ADVISORY COMMITTEE ON CRIMINAL RULES

CAMBRIDGE, MA
SEPTEMBER 27-28, 2010

AGENDA
CRIMINAL RULES COMMITTEE MEETING
SEPTEMBER 27-28, 2010
CAMBRIDGE, MASSACHUSETTES

I. PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of April 2010 meeting in Chicago, Illinois

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

D. Minutes of the June 2010 Standing Rules Committee Meeting

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress (No Memo)

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

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

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.

B. Proposed Amendments Approved By the Standing Committee for Transmittal to the Judicial Conference (No Memo)

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

C. Proposed Amendments Approved By the Standing Committee for Publication (No Memo)

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 37.1. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

3. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

III. CONTINUING AGENDA ITEMS

A. Rule 16. (Memo)

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

C. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea. (Memo)

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 (No Memo)

B. Sealing Committee Report

C. Update on Work of Privacy Subcommittee (No Memo)

D. Administrative Office Forms Regarding Appearance Bonds (Memo)

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETING

A. Spring Meeting

B. Other

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:	**Reporter:**
Honorable Richard C. Tallman United States Circuit Judge United States Circuit Judge United States Court of Appeals 902 William Kenzo Nakamura United States Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360 Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
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Liaison Member: Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East	**Representative:** Bruce Rifkin United States District Court United States Courthouse, Lobby Level 700 Stewart Street Seattle, WA 98101-1271

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ADVISORY COMMITTEE ON CRIMINAL RULES

Members	Position	District/Circuit	Start Date	End Date
Richard C. Tallman	C	Ninth Circuit	Member: 2004	----
Chair			Chair: 2007	2010
Lanny A. Breuer*	DOJ	Washington, DC	----	Open
Rachel Brill	ESQ	Puerto Rico	2006	2012
Leo P. Cunningham	ESQ	California	2006	2012
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2010
Morrison C. England, Jr.	D	California (Eastern)	2008	2011
John F. Keenan	D	New York (Southern)	2007	2010
David M. Lawson	D	Michigan (Eastern)	2009	2012
Andrew Leipold	ACAD	Illinois	2007	2010
Thomas P. McNamara	FPD	North Carolina	2005	2011
Donald W. Molloy	D	Montana	2007	2010
Timothy R. Rice	M	Pennsylvania (Eastern)	2009	2012
James B. Zagel	D	Illinois (Northern)	2007	2010
Sara Sun Beale	ACAD	North Carolina	2005	Open
Reporter				
Principal Staff:				
Peter G. McCabe		(202) 502-1800		
John K. Rabiej		(202) 502-1820		

TAB

I. A-B

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 15-16, 2010
Chicago, Illinois

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Chicago, Illinois, on April 15-16, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Judge Donald W. Molloy
Judge James B. Zagel
Judge Timothy R. Rice
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

Thomas P. McNamara, Federal Public Defender of the Eastern District of North Carolina, was unable to attend due to illness.

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. 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
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court.

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

Judge Tallman welcomed everyone to Northwestern University School of Law and particularly welcomed newly appointed Committee member Timothy R. Rice, U.S. Magistrate Judge for the Eastern District of Pennsylvania. Judge Tallman greeted several law students in attendance and briefly explained the role of the Committee.

B. Review and Approval of the Minutes

Following two revisions offered by Judge Tallman, a motion was made to approve the draft minutes of the October 2009 meeting as revised.

The Committee unanimously approved the revised minutes.

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

Mr. Rabiej reported that the Supreme Court had yet to act on the package of proposed rules amendments that had been approved by the Judicial Conference in September 2009 (listed below in Section II.A). Noting that the Supreme Court has until May 1, 2010, to act, Mr. Rabiej observed that we would soon find out the fate of these proposed amendments. (The Supreme Court subsequently approved the proposed amendments with the exception of the proposed amendments to Rule 15, which was recommitted to the Committee for further consideration.)

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference for transmittal to the Supreme Court

Mr. Rabiej reported that the following proposed amendments had been approved by the Judicial Conference at its September 2009 session and were pending before the Supreme Court:

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

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

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

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

B. Proposed Technology Amendments Published for Public Comment

The following proposed amendments were published for public comment in August 2009:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides a comprehensive procedure for issuance of complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permitting a defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing requests for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrants and inventories by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross-referencing Rule 32.1 provision for participation in revocation proceedings by video teleconference

and permitting a defendant to participate in misdemeanor proceedings by video teleconference.

10. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

Many comments had been submitted on the proposed amendments. The Committee reviewed the comments and made changes to the proposed amendments based upon the comments. The most extensive changes were made to new Rule 4.1, the central part of the Committee's effort to engraft new technology to the procedures previously set forth in current Rule 41. The Committee approved the following changes to Rule 4.1:

(1) Subdivision (a). The published rule referred to the action of a magistrate judge as "deciding whether to approve a complaint." In response to the Federal Magistrate Judges Association's comment that a judge does not "approve" a complaint, the Committee amended the rule to refer to the judge as "reviewing a complaint or deciding whether to issue a warrant or summons."

(2) Subdivision (b)(2)(A) and (B). The Federal Magistrate Judges Association recommended revision of subdivisions (b)(2) and (3), and the Committee's style consultant recommended additional clarifying changes. The Committee combined these two subdivisions into subdivision (b)(2)(A) and (B). The change was to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. (Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).)

(3) Subdivision (b)(5). This subdivision (previously published as (b)(6)) deals with modification of a complaint, warrant, or summons. In response to a comment from the National Association of Criminal Defense Lawyers, the Committee added language requiring a judge who directs an applicant to modify a duplicate original to file the modified original. This change was intended to ensure that a complete record was preserved.

(4) Subdivision (b)(6). The Committee eliminated the introductory language "If the judge decides to approve the complaint, or . . . ." As noted by the Federal Magistrate Judges Association, a judge does not "approve" a complaint. Accordingly, the Committee revised the rule to refer only to the steps necessary to issue a warrant or summons, which is the action taken by the judicial officer. In subdivision (b)(6)(A) the Committee amended the requirement that the judge "sign the original" to "sign the original documents." This phrase is broad enough to encompass the current practice of the judge signing the complaint forms. In subdivision (b)(6)(B), the reference to the "face" of a document was deleted as superfluous and anachronistic, and the action was clarified to be the entry of the date and time of "the approval of a warrant or summons." Finally, as recommended by the National Association of Criminal

Defense Lawyers, subdivision (b)(6)(C) was revised to require that the judge direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

The Committee determined that these changes were not substantive in nature and did not require republication. Nevertheless, due to the extensive redrafting, the Committee thought it advisable to recirculate Rule 4.1 to the commentators. Following the meeting, the Committee emailed the revised version of Rule 4.1 to the commentators and requested that they provide any feedback by May 14, 2010.

In addition, the Committee made minor modifications to the following technology-related rules:

Rule 1. Noting that defining a telephone as a "form of communication" was awkward, the Committee revised the definition to "any technology for transmitting communication."

Rules 32.1 and 43(a). The Committee voted to withdraw the proposed rule allowing a defendant to request that he or she be permitted to participate by video teleconference in a proceeding to revoke or modify probation or supervised release. The proposed cross reference in Rule 43(a) was also withdrawn.

Rule 40. The Committee voted to revise the proposed amendment to track the language of Rule 5.

Rules 3, 4, 6, 9, 41, 43(b)(2), and 49 were approved by the Committee as published.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Before beginning the discussion of Rule 16, Judge Tallman welcomed the Honorable Emmet Sullivan, United States District Judge for the District of Columbia. Judge Sullivan presided over the trial of former Senator Ted Stevens and had written the Committee a letter in April 2009 requesting that the Committee consider amending Rule 16 to require disclosure of all exculpatory and potentially impeaching evidence. Judge Tallman invited Judge Sullivan to attend the meeting in Chicago and Judge Sullivan accepted.

Judge Tallman reported on the Rule 16 Subcommittee's recent actions. On February 1, 2010, the Subcommittee held a consultative session on Rule 16 in Houston, Texas. Judge Tallman noted that the session brought together representatives from all parts of the criminal justice system to engage in a full and frank exchange.

The Rule 16 Subcommittee also met by telephone conference call on March 8, 2010. During the call, the Subcommittee commented on and revised questions contained in a draft

survey designed by the Federal Judicial Center and also discussed ongoing efforts at the Department of Justice to better address the discovery obligations of prosecutors.

Assistant Attorney General Lanny Breuer offered an update on the Department's efforts. He said that the Deputy Attorney General had issued new guidelines and 5,000 federal prosecutors had completed training courses on how to meet their disclosure obligations. General Breuer further noted that the Department was in the process of developing training curricula and creating a deskbook to provide guidance to prosecutors. General Breuer said that he has traveled around the country and spoken to many dedicated federal prosecutors who expressed a sincere desire to "do the right thing" in meeting their disclosure obligations.

General Breuer introduced Andrew Goldsmith, who was appointed to the Department's newly created position of National Criminal Discovery Coordinator. Mr. Goldsmith was a prosecutor for 27 years and is recognized as an expert on the policies and procedures governing electronically stored information. Mr. Goldsmith said that in his new capacity, he operates out of the Deputy Attorney General's Office, which gives him broad authority. His responsibilities include reviewing the discovery plans of all 94 U.S. Attorney Offices, overseeing the creation of a "bluebook" on discovery practices written by experts, designing training for law enforcement agents and for paralegals, developing a discovery "bootcamp" for new prosecutors, and consulting with judges and members of the defense bar to absorb all points of view on the issue of criminal discovery.

Members asked Mr. Goldsmith questions. One asked whether any of the Department's training initiatives would be available to law enforcement agents outside the Department. Mr. Goldsmith replied that such training is currently available only as time permits but would eventually be part of a "second wave" of efforts. Professor Beale asked whether any efforts were being made to encourage discovery-related dialogue between agents and managers, a "feedback loop," with the goal of eventually making discovery obligations "part of the culture." Mr. Goldsmith replied that such a practice had not been explicitly encouraged but that agents and prosecutors are now sensitized to this issue.

General Breuer commented that the issues raised by the Committee and the discovery-related tasks facing the Department, particularly when dealing with other agencies, constituted "profound challenges." In order to meet those challenges, General Breuer favored a "friendly" as opposed to an "adversarial" approach. The Department is also attempting to improve the use of technology to better manage discovery information in its cases.

Judge Tallman thanked General Breuer and Mr. Goldsmith for their presentations and for the careful, thoughtful, and deliberative process that the Department had undertaken to accomplish change. Judge Tallman said it was reassuring that this issue was getting the attention of the highest levels of the Department.

Judge Tallman introduced United States District Judge Emmet Sullivan, who had previously written in support of amending Rule 16. Judge Sullivan thanked Judge Tallman for his leadership on the Rule 16 issue. He said that his own interest in amending Rule 16 grew out of the Stevens case but that his concern, and the concern of prosecutors too, transcended any one case and amounted to seeking justice. Judge Sullivan applauded the Department's efforts to improve the administration of justice by training prosecutors and offering guidance on discovery. But he wondered whether these efforts are sufficient. He observed that Administrations change and questioned how much weight *Brady* issues will be given in the future when new leaders take over the Department. He noted that the *Brady* issue resurfaces every few years and seems a perennial problem.

Judge Sullivan submitted that a permanent solution is warranted. He suggested that the Committee reconsider amending Rule 16 as proposed in 2007 to require full disclosure of all evidence favorable to the defendant. He said that the concerns raised by the Department could be addressed by a prudent judge. He asserted that the government should not make unilateral judgments as to what it should turn over to the defendant. He quoted from the dissenting opinion in *United States v. Bagley*, 473 U.S. 667 (1985), in which Justice Marshall argued that the right announced in *Brady*, to be effective, must be integrated into "the harsh, daily reality"of the criminal justice system. *Id.* at 696. To integrate such a right, Justice Marshall concluded, a prosecutor must be required to "divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure." *Id.* at 699. Noting that Justice Marshall's words were written twenty-five years ago, Judge Sullivan said it was high time that the Committee offer an amendment to Rule 16 that fully incorporates the principles announced in *Brady*.

Judge Tallman thanked Judge Sullivan for his eloquent words advocating an amendment to Rule 16.

Turning to the survey designed by the Federal Judicial Center (FJC) to collect better information about disclosure practices, Judge Tallman said that several analytical issues needed to be resolved. First, the survey had originally targeted only those districts where a broad discovery policy was already in effect. However, Judge Tallman observed that in order to assess whether an amendment is necessary, the Committee first needs to define the scope of the problem of non-disclosure. He said that he therefore favored enlarging the scope of the survey from the initial small group of districts to all 94 federal districts. Second, Judge Tallman expressed concern about the length of the survey and noted that if the survey was too long, the response rate would drop.

Judge Tallman introduced Laural Hooper of the FJC, who addressed these two questions. Regarding how many districts should be surveyed, Ms. Hooper said that she favored a broad sampling to capture a wider, more representative spectrum of responses. Regarding the second issue, she noted that generally if a survey takes more than 15 minutes to complete, the response rate drops. The FJC typically tries to get a response rate of 65-70% on this type of survey. Ms. Hooper also observed that the American Bar Association would be sending out a similar survey

that would be competing for attention, in a sense, against the Committee's survey. Judge Rosenthal added that the Committee needed to be respectful of the respondents' time and keep the survey as brief as possible.

In response to a member's question as to who would be receiving the survey, Ms. Hooper replied that the respondents would include three groups: district judges, prosecutors, and defense counsel who practice in federal court. After a brief discussion, Judge Tallman said that the sense of the Committee appeared to be in favor of a broader survey encompassing all 94 districts. Ms. Hooper stated that she would transmit to Judge Tallman and Professor Beale a revised, shorter version of the survey within a few weeks. Following their review, the survey would be vetted by the full Committee before being disseminated.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 Subcommittee, gave an overview of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense before trial, but would have provided relief in certain narrow circumstances when defendants fail to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

Judge England reported that the Rule 12 Subcommittee had voted in January 2010 to move forward with drafting a revised amendment. However, as the Subcommittee worked on redrafting the amendment, new concerns arose and the scope of the project continued to grow. Judge England expressed concern that the project now appears to require a complete rewrite of Rule 12.

Officials from the Department agreed that the scope of the project had grown from the initial concept of merely harmonizing Rule 12 with *Cotton*. Ms. Felton observed that part of the difficulty of amending the rule is that there is considerable confusion in the case law interpreting the meaning of "forfeiture" and "waiver" in Rule 12. The Subcommittee's attempt to surgically fix the rule invariably implicated other parts of the rule and created more concerns.

Discussion ensued about whether it is appropriate for the Committee to resolve conflicts among the circuits over interpretation of the rules, or leave such resolution to the Supreme Court. Judge Rosenthal said that if the circuit conflicts are due to inherent ambiguity in the rule, then it would be appropriate for the Committee to attempt to resolve the confusion by clarifying the rule.

Judge Tallman concluded the discussion by recommitting the matter to the Rule 12 Subcommittee for further consideration.

C. Rule 37 (Indicative rulings)

Professor Catherine Struve, Reporter to the Advisory Committee on Appellate Rules, joined the discussion on indicative rulings via telephone.

At the October meeting, the Committee approved a new Criminal Rule 37 permitting "indicative rulings" that would parallel Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009. These rules are designed to facilitate remands to the district court to enable the court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. The only issue before the Committee now is whether to amend the Committee Note following the proposed new Rule. (The Note is found on pages 306-08 of the agenda book.)

Judge Tallman initiated the discussion by noting that he had asked a Ninth Circuit Staff Attorney, Susan Gelmis, to address the merits of a new rule permitting indicative rulings. Ms. Gelmis concluded in a written memo (page 309 of agenda book) that a new criminal rule would be beneficial. Her reasoning supported his view that the Committee should go forward with proposing a new rule that facilitated the issuance of indicative rulings.

Professor Beale agreed with Judge Tallman that the new rule was needed, and she turned the discussion towards the language of the proposed Committee Note, particularly the sentence that states that the rule "does not apply to motions under 28 U.S.C. § 2255." The rationale behind this sentence was to deter prisoners from filing § 2255 motions while their appeal was pending. Professor Beale also noted that the Committee Note on page 307 of the agenda book inadvertently omitted language that had been approved by the Committee at the October meeting. The omitted language can be found on page 11 of the agenda book, and describes three situations where the new rule was likely to be invoked.

A member pointed out that the language excluding § 2255 motions from the rule's operation was unlikely to be noticed by a prisoner, as it is buried in the Note. Professor Struve agreed and added that the sentence is also inconsistent with the law of at least one circuit.

Judge Tallman moved to amend the Committee Note by deleting the sentence in bold on page 307 that excludes § 2255 motions and inserting in its place the following:

> The procedure formalized by Appellate Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v.*

Cronic, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

The motion was approved unanimously by voice vote.

D. Procedures Concerning Crime Victims

Professor Beale reported that the Administrative Office had issued its fifth annual report on the rights of crime victims as required by the Justice for All Act of 2004, 18 U.S.C. § 3771. The report did not raise any concerns that would prompt consideration of changes to the rules. However, the Committee continued to monitor the status of crime victims' rights given the importance of the matter. Justice Edmunds, Chair of the Subcommittee on the Crime Victims' Rights Act, concurred.

Judge Molloy recounted an episode from *United States v. W.R. Grace*, a criminal environmental case that he presided over, that illustrated a possible need for a future rules amendment. In *Grace*, the prosecutor filed a mandamus action on behalf of 37 crime victims with whom the prosecutor had not actually spoken. Judge Molloy suspected that this was done strategically to delay the proceedings and suggested that perhaps in the future the Committee might consider an amendment requiring prosecutors to certify that they had spoken to any crime victims they claim to represent.

A member described a "procedural anomaly" that he encountered while representing a crime victim in a case before the District of Columbia District Court. Because the crime victim was not a party, the court's electronic filing system did not allow the member to file a motion asserting the crime victim's rights. The member questioned whether there are unintended barriers to crime victims inherent in the structure of a court's electronic filing system.

Judge Tallman said that the Committee has an obligation to improve any procedures that hinder crime victims from asserting their rights, but asked whether this particular issue would more properly be considered by the Committee on Court Administration and Case Management ("CACM"). Mr. Rifkin noted that in the Western District of Washington, a non-party may be granted permission to file on an ad hoc basis. Judge Sullivan said that he sits on the D.C. District Court's electronic filing committee and he would follow up on the issue of granting non-parties the ability to file.

Judge Rosenthal said that she would work with Judge Tallman to draft a letter to the Chair of CACM raising this issue. She further noted that this would serve as a good example of how the Committee is committed to carrying out the mandate of the Crime Victims' Rights Act. She remarked that this requires constant diligence on our part.

IV. NEW PROPOSALS

A. Rules 5 and 58 (Initial Appearance)

General Breuer addressed the Department's proposal to amend Rules 5 and 58. As set forth in his memo on page 322 of the agenda book, the proposed amendments are designed to better equip federal courts to handle aspects of the international extradition process and to ensure that the treaty obligations of the United States are fulfilled.

1. Amendment to Rule 5(c) – Initial Appearance of Extradited Defendant

The first proposal is to amend Rule 5(c) by adding a new paragraph (4) clarifying where an extradited defendant must first appear. (The proposed amendment is on page 324 of the agenda book.) General Breuer said that confusion currently exists over whether the first appearance should be in the judicial district where the defendant first arrives or in the district where charges are pending. General Breuer suggested that since the defendant has already been informed of the charges that are pending before being extradited, requiring a first appearance immediately in the district of arrival is unnecessary and merely causes delay.

A member asked whether the defendant would be without counsel during the period between the defendant's arrival in the United States and the defendant's first appearance in the district where charges are pending. If so, could there be any adverse consequences, *i.e.*, improper interrogation?

General Breuer responded that typically there would be no incentive to interrogate a defendant in that situation because an investigation had already been completed prior to the defendant's extradition. Further, Judge Tallman pointed out that the defendant would be in the custody of the U.S. Marshals Service during the entire period in which he is being transported back to the jurisdiction requesting his extradition.

A judge member suggested that if there were a concern about the defendant languishing in the district of arrival while awaiting transport to the district where charges are pending, such a concern could be addressed by simply adding a time limit to the proposed amendment. A member pointed out that a time limit on first appearances is already contained in Rule 5(a)(1)(A), which requires that after arrest, a defendant must be brought "without unnecessary delay" before a judicial officer.

Judge Tallman reminded the members that at this juncture, the Committee was merely considering whether to recommend to the Standing Committee that the proposed amendment to Rule 5 be published for comment. Issues such as whether there should be a time limit in the amendment or whether it implicated the defendant's right to counsel would presumably be addressed, if warranted, by commentators. Viewed in that light, Judge Tallman moved that the proposed amendment be forwarded to the Standing Committee with the recommendation that it be published for comment.

The motion was approved unanimously by voice vote.

Judge Tallman directed Professor Beale to draft a proposed Committee Note to accompany the proposed amendment to Rule 5(c) and to circulate the Note by email to members after the meeting.

2. Amendment to Rule 5(d)(1) and Rule 58(b)(2)(H) – Consular Notification

General Breuer turned to the second proposed amendment, which would ensure that the United States fulfills its obligations under the Vienna Convention on Consular Relations. Article 36 of the Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. The proposed amendments to Rules 5 and 58 (set forth on pages 326 and 327 of the agenda book) are designed to meet that obligation. The amendment to Rule 5 requires notification in felony cases and for petty offenses under Rule 58.

General Breuer explained that under the government's view, the Vienna Convention does not create an enforceable right in favor of an individual, and that the amendments therefore do not use the word "must" in describing the duty to notify. Rather, the amendments provide that upon a defendant's request, the government "will" notify the appropriate consular officer. Noting this intentional difference, Judge Tallman directed that when the amendment is transmitted to the style consultant, the word "will" should not be changed because it reflects a substantive choice.

Ms. Felton offered an identical modification to each amendment. She asked that the phrase "or other international agreement" be inserted before the period at the end of Rule 5(d)(1)(F) and the end of Rule 58(b)(2)(H). Judge Tallman moved that the proposed amendments, with Ms. Felton's modification, be forwarded to the Standing Committee with the recommendation that they be published for comment.

The motion was approved unanimously by voice vote.

3. Advisory Committee Note

The Committee turned to the Committee Note following the proposed amendments on pages 327-28 of the agenda book. Discussion centered on the last sentence of the Note, which states: "Nothing in these amendments shall be construed as creating any individual justiciable right, authorizing any delay in the investigation or prosecution because of a request for consular assistance, or any basis for the suppression of evidence, dismissal of charges, reversal of judgment, or any other remedy."

A member expressed concern that the sentence amounted to a substantive comment that no remedy existed for the failure to adhere to the notification requirements contained in the rules and that the proper place for such a disclaimer would be in the rules themselves. Discussion ensued over whether, notwithstanding this disclaimer, the proposed amendments in fact created some sort of enforceable right. A judge member predicted that judges will rarely fail to advise defendants of their right to consular notification because the notification will simply be added to the judges' checklist of things that they must cover when addressing a defendant.

A member proposed deleting the last sentence of the Committee Note and substituting the following: "This Rule does not address what remedy, if any, a defendant may have for failure to comply with Rule 5(d)(F) and Rule 58(b)(2)(H)." The proposed modification was withdrawn after Judge Tallman offered the following substitute amendment: "These amendments do not address those questions." A member moved that the substitute amendment be adopted.

The motion was approved unanimously by voice vote.

Ms. Felton moved that after the second sentence of the Committee Note, the following sentence be inserted: "Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it."

The motion was approved unanimously by voice vote.

Judge Tallman said he would present the amendments, as modified, to the Standing Committee in June with the recommendation that they be published for comment.

B. Rule 32 (Technical and Conforming Amendment)

Professor Beale explained that the style consultant, Professor Joseph Kimble, had suggested a technical amendment to Rule 32(d)(2). The amendment, set forth on page 334 of the agenda book, switched the order of two provisions and corrected a lack of parallelism in one of the two provisions.

The Committee voted unanimously to approve the amendment and forward it to the Standing Committee.

Mr. Rabiej noted that because the amendment does not affect the substance of Rule 32, it does not need to be published for comment. However, the amendment does require a brief Committee Note explaining that it is merely a technical amendment. Professor Beale agreed to draft a Note to accompany the amendment.

C. Proposal to Amend Multiple Provisions of 18 U.S.C. § 3060(b)

Professor Beale explained that a disparity had been identified between the statute and the rule that address the time period for a preliminary hearing when a defendant is released from custody. The statute, 18 U.S.C. § 3060(b)(2), requires that the hearing be held within 20 days. Federal Rule of Criminal Procedure 5(c), however, prescribes 21 days. Professor Beale suggested that the Committee recommend that the statute be changed to 21 days to remedy this inconsistency and to conform to the general principle underlying the time-computation project that time periods be stated in multiples of seven. It was so moved.

The Committee voted unanimously to recommend the statutory change and forward it to the Standing Committee.

Judge Tallman reported that the Chief Justice had publicly acknowledged and expressed his appreciation for the extensive and highly productive efforts of Judge Rosenthal and the rules committees to complete the time-computation project, including both rules and corresponding statutory changes.

D. Proposal to Amend Multiple Provisions of the Rules Governing Section 2254 Cases

Professor Beale summarized correspondence from Ms. Sharon Bush Ellison, suggesting numerous changes to the Rules Governing Section 2254 Cases. After discussion of the changes, a member moved that the Committee decline to adopt the suggestions.

The Committee voted unanimously to decline to adopt the suggested changes to the Rules Governing Section 2254 Cases.

E. Rule 11 – Immigration Consequences of Guilty Plea

Judge Tallman raised a matter that was not on the agenda. The recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation. *Padilla* thus highlights the importance of informing a defendant of the immigration consequences of a guilty plea.

To study the question of whether these consequences should be added to the list of matters about which a judge must inform a defendant when taking a guilty plea under Rule 11, Judge Tallman appointed Judge Rice to chair a Rule 11 Subcommittee. Judge Tallman also appointed the following members to the subcommittee: Judge Lawson, Judge Molloy, Professor Leipold, Leo Cunningham, and a representative of the Department of Justice. Judge Tallman further asked the newly formed subcommittee to consider whether, as an interim measure, the Committee should ask the Federal Judicial Center to amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

Judge Rice said he would convene a meeting of the Rule 11 Subcommittee via conference call to discuss these issues and would report to the full Committee at its fall meeting.

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

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

Judge Tallman noted that Mr. Rabiej had earlier reported on this topic.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had concluded its deliberations, which included reviewing an extensive study by the FJC examining all civil cases filed in federal court–district and appellate–in 2006. He reported that the subcommittee had found very few cases that had been improperly sealed.

Judge Zagel further reported that the biggest problem appears to be cases that remain sealed after the need for sealing has been obviated. The subcommittee is likely to recommend a change in the courts' electronic filing system to prompt a periodic review of sealed cases, in the hopes of remedying the problem. Professor Richard Marcus is drafting the final report which should be ready for the subcommittee's review in the near future.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported on the activities of the Standing Committee's Privacy Subcommittee. She noted that both the FJC and the Administrative Office had examined the issue of social security numbers occasionally appearing in court documents that are publicly available over the internet. The results of those studies showed that the problem is not widespread but needed to be addressed.

In addition to these statistical studies, the subcommittee held a mini-conference in early April 2010 at Fordham University Law School, organized by Professor Dan Capra, to examine privacy-related issues from all perspectives. Judge Raggi said the conference was a tremendous success because of the great variety of viewpoints presented.

Judge Raggi said that the subcommittee's next step would be the drafting of its report, which she expected to be ready in time for the Standing Committee's meeting in January 2011. She added that two main issues to be addressed would be plea agreements and juror privacy. However, Judge Raggi cautioned that due to the multiplicity of different approaches to resolving these problem areas, the subcommittee's report would not offer any magical "one-size-fits-all" solution. Instead, she expects that the report will describe many of the approaches that seem to be working.

Judge Rosenthal applauded the work of the subcommittee and noted that the Fordham mini-conference featured many informed speakers from across the privacy spectrum.

D. Rule 45(c)

Professor Beale explained that Criminal Rule 45(c) currently mirrors Civil Rule 5(b) in adding three days to the time period in which a party must act after service of process is effected in certain ways. Judge Rosenthal reported that at its meeting in October 2009, the Advisory Committee on Civil Rules considered amending Rule 5(b) to delete the three-day provision and eliminate the disparity between different types of service. However, the Civil Rules Committee decided against amending the rule at this time. The Civil Rules Committee further decided to solicit the views of the other advisory committees on parallel rules, such as Rule 45(c).

A member stated that he saw no pressing need to amend Rule 45 at this point but that the issue should be monitored. Accordingly, he moved to table the issue until the next meeting of the Committee.

The motion was approved unanimously by voice vote.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman noted that Mr. Rifkin would retire in September 2010 from his position as District Executive/Clerk of Court for the Western District of Washington and that this would therefore be his last meeting. Observing that he had known Mr. Rifkin for over thirty years, Judge Tallman thanked him for his exemplary service to the judiciary and wished him well in his retirement.

Judge Tallman proposed several dates for the next meeting of the Committee. After a brief discussion, the Committee decided that the fall meeting would take place on Monday and Tuesday, September 27-28, 2010, in Boston, Massachusetts. By subsequent email notification, the date of the spring meeting was set for Monday and Tuesday, April 11-12, 2011.

Judge Tallman thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor

TAB

I. C

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

FINAL CONSENT CALENDAR

September 14, 2010

The following recommendations are hereby presented for approval by acclamation:

That the Judicial Conference —

E-19 Committee on Rules of Practice and Procedure
Judge Lee H. Rosenthal, Chair

1. a. Approve the proposed amendments to Appellate Rules 4 and 40 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

   b. Seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Appellate Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party..... pp. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 5-15

E-19 Committee on Rules of Practice and Procedure (continued)

b. Approve the proposed revisions of Bankruptcy Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, to take effect on December 1, 2010. . . pp. 14-15

3. Approve the proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 20-24

4. Approve the proposed amendments to Evidence Rules 101 through 1103 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 27-30

TAB

I. D

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 2010
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 14 and 15, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

The Department of Justice was represented on the committee by Lisa O. Monaco, Principal Associate Deputy Attorney General. Other attendees from the Department included Karyn Temple Claggett, Elizabeth Shapiro, Kathleen Felton, J. Christopher Kohn, and Ted Hirt.

Professor R. Joseph Kimble, the committee's style consultant, participated throughout the meeting, and Judge Barbara Jacobs Rothstein, director of the Federal Judicial Center, participated in part of the meeting.

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
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee III	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, 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
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that the Supreme Court had transmitted to Congress all the rule amendments approved by the Judicial Conference in September 2009, except the proposed amendment to FED. R. CRIM. P. 15 (depositions). That proposal would have authorized taking the deposition of a witness in a foreign country outside the presence of the defendant if the presiding judge were to make several special findings of fact. The Court remitted the amendment to the committee without comment, but some further explanation of the action is anticipated. She noted that the advisory committee had crafted the rule carefully to deal with delicate Confrontation Clause issues, and it appears that it may have further work to do.

Judge Rosenthal reflected that the rules committees had accomplished an enormous amount of work since the last Standing Committee meeting in January 2010. First, she said, the Advisory Committee on Evidence Rules had completed the restyling of the entire Federal Rules of Evidence and was now presenting them for final approval. The evidence rules, she noted, are the fourth set of federal rules to be restyled, and the final product is truly impressive.

Second, she said, final approval was being sought for important changes in the appellate and bankruptcy rules and for a package of amendments to the criminal rules that would allow courts and law enforcement authorities to take greater advantage of technological developments. Third, she pointed to the recent work of the sealing and privacy subcommittees and the Federal Judicial Center's major report on sealed cases in the federal courts.

Finally, she emphasized that the civil rules conference held at Duke Law School in May 2010 had been an unqualified success. She noted that the conference proceedings and the many studies and articles produced for the event should be viewed as just the beginning of a major rules project that will continue for years. All in all, she said, it had been a truly productive year for the rules committees, and the year was still not half over.

Judge Rosenthal introduced the committee's newest member, Chief Justice Wallace Jefferson of Texas. She noted that he is extremely well regarded across the entire legal community and recently received more votes that any other candidate for state office in Texas. She described some of his many accomplishments and honors, and she noted that he will be the next presiding officer of the Conference of Chief Justices.

With regret, she reported that several rules committee chairs and members were attending their last Standing Committee meeting because their terms would expire on October 1, 2010. She thanked Judge Swain and Judge Hinkle for their leadership and enormous contributions as advisory committee chairs for the past three years.

She pointed out that Judge Swain, as chair of the Advisory Committee on Bankruptcy Rules, had embarked on new projects to modernize the official bankruptcy forms and update the bankruptcy appellate rules, and had guided the committee through controversial rules amendments that were necessary to respond to economic developments. She emphasized that the work had been extremely complicated, timely, and meticulous.

Judge Hinkle's many accomplishments as chair of the Advisory Committee on Evidence Rules, she said, included the major, and very difficult, project of restyling the Federal Rules of Evidence. The new rules, she said, are outstanding and are an appropriate monument to his leadership as chair.

Judge Rosenthal said that the terms of two members of the Standing Committee were also about to end – Judge Hartz and Mr. Kester. She noted that Judge Hartz had come perfectly prepared to serve on the committee, having been a private practitioner, a prosecutor, a law professor, and a state judge. She thanked him for his incisive work as chair of the sealing subcommittee, for his amazing attention to detail, and for his willingness to do more than his share of hard preparatory work.

She said that Mr. Kester had been a wonderful member, bringing to the committee invaluable insights and wisdom as a distinguished lawyer. She detailed some of his background as a partner at a major Washington law firm, a law clerk to Justice Hugo Black, a former president of Harvard Law Review, a former high-level official at the Department of Defense, and a member of many public and civic bodies. She noted that he always shows great respect and appreciation for the work of judges and has written articles on law clerks and how they affect the work of judges.

Judge Rosenthal pointed out that two of the committee's consultants – Professor Geoffrey C. Hazard, Jr. and Joseph F. Spaniol, Jr. – had been unable to attend the meeting and would be greatly missed. She noted that Mr. Spaniol had been part of the federal rules process for more than 50 years.

Judge Rosenthal reported that Tom Willging was about to retire from his senior position with the Research Division of the Federal Judicial Center. She noted that Dr. Willging had worked closely with the Advisory Committee on Civil Rules for more than 20 years and had directed many of the most important research projects for that committee. She thanked him for his many valuable contributions to the rules committees and emphasized his hard work, innovative approach, and completely honest assessments.

Judge Rosenthal also thanked the staff of the Administrative Office for their uniformly excellent work in supporting the rules committees, noting in particular that they coped successfully with the recent upsurge in rules committee activities and contributed mightily to the success of the May 2010 civil rules conference at Duke Law School.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 7-8, 2010.

LEGISLATIVE REPORT

Civil Pleading

Judge Rosenthal reported that legislation had been introduced in 2009 in each house of Congress attempting to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). Three hearings had been held on the bills, but none since January 2010.

In May 2010, she said, a discussion draft had been circulated of new legislation that would take a somewhat different approach from the two earlier bills. She added that Congressional markup of some sort of pleading legislation had been anticipated by May, but had been postponed indefinitely. Another markup session, she said, may be scheduled before the summer Congressional recess, but there is still a good deal of uncertainty over what action the legislature will take.

Judge Rosenthal pointed out that the judiciary's primary emphasis has been to promote the integrity of the rulemaking process and to urge Congress to use that process, rather than legislation, to address pleading issues. She noted that the rules committees have been: (1) monitoring pleading developments since *Twombly* and *Iqbal;* (2) memorializing the extensive case law developed since those decisions; and (3) drawing on the Administrative Office and the Federal Judicial Center to gather statistics and other empirical information on civil cases before and after *Twombly* and *Iqbal.* That information, she said, had been given to Congress and posted on the judiciary's website. In addition, she, Judge Kravitz, and Administrative Office Director Duff had written letters to Congress emphasizing the importance of respecting and deferring to the Rules Enabling Act process, especially in such a delicate and technical legal area as pleading standards.

Sunshine in Litigation

Judge Rosenthal reported that the committee was continuing to monitor proposed "sunshine in litigation" legislation that would impose restrictions on judges issuing protective orders during discovery in cases where the information to be protected by the order might affect public health or safety. She noted that a new bill had recently been introduced by Representative Nadler that is narrower than earlier legislation. But, she said, it too would require a judge to make specific findings of fact regarding any potential

danger to public health and safety before issuing a protective order. As a practical matter, she explained, the legislation would be disruptive to the civil discovery process and require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 28, 2010 (Agenda Item 11).

Amendments for Final Approval

FED. R. APP. P. 4(a)(1) and 40(a) and PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

Judge Sutton reported that the proposed changes to Rule 4 (time to appeal) and Rule 40 (petition for panel rehearing) had been published for comment in 2007. The current rules, he explained, provide additional time to all parties to file a notice of appeal under Rule 4 (60 days, rather than 30) or to seek a panel rehearing under Rule 40 (45 days, rather than 14) in civil cases in which one of the parties in the case is a federal government officer or employee sued in an *official* capacity. The proposed amendments, he said, would clarify the law by specifying that additional time is also provided in cases where one of the parties is a federal government officer or employee sued in an *individual* capacity for an act or omission occurring in connection with duties performed on the government's behalf.

He noted, by way of analogy, that both FED. R. CIV. P. 4(i)(3) (serving a summons) and FED. R. CIV. P. 12(a)(3) (serving a responsive pleading) refer to a government officer or employee sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The same concept was being imported from the civil rules to the appellate rules.

Judge Sutton pointed out that the advisory committee had encountered a complication when the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that an appeal time period reflected in a statute is jurisdictional in nature. In light of that opinion, the advisory committee questioned the advisability of making the change in Rule 4 without also securing a similar statutory amendment to 28 U.S.C. § 2107.

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in

one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

Judge Sutton reported that the advisory committee had made a change in the proposed amendments following publication to specify that the rules apply to both current and former government employees.

He also explained that the advisory committee had debated whether to set forth specific safe harbors in the text of the rule to ensure that the longer time periods apply in certain situations. All committee members, he said, agreed to include two safe harbors in the rule. They would cover cases where the United States: (1) represents the officer or employee at the time the relevant judgment is entered; or (2) files the appeal or rehearing petition for the officer or employee.

Judge Sutton explained that two committee members had wanted to add a third safe harbor, to cover cases where the United States pays for private representation for the government officer or employee. There was no opposition to the third safe harbor on the merits, but a seven-member majority of the committee pointed to practical problems that cautioned against its inclusion. For example, neither the clerk's office nor other parties in a case will know whether additional time is provided because they will not be able to tell from the pleadings and the record whether the United States is in fact financing private counsel. The rule, moreover, had proven quite complicated to draft, and adding another safe harbor would make it more difficult to read.

In short, he said, the advisory committee concluded that the third safe harbor was simply not appropriate for inclusion in the text of the rule. He suggested, though, that some language addressing it could be included in the committee note, even though it would be unusual to specify a safe harbor in the note that is not set forth in the rule itself.

A participant inquired as to how often the situation arises where the government funds an appeal but does not provide the representation directly. Judge Sutton responded that the advisory committee had been informed that it arises rather infrequently, in about 30 to 50 cases a year.

A member suggested that the committee either add the third safe harbor to the text of the rules or not include any safe harbors in the rules at all. For example, the text of the two rules could be made simpler and a non-exclusive list added to the committee notes.

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, "including, but not limited to . . . ." The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere

in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.*, "including but not limited to . . ."; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

A member moved to adopt the second option, using the language drafted by Professor Struve, with a minor modification.

The committee without objection by voice vote approved the proposed amendments to Rules 4 and 40, including the additional language for the committee notes. Without objection by voice vote, it also approved the proposed corresponding statutory amendment to 28 U.S.C. § 2107.

Informational Items

Judge Sutton reported that the advisory committee was considering proposals to amend FED. R. APP. P. 13 (review of Tax Court decisions) and FED. R. APP. P 14 (applicability of other rules to review of Tax Court decisions) to address interlocutory appeals from the Tax Court. He noted that the committee would probably ask the Standing Committee to authorize publication of the proposed amendments at its January 2011 meeting.

He reported that the advisory committee was continuing to study whether federally recognized Indian tribes should be given the same status as states under FED. R. APP. P. 29 (amicus briefs), thereby allowing them to file amicus briefs without party consent or court permission. He said that he would consult on the matter with the chief judges of the Eighth, Ninth, and Tenth Circuits, where most tribal amicus filings occur. One possibility, he suggested, would be for those circuits to amend their local rules to take care of any practical problems. This course might avoid the need to amend the national rules. Otherwise, he said, the advisory committee would consider amending Rule 29. In addition, he noted that the Supreme Court does not give tribes the right to file amicus briefs without permission, but it does allow municipalities to do so.

He also reported that the advisory committee was considering some long-term projects, including possible rule amendments in light of the recent Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter,* 130 S. Ct. 599 (2009), which held that a ruling by a district court on attorney-client privilege did not qualify for an immediate appeal under the "collateral order" doctrine. Another long-term project, he said, involved studying the case law on premature notices of appeal. He noted that there are splits among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

Finally, Judge Sutton noted that the advisory committee was considering whether to modify the requirements in FED. R. APP. P. 28(a)(6) and (7) (briefs) that briefs contain separate statements of the case and of the facts. He suggested that the requirements prevent lawyers from telling their side of the case in chronological order. Several members agreed with that assessment and encouraged the advisory committee to proceed.

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 attachment of May 27, 2010 (Agenda Item 10).

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

Judge Swain reported that proposed new Rule 1004.2 (chapter 15 petition) would require a chapter 15 petition – which seeks recognition of a foreign proceeding – to designate the country in which the debtor has "its center of main interests." The proposal, originally published in 2008, had been criticized in the public comments for allowing too much time for a party to file a motion challenging the designation. As a result, the advisory committee republished the rule in 2009 to reduce the time for filing an objection from 60 days after notice of the petition is given to 7 days before the date set for the hearing on the petition.

She noted that no comments had been submitted on the revised proposal, and only stylistic changes had been made after publication.

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

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting.

If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to "hold open" the meeting for up to 120 days to allow the debtor additional time to file.

Under FED. R. BANKR. P. 3002(c) (filing a proof of claim or interest), taxing authorities have 60 days to file their proofs of claim after the debtor files the returns. If the debtor fails to file them within the time period provided by § 1308, the failure is a basis under § 1307 of the Code for mandatory dismissal of the case or conversion to chapter 7.

Professor Gibson pointed out that the purpose of the proposed amendment to Rule 2003 was to give clear notice to all parties as to whether a meeting of creditors has been concluded or adjourned and, if adjourned, for how long. It will let them know whether the trustee has extended the debtor's time to file tax returns as required for continuation of a chapter 13 case, since adjourning the meeting functions as "holding open" the meeting for purposes of the tax return filing provision.

She noted that eight of the nine public comments on the rule had been favorable. The Internal Revenue Service, however, recommended that the rule be revised to require the presiding officer to specify whether the meeting of creditors is being: (1) "held open" explicitly under § 1308 of the Code to give a taxpayer additional time to file returns; or (2) adjourned for some other purpose.

She reported that the advisory committee had debated the matter, and the majority voted to approve the rule as published for three reasons. First, no court has required a presiding officer to state specifically that the meeting is being "held open" or to cite § 1308. Rather, courts distinguish only between whether the meeting is concluded or continued. Second, the advisory committee believed that "holding open" and "adjourning" are truly equivalent terms, even though Congress used the inartful term "hold open" in § 1308. Third, the advisory committee was persuaded that the consequences of a presiding officer not specifically using the term "hold open" would be sufficiently severe for the debtor – conversion or dismissal of the case – that use of the exact words should not be required. Moreover, the taxing authorities are not prejudiced because they still have 60 days to file their proofs of claim.

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the

narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

The Department, he said, agreed that § 1308 had been designed to help taxing authorities prod debtors into filing returns and promptly providing information early in a case. The Department, he said, was concerned that there will be confusion if the distinction between holding open and adjourning a meeting is blurred. Moreover, the sanctions that may be imposed for failing to file in a timely fashion may be compromised.

The committee by voice vote with one objection (the Department of Justice) approved the proposed amendment for approval by the Judicial Conference.

FED. R. BANKR. P. 2019

Judge Swain reported that the advisory committee was recommending a substantial revision of Rule 2019 (disclosure of interests) to expand both the coverage of the rule and the content of its disclosure requirements. The rule, she said, provides the courts and parties with needed insight into the interests and potentially competing motivations of groups participating in a case. It attracted little attention over the years until buyers of distressed debt began to participate actively in chapter 11 cases.

The revised rule would require official and unofficial committees, groups, or entities that consist of, or represent, more than one creditor or equity security holder to disclose their "disclosable economic interests." That term is defined broadly in the revised rule to include not only a claim, but any other economic right or interest that could be affected by the treatment of a claim or interest in the case.

Among other things, she said, there has been strategic use of the current rule, especially to force hedge funds and other distressed-debt investors to reveal their holdings when they act as ad hoc committees of creditors or equity security holders. As a result, a hedge fund association suggested that the rule be repealed in its entirety. Other groups, however, including the National Bankruptcy Conference and the American Bar Association, recommended that the rule be retained and broadened.

Judge Swain pointed out that the proposal had drawn considerable attention, including 14 written comments and testimony from seven witnesses at the advisory committee's public hearing. In the end, she said, all but one commentator acknowledged the need for disclosure and supported expansion of the current rule.

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies,

seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

On the other hand, she said, there had been many public comments in support of the rule. The supporters, however, agreed that the rule would still be effective even if narrowed to address some of the objections. Accordingly, after publication, the committee made a number of changes to narrow the disclosure requirements and the sanctions provision.

She said that republication would not be necessary because all the subject matter included in the revised rule had been included in the broader published rule, and the advisory committee had added no new restrictions or requirements. Republication, moreover, would delay the rule by a year, and it is important to have it take effect as soon as possible to avoid further litigation over the scope and meaning of the current rule and strategic invocation of the current rule to gain leverage in disputes.

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

FED. R. BANKR. P. 3001

Professor Gibson reported that the proposed amendments to Rule 3001 (proof of claim) and new Rule 3002.1 (notice of fees, charges and payment amount changes imposed during the life of a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) were designed to address problems encountered in the bankruptcy courts with inadequate claims documentation in consumer cases. First, she said, proofs of claims are frequently filed without the documentation currently required by the rules and Official Form 10, especially by bulk purchasers of consumer claims. Second, problems arise in chapter 13 cases as a result of inadequate notice of various fees and penalties assessed on home mortgages. Debtors who successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

Professor Gibson explained that current Rule 3001(c) lays down the basic requirement that whenever a claim is based on a writing, the original or a duplicate of the writing must be filed with the proof of claim. The published amendments to Rule 3001(c)(1) would have added a requirement that a copy of the debtor's last account statement be attached to open-end or revolving credit-card account claims. The statement would let the debtor and trustee know who the most recent holder of the claim was, how old the claim is and whether it may be barred by the statute of limitations.

Because accounting mistakes occur and creditors change periodically, it would also help debtors to match up the claim with the specific debt.

She reported that the two rules had attracted a good deal of attention, including more than a hundred written comments and several witnesses at the advisory committee's public hearing. Comments from buyers of consumer debt objected because the last account statements, they said, are often no longer available. Federal law, for example, requires that they be kept for only two years. In addition, industry representatives stated that some of the loan information required by the amendments is not readily available to current creditors and cannot be broken out as specified in the proposed rules. Some commentators also argued that a copy of the last statement would unnecessarily reveal private information as to the nature and specifics of the credit card purchases of the debtor.

Professor Gibson reported that as a result of the public comments and testimony, the advisory committee had decided to withdraw the proposed revolving and open-end credit related amendments, redraft them, and republish them for further comment as a proposed new paragraph (c)(3). See *infra*, page 18.

The advisory committee, therefore, was seeking final approval at this point of only the proposed changes in Rule 3001(c)(2). They would require that additional information be filed with a proof of claim in cases in which the debtor is an individual, including:
(1) itemized interest charges and fees; and (2) a statement of the amount necessary to cure any pre-petition default and bring the debt current. In addition, a home mortgage creditor with an escrow account would have to file an escrow statement in the form normally required outside bankruptcy.

To standardize the new requirements of paragraph (c)(2) and supersede the many local forms already imposing similar requirements, the advisory committee was also seeking approval to publish for comment a proposed new standard national form – Official Form 10, Attachment A. See *infra,* page 20. The form would take effect on December 1, 2011, the same date as the proposed amendments to Rule 3001(c)(2).

Professor Gibson added that some public comments had recommended requiring a creditor to provide additional information on fees and calculations, while others argued for less information. The advisory committee, she said, had tried to strike the correct balance between obtaining additional disclosures needed for the debtor and trustee to understand the claim amounts and avoiding imposing undue burdens on creditors.

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the

holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

She reported that the provision had attracted several comments. After publication, the advisory committee revised the rule and committee note to emphasize that: (1) a court has flexibility to decide what sanction to apply and whether to apply a sanction at all; (2) the rule does not create a new ground to disallow a claim, beyond the grounds specified in § 502 of the Code; and (3) a court has discretion to allow a holder of the claim to file amendments to the claim. The proposed rule, she said, is a clear rejection of the concept that creditors may routinely ignore the documentation requirements of the rule and force debtors to go to the court to obtain necessary information.

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

FED. R. BANKR. P. 3002.1

Professor Gibson explained that proposed new rule 3002.1 (notice related to post-petition changes in payment amounts, and fees and charges, during a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) implements § 1322(b)(5) of the Bankruptcy Code. It would provide a procedure for debtors to cure any pre-petition default, maintain payments, and emerge current on their home mortgage at the conclusion of their chapter 13 plan. For the option to work, she explained, the chapter 13 trustee needs to know the required payment amounts, and the debtor should face no surprises at the end of the case.

She noted that subdivision (b) of the new rule would require the secured creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition changes in the monthly mortgage payment amount, including changes in the interest rate or escrow account adjustments. As published, the rule would have required a creditor to provide the notice 30 days in advance of a change. Public comments pointed out, though, that only 25 days is sometimes required by non-bankruptcy law. Accordingly, the advisory committee modified the rule after publication to require 21 days' advance notice of changes.

She added that the advisory committee had drafted a new form to implement subdivision (b) (Official Form 10, Supplement 1, Notice of Mortgage Payment Change). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that

debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

She noted that the advisory committee had drafted a new form to implement subdivision (c) (Official Form 10, Supplement 2, Notice of Postpetition Mortgage Fees, Expenses, and Charges). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson explained that subdivisions (f) through (h) deal with final-cure payments and end-of-case proceedings. They will permit debtors to obtain a determination as to whether they are emerging from bankruptcy current on their mortgage. The amendments recognize that in some districts, debtors make mortgage payments directly, and in others they are paid by the chapter 13 trustee. In all districts, the trustee makes the default payments.

Within 30 days of the debtor's completion of all payments under the plan, the trustee would be required by the rule to provide notice to the debtor, debtor's counsel, and the holder of the mortgage claim that the debtor has cured any default. The holder of the claim would be required to file a response indicating whether it agrees that the debtor has cured any default and also indicating whether the debtor is current on all payments.

She pointed out that subdivision (i) contains a sanction provision for failure to provide the information required under the rule, similar to the sanction provision proposed in Rule 3001, *supra* page 14.

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

FED. R. BANKR. P. 4004

Professor Gibson explained that the proposed amendments to Rule 4004 (grant or denial of discharge) would resolve a problem identified by the 7th Circuit in *Zedan v. Habash,* 529 F.3d 398 (2008). They would permit a party in specific, limited circumstances to seek an extension of the time to object to the debtor's discharge after the time for objecting has expired. The proposal would address the unusual situation in which there is a significant gap in time between the deadline in Rule 4004(a) for a party to object to the discharge (60 days after the first date set for the meeting of creditors) and the date that the court actually enters the discharge order.

During such a gap, a party – normally a creditor or the trustee – may learn of facts that may provide grounds to revoke the debtor's discharge under § 727(a) of the Code, such as fraud committed by the debtor. But it is too late at that point to file an objection. The party, moreover, cannot seek revocation because § 727(d) of the Code specifies that revocation is not permitted if a party learns of fraud *before* the discharge is granted. The party, therefore, may be left without appropriate recourse.

The proposed amendments would allow a party to file a motion to extend the time to object to discharge after the objection deadline has expired and before the discharge is granted. The motion must show that: (1) the objection is based on facts that, if learned after the discharge was entered, would provide a basis for revocation under § 727(d); and (2) the party did not know of those facts in time to file an objection to discharge. The motion, moreover, must be filed promptly upon discovery of the facts.

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

FED. R. BANKR. P. 6003

Judge Swain reported that Rule 6003 (relief immediately after commencement of a chapter 11 case) generally prohibits a court from issuing certain orders during the first 21 days of a chapter 11 case, such as approving the employment of counsel, the sale of property, or the assumption of an executory contract or unexpired lease. The proposed rule amendment would make it clear that the waiting period does not prevent a court from later issuing an order with retroactive effect, relating back, for example, to the date that the application or motion was filed. Thus, professionals can be paid for work undertaken while their application is pending.

The amendment would also clarify that the court is only prevented from granting the relief specifically identified in the rule. A court, for example, could approve the procedures for a sale during the 21-day waiting period, but not the actual sale of estate property itself.

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

OFFICIAL FORMS 22A, 22B, and 22C

Judge Swain reported that the proposed amendments to the "means-test" forms, Official Forms 22A (chapter 7), 22B (chapter 11), and 22C (chapter 13), would replace in several instances the terms "household" and "household size" with "number of persons" or "family size." The revised terminology more closely reflects § 707(b) of the Code and IRS standards. Section 707(b)(2)(A)(ii)(I) of the Code specifies that the debtor's means-test deductions for various monthly expenses may be taken in the amounts specified in the IRS National and Local Standards. The national standards, she said, are based on numbers of persons, rather than household size. The local standards are based on family size, rather than household size.

In addition, she said, an instruction would be added to each form explaining that only one joint filer should report household expenses regularly paid by a third person. Instructions would also be added directing debtors to file separate forms if only one joint debtor is entitled to an exemption under Part I (report of income) and they believe that filing separate forms is required by § 707(b)(2)(C) of the Code. The statutory provisions, she said, are ambiguous on means-testing exclusions. Therefore, the form does not impose a particular interpretation, and the instructions allow debtors to take positions consistent with their interpretations of the ambiguous exemption provisions.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference.

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

Judge Swain reported that the proposed changes to Official Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were technical in nature and did not require publication. They would conform the forms to: (1) the 2005 amendment to § 727(a)(8) of the Code, which extends the time during which a debtor is barred from receiving successive discharges from 6 years to 8 years; and (2) the 2007 addition of FED. R. BANKR. R. 9037, which directs filers to provide only the last four digits of any social security number or individual taxpayer-identification number.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 3001

As noted above on pages 12-14, the proposed amendments to Rule 3001(c)(1) (proof of claim) published in August 2009 would have required a creditor with a proof of claim based on an open-end or revolving consumer credit agreement to file the debtor's last account statement with the proof of claim. The main problem that the rule was designed to address is that credit-card debt purchased in bulk claims may be stale.

Professor Gibson explained that the advisory committee had withdrawn the published proposal in light of many comments from creditors that they could not effectively produce the account statements, especially since claims for credit-card debt may be sold one or more times before the debtor's bankruptcy. Some recommended that pertinent information be required instead.

Professor Gibson explained that the advisory committee would replace the proposal with a substitute new paragraph 3001(c)(3). In lieu of requiring that a copy of the debtor's last account statement be attached, the revised proposal would require the holder of a claim to file with the proof of claim a statement that sets forth several specific names and dates relevant to a consumer-credit account. Those details, she said, are important for a debtor or trustee to be able to associate the claim with a known account and to determine whether the claim is timely or stale.

Although the creditor would not have to attach the underlying writing on which the claim is based, a party, on written request, could require the creditor to provide the writing. In certain cases, the debtor needs the information to assert an objection.

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

FED. R. BANKR. P. 7054

Judge Swain reported that the proposed amendment to Rule 7054 (judgment and costs) would conform the rule to FED. R. CIV. P. 54 and increase the time for a party to respond to the prevailing party's bill of costs from one day to 14 days. The current period, she said, is an unrealistically short amount of time for a party to prepare a response. In addition, the time for serving a motion for court review of the clerk's action in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

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

FED. R. BANKR. P. 7056

Judge Swain explained that Rule 7056 (summary judgment) incorporates FED. R. CIV. P. 56 in adversary proceedings. Rule 56 is also incorporated in contested matters through FED. R. BANKR. P. 9014(c).

She reported that the proposed amendment to Rule 7056 would alter the rule's default deadline for filing a summary judgment motion in bankruptcy cases. She explained that the deadline in civil cases – 30 days after the close of discovery – may not work well in fast-moving bankruptcy contested matters, where hearings often occur shortly after the close of discovery. Therefore, the advisory committee decided to set the deadline for filing a summary judgment motion in bankruptcy at 30 days before the initial date set for an evidentiary hearing on the issue for which summary judgment is sought. As with FED. R. CIV. P. 56(c)(1), she noted, the deadline may be altered by local rule or court order.

A member suggested that the proposed language of the amendment was a bit awkward and recommended moving the authorization for local rule variation to the end of the sentence. Judge Swain agreed to make the change.

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

OFFICIAL FORM 10
and
ATTACHMENT A, SUPPLEMENT 1, AND SUPPLEMENT 2

Judge Swain reported that the advisory committee was recommending several changes in Official Form 10 (proof of claim). The holder of a secured claim would be required to specify the annual interest rate on the debt at the time of filing and whether the rate is fixed or variable. In addition, an ambiguity on the current form would be eliminated to make it clear that the holder of a claim must attach the documents that support a claim, and not just a summary of the documents.

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the court), *i.e.*, that the claim is "true and correct to the best of the signer's knowledge, information, and reasonable belief." This is particularly important, she said, because a proof of claim is prima facie evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a "uniform claim identifier," a system

implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer

Professor Gibson reported that three new claim-attachment forms had been drafted to implement the mortgage claims provisions of proposed Rules 3001(c)(2) and 3002.1. They would prescribe a uniform format for providing additional information on claims involving a security interest in a debtor's principal residence.

Attachment A to Official Form 10 would implement proposed Rule 3001(c)(2) and provide a uniform format for the required itemization of pre-petition interest, fees, expenses, and charges included in the home-mortgage claim amount. It would also require a statement of the amount needed to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement would have to be attached, as required by proposed Rule 3001(c)(2)(C).

Supplement 1 to Official Form 10 would implement proposed Rule 3002.1(b) and require the home-mortgage creditor in a chapter 13 case to provide notice of changes in the mortgage installment payment amounts.

Supplement 2 to Official Form 10 would implement proposed Rule 3002.1(c) and provide a uniform format for the home-mortgage creditor to list post-petition fees, expenses, and charges incurred during the course of a chapter 13 case.

Judge Swain noted that, following publication, the proposed form changes would become effective on December 1, 2011.

The committee without objection by voice vote approved the proposed amendments to Form 10 and the new Attachment A and Supplements 1 and 2 to the form for publication.

OFFICIAL FORM 25A

Judge Swain reported that Official Form 25A is a model plan of reorganization for a small business. It would be amended to reflect the recent increase of the appeal period in bankruptcy from 10 to 14 days in the 2009 time-computation rule amendments. The effective date of the plan would become the first business day following 14 days after entry of the court's order of confirmation.

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

Informational Items

Professor Gibson reported that the advisory committee was continuing to make progress on its two major ongoing projects – revising the bankruptcy appellate rules and modernizing the bankruptcy forms. She noted that the committee would begin considering a draft of a completely revised Part VIII of the Bankruptcy Rules at its fall 2010 meeting. In addition, it would try to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules in order to have the two committees consider the proposed revisions together.

Judge Swain reported that the forms modernization project, under the leadership of Judge Elizabeth L. Perris, had made significant progress in reformatting and rephrasing the many forms filed at the outset of a individual bankruptcy case. She noted that the project had obtained invaluable support from Carolyn Bagin, a nationally renowned forms-design expert, and it was continuing to reach out to users of the forms to solicit their feedback through surveys and questionnaires. In addition, the project was working closely with the groups designing the next generation replacement for CM/ECF to make sure that the new system includes the ability to extract and store data from the forms and to retrieve the data for user-specified reports.

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 attachment of May 17, 2010 (Agenda Item 5). The advisory committee had no action items to present.

Informational Items

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee, aided by a subcommittee chaired by Judge David G. Campbell, was exploring potential improvements to Rule 45 (subpoenas). Professor Marcus, he noted, was serving as the subcommittee's reporter.

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee's efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; and (3) simplifying the overly complex rule. The subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

Judge Kravitz reported that the committee would convene a Rule 45 mini-conference with members of the bench and bar in Dallas in October 2010. The

conference, he said, should be helpful in informing the advisory committee on what approach to take at its fall 2010 and spring 2011 meetings. Rule amendments might be presented to the Standing Committee in June 2011.

PLEADING

Judge Kravitz reported that the advisory committee was continuing to monitor dismissal-motion statistics and case-law developments in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009). The committee, he said, was focusing in particular on whether the decisions have had an impact on motions to dismiss and rates of dismissal.

Dr. Cecil explained that the Federal Judicial Center was collecting and coding court orders disposing of Rule 12(b)(6) motions in about 20 district courts and comparing outcomes in 2006 with those in 2010 to see whether there are any differences. In addition, the Center was examining court records to determine whether judges in granting dismissal motions allow leave to amend and whether the plaintiffs in fact file amended complaints.

Judge Kravitz noted that a division of opinion had been voiced at the May 2010 Duke conference on the practical impact of *Twombly* and *Iqbal.* One prominent judge, for example, urged the participants to focus on the actual holdings in the two cases, and not on the language of the opinions. Other judges concurred and argued that the two cases had not changed the law materially and were being implemented very sensibly by the lower courts. On the other hand, two prominent professors argued that the two Supreme Court decisions would cause great harm, were cause for alarm, and would effectively diminish access to justice.

Judge Kravitz emphasized that stability matters. He suggested that the advisory committee's intense research efforts demonstrated that the law of pleading in the federal courts was clearly settling down, and the evolutionary process of common-law development was working well. For that reason, he said, it would make no sense to enact legislation or change pleading standards at this point. He noted that the advisory committee's reporters were considering different ways to respond to the cases by rule, but they were awaiting the outcome of further research efforts by the Federal Judicial Center.

He pointed out that the advisory committee was looking carefully at the frequently cited problem of "information asymmetry." To that end, it was considering permitting some pre-dismissal, focused discovery to elicit information needed specifically for pleading. Another approach, he said, might be to amend FED. R. CIV. P. 9 (pleading special matters) to enlarge the types of claims that require more specific pleading. In addition, there may be a need for more detailed pleading requirements regarding affirmative defenses.

In short, he said, the advisory committee was looking at several different approaches and focusing on special, limited discovery for pleading purposes. He added that true "notice pleading" is actually quite rare in the federal courts. To the contrary, he said, when plaintiffs know the facts, they usually set them forth in the pleadings. The problem seems to be that some plaintiffs at the time of filing simply lack access to certain information that they need in order to plead adequately.

Judge Kravitz added that pleading issues should occupy a good deal of the advisory committee's time at its November 2010 meeting. The committee, he said, should have a report available in January 2011, but it may not have concrete proposals ready until later.

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz thanked Dean Levi for making the facilities at Duke Law School available for the May 2010 conference. He said that the event had been a resounding success, thanks largely to the efforts of the conference organizer, Judge John G. Koeltl. He pointed out that Judge Koeltl had done an extraordinary job in creating an excellent substantive agenda, assembling an impressive array of speakers, and soliciting a wealth of valuable articles and empirical data.

Several members who had attended the conference agreed that the program had been outstanding. They described the panel discussions as extremely substantive and valuable.

Specific Suggestions Made at the Conference

Judge Kravitz noted that a few recommendations had been made at the conference for major rule changes, such as: (1) moving away from "trans-substantivity" towards different rules for different kinds of cases; (2) abandoning notice pleading; (3) limiting discovery; and (4) recasting the basic goals enunciated in Rule 1. Nevertheless, he emphasized, most of the speakers and participants at the conference did not advocate radical changes in the structure of the rules. Essentially, the consensus at the conference was that the civil process should continue to operate within the broad 1938 outline.

Judge Kravitz noted that the topics discussed at the conference were largely matters that the advisory committee has been considering in one form or another for years. He added that much of the discussion and many of the papers presented dealt with discovery issues, and he proceeded to describe some of the suggestions.

The initial disclosures required by Rule 26(a), he said, came under attack from two sides. Some speakers recommended eliminating them entirely, while others urged that they be expanded and revitalized.

Some support was voiced for imposing presumptive limits on discovery. In particular, it was suggested that the current presumptive ceiling on the number of depositions and the length of depositions might be reduced.

Judge Kravitz reported that strong support was voiced by many participants for increased judicial involvement at the pretrial stage of civil cases. Lawyers at the conference all cited a need for more actual face-to-face time with judges in the discovery process. Judges, they said, need to be personally available to provide direction to the litigants and resolve disputes quickly. Nevertheless, he suggested, it would be difficult to mandate appropriate judicial attention through a national rule change. Other approaches, such as judicial education, may be more effective in achieving this objective.

Support was offered for developing form interrogatories and form document requests specifically tailored to different categories of cases, such as employment discrimination or securities cases. The models could be drafted collectively by lawyers for all sides and established as the discovery norm for various kinds of cases.

A concept voiced repeatedly was the need for greater cooperation among lawyers. Judge Kravitz pointed out that data from the recent Federal Judicial Center's discovery study had demonstrated a direct correlation between lawyer cooperation and reduced discovery requests and costs. He noted that a panelist at the conference emphasized that the discovery process is considerably more coordinated and disciplined in criminal cases (where the defendant's freedom is at stake) than in civil cases (where money is normally the issue). He observed that lawyers in criminal cases focus on the eventual trial and outcome, while civil lawyers focus mostly on the discovery phase itself. There are, moreover, more guidelines and limits in criminal discovery, due to the specific language of FED. R. CRIM. P. 16 and the Jencks Act. In addition, there are no economic incentives for the attorneys to prolong the discovery phase in criminal cases.

Judge Kravitz reported that many participants who represent defendants in civil cases complained about discovery costs. Among other things, they stated that the costs of reviewing discovery documents before turning them over to the other side continue to be huge, despite the recent enactment of FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product). He observed that lawyers are naturally reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

Judge Kravitz noted that support was also voiced at the conference for adopting simplified procedures, improving the Rule 16 and Rule 26 conferences, fashioning sensible discovery plans, and providing for greater cost shifting.

He reported that electronic discovery was a major topic at the conference. The lawyers, he said, were in agreement on two points. First, they recommended amending the civil rules to specify with greater precision what materials must be preserved at the outset of a case, and even before a federal case is filed. Second, they urged revision of the current sanctions regime in Rule 37(e) and argued that the rule's safe harbor is too shallow and ineffective.

Judge Kravitz said that current law provides clear triggers for the obligation to preserve potential litigation materials, but they are not specified in the federal rules. Preservation obligations, moreover, vary among the states and among the federal circuits. He said that the advisory committee was examining potential rule amendments to address both the preservation and sanctions problems. But, he cautioned, it will be very difficult to accomplish the changes that the bar clearly wants through the national rules.

He pointed out that the Rules Enabling Act limits the rules committees to matters of procedure, not substance. That statutory limitation is a serious impediment to regulating pre-lawsuit preservation obligations. Yet, once a case is actually filed in a federal court, the rules may address preservation and sanctions issues. Thus, despite the difficulty of drafting a rule to accomplish what the participants recommend, the advisory committee will move forward on the matter.

Professor Cooper agreed that the bar was promoting the laudatory goal of having clear and precise rules on what they must preserve and how they must preserve it. But the task of crafting a national preservation rule will involve complex drafting problems, as well as jurisdictional problems, and it just may not be possible.

Professor Coquillette added that state attorney-conduct rules addressing spoliation have been incorporated in a number of federal district-court rules. He explained that the Standing Committee had considered adopting national rules on attorney conduct a few years ago, but it eventually backed away from doing so because it involved many competing interests and difficult state-law issues.

Judge Kravitz reported that an excellent presentation was made at the conference on a promising pilot project in the Northern District of Illinois that focuses on electronic discovery. It emphasizes educating the bar about electronic discovery, promoting cooperation among the lawyers, and having the parties name information liaisons for discovery.

Judge Kravitz observed that, overall, the bar sees the 2006 electronic-discovery rule amendments as a success. They have worked well despite continuing concerns about

preservation and sanctions. He suggested that the rules may well need further refining, but they were, in retrospect, both timely and effective.

Judge Kravitz referred to a panel discussion at the conference that focused on trials and settlement. He noted that substantial angst was expressed by some participants over diminution in the number of trials generally. Nevertheless, no changes to that phenomenon appear in sight. One professor, he noted, argued that since all civil cases are eventually bound for settlement, the rules should focus on settlement, rather than trial. On the other hand, an attorney panelist countered that maintaining the current focus of the rules on the trial facilitates good results before trial.

Perceptions of the Current System

Judge Kravitz reported that several written proposals had been submitted to the conference by bar groups, and a good deal of survey data had been gathered. One clear conclusion to be drawn from the conference, he said, is that a large gap exists between the perceptions of plaintiffs' lawyers and those of defendants' lawyers. Those differences, he said, will be difficult to reconcile. Nevertheless, the advisory committee may be able to take some meaningful steps toward achieving workable consensus.

The general consensus, he said, is that the civil rules are generally working well. At the same time, though, frustration experienced by certain litigants leads them to believe that the system is not in fact working. The two competing perceptions, he said, are reconcilable. The reality appears to be that the process works well in most cases, but not in certain kinds of cases, particularly complex cases with high stakes. The various empirical studies, he said, show that the stakes in cases clearly matter, and complex cases with more money at stake tend to have more discovery problems and greater discovery costs. The goal in each federal civil case, he suggested, should be to agree on a sensible and proportionate discovery plan that relates to the stakes of the litigation.

Dr. Lee described and compared the various studies presented at the conference. He said that two different kinds of surveys had been conducted – those that asked lawyers for their general perceptions and those that were empirically based on actual experiences in specific cases.

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies demonstrate empirically that costs in the average federal case were only about $15,000 to $20,000.

The difference between the two results, he suggested, is due to cognitive biases. Respondents focus naturally on extreme cases and cases that stand out in their memory, and not on all their other cases. Perceptions, understandably, are not always accurate.

Judge Kravitz added that the empirical studies show that the vast majority of civil cases in the federal courts actually have little discovery. Nevertheless, discovery in complex civil cases can be enormous and extremely costly. Lawyers at the conference, he said, emphasized that it is the complex cases that judges should spend their time on.

Dr. Lee added that the empirical studies show that discovery costs clearly increase in complex cases. The stakes in litigation, he said, are the best predictor of costs, and they alone explain about 40-50% of the variations in costs shown in the studies. The economics of law practice, he said, also affects costs. Large firms, for example, have higher costs, and hourly billing increases costs for plaintiffs. He concluded that most of the factors shown in the studies to affect costs – such as complexity, litigation stakes, and law practice economics – are not driven by the rules themselves, but by other causes. Therefore, changing the rules alone may only have a marginal impact on the problems.

Future Committee Action

Judge Kravitz suggested that a handful of common themes had emerged at the conference. (1) There was universal agreement that cooperation among the attorneys in a case has a beneficial impact on limiting cost and delay. (2) There was universal agreement that active judicial involvement in a case, especially a case that has potential discovery problems, is essential. (3) There was little enthusiasm for retaining the Rule 26(a) mandatory disclosures in their current format. (4) Discovery costs in some cases are very high, and they may drive parties to settlement in some cases. (5) Certain types of cases are more prone to high discovery costs than others.

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

A member suggested that the conference discussions on electronic discovery were particularly meaningful and asked the advisory committee to place its greatest priority on addressing the electronic discovery issues – preservation and sanctions. He said that most of the other problems referred to at the conference can be resolved by lawyers working cooperatively, but rules changes will be needed to address the electronic discovery problems.

Other members agreed, but they questioned whether changes in the electronic discovery rules to address preservation obligations can be promulgated under the Rules Enabling Act. Judge Kravitz pointed out that the advisory committee was very sensitive to the limits on its authority. He said that the committee might be able to rework the sanction provisions, make them clearer, and specify the applicable conduct standards more precisely. On the other hand, preservation obligations are normally addressed in state laws and ethics rules. There are also federal laws on the subject, such as Sarbanes-Oxley. He said that the advisory committee would explore preservation issues closely, and it might be able to make the preservation triggers clearer. Ultimately, though, legislation may be required, as with the 2008 enactment of FED. R. EVID. 502 (attorney-client privilege and work product; limitations on waiver).

A member pointed out that general counsels from several corporations participated actively in the conference. He noted that they did not generally criticize the way that the rules are working and recommended only minor tweaks in the rules. On the other hand, they argued unanimously and strongly for greater judicial involvement in the discovery process, especially early in cases. They tended to be critical of their own lawyers for contributing to increased costs and saw the courts as the best way to drive down costs. He acknowledged that mandating effective early judicial involvement is hard to accomplish formally by a rule, but it should be underscored as an essential ingredient of the civil process.

A judge added that many suggestions raised at the conference are not easily addressed in rules, but might be promoted through best-practices initiatives, handbooks, websites, workshops, and other educational efforts. She added that controlled pilot projects could also be helpful to ascertain what practices work well and produce positive results.

A member noted that he had heard a good deal of criticism of judges at the conference, especially about their lack of sufficient focus on resolving discovery matters. He noted that magistrate judges handle discovery extremely well and can provide the intense focus on discovery that is needed, especially with regard to electronic discovery. The system, though, may not be working effectively in some districts because the magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

A participant cautioned, though, that for every theme raised at the conference, there was a counter theme. Several lawyers suggested, for example, that there should be a single judge in a case. Yet every court has its own culture and different available resources. Essentially, each believes that its own way of doing things is the best approach.

Judge Rosenthal pointed out that a report of the conference and an executive summary would be prepared. She added that the advisory committee and the Standing

Committee were resolved to take full advantage of what had transpired at the conference, and the proceedings will be the subject of considerable committee work in the future.

RULE 26(C) PROTECTIVE ORDERS

Judge Kravitz reported that the advisory committee had brought Rule 26(c) (protective orders) back to its agenda for further study in light of continuing legislative efforts to impose restrictions on the use of protective orders. He noted that the chair and reporter had worked on a possible revision of Rule 26(c), working from Ms. Kuperman's thorough analysis of the case law on protective orders in every circuit.

He noted that draft amendments to Rule 26(c) had been circulated at the advisory committee's spring 2010 meeting. They would incorporate into the rule a number of well-established court practices not currently explicit in the rule itself and add a provision on protecting personal privacy.

The committee, he said, was of the view that the federal courts are doing well in applying the protective-order rule in its current form. Nevertheless, it decided to keep the proposed revisions on its agenda for additional consideration. He noted, too, that none of the participants at the May 2010 conference had cited protective orders as a matter of concern to them. That fact, he suggested, was an implicit indication that the current rule is working well.

OTHER MATTERS

Judge Kravitz referred briefly to a number of other matters pending on the advisory committee's agenda, including the future of the illustrative forms issued under Rule 84 and the committee's interplay with the appellate rules committee on a number of issues that intersect both sets of rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 19, 2010 (Agenda Item 6).

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

Judge Tallman reported that the package of proposed technology changes would make it easier and more efficient for law enforcement officers to obtain process, typically early in a criminal case. It includes the following rules:

FED. R. CRIM. P. 1	Scope and definitions
FED. R. CRIM. P. 3	Complaint
FED. R. CRIM. P. 4	Arrest warrant or summons
FED. R. CRIM. P. 4.1 (new)	Issuing process by telephone or other reliable electronic means
FED. R. CRIM. P. 6	Grand jury
FED. R. CRIM. P. 9	Arrest warrant or summons on an indictment or information
FED. R. CRIM. P. 40	Arrest for failing to appear or violating release conditions in another district
FED. R. CRIM. P. 41	Search and seizure
FED. R. CRIM. P. 43	Defendant's presence
FED. R. CRIM. P. 49	Serving and filing papers

Judge Tallman commended the leadership of Judge Anthony Battaglia of the Southern District of California, who chaired the subcommittee that produced the technology package. The project, he said, was a major effort that had required substantial consultation, analysis, and drafting. He also thanked Professors Beale and King, the committee's hard-working reporters, for their contributions to the project.

He noted that the proposed amendments are intended to authorize all forms of reliable technology for communicating information for a judge to consider in reviewing a complaint and affidavits or deciding whether to issue a warrant or summons. Among other things, the term "telephone" would be redefined to include any form of technology for transmitting live electronic voice communications, including cell phones and new technologies that cannot yet be foreseen.

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate.

They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

The heart of the technology package, he said, is new Rule 4.1. It prescribes in one place how information is presented electronically to a judge. It requires a live conversation between the applicant and the judge for the purpose of swearing the officer, who serves as the affiant. A record must be made of that affirmation process.

Rule 4.1 also reinforces and expands the concept of a "duplicate original warrant" now found in Rule 41 and extends it to other kinds of documents. In the normal course, he said, the signed warrant will be transmitted back to the applicant, but there will also be occasions in which the judge will authorize the applicant to make changes on the spot to a duplicate original.

He noted that new Rule 4.1 preserves the procedures of current Rule 41 and adds improvements. Like Rule 41, Rule 4.1 permits only a federal judge, not a state judge, to handle electronic proceedings.

Judge Tallman pointed out that the proposed amendments carry the strong endorsement of the Federal Magistrate Judges Association. Helpful comments were also received from individual magistrate judges, federal defenders, and the California state bar. The advisory committee, he said, had amended the published rules in light of those comments.

The advisory committee, he explained, had withdrawn a proposed amendment to FED. R. CRIM. P. 32.1 (revoking or modifying probation or supervised release) that would have allowed video teleconferencing to be used in revocation proceedings. He noted that there is strong societal value in having defendants appear face-to-face before a judge, and many observers fear that embracing technology may diminish the use of courtrooms and undercut the dignity of the court. Revocation proceedings, he said, are in the nature of a sentencing, and they clearly may affect the determination of innocence or guilt. For that reason, the advisory committee concluded that while video teleconferencing is appropriate for certain criminal proceedings, it should not be used for revocation proceedings.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope and definition) would expand the term "telephone," now found in Rule 41 to allow new kinds of technology.

A member asked whether the term "electronic" is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal

explained that the same issue had arisen with the 2006 "electronic discovery" amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term "electronically stored information." She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point "electronic" appears to be the best term to use in the rule.

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

FED. R. CRIM. P. 3

Judge Tallman explained that the proposed amendment to Rule 3 (complaint) refers to new Rule 4.1 and authorizes using the protocol of that rule in submitting complaints and supporting materials to a judge by telephone or other reliable electronic means.

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

FED. R. CRIM. P. 4

Judge Tallman reported that the proposed amendments to Rule 4 (arrest warrant or summons on a complaint) also refers to new Rule 4.1 and authorizes using that rule to issue an arrest warrant or summons.

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

FED. R. CRIM. P. 4.1

Judge Tallman pointed out that proposed new rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) is the heart of the technology amendments. He emphasized that a judge's use of the rule is purely discretionary. A judge does not have to permit the use of technology and may insist that paper process be issued in the traditional manner through written documents and personal appearances.

He noted that if the protocol of Rule 4.1 is used, the supporting documents will normally be submitted electronically to the judge in advance. A phone call will then be made, the applicant law enforcement officer will be placed under oath, and a record will be made of the conversation. If the applicant does no more than attest to the contents of the written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally

acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

The judge may authorize the applicant to prepare a duplicate original of the complaint, warrant, or summons. The duplicate will not be needed, though, if the judge transmits the process back to the applicant.

The judge may modify the complaint, warrant, or summons. If modifications are required, the judge must either transmit the modified version of the document back to the applicant or file the modified original document and direct the applicant to modify the duplicate original document. In addition, Rule 4.1(a) adopts the language in existing Rule 41(d) specifying that, absent a finding of bad faith, evidence obtained from a warrant issued under the rule is not subject to suppression on the grounds that issuing the warrant under the protocol of the rule was unreasonable under the circumstances.

A member noted that the proposed rule expands the requirement in current Rule 41(d) that testimony be recorded and filed. Yet, he said, there is no requirement in either the current or revised rule that the warrant and affidavits themselves be filed. He pointed out that record-keeping processes among the courts are inconsistent, and the advisory committee should explore how documents are being filed and preserved in the courts, especially in the current electronic environment.

Judge Tallman agreed and noted that the advisory committee was aware of the inconsistencies. Some districts, for example, assign a magistrate-judge docket number to warrant applications and file the written documents in a sealed file without converting them to electronic form. Other courts digitize the documents and transfer them to the district court's criminal case file when an indictment is returned and a criminal case number assigned. He said that preserving a record of warrant proceedings is very important to defense lawyers, and the advisory committee will look further into the matter.

Mr. Rabiej reported that one of the working groups designing the next generation CM/ECF system is addressing how best to handle criminal process and other court documents that generally do not appear in the official public case file. Dr. Reagan explained that as part of the Federal Judicial Center's recent study of sealed cases, he had looked at all cases filed in the federal courts in 2006. Typically, he said, a warrant application is assigned a magistrate-judge electronic docket number. Although the records may still be retained in paper form in the magistrate judge's chambers in one or more districts, most courts incorporate them into the files of the clerk's office.

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out

the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

A member said that the rule assumes that the applicant will wind up with an official piece of paper in hand. Yet in the current age of rapid technological development, perhaps an electronic version of the document should suffice. By way of example, electronic boarding passes are now accepted at airports, and police officers use laptop computers and hand-held devices in their patrol cars.

Judge Tallman explained, though, that Rule 41(f) requires the officer to leave a copy of a search warrant and a receipt for the property taken with the person whose property is being searched. Professor Beale added that Rule 4.1 may need to be changed in the future to take account of electronic substitutes for paper documents. Nevertheless, the rule as currently proposed will help a great deal now because it will make electronic process more widely available and reduce the number of situations where officers act without prior judicial authorization. Ms. Monaco added that the Department of Justice believes that the new rule will be of great help to its personnel, and it plans to provide the U.S. attorneys with guidance on how to implement it.

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

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to Rule 6 (grand jury) would allow a judge to take a grand jury return by video teleconference. He noted that there are places in the federal system where the nearest judge is located a substantial distance from the courthouse in which the grand jury sits. The rule states explicitly that it is designed to avoid unnecessary cost and delay. The rule would also preserve the judge's time and safety.

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

FED. R. CRIM. P. 9

Judge Tallman reported that the proposed amendment would authorize the protocol of Rule 4.1 in considering an arrest warrant or summons on an indictment or information.

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

FED. R. CRIM. P. 40

Judge Tallman reported that the proposed amendment to Rule 40 (arrest for failing to appear or violating conditions of release in another district) would allow using video teleconferencing for an initial appearance, with the defendant's consent. It will be helpful to some defendants, as, for example, when a defendant faces a long transfer to another district and hopes that the judge might quash the warrant or order release if he or she is able to present a good reason for not having appeared in the other district.

Professor Beale added that Rule 40 currently states that a magistrate judge should proceed with an initial appearance under Rule 5(c)(3), as applicable. The advisory committee, she said, had some concern whether current Rule 5(f), allowing video teleconferencing of initial appearances on consent, would clearly be applicable to Rule 40 situations. So, as a matter of caution, it recommended adding a specific provision in Rule 40 to make the matter clear.

A member cautioned that the committee should not encourage a reduction in the use of courtrooms, and he asked where the participants will be located physically for the Rule 40 video teleconferencing. Judge Tallman suggested that the judge and the defendant normally will both be in a courtroom for the proceedings.

He added that the potential benefits accruing to a defendant who consents to video conferencing under Rule 40 outweigh the general policy concerns about diminishing the use of courtrooms. Professor Beale pointed out that Rule 5 already authorizes video teleconferencing in all initial appearances if the defendant consents. Moreover, the role of lawyers and the use of court interpreters will not change. The proposed amendment merely extends the current provision to the Rule 40 subset of initial appearances.

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

FED. R. CRIM. P. 41

Judge Tallman said that the proposed amendments to Rule 41 (search and seizure) are largely conforming in nature. Most of the current text in Rule 41 governing the protocol for using reliable electronic means for process would be moved to the new Rule 4.1. In addition, revised Rule 41(f) would explicitly authorize the return of search warrants and warrants for tracking devices to be made by reliable electronic means.

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

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying

probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

The remaining Rule 43 amendment would authorize video teleconferencing in misdemeanor or petty offense proceedings with the defendant's written consent. He noted that Rule 43 currently permits arraignment, plea, trial, and sentencing in misdemeanor or petty offense cases in the absence of the defendant. The procedure, he noted, is used mainly in minor offenses occurring on government reservations such as national parks because requiring a defendant to return to the park for court proceedings may impose personal hardship. He emphasized, though, that the presiding judge may always require the defendant's presence and does not have to permit either video teleconferencing or trial in absentia.

A member agreed that there are practical problems with misdemeanors in national parks, but lamented the trend away from courtroom proceedings. The dignity of the courtroom and the courthouse, he said, are very important and have positive societal value. The physical courtroom, moreover, affects personal conduct. In essence, steps that reduce the need for courtroom proceedings should only be taken with the utmost caution and concern.

Judge Tallman agreed and explained that the advisory committee had withdrawn the proposed amendment to Rule 32.1 for just that reason. Several members concurred that substitutes to a physical courtroom should be the exception and never become routine. One member noted, though, that courts are being driven to using video teleconferencing by the convenience demands of others, including law enforcement personnel, lawyers, and parties. A member added that the only practical alternative to video teleconferencing for a defendant in a misdemeanor case now is for the defendant not to show up and to pay a fine.

Members suggested that language be added to the committee note to emphasize that the use of video teleconferencing for misdemeanor or petty offense proceedings should be the exception, not the rule, and that judges should think carefully before allowing video trials or sentencing. They suggested that the advisory committee draft appropriate language to that effect for the committee note. Judge Tallman pointed out that the committee note to the current Rule 5 contains appropriate language that could be adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

The committee without objection by voice vote approved the proposed amendment, including the additional note language, for approval by the Judicial Conference.

FED. R. CRIM. P. 49

Judge Tallman reported that the proposed amendment to Rule 49 (serving and filing papers) would bring the criminal rules into conformity with the civil rules on electronic filing. Based on FED. R. CIV. P. 5(d)(3), it would authorize the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means, consistent with any technical standards of the Judicial Conference.

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

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

Judge Tallman reported that the proposed amendments to Rule 32(d)(2)(F) and (G) (sentencing and judgment) had been recommended by the committee's style consultant. They would remedy two technical drafting problems created by the recent package of criminal forfeiture rules.

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

FED. R. CRIM. P. 41

Judge Tallman reported that the proposed amendments to Rule 41 (search and seizure) were also technical and conforming in nature. The rule currently gives a law enforcement officer 10 "calendar" days after use of a tracking device has ended to return the warrant to the judge and serve a copy on the person tracked. The proposed amendments would delete the unnecessary word "calendar" from the rule because all days are now counted the same under the 2009 time computation amendments' "days are days" approach.

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

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

Amendments for Publication

FED. R. CRIM. P. 37

Judge Tallman reported that the proposed new Rule 37 (indicative rulings) would authorize indicative rulings in criminal cases, in conformance with the new civil and appellate rules that formalize a procedure for such rulings – FED. R. CIV. P. 62.1 and FED. R. APP. P. 12.1. Professor Beale pointed out that the criminal advisory committee had benefitted greatly from the work of the civil and appellate committees in this matter. She added that the advisory committee would also delete the first sentence of the second paragraph of the proposed committee note.

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

FED. R. CRIM. P. 5 and 58

Judge Tallman reported that the proposed amendments to Rule 5 (initial appearance) and Rule 58 (petty offenses and other misdemeanors) had been suggested by the Department of Justice and would implement the government's notice obligations under applicable statutes and treaties.

He noted that the proposed amendment to Rule 5(c)(4) would require that the initial appearance of an extradited foreign defendant take place in the district where the defendant is charged, rather than in the district where the defendant first arrives in the United States. The intent of the amendment is to eliminate logistical delays. A member voiced concern, though, over potential delay of the initial appearance if the defendant no longer receives an initial appearance as soon as he or she arrives in the United States.

A member suggested adding language to the rule requiring that the initial appearance be held promptly. Professor Beale and Judge Tallman pointed out that Rule 5(a)(1)(B) already states explicitly that the initial appearance must be held "without unnecessary delay." The member suggested that it would be helpful to include a reference in the committee note to the language of Rule 5(a)(1)(B). After a break, Judge Tallman presented note language to accomplish that result.

Judge Tallman explained that the other proposed amendments to Rule 5 and 58 would carry out treaty obligations of the United States to notify a consular officer from the defendant's country of nationality that the defendant has been arrested, if the defendant requests. A member recommended removing the first sentence of the committee note for each rule, which refers to the government's concerns. Professor Beale agreed that the sentences could be removed, but she noted that the rule and note had been carefully negotiated with the Department of Justice. Judge Tallman suggested rephrasing the first sentence of each note to state simply that the proposed rule facilitates compliance with treaty obligations, without specifically mentioning the government's motivation.

The committee without objection by voice vote approved the proposed amendments, including the additional note language, for publication.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman noted that at the January 2010 Standing Committee meeting, he had presented a report on the advisory committee's study of proposals to broaden FED. R. CRIM. P. 16 (discovery and inspection) and incorporate the government's obligation to provide exculpatory evidence to the defendant under *Brady v. Maryland,* 373 U.S. 83 (1963) and later cases. He noted that the advisory committee had convened a productive meeting on the subject in February with judges, prosecutors, law enforcement authorities, defense attorneys, and law professors. The participants, he said, had been very candid and non-confrontational, and the meeting provided the committee with important input on the advisability of broadening discovery in criminal cases.

He reported that the Federal Judicial Center had just sent a survey to judges, prosecutors, and defense lawyers on the matter, and the responses have been prompt and massive, with comments received already from 260 judges and nearly 2,000 lawyers. He added that the records of the Department of Justice's Office of Professional Responsibility showed that over the last nine years an average of only two complaints a year had been sustained against prosecutors for misconduct. But, he added, lawyers may be reluctant to file formal complaints with the Department. The current survey, he noted, was intended in part to identify any types of situations that have not been reported.

FED. R. CRIM. P. 12

Judge Tallman noted that in June 2009 the Standing Committee recommitted to the advisory committee a proposed amendment to Rule 12 (pleadings and pretrial motions) that would have required a defendant to raise before trial any claims that an indictment fails to state an offense. The advisory committee was also asked to explore the advisability of using the term "forfeiture," rather than "waiver," in the proposed rule.

He reported that the pertinent Rule 12 issues are complex. Therefore, the committee was considering a more fundamental, broader revision of the rule that might clarify which motions and claims must be raised before trial, distinguish forfeited claims from waived claims, and clarify the relationship between these claims and FED. R. CRIM. P.52 (harmless and plain error).

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky,* 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether

immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor implementation of the Crime Victims' Rights Act. Among other things, he said, the committee had discovered an instance of an unintended barrier to court access by crime victims. An attorney representing victims had been unable to file a motion asserting the victim's rights because the district court's electronic filing system only authorized motions to be filed by parties in the case. On behalf of the advisory committee, he said, he had brought the matter to the attention of the chair of the Judicial Conference committee having jurisdiction over development of the CM/ECF electronic system.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 10, 2010 (Agenda Item 7).

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

Judge Hinkle reported that the restyling of the Federal Rules of Evidence was the only action matter on the agenda. He noted that the project had been a joint undertaking on the part of the advisory committee and the Standing Committee's Style Subcommittee, comprised of Judge Teilborg (chair), Judge Huff, and Mr. Maledon.

He noted that the project to restyle the federal rules had originated in the early 1990s under the sponsorship of the Standing Committee chair at the time, Judge Robert Keeton, who set out to bring greater consistency and readability to the rules. Judge Keeton had appointed Professor Charles Alan Wright as the first chair of the Standing Committee's new Style Subcommittee and Bryan Garner as the committee's first style consultant. Judge Hinkle pointed out that Mr. Garner had authored the pamphlet setting out the style conventions followed by the subcommittee – *Guidelines for Drafting and Editing Court Rules.*

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the

doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

He added that whatever disruption there may be initially will evaporate rather quickly because the committee worked intensively to avoid any changes in substance. He pointed out, though, that there are indeed differences between the evidence rules and the other sets of federal rules because the evidence rules are used in courtrooms every day, and lawyers need to know them intimately and instinctively.

Judge Hinkle reported that Professor Kimble had assumed the duties of style consultant near the end of the criminal rules restyling project and had been an indispensable part of both the civil and evidence restyling efforts. He pointed out that the restyled civil rules had proven so successful that they had been awarded the Burton Award for Reform in Law, probably the nation's most prestigious prize for excellence in legal writing.

Judge Hinkle explained that the process used by the advisory committee to restyle the rules had involved several steps. It started with Professor Kimble drafting a first cut of the restyled rules. That product was reviewed by Professor Capra, the committee's reporter, who examined the revisions carefully to make sure that they were technically correct and did not affect substance. Then the rules were reviewed again by the two professors and by members of the advisory committee. They were next sent to the Style Subcommittee for comment. After the subcommittee's input, they were reviewed by the full advisory committee.

The advisory committee members reviewed the revised rules in advance of the committee meeting and again at the meeting. He added that the committee had also been assisted throughout the project by Professor Kenneth S. Broun, consultant and former member of the committee, by Professor Stephen A. Saltzburg, representing the American Bar Association (and former reporter to the criminal advisory committee), and by several other prominent advisors. He explained that the rules were all published for comment at the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

Judge Hinkle reported that if the advisory committee decided that any change in the language of a rule impacted substance, it made the final call on the revised language. If, however, a change was seen as purely stylistic, the advisory committee noted that it was not a matter of substance, and the Style Subcommittee made the final decision on language.

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they

are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

At its last meeting, the advisory committee considered the comments and took a fresh look at the rules. In addition, Professors Capra and Kimble completed another top-to-bottom review of the rules. The Style Subcommittee also reviewed them carefully and conducted many meetings by conference call.

Finally, the advisory committee received helpful comments from members of the Standing Committee in advance of the current meeting. The comments of Judges Raggi and Hartz were reviewed carefully and described in a recent memorandum from Professor Capra. Dean Levi also suggested changes just before the meeting that Judge Hinkle presented orally to the committee.

A motion was made to approve the package of restyled evidence rules, including the recent changes incorporated in Professor Capra's memo and those described by Judge Hinkle.

A member stated that she would vote for the restyled rules, but expressed ambivalence about the project. She applauded the extraordinary efforts of the committee in producing the restyled rules, but questioned whether they represent a sufficient improvement over the existing rules to justify the transactional costs of the changes.

She also expressed concern over the need to revise the language of all the rules since the evidence rules are so familiar to lawyers as to make them practically iconic. They are cited and relied on everyday in courtroom proceedings. Any changes in language, she said, will inevitably be used by lawyers in future arguments that changes in substance were in fact made.

She noted that some of the changes clearly improve the rules, such as adding headings, breakouts, numbers, and letters that judges and lawyers will find very helpful. Nevertheless, every single federal rule of evidence was changed in the effort, and some of the changes were not improvements. She asked whether it was really necessary to change each rule of evidence, especially because the rules were drafted carefully over the years, and many of them have been interpreted extensively in the case law.

She recited examples of specific restyled rules that may not have been improved and suggested that some of them were actually made worse solely for the sake of stylistic consistency. In short, she concluded, the new rules represent a solution in search of a problem. Nevertheless, despite those reservations, she stated that she would not cast the only negative vote against the revised rules and would vote to approve the package, but with serious doubts.

A member suggested that those comments were the most thoughtful and intelligent criticisms he had ever heard about the restyling project. Yet, he had simply not been persuaded.

Another member also expressed great appreciation for those well-reasoned views, but pointed out that the great bulk of lawyers and organizations having reviewed the revised rules support them enthusiastically. She explained that the new rules eliminate wordiness and outdated terms in the existing rules. They also improve consistency within the body of evidence rules and with the other federal rules. Moreover, the restyling retains the familiar structure and numbering of the existing evidence rules, even though the style conventions might have called for renumbering or other reformatting. In the final analysis, she suggested, the restyled evidence rules are significantly better and lawyers will easily adapt to the changes.

A member agreed and said that, as a practicing lawyer, he had been skeptical when the project had first started. He pointed out, though, that the committee had made extraordinary efforts to avoid any changes in substance or numbering that could potentially disrupt lawyers. This attempt to preserve continuity, he said, had been a cardinal principle of the effort and had been followed meticulously.

On behalf of the Style Subcommittee, Judge Teilborg offered a special tribute to Judge Hinkle for his outstanding leadership of the project, as well as his great scholarship and technical knowledge. The end product, he said, was superlative and could only have been achieved through an enormous amount of work and cooperation. He also thanked Judge Huff and Mr. Maledon for their time and devotion to the Style Subcommittee's efforts, especially for giving up so many of their lunch hours for conference calls.

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

A member suggested that one of the great benefits of the restyling process is that the reviewers uncover unintended ambiguities in the rules. He pointed out that Professor Capra was keeping track of all the ambiguities in the evidence rules, so they may be addressed in due course as matters of substance on a separate track. He also remarked that the committee's style conventions are not well known to the public and suggested that they be made available to bench and bar to help them understand the process.

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

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the Sealing Subcommittee, reported that the subcommittee had been charged with examining the sealing of entire cases in the federal courts. The assignment had been generated by a request to the Judicial Conference from the chief judge of the Seventh Circuit.

Judge Hartz noted that the bulk of the subcommittee's work in examining current court practices had been assigned to the Federal Judicial Center. Dr. Reagan of the Center, he said, had reviewed every sealed case filed in the federal courts in 2006.

He pointed out that there are very good reasons for courts to seal cases – such as matters involving juveniles, grand juries, fugitives, and unexecuted warrants. The study, he added, revealed that many of the sealed "cases" docketed by the courts were not entire cases, but miscellaneous proceedings that carry miscellaneous docket numbers.

He noted that the Center's report had been exhaustive, and the subcommittee felt comfortable that virtually all the sealing decisions made by the courts had been supported by appropriate justification. On the other hand, it was also apparent from the study that court sealing processes could be improved. In some cases, for example, lesser measures than sealing an entire case might have sufficed, such as sealing particular documents. Moreover, the study found that in practice many sealed matters are not timely unsealed after the reason for sealing has expired.

In the end, the subcommittee decided that there is no need for new federal rules on sealing. The standards for sealing, he said, are quite clear in the case law of every circuit, and the courts appear to be acting properly in sealing matters. Nevertheless, there does appear to be a need for Judicial Conference guidelines and some practical education on sealing.

Professor Marcus said that it is worth emphasizing that when the matter was first assigned to the rules committee, the focus was on whether new national rules are needed. He added that there is a general misperception that many cases are sealed in the courts. The Federal Judicial Center study, though, showed that there are in fact very few sealed cases, and many of those are sealed in light of a specific statute or rule, such as in qui tam cases and grand jury proceedings. As for dealing with public perceptions, he said, the committee should emphasize that the standards for sealing are clear and that judges are acting appropriately. Nevertheless, some practical steps should be taken to improve sealing practices in the courts.

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's

Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

> First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.
>
> Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.
>
> Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

Professor Marcus explained that the subcommittee was also recommending that the Court Administration and Case Management Committee consider exploring the following steps to promote compliance with the proposed national policy statement:

(1) judicial education to make sure that judges are aware of the proper criteria for sealing, including the lesser alternatives;
(2) education for judges and clerks to ensure that sealing is ordered only by a judge or reviewed promptly by a judge;
(3) a study to identify when a clerk may seal a matter temporarily and to establish procedures to ensure prompt review by a judge;
(4) judicial education to ensure that judges know of the need to unseal matters promptly and to set expiration dates for sealing;
(5) programming CM/ECF to generate notices to courts and parties that a sealing order must be reviewed after a certain time period;
(6) programming CM/ECF to generate periodic reports of sealed cases to facilitate more effective and efficient review of them; and
(7) administrative measures that the courts might take to improve handling requests for sealing.

The committee endorsed the subcommittee report and recommendations and voted to refer them to the Court Administration and Case Management Committee for appropriate action.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect

privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

She noted that the subcommittee included three representatives from the Court Administration and Case Management Committee, whose contributions have been invaluable. In addition, she said, Judge John R. Tunheim, former chair of the Court Administration and Case Management Committee, and Judge Hinkle were serving as advisors to the subcommittee.

In short, the subcommittee was reviewing: (1) whether the new rules are being followed; and (2) whether they are adequate. To address those questions, she explained, the subcommittee had started its efforts with extensive surveys by the Administrative Office and the Federal Judicial Center. It then conducted a major program at Fordham Law School, organized by Professor Capra, to which more than 30 knowledgeable individuals with particular interests in privacy matters were invited. The invitees included judges, members of the press, representatives from non-government organizations, an historian, government lawyers, criminal defense lawyers, and lawyers active in civil, commercial, and immigration cases. With the benefit of all the information and views accumulated at the conference, the subcommittee will spend the summer drafting its report for the January 2011 Standing Committee meeting.

Judge Raggi noted that, like the sealing subcommittee, her subcommittee's report will likely not include any recommendations for changes in the federal rules. Rather, it will provide relevant information on current practices in the courts and on the effectiveness of the new privacy rules. Professor Capra added that the Federal Judicial Center had prepared an excellent report on the use of social security numbers in case filings that will be a part of the subcommittee report.

LONG RANGE PLANNING

It was noted that the April 2010 version of the proposed *Draft Strategic Plan for the Federal Judiciary* had been included in the committee's agenda materials, and several of the plan's strategies and goals relate to the work of the rules committees. It was also pointed out that a separate chart had been included in the materials setting out the specific matters in the proposed plan that have potential rules implications.

NEXT MEETING

The members agreed to hold the next committee meeting on January 6-7, 2011, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB

II. A

Proposed Amendments Approved by the Supreme Court

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.3. Notice of a Public-Authority Defense**

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

* * * * *

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

* * * * *

(C) *Government's Reply.* Within 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 — and the address and telephone number of each witness other than a victim — that the

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*New material is underlined; matter to be omitted is lined through. The Supreme Court declined to approve the proposed amendment to Criminal Rule 15.

**Incorporates amendments approved by the Supreme Court scheduled to take effect on December 1, 2009, if Congress takes no action to the contrary.

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:

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

(2B) 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).

* * * * *

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).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

Rule 21. Transfer for Trial

* * * * *

(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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

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

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

2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

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

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

TAB

II. B

Proposed Amendments Approved by the Judicial Conference

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

* * * * *

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

* * * * *

(11) "Telephone" means any technology for transmitting live electronic voice communication.

~~(11)~~(12) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

* * * * *

Committee Note

Subdivisions (b)(11) and ((12). The added definition clarifies that the term "telephone" includes 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, for example, would be included. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice

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

communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The text was rephrased by the Committee to describe the telephone as a "technology for transmitting electronic voice communication" rather than a "form" of communication.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. ~~It~~ Except as provided in Rule 4.1, it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

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 or affirmation 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 permits electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 4. Arrest Warrant or Summons on a Complaint

* * * * *

(c) Execution or Service, and Return.

* * * * *

(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.

* * * * *

(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.

* * * * *

(d) **Warrant by Telephone or Other Reliable Electronic Means.** In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

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 4.1 (b)(5) (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 4.1.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) In General. A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(b) Procedures. If a magistrate judge decides to proceed under this rule, the following procedures apply:

(1) ***Taking Testimony Under Oath.*** The judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based.

(2) ***Creating a Record of the Testimony and Exhibits.***

(A) *Testimony Limited to Attestation.* If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit.

(B) *Additional Testimony or Exhibits.* If the judge considers additional testimony or exhibits, the judge must:

(i) have the testimony recorded verbatim by an electronic recording device, by a court reporter, or in writing;

(ii) have any recording or reporter's notes transcribed, have the transcription certified as accurate, and file it;

(iii) sign any other written record, certify its accuracy, and file it; and

(iv) make sure that the exhibits are filed.

(3) ***Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons.*** The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the judge.

(4) ***Preparing an Original Complaint, Warrant, or Summons.*** If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by

reliable electronic means, the transmission received by the judge may serve as the original.

(5) ***Modification.*** The judge may modify the complaint, warrant, or summons. The judge must then:

(A) transmit the modified version to the applicant by reliable electronic means; or

(B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

(6) ***Issuance.*** To issue the warrant or summons, the judge must:

(A) sign the original documents;

(B) enter the date and time of issuance on the warrant or summons; and

(C) transmit the warrant or summons by reliable electronic means to the applicant or direct the

applicant to sign the judge's name and enter the date and time on the duplicate original.

(c) **Suppression Limited.** Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Committee Note

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Rule 4.1 prescribes uniform procedures and ensures an accurate record.

The procedures that have governed search warrants "by telephonic or other means," formerly in Rule 41(d)(3) and (e)(3), have been relocated to this Rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. By

using the term "magistrate judge," the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The Rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retain the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2)(A). Former Rule 41(d)(3)(B)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2)(A) provides that 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 those written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge should simply acknowledge in writing the attestation on the affidavit. This may be done, for example, by signing the jurat included on the Administrative Office of U.S. Courts form. Rule 4.1(b)(2)(B) carries forward the requirements formerly in Rule 41 to cases in which the magistrate judge considers testimony or exhibits in addition to the affidavit. In addition, Rule 4.1(b)(6) specifies that in order to issue a warrant or summons the magistrate judge must sign all of the original documents and enter the date and time of issuance on the warrant or summons. This procedure will create and maintain a complete record of the warrant application process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Published subdivision (a) referred to the action of a magistrate judge as "deciding whether to approve a complaint." To accurately describe the judge's action, it was rephrased to refer to the judge "reviewing a complaint."

Subdivisions (b)(2) and (3) were combined into subdivisions (b)(2)(A) and (B) to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. The clauses in subparagraph (B) were reordered and further divided into items (i) through (iv). Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).

In subdivision (b)(5), language was added requiring the judge to file the modified original if the judge has directed an applicant to modify a duplicate original. This will ensure that a complete record is preserved. Additionally, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

In subdivision (b)(6), introductory language erroneously referring to a judge's approval of a complaint was deleted, and the rule was revised to refer only to the steps necessary to issue a warrant or summons, which are the actions taken by the judicial officer.

In subdivision (b)(6)(A) the requirement that the judge "sign the original" was amended to require signing of "the original documents." This is broad enough to encompass signing a summons, an arrest or search warrant, and the current practice of the judge signing the jurat on complaint forms. Depending on the nature of the

case, it might also include many other kinds of documents, such as the jurat on affidavits, the certifications of written records supplementing the transmitted affidavit, or papers that correct or modify affidavits or complaints.

In subdivision (b)(6)(B), the superfluous and anachronistic reference to the "face" of a document was deleted, and rephrasing clarified that the action is the entry of the date and time of "the approval of a warrant or summons." Additionally, (b)(6)(C) was modified to require that the judge must direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

Rule 6. The Grand Jury

* * * * *

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not

concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

* * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

* * * * *

(d) **Warrant by Telephone or Other Means.** In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 32. Sentencing and Judgment

* * * * *

(d) Presentence Report.

* * * * *

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

(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) 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;

~~(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;~~

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

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

* * * * *

Committee Note

Subdivision (d)(2). This technical and conforming amendment reorders two subparagraphs describing the information that may be included in the presentence report so that the provision authorizing the inclusion of any other information the court requires appears at the end of the paragraph. It also rephrases renumbered subdivision (d)(2)(F) for stylistic purposes.

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

* * * * *

(d) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Committee Note

Subdivision 40(d). The amendment provides for video teleconferencing in order to bring the Rule into conformity with Rule 5(f).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The amendment was rephrased to track precisely the language of Rule 5(f), on which it was modeled.

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Reliable Electronic Means.*** In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic 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.~~

~~(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 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.

* * * * *

(2) Contents of the Warrant.

* * * * *

(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:

(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 transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.~~

(f) Executing and Returning the Warrant.

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

* * * * *

(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 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).

* * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (e)(2). The amendment eliminates unnecessary references to "calendar" days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include "every day, including intermediate Saturdays, Sundays, and legal holidays[.]"

Subdivisions (f)(1) and (2). The amendment permits any warrant return to be made by reliable electronic means. 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. Additionally, in subdivision (f)(2) the amendment eliminates unnecessary references to "calendar" days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include "every day, including intermediate Saturdays, Sundays, and legal holidays[.]"

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Obsolescent references to "calendar" days were deleted by a technical and conforming amendment not included in the rule as published. No other changes were made after publication.

Rule 43. Defendant's Presence

* * * * *

(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 teleconferencing or in the defendant's absence.

* * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

The Committee reiterates the concerns expressed in the 2002 Committee Notes to Rules 5 and 10, when those rules were amended to permit video teleconferencing. The Committee recognized the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence. These concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing. However, the Committee concluded that the use of video teleconferencing may be

valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Because the Advisory Committee withdrew its proposal to amend Rule 32.1 to allow for video teleconferencing, the cross reference to Rule 32.1 in Rule 43(a) was deleted.

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 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 written or in writing under these rules.

Committee Note

Subdivision (e). Filing papers 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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the rule as published.

TAB

II. C

Proposed Amendments Published for Public Comment

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

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

* * * * *

(4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(D) any right to a preliminary hearing; ~~and~~

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

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) **Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) **Notice to the Court of Appeals.** The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

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

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

TAB

III. A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 16

DATE: September 4, 2010

The Rule 16 Subcommittee convened by teleconference to hear a preliminary report from the Federal Judicial Center, which has completed the data collection stage of its survey of judges, defense counsel, and prosecutors. There was a high rate of return and the survey generated a very large quantity of data, which the Federal Judicial Center is analyzing.

The FJC will present a preliminary analysis of the data from the survey at the Advisory Committee's September meeting in Boston.

TAB

III. B

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

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

RE: **Rule 12**

DATE: **September 3, 2010**

Background

In 2009 the Advisory Committee voted (with four dissents) to recommend that the Standing Committee approve for publication an amendment to Rule 12(b). The proposal was a response to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. This aspect of the decision in *Cotton* undercut the justification for the current rule, which allows such claims to be raised at any time, even on appeal. The Committee's proposal (1) added claims that an indictment fails to state an offense to those claims already subject to the general rule that claims not raised prior to trial are "waived," and (2) provided that relief from this waiver could be granted for good cause *or* when the defect in the indictment "has prejudiced the substantial rights of the defendant." The proposal also included a conforming amendment to Rule 34.

In making provision for the standard of review for failure to state an offense, the Advisory Committee's 2009 proposal focused attention on the distinction between the terms "waiver" (now found in Rule 12(e)) and "forfeiture" (used by the Supreme Court in *Cotton* to characterize the failure to raise a timely objection), and the relationship between the Rule 12(e) "waiver" provision and Rule 52. The Standing Committee remanded the proposed amendments to the Advisory Committee for further study of Rule 12(e)'s use of the term "waiver," and this issue was committed to the Subcommittee for further study.

Discussion

By a divided vote, the Subcommittee recommends the approach taken in the proposal that follows, recognizing that some additional refinement will be needed. Mr. McNamara is opposed to the amendment on the grounds that no change to accommodate the *Cotton* decision is warranted. The proposal includes the following elements:

- It requires claims that an indictment "fails to state an offense" to be raised prior to trial (subject to a limitation noted below).

- It provides that if the claim that the indictment fails to state an offense is not raised in a timely fashion it is "forfeited," and that forfeited claims are subject to review under Rule 52(b) for plain error.

- It provides that a jurisdictional error can be raised at any time while a case is pending.

- It provides that all other claims not raised before trial as required by Rule 12(b)(3) are "waived," and that they may be reviewed thereafter only upon a showing of "cause and prejudice."

- It enumerates in Rule 12(b)(3) a non-exclusive list of common claims that are waived if not raised before trial.

- For all of the defenses, objections and requests listed in Rule 12(b)(3), it introduces **a new criterion** for determining which must be raised before trial: whether the "basis" for the defense/objection/request is **"then available."**

- It shifts from (b)(2) the requirement that motions raised prior to trial be those that "the court can determine without a trial of the general issue" to (b)(3), and also rephrases that limitation to provide that "**the motion can be determined without a trial on the merits.**"

The discussion that follows explains each of these elements and cites the pertinent lines in the proposed rule, which is provided at the end of this memorandum.

1. Failure to State an Offense

The proposal implements the Committee's decision in 2009 to amend Rule 12 to require failure to state an offense to be raised before trial. See line 34. As noted in the Introduction, in 2009 the Committee's decision to recommend the amendment was not unanimous. Some members of the Subcommittee dissent from the proposal and/or wish to have further discussion on this point.

2. Consequences of Not Raising Failure to State an Offense Before Trial

The Committee's 2009 proposal sought to define a new standard applicable to claims of failure to state an offense, allowing relief from waiver either for good cause or when the defect in the indictment "has prejudiced the substantial rights of the defendant." The Standing Committee asked for further study of this standard as it related to the current "good cause" standard in Rule 12(e) and to Rule 52. Additionally, the Standing Committee asked the

Advisory Committee to consider whether the standard for some or all violations of Rule 12(b)(3) should be forfeiture rather than waiver.

For claims of failure to state an offense – but, as noted below in paragraph 7, not other claims – the Subcommittee's proposal uses the term "forfeiture" rather than waiver, and provides that the forfeited claim is subject to review under Rule 52(b), i.e., the harmless error standard. See lines 84-90. This provides a clear standard of review, and one that is more generous than that applicable to other claims governed by Rule 12(b)(3).

3. Jurisdictional Issues

At present, Rule 12(b)(3)(B) allows review of "a claim that the indictment or information fails to invoke the court's jurisdiction" at "any time while the case is pending." The Subcommittee concluded that it was important to retain this provision, but that it should be moved to a separate subdivision, rather than stated as an exception to one of the defenses and claims subject to the timing requirements of Rule 12(b)(3).

The Subcommittee's draft places this new subdivision in Rule 12(b)(2), lines 7-10. This placement was possible because the Subcommittee recommends the deletion of current (b)(2), as discussed below.

4. Deleting (b)(2)

Rule 12(b)(2) presently provides that "any defense, objection, or request that the court can determine without trial of the general issue" *may* be raised by a motion before trial. The 1944 Advisory Committee Notes explain that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised "by demurrers, special pleas in bar and motions to quash." The Subcommittee concluded that the use of motions is now so well established that it no longer requires explicit authorization. The deletion of (b)(2) would be consistent with a decision made in 2002 as part of the restyling of the Criminal Rules. At that time, language in Rule 12(a) abolishing "all other pleas, and demurrers and motions to quash" was deleted as unnecessary.

The Subcommittee was also concerned that there is, inevitably, some tension between (b)(2) and (b)(3) if (b)(2) is read literally. As noted, (b)(2) says that any defense, objection, or request that is capable of being determined before trial "may" be raised by pretrial motion. The permissive term "may" might be understood to indicate that each party has the *option* of bringing *or not bringing* all such motions before trial. This is in tension with (b)(3), which provides a list of motions that *must* be brought before trial.

Since the "may be raised" language now found in (b)(2) is no longer needed and it might create confusion, the Subcommittee concluded it should be deleted. The limitation that the motion be one that can be determined without trial was shifted to (b)(3), as discussed in paragraph 6, below.

The decision to delete the language now found in (b)(2) raised the possibility that the subdivisions that followed (b)(2) would all be renumbered. The subdivisions of Rule 12 were reordered (or "relettered") in 2002, and this has caused courts and litigants some difficulty in researching and writing about the rule. For that reason, several judges contacted members of the Advisory Committee to request that the current revision avoid another renumbering or relettering. The Subcommittee was sensitive to this concern, and it considered two possibilities in connection with its recommendation to delete the language now in Rule 12(b)(2). First, it would be possible to "reserve" this subdivision. But the Subcommittee favored the second alternative, which was to use this subdivision for the new separate jurisdictional provision.

5. The Availability Requirement

As a general rule, the types of claims and defenses subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. Except for jurisdictional errors, the proposal brings virtually all claims and defenses within subdivision (b)(3), which requires that they be raised by motion before trial. It provides (with an important limitation discussed below) that if (b)(3) claims and defenses -- other than failure to state an offense – are not raised before trial they are "waived" and subject to further review only upon a showing of cause and prejudice.[1]

The Subcommittee recognized, however, that in some exceptional cases, it may not be possible to raise particular claims that fall within the general categories subject to Rule 12(b)(3). If the basis for the motion was not available to a party, courts currently consider whether or not the circumstances constitute "good cause" such that the party can be excused for the failure to raise the claim before trial. The Subcommittee concluded that (1) the failure to raise a claim one could not have raised should never be considered waiver and (2) it would be desirable to make this point explicit in the rule rather than assuming that litigants and courts will recognize that it is contained within the concept of "good cause." Accordingly, the Subcommittee added the language on lines 12-15, which limits the requirement that defenses, objections and claims "must" be raised before trial to those in which "the basis for the motion is then available...."

The addition of this language means that if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the first step in the analysis should be to determine whether the basis for raising the issue was "available" before trial to the party who wishes to raise it (and the second step, discussed below, would be to determine whether it would have been possible for the court to resolve the issue at that time, before trial). For example, Rule 12(b)(3)(A) requires that a defect in the prosecution ordinarily be raised before trial. If, however, in a particular case the information necessary to raise such a defect first becomes "available" during the trial, the defendant's failure to raise the issue earlier would not constitute a waiver. Similarly, Rule 12(b)(3)(C) requires suppression motions to be made before trial, but the proposal would provide that the rule is applicable only if the basis for a motion to suppress was "available" before trial.

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[1]As discussed in paragraph 7 infra, claims of failure to state an offense are forfeited (rather than waived) if not raised before trial and are subject to review under Rule 52(b).

A majority of the Subcommittee endorsed this general approach, with the proviso that further thought be given to whether another term might be preferable to the word "available." There was discussion of whether it might be better to qualify this as "reasonably available," and whether it might be necessary to spell out the relationship between the concept of availability and due diligence. (For example, the Jury Selection and Service Act requires claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence." 28 U.S.C. § 1867(a) & (b).) If the Advisory Committee considers this general approach promising, the Subcommittee may wish to refine the language in the proposed amendment, and additional guidance might also be provided in the Committee Note.

6. The Capable-of-Determination-Without-Trial Requirement

The Subcommittee was also concerned that parties not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) accomplishes this by the negative implication that issues that depend on a trial "of the general issue" may not be raised prior to trial. The Subcommittee's proposal shifts this requirement to the introductory language of (b)(3) (lines 12-15), which provides that only those issues which can be determined "without a trial on the merits" "must be raised by motion before trial," and if not so raised are subject to waiver/cause and prejudice analysis. Note that the Subcommittee substituted the modern phrase "trial on the merits" for the more archaic phrase "trial of the general issue" now found in (b)(2). No change in meaning is intended.

7. Consequences of Failure to Raise Claims or Defenses Before Trial

The proposal bifurcates subdivision (e). Subdivision (e)(1), lines 76 to 83, provides that, except for claims that the indictment fails to state an offense, waiver applies to failure to raise defenses and claims before trial as required by Rule 12(b)(3). Subdivision (e)(2), lines 84-90, provides that the claim of failure to state an offense is subject to forfeiture if not raised in a timely fashion. This preserves the Committee's earlier conclusion, captured in the 2009 proposed amendment, that the "cause" required for excusing waiver for other sorts of claims is inappropriate for claims that the indictment fails to state an offense.

Additionally, the Subcommittee proposal is more explicit than the present Rule concerning the consequences of both waiver and forfeiture. Subdivision (e)(1) provides that a claim that is "waived" may not be raised unless there is a showing of both "cause and prejudice." This is a change in language from the phrase "good cause" in the present rule, but not a change in substance. "Good cause" in Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require both cause and prejudice,[2] terms that are well defined in the case law. In contrast, in (e)(2) the proposal clarifies that a claim that is "forfeited" is subject to review under Rule 52(b) for plain error. (Rule 52, it is well understood, requires prejudice, but not cause.) The Subcommittee recognized the possibility that the more generous forfeiture

[2]*See* Davis v. United States, 411 U.S. 233 (1973) (holding section 2255 petitioner claiming a defect in the institution of his prosecution would be held to same standard as Rule 12(b), which treats such claims as waived and subject to review only upon a showing of both cause and prejudice).

standard might be appropriate for some other claims or defenses, but there was no consensus on adding any other claims.

8. Spelling Out Claims Subject to Waiver

The Subcommittee's proposal does not disturb the general approach used in the current (b)(3) to describe those claims subject to waiver: it starts with two general categories of claims (defects in "instituting the prosecution" and defects "in the indictment or information") and adds three specific categories (discovery, suppression, and joinder). To add clarity and provide guidance to litigants, on lines 16-34 the proposed rule lists some of the more common claims that fall into the two general categories, using the word "including" to make it clear that the lists on lines 18-28 and 31-34 are not exhaustive. The Advisory Committee may prefer that these lists be trimmed, expanded, or reordered.

On lines 20-21 the proposal includes "a violation of the constitutional right to a speedy trial" as one of the defects in the institution of a prosecution that must be raised before trial under (b)(3)(A). The Subcommittee did not include statutory speedy trial violations because the Speedy Trial Act already specifies that a defendant must raise any claim under the act before trial. See 18 U.S.C. § 3162(a)(2).

The Subcommittee also discussed whether a more specific definition of "motions to suppress" or "suppression of evidence" would be helpful, and decided it would be better to leave any uncertainty over this concept to case law development.

9. Conforming Amendment to Rule 34

If the Subcommittee's proposal is approved, it will revive the need for the conforming amendment to Rule 34 (included below) that was approved by the Advisory Committee in 2009.

Rule 12. Pleadings and Pretrial Motions *

* * * * *

(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.~~***Motion That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by motion before trial, if the basis for the motion is then available and

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

the motion can be determined without a trial on the merits:

(A) ~~a motion alleging a~~ defects in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) double jeopardy;

(v) statute of limitations;

(vi) selective or vindictive prosecution;

(vii) outrageous government conduct; and

(viii) errors in the grand jury or preliminary hearing;

(B) ~~a motion alleging a~~ defects in the indictment or information, including

(i) duplicity;

(ii) multiplicity;

(iii) lack of specificity; and

(iv) 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~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(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.**~~

Consequence of Failure to Make Motion Required Prior to Trial.

(1) ***Waiver.*** A party waives any Rule 12(b)(3) defense, objection, or request – other than failure to state an offense – not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. ~~For good cause~~ Upon a showing of cause and prejudice, the court may grant relief from the waiver. Otherwise, a party may not raise the waived claim.

(2) ***Forfeiture.*** A party forfeits a claim based on the failure of the indictment or information to state an offense [**additional (b)(3) claims may be added here**] that was not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. A forfeited claim is subject to review under Rule 52(b).

Rule 34. Arresting Judgment

(a) **In General.** Upon the defendant's motion or on it own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

Subdivision (a). 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.

TAB

III. C

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

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

RE: **Rule 11 and the Judges' Benchbook**

DATE: **September 5, 2010**

At the Advisory Committee's April 2010 meeting Judge Tallman appointed a Subcommittee to study the implications of the Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). *Padilla* holds that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation. *Padilla* highlights the importance of informing a defendant of the immigration consequences of a guilty plea. Judge Tallman asked the Subcommittee to consider whether Rule 11 should be amended in light of *Padilla* and whether, as an interim measure, the Advisory Committee should ask the Federal Judicial Center to amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

The Rule 11 Subcommittee is chaired by Judge Rice, and its members are Judge Lawson, Judge Molloy, Mr. Cunningham, and Professor Leipold, as well as Ms. Felton and Mr. Wroblewski, who represented the Department of Justice. The Subcommittee held two teleconference meetings, supplemented by numerous e-mail exchanges, to consider these issues.

As explained in the 1974 Committee Notes, the Rule 11 colloquy is designed to insure that a defendant who has plead guilty has made an informed plea. In light of *Padilla*, a majority of the Subcommittee concluded that it would be desirable to expand the Rule 11 colloquy to advise the defendant of possible immigration consequences. In drafting its proposal, the Subcommittee was cognizant of the complexity of immigration law, as well as the fact that there have been, and likely will be, legislative changes in the immigration laws. The Subcommittee's proposal (which follows

below) uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

The Subcommittee's proposal requires the court to advise that "a plea of guilty by a defendant who is not a United States citizen may prevent the defendant from remaining in, or returning to, the United States, or from becoming a citizen." The Subcommittee also proposes that the Benchbook be amended to provide the same general information, followed by two questions: whether the defendant has discussed this issue with defense counsel, and whether the defendant still wishes to go forward with a guilty plea.

The Subcommittee also recommends the addition of language in both the Rule 11 colloquy and the Judges' Benchbook concerning sex offender registration and notification. Although the *Padilla* decision addressed only the immigration consequences of a guilty plea, it also raises the more general policy questions whether there are other collateral consequences that warrant inclusion in the advice of counsel provided to a defendant regarding a guilty plea, and whether those consequences should also be included in the plea colloquy. A majority of the Subcommittee favored expanding the colloquy to include sex offender registration and notification requirements. Because the various state and federal laws differ greatly, the advice is worded in broad general terms – "federal and state sex offender registration and notification requirements may apply" – designed to insure that the defendant is aware of the issue and can discuss it with counsel.

The Subcommittee's proposed additions to the Benchbook conclude with the question whether the defendant wishes to proceed with his or her plea after having been advised that it may have consequences for immigration or sex offender registration and notification. This language, designed to create a clear record, was suggested by the Department of Justice and endorsed by the Subcommittee.

Judge Molloy dissented from the Subcommittee's recommendation to amend Rule 11. In his view the already lengthy colloquy required by Rule 11 should not be expanded. The present rule is not inconsistent with the Supreme Court's decision in *Padilla,* which addresses the duties of defense counsel, not the courts. Given the complexity of immigration law and the uncertainty concerning which offenses would trigger sex offender registration and notification requirements in the various states, it is not realistic to expect courts to provide useful or accurate advice to individual defendants about the consequences of their pleas. Moreover, if Rule 11 is amended to address immigration consequences (and sex offender registration and notification), what distinguishes other adverse collateral consequences of conviction? Judge Molloy concluded that the Committee should not start down this slippery slope. If, however, the Advisory Committee favors amending Rule 11, Judge Molloy agreed with the Subcommittee's proposed language.

A. ADVICE CONCERNING IMMIGRATION CONSEQUENCES

1. Rule 11

The Subcommittee recommends the following amendment to Rule 11.

Rule 11. Pleas.

* * * * *

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

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

* * * * *

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

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that a plea of guilty by a defendant who is not a United States citizen may prevent the defendant from remaining in, or returning to, the United States, or from becoming a citizen.

2. The Judges' Benchbook

The Subcommittee recommends the following addition to the Judges' Benchbook.

Are you a citizen of the United States?
For a non citizen:
Do you understand that in addition to the other possible penalties that you are facing, a plea of guilty may prevent you from remaining in, or returning to, the United States, or from becoming a U.S. citizen? Have you discussed this with your attorney? Do you wish to proceed with your plea despite the risk that you may be prevented from remaining in, or returning to, the United States, or from becoming a U.S. citizen?

B. ADVICE CONCERNING SEX OFFENDER REGISTRATION AND NOTIFICATION CONSEQUENCES

1. Rule 11

The Subcommittee recommends the following amendment to Rule 11. The new subdivision is designated as (b)(1)(P) on the assumption that proposed subdivision (b)(1)(O) concerning immigration consequences will be approved as well.

Rule 11. Pleas.

* * * * *

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

(1) Advising and Questioning the Defendant.

* * * * *

(P) for sex offenses, that federal and state sex offender registration and notification requirements may apply.

2. The Judges' Benchbook

The Subcommittee recommends the following addition to the Judges' Benchbook.

For sex offenses:

Do you understand that if you plead guilty [to this crime], you may be subject to federal and state sex offender registration and notification requirements? Have you discussed this with your attorney? Do you wish to proceed with your plea despite the risk that you may be subject to sex offender registration and notification requirements?

TAB

IV. A-B

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (the "Committee") met on June 14-15, 2010. All members attended. Lisa O. Monaco, Principal Associate Deputy Attorney General, and Karyn Temple Claggett, Senior Counsel to the Deputy Attorney General, attended on behalf of the Department of Justice. Chief Justice Wallace Jefferson of the Texas Supreme Court also attended.

Representing the advisory rules committees were: Judge Jeffrey S. Sutton, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Laura Taylor Swain, chair, and Professor S. Elizabeth Gibson, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, chair, Professor Edward H. Cooper, reporter, and Professor Richard L. Marcus, associate reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, chair, Professor Sara Sun Beale, reporter, and Professor Nancy J. King, associate reporter, of the Advisory Committee on Criminal Rules; and Judge Robert L. Hinkle, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; Professor R. Joseph Kimble, consultant to the

sealing cases were required by a statute, such as the False Claims Act, or by a rule, such as Rule 6(e)(6) of the Federal Rules of Criminal Procedure. A small number of cases that were initially sealed appropriately remained sealed after the reason for sealing had expired. The Subcommittee recommended that the Committee on Court Administration and Case Management ("CACM") consider recommending that the Judicial Conference adopt a policy statement that recognizes that an entire case is properly sealed only when consistent with specified criteria, including: (1) sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information; (2) a judicial officer makes or promptly reviews the decision to seal a case; and (3) the seal is lifted when the reason for sealing has ended.

The Subcommittee also recommended that CACM and other appropriate Judicial Conference committees consider additional steps to improve sealing practices, such as: (1) judicial education to ensure that judges are fully aware of the established criteria for the proper sealing of entire cases; (2) judicial and clerks' office education to ensure that both judges and clerks are aware that if a clerk or designee has sealed a case temporarily, a judge must promptly review and decide whether the seal should continue; (3) study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or designee may seal a matter temporarily pending judicial approval, and to establish procedures to obtain prompt judicial approval; (4) judicial education to ensure that judges are aware of the need to limit the duration of sealing orders and the various ways to do so, such as by stating in the order a date when the seal will expire unless a party otherwise moves, or stating in the order a date when the court will review the order; (5) study by CACM and other appropriate committees into how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed, and to generate

Report on Sealing Cases
Prepared by the Sealed Cases Subcommittee for the Judicial Conference Committee on Rules of Practice and Procedure

I. Introduction

The federal courts have a longstanding and pervasive commitment to public access to court records. This commitment flows partly from the First Amendment right of access to court proceedings and from a common law right of access. At the same time, there is a longstanding and established recognition that it is sometimes necessary to restrict public access to certain court records. Federal court cases and filings may contain highly sensitive information that must be kept confidential for reasons ranging from protecting individuals' privacy to safeguarding national security, maintaining the integrity of ongoing law enforcement investigations, keeping witnesses, victims, or cooperating defendants safe, and to protecting the commercial value of trade secrets or proprietary data. Most commonly, the restriction relates to specific court filings or parts of filings in a case to which the public otherwise has access. But there are also circumstances in which an entire case is appropriately sealed from public access.

A variety of statutes and rules require or authorize the sealing of certain types of cases in the federal courts. For example, False Claims Act complaints are required by law to be sealed until the federal government decides whether to participate. A federal rule requires grand-jury matters to be sealed. Indictments and criminal complaints against defendants not in custody generally must be sealed so the defendants do not flee. Established case law also recognizes that sealing an entire case may be justified without a statutory or rule requirement. Because sealing an entire case is such a significant restriction on public access and shields the information needed to question or challenge the sealing, however, courts have recognized the importance of ensuring that such sealing orders are only entered when the proper showing has been made.

Electronic filing has made the presumptive right of public access to documents filed in the federal courts a practical reality by making court filings remotely accessible online. The federal

courts' shift to electronic filing and the broad public access to court files has produced many benefits for litigants and the public. But electronic filing has also increased the risks resulting from mistaken public filing of materials that should not be publicly accessible. Even if publicly accessible for only a short time, a mistaken public filing of such materials could result in very serious harm. As a consequence, electronic filing has increased the need for vigilance about prompt and accurate sealing of cases that should be sealed, without reducing the importance of preserving the general public right of access.

In 2006, Chief Judge Flaum, on behalf of the Seventh Circuit Judicial Council, raised questions about the handling of sealed cases that led to Judicial Conference action concerning the report CM/ECF would provide regarding sealed cases. Thereafter, Chief Judge Easterbrook indicated that this change did not fully address the concern raised by the Seventh Circuit Judicial Council because that concern was also about the frequency of sealing entire cases, and the criteria for such sealing. Against this backdrop, the Judicial Conference Executive Committee asked the Rules Committees, in consultation with any other appropriate JCUS committee, to examine the sealing of entire cases in the federal courts and to address Judge Easterbrook's recommendation that standards be developed to regulate such sealing orders. The Executive Committee authorized the Standing Committee on Rules of Practice and Procedure to establish this inter-committee Sealed Cases Subcommittee to perform this work. The Sealed Case Subcommittee consists of a judge from each of the six Rules Committees and a judge from the Court Administration and Case Management Committee, as well as a representative of the Department of Justice. All the Rules Committees' reporters and James Hatten, an experienced clerk of court, assisted the subcommittee as consultants.

The Sealed Cases Subcommittee worked with the Federal Judicial Center to research sealed cases in the federal courts. The FJC identified every matter filed in the federal courts during 2006 that was still sealed at the time of the FJC's study. For every sealed case filed in a Court of Appeals or having a CV (civil case) or CR (criminal case) docket number in a federal district court, the FJC determined the subject matter and examined the ground for sealing.

The FJC research shows that the number of sealed cases is a very small fraction of the total number of federal cases. The research also shows that the great majority of those sealed cases are

sealed because a statute or rule requires it or for another valid reason. But the FJC research also shows that some sealing orders that were proper when entered remain in place after the reason for sealing has expired, and that a small proportion of sealed cases were sealed on grounds that raised questions.

The Sealed Cases Subcommittee concluded that there is no need for new or amended Rules of Civil, Criminal, Bankruptcy, or Appellate Procedure to regulate the sealing of entire cases in the federal courts. Instead, this report recommends steps to be considered by the appropriate JCUS committees to ensure that entire cases are sealed only when consistent with the proper, and established, criteria.

The Subcommittee recommends that CACM consider recommending that the JCUS adopt a policy statement concerning sealing. That policy statement would recognize that an entire case is properly sealed only when consistent with the following criteria:

1. Sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information, so that sealing an entire case is a last resort;

2. A judicial officer makes or promptly reviews the decision to seal a case; and

3. The seal is lifted when the reason for sealing has ended.

The recommended steps to promote compliance with these criteria include the following:

1. judicial education to ensure that judges are fully aware of the established criteria for proper sealing of entire cases (as opposed to sealing specific documents within a case), including the specific showing required, the need to consider available alternatives, and the need to memorialize the findings justifying sealing in the record;

2. judicial and clerks' office education to ensure that both judges and clerks are aware that sealing an entire case must be a judicial decision, and that if a clerk or designee has sealed a case temporarily a judge will promptly review and decide whether the seal should continue;

3. study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or a judge's designee may seal a matter temporarily

pending approval by a judicial officer and to establish procedures for ensuring prompt review by a judge;

4. judicial education to ensure that judges are aware of the need to limit the duration of sealing orders and the various ways to do so, such as by stating in the order a date when it will expire unless the party seeking the seal moves for its continued application and shows good cause, or stating in the order a date when the court will review the order to decide whether it should remain in place;

5. study by CACM and other appropriate committees into whether and how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed;

6. study by CACM and other appropriate committees to determine whether and how CM/ECF might be programmed to generate periodic reports of sealed cases to facilitate more effective and efficient review; and

7. consideration by CACM or other appropriate committees of local administrative measures that courts could adopt to improve the handling of requests for sealing.

II. The Basis for the Findings and Recommendations

A. The Grounds for Sealing Entire Cases

The Subcommittee's work began by recognizing the grounds recognized as requiring or authorizing a court to seal an entire case. The most frequent is a command in a statute or a rule that certain matters be sealed. See memorandum dated Dec. 10, 2007, from Andrea Thomson entitled Statutes Requiring or Permitting Sealing, which is posted at <www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Publications.aspx>. Some of the most common are set out below.

> False Claims Act: 31 U.S.C. §3730(b)(2) directs that a complaint filed by a private person under the False Claims Act remain under seal and not be served on the defendant for at least 60 days to enable the Government to decide whether to intervene. §3730(b)(3) permits the Government to move to extend the time the case remains under seal to enable it to complete its investigation, a request made necessary fairly frequently if the Government's investigation cannot be completed within the time specified in the statute.

Grand Jury Matters: Fed R. Crim. P. 6(e)(6) directs that "[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."

Indictments: Fed. R. Crim. P. 6(e)(4) authorizes a magistrate judge to "direct that the indictment be kept secret until the defendant is in custody" and directs the clerk to seal the indictment when the magistrate judge so orders.

Juvenile Delinquency Matters: 18 U.S.C. §5038(c) says: "During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the government, and others entitled under this section to receive juvenile records." §5038(a) very narrowly authorizes certain disclosures about such a proceeding, and otherwise provides that "information about the juvenile record may not be released."

Other statutes and rules authorize sealing of court records for specified reasons, often national security concerns.

In addition to statutes and rules authorizing or requiring sealing, the Supreme Court has recognized that the courts have authority to seal court records to deal with a variety of situations in which those records might "become a vehicle for improper purposes." *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978). When justified by extraordinary circumstances and in the absence of less restrictive feasible and effective alternatives, sealing may extend to the entire case.

B. The Subcommittee's Work

The Sealed Cases Subcommittee limited its focus to fully sealed cases, the concern raised by the JCUS. The Subcommittee requested and obtained the assistance of the Federal Judicial Center in performing needed research. The FJC Report, Sealed Cases in Federal Courts (FJC, Oct. 23, 2009), provides a comprehensive picture of actual case-sealing practices in the federal courts during an entire calendar year (2006). A copy of the FJC Report is posted at <www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Publications.aspx>.

The FJC researchers used CM/ECF data to identify every matter filed in every district during calendar year 2006 and to determine how many were actually sealed. District courts are not

consistent in labeling matters as civil – CV – or criminal – CR – cases, rather than as magistrate judge – MJ — or miscellaneous – MC – matters. For example, although most districts classified search warrant applications as MJ or MC, some included them in CR cases. Most districts, however, used the CV and CR designation to identify what are generally considered "cases," and used MJ or MC to designate more discrete matters that are not generally thought of as "cases." The diversity of practice affected the frequency of sealed "cases" in various districts. In order to be comprehensive, the FJC research took an expansive approach to what should be considered a "case," including any matter that was assigned a number.

Sealed civil cases (CV): Among 245,326 civil cases filed in the federal courts in 2006, there were 576 sealed cases, representing 0.2% of all civil filings (2 out of every 1,000 cases). 23 of 94 districts had no sealed civil 2006 cases. This is a very small number, particularly given the high percentage sealed because a statute or rule so required. Nearly a third of these sealed civil filings were qui tam actions, subject to a statutory sealing command. Another third are regarded as "cases" only because they were filed in a district that designated them "CV," but in other districts these matters would be designated "MJ" or "MC" and would not be recognized as a "case." Thus, two-thirds of the sealed CV cases were either required to be filed under seal by statute or would not be viewed as "cases" in most districts.

Of the remaining sealed civil cases, the largest categories were: habeas corpus petitions and other prisoner petitions involving juveniles or cooperating defendants whose lives might be in jeopardy if information about them was publicly available; other cases involving minors; and cases sealed to prevent litigants from filing pleadings or other documents in those cases because the filing was supposed to be in another, unsealed, case.

Sealed criminal cases (CR): Of 66,458 criminal cases filed in the federal courts in 2006, 1,077 (1.6%) were sealed. 13 of 94 districts had no sealed 2006 criminal cases. Some 226 sealed "cases" were applications for various types of warrants. In most districts, such applications were not classified as criminal ("CR") cases. Disregarding these warrant applications leaves 851 sealed criminal cases; of those 705 (nearly 83%) were sealed for one of three reasons. A primary reason was

to seal the indictment until the defendant was apprehended. Fed. R. Crim. P. 6(e)(4) authorizes a magistrate judge to "direct that the indictment be kept secret until the defendant is in custody" and directs the clerk to seal the indictment when the magistrate judge so orders. A second common reason was to protect a juvenile defendant's identity, again based on statutory directives; 18 U.S.C. §5038 directs that juveniles' identities be protected in juvenile delinquency proceedings, and 18 U.S.C. §3607(c) provides for expunging the record of defendants under 21 years of age who are subject to disposition under §3607(a). A third common reason was that sealing the case keeps secret details of a cooperating defendant's cooperation with the government. The appropriate handling of plea agreements with cooperating defendants is the subject of specific study by other JCUS committees and is not specifically addressed in this report. Additional sealed CR cases involved such reasons as sealing to protect victims (including juvenile victims), to protect trade secrets, and to protect information concerning the defendant's psychiatric examination.

Sealed magistrate judge matters (MJ): The FJC researchers used sampling to determine what kinds of MJ matters were sealed. That sampling showed that 83% were warrant applications, 10% were sealed criminal complaints, and 6% were grand jury and Criminal Justice Act (CJA) matters. Only 1% of MJ matters sealed were outside these categories. No "cases" were among the sealed MJ matters, and the reasonableness of the initial sealing of the great majority of those matters is apparent.

Sealed miscellaneous matters (MC): The FJC researchers used sampling to examine the types of MC matters that were sealed. That sampling indicated that 58% were warrant applications, 30% were grand jury and CJA matters, 3% were requests from foreign governments for assistance with cases in their courts, 1% were forfeitures and seizures in which sealing may be needed to avoid tipping off the person from whom the seizure is to occur, and 8% are other matters. The "other matters" ranged from files opened for marriages performed in a territorial court to attorney discipline situations to arbitration matters. As with MJ matters, there is no indication that these are "cases" in a conventional sense or that there was inappropriate sealing used.

Sealed appeals: Of 64,475 appeals to the courts of appeals from district court cases filed in 2006, there were 82 sealed appeals (slightly over 0.1%). Five of thirteen courts of appeals had no sealed 2006 appeals. Of the 82 sealed appellate files, 13 were resolved by published opinions and 27 were resolved by unpublished but public opinions, for a total of nearly half resolved by public opinions. 36 others were resolved without opinions, and three of the 81 sealed appeals were still pending when the FJC study was completed. Two appeals were resolved by sealed opinions or orders, and one was dismissed for lack of prosecution. Usually the sealing of the appellate file originated in the district court; if the district court sealed the case the appellate court did so as well. Of the sealed appellate matters, 18 were grand jury matters (22%), another 18 were juvenile prosecutions (22%), and 17 were criminal appeals involving cooperating defendants (21%).

Bankruptcy courts: For 2006 filings, the bankruptcy courts had almost no sealed cases. 651,488 bankruptcy court cases were filed in 2006. Among these, one court had expunged five cases and another court had expunged one case upon determining that the cases were fraudulently filed by somebody falsely claiming to be the debtor.

III. Analysis

1. The federal courts seal a very small number of cases. The number of actual sealed cases is extremely small. Most of these are sealed because a specific statute or rule so requires. The largest category of sealed civil cases is under the False Claims Act, a statute that directs that cases be sealed until the Government decides whether to intervene. Many criminal cases are sealed under the federal rule directing that grand jury matters be sealed. The great majority of other sealed cases were sealed for reasons that were clear and appropriate.

2. The legal criteria for sealing an entire case are established. Sealing an entire case is justified when required by statute or rule or on a showing of extraordinary circumstances. No new statutes or national rules are needed to establish the criteria for sealing entire cases. A variety of statutes and rules already address sealing cases. Some command sealing for certain types of matters. Others call for judicial discretion to determine whether to seal. This statutory and rule-based authority, coupled with the authority the Supreme Court has recognized to avoid use of court records

"for improper purposes," *Nixon v. Warner Communications*, 435 U.S. 589, 598-99 (1978), has led to the development of case law setting the criteria for proper sealing. Case law establishes that sealing can be important to protect interests that range from national security to personal safety, privacy to property rights, and for effective law enforcement, but that sealing -- even for a particular filing within a case -- is an exception to the presumption of public accessibility. Sealing an entire case requires a stronger showing of need and closer judicial scrutiny than the episodic sealing of a particular filing within a case. When it is not commanded by statute or rule, such sealing requires a showing of extraordinary circumstances and the absence of a feasible, effective, narrower alternative, such as redacting information or sealing specific documents within a case.

3. Sealing an entire case should be a last resort, to be used only if other less restrictive measures are infeasible or ineffective. Under legal principles expounded in each circuit, sealing an entire case requires a more compelling and articulated reason and implicates closer judicial scrutiny than the episodic sealing of a particular paper within a case. Sealing an entire case should be used only on a showing not only of compelling circumstances, but also the absence of feasible and effective alternatives. These alternatives include expunging or redacting information (for example, using initials or another shorthand rather than a name, a place, or a proprietary formula), or adopting other customized means to accommodate the legitimate concern that caused a party to request sealing.

4. Decisions to seal are judicial decisions that should be made or promptly reviewed by a judicial officer. Of necessity, initial decisions to seal cases must in some instances be made by the clerk's offices. Given electronic access, mistaken failure to seal for even a short period could have very harmful consequences, so intake personnel in clerk's offices must have some authority to file under seal those matters appearing to come within statutory or rule mandates for sealing. But the decision to seal must be a judicial determination. A judge must promptly review a case that is initially sealed by a clerk's office employee and decide whether it should remain sealed.

5. There have been instances of questionable sealing. The FJC study showed that some cases that were properly sealed were kept sealed for too long a period; in a few cases, the sealing was too extensive; and, in even fewer cases, the sealing was for a questionable purpose.

a. Sealing for too long. The FJC study discovered that cases that had properly been sealed at the outset were sometimes still sealed although the original justification had passed. For example, complaints under the False Claims Act must be sealed until the Government decides whether to intervene. But there were several instances in which a False Claims Act case remained sealed after that decision had been made or the court refused to grant further extensions of time for the Government's investigation. An indictment might needlessly remain sealed even after it was voluntarily dismissed by the government before the defendant appeared. Because of the variety of reasons for sealing, across-the-board rules on the duration of sealing are not feasible. And it may not be necessary to unseal a given matter if all the filings can now be found in a separately filed unsealed case. An example is a sealed miscellaneous file containing a complaint or indictment against a person not in custody; once the defendant is apprehended and a criminal file is opened, the complaint will be publicly available in the criminal file and it is not necessary to unseal the miscellaneous file.

b. Sealing too much. The FJC study also revealed a few sealed cases in which the purpose of the sealing apparently could have been accomplished by less restrictive methods. Occasionally the privacy of juveniles was protected by sealing the entire case when it may have been adequate to replace the juvenile's name by initials. Or a civil case involving intellectual property may be sealed when confidentiality could be protected by sealing some documents and redacting others.

c. Sealing for a questionable purpose. The FJC study found a few cases in which the purpose of the sealing appeared inappropriate or erroneous. In some instances, the assigned judge was not aware the case had been or continued to be sealed. In a very few cases, it appeared that sealing resulted from the parties' request or to protect against unwanted publicity. The law is clear that sealing an entire case for such reasons is not justified. The Subcommittee did not, of course,

have complete information about these sealed cases. As the Supreme Court has recognized, it is sometimes proper to seal judicial records to protect against their use "for improper purposes," and it is accordingly impossible to be certain about the propriety of any specific sealing decision without full knowledge of the particulars.

IV. Subcommittee Recommendations

1. The Subcommittee recommends that CACM consider recommending that the JCUS adopt a policy statement concerning sealing of entire cases. That policy statement could recognize that an entire case is properly sealed only when consistent with specified criteria, such as the following:

a. sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information, so that sealing an entire case is a last resort;

b. a judicial officer makes or promptly reviews the decision to seal a case; and

c. the seal is lifted when the reason for sealing has ended.

2. The Subcommittee recommends that CACM and other appropriate Judicial Conference Committees consider the following additional steps to improve sealing practices:

a. judicial education to ensure that judges are fully aware of the established criteria for proper sealing of entire cases (as opposed to sealing specific documents within a case), including the specific showing required, the need to consider available alternatives, and the need to memorialize the findings justifying sealing in the record;

b. judicial and clerks' office education to ensure that both judges and clerks are aware that sealing an entire case must be a judicial decision and if a clerk or designee has sealed a case temporarily, a judge will promptly review and decide whether the seal should continue;

c. study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or a judge's designee may seal a matter temporarily pending approval by a judicial officer and to establish procedures for ensuring prompt review by a judge;

d. judicial education to ensure that judges are aware of the need to limit the duration of initially appropriate sealing orders and the various ways to do so, such as by stating in the order a date when it will expire unless the party seeking the seal moves for its continued application and shows good cause, or stating in the order a date when the court will review the order to decide whether it should remain in place;

e. study by CACM and other appropriate committees into whether and how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed;

f. study by CACM and other appropriate committees to determine whether and how CM/ECF might be programmed to generate periodic reports of sealed cases to facilitate more effective and efficient review; and

g. consideration by CACM or other appropriate committees of administrative measures that could be adopted to improve the handling of requests for sealing by, for example, ensuring (particularly when the initial decision must be made by the clerk's office) that such requests are supported by legally adequate grounds, and that initial sealing by personnel of the clerk's office is promptly reviewed by a judicial officer.

V. Conclusion

Public access to court records is universally recognized as essential to maintaining public knowledge about, and confidence in, the federal judiciary. Although certain persons and subjects are entitled in unusual circumstances to a carefully constrained protection from injurious and unjustified exposure to public scrutiny, the public should accurately perceive that, except for sealing done in those carefully circumscribed instances and for only so long as necessary, the records of the judiciary are open to public inspection both by in-person inspection and by remote electronic inspection. The FJC Report, based on a study of unprecedented thoroughness, has shown that the actual number of sealed cases in federal courts is extremely small, and that the great majority of those cases were sealed pursuant to a statute or rule or for some evident reason. Although the FJC study has also identified a very small number of instances of sealing for what appear to be weak reasons or by

mistake, no legislation or rule changes are needed to deal with these rare problems. Instead, the administrative measures outlined above appear the best way to ensure that even this very small number of apparent mistakes is minimized, although no system can entirely eliminate mistakes.

Honorable Harris L Hartz, Chair
Professor Richard L. Marcus, Reporter
Honorable T.S. Ellis, III,
Appellate Rules Committee
Honorable Joan N. Ericksen,
Evidence Rules Committee
Honorable Jeffery P. Hopkins,
Bankruptcy Rules Committee
Honorable John G. Koeltl,
Civil Rules Committee
Honorable Steven D. Merryday,
Committee on Court Administration and
Case Management
Honorable James B. Zagel,
Criminal Rules Committee
Jonathan Wroblewski, Department of Justice

JAMES C. DUFF
Director

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Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

PETER G. McCABE
Assistant Director

Office of Judges Programs

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

FROM: Henry Wigglesworth

DATE: September 8, 2010

RE: Informational Item – Revision of AO Form 98 (Appearance Bond) & Related Forms

In 2009, the Forms Working Group undertook revision of AO Form 98, the national form that is used to ensure the appearance of criminal defendants in federal court, taking into consideration the interplay of this form and related forms that impose conditions of release. A subcommittee chaired by United States Magistrate Judge Boyd N. Boland (D. Colorado) drafted revisions to the forms. Judge Boland described and explained the subcommittee's recommended changes in a memorandum dated October 5, 2009 (attached).

As the memorandum states, the principal substantive change to Form 98 is to insert at the beginning a defendant's agreement to appear, which currently is contained in a different form, AO Form 199A. As Judge Boland explains, "the agreement to appear is so fundamental to the purpose of an appearance bond . . . that it should be contained in the Appearance Bond itself." Boland Memorandum at 1. In addition, the scope of the Appearance Bond has been broadened to "encompass a bond secured by personal or real property." *Id.* at 3. Accordingly, the revised AO Form 98 obviates the need for AO Form 100, which would be discontinued, and would also necessitate conforming changes to AO Forms 199A and 199B.

In July 2010, the Forms Working Group adopted most of Judge Boland's recommended revisions, and added a few more, resulting in new versions of the following forms (attached):

- AO 98 (Appearance Bond);
- AO 99 (Appearance Bond of Witness);
- AO 199A (Order Setting Conditions of Release); and
- AO 199B (Additional Conditions of Release).

These forms are currently being reviewed by the Criminal Law Committee. Once that committee has approved the forms, they will be posted on the J-Net for review and comment.

UNITED STATES DISTRICT COURT
ALFRED A. ARRAJ UNITED STATES COURTHOUSE
DENVER, COLORADO

Boyd N. Boland **303-844-6408**
United States Magistrate Judge

MEMORANDUM

TO: Jennie Allen
Henry Wigglesworth

RE: Proposed Revised Form AO98 Appearance Bond

DATE: October 5, 2009

Enclosed for distribution to and review by the Forms Working Group is a proposed revision to Form AO 98 Appearance Bond. The proposed form completely reworks and would replace the existing form.

The proposed Appearance Bond contains three sections: (1) the defendant's agreement to appear; (2) the bond securing the defendant's appearance; and (3) the terms of the bond.

The first section of the proposed form is the defendant's agreement to appear. This agreement is not included in the current Form AO 98. An agreement to appear is contained in Form AO 199A (Order Setting Conditions of Release) at ¶4. The agreement to appear is so fundamental to the purpose of an appearance bond, however, that it should be contained in the Appearance Bond itself.

The second section of the proposed form is a check-off by which the court may designate the type of bond ordered in a particular case. In this regard, 18 U.S.C. § 3142 specifies four types of bonds which may be employed in connection with the pretrial release of a defendant:

(1) A personal recognizance bond, specified in § 3142(b);

(2) An unsecured bond, also specified in § 3142(b);

(3) "[A]n agreement to forfeit upon failing to appear [] property of a sufficient unencumbered value, including money, as is reasonably necessary. . . ." 18 U.S.C. § 3142(c)(1)(B)(xi). This appears to be a form of secured bond, secured not by a bail bond but by a promise to forfeit specified cash or other property in the event the defendant fails to appear. The statute is silent on the matter, but it seems that the agreement to forfeit may be made by either the defendant or a third party surety. The promise to forfeit is sometimes further secured by the deposit in the registry of the court of a percentage of the bond amount. See Form AO 199B (Rev. 03/09) at ¶8(c). Deposited funds also may belong to either the defendant or a third party surety. The draft revision to Form AO 98 is designed to provide for either (i) a bond secured by cash deposited in the registry of the court or (ii) a bond secured by a promise to forfeit cash or property not deposited in the registry of the court; and

(4) A traditional bail bond issued by a commercial surety. 18 U.S.C. § 3142(c)(1)(B)(xii).

The third section of the proposed form contains the terms of the bond. Because the forfeiture condition is the most important, it appears first. The bond and all security may be forfeited if the defendant fails to comply with the terms of the Appearance Bond.

The term for release of the bond is second. A phrase has been added to allow the early release of the bond by court order.

The terms concerning ownership of the security and acknowledgment of the defendant's conditions of release are changed in form but not in substance.

The section captioned "Surety Information" is deleted as unnecessary. Similarly, because the release term is not satisfied while a case is subject to appeal or other review, the "Continuing Agreement" term has been deleted as unnecessary.

The signature block is modified to conform to the requirements of an unsworn declaration under penalty of perjury, as provided by 28 U.S.C. § 1746.

The proposed revision to Form AO 98 obviates the need for Form AO 100, which apparently concerns the agreement to forfeit real property to obtain a defendant's release. The proposed revision to Form AO 98 is broad enough to encompass a bond secured by personal or real property.

The proposed Appearance Bond is designed to be executed in every case where the defendant is granted pretrial release, regardless of whether the defendant is released on personal recognizance, an unsecured bond, or any form of a secured bond. Consequently, if proposed revised Form AO 98 is adopted, Forms AO 199A and 199B would require modification. In particular, Form AO 199A would be limited in scope to an order setting conditions of release. It would not serve as a personal recognizance or unsecured bond, as it purports now to do. Paragraphs (5) and (6) of Form AO 199A would be consolidated to require that the defendant must execute either a personal recognizance or an unsecured Appearance Bond, as ordered. Revised Form AO 98 would be available for that purpose.

Form AO 199B would be modified to renumber the conditions as (6) and (7) and to reletter the subparts as necessary. In addition, former paragraph (8)(b) would be revised to require the defendant to "execute an Appearance Bond, as ordered," and revised Form AO 98 could be used. Former paragraphs 8(c) and (d) would be deleted as unnecessary.

Copies of Forms AO 199A and 199B with these proposed revisions are also enclosed.

Three unresolved issues arose while these drafts were being circulated among the subcommittee. Judge Lisa Lenihan raised two issues:

First, Form AO 199A contains a paragraph which I did not add but which appears to be new to the form, providing that "[t]he defendant must cooperate in the collection of a DNA sample if the collection is authorized by 42 U.S.C. § 14135a." Judge Lenihan indicates that this provision is not applied in several districts, e.g., W.D. Pennsylvania and D. North Dakota (and perhaps others). She inquires when that term was added to the form and with whose approval; and

Second, Form AO 199B formerly contained a provision requiring persons on pretrial release to report any contact with police. That provision is deleted from the form, although not at my suggestion. She inquires when that term was deleted from the form and with whose approval.

The third issue is raised by Judge Andy Austin of the Western District of Texas. Judge Austin writes:

> As you may remember, there was an e-mail discussion regarding whether the form [AO 98] should be conditioned only on the defendant's appearance, or also on the defendant's compliance with bond conditions. As the new form is written, it is conditioned not only on appearance, but also on compliance with all conditions. Thus, if a released defendant uses marijuana, fails to maintain employment, etc., the bond is to be forfeited. I believe that this makes no sense, and may not even be lawful.
>
> The purpose of a monetary surety or bond has always been to assure that the defendant appears as required, not to prevent him from using drugs, not maintaining employment, or not having contact with co-defendants or witnesses (for example). Indeed, I do not believe that we are authorized to impose a monetary

forfeiture provision to assure compliance with bond conditions. The Bail Reform Act lists the conditions we may impose, and two of these are on point:

"(xi) execute an agreement to forfeit ***upon failing to appear as required***, the property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;

"(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amounts as is reasonably necessary ***to assure appearance of the person as required*** and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount fo the bail bond. . . ."

18 U.S.C. § 3142(c)(1)(B)(xi) and (xii) [emphasis added]. As you can see, the statute makes no mention of a bond to assure compliance with conditions, but rather only addresses assuring appearance. I believe that this is the only proper purpose for a bond or agreement to forfeit. We have all sorts of other means to assure compliance with conditions (pretrial supervision, electronic monitors, drug testing, etc.).

Regardless of whether I'm right on this, though, I thought that the forms committee was going to draft alternative forms of AO 98--one conditioned on appearance and compliance with all bond conditions, and the other conditioned only on the defendant's appearance.

Please circulate these materials to the members of the Forms Working Group for their review and comments. In addition, please do not hesitate to contact me if you have any questions or would like additional information.

Thank you.

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

APPEARANCE BOND

I, _____ *(defendant)*, agree to appear before, and at such other place as may be ordered by, this court or any other United States District Court to which I may be held to answer or to which this case may be transferred, and to comply with all conditions of release set by the court.

( ) (1) This is a personal recognizance bond.

( ) (2) This is an unsecured bond in the amount of $ _____ .

( ) (3) This is a secured bond in the amount of $ _____ , secured by:

( ) (a) $ _____ , in cash deposited in the registry of the court.

( ) (b) the agreement of the defendant and/or surety to forfeit the following cash or other property *(describe the cash or other property, including any encumbrance on it)*: _____

_____

_____ .

(If secured by real property, documents necessary to perfect an interest in the property will be filed of record as permitted by law.)

( ) (c) a bail bond *(attach a copy of the bail bond, or describe it including the identity of the surety)*: _____

_____

_____ .

Forfeiture. If the defendant fails to comply with the terms of this Appearance Bond, the defendant and any undersigned surety agree that the court may immediately order the amount of the bond forfeited to the United States, including any security for the bond, and on motion of the United States may order a judgment of forfeiture against the defendant and the surety, jointly and severally, including interest and costs.

Release of Bond. Unless terminated earlier by court order, this Appearance Bond is satisfied and terminates and any security is released when the defendant is exonerated on all charges or, if convicted, when the defendant reports to serve any sentence imposed.

Ownership. The defendant and/or any undersigned surety declare under penalty of perjury that (i) they are the sole owners of the property securing this Appearance Bond; (ii) the property is not subject to any claim or other encumbrance except as disclosed above; and (iii) they will not sell or further encumber the property or do anything to reduce its value while this Appearance Bond is in effect.

Acknowledgment of Conditions of Release. The defendant and any undersigned surety acknowledge that they have read this Appearance Bond and either have read all other conditions of release set by the court or those conditions have been explained to them.

I declare under penalty of perjury that the foregoing information is true and correct. (See 28 U.S.C. §1746.) I agree to the conditions of this Appearance Bond. Executed on the date noted below.

Date: _____

_____
Defendant's signature

_____ _____
Surety's printed name *Surety's signature and date*

_____ _____
Surety's printed name *Surety's signature and date*

_____ _____
Surety's printed name *Surety's signature and date*

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Approved.

Date: _____

_____
Judge's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

APPEARANCE BOND OF WITNESS

I, _____ *(witness)*, agree to appear before, and at such other place as may be ordered by, this court or any other United States District Court to which I may be held to answer or to which this case may be transferred, and to comply with all conditions of release set by the court.

( ) (1) This is a personal recognizance bond.

( ) (2) This is an unsecured bond in the amount of $ _____ .

( ) (3) This is a secured bond in the amount of $ _____ , secured by:

( ) (a) $ _____ , in cash deposited in the registry of the court.

( ) (b) the agreement of the witness and/or surety to forfeit the following cash or other property *(describe the cash or other property, including any encumbrance on it)*: _____

_____

_____ .

(If secured by real property, documents necessary to perfect an interest in the property will be filed of record as permitted by law.)

( ) (c) a bail bond *(attach a copy of the bail bond, or describe it including the identity of the surety)*: _____

_____

_____ .

Forfeiture. If the witness fails to comply with the terms of this Appearance Bond, the witness and any undersigned surety agree that the court may immediately order the amount of the bond forfeited to the United States, including any security for the bond, and on motion of the United States may order a judgment of forfeiture against the defendant and the surety, jointly and severally, including interest and costs.

Release of Bond. Unless terminated earlier by court order, this Appearance Bond is satisfied and terminates and any security is released when the witness satisfies all court notices, orders, and conditions.

Ownership. The witness and/or any undersigned surety declare under penalty of perjury that (i) they are the sole owners of the property securing this Appearance Bond; (ii) the property is not subject to any claim or other encumbrance except as disclosed above; and (iii) they will not sell or further encumber the property or do anything to reduce its value while this Appearance Bond is in effect.

Acknowledgment of Conditions of Release. The witness and any undersigned surety acknowledge that they have read this Appearance Bond and either have read all other conditions of release set by the court or those conditions have been explained to them.

I declare under penalty of perjury that the foregoing information is true and correct. (See 28 U.S.C. §1746.) I agree to the conditions of this Appearance Bond. Executed on the date noted below.

Date: _____

_____
Witness's signature

_____ _____
Surety's printed name *Surety's signature and date*

_____ _____
Surety's printed name *Surety's signature and date*

_____ _____
Surety's printed name *Surety's signature and date*

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Approved.

Date: _____

_____
Judge's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

ORDER SETTING CONDITIONS OF RELEASE

IT IS ORDERED that the defendant's release is subject to these conditions:

(1) The defendant must not violate any federal, state or local law while on release.

(2) The defendant must cooperate in the collection of a DNA sample if the collection is authorized by 42 U.S.C. § 14135a.

(3) The defendant must advise the court or the pretrial services office or supervising officer in writing before making any change in address or telephone number.

(4) The defendant must appear in court as required and must surrender to serve any sentence imposed.

The defendant must appear at *(if blank, to be notified)* _____
Place

_____ on _____
Date and Time

(5) The defendant must execute an Appearance Bond, as ordered.

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICES U.S. ATTORNEY U.S. MARSHAL

ADDITIONAL CONDITIONS OF RELEASE

IT IS FURTHER ORDERED that the defendant's release is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:
Person or organization _____
Address *(only if above is an organization)* _____
City and state _____ Tel. No. *(only if above is an organization)* _____
who agrees (a) to supervise the defendant in accordance with all of the conditions of release, (b) to use every effort to assure the defendant's appearance at all scheduled court proceedings, and (c) to notify the court immediately if the defendant violates any condition of release or disappears.

Signed: _____ _____
Custodian *Date*

( ) (7) The defendant must:

( ) (a) report for supervision to the _____,
telephone number _____, no later than _____.

( ) (b) maintain or actively seek employment.

( ) (c) maintain or commence an education program.

( ) (d) surrender any passport to: _____

( ) (e) not obtain a passport or other international travel document.

( ) (f) abide by the following restrictions on personal association, place of abode, or travel: _____

( ) (g) avoid all contact, directly or indirectly, with any person who is or may become a victim or potential witness in the investigation or prosecution, including : _____

( ) (h) undergo medical or psychiatric treatment: _____

( ) (i) return to custody each (week) day at _____ o'clock after being released each (week) day at _____ o'clock for employment, schooling, or the following purpose(s): _____

( ) (j) maintain residence at a halfway house or community corrections center, as the pretrial services office or supervising officer considers necessary.

( ) (k) not possess a firearm, destructive device, or other dangerous weapons.

( ) (l) not use alcohol ( ) at all ( ) excessively.

( ) (m) not use or unlawfully possess a narcotic drug or other controlled substances defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner.

( ) (n) submit to any testing required by the pretrial services office or the supervising officer to determine whether the defendant is using a prohibited substance. Any testing may be used with random frequency and include urine testing, the wearing of a sweat patch, a remote alcohol testing system, and/or any form of prohibited substance screening or testing. The defendant must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is (are) required as a condition of release.

( ) (o) participate in a program of inpatient or outpatient substance abuse therapy and counseling if the pretrial services office or supervising officer directs.

( ) (p) participate in one of the following location monitoring programs and abide by its requirements as the pretrial services office or supervising officer instructs.

( ) (i) **Curfew.** You are restricted to your residence every day ( ) from _____ to _____, or ( ) as directed by the pretrial services office or supervising officer; or

( ) (ii) **Home Detention.** You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities pre-approved by the pretrial services office or supervising officer; or

( ) (iii) **Home Incarceration.** You are restricted to 24-hour-a-day lock-down except for medical necessities and court appearances or other activities specifically approved by the court.

( ) (q) submit to the location monitoring indicated below and abide by all of the program requirements and instructions provided by the pretrial services office or supervising officer related to the proper operation of the technology.

( ) The defendant must pay all or part of the cost of the program based upon your ability to pay as the pretrial services office or supervising officer determines.

( ) (i) Location monitoring technology as directed by the pretrial services office or supervising officer;

( ) (ii) Radio Frequency (RF) monitoring;

( ) (iii) Passive Global Positioning Satellite (GPS) monitoring;

( ) (iv) Active Global Positioning Satellite (GPS) monitoring (including "hybrid" (Active/Passive) GPS);

( ) (v) Voice Recognition monitoring.

( ) (r) report as soon as possible, to the pretrial services office or supervising officer, any contact with any law enforcement personnel, including, but not limited to, any arrest, questioning, or traffic stop.

( ) (s) _____

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March 2011						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

May 2011						
S	M	T	W	T	F	S
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29	30	31				

June 2011						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

April 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22 **Good Friday**	23
24 **Easter Sunday**	25 **Easter Monday**	26	27	28	29	30
						U.S. Federal Holidays are in Red.

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