008	Authorized Work Units[1]/(increase)	Cost of increase in Authorized Work Units
Current (No Change)	34.86/report	68,896	1,262.92	N/A
+ .25 hour (15 min.)	35.11/report	68,896	1,271.98 (+9.06)	$523,668
+ .50 hour (30 min.)	35.36/report	68,896	1,281.03 (+18.11)	$1,046,758
+ 1 hour (60 min.)	35.86/report	68,896	1,299.15 (+36.23)	$2,094,094

It should be noted that this additional workload is being considered during a period when the judiciary is under significant pressure to contain costs and focus on core, mission-critical tasks. It is also a period in which the number of staff providing support services for probation officers (e.g., record gathering, photocopying, mailing) are declining. Due to budget constraints over the past several years, probation offices across the country have eliminated numerous administrative and clerical positions. Specifically, since January 2004, the number of people in clerical positions in probation offices has declined 24%, going from 1,936 to 1,479. Aspects of the proposed rule that would require the probation office to photocopy material for the parties would inevitably fall upon the shoulders of probation officers, taking them away from their core duties of providing accurate and comprehensive reports for the court.

Content of the Presentence Report

The proposed rule may impact the availability of information for inclusion in the presentence report. During the course of their investigation, probation officers may be required to interview the case agents to obtain relevant and reliable information concerning the offense. While it is not clear whether such information would be subject to disclosure by the AUSA under paragraph (3) or by the probation officer under paragraph (4), it is clear that such information would be disclosed to the attorney for the defendant. Making case agent's notes and reports subject to disclose may have a chilling effect on their willingness to share information with the probation officer. In some instances, the case agent's disclosures may not directly relate to the offense or the guidelines, but may instead identify family members or victims who may be willing to talk to the probation officer. And while paragraph (3) allows for an exception to the disclosure based on "good cause," there is no comparable provision included in paragraph (4).

[1]Authorized Work Units = (# of guideline presentence reports submitted to the court during a 12-month period * workload hours)/1,763.04 [the number of hours a full-time employee is available for work in a 12-month period].

The proposed rule may affect a defendant's willingness to provide the probation officer with information out of fear of exposing themselves to further scrutiny by the government or punishment by the court. The probation officers who were interviewed noted that it is already difficult in many cases to get defendants and their family members to cooperate with the presentence investigation. More and more defendants are being advised by their attorneys to avoid answering certain questions, and corroborating documents are seldom provided to the officer. The proposed rule may be particularly problematic when receiving financial information from defendants, especially those charged with financial crimes or those possessing significant assets. When defendants do not supply the documentation, the probation officer must expend time and resources pursuing alternative methods of collecting and verifying the information. In some cases, the information obtained is incomplete or not timely, and may affect the court's ability to assess the defendant.

The proposed rule may also impact the probation officer's ability to gather and verify information supplied by third parties. Although Rule 32(d)(3)(B) requires the probation officer to exclude from the presentence report any sources of information obtained upon a promise of confidentiality, there are no available data to identify the frequency with which this information is withheld under the rule. The probation officers who were interviewed, however, indicated that it seldom occurs, and that third parties are routinely advised that the information they supply to the officer will be provided to the court. Nonetheless, third parties may be reluctant to provide written statements or other documentation to the probation officer if they are aware that these documents be provided to the parties.

Traditional Role of Probation Officers

Probation officers are tasked with conducting a presentence investigation and preparing a presentence report that conforms to the requirements set forth in Rule 32. Under the Judicial Conference policies contained in Publication 107, *The Presentence Investigation Report*,[2] officers are instructed to provide "a timely, accurate, objective, and comprehensive report to the court [and] assist the court in making a fair sentencing decision and to assist corrections and community corrections officials in managing offenders under their supervision."[3] Publication 107 also notes that the "attorneys for opposing sides may aggressively contest the accuracy of facts contained in the presentence report or application of the guidelines to those facts. Officers should be prepared to respond to these situations professionally by having all supporting documentation readily at hand. Throughout the investigation, the officer treats the defendant, the attorneys, and others with whom they are in contact with dignity and respect."[4]

Traditionally, the probation officer's file has not been subject to discovery, but on occasion, courts have directed the officer to disclose information to the parties in the interest of justice. The proposed rule would significantly alter this relationship and remove the judge from

2 This monograph can be accessed by the public at: http://www.fd.org/pdf_lib/publication%20107.pdf.
3 Id., at p. I-1.
4 Id.

the decision making process. Instead, the demand for information would be submitted to the probation officer who will be charged with complying with the demand. Under the proposed rule, the court would not have the opportunity to review the request or decide whether the officer's time and resources should be spent complying with the request. The probation officers who were interviewed felt that any disclosures made from the probation officer's file should be routed through the court for approval. The officer could advise the court whether the disclosure would present any problems (e.g., workload complications, disclosure would violate a federal regulation, information was obtained under a promise of confidentiality), and the court could then make an informed decision.

Alternative Remedies That Might Be Considered

The probation officers who were interviewed felt that an amendment to the rule was a drastic step to address a problem of unknown magnitude. They acknowledged, however, that more moderate steps might be reasonable to address the problems identified by the ABA. First, the guidance to probation officers contained in Publication 107 could be revised to clarify the importance of accurate citation of sources in the presentence report. If the reports cited specific sources of the information, the parties would be free to independently pursue the information without involving the probation officer or violating any prohibitions on redisclosure.

Another option may be to reinforce the disclosure of sentencing recommendations. Although Rule 32 presumes that the officer's recommendation is disclosed to the parties, most of the officers interviewed explained that this was not common practice. The disclosure of the recommendation may offer greater transparency in the presentence process and mitigate any concerns that officers were using the sentencing recommendation to introduce "secret" information to the court.

Finally, the group felt that the local rules and procedures established in many districts could be modified to give the parties an opportunity to petition the court for information. A local rule in which the parties must submit their requests to the court, and the court – after consulting with the probation office – decides whether the probation officer should disclose the information, would permit disclosure in the interest of justice, conserve the probation office's resources from frivolous demands, protect confidential information from unauthorized disclosure, and preserve the traditional role of the officer as being responsive to the court.

The chiefs and probation officers have expressed their willingness to work with the AO, the Criminal Law Committee, the Advisory Committee, and the ABA to explore whether the proposed rule is the best way to address the problems that have been identified.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: February 24, 2009

FROM: William Barto, Senior Attorney, Article III Judges Division
David Levine, Attorney Advisor, Article III Judges Division
Terrence Sauvain, Attorney Advisor, Article III Judges Division

SUBJECT: Final Report, Rule 32 Research Project

THRU: Peggy Irving, Chief, Article III Judges Division

TO: John Rabiej, Rules Committee Support Office

Background. At your request, three attorneys from the Article III Judges Division have researched the local experience in district courts concerning disclosure/discovery of materials related to sentencing.

Methodology. The attorneys reviewed the local rules of all 94 districts, and identified for research 14 districts with local rules relating to pre-sentencing discovery/disclosure that went beyond the present disclosure requirements of Rule 32. To obtain some degree of statistical significance, 21 additional districts were identified for research in a partially random manner that ensured courts of all sizes were included in the sample. In collaboration with the Federal Judicial Center and the Rules Committee Support Office, an interview protocol was developed for use in collecting relevant information from chief district judges concerning sentencing disclosure/discovery. The chief judges to be contacted were provided with an information paper describing the research effort, a copy of the final American Bar Association proposal concerning Rule 32, and, upon request, additional supporting materials.

Status. The research team was able to interview 34 out of the 35 chief judges in districts selected for research.

Summary of Interview Results. Please see the summary of interview results in enclosures one through five.

Enclosure One:

Chief judge response to ABA proposal that would require disclosure by parties of documentary information provided to probation officer in connection with pre-sentence investigation.

Section (a) of the ABA recommendation would require the following:

> Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer.

The ABA Report suggests this amendment would "substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer." ABA Report at 3.

Review of the local rules and procedures of all ninety-four districts revealed eight districts with local rules or general orders that currently require some form of mutual disclosure or service of documents provided to the probation officer:

- **California Northern:** Local Rule 32-3 requires the government to "respond" within seven days after receiving a written request for information from the probation officer. If the government supplies any other information to the probation officer, the government must serve a copy of the material on defense counsel (except material already in defense counsel's possession).

- **Colorado:** General Order 2002-3 requires the government, and permits the defendant, to submit to the Probation Office, "a sentencing statement" setting forth factors to be considered at sentencing. The government must serve its statement on defense counsel. If the defendant submits a sentencing statement, defense counsel must serve the government.

- **Connecticut:** Local Rule 32 requires the parties to serve one another with the information submitted to the court through its probation officer. In particular, subsections (l) and (m) permit parties to submit "versions of the offense" to the probation officer. Parties submitting a version of the offense must make available to opposing counsel "all documents" provided to the probation officer not already provided during discovery.

- **Illinois Northern:** Local Rule 32.1 requires both parties to submit to the probation officer and serve on opposing counsel a "written version of the offense conduct."

- **Illinois Southern:** Local Rule 32.1 permits the government and defense to file a "written version of the offense conduct" with the court. Attorneys must provide a copy of their version to opposing counsel and to the Probation Office.

- **Iowa Northern & Iowa Southern (courts operate from the same local rules):** Local Rule 32.2 requires parties to submit to the court and serve on opposing counsel, at least 5 court days before the sentencing hearing, any letters or other exhibits they intend to offer or rely upon at the sentencing hearing.

- **Nebraska**: Local Rule 32.1 requires the government to respond to a written request for information from the probation officer, and to serve defense counsel with a copy of any material provided to the probation officer not already in defense counsel's possession.

Interviews of chief judges in each of these districts suggested a consensus opinion that their local rule worked well in practice. None of these chief judges expressed reservations about amending Rule 32 to require parties to exchange documentary information submitted to the probation officer.

In addition to the districts that have formally adopted local rules requiring parties to serve documents, nine of the 34 chief judges interviewed indicated that under local custom and practice, attorneys typically exchange or share documents submitted to the probation officer. Three of these chief judges noted that their local United States Attorney's Offices have an "open file" policy that permits both probation officers and defense attorneys access to the government's case file.

Eleven chief judges interviewed opposed the proposed amendment. Their objections break down into two categories:

- Four chief judges believed the proposed rule modification is unnecessary. They rejected the ABA Report's assertion that current practice does not adequately permit parties to address information contained in the presentence report. In their view, current sentencing procedures contained in Rule 32 are thorough and fair, and provide a full opportunity to correct or challenge any facts or assertions in the presentence report.[1] One of the four chief judges in this category noted that, in

[1] In particular, they referenced Rule 32(e)'s requirement that probation officers provide a copy of the report to counsel and defendant at least 35 days before sentencing, unless the defendant waives the 35-day period. Within 14 days after receiving the report, the parties must serve the probation officer and

practice, probation officers understand that they ultimately bear the burden of supporting any challenged facts or assertions contained in the presentence report, which tends to increase the detail and documentation included in the reports.

- The other seven chief judges opposed the proposal on grounds it would delay the sentencing process without improving it. These judges noted that by the time a defendant is convicted, the parties already have most information relevant to sentencing. For example, several judges pointed out that defendants are aware of their prior criminal convictions. Another judge noted that under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the prosecution must disclose to the defendant any information or material that is relevant to guilt or punishment and favorable to the defendant. One chief judge in this category also objected to the proposed rule because language in the proposed rule permitting courts to excuse performance ("unless excused by the court") would lead to more litigation.

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the opposing party with any written objections, "including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report." Fed. R. Crim. P. 32(f)(1) and (2). Thereafter, Rule 32(f) permits the probation officer to "meet with the parties to discuss the objections," "investigate further," and revise the report. Fed. R. Crim. P. 32(f)(3). At least seven days before the sentencing hearing, the probation officer must submit the report to the court, together with any remaining objections, the grounds for those objections, and the probation officer's comments. Fed. R. Crim. P. 32(g). At the sentencing hearing, counsel may comment on the report and the court may permit parties to introduce evidence on objections. Fed. R. Crim. P. 32(i).

Enclosure Two:

Chief judge response to ABA proposal that would require disclosure by probation officer to the parties of any documentary information received from non-parties in connection with a presentence investigation.

Section (c) of the ABA recommendation would require the following:

> A probation officer who receives documentary information from a non-party in connection with a pre-sentence investigation [shall], unless excused by the Court for good cause shown, promptly provide that documentary information to the parties . . . .

The chief judges interviewed were evenly split on the measure as proposed. Judges opposed to the measure typically expressed concerns about the increase in workload for probation officers and potential costs. Roughly one-third of those who objected to the measure would not object to a modified proposal in line with the Constitution Project's recommendation that relevant non-party documents be made available on request. Of the judges supporting the ABA proposal, four chief judges asserted that probation officers in their districts already provide criminal litigants with copies of non-party documentary information.

Among the judges opposing the measure, several issues were repeatedly cited. The following summarizes the most common critical comments on the ABA section (c) proposal.[2]

- Some judges in the district preclude the issues apparently targeted by this proposal by not meeting ex-parte with probation officers. (6)
- Sources of information may "dry-up" if complete documents must be shared with opposing parties. (5)
  - In districts where the government gives probation officers access to its case files, the government would close its files if the defendant is given access to all materials made available to the probation officer. (3)
  - Defendants may withhold information on individuals able to provide mitigating information if the information will be disclosed to the government, possibly subjecting the sources to government scrutiny. (1)
  - The additional burden of preparing and distributing copies of reports to the parties will limit the probation officer's inquiries, reducing the quality and

[2] Number of districts raising an issue is cited parenthetically, where applicable.

scope of the presentence investigation. (1)

- Statutory or regulatory barriers may prohibit probation officers from disclosing certain documents types. (4)
  - Law enforcement databases, such as the National Crime Information Center, the Bureau of Prisons database, or similar state systems, may grant database users access only on the condition that they limit disclosure of reports to law enforcement agents.
  - Contractual obligations may prevent duplication of other reports, such as credit reports produced pursuant to the federal judiciary's national contract with credit reporting bureaus.
- The proposal would invite litigation of issues not relevant to sentencing or that would otherwise be resolved amicably. (3)
- The court should not be the parties' source of state court records or juvenile criminal files / the parties should conduct their own investigations. (3)

The following unique comments or criticisms were not widely held, but may be useful to further develop thinking on the issue and show the range of opinions on the proposal:

- Scope of "good cause" exception to the rule is ill defined and would lead to litigation.
- Question turns on the nature of the probation officer's relationship with the judge. The probation officer should either act as a law enforcement officer or as a law clerk.
- Privacy issues are best managed when the parties must request access to records, such as medical reports. Providing documents only upon request allows for privacy concerns to be litigated.
- Facts are included in the PSI report and the truth of the facts can be challenged - "who said something matters less than the truth of the facts."
- Factual disclosure is insufficient - who said what matters.

Enclosure Three:

Chief judge response to ABA proposal that would require a probation officer to prepare a written summary of any oral information received in connection with a presentence investigation and disclosure of written summary to the parties.

Sections (b) and (d) of the ABA recommendation would require the following:

> A probation officer who receives oral information . . . other than through the interview of the defendant, unless excused by the Court for good cause shown, [shall] provide a written summary of the information to the parties.

No district currently has a local rule or order that requires the preparation of such summaries. Opposition to implementation of this requirement was widespread, and typically rested on one of two objections. The majority of chief judges asserted that adoption of this provision would unjustifiably delay the preparation of the presentence report. Other judges asserted that this provision was unnecessary in that the probation officers currently provided written summaries of any relevant oral information received during the course of the investigation in the presentence report itself.

Specific comments critical of the proposal included the following:

- The proposals represent an unworkable burden to the probation officer;
- This requirement would bog down the process, summarize irrelevant information, and give rise to privacy disputes (medical information, family statements, victim's input);
- Probation officers will limit the number of people they contact because they would have to produce written reports on each contact;
- Requiring summaries of all verbal communications by the probation officer is a "mistake";
- The objective of this proposal is unclear, as all relevant information is recorded in the report;
- The proposal puts a burden on the probation officers that the budget cannot accommodate;
- This proposal fails to consider that probation officers collect a lot of irrelevant information;
- This requirement is "completely crazy" and would be unduly burdensome;
- Electronic case filing would necessitate not only document preparation but also scanning and uploading the summaries;

- All relevant information should be in the report, so it seems duplicative to require the probation officer to provide a separate written summary;
- This requirement is "make work," as the oral information is listed in the PSI;
- Border courts try a substantial percentage of the nation's felony cases, and this proposal would have a significant adverse effect upon the efficiency of the sentencing process in these courts;
- In a small court with growing costs, this requirement could necessitate extension to sentencing time line; and
- Preliminary summaries are not necessary - probation officers do not hold back information favorable to defense.

Specific, positive comments were made by less than 15% of the chief judges interviewed:

- This proposal leans toward disclosure and anything received verbally is usually reduced to writing;
- Early disclosure is good and furthers transparency and fairness;
- Early disclosure prevents last minute complaint;
- This proposal is unobjectionable if all it requires is interim disclosure of the information that would ultimately go into the final report;
- It is really a minimal burden on probation officers to create written summaries of verbal communications; and
- These summaries will give parties clues as to what a probation officer may say to the judge ex-parte and allows them to address potential issues or prejudices not clearly stated in the report.

Several judges noted the "open-ended" nature of the requirement, and suggested that the requirement would be more feasible if it were limited to "relevant" information or, in the alternative, information that will not be included in the presentence report. A small number of judges made comments that suggested modifications to the proposed rule:

- Probation officers should only have to summarize mitigating information;
- Any summary requirement should be limited to information that affects calculation of sentencing guideline range;
- The Constitution Project proposal that gave rise to ABA recommendations is narrower and more reasonable in that it would allow inspection only upon request of matters received from non-parties that are used in preparation of PSR or otherwise submitted to the court;

- The attorney should have to make a request for specific information; and
- To minimize delays, the summaries should be provided when the draft PSI is produced or by limiting disclosure to materials requested by the parties.

Enclosure Four: Use of Confidential Sources.

The Advisory Committee on Criminal Rules expressed interest in the local experience "in promising confidentiality to information sources who provide input to the probation officer in the presentence investigation."

Rule 32(d)(3)(B) states that the "presentence report must exclude . . . any sources of information obtained upon a promise of confidentiality." Half of the judges reported that local probation officers simply did not use any type of confidential information at sentencing and they saw no litigation on the issue. The remaining districts reported some rare use or reference to confidential sources, typically involving either medical information or charging documents and discovery.

Sensitive medical information may be withheld from the presentence investigation report to protect a defendant's privacy. Typically, medical examinations are conducted by the parties and disclosure is upon motion, following an opportunity for objections. At sentencing, the court may use medical information to make recommendations to the Bureau of Prisons concerning prisoner accommodation or to set terms for supervised release.

Judges most commonly reported that the pretrial process and trial or entry of a plea would test the reliability of most "confidential" information referenced in the presentence investigation report. Suppression hearings, confrontation at trial, or establishing the factual basis of a plea agreement would all present the defendant with an opportunity to fully litigate questions on the value of information received from a confidential informant. As a result, the identity of a confidential informant cited in discovery materials or a charging document will be known to the defendant prior to sentencing.

Three districts reported practices where the probation officer can directly obtain testimonial information from a source on promise of confidentiality.

- One district has a local rule permitting a probation officer to present the judge with a packet of confidential information that is not included in the presentence investigation report. The chief judge in this district reported that the rule was "essentially never used." The judge further explained that the rule was intended to protect the confidentiality of information such as medical reports.
- A second district asserted that confidential information obtained by the probation officer would not be used in the presentence investigation report or to otherwise calculate relevant conduct. The confidential information would be used only for purposes of supervision, such as education, training, treatment, or otherwise for the benefit of the defendant.
- A single district allows probation officers to relay confidential information from the defendant's family and others to the court, without including that information in the presentence investigation report.

Enclosure Five: Notice of Variance.

The Committee also expressed interest in a "review of practice/experience" of the courts when handling variance in sentencing. The majority of chief judges reported that it was already their practice to "make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues." *Irizarry v. United States*, 128 S. Ct. 2198, 2203 (2008). As a result, few judges reported sentencing circumstances like those described in *Irizarry*. The majority of judges did not think that notice should be required by rule if the court is contemplating imposing a sentence outside the advisory Guideline range. When counsel did allege surprise at a sentencing decision, all but a small handful of judges reported that they would "consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial." *Id.* Substantive comments included the following:

- "I usually provide the parties with notice of my intent to depart or impose a variance, even though the Supreme Court's *Irizarry* decision holds that I am not compelled to do so. If new information not previously known to the parties arises, we would typically continue the matter. We would not want to barrel along. That's the way most of the judges would feel";
- "I am a big believer in no surprises at sentencing. If something new comes up, I will allow additional time to respond";
- "I have been giving notice for a long time using provisional sentences when I am contemplating an upward departure or variance, and I will delay sentencing if factual disputes arise from my anticipated sentence";
- Advance written notice to the parties of an anticipated upward variance or departure is provided in advance of sentencing and made a part of the record;
- It is seldom possible to give notice of an upward variance before the sentencing proceeding. If a court issues a variance, it needs to state reasons, but counsel develop those reasons in their sentencing memoranda or in court. "Judges don't pull them out of a hat." If a party expresses genuine surprise, an opportunity to respond will generally be granted;
- Determining what constitutes adequate notice should be left to judicial discretion;
- Notice is not a problem. The guidelines are now advisory, "all sentences in play," so any formalization of notice requirements would "get too much into the head of the judge";
- The present rule should not be changed. Calculating guidelines sentences is complicated, and it is proper to give notice of departures. As to variances, it is too restrictive to require a notice even though some judges might feel that due process requires a continuance in a particular case;

- Judges know that any upward departure or variance will be appealed, and are extremely careful to ensure a fair proceeding;
- Defense counsel usually submits a sentencing memo and argues last. If the defendant is arguing for a variance, court cannot make that decision without first giving the defendant the opportunity to comment;
- Cases should not be continued every time a new fact arises in sentencing, but if a judge intends to impose a variance above the guidelines range based upon a particular factor, then both parties should receive notice and an opportunity to address that factor;
- "I do not impose many variances or departures. When I do, I advise the parties of my intent to do so. If the parties need additional time, they get it";
- Delay is only appropriate if variance is based solely on presentation of counsel;
- "I cannot see any other benefit to this than delay. The system is already totally insane, and it is virtually impossible to get to sentencing anyway; why would the judiciary impose this on us?"
- Any rule requiring notice would effectively give the parties an automatic continuance, thereby reducing judicial discretion and delaying sentencing;
- Requests for sentencing continuances are rare under the current rule;
- A judge should give notice of an anticipated variance but avoid unnecessary continuances; and
- "The fewer rules we have on this, the better."

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

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

RE: **Decisions Applying Rule 32(h) after *Irizarry***

DATE: **March 8, 2009**

I have prepared the following research memorandum to provide background for the Committee's consideration of issues relating to the proposed amendment that would extend Rule 32(h) to departures as well as variances.

I have reviewed the cases decided subsequent to the Supreme Court's decision in *Irizarry v. United States*, 128 S.Ct. 2198 (2008), with the following questions in mind:

(1) Are there indications that the district courts are not giving notice? If so, what kinds of grounds were involved in these cases?

(2) What constitutes adequate notice?

(3) Are the appellate courts having trouble determining what's a variance (for which no notice is needed) or a departure (for which notice must be given)?

(4) How are appellate courts resolving these cases?

1. Cases in which the district court did not give notice of its intention to vary on the basis of a ground not previously identified

I found 29 appellate cases in which either the prosecution or the defendant appealed on the basis of a claim that the trial court failed to give the notice required by Rule 32(h), and the court resolved the issue on the assumption that no notice (or insufficient notice) was given. These cases are listed in an appendix at the end of this memorandum. For several reasons it is difficult to draw any broad conclusions from this group of cases. In general, the courts regarded these issues as foreclosed by *Irizarry*, and the discussion is abbreviated. Many of these decisions were decided per curiam, and several do not identify the basis for the variance. In other cases, the courts make no effort to determine whether the failure to give notice would have been prejudicial.

There is also a smaller group of cases in which the appellate court comments that notice was given by the trial court.[1] Presumably there are many other cases in which notice is given in which no reference is made to that fact in a reported decision.

2. What constitutes adequate notice

Irizarry holds that notice is not required in variance cases, and the post-*Irizarry* cases contain little discussion of the issue of what constitutes sufficient notice. The Sixth Circuit has reiterated its position that only "reasonable notice" is required under Fed. R. Crim. P. 32(h) and that such notice can take place orally and during the hearing. In *United States v. Springer*, 2008 WL 4829670 (6th Cir. 2008), the court held that reasonable notice had taken place when the court notified the defendant at the sentencing hearing of a possible upward departure and the specific basis for it, and defendant's counsel was offered the opportunity to respond. The Sixth Circuit has also held that what constitutes reasonable notice depends on the circumstances of the particular case. *United States v. Erpenbeck*, 532 F.3d 423, 443 (6th Cir. 2008).[2]

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[1]In the following cases, the appellate court notes that the district court gave notice. *United States v. Sanchez-Espino*, 2009 WL 188074 at *1 (9th Cir. 2009); *United States v. Galacia*, 2008 WL 2699971 at *1 (2d Cir. 2008); *United States v. Cavera*, 550 F.3d 180, 194 (2d Cir. 2008); *United States v. Ybarra*, 2008 WL 3375710 at *6 (5th Cir. 2008); *United States v. Springer*, 2008 WL 4829670 (6th Cir. 2008). In two other cases, the district court specifically noted that it had provided notice. *United States v. Rausch*, 570 F.Supp.2d 1295, 1298 (D.Colo. Aug. 13, 2008); *United States v. Lay*, 568 F.Supp.2d 791, 792 (N.D. Ohio July 8, 2008).

[2]The *Erpenbeck* opinion also recaps that circuit's cases on reasonable notice:

> Only "reasonable notice" is required, and what constitutes reasonable notice will vary depending on the circumstances of the particular case. *United States v. Meeker*, 411 F.3d 736, 744 (6th Cir.2005) (explaining that only "reasonable notice" is required to satisfy Rule 32(h)); see also *United States v. Quinlan*, 473 F.3d 273, 279-80 (6th Cir.2007) (holding that notice was reasonable although the district court departed upward without informing the defendant in advance because the government had put the defendant and the court on notice that it was recommending an above-the-Guidelines sentence); *United States v. Ragland*, 226 Fed.Appx. 507, 510-11 (6th Cir.2007) (holding that Rule 32(h) was satisfied even though no written notice of any specific grounds for departure was provided to the defendant because the defendant knew that the grounds for departure relied upon by the court had been brought to the court's attention and the court had heard testimony about the circumstances surrounding the grounds for departure); *United States v. Hernandez*, 251 F.3d 1247, 1252 (9th Cir.2001) (holding that the district court gave reasonable notice by stating its intention to depart upwards at the beginning of the sentencing hearing, even though "neither the [PSR] nor the government's sentencing memorandum identified factors warranting a departure").

Two Second Circuit decisions found sufficient notice had been given where the court announced its intent to give an above-guideline sentence at the sentencing hearing and offered the parties an adjournment to respond. *United States v. Galacia*, 2008 WL 2699971 at *1 (2d Cir. 2008); *United States v. Cavera*, 550 F.3d 180, 194 (2d Cir. 2008).

A few other post-*Irizarry* decisions address the question whether notice was required, given the issues noted in the PSR and pleadings and the nature of the ground relied upon by the district court. The Fifth Circuit held Rule 32(h) did not require notice because the defendant had been put on notice sufficiently of the factual claims that underpinned the court's upward variance. *United States v. Ybarra*, 2008 WL 3375710 at *6 (5th Cir. 2008) (defendant had actual knowledge that sex offender conditions were being considered by the judge for sentencing because he was present for hearings to revoke his supervised release where a victim testified that the defendant had sexually assaulted her).[3] The Sixth Circuit has also noted that the "garden variety" sentencing considerations mentioned in *Irizarry* – such as culpability, criminal history, and the nature and seriousness in the crime – should not be a surprise to an attorney who has prepared for sentencing, and reasoned that notice of such issues should not be required. *United States v. Obi*, 542 F.3d 148, 156 (6th Cir. 2008).

3. Distinguishing between variances and departures on appeal

In light of the Supreme Court's decision in *Irizarry*, the characterization of the district court's action is critical. In a few cases, the court of appeals found that the district court was departing, not varying, and hence the failure to give notice was reversible error. *United States v. Evans-Martinez*, 530 F.3d 1164, 1169 (9th Cir. 2008); *United States v. Folaumahina*, 293 F.3d (9th Cir. 2008). Neither of these decisions discusses the reason for treating the district court's decision as a departure rather than a variance.

In the vast majority of cases, however, the appellate courts have found that the ruling in question was a variance. Only a few cases reflect any difficulty in characterizing the district court's action. For example, in *United States v. Stephens*, 296 Fed. Appx. 5. 2008 WL 4458184 at *2-3 (11th Cir. 2008), the opinion notes that the appellate court's characterization is based upon "the entire record from the sentencing hearing." The district court's characterization is not, however, necessarily dispositive. In *United States v. Marrone*, 292 Fed. Appx. 253, 2008 WL

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532 F.3d at 443.

[3]Similarly, in *United States v. Munoz*, 2008 WL 5381473 (5th Cir. 2008), where the issue was lack of notice of a factor that influenced a within-guideline sentence of 235 months, the court found no abuse of discretion in the court's denial of multiple requests for a continuance to respond to testimony at the sentencing hearing that defendant's brothers had intimidated witnesses, on the ground that the essence of this claim was disclosed to the defendant in the government's response to the pre-sentencing report, and the defense was able to cross examine effectively on this issue..

4180053 at *2 (4th Cir. 2008), the district court described its action as a departure, but the court of appeals concluded it should be treated as a variance because "the court looked only at the factors set out in § 3553(a)." In *United States v. Erpenbeck*, 532 F.3d 423, 441 (6th Cir. 2008), the court noted but found it unnecessary to resolve the issue whether the court had departed or varied, because the issue would not be dispositive in light of its ruling on the government's cross appeal.

The remaining opinions noted in this memorandum also characterize the district court's action as a variance, rather than a departure. In many cases the opinion simply states that the district court varied. In other cases there is a brief reference to the fact that the district court relied upon the statutory factors under 18 U.S.C. § 3553. *See, e.g., United States v. Sandoval*, 293 Fed. Appx. 809, 2008 WL 4376229 at *1 (2d Cir. 2008) (sentence "was clearly a variance because it cited to numerous §3553(a) factors"); *United States v. Billups*, 2008 WL 4649387 at *2 (11th Cir. 2008) (ruling in question was a variance because court first calculated guideline range and then considered its adequacy in light of the statutory factors). In at least one case, the appellate court relied upon the judgement and commitment order to characterize the district court's action. *United States v. Blackie*, 548 F.3d 395, 403-04 (6th Cir. 2008).

4. Resolution in the appellate courts

There have been a significant number of post-*Irizarry* Rule 32(h) notice cases in the appellate courts, and relief has been denied in all but a handful of them. As noted above, in two cases the Ninth Circuit found that the district court was departing, not varying, and hence the failure to give notice was reversible error. *United States v. Evans-Martinez*, 530 F.3d 1164, 1169 (9th Cir. 2008); *United States v. Folaumahina*, 293 F.3d (9th Cir. 2008). The remaining cases found no reversible error.

In some cases denying relief the opinions have included a brief discussion of the standard of plain error review. *See United States v. Warr*, 530 F.3d 1152, 1162-63 (9th Cir. 2008); *United States v. Johnson*, 2008 WL 4150019 at *3-4 (10th Cir. 2008); *United States v. Griffiths*, 2008 WL 4107256 at *2 (4th Cir. 2008); *United States v. Estrada-Cortez*, 2008 WL 2872403 at *1 (9th Cir. 2008); *United States v. Gil-Cruz*, 2008 WL 2645505 at *2 (5th Cir. 2008); *United States v. Silva-Torres*, 2008 WL 4280316 at *2 (5th Cir. 2008); *United States v. Gil-Cruz*, 2008 WL 2645505 at *2 (5th Cir. 2008).

In most cases, however, the courts have simply held that under *Irizarry* there was no error. In the vast majority of these cases, the courts have been able to dispose of the issue in per curiam or memorandum decisions. These decisions (as well as those discussing plain error review) are included in the appendix that follows. Where the ground of the district court's ruling is stated in the appellate opinion, it is noted.

Appendix – Appellate Cases Finding or Assuming Notice Not Given[4]

United States v. Warr, 530 F.3d 1152, 1162-63 (9th Cir. 2008) (no notice of intent to rely on Bureau of Prisons study of recidivism)

United States v. Johnson, 2008 WL 4150019 at *3-4 (10th Cir. 2008) (no notice of reliance on probation officer's possibly flawed extrapolation method to increase the sentence)

United States v. Sandoval, 2008 WL 4376229 at *1 (2d Cir. 2008) (summary order) (no notice of intent to sentence above the Guidelines because the conspiracy involved more than 10 victims and more than $120,000)

United States v. Madison, 2009 WL 294779 at *1 (3d Cir. 2009) (no notice of intent to impose sentence above guidelines on the grounds of defendant's extensive criminal history)

United States v. Griffiths, 2008 WL 4107256 at *2 (4th Cir. 2008) (per curiam) (no notice of intent to impose variance because of criminal history though defendant had notice government would seek upward departure on this ground)

United States v. Gil-Cruz, 2008 WL 2645505 at *2 (5th Cir. 2008) (no notice of intent to vary because of extensive criminal history)

United States v. DeLaughter, 2008 WL 4375918 at *1 (5th Cir. 2008) (per curiam) (no notice of intent to impose a sentence above the Guidelines for a history of violent criminal threats)

United States v. Bravo, 2008 WL 5099675 at *1 (5th Cir. 2008) (per curiam) (no notice of intent to vary because of repeated convictions)

United States v. Pardo-Luengas, 2008 WL 4910570 at *1 (5th Cir. 2008) (per curiam) (no notice of intent to vary because of underrepresentation of defendant's criminal history and his recidivism)

United States v. Ellsworth, 2008 WL 3093344 (5th Cir. 2008) (per curiam) (no notice of intent to vary on the basis of a prior conviction for illegally possessing a firearm)

United States v. Silva-Torres, 2008 WL 4280316 at *2 (5th Cir. 2008) (per curiam) (no notice of intent to vary for reasons that were stated at sentencing but remained under seal)

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[4]This list excludes cases arising out of the revocation of supervised release.

United States v. Erpenbeck, 532 F.3d 423, 443-44 (6th Cir. 2008) (no notice of intent to vary for defendant's actions in substantially jeopardizing the safety of a financial institution and for leading five or more participants in a crime)

United States v. Blackie, 548 F.3d 395, 404-05 (6th Cir. 2008) (no notice of intent to vary due to the seriousness of the offense and the need for deterrence)

United States v. Duong, 2009 WL 117984 at *1 (9th Cir. 2008) (memorandum) (no notice of intent to vary for defendant's failure to take responsibility, failure to make restitution, the sophistication of his fraud, and his inability to explain where the stolen money had gone)

United States v. Estrada-Cortez, 2008 WL 2872403 at *1 (9th Cir. 2008) (memorandum) (no notice of intent to vary for uncharged conduct)

United States v. Orlando, 2009 WL 153243 at *1 (9th Cir. 2009) (no notice of intent to vary based on criminal history)

United States v. Kaufman, 546 F.3d 1242, 1270 (10th Cir. 2008) (no notice of intent to vary for accepting responsibility, dependent personality disorder, and the fact that defendant was an abettor not the principal actor)

United States v. Perez, 2008 WL 2446099 at *1 (11th Cir. 2008) (per curiam) (no notice of intent because of risk of bodily injury while transporting illegal immigrants for monetary gain)

United States v. Barnes, 2008 WL 3166355 at *1 (11th Cir. 2008) (per curiam) (no notice of intent to vary due to the severity of crimes, compulsive criminal conduct up until plea, and failure to abide by the terms of her release)

United States v. Stephens, 2008 WL 4458184 at *2-3 (11th Cir. 2008) (per curiam) (no notice of intent to vary due to the future risk to the public)

United States v. Billups, 2008 WL 4649387 at *2 (11th Cir. 2008) (per curiam) (no notice of intent to vary based on defendant's prior criminal conduct, use of a firearm, need to deter such conduct, and the need to protect the public)

United States v. Colbert, 2008 WL 5125988 at *2 (11th Cir. 2008) (per curiam) (no notice of intent to vary based on testimony regarding defendant's conduct as a federal postal employee)

United States v. Quiambao, 2008 WL 2008 WL 2951869 at *1 (9th Cir. 2009) (per curiam)

United States v. Torres, 2008 WL 4145528 at *1 (9th Cir. 2009) (memorandum)

United States v. Roberts, 2009 WL 166491 at *1 (9th Cir. 2009) (memorandum)

United States v. Machado-Martinez, 2008 WL 3876420 at *1 (5th Cir. 2008) (per curiam)

United States v. Escajeda, 2008 WL 2682810 at *1 (5th Cir. 2008) (per curiam)

United States v. Marrone, 2008 WL 4180053 at *2 (4th Cir. 2008) (per curiam)

United States v. Anderson, 2008 WL 4238640 at *1 (4th Cir. 2008) (per curiam)

3D

MEMORANDUM

To: **Members, Advisory Committee on Criminal Rules**
From: **James P. Jones, Chair, Subcommittee on Victims' Rights**
Re: **Possible Amendment to Rule 12.4 (Disclosure Statement)**
Date: **March 16, 2009**

The Judicial Conference Committee on Codes of Conduct previously suggested that the Committee on Rules of Practice and Procedure examine Rule 12.4 of the Criminal Rules in order to determine if an amendment is appropriate in order to better assist judges in determining their recusal obligation as it relates to victims.

In accord with this suggestion, the Subcommittee on Victims' Rights met on Rule 12.4 on February 4, 2009. In summary, the Subcommittee does not recommend at this time any amendment to Rule 12.4.

Present Rule 12.4, adopted in 2000, requires the government to promptly disclose the identity of any organizational victim, and, if the organizational victim is a corporation, any parent corporation and any publically held corporation that owns 10% or more of its stock. There is no present obligation that the identity of individual victims be disclosed. Under current Code of Conduct interpretation, a judge must recuse in a criminal case if the judge's impartiality might reasonably be questioned because of the victim or if the judge has a financial interest that could be substantially affected by the outcome, e.g., a restitution claim by a victim.

The disclosure of an individual victim's identity may pose serious privacy concerns for the victim. Even if the disclosure were filed under seal, unsealing may be required under certain circumstances. See United States v. Robinson, Cr. No. 08-10309-MLW, 2009 WL 137319 (D. Mass. Jan. 20, 2009) (Wolf, J.) (denying media request for order requiring government to publically disclose identity of individual victim in extortion prosecution, on the ground that the identity of the victim had not been filed and thus the court was not required to consider the presumptive right to access documents used in criminal proceedings).

Moreover, the Department of Justice points out that an obligation by it to disclose individual victims would cause difficulty in cases involving data breach or security fraud, where such victims may number in the millions.

There is also a concern as to any remedy available in the event that a heightened disclosure requirement was not followed. Would the defendant have a remedy if there was a failure to disclosure as required, or would the defendant be required to prove an actual judicial conflict?

The Subcommittee believes that an amendment to Rule 12.4 imposing a duty on the government to disclose individual victims may not be worth any marginal assistance to judges in determining their recusal obligation, particularly since there are likely few recusal situations involving individual victims. It may be worthwhile to request the Federal Judicial Center to conduct a survey in order to determine the frequency of recusal issues involving individual victims, before any further consideration of amendment to Rule 12.4.

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

March 2, 2009

Honorable Richard C. Tallman, Chair
Advisory Committee on the Criminal Rules
United States Court of Appeals
Park Place Building, 21st Floor
1200 Sixth Avenue
Seattle, WA 98101

Dear Judge Tallman,

Per your request, this is to update you on the outreach we have done with the victims' rights community in relation to criminal rules matters.

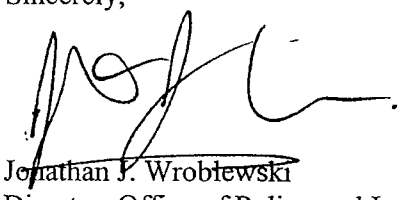
Over the past several years, the Department of Justice's Office of Intergovernmental and Public Liaison has convened a Victims' Rights Roundtable to discuss issues of mutual interest to the Department and the victims' rights community. The Roundtable, generally held twice a year, has brought together victims' rights leaders from around the country and has included representatives from the National Center for Victims of Crime, the National Network to End Domestic Violence, the National Association of VOCA Assistance Administrators, Mothers Against Drunk Driving, and many other victims' rights organizations. I have attended several of these Roundtable discussions over the last year or so, during each of which I updated the representatives on the ongoing work of the Advisory Committee on Criminal Rules, sought feedback on this work, and generally solicited any concerns from the representatives relating to the Federal Rules of Criminal Procedure.

In addition, as part of my work at the Department, I have been in periodic contact with several members of the victims' rights community. During these contacts, I have shared relevant proposals under consideration by the Committee, solicited feedback on these proposals, discussed recent case law, and explored concerns over current criminal procedure.

I hope this information is helpful. I'd be happy to discuss these outreach efforts with you and explore other ways to ensure that the voices of victims and the victims' rights community are heard in our Committee.

Please let me know if you have any questions about any of this or if you need any further information. I look forward to seeing you at our meeting in April.

Sincerely,



Jonathan J. Wroblewski
Director, Office of Policy and Legislation

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JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

January 6, 2009

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write on behalf of the Judicial Conference of the United States to request respectfully that Congress enact legislation that would slightly change deadlines in certain statutes affecting court proceedings. These changes are necessary to account for amendments to the time-computation rules in the Federal Rules of Practice and Procedure approved by the Judicial Conference. The rules changes are scheduled to take effect on December 1, 2009, and to avoid confusion, we request the statutory changes to take effect on the same date.

The rules amendments simplify the provisions for calculating deadlines and make those rules consistent in each set of the Federal Rules. The amendments respond to years of complaints by practitioners that the present rules are confusing and can lead to missing deadlines and losing important rights. Because some statutes affecting court proceedings use the time-computation provisions in the Federal Rules, corresponding changes should be made to maintain consistency and avoid confusion. The proposed statutory amendments are noncontroversial and neutral. They have been vetted by numerous law and bar organizations.

Under some – but not all – of the current Federal Rules on calculating a deadline, intermediate weekends and holidays are omitted in computing short time periods but included in computing longer periods. To simplify calculating deadlines and to be consistent across the Federal Appellate, Bankruptcy, Civil, and Criminal Rules, the amended rules count intermediate weekends and holidays for all time periods. This simple "days are days" approach can have the effect of shortening a time period. The rules amendments lengthen deadlines in the rules to offset this effect. Legislation to effect a similar change in some statutory deadlines is necessary because the Federal Rules for calculating time periods also apply to time periods in statutes that affect court proceedings, if those statutes do not themselves specify how to calculate time periods.

The Judicial Conference seeks legislation to amend a modest number of statutory provisions affecting court proceedings in cases litigated in federal court to coincide with the rules changes in two important ways. First, the legislation would change certain statutory deadlines to offset any shortening of the time period resulting from the rules changes that count every day, in effect maintaining the same time period in the statutes. Second, the legislation would change some statutory deadlines that would otherwise be inconsistent with the amended rules deadlines and lead to confusion.

The rules amendments were the subject of extensive study and public comment during the Rules Enabling Act rulemaking process. The proposed statutory amendments have been circulated to a number of organizations and agencies and comment has been favorable.

The rules amendments are now before the United States Supreme Court. If the Court approves them, they will be sent to Congress in late April or May 2009 and, if Congress does not act to delay or defeat them, will become effective on December 1, 2009. Again, the statutory changes should become effective at the same time to avoid confusion.

The following materials are enclosed:

1. An explanation of the proposed rules amendments and the legislative changes.
2. A statutory language model.
3. An example of the proposed "template" rule, Civil Rule 6(a), on calculating time periods, with the committee note.
4. Letters from bar organizations and entities supporting the proposed legislation.

Thank you for your continued efforts to improve our justice system by making it less confusing and complex when it is possible to do so. I look forward to working with you on this opportunity to make the system work better. If you have any questions about this or other matters regarding the Federal Judiciary, please contact Cordia A. Strom, Assistant Director for Legislative Affairs, at (202) 502-1700.

Sincerely,

James C. Duff
Secretary

Enclosures

Identical letters sent to: Honorable Steny H. Hoyer
Honorable John A. Boehner
Honorable Lamar S. Smith

SUMMARY OF THE NEED FOR LEGISLATION

The Judicial Conference is requesting legislation that would slightly alter deadlines in certain statutes that affect court proceedings. These changes are needed to take into account the effect of proposed amendments to the Federal Rules of Practice and Procedure on how to calculate time periods.

Under the current time-calculation rules, intermediate weekends and holidays are omitted when computing short time periods but included when computing longer periods. This has long proved vexing to lawyers and litigants and has led to missing deadlines and losing important rights. Three years ago, the Standing Committee began examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules to make them simpler, clearer, and more consistent. The project responded to frequent complaints by practitioners about the time, energy, and potential for prejudice created by the time-computation rules and to criticisms by judges about the anomalous results of those rules.[1]

To simplify calculating deadlines the amended rules count intermediate weekends and holidays for all time periods.[2] This simplified approach is made consistent across the rules in proposed amended Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. The proposed amendments adopt a "days-are-days" approach to computing all periods, omitting the current requirement of excluding weekends and legal holidays in calculating shorter time periods and including them in calculating longer time periods. Other changes include how to count forward when the deadline falls on a weekend or legal holiday, how to tell when the last day of a period ends, how to compute hourly time periods, and how to calculate a time period when the clerk's office is inaccessible. At the same time, the Advisory Committees reviewed all the deadlines in every set of rules to be sure that the periods were reasonable and to offset the shortening effect of the amended calculation approach. To further simplify time-counting, the Advisory Committees proposed changing most rule-based periods of less than 30 days to multiples of 7 days – 7, 14, and 21-day

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[1] "If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days. And this does not even take into account inclement weather. As we sometimes say in Kentucky, there's eight ways to Sunday. This case presents sort of an issue of first impression for this Court regarding the timeliness of motions for attorney fees under Federal Rule of Civil Procedure 54(d)(2)(B). After considering Federal Rules of Civil Procedure 6, 54, 59, 83, and a sprinkle of Federal Rule of Appellate Procedure 4, we reverse." *Miltimore Sales, Inc. v. International Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

[2] The proposed time-computation rules apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, the date for filing is "no later than November 1, 2007," the time-computation rules will not apply. But if a filing is required to be made "within 10 days" or "within 72 hours," the relevant time-computation rule explains how to compute that period.

periods – so that deadlines will usually fall on weekdays. The Advisory Committees proposed amendments that generally extended the Rules' 5-day periods to 7-day periods and 10-day periods to 14-day periods.

In August 2007, the proposed amendments to each set of rules were published for comment from the bench and bar. A scheduled public hearing on the amendments was canceled because no one asked to testify. The Advisory Committees approved the amendments in the spring of 2008, the Standing Committee approved them in June 2008, and the Judicial Conference approved them in September 2008. The proposed rules changes are now before the United States Supreme Court. If approved, the proposed amendments will be transmitted to Congress in April or May 2009, and if Congress does not act to delay or defeat them, will become effective on December 1, 2009.

A brief summary of the time-calculation rule and a copy of proposed Civil Rule 6(a) and committee note as an example are attached.

II. The Need for the Legislation to Amend Certain Statutory Time Periods

The simple "days-are-days" approach also applies to time periods in statutes that affect court proceedings, if those statutes do not themselves specify how to calculate time periods. Current Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) expressly apply to statutory time periods that affect court proceedings.[3]

As noted, the Rules Committees and the Judicial Conference concluded that virtually all short time deadlines in the Rules should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. Consistent with this decision, the Judicial Conference seeks changes in a modest number of statutes containing short statutory deadlines that are frequently applied or that could helpfully be adjusted to offset the effects of adopting a "days-are-days" approach.

A large number of statutory time periods could theoretically be affected by the proposed shift in the Federal Rules' time-computation approach. However, the number of statutory provisions to which case law has applied the Rules' time-computation method is much smaller. An even smaller number of statutes are either frequently used or have time periods that could helpfully be adjusted to offset the effects of the time-computation method. The proposed legislation would merely provide short extensions of short time deadlines in this small number of statutes to offset the effective shortening caused by the new Rules approach. The proposed statutory amendments take the same approach as was applied to the deadlines in the Rules themselves. Five-day periods are extended to seven-day periods and ten-day periods to fourteen-day periods. With respect to a few particularly

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[3] Criminal Rule 45(a) governs "any period of time specified in these rules, any local rule, or any court order." Before 2002, it applied to "any period of time." Under the proposed amendments scheduled to take effect on December 1, 2009, Criminal Rule 45(a) would explicitly apply to statutory periods, consistent with the way it read before 2002 and consistent with the other sets of Rules.

short statutory time periods, the statute would state that the time period for that statute is to be calculated by excluding intervening weekends and holidays; the time-calculation Rules only apply to a statutory deadline if the statute does not provide its own time-calculation method.

III. The Proposed Amendments to Statutory Provisions

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules concluded that legislation slightly extending the time deadlines in the statutory provisions affecting selected court proceedings should be considered. The proposed amendments and the statutes that would be affected are set out below.

The list is ordered by code provision altered slightly to group related provisions.

Bankruptcy Provisions

1. Certain timing provisions applicable to bankruptcy-related provisions should be changed from 5 to 7 days:

   a. 11 U.S.C. § 109(h)(3)(A)(ii): five-day period concerning debtor's unsuccessful attempt to obtain credit-counseling services.
   b. 11 U.S.C. § 322(a): five-day period within which trustee must file bond.
   c. 11 U.S.C. § 332(a): five-day deadline for United States trustee to appoint consumer privacy ombudsman.
   d. 11 U.S.C. § 342(e)(2): If a creditor specifies an address at which it desires to receive notice in a chapter 7 and 13 case of an individual debtor, that address must be used by the court and the debtor for any notice required to be provided the creditor later than five days after the court and debtor receive the creditor's notice of address.
   e. 11 U.S.C. § 521(e)(3)(B): If a creditor in a Chapter 13 case files a request to receive a copy of the plan filed by the debtor, the court shall make a copy of the plan available to such creditor not later than 5 days after such request is filed.
   f. 11 U.S.C. § 521(i)(2): Provides for dismissal, in certain cases, if an individual debtor fails to file required information within 45 days after filing of the petition; and provides that if a party in interest requests such an order of dismissal, the court shall (subject to certain other provisions) enter the order of dismissal not later than 5 days after such request.
   g. 11 U.S.C. § 704(b)(1)(B): With respect to individual debtors in cases under Chapter 7, United States trustee shall review debtor's filings and file a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and the court shall provide a copy of the statement to all creditors not later than 5 days after receiving it.
   h. 11 U.S.C. § 764(b): With respect to commodity broker liquidations, limits trustee's ability to avoid certain transfers of commodity contracts made before five days after the order for relief.

i. 11 U.S.C. § 749(b): With respect to stockbroker liquidations, limits trustee's ability to avoid certain transfers of securities contracts made before five days after the order for relief.

Criminal Provisions

2. Certain timing provisions applicable to the period between a criminal defendant's initial appearance and the preliminary hearing (and related provisions concerning that phase of a prosecution) should be changed from 10 to 14 days:

a. 18 U.S.C. § 3060(b): preliminary examinations, except in certain circumstances, "shall be held . . . no later than the tenth day following the date of the initial appearance of the arrested person."

b. 18 U.S.C. § 983(j)(3): a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than 10 days after the date on which it is entered."

c. 18 U.S.C. § 1514(a)(2)(C): a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "10 days from issuance."

d. 18 U.S.C. § 1963(d)(2): a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than ten days after the date on which it is entered."

e. 21 U.S.C. § 853(e)(2): "a temporary restraining order under this subsection . . . shall expire not more than ten days after the date on which it is entered."

3. The four-day deadlines in the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that intermediate weekends and holidays are excluded.

a. 18 U.S.C. § 2339B(f)(5)(B)(iii)(I): if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals – (I) shall hear argument . . . not later than 4 days after the adjournment of the trial; . . . ."

b. 18 U.S.C. § 2339B(f)(5)(B)(iii)(III): if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals – (III) shall render its decision not later than 4 days after argument on appeal . . . ."

c. 18 U.S.C. App. 3 § 7(b)(1): in an appeal pursuant to the CIPA statute, "the court of appeals shall hear argument . . . within four days of the adjournment of the trial."

d. 18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to the CIPA statute, the court of appeals "shall render its decision within four days of argument on appeal."

4. CIPA's deadline for taking a pretrial appeal should be changed from 10 to 14 days.

- 18 U.S.C. App. 3 § 7(b) provides that "an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved."

5. The material-support statute's deadline for taking a pretrial appeal should be changed from 10 to 14 days.

- 18 U.S.C. § 2339B(f)(5)(B)(ii) provides that an "appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved."

6. The two-day notice provision in 18 U.S.C. § 1514(a)(2)(E) should be amended to exclude weekends and holidays.

- 18 U.S.C. § 1514(a)(2)(E) provides that "if on two days notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ."

7. The 10-day notice deadline in 18 U.S.C. § 2252A(c) should be changed to 14 days.

- Under 18 U.S.C. § 2252A(c) a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than 10 days before the commencement of the trial." Extending the time for notification to 14 days will conform to the times provided for notice of other defenses. The Criminal Rules Committee has proposed extending the period for such notice under Rule 12.1 (alibi defense) and Rule 12.3 (public-authority defense) to 14 days.

8. The three-day period set by 18 U.S.C. § 3432 should be amended to exclude weekends and holidays.

- Under 18 U.S.C. § 3432 "a person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial."

9. The five-day deadline for applications under 18 U.S.C. § 3509(b)(1)(A) should be changed to 7 days.

- 18 U.S.C. § 3509(b)(1)(A) provides that a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order at least 5 days before the trial date." Extending this period to 7 days will permit adequate time for the party against whom the child would testify to file any objections, and for the court to rule on the request.

10. The 10-day mandamus petition deadline in the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(5), should be changed to 14 days.

- 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. Under the proposed amendment to FRAP 4(b), the defendant's time to appeal would also be extended from 10 to 14 days, so there would be no conflict between the two periods.

Civil Provisions

11. The 10-day period in 28 U.S.C. § 636(b)(1) should be changed to 14 days. This statute applies to objections to a magistrate judge's report and recommendation in criminal proceedings as well as civil proceedings.

- Section 636(b)(1) sets the period for objecting to a magistrate judge's report and recommendation at 10 days. The proposed amendments to Civil Rule 72 and Criminal Rule 59 extend the time from 10 days to 14 days, recognizing that under the present computation method 10 days has always meant at least 14 calendar days. Section 636(b) should be amended to allow 14 days so that the statute and rules continue to operate in harmony.

Appellate Provisions

12. The "not less than 7" day period in 28 U.S.C. § 1453(c)(1) should be changed to "not more than 10" days.

- This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method.

13. The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days.

- This period, which constitutes one of the time limits on making a motion to reopen the time to appeal in a civil case, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(B). The Appellate Rules Committee suggests choosing 14 days as opposed to 10 days, in keeping with the time-computation project's preference for periods that are multiples of 7 days. Lengthening the time period to 14 days would not unduly threaten any principle of repose; a party that wishes to be confident about the expiration of appeal time can protect itself by giving notice of the judgment to other parties.

V. Conclusion

The time-computation rule and statutory changes will benefit the bar and public by standardizing deadlines and making their computation easier. It is important that both the proposed rules and statutory amendments take effect simultaneously. We appreciate your assistance in this important matter.

SUMMARY OF CHANGES IN TIME-COMPUTATION RULES

Days-are-days approach. The current Rules' time-computation approach can be confusing and counterintuitive, because they direct one to omit intermediate weekends and holidays when computing short time periods. Under subdivision (a)(1) of the proposed time-computation rules, all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days – including intermediate weekends and holidays – are counted. However, if the period ends on a weekend or holiday, the deadline falls on the next day that is not a Saturday, Sunday or holiday. (The application of this principle to backward-counted time periods is discussed below.)

Deadlines stated in hours. The current time-computation rules do not specifically discuss periods stated in hours. Such periods are set by some statutes and also may be set by court orders in expedited proceedings. Accordingly, subdivision (a)(2) of the proposed amendments addresses those periods.

Inaccessibility of the clerk's office. Subdivision (a)(3) of the proposed amendments carries forward and refines existing provisions that extend filing deadlines in the event that the clerk's office is inaccessible.

Definition of the "last day." Proposed subdivision (a)(4) defines the end of the "last day" of a filing period. It distinguishes between electronic filing and filing by other means. Proposed Appellate Rule 26(a)(4) adds further distinctions based upon other methods of filing contemplated by the Appellate Rules.

Definition of the "next day," and backward-counted periods. Proposed subdivision (a)(5) explains how to determine the "next day." This definition comes into play when a deadline falls on a weekend or holiday, because subdivision (a)(1) then directs that the deadline continues to run until the "next day" that is not a weekend or holiday. Under subdivision (a)(5), if the deadline is measured after an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count forward. But if the deadline is measured before an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count backward – e.g., from Saturday the 31st to Friday the 30th.

Legal holidays. Proposed subdivision (a)(6) carries forward and refines the time-computation rules' current definition of legal holiday. As under the current rule, the proposed rule defines "legal holiday" to include certain state holidays.

STATUTORY MODEL

A BILL

To make technical amendments to laws containing time periods affecting judicial proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Statutory Time-Periods Technical Amendments Act of 2009'.

SEC. 2. AMENDMENTS RELATED TO TITLE 11, UNITED STATES CODE.

(a) Section 109(h)(3)(A)(ii) is amended by striking '5-day' and inserting '7-day'.

(b) Section 322(a) is amended by striking 'five days' and inserting 'seven days'.

(c) Section 332(a) is amended by striking '5 days' and inserting '7 days'.

(d) Section 342(e)(2) is amended by striking '5 days' and inserting '7 days'.

(e) Section 521(e)(3)(B) is amended by striking '5 days' and inserting '7 days'.

(f) Section 521(i)(2) is amended by striking '5 days' and inserting '7 days'.

(g) Section 704(b)(1)(B) is amended by striking '5 days' and inserting '7 days'.

(h) Section 749(b) is amended by striking 'five days' and inserting 'seven days'.

(i) Section 764(b) is amended by striking 'five days' and inserting 'seven days'.

SEC. 3. AMENDMENTS RELATED TO TITLE 18, UNITED STATES CODE.

(a) Section 983(j)(3) is amended by striking '10 days' and inserting '14 days'.

(b) Section 1514(a)(2)(C) is amended by striking '10 days from issuance' and inserting '14 days from issuance' and striking '10 days or for such longer period' and inserting '14 days or for such longer period'.

(c) Section 1514(a)(2)(E) is amended by inserting ', excluding intermediate weekends and holidays,' after 'two days notice to the attorney for the Government'.

(d) Section 1963(d)(2) is amended by striking 'ten days' and inserting 'fourteen days'.

(e) Section 2252A(c) is amended by striking '10 days' and inserting '14 days'.

(f) Section 2339B(f)(5)(B)(ii) is amended by striking '10 days' and inserting '14 days'.

(g) Section 2339B(f)(5)(B)(iii)(I) is amended by inserting ', excluding intermediate weekends and holidays' after '4 days after the adjournment of the trial'.

(h) Section 2339B(f)(5)(B)(iii)(III) is amended by inserting ', excluding intermediate weekends and holidays,' after '4 days after argument on appeal'.

(i) Section 3060(b)(1) is amended by striking 'tenth day' and inserting 'fourteenth day'.

(j) Section 3432 is amended by inserting ', excluding intermediate weekends and holidays,' after 'three entire days before commencement of trial'.

(k) Section 3509(b)(1)(A) is amended by striking '5 days' and inserting '7 days'.

(l) Section 3771(d)(5)(B) is amended by striking '10 days' and inserting '14 days'.

(m) Section 7(b) of Appendix 3 is amended by striking 'ten days' and inserting 'fourteen days'.

(n) Section 7(b)(1) of Appendix 3 is amended by inserting 'excluding intermediate weekends and holidays,' after 'four days of the adjournment of the trial,'.

(o) Section 7(b)(3) of Appendix 3 is amended by inserting 'excluding intermediate weekends and holidays,' after 'four days of argument on appeal,'.

SEC. 4. AMENDMENT RELATED TO TITLE 21, UNITED STATES CODE.

Section 853(e)(2) is amended by striking 'ten days' and inserting 'fourteen days'.

SEC. 5. AMENDMENTS RELATED TO TITLE 28, UNITED STATES CODE.

(a) Section 636(b)(1) is amended by striking 'ten days' and inserting 'fourteen days'.

(b) Section 1453(c)(1) is amended by striking 'not less than 7 days' and inserting 'not more than 10 days'.

(c) Section 2107(c) is amended by striking '7 days' and inserting '14 days'.

SEC. 6. EFFECTIVE DATE

The amendments made by this Act shall take effect on December 1, 2009.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE****

Rule 6. Computing and Extending Time; Time for Motion Papers

~~(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) *Day of the Event Excluded.* Exclude the day of the act, event, or default that begins the period.~~

~~(2) *Exclusions from Brief Periods.* Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~(3) *Last Day.* Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded,~~

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

~~the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~(4) *"Legal Holiday" Defined.* As used in these rules, "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.~~

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in

any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"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; and

(C) for periods that are measured after an event, any other day declared a holiday by 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 these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

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. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

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). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. 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 the 10-day period not infrequently 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 event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — 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)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers 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 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.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of

the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

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 subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires 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. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, 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. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

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. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district

has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

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). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) 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 event. *See, e.g.*, Rule 59(b) (motion for new trial "must be filed no later than 30 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (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 30 days *after* an event, and the thirtieth 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 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods – *i.e.*, periods that are measured after an event – subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the

clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday – no earlier than Tuesday, April 22.

U.S. Department of Justice

Environment and Natural Resources Division

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

December 22, 2008

The Honorable Lee H. Rosenthal, Chair
Committee on Rules of Practice and Procedure
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2600

Dear Judge Rosenthal,

This letter is to summarize briefly the Justice Department's views on certain proposed changes in time computation. We continue to support the Judiciary's goals to simplify the time computation process. We generally agree that, if correctly coordinated, these changes will provide salutary simplification in administering our judicial system. As we have previously stated, we remain concerned about the interplay between the proposed time computation rule amendments and existing statutory time periods and local rules. Thus, we are gratified by the work the various Rules Committees have done in developing a list of statutory changes to complement the pending rules amendments. As we have noted throughout this process, we see the timely adoption of such statutory changes to be essential. Failure to adopt statutory changes that move in concert with the proposed rule changes will result in exactly the opposite effect of what is intended -- changes to the rules alone will introduce greater confusion rather than desirable simplification. Thus, we commend the Judicial Conference's efforts to secure all necessary statutory adjustments.

If I can be of any further assistance, please feel free to contact me

Sincerely,

Ronald J. Tenpas
Assistant Attorney General

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July 2, 2008

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Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of The United States
Washington, D.C. 20544

Re: ***Request for Comments on Proposed Legislation Extending Statutory Deadlines***

Dear Judge Rosenthal:

This letter responds to the Standing Committee's request for comments on proposed legislation altering deadlines in certain statutes that affect court proceedings. I am current Chair of the Federal Rules of Civil Procedure Committee for the American College of Trial Lawyers and authorized to respond on behalf of the College.

We fully support the proposed changes as they affect the Civil Rules. We have been watching the process that led to the proposed changes for some time and also express our confidence that those affecting Appellate, Bankruptcy and Criminal Rules appear well considered and appropriate.

Very truly yours,

Chris Kitchel
Chair, Committee on Federal Rules of Practice
American College of Trial Lawyers

CK:kle
cc: Mike Stout, President ACTL

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July 30, 2008

The Honorable Lee H. Rosenthal
Chair Committee on the Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Rosenthal:

I am writing to express the support of the Section of Criminal Justice of the American Bar Association for the proposed legislation of Criminal Rule 45(a) of the Federal Rules of Criminal Procedure. The proposed legislation has been referred to the Committee on Rules of Practice and Procedure, and was the subject of a Committee hearing in May of 2008. The views herein are presented on behalf of the Section of Criminal Justice. They have not been approved by the ABA House of Delegates or Board of Governors, and should not be construed as representing the views of the Association.

The proposed legislation amending criminal rule 45(a) will simplify the process of calculating days for court deadlines less than 30 days. The approach titled, "days are days" would use the same method used to calculate longer deadlines by counting all days including holidays and weekends. To prevent time periods becoming shorter the proposed legislation changes 5 day periods to 7 days and 10 day periods to 14 days. If a time period ends on a holiday or a weekend the time period will be extended to the next non weekend or non holiday day. The day of the event that triggers the deadline will not be counted.

The proposed legislation is an attempt to address the inconsistencies in the rules and prevent confusion for all parties involved in criminal litigation. It would create a consistent method for defense attorneys, defendants, prosecutors and the court to calculate deadlines. The rule does not effect sentencing calculations. We believe this to be a neutral constructive approach to eliminating confusion within the criminal justice system, and we therefore support the proposed legislation to the criminal rules of federal procedure.

Sincerely,

Stephen A. Saltzburg

Section of Criminal Justice

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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September 30, 2008

VIA FIRST-CLASS MAIL

Honorable Lee H. Rosenthal
Chair, Standing Committee on Rules
of Practice and Procedure
United States Courthouse
515 Rusk Avenue
Houston, TX 77002

Re: Proposed Legislation Extending Statutory Deadlines

Dear Judge Rosenthal:

The Council of the Section of Litigation of the American Bar Association supports the proposed legislation extending statutory deadlines that you sent to us for comment by memorandum dated June 24, 2008, addressed to Judith A. Miller, then Chair of the Section. Your memorandum thoughtfully explains why the time-computation project and the implementing legislation will benefit the bar and public.

Please let us know if we may be of assistance to the Standing Committee in facilitating the adoption of this legislation.

Respectfully yours,

Robert L. Rothman
Chair, Section of Litigation

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SECTION of LITIGATION

July 24, 2008

By Email: John_Rabiej@ao.uscourts.gov
John K. Rabiej, Esq.
Chief of the Rules Committee Support Office
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544-0001

Comments on Proposed Legislation to Extend Statutory Deadlines

The Council of Appellate Lawyers thanks Judge Rosenthal and the Committee on Rules of Practice and Procedure for inviting comment on the Committee's proposed legislation to extend statutory deadlines that would be affected by implementation of the proposed amendments to federal rules governing the computation of time. While the Council of Appellate Lawyers is primarily concerned with the statutes and rules that govern practice in appellate courts, we believe that the comments expressed below pertain equally to the implementation of the proposed amendments to all of the time computation rules. In particular, we are concerned about the lack of transition rules to govern the computation of time periods in statutes that have not yet been amended to take account of the new time computation rules by the time the amended federal rules become effective.

The proposed change to "days-are-days" computation of all time periods necessitates corresponding lengthening of all prescribed periods of less than 11 days in all the current rules and in all affected statutes. Therefore, we support the Committee's recommended legislation to adjust statutory time periods. In the area of the Council's specific interest, we agree with the Committee's proposed revisions of the periods prescribed in 28 U.S.C. §§ 1453(c)(1) and 2107(c). And, of course, we agree with the proposed textual correction of § 1453(c)(1).

Our concern is that the necessity of these proposed statutory revisions does not guaranty the passage of legislation to implement them in time to become law by the effective date of the proposed amendments to the federal rules; that is, the Committee's goal that the new rules and statutory amendments become effective at the same time may not be met. We have the same concern about whether the circuit courts, district courts, and bankruptcy courts will amend all of their affected rules by that effective date.

The last version of the proposed time computation amendments that we saw was published for comment in August 2007. It did not contain transition rules to govern affected statutes and local rules, perhaps in the expectation that these would all be amended to take effect simultaneously with the amended federal rules. We suggest that the Committee consider a transition rule as a backstop. Many transition formulations can be devised. The least controversial would be transition rules to the effect that until a time period prescribed by a statute or local rule of court has been revised specifically to take account of the amended time computation rules, the time prescribed shall be computed under the present, un-amended version of the applicable rule. Once

all affected statutes and rules have been amended, the federal rules can be amended to delete the transitional provisions.

Based on the same concern, we hope that promulgation of the new time computation rules will be preceded by a comprehensive and detailed campaign to educate judges, clerks, and other personnel in the federal court system. Judges should understand that their routine orders to serve or submit something in 5, 7, or 10 days will immediately become 2–4 days shorter when the amended time computation rules take effect, so they should expand the time periods in their orders accordingly. Further, we hope that this education campaign will encourage time periods that are even multiples of 7 both in local rules and in orders of the court. An unintended effect of the Committee's "days-are-days" approach is the opportunity that it will afford lawyers to time their service or filing of papers to minimize the number of business days that opposing counsel will have to respond. Prescribing time periods that are even multiples of 7 minimizes that possibility. Finally, this educational initiative should also emphasize that although many times computation rules and statutes may have changed, some statutes remain unaffected by the changes pending additional congressional action.

The Council of Appellate Lawyers is a part of the Appellate Judges Conference of the American Bar Association's Judicial Division. The views expressed here are solely those of the Council and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

Respectfully submitted,

Sharon N. Freytag

Sharon N. Freytag
Chair, Council of Appellate Lawyers
Steve Finell
Co-Chair, CAL Rules Committee

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

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

RE: **Sealing Subcommittee**

DATE: **March 9, 2009**

The Sealing Subcommittee is chaired by Judge Harris Hartz and made up of members from each of the Rules Committees and the reporters. Judge James Zagel represents the Criminal Rules Committee.

The Subcommittee has received a research report on the nature of the cases that have been sealed, and is now preparing to move ahead with the following further enquiries:

1. How is sealing requested?
2. How is sealing decided?
    a. Who decides?
    b. Is there an opportunity for public challenge?
3. Is there a record of what is sealed and why?
    a. Is there a public record?
    b. Is there a record on the docket sheet?
4. Are cases unsealed when they no longer need to be sealed?

This subject is on the agenda for the April meeting in Washington as an information item.

4C

United States District Court
Middle District of North Carolina
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and United States Courthouse
Winston-Salem, North Carolina 27101

Chambers of
Russell A. Eliason
Magistrate Judge

Telephone
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January 15, 2008

Honorable Harvey E. Schlesinger
United States District Court
11-150 Bryan Simpson
United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202-4204

Dear Judge Schlesinger:

I have been requested to prepare a response to the January 5, 2009 letter (attached) from Elisebeth C. Cook, Assistant Attorney General, to Peter McCabe in regard to our proposed forms AO102 and AO104 governing applications and warrants for tracking devices. The concerns expressed in the letter were discussed by our Forms Group at the October 15, 2008 meeting. We, nevertheless, decided that the proposed forms would be of substantial benefit to the judges in the field and did not pose the problems envisioned by Ms. Cook.

Ms. Cook's primary concern is that our forms could be used with respect to cell phones. In that instance, the government does not install a piece of tracking equipment to track the person or property. Moreover, the situations referenced by Ms. Cook involve obtaining cell site information under the Pen Register Act. 18 U.S.C. § 3121, et seq., along with consideration of the Stored Communications Act, 18 U.S.C. § 2701, et seq., and the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1002(a)(2). Depending on the information sought, a majority of courts have required the government to show probable cause in order to obtain information approaching real time tracking, while others have required a lesser showing of specific and articulable facts. The recent case of In the Matter of an Application of the United States, Misc. No. 08-308, 2008 WL 5082506 (E.D.N.Y. Nov. 26, 2008) (attached), fairly well sets out the nature of the controversy and the government's position.

The forms do not take sides in this controversy. First, the forms do not restrict themselves to the tracking of cell phones. It was the consensus of the Forms Group that we

should have a form available to agents which would cover all types of tracking, including situations where the subject's own property would be used to continuously track movement of the property, not limited to real time tracking of cell phones but also for GPS devices, like OnStar, or other new technology. These situations are not uncommon and I have personally issued warrants for both of them. Moreover, even the cases espousing the government's position expressed concerned about providing "detailed tracking information that would allow precise tracking of a target inside his or her home" without a showing of probable cause. In the Matter of an Application of the United States, 2008 WL 5082506, at *5.

In constructing the tracking forms, the Forms Group relied heavily on the 2006 amendments to Fed. R. Crim. P. 41. Ms. Cook makes a point that Rule 41(a)(2)(E) uses 18 U.S.C. § 3117 for its definition of what constitutes a tracking device. More specifically, however, the rule relies on 18 U.S.C. § 3117(b). That statute subpart is a definition section and reads as follows:

> As used in this section, the term "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

On its face, § 3117(b) (and by inference, Rule 41) does not restrict a tracking device to only being an electronic device installed by the government. It includes any device, including one owned by the subject. Notwithstanding, there clearly is room for an argument that the statute, as a whole, contemplates that a § 3117 tracking device would be installed by the government. This is so because subsection (a) authorizes usage of such devices within or without the district when a court is "empowered to issue a warrant or other order for the installation of a mobile tracking device" (emphasis added). And, as Ms. Cook points out in an earlier letter, a number of courts have so concluded.[1] However, the specific language adopted from § 3117(b) by Rule 41 does not limit a tracking device to being one installed by the government.

Regardless of the coverage of 18 U.S.C. § 3117, the Forms Working Group decided that the tracking warrant forms, if not explicitly authorized by Rule 41, were not prohibited

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[1] In re Applications, 509 F. Supp. 2d 76, 81 n.11 (D. Mass. 2007); In re Application, 460 F. Supp. 2d 448, 461 (S.D.N.Y. 2006); In re Application, 405 F. Supp. 2d 435, 449 n.8 (S.D.N.Y. 2005).) It may be pointed out that in each of those cases, the issue involved obtaining information from cellular telephone service providers concerning the location of cell site towers used to make phone calls and, therefore, the comments on the proper construction of 18 U.S.C. § 3117 are dicta because the cases do not involve a "tracking device."

and were contemplated by the spirit and purpose of the rule.[2] Moreover, as discussed next, § 3117 was not the only basis for the adoption of the tracking warrant amendments to Rule 41.

The Advisory Committee Notes with respect to the 2006 Amendments to Rule 41 indicate that the new tracking provisions set out in Rule 41(b)(4) are designed to cover searches recognized both by statute (18 U.S.C. § 3117(a)), and by case law, (see e.g., United States v. Karo, 468 U.S. 705 (1984), and United States v. Knotts, 460 U.S. 276 (1983)). The Notes point out that "warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy." 2006 Advisory Notes. These same concerns are not lessened merely because the government may be using a subject's own personal property for the purposes of tracking. In other words, there are two privacy concerns when issuing a tracking warrant. The first is the installation of a device on or into someone's personal property. The second is the actual tracking when done in an area where there is a reasonable expectation of privacy. Our proposed forms attempt to cover both of these areas of concern. We felt this decision was in conformance with the Advisory Committee Notes, which stated for the subdivision (b) amendments: "The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device." Id.

The Advisory Committee, like the Forms Group, did not intend to take sides on the issue of when a probable cause warrant is necessary for tracking. Rather, the purpose of the amendments to Rule 41 was to make sure that officers have a procedure available to them when the officer wants to use a warrant. The Advisory Committee Notes state:

> The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain a warrant.

In the same way, the Forms Working Group does not see the proposed tracking forms to be an instruction to judges as to when warrants are required for tracking devices. In fact, such an intention would be futile because, as the Advisory Committee recognizes, the officer need not and will not obtain a warrant unless he or she determines that a privacy issue is involved. But, if the officer determines that obtaining a warrant would be prudent, then our forms, as with the amendments to Rule 41, simply give the added assurance to the

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[2]The All Writs Act, 28 U.S.C. § 1651, was also considered as a source of authority, but the Group decided that the Act need not be cited.

officer, "[t]hat if probable cause is shown, the magistrate judge must issue the warrant" (emphasis added). Id.

Ms. Cook also points to the specific language of Rule 41(b)(4), which states that a magistrate judge in the district "has authority to issue a warrant to install" a tracking device for use both within and without that district. She notes that our proposed tracking warrant does not require installation, but merely the execution of the warrant to initiate tracking. Again, Rule 41(b)(4) was not viewed by the Forms Group as restricting issuance of warrants to those which require installation. Rather, the important part of the (b)(4) authorization is that the device can be used within and outside of the district, or both.

In summation, the Forms Group does not believe that the tracking warrant forms in any way reflect a "legal position." Instead, we regard our role as providing necessary tools to officers and judges to the extent that the officers determine that such tools are necessary to their investigation. We feel that the forms are well within the type of warrants contemplated by Rule 41, and that immediate publication of them will be of assistance to judges who have expressed a need for such forms and are confronted by requests for such warrants from federal agents.

Sincerely yours,

Russell A. Eliason

Russell A. Eliason

RAE/bab
Attachments (2)

cc: Peter G. McCabe
Timothy K. Dole

Westlaw.

Slip Copy
Slip Copy, 2008 WL 5082506 (E.D.N.Y.)
(Cite as: 2008 WL 5082506 (E.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. New York.

In the Matter of an Application of the UNITED STATES of America for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices.

Misc. No. 08-308.

Nov. 26, 2008.

Shreve Ariail, United States Attorneys Office, Brooklyn, NY, for Plaintiff.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, District Judge.

*1 This matter comes before the court as an appeal of Magistrate Judge James Orenstein's June 11, 2008 Amended Orders, in which Judge Orenstein authorized the issuance of two pen registers under the Pen Register and Trap and Trace Statute, 18 U.S.C. §§ 3121 *et seq.* ("Pen Register Statute"). In the Government's view, Judge Orenstein's denial of its request for post-cut-through dialed digits [FN1] along with other "significant caveats" in the Amended Orders effectively denied its application. (*See* Government's Appeal to the District Court, dated June 23, 2008 ("Gov.Br.") at 7, 9.) [FN2] In addition to its appeal of Judge Orenstein's decision, the Government has made a supplemental application directly to this court requesting prospective cell-site information which it did not request in its initial application before Judge Orenstein. (Government's Aug. 19, 2008 letter to the court, exhibit A.)

FN1. As discussed below, post-cut-through dialed digits are digits that are dialed from a telephone after a call is connected or "cut through."

FN2. The court is aware that all the Government's submissions have been filed *ex parte* and under seal in order to protect sensitive law enforcement information contained therein. It is necessary, however, for the court to set forth certain information stated therein. Thus, the court will refer to the Government's submissions throughout this opinion as necessary, but will not recount information from those submissions that might compromise the Government's investigatory techniques and procedures in general or divulge the details of the investigatory efforts in this case in particular.

As a result of several submissions made to this court by the Government, the legal issues presented by Judge Orenstein's "effective" denial of the Government's application are now moot. Therefore, the only significant legal issues presented here concern the Government's supplemental application for prospective cell-site information. Because of the complexity and significance of these legal issues, the court invited the Electronic Frontier Foundation ("EFF") to submit a memorandum of law as *amicus curiae.*

I. Judge Orenstein's Amended Orders

On June 11, 2008, the Government applied to Judge Orenstein for authorization to install and use a pen register and trap and trace device on two wireless telephones (the "SUBJECT WIRELESS TELEPHONES"). (Gov. Br. at 5.) The Government requested, *inter alia,* an Order authorizing the recording of post-cut-through dialed digits ("PCTDD") via pen register. PCTDD are digits dialed from a telephone after a call is connected or "cut through." *In the Matter of Applications,* 515 F.Supp.2d 325, 328 (E.D.N.Y.2007) ("Azrack Opinion"). Because PCTDD sometimes transmit information such as bank account numbers and Social Security numbers which constitutes "contents of communications," and because the Pen Register

Statute defines a pen register as "a device or process which *records or decodes* dialing ... or signaling information ... provided, however, that *such information shall not include the contents of any communication,*"18 U.S.C. § 3127(3) (emphasis added), Judge Orenstein denied the Government's request for authorization to record PCTDD. The Government subsequently appealed Judge Orenstein's denial of its request to this court, asking this court to authorize it to record PCTDD.

On September 23, 2008, in response to the court's request for clarification of the specifics of its request for pen register data, the Government informed the court that the law enforcement agency involved in the investigation of the SUBJECT WIRELESS TELEPHONES will configure its computers so as to immediately delete all PCTDD received from the provider. (Government's September 23, 2008 letter to the court.) Therefore, as the pen registers sought by the Government in this application will not "record" or "decode" content within the meaning of the Pen Register Statute, the legal question presented by the Government in its appeal is moot.[FN3]As the Government is entitled to the information it now seeks, the court directs the Magistrate Judge to issue, if still necessary, an order authorizing the installation of the pen registers on the SUBJECT WIRELESS TELEPHONES that is consistent with the representations in the Government's letter of September 23, 2008.

> FN3. It is irrelevant that the provider will forward PCTDD to the Government and that the Government will therefore be able, if it violates the court order, to record and decode it. The court trusts that the Government does not violate court orders. In any case, Congress, in Title III, has clearly expressed its belief that the Government can without supervision limit its investigatory activities so as to protect the constitutional rights of suspects. *See*18 U.S.C. § 2518(5) (every order "shall contain a provision that the authorization to intercept shall be ... conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.")

II. The Government's Request for Prospective Cell-Site Information

*2 On August 19, 2008, after it appealed Judge Orenstein's Amended Orders, the Government made a supplemental application to this court for prospective cell-site information.[FN4](Government's August 19, 2008 letter to the court, ex. A.) In its application, the Government seeks prospective cell-site information pursuant to the so-called "hybrid theory," under which the Government argues that it is authorized to receive cell-site information pursuant to the combined authority of the Pen Register Statute and the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.* Many district and magistrate judges around the country have considered this theory. Courts are divided, with a majority denying the Government's requests. *See In the matter of the Application,* 534 F.Supp.2d 585, 599-600 (W.D.Pa.2008) ("Lenihan Opinion") (collecting cases), *aff'd,* 2008 WL 4191511 (W.D.Pa. Sep.10, 2008). This court joins the minority of courts in concluding that the Government may obtain, without a showing of probable cause, the cell-site information it requests pursuant to the combined authority of the Pen Register Statute and the SCA.

> FN4. As discussed below, cell-site information is information that discloses which antenna towers are receiving signals from a particular cellular telephone at any point in time when the cellphone is powered on. If received on a prospective basis, this information can be used to track the location of the cellphone and its user in the future. Historical cell-site information, on the other hand, can be used to track the previous movements of a cellphone and its user. Judge Orenstein granted the Government's

request for historical cell-site information in his June 11, 2008 Amended Orders. (*See* Sealed Order of Authorization (Gov.Br., ex. D) at 2-3, 5.)

A. *The Hybrid Theory*

When a cellular telephone is on, regardless of whether it is making or receiving a voice or data call, it "periodically transmits a unique identification number to register its presence and location in the network." *In re Application,* 460 F.Supp.2d 448, 450 (S.D.N.Y.2006) ("Kaplan Opinion"). This signal, as well as the signals associated with calls made by that phone, is received by every antenna tower within range of the phone. *Id.* The general location of the phone can then be determined based upon the location of the antenna tower receiving these signals, sometimes "with a fair degree of precision" if they are received by two or more antenna towers simultaneously.*Id.* at 451.[FN5]Cellular telephone service providers record the identity and location of the antenna towers receiving signals from each phone, regardless of whether those phones are making voice or data calls, in order to determine whether roaming charges apply and in order to track call volume by location. *Id.* For obvious reasons, such information, known as cell-site information, is also useful to the Government as an investigatory tool. *Id.* at 451-52.

FN5. Current technology allows tracking of a cellphone's location using cell-site information to within fifty feet. Lenihan Opinion, 534 F.Supp.2d at 602.

Under the hybrid theory, the Government contends that the Pen Register Statute, which provides it with the authority to install and use a pen register, defined as "a device or process which records or decodes ... signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted,"*see*18 U.S.C. 3127(3), also allows it to receive cell-site information. *See In re Application,* 405 F.Supp.2d 435, 438-39 (S.D.N.Y.2005) ("Gorenstein Opinion"). The Government concedes, however, that it may not obtain cell-site information under the authority of the Pen Register Statute alone because of an exception contained in the Communication Assistance for Law Enforcement Act ("CALEA") of 1994, which requires telecommunications carriers to ensure that their equipment is capable of providing law enforcement agencies with information to which they may be entitled under statutes relating to electronic surveillance. *Id.* at 440.In relevant part,

> *3 a telecommunications carrier shall ensure that its equipment, facilities, or services ... are capable of expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the carrier *...except that, with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of Title 18), such call-identifying information shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number).*

47 U.S.C. § 1002(a)(2) (emphasis added).[FN6]

FN6. As Magistrate Judge Gorenstein has pointed out, this exception clause reflects the underlying assumption that "physical location data *would* have been obtainable under the Pen Register Statute in the absence of the exception clause. Otherwise, it would have been unnecessary to add the exception clause at all." *Gorenstein Opinion,* 405 F.Supp.2d at 440 (emphasis in original). Judge Gorenstein has also noted that, notwithstanding the fact that the operative definition of a pen register at the time CALEA was enacted did not seem to include cell-site information, the legislative history of Section 1002 suggests that Congress thought such information was avail-

> able under the Pen Register Statute at the time it enacted the exception clause. *Id.* at 441 & n. 4.

As the argument goes, Congress's use of the word "solely" in this exception means that, while the Government may not obtain cell-site information under the authority of the Pen Register Statute alone, it may obtain cell-site information pursuant to the Pen Register Statute and some other, albeit unnamed, statute. *See Gorenstein Opinion,* 405 F.Supp.2d at 440-42. More specifically, some courts have suggested that Section 1002's use of "solely" was predicated on a desire not to preclude the Government from seeking cell-site information, but rather on a desire to impose "an authorization requirement different from that minimally necessary for use of pen registers and trap and trace devices."*See, e.g. id.* at 443 (*quoting United States Telecom Ass'n v. F.C.C.,* 227 F.3d 450, 463 (D.C.Cir.2000) (approving the FCC's interpretation of the statutory language in this manner). The Government argues that Section 2703 of the SCA is an appropriate mechanism to "combine" with the Pen Register Statute to allow the Government to obtain cell-site information.

Sections 2703(c)(1) and 2703(d) of the SCA provide that a "governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)," provided the governmental entity "offers specific and articulable facts showing that there are reasonable grounds to believe that ... the records or other information sought are relevant and material to an ongoing criminal investigation."[FN7]An electronic communication service is "any service which provides to users thereof the ability to send or receive wire or electronic communications."18 U.S.C, § 2510(15). The phrase "electronic communication" means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce."18 U.S.C. § 2510(12). However, "electronic communication ... does not include ... any communication from a tracking device,"18 U.S.C. § 2510(12)(C), which is defined in Section 3117(b) of Title 18 as any "electronic or mechanical device which permits the tracking of the movement of a person or object."

> FN7. The SCA's requirement of specific and articulable facts showing reasonable grounds is higher than the Pen Register Statute's requirement that an attorney for the Government certify that the information "likely to be obtained is relevant to an ongoing criminal investigation being conducted."18 U.S.C. § 3122(b)(2).

*4 As noted above, many cases have considered the exact issue before this court. Having reviewed the statutory framework, the decisions granting and denying such requests, and the legislative history of the statutes, I find persuasive the detailed analysis contained in Magistrate Judge Gorenstein's and Judge Kaplan's opinions from the Southern District of New York. I am particularly persuaded that the use of the term "solely" in Section 1002 of CALEA is intended to guard against obtaining cell-site information under the Pen Register Statute's minimal "relevant to an ongoing criminal investigation" standard, rather than to prohibit obtaining cell-site information completely. The SCA provides such a standard by requiring the Government to present "specific and articulable facts" in support of applications requesting cell-site information.

In addition, I am persuaded that the definition of the phrase "electronic communication" in the SCA, which excludes information from a tracking device, is immaterial to the question of whether the Government may obtain "a record or other information pertaining to a subscriber or customer of" such an electronic communication service under Section 2703 of the SCA. I agree with Judges Kaplan and Gorenstein that "record or other information" are

the relevant terms in Section 2703, that cell-site information clearly qualifies as "information," [FN8] and that the term "electronic communication service" has a meaning independent of the meaning of "electronic communication." *See Kaplan Opinion,* 460 F.Supp.2d at 460 & n. 55. This is in contrast to those courts that agree with the Kaplan/Gorenstein analysis to this point, but then conclude that, because the definition of "electronic communication" excludes information from a tracking device, cell-site information cannot be the kind of "record or other information" accessible under Section 2703. *See, e.g., In the Matter of the Application,* 497 F.Supp.2d 301, 311 (D.P.R.2007) (rejecting Judge Kaplan's approach and concluding that "the court would have to judicially amend the statute to remove the definition of 'electronic communication' found at Section 2510(12) for the tracking device exception *not* to apply ... I cannot prune the definition of 'electronic communication' from 'electronic communication service.' ")

> FN8. EFF argues in its *amicus* brief that prospective cell-site information is not a "record or other information" within the meaning of Section 2703(c), because those terms refer to already-existing "historical" data. (EFF Brief at 25-28.) The prospective cell-site information sought by the Government, however, becomes a "historical record" as soon as it is recorded by the provider. Because the SCA in no way limits the ongoing disclosure of records to the Government as soon as they are created, the cell-site information the Government seeks is subject to disclosure to the Government pursuant to Section 2703(c).

Judge Kaplan opines that incorporating the definition of "electronic communication" into the term "electronic communications service" would have unintended consequences because the term "electronic communication" excludes *"any* communication from a tracking device, not just those communications that permit tracking." *Kaplan Opinion,* 460 F.Supp.2d at 460 & n. 55. Applying this definition, any information a cellphone provides to a telecommunications carrier would not qualify as "electronic communication," rendering such carriers not an "electronic communication service." *Id.* The result of a telecommunications carrier not qualifying as an "electronic communication service," Judge Kaplan concludes, is that the carrier "would have no obligation to disclose *any* information to the government under Section 2703(c). Accordingly, this reading virtually eviscerates Section 2703(c)."*Id.*This unintended consequence lends substantial support to the conclusion that the definition of "electronic communication" does not apply to Section 2703.

*5 An argument made by EFF that has not been considered in the previous decisions adopting the Government's hybrid theory is that the doctrine of constitutional avoidance compels its rejection. Under this doctrine, a court "should construe an ambiguous statute to avoid constitutional problems if a viable alternative interpretation exists." *United States v. Awadallah,* 349 F.3d 42, 55 (2d Cir.2003).

> [I]t is a cardinal principle of statutory interpretation ... that when an Act of Congress raises a serious doubt as to its constitutionality, [courts should] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Zadwdas v. Davis, 533 U.S. 678, 689, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (internal citations omitted).

It is clear that the hybrid theory is not the only way that the Pen Register Statute and the SCA may be construed. *See In the Matter of the Application,* 415 F.Supp.2d 211, 214 (W.D.N.Y.2006) (the hybrid theory "simply is not found in the plain language of any of the three statutes upon which the government relies"). Moreover, Congress has not provided the kind of guidance as to the correct manner of combining the Pen Register Statute with the SCA that might be expected if Congress inten-

ded such a combination. *See Gorenstein Opinion*, 405 F.Supp.2d at 443 ("The idea of combining some mechanism with as yet undetermined features of the Pen Register Statute is certainly an unattractive choice. After all, no guidance is provided as to how this 'combination' is to be achieved."); *Kaplan Opinion*, 460 F.Supp.2d at 461 (noting that the statutes' lack of any direct authorization for the combination of authority the Government proposed, while not fatal to the Government's application, was "somewhat troubling"). Therefore, if the court had serious doubts as to the constitutionality of the SCA and the Pen Register Statute, as construed using the hybrid theory, the court would be compelled by the doctrine of constitutional avoidance to reject the hybrid theory.

The interesting aspect of EFF's argument is that the "serious doubts" EFF is concerned about arise not in the present case, but in a hypothetical future case in which the Government might, pursuant to the hybrid theory, request far more detailed tracking information that would allow precise tracking of a target inside his or her home. According to EFF, the hybrid theory, so applied, would be unconstitutional because it would contravene the holding of the Supreme Court in *United States v. Karo*, 468 U.S. 705, 714-18, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), prohibiting warrantless location tracking of a person inside the person's home. (EFF Br. at 35.) The specter of such precise location tracking does not loom over this case, because the Government is seeking only information identifying the one antenna tower (and portion of such tower) receiving transmissions from the SUBJECT WIRELESS TELEPHONES at the beginning and end of calls made from those phones. (Government's Aug. 19, 2008 letter to the court, exhibit A.) Such information, unlike the information revealed by triangulation or by more advanced communications devices like the iPhone, which contain Global Positioning System devices, is not precise enough to enable tracking of a telephone's movements within a home. EFF argues, however, that this court should take into account in this case the possibility that in future cases the hybrid theory could be used to justify the disclosure of more precise tracking information.

*6 In *Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), the Supreme Court held that the serious constitutional doubts triggering application of the doctrine of constitutional avoidance need not arise in the controversy before the court:

> It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern ... In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail-whether or not those constitutional problems pertain to the particular litigant before the Court.

(internal citations omitted).

In *Clark*, the Supreme Court considered a statute, Section 1231(a)(6) of Title 8, which allows for the continued detention of an inadmissible alien subject to a removal order after a 90-day period in which the Secretary of Homeland Security is supposed to remove the alien from the United States has elapsed. In *Zadvydas*, an earlier case, the Supreme Court, considering aliens who had been admitted to the United States before later being ruled inadmissible, construed the statute so as to allow such continued detention only while removal was still reasonably foreseeable. 533 U.S. at 689-90. This construction, the Supreme Court held, was required by the doctrine of constitutional avoidance. *Id.* In *Clark*, the Supreme Court considered the application of the same statute to aliens who had never been admitted to the United States. 543 U.S. at 378. Even though such an application arguably did not give rise to serious constitutional doubts, the Court held that the same statute could only have one con-

struction, and therefore that a court applying the doctrine of constitutional avoidance had to consider the universe of possible applications of the statute in question, not only the application of the statute in the present cause. *Id*

The court finds, for several reasons, that *Clark v. Martinez* is inapposite here. First, the hypothetical situation creating constitutional problems is far more hypothetical in the present case than in *Clark*. Whereas the statute considered in *Clark* and *Zadvydas* by its terms explicitly applied both to aliens previously found admissible and aliens who had never been found inadmissible, and it was clear that the statute would routinely be applied to both groups of aliens, here there is no assurance that a court will ever be confronted with an application that would present serious constitutional problems. It is entirely in the Government's discretion to determine the scope of the disclosure of information it seeks, and the Government may very well restrict itself to single-tower location information, like that sought in the present case, which would never allow tracking precise enough to lead to constitutional problems.

*7 Second, applications under the Pen Register Statute and the SCA, which directly implicate Fourth Amendment concerns, are uniquely suited to case-by-case decision. Whereas an alien can be detained under Section 1231(a)(6) upon an exercise of discretion of the Secretary of Homeland Security, each application for disclosure under the hybrid theory must be approved by a federal judge-an official uniquely suited to consider constitutional problems and to limit possible future unconstitutional investigatory intrusions by the Government. *See* 18 U.S.C. § 2703(d) (requirements for court under under SCA); 18 U.S.C. § 3122 (application for a judicial order authorizing the installation and use of a pen register). In *Sibron v. United States,* the Court has noted that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." 392 U.S. 40, 60 (1968).[FN9] Given this background principle of Fourth Amendment jurisprudence, the court declines to rule preemptively that a whole class of warrantless searches is constitutionally invalid.

> FN9. The court in *Sibron* expressly distinguished "the question of the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances," which it suggested, citing *Bereer v. New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), was a proper focus of a facial attack. As Congress has not here demonstrated its intention to promulgate a general statute purporting to authorize, without regard to constitutionality, all types of location tracking, the court does not believe that it is proper to consider the constitutionality of the hybrid theory "on its face." Such consideration is more properly undertaken incrementally, as judges exercise their authority to determine the constitutionality of discreet applications made by the Government pursuant to the hybrid theory.

Third, in a field like search and seizure law, where lawmakers are continually struggling to update legislation to cope with changing technology, the presumption, inherent in the doctrine of constitutional avoidance, that Congress did not intend to promulgate legislation which "raises serious constitutional doubts," *see Clark,* 543 U.S. at 381, has little applicability. At the time that Congress promulgated the Pen Register Statute and the SCA, it could only speculate as to the changing technology which might increase the universe of information available to the Government under those acts. Congress therefore wisely made disclosure under both of those acts subject to the interposition of a judicial official, who could make sure that the Government's requests complied both with constitutional and statutory prerequisites.

Although I understand the hesitance of some judges

to grant the Government's requests because of the lack of any express indication that the Pen Register Statute should be combined with the SCA, I am satisfied that CALEA clearly contemplates some combination of the Pen Register Statute and an additional statute to allow the Government to access and retrieve the cell-site information requested in this application. This conclusion is buttressed by Congress's most recent indication of its intent with respect to cell-site information, namely that its inclusion of "signaling information" in the Pen Register Statute's 2001 revision of the definition of a pen register contemplates giving the Government access to cell-site information. *See Gorenstein Opinion,* 405 F.Supp.2d at 438-49;*see also United States Telecom Ass'n,* 227 F.3d at 463-64 (holding that cell-site information constitutes "signaling information"); *Kaplan Opinion,* 460 F.Supp.2d at 456 (presuming that Congress knew when it added the term "signaling information" to the definitions of pen registers and trap and trace devices in 2001 that the D.C. Circuit had interpreted that term to include cell-site information a year earlier). Congress's lack of clarity as to the appropriate mechanism and standard the Government must meet in order to obtain cell-site information is less troubling inasmuch as it has made clear that the Government should be able to obtain cell-site information by some mechanism. Furthermore, as Judge Kaplan points out, the Pen Register Statute and the SCA have "interconnected histories"-Congress enacted both in 1986 as part of the Electronic Communications Privacy Act and amended both with CALEA in 1994-which suggests that it is not unreasonable to use them in conjunction even in the absence of a specific directive from Congress to do so. *See Kaplan Opinion,* 460 F.Supp.2d at 461.

***8** Having reached this conclusion, I join in Judges Gorenstein's and Kaplan's concern, not to mention the concern of those judges denying the Government's requests, over Congress's lack of clear guidance on this issue. *See Gorenstein Opinion,* 405 F.Supp.2d at 443 ("The idea of combining some mechanism with as yet undetermined features of the Pen Register Statute is certainly an unattractive choice. After all, no guidance is provided as to how this 'combination' is to be achieved."); *Kaplan Opinion,* 460 F.Supp.2d at 461 (noting that the statutes' lack of any direct authorization for the combination of authority the Government proposed, while not fatal to the Government's application, was "somewhat troubling"). I also join in suggesting that Congress "may wish to consider whether this result is consistent with its intention." *Kaplan Opinion,* 460 F.Supp.2d at 450. District courts across the country are divided on an issue that requires balancing the Government's investigatory needs with citizens' right to privacy. Absent clarity from Congress, this division and inconsistency in outcomes will continue because the issue is one about which reasonable judges can, and obviously do, disagree.

Based upon the foregoing conclusions, I grant the Government's application for cell-site information. It has presented, under seal, specific and articulable facts showing reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation. *See*18 U.S.C. 2703(d). This Order authorizes telephone service providers to provide the Government with information which identifies the antenna tower receiving transmissions from the SUBJECT WIRELESS TELEPHONES at the beginning and end of a particular call made or received by the SUBJECT WIRELESS TELEPHONES' users, including information on what portion of that tower is receiving a transmission at the beginning and end of a particular call. This Order does not permit the Government to receive triangulation information or location information other than that transmitted at the beginning and end of particular calls. Additionally, for the reasons stated in Part I of this Memorandum and Order, the court directs the Magistrate Judge to issue, if still necessary, an Order authorizing the installation of the pen registers on the SUBJECT WIRELESS TELEPHONES that is consistent with the representations in the Government's letter of September 23, 2008.

SO ORDERED.

E.D.N.Y.,2008.
In re U.S.
Slip Copy, 2008 WL 5082506 (E.D.N.Y.)

END OF DOCUMENT

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

January 5, 2009

Peter McCabe
Assistant Director, Office of Judges Programs
Administrative Office, U.S. Courts
Washington, D.C. 20544

Dear Mr. McCabe:

We appreciate the opportunities you have given the Department of Justice to review the proposed revisions to the criminal forms developed by the Forms Working Group of the Administrative Office of the U.S. Courts. We also appreciate the fact that the Working Group has taken many of our suggestions and incorporated them into the forms. We believe the revised forms are generally far improved and that they will improve the administration of justice in the federal courts.

We remain concerned about the forms governing tracking devices, however, for the reasons we expressed in our correspondence of September 18, 2008. We understand that proposed forms 102 and 104, governing applications and warrants for tracking devices, may soon be distributed for use throughout the country. With the amendment of Rule 41 in 2006 to include express provisions for the use of tracking devices, as defined in 18 U.S.C. § 3117, it is certainly appropriate to develop standard forms for that purpose. However, the proposed forms purport on their face to cover not only "tracking devices," but also other objects falling outside the scope of that statutorily defined term. We believe that this additional language is not appropriate in light of the different positions taken by various courts regarding the proper authorities for governmental acquisition of cell phone location information. Simply put, because the question of whether certain objects are in fact "tracking devices" within the meaning of Rule 41 is still the subject of extensive debate and litigation in the courts, we believe it would be inappropriate for the forms to reflect a legal position that has not been adopted by all courts.

In addition, we are concerned that the forms deviate from the express language of the Rule with respect to the installation of a tracking device. Under Rule 41(b)(4), a court has authority to issue a warrant for installation of the device within the district, as well as for tracking thereof both within and outside the district. The proposed forms, however, condition the court's authority on the "execution" of the warrant occurring within the district. We believe that this term, as well as the suggestion -- in Form 104's section for return to the court -- that there can be a "Tracking Warrant Without Installation," deviates from the express wording of the Rule in a manner that will lead to confusion and misapplication.

We believe these issues are of sufficient seriousness that further discussions should take place before the two forms are distributed for public use. We would appreciate the opportunity to sit down to discuss these matters further with you. In addition, you may want to consider referring these forms and issues to the Advisory Committee on the Criminal Rules, the Judicial Conference Committee responsible for overseeing and amending the Federal Rules of Criminal Procedure. The Advisory Committee could fully consider these matters at its next meeting and could make a recommendation to the Forms Working Group as to whether additional changes to the forms are warranted.

Thank you for your consideration, and we look forward to hearing from you soon.

Sincerely,

Elisebeth C. Cook

Elisebeth C. Cook
Assistant Attorney General

UNITED STATES DISTRICT COURT

for the

In the Matter of the Tracking of
(Identify the person to be tracked or describe the object or property to be used for tracking)

) Case No.

APPLICATION FOR A TRACKING WARRANT

I, a federal law enforcement officer or attorney for the government, have reason to believe that the person, property, or object described above has been and likely will continue to be involved in one or more violations of ____ U.S.C. § _____. Therefore, in furtherance of a criminal investigation, I request authority to install and use a tracking device or use the tracking capabilities of the property or object described above to determine location. The application is based on the facts set forth on the attached sheet.

- ❒ The person, property, or object is located in this district.
- ❒ The person, property, or object is not now located in this district, but will be at the time of execution.
- ❒ The activity in this district relates to domestic or international terrorism.
- ❒ Other:

The tracking will likely reveal these bases for the warrant under Fed. R. Crim. P. 41(c): *(check one or more)*

- ❒ evidence of a crime;
- ❒ contraband, fruits of crime, or other items illegally possessed;
- ❒ property designed for use, intended for use, or used in committing a crime;
- ❒ a person to be arrested or a person who is unlawfully restrained.

❒ I further request, for purposes of installing, maintaining or removing the tracking device, authority to enter the following vehicle or private property, or both:

❒ Delayed notice of ____ days (give exact ending date if more than 30 days: _____) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

_____
Applicant's signature

_____
Applicant's printed name and title

Sworn to before me and signed in my presence.

Date: _____

_____
Judge's signature

City and state: _____

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

In the Matter of the Tracking of *(Describe the object or property to be used for tracking)*	)	
	)	Case No.
	)	

ORDER REQUIRING ASSISTANCE IN EXECUTING A TRACKING WARRANT

(Under Seal)

To:

An application has been made by a federal law enforcement officer or an attorney for the government to direct you to provide facilities or other assistance, or both, in executing the tracking warrant issued in this case. The court finds the assistance to be necessary.

IT IS ORDERED: You and your agents and employees must provide assistance in executing the tracking warrant to the following government agency and agents, _____,

by providing facilities and installing, operating, and monitoring any tracking devices or also by _____

_____

during the time allowed by the tracking warrant. You may be compensated for reasonable expenses incurred in providing facilities and assistance.

This order is **sealed**. You and your agents and employees must not disclose the existence of this order, of the tracking warrant, or of the investigation to any person until the person whose object or property was tracked has been notified by the government or until authorized to do so by the court.

Date: _____

_____

Judge's signature

_____

Printed name and title

UNITED STATES DISTRICT COURT

for the

In the Matter of the Tracking of
(Identify the person, property, or object to be tracked)

Case No.

TRACKING WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government shows there is reason to believe that the person, property, or object described above has been involved in and likely will continue to be involved in the criminal activity identified in the application, and ❒ is located in this district; ❒ is not now located in this district, but will be at execution; ❒ the activity in this district relates to domestic or international terrorism; ❒ other: _____.

I find that the affidavit(s), and any recorded testimony, establish probable cause to believe that
(check the appropriate box) ❒ using the object ❒ installing and using a tracking device
to monitor the location of the person, property, or object will satisfy the purpose set out in Fed. R. Crim. P. 42(c) for issuing a warrant.

❒ I find entry into the following vehicle or onto the following private property to be necessary without approval or knowledge of the owner, custodian, or user of the vehicle or property for installing, maintaining, and removing the tracking device:

YOU ARE COMMANDED to execute this warrant and begin using the object or installing the tracking device within ten days from the date of this order and may continue use for 45 days. The tracking may occur within this district or another district. To install, maintain, or remove the device, you may enter *(check boxes as appropriate)*

❒ into the vehicle described above ❒ onto the private property described above

❒ in the daytime only *(i.e., 6:00 a.m. to 10:00 p.m.)*. ❒ at any time of day or night because good cause has been established.

Within 10 calendar days after the use of the tracking device has ended, the officer executing this warrant must both return it to United States Magistrate Judge *(name)* _____ and — unless delayed notice is authorized below — serve a copy of the warrant on the person who, or whose property or object, was tracked.

❒ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property or object, will be tracked *(check the appropriate box)* ❒ for ____ days *(not to exceed 30)*

❒ until, the facts justifying, the later specific date of _____ .

Date and time issued: _____

Judge's signature

City and state: _____ _____

Printed name and title

Case No.

Return of Tracking Warrant With Installation

1. Date and time tracking device installed:

2. Dates and times tracking device maintained: _____

3. Date and time tracking device removed: _____

4. The tracking device was used from *(date and time)*. _____

   to *(date and time)*: _____.

Return of Tracking Warrant Without Installation

1. Date warrant executed: _____

2. The tracking information was obtained from *(date and time)*: _____

   to *(date and time)*: _____.

Certification

I declare under the penalty of perjury that this return is correct and was returned along with the original warrant to the designated judge.

Date: _____

Executing officer's signature

_____

Printed name and title

Tracking Warrant Forms

At the July 2008 meeting of the Forms Working Group, three new draft forms pertaining to tracking devices were considered. The Group requested the views of the Magistrate Judges Advisory Group concerning these forms at the Advisory Group's meeting in September 2008.

A. Background

The Forms Working Group asked the Advisory Group for comments concerning three proposed forms for use when the government seeks to use a tracking device.

AO 102: Application for a Tracking Order

AO 103: Order Requiring Assistance in Executing a Tracking Warrant (Under Seal)

AO 104: Tracking Warrant

All three proposed forms are set forth in Attachment I.

B. View of the Magistrate Judge Advisory Group

It was the consensus view of the Advisory Group that the proposed forms were needed. During discussion of the draft tracking form, AO 104 form, members of the Advisory Group suggested that the term "Private property generally open to the public" in the second sentence of the second paragraph was confusing and might need to be further defined or otherwise re-drafted. In addition, members of the Group further suggested that the check-off boxes following the paragraph that begins, **"YOU ARE COMMANDED..."** were unnecessary and might be omitted from the form.

C. Additional Magistrate Judge Comments on Tracking Warrant Forms

On August 21, 2008, Magistrate Judge Bernard Zimmerman, CA(N), submitted the following comment concerning the proposed tracking warrant forms:

> With respect to tracking [beeper] warrants, what is the authority for covert entry. The only authority of which I am aware, eg. US v Karo, 465 US 705, approves beepers installed without breaking into the vehicle. I have had several applications for covert entry which I have denied subject to the gov't providing authority for covert entry. It never has.

On August 25, 2008, Judge Eliason provided the following response to Judge Zimmerman's question:

I also do not know of any explicit case-decision authority providing (or rejecting) authorization to enter a vehicle in order to install a tracking device, and in particular with respect to the new procedures of Rule 41. In making the forms, we look to the language of the rules and any interpretations of them. We have taken the view that there is authority to enter when the tracking device is installed via the Rule 41 process because the rule authorizes the nonconsensual entry onto or into private property. For this we have relied on the 2006 Advisory Committee Notes for Rule 41 which state in pertinent part discussing Subdivision (b): "The magistrate judge's authority under this rule includes the authority to permit entry into an area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. ... The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so." And in Subdivision (d) the committee states: "And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) ... ."

Of course advisory committee notes are just that and your question remains a good one and we will keep it in mind.

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Tracking of *(Identify the person to be tracked or describe the property to be used for tracking)*	))))))))	Case No.

APPLICATION FOR A TRACKING WARRANT

I, a federal law enforcement officer or attorney for the government, have reason to believe that the person or property described above has been and likely will continue to be involved in one or more violations of ____ U.S.C. § _____ .

Therefore, in furtherance of a criminal investigation, I request authority to install and use a tracking device or use the tracking capabilities of the property described above to determine location.

❒ The person or property is located in this district.

❒ The activity in this district relates to domestic or international terrorism.

❒ I further request, for purposes of installing, maintaining or removing the tracking device, authority to enter the following vehicle or private property, or both:

The application is based on these facts:

❒ Continued on the attached sheet.

_____
Applicant's signature

_____
Applicant's printed name and title

Sworn to before me and signed in my presence.

Date: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Tracking of *(Describe the property to be used for tracking)*	)	Case No.

ORDER REQUIRING ASSISTANCE IN EXECUTING A TRACKING WARRANT
(Under Seal)

To:

An application has been made by a federal law enforcement officer or an attorney for the government to direct you to provide facilities or other assistance or both in executing the tracking warrant issued in this case. The court finds the assistance to be necessary.

IT IS ORDERED: Under 18 U.S.C. § 3124 and 28 U.S.C. § 1651(a), you and your agents and employees must provide assistance in executing the tracking warrant to the following government agency and agents, _____, by providing facilities and installing, operating, and monitoring any tracking devices for the time allowed by the tracking warrant. You may be compensated for reasonable expenses incurred in providing facilities and assistance. This order is sealed. The provider(s) of assistance must not disclose the existence of this order, of the tracking warrant, or of the investigation to any person until the person whose property was tracked has been notified by the government or until authorized to do so by the court.

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Tracking of *(Identify the person to be tracked or describe the property to be used for tracking)*	)	Case No.

TRACKING WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government shows there is reason to believe that the person or property described above has committed or has been used to commit and likely will continue in the criminal activity identified in the application ❒ is located in this district. ❒ the activity in this district relates to domestic or international terrorism.

I find that the affidavit(s), and any recorded testimony, establish probable cause to believe that the person or property is sufficiently involved in the criminal activity so as to justify ❒ using ❒ installing and using a tracking device to monitor the location of the person or property. Private property generally open to the public may be entered in order to install, maintain, and remove the tracking device.

❒ I further authorize entry into the following vehicle and/or onto the following private property, not open to the public, without approval or knowledge of the owner, custodian, or user of the vehicle or property for installing, maintaining, and removing the tracking device:

YOU ARE COMMANDED to execute this warrant and use or to install within this district and use the tracking device on or before _____ *(not to exceed 10 days)*, to track movement of the person or property both within and outside this district for a period not to exceed 45 days, and *(check box(es) as appropriate)*

❒ enter into the vehicle ❒ onto the private property described above to install, maintain, or remove the device

❒ in the daytime only *(i.e., 6:00 a.m. to 10:00 p.m.)* ❒ at any time of day or night because good cause has been established.

Within 10 calendar days after the use of the tracking device has ended, the officer executing this warrant must both return it to United States Magistrate Judge _____ and serve a copy of the warrant on the person who, or whose property, was tracked.

At the request of the government, the officer executing this warrant may delay notice to the person who, or whose property, was tracked for a period of _____ *(not to exceed 30 days)*, which on further written application may be extended if justified under 18 U.S.C. § 3103a(b).

Date and time issued: _____ _____

Judge's signature

City and state: _____ _____

Printed name and title

Case No.

Return of Tracking Warrant With Installation

1. Date and time tracking device installed: _____
2. Dates and times tracking device maintained: _____
3. Date and time tracking device removed: _____
4. The tracking device was used from *(date and time)*: _____

   to *(date and time)*: _____.

Return of Tracking Warrant Without Installation

1. Date warrant executed: _____
2. The tracking information was obtained from *(date and time)*: _____

   to *(date and time)*: _____.

Certification

I declare under the penalty of perjury that this return is correct.

Date: _____

_____
Officer's signature

_____
Printed name and title

United States District Court
Middle District of North Carolina
Suite 224, Federal Building
and United States Courthouse
Winston-Salem, North Carolina 27101

Chambers of
Russell A. Eliason
Magistrate Judge

Telephone
(336) 734-2520
(336) 631-5186 Fax

October 6, 2008

Timothy K. Dole, Esq.
Office of Judges Programs, 4-150
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Tim:

This is an evaluation of Assistant Attorney General Elisebeth C. Cook's letter concerning the proposed tracking warrant forms. She has made some good suggestions, a number of which I have incorporated into our tracking warrant forms and I am sending them to you. I will attempt to explain my reasoning. Ms. Cook lists her comments under four major headings. For ease of comparison, I will adopt those headings in this letter.

Forms 102, 103, and 104 - Forms related to Tracking Devices

Ms. Cook indicates that the Department of Justice is concerned that the new forms assume that a cell phone is a tracking device covered by 18 U.S.C. § 3117. She points out that several courts may have indicated that a cell phone may not be a tracking device.

These forms do not attempt to take sides in any debate over whether a cell phone in all instances can never be used as a tracking device. Rather, the forms are intended to cover those instances in which a court may consider that a cell phone will be used as a tracking device and may wish to require a showing of probable cause. The forms do not in any way compel any court to treat all cell phones as a tracking device. As the Fed. R. Crim. P. 41 Advisory Committee Notes to the 2006 Amendments state with respect to tracking devices, the amendment does not resolve the issues of when probable cause must be found in order for agents to use tracking devices. All the rule does is provide an option for a situation when probable cause may be required. The tracking warrant forms are in line with this statement in the Advisory Committee Notes. In addition, it must be pointed out that a cell phone is not the only device that a court may consider to be a tracking

device, even without the installation of a separate device. For example, navigation systems in cars allow for their tracking without any installation whatsoever.

Form 102 - Application for a Tracking Warrant

The Department requests that the form use the term "object" instead of property when describing what is being tracked. It should be noted that the rule itself describes that the warrant covers either the person or the property which is to be tracked. Fed. R. Crim. P. 41(f)(2). On the other hand, the rule also states that a tracking device has the meaning as set out in 18 U.S.C. § 3117(b). That statute states that a tracking device is a device which permits the tracking of the movement of an object. While it would seem that the form could use either "object" or "property," it may be better to use the word "object" instead of "property" since that term is used in the statutory definition, and I recommend that change.

Next, the Department states that the identification of the form should read, "Application for a Tracking Warrant," as opposed to "Application for a Tracking Order." This change has already been made. The Department further adds that the Application should have the parenthetical "Under Seal." I recommend against that change for both the Application and the Tracking Warrant. The reason for this is that neither the Application nor the Warrant is a public document until the Warrant has been executed and the return has been made. In some instances there may well be a need to keep the Application and Warrant from being made public after execution, as happens with any search warrant. The proper procedure then is for the government to make a separate application to have the Application and the Warrant filed under seal. It cannot be assumed that all applications and warrants in every case should be filed under seal without any justification. The justification must be made in a separate document and a separate order should be entered. Therefore, I recommend that this suggestion not be adopted for either Form 102 or 104.

The Department next states that: "Form 102 only requires the law enforcement officer or government attorney to establish that he or she has 'reason to believe that the person or property described above has been and likely will continue to be involved in one or more violations of [crimes].'" The Department suggests that this should be replaced with an appropriate statement regarding probable cause, but does not give an example of what that statement would be. The Department also suggests that the form should allow for the possibility that a person has committed a state offense and is being sought pursuant to federal apprehension authority. As to the first comment, I agree and have made suggested changes. I also believe my changes will cover authority to issue a tracking warrant

pursuant to federal investigation conducted pursuant to federal apprehension authority of persons who have committed a state offense.

Last, the Department points out that Rule 41(b)(4) only requires that the person or property be in the district at the time of installation, not at time of application. This is correct and a third check box has been suggested which will encompass this additional possibility.

Form 103 - Order Requiring Assistance in Executing a Tracking Warrant

The first paragraph suggests the word "object" instead of "property" should be used and it has already been so recommended.

The Department wants to expand the last sentence of the first paragraph from, "The court finds the assistance to be necessary," to, "The court finds that the assistance is necessary to achieve the ends of justice entrusted to it, that it is not unduly burdensome, and that is otherwise agreeable to the usage and principles of law." It is not believed that this additional language adds anything of substance and I recommend that the form remain as it is.

The Department points out that in the order section, a reference is made to 18 U.S.C. § 3124, which is the pen register statute and that the citation should be deleted because it does not cover tracking devices. It suggests that the form should encompass all third party assistance scenarios of any nature. No authority is cited for this last proposition. I agree that use of Section 3124 is unclear and changes should be made to show that it is one type of assistance which has been authorized in other instances. As for the suggestion that the form authorizes any and all assistance other than the type contemplated by Section 3124, I recommend against it, and instead suggest a space where the court can specify any other assistance.

Finally, the Department suggests that the last sentence, which uses the term, "The providers of assistance," should read, "you and your agents and employees." I recommend this change be made.

Form 104 - Tracking Warrant

Again, it is agreed that the word "object" should be used instead of property. However, as with Form 102, the Department's suggestion that the Warrant itself be labeled "Under Seal," is rejected for the reasons previously stated.

The Department is of the view that the first and second paragraphs wrongly require that the object in question be used to commit a criminal offense and that the proper test is whether there is probable cause that the information obtained for tracking will lead to evidence, fruits, or instrumentalities of the specified offenses. I am in major agreement. The test in the first paragraph should reflect that the person or object to be tracked should be involved in, as opposed to have committed, the criminal activity. The second paragraph has been changed to reflect the Rule 41(c) purposes for which a warrant may be issued.

The Department again points out that the current tracking form does not include the possibility that the object need only be in this district at the time of execution as allowed by Rule 41(b)(4), and I recommend an additional check box be created. The Department further recommends that the check box allowing for a tracking warrant connected to domestic or international terrorism be expanded to include "special circumstances." The cited basis for this addition is Rule 41(a)(1). The check boxes in this warrant only cover the authority authorized by Rule 41(b). I recommend against combining Rule 41(a) authority with Rule 41(b) because there may be extra requirements for such a warrant. Should a court wish to issue a warrant pursuant to Rule 41(a)(1), in that rare instance, the court can add a check box separately and state the basis for the issuance.

The Department suggests that the second paragraph wrongly implies that a tracking device does not necessarily involve an installation. Again, the form merely provides an alternative for those courts which think that a tracking device may involve the use of an object without the installation of a separate device.

The Department takes issue with the last sentence of the second paragraph because it feels that areas outside the home or a home's curtilage may be entered without infringing a Fourth Amendment interest. The forms were not intended to rule on this kind of issue. To eliminate any concern that this form is taking any position, it is recommended that the last sentence of the first full paragraph be eliminated, which starts with, "Private property generally," and that in the next paragraph, the phrase,"not open to the public," be eliminated.

Under the "YOU ARE COMMANDED" paragraph, the Department suggests that the language purports to regulate when a tracking device may be used, when only installation is so regulated. I agree and have suggested changes.

The Department next states that under the "YOU ARE COMMANDED" paragraph, there is a provision for the date and time which the tracking device may be removed. This will be dealt with in the discussion about the return. No change is recommended.

The next suggestion by the Department is that the paragraph with respect to delayed notice is defective because 18 U.S.C. § 3103(a)(b)(3) allows for a delay of up to "thirty days or more." In fact, that statute only allows for a delay of thirty days or else a specific date, if the facts so justify. It is recommended that this section be changed so that the judge may set a specific date for the delay in notification.

The Department points out that in order for there to be a delay, the court must find an adverse result as set out in 18 U.S.C. § 3103(a), which refers to 18 U.S.C. § 2705. I agree and am suggesting changes to Form 104 to include this finding.

Finally, the Department objects to the return because it has a place for information when a tracking device is issued for an object which is not installed and because the return requests information concerning the removal of any installed tracking device. With respect to the first objection, it has been previously discussed and no change is recommended.

With respect to the objection that the return covers information concerning removal of any tracking device, the Department states that the information is not required under Rule 41(f)(2) and that information concerning when the device was maintained and removed is unnecessary. Rule 41 does not mention either removal or maintenance but, in my experience, agents have found both to be necessary and have requested permission. Both are implied uses deriving from the installation. Rather than having agents make a separate application, the forms allow for both at the time of issuance. If an agent maintains or removes, then such times should be reported. No change is recommended.

Sincerely yours,

Russell A. Eliason

RAE:bab

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D C 20530

September 18, 2008

Timothy K. Dole, Esq.
Office of Judges Programs, 4-150
Administrative Office of the U. S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. Dole:

Thank you for the opportunity to review the revisions proposed by the Forms Working Group of the Administrative Office of the U.S. Courts. Clearly, much work has gone into improving and restyling the criminal and civil forms. Although we are generally pleased with the proposals, after a careful review of this second batch of forms, we have several suggestions and concerns we would like to bring to your attention.

Forms 102, 103, and 104 – Forms related to Tracking Devices

The Department is deeply concerned about the new proposed Forms 102, 103, and 104, which govern applications and warrants for tracking devices. As a threshold matter, the forms appear to assume that a cell phone is a "tracking device" covered by 18 U.S.C. § 3117. In fact, there is substantial disagreement among the federal courts on this question. The Department of Justice has argued in numerous cases that this term should be limited to homing devices installed by the government. Several courts have agreed and held explicitly that, given the limited purpose of the tracking device statute, there is no basis for broadly interpreting "tracking device" to include a target's telephone. *See, e.g.*, *In re Applications*, 509 F. Supp. 2d 76, 81 n.11 (D. Mass. 2007) (18 U.S.C. § 3117 "governs the 'installation' of tracking devices. The 'tracking' of a cell phone does not require the installation of any sort of device."); *In re Application*, 460 F. Supp. 2d 448, 461 (S.D.N.Y. 2006) (same); *In re Application*, 405 F. Supp. 2d 435, 449 n.8 (S.D.N.Y. 2005) (same). We strongly believe that the standard forms should not endorse the contrary position.

In addition, the Department of Justice respectfully suggests that Forms 102-104 deviate from Rule 41 itself, imposing additional requirements nowhere embodied in the Rule. These objections and our proposed edits are outlined in detail below.

Form 102 – Application for a Tracking Order

The caption parenthetical improperly calls for the applicant to "[i]dentify the person to be tracked or describe the property to be used for tracking." This language deviates from the language used in the statutory definition, and should be revised to read "[i]dentify the person or object to be tracked." For the same reason, the phrase "or use the tracking capabilities of the property described above," found in the body of the application, should be struck.

The caption should be modified further by replacing the word "Order" with "Warrant" and by adding the parenthetical "Under Seal," so that it is consistent with the other forms.

Form 102 only requires the law enforcement officer or government attorney to establish that he or she has "reason to believe that the person or property described above has been and likely will continue to be involved in one or more violations of [crimes]." This statement should be replaced with an appropriate statement regarding the probable cause that serves as the basis for issuing the warrant. Similarly, the form should allow for the possibility that the person described in the warrant has committed a state offense and is being sought pursuant to federal apprehension authority.

The first pair of checkboxes seemingly provides only two alternatives: a) the person or property is located in the district; or b) the investigation relates to terrorism. These choices are presumably meant to correspond to Rule 41(b)(4) and (3), respectively. However, Rule 41(b)(4) does not require the person or property to be in the district at the time of application; rather, where an installation is to be performed by the Government, the Rule merely requires that the installation occur within the district. Since the property need be in the district only at the time of installation, not at the time the order is issued, the first checkbox should be revised to read as follows: "The tracking device will be installed in this district."

Form 103 – Order Requiring Assistance in Executing a Tracking Warrant

Again, as in Form 102, the caption parenthetical improperly calls for the applicant to "[D]escribe the property to be used for tracking." This language deviates from the language used in the statutory definition, and should be revised to read as follows: "[D]escribe the object to be tracked."

We suggest modifying the last sentence of the first full paragraph to read as follows: "The court finds that the assistance is necessary to achieve the ends of justice entrusted to it, that it is not unduly burdensome, and that it is otherwise agreeable to the usages and principles of law." This language is consistent with 28 U.S.C § 1651(b) and the common law holding in *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1979).

With respect to the language in the "IT IS ORDERED" paragraph, the citation to 18 U.S.C. § 3124, the pen register statute, should be deleted because neither a pen register nor a trap and trace device is involved in the use of a tracking device as contemplated by this order.

We believe that Form 103 should encompass all third-party assistance scenarios, such as requiring assistance from locksmiths, alarm specialists, car dealers, wreckers, and any other party in a position to assist or frustrate law enforcement's efforts. To this end, we suggest adding the phrase "by providing assistance or" before "by providing facilities and installing, operating, and monitoring..." to the first sentence following, "IT IS ORDERED." This language would allow law enforcement to present this order to any third party with the ability and expertise to assist law enforcement in the installation or use of a tracking device.

The last sentence of the "IT IS ORDERED" paragraph refers to "the provider(s) of assistance," although earlier language in the form addresses "you and your agents." We suggest using the phrase "you and your agents" consistently throughout this form.

Form 104 – Tracking Warrant

As in Forms 102-103, the caption parenthetical improperly calls for the applicant to "[i]dentify the person to be tracked or describe the property to be used for tracking." This language deviates from the language used in the statutory definition, and should be revised to read "[i]dentify the person or object to be tracked."

The caption should be modified further by adding the parenthetical "Under Seal," so that it is consistent with the other forms.

The first and second paragraphs wrongly require that the property in question be used to commit the criminal offense. This is not the proper test; rather, the test is whether there is probable cause that the information be obtained from the tracking device will be (or lead to) evidence, fruits, or instrumentalities of the specified offenses.

Again, as noted with respect to Form 102, the first pair of checkboxes seemingly provides only two alternatives: a) the person or property is located in the district or b) the investigation relates to terrorism. As explained above, Rule 41(b)(4) does not require the person or property to be in the district at the time of application; rather, where an installation is to be performed by the Government, the Rule merely requires that the installation occur within the district. Since the property need be in the district only at the time of installation, not at the time the order is issued, the first checkbox should be revised to read as follows: "The tracking device will be installed in this district."

Similarly, we recommend replacing the terrorism alternative with "special circumstances jurisdiction permits installation outside this district." This modified phrase would encompass investigations relating to domestic or international terrorism, as well as circumstances in which installation is authorized under Federal Rule of Criminal Procedure 41(a)(1).

The checkboxes in the second paragraph wrongly imply that a "tracking device" does not necessarily involve an installation.

The last sentence of the second paragraph and the checkbox items that follow it appear to suggest that a warrant is required whenever installation of the tracking device requires entry onto private property. Any such implication is materially incorrect as a matter of law. It is well settled that areas outside the home or the home's curtilage may be entered without infringing upon a Fourth Amendment interest, including – depending on the facts of the case – a driveway on private property. *See, e.g., United States v. French*, 291 F.3d 945 (7th Cir. 2002); *United States v. Roccio*, 981 F.2d 587 (1st Cir. 1992). Accordingly, the last sentence of the paragraph and the phrase "not open to the public" in the checkbox text, should be deleted.

The third and fourth checkboxes under "YOU ARE COMMANDED" purport to regulate the times of day when a tracking device may be used or installed. This is incompatible with Rule 41(e)(2)(B)(ii), which imposes time-of-day restrictions as to the installation only. There is no requirement that the tracking device be used solely in the daytime.

The second paragraph under "YOU ARE COMMANDED" includes a section for "date and time tracking device removed." The government is not required to provide this information under Rule 41(f)(2).

The final paragraph, concerning delay of notice, contains the parenthetical "(not to exceed 30 days)". This is incompatible with 18 U.S.C. § 3103a(b)(3), which allows for a delay of up to 30 days or more "if the facts of the case justify a longer period of delay."

Similarly, the final paragraph states that notice is to be delayed "at the request of the government." Under 18 U.S.C. § 3103a, the court must make a finding that there is reasonable cause to believe that immediate notification would have an adverse result. The form should explicitly include such a finding when notice is to be delayed: "The court finds reasonable cause to believe that providing immediate notification of the warrant may _____ (state adverse result from 18 U.S.C. § 2705)."

The "return" sections on the second page of this form suffer from at least two serious defects. First, they purport to distinguish between tracking warrants with and without installation. As noted above, 18 U.S.C. § 3117 contemplates that a "tracking device" is necessarily installed by the government; likewise, the applicable return provision at Rule 41(f)(2)(A) expressly assumes that installation will occur. The "Without Installation" section should be deleted in its entirety and the title of the "With Installation" section revised accordingly. Second, the "With Installation" section demands 4 separate pieces of information, only two of which – 1 and 4 – are required under the terms of Rule 41. Items 2 and 3 should be deleted.

Miscellaneous Suggestions

Form 94 – Commitment to Another District

We propose adding the following language to the end of the order, so that the form is in compliance with Federal Rule of Criminal Procedure 5(c)(3)(E):

"The clerk of this district must promptly transmit the papers and any bail to the clerk in the _____ District of _____."

Form 240 – Application to Proceed without Prepaying Fees or Costs (Short Form)

We suggest editing the first sentence in subsection 1 to make it clearer. Specifically, we recommend revising this sentence to read as follows: "If I am employed there or I have an account at the institution, I have attached to this document..."

Conclusion

We are grateful for the opportunity to provide our views on the revised forms being considered by the Administrative Office of the U.S. Courts. We look forward to continuing to work with the Administrative Office as you continue in this worthwhile endeavor.

Sincerely,

Elisebeth C. Cook

Elisebeth C. Cook
Assistant Attorney General

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

February 23, 2009

To: Chairs and Reporters of the Advisory Committees

From: Lee H. Rosenthal
Chair, Standing Committee

Re: Privacy Subcommittee

The Executive Committee of the Judicial Conference has agreed to renew the Subcommittee formed after the E-Government Act of 2002, which required new rules "to protect the privacy and security concerns relating to electronic filing of documents" in the federal courts. In accordance with the E-Government Act, the Standing Rules Committee established the E-Government Subcommittee, composed of a representative from each of the Advisory Rules Committees and from the Committee on Court Administration and Case Management. The Subcommittee's work led to the Rules Committees' examination and adoption of the privacy rules that took effect on December 1, 2007. The E-Government Subcommittee's immediate assignment was then completed. The renewed Subcommittee, composed of representatives from each of the Rules Committees and from CACM, will address problems with the privacy rules and examine whether or how the rules or their implementation might be improved.

Since the privacy rules took effect in 2007, members of the public and court officials have raised many questions, complaints, and concerns about the rules and their implementation. This is not surprising. It was recognized that the privacy rules would have to be revisited after seeing how they worked in practice. New questions have arisen with the rules' implementation and with experience under the CM/ECF system. Other questions were present when the privacy rules were adopted but could not be answered then because the CM/ECF system was so new. The renewed Privacy Subcommittee will examine these issues.

Judge Reena Raggi of the Second Circuit, and member of the Standing Committee, has agreed to chair the Privacy Subcommittee. Professor Dan Capra of the Fordham Law School, Reporter for the Evidence Rules Committee, and Reporter for the E-Government Subcommittee, has agreed to serve as Reporter for the Privacy Subcommittee. I ask each Advisory Committee Chair to designate a representative to serve on the Privacy Subcommittee and to advise me and Judge Raggi of your designee no later than March 9, 2009. In addition, I am asking that as with the E-Government Subcommittee, the Advisory Rules Committees' Reporters serve on the Privacy Subcommittee as consultants.

Here are a few examples of issues that have been raised, including some raised by privacy watchdog groups that are increasingly vocal about the need for better privacy protection in the federal courts:

- Should alien registration numbers and driver's license numbers be included among the personal identifiers that must be redacted from court filings?

- Are the names of victims and cooperating witnesses in criminal cases afforded sufficient privacy in court filings?

- Should personal identifier information be redacted from documents attached to bankruptcy notices of claims, which can be voluminous?

- Should mental health records be redacted from court filings?

- What do the courts need to do to ensure effective implementation of the rules, particularly in light of information showing that there are many personal identifiers still appearing in district court filings?

Please let me know if you have any questions. I look forward to hearing from you.

Lee H. Rosenthal

cc: Judge Reena Raggi
Judge John Tunheim
Professor Dan Coquillette
Peter McCabe, Esq.

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