COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
June 11-12, 2007
Volume I-A

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 11-12, 2007

VOLUME I-A

1. Opening Remarks of the Chair

   A. Report on the March 2007 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2007 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Time-Computation Subcommittee

6. Report of the Evidence Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed new Evidence Rule 502 on waiver of attorney-client privilege and work-product protection and draft letters to Congress accompanying the proposed new rule
   B. **ACTION** – Approving draft report to Congress on harm-to-child exception to marital privileges required under Adam Walsh Child Protection Act
   C. Minutes and other informational items

VOLUME I-B

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 60, and new Rule 61 implementing the Crime Victims' Rights Act
   B. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendment to Criminal Rule 41(b) authorizing issuance of search warrants
   C. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases on time computation.
   D. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 7, 16, 32, 32.2, 41 and Rule 11 of the Rules Governing §§ 2254

and 2255 Cases.

E. Minutes and other informational items

VOLUME II-A

8. Report of the Bankruptcy Rules Committee

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011.

B. **ACTION** – Approving and transmitting to the Judicial Conference proposed technical amendments to Bankruptcy Rules 7012, 7022, 7023.1, and 9024.

C. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 4008, 7052, 9006, and 9021, and proposed new Bankruptcy Rules 1017.1 and 7058.

D. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 on time computation.

VOLUME II-B

E. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, 24, and Exhibit D to Official Form 1, and new Official Forms 25A, 25B, 25C, and 26.

F. **ACTION** – Approving publishing for public comment proposed revisions to Official Forms 8 and 27.

G. Minutes and other informational items

VOLUME III

9. Report of the Civil Rules Committee

A. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 59, 62, 65, 68, 71.1, 72, 81, and Supplemental Rules B, C, and G on time computation.

B. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rules 56 and 81, and proposed new Rule 62.1
C. Minutes and other informational items

10. Report of the Appellate Rules Committee

A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 on time computation.
B. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 4, 22, 26, 29, and 40, and new Rule 12.1
C. Minutes and other informational items

11. Report on Standing Orders

12. Report on Sealing Cases

13. Long-Range Planning Report

14. Next Meeting: January 2008

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Judge C. Christopher Hagy (Civil)
(Open) (Criminal)
Committee Reporters, Consultants

Subcommittee on Time Project
Judge Mark R. Kravitz, Chair
Committee Reporters, Consultants
Mark I. Levy, Esquire (Appellate)
Judge Christopher M. Klein (Bankruptcy)
Chilton Davis Varner, Esquire (Civil)
Leo P. Cunningham, Esquire (Criminal)
(Open) (Evidence)
Ted Hirt, Esquire (DOJ representative)

LIAISONS TO ADVISORY RULES COMMITTEES
Judge Harris L Hartz (Appellate)
Judge James A. Teilborg (Bankruptcy)
Judge Sidney A. Fitzwater (Civil)
Judge Mark R. Kravitz (Criminal)
Judge Thomas W. Thrash, Jr. (Evidence)

ADVISORY COMMITTEE ON APPELLATE RULES

SUBCOMMITTEES

Subcommittee on Time Computation
Judge Jeffrey S. Sutton, Chair
Maureen E. Mahoney, Esquire
DOJ Representative

May 24, 2007
Projects

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEES

Subcommittee on Attorney Conduct and Health Care
Judge Richard A. Schell, Chair
Judge William H. Pauley, III
Judge Mark B. McFeeley
John Rao, Esquire
J. Michael Lamberth, Esquire

Subcommittee on Business Issues
Judge Laura Taylor Swain, Esquire
Judge Eugene R. Wedoff
Judge Mark B. McFeeley
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
James J. Waldron, *ex officio*

Subcommittee on Consumer Issues
Judge Eugene R. Wedoff, Chair
Judge R. Guy Cole
Judge Laura Taylor Swain
Judge William H. Pauley III
John Rao, Esquire
G. Eric Brunstad, Jr., Esquire
James J. Waldron, *ex officio*

Subcommittee on E-Government
Judge Thomas S. Zilly
Judge Laura Taylor Swain
Professor Jeffrey W. Morris

Subcommittee on Forms
Judge Christopher M. Klein, Chair
Judge Irene M. Keeley
Judge Kenneth J. Meyers
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*
Patricia S. Ketchum, Esquire, Consultant

Subcommittee on Privacy, Public Access, and Appeals
William H. Pauley III, Chair
Judge Christopher M. Klein
Judge Richard A. Schell
G. Eric Brunstad, Jr., Esquire

Subcommittee on Style
Dean Lawrence Ponoroff, Chair
Judge Irene M. Keeley
Judge Christopher M. Klein
Judge Kenneth J. Meyers
J. Michael Lamberth, Esquire

Subcommittee on Technology and Cross Border Insolvency
Judge Mark B. McFeeley, Chair
Judge R. Guy Cole, Jr.
Judge Irene M. Keeley
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire

CM/ECF Working Group
Judge Mark B. McFeeley

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Rules 26(a) and 30(b)(6)
Judge David G. Campbell, Chair
Chilton Davis Varner, Esquire
Daniel C. Girard, Esquire
Anton R. Valukas, Esquire
Professor Richard L. Marcus, Special Reporter
DOJ Representative

Subcommittee on Rule 56 – Pleading
Judge Michael M. Baylson, Chair
Judge Paul J. Kelly, Jr.
Judge Vaughn R. Walker
Judge C. Christopher Hagy
Justice Randall T. Shepard
Robert C. Heim, Esquire
Anton R. Valukas, Esquire
DOJ Representative

Subcommittee on Time Counting
Subcommittee A
Judge David G. Campbell, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
Daniel C. Girard, Esquire
Anton R. Valukas, Esquire
Honorable Peter D. Keisler

Subcommittee B
Judge Michael M. Baylson, Chair
Judge Jose A. Cabranes
Judge Vaughn R. Walker
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Subcommittee on Booker
Judge David G. Trager, Chair
Professor Nancy J. King
Thomas P. McNamara
Justice Robert H. Edmunds, Jr.
Rachel Brill, Esquire
DOJ Representative

Subcommittee on CVRA
Judge James P. Jones, Chair
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Leo P. Cunningham, Esquire
DOJ Representative

Subcommittee on E-Government
Judge Harvey Bartle III, Chair
Thomas P. McNamara
Rachel Brill, Esquire
DOJ Representative

Subcommittee on Electronically Stored Information
Judge Anthony J. Battaglia, Chair
Judge Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ Representative

Subcommittee on Forfeiture
Judge Mark L. Wolf, Chair
Judge James P. Jones
Professor Nancy J. King
Thomas P. McNamara
Rachel Brill, Esquire
DOJ Representative
David Smith (NACDL) ad hoc

Subcommittee on Rule 16 (Brady)
Professor Nancy J. King
Judge Richard C. Tallman
Judge Mark L. Wolf
Thomas P. McNamara
DOJ Representative

Subcommittee on Rule 29
Judge Richard C. Tallman, Chair
Judge David G. Trager
Judge Mark L. Wolf
Professor Nancy J. King
Thomas P. McNamara
DOJ Representative

Subcommittee on Time Computation
Leo P. Cunningham, Esquire, Chair
Judge Harvey Bartle III
Judge Anthony J. Battaglia
DOJ Representative

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

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

May 24, 2007
Projects

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

			Start Date	End Date
David F. Levi	D	California (Eastern)	Member: 2003	----
Chair			Chair: 2003	2007
David J. Beck	ESQ	Texas	2003	2009
Douglas R. Cox	ESQ	Washington, DC	2005	2008
Sidney A. Fitzwater	D	Texas (Northern)	2000	2007
Ronald M. George	CJUST	California	2006	2009
Harris L. Hartz	C	Tenth Circuit	2003	2009
John G. Kester	ESQ	Washington, DC	2004	2007
Mark R. Kravitz	D	Connecticut	2001	2007
William J. Maledon	ESQ	Arizona	2005	2008
Paul J. McNulty*	DOJ	Washington, DC	----	Open
Daniel J. Melzer	ACAD	Massachusetts	2006	2009
James A. Teilborg	D	Arizona	2006	2009
Thomas W. Thrash, Jr.	D	Georgia (Northern)	2000	2007
Daniel Coquillette	ACAD	Massachusetts	1985	Open
Reporter				

Secretary: Peter G. McCabe (202) 502-1800
Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

ADVISORY COMMITTEE ON APPELLATE RULES

			Start Date	End Date
Carl E. Stewart	C	Fifth Circuit	Member: 2001	----
Chair			Chair: 2005	2008
James Forrest Bennett	ESQ	Missouri	2005	2008
Kermit Edward Bye	C	Eighth Circuit	2005	2008
Paul D. Clement*	DOJ	Washington, DC	-----	Open
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Randy J. Holland	JUST	Delaware	2004	2007
Mark I. Levy	ESQ	Washington, DC	2003	2009
Maureen E. Mahoney	ESQ	Washington, DC	2005	2008
Stephen R. McAllister	ACAD	Kansas	2004	2007
Jeffrey S. Sutton	C	Sixth Circuit	2005	2008
Catherine T. Struve	ACAD	Pennsylvania	2006	Open
Reporter				

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

* Ex-officio

ADVISORY COMMITTEE ON BANKRUPTCY RULES

			Start Date	End Date
Thomas S. Zilly	D	Washington (Western)	Member: 2000	----
Chair			Chair: 2004	2007
G. Eric Brunstad, Jr.	ESQ	Connecticut	2005	2008
Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2009
Irene M. Keeley	D	West Virginia (Northern)	2002	2008
Christopher M. Klein	B	California (Eastern)	2000	2007
J. Christopher Kohn*	DOJ	Washington, DC	-----	Open
J. Michael Lamberth	ESQ	Georgia	2005	2008
Mark B. McFeeley	B	New Mexico	2001	2007
Kenneth J. Meyers	B	Illinois (Southern)	2006	2009
William H. Pauley III	D	New York (Southern)	2005	2008
Lawrence Ponoroff	ACAD	Louisiana	2004	2007
John Rao	ESQ	Massachusetts	2006	2009
Richard A. Schell	D	Texas (Eastern)	2003	2009
Laura Taylor Swain	D	New York (Southern)	2002	2008
Eugene R. Wedoff	B	Illinois (Northern)	2004	2007
Jeffrey W. Morris	ACAD	Ohio	1998	Open
Reporter				

Principal Staff: John K. Rabiej (202) 502-1820
Jim H. Wannamaker (202) 502-1910

* Ex-officio

ADVISORY COMMITTEE ON CIVIL RULES

			Start Date	End Date
Lee H. Rosenthal	D	Texas (Southern)	Member: 1996	----
Chair			Chair: 2003	2007
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2007
Jose A. Cabranes	C	Second Circuit	2004	2007
David G. Campbell	D	Arizona	2005	2008
Steven S. Gensler	ACAD	Oklahoma	2005	2008
Daniel C. Girard	ESQ	California	2004	2007
C. Christopher Hagy	M	Georgia (Northern)	2003	2009
Robert C. Heim	ESQ	Pennsylvania	2002	2008
Peter D. Keisler *	DOJ	Washington, DC	----	Open
Paul J. Kelly, Jr.	C	Tenth Circuit	2002	2007
Randall T. Shepard	CJUST	Indiana	2006	2009
Anton R. Valukas	ESQ	Illinois	2006	2009
Chilton Davis Varner	ESQ	Georgia	2004	2007
Vaughn R. Walker	D	California (Northern)	2006	2009
Edward H. Cooper	ACAD	Michigan	1992	Open
Reporter				

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

* Ex-officio

ADVISORY COMMITTEE ON CRIMINAL RULES

			Start Date	End Date
Susan C. Bucklew	D	Florida (Middle)	Member: 1998	----
Chair			Chair: 2004	2007
Harvey Bartle III	D	Pennsylvania (Eastern)	2001	2007
Anthony J. Battaglia	M	California (Southern)	2003	2009
Rachel Brill	ESQ	Puerto Rico	2006	2009
Leo P. Cunningham	ESQ	California	2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2007
Alice S. Fisher*	DOJ	Washington, DC	----	Open
James Parker Jones	D	Virginia (Western)	2003	2009
Nancy J. King	ACAD	Tennessee	2001	2007
Thomas P. McNamara	FPD	North Carolina	2005	2008
Richard C. Tallman	C	Ninth Circuit	2004	2007
David G. Trager	D	New York (Eastern)	2000	2007
Mark L. Wolf	D	Massachusetts	2005	2008
Sara Sun Beale	ACAD	North Carolina	2005	Open
Reporter				

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

* Ex-officio

ADVISORY COMMITTEE ON EVIDENCE RULES

			Start Date	End Date
Jerry E. Smith	C	Fifth Circuit	Member: 2002	----
Chair			Chair: 2002	2007
Joseph F. Anderson, Jr.	D	South Carolina	2005	2008
Michael M. Baylson**	D	Pennsylvania (Eastern)	2006	2007
Joan N. Ericksen	D	Minnesota	2005	2008
William T. Hangley	ESQ	Pennsylvania	2006	2009
Robert L. Hinkle	D	Florida (Northern)	2002	2008
Andrew D. Hurwitz	JUST	Arizona	2004	2007
Marjorie A. Meyers	FPD	Texas (Southern)	2006	2009
William W. Taylor III	ESQ	Washington, DC	2004	2007
Ronald J. Tenpas*	DOJ	Washington, DC	----	Open
David G. Trager**	D	New York (Eastern)	2000	2007
Daniel J. Capra	ACAD	New York	1996	Open
Reporter				

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

* Ex-officio
** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

1A

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 13, 2007

****

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its March 13, 2007 session, the Judicial Conference of the United States:

Elected to the Board of the Federal Judicial Center, each for a term of four years, Judge David O. Carter of the District Court for the Central District of California to succeed Judge James A. Parker of the District Court for the District of New Mexico, and Judge Philip M. Pro of the District Court for the District of Nevada to succeed Judge Sarah S. Vance of the District Court for the Eastern District of Louisiana.

COMMITTEE ON THE ADMINISTRATIVE OFFICE

Agreed to support the Department of Justice in its efforts to secure legislation extending its statutory deadline for submitting wiretap data to the Administrative Office, provided that any such modification include a commensurate extension of the judiciary's deadline for submitting the annual wiretap report to Congress.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the Administrative Office to transmit to Congress proposed legislation authorizing: (1) three additional bankruptcy judgeships for the Eastern District of Michigan and one for the Northern District of Mississippi, and (2) the conversion of the existing temporary positions to permanent (one each) in the Eastern District of Michigan, the Southern District of Georgia, the Southern District of Illinois, and the Western District of Tennessee

Rescinded its 1991 position to seek legislation as a means to assure that trustees in cases converted to chapter 7 of the Bankruptcy Code receive compensation equivalent to the compensation received by trustees in cases originally filed under that chapter.

Approved raising the "informal recognition" non-monetary award cap from $50 to $100 per court employee, per year.

COMMITTEE ON JUDICIAL SECURITY

Agreed to support the efforts of the United States Marshals Service, through administrative and/or legislative remedies, to assume the security functions currently performed by the Federal Protective Service in courthouses, as appropriate, and the associated funding.

Endorsed judiciary participation in the Homeland Security Presidential Directive-12 program, which establishes a secure form of identification to be issued by the federal government to its employees and contractors.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved a proposed amendment to Rule C(6)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions and agreed to transmit this change to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Endorsed the proposed Five-Year Courthouse Project Plan for FYs 2008-2012, subject to revisions related to project costs, funding phases, or congressional action.

Approved, pursuant to the budget check process, the actions taken by the Committee on Space and Facilities regarding several space requests.

For prospectus-level courthouse projects, agreed that the Conference must specifically approve each departure from the *U.S. Courts Design Guide* approved by a circuit judicial council that results in additional estimated costs of the project (including additional rent payment obligations), after review by the Space and Facilities Committee. If the departure is approved by the Conference, the chairperson of the circuit space and facilities committee or the chief judge or project judge requesting construction that exceeds *Design Guide* criteria must be willing, if requested by the Committee on Space and Facilities, to appear before Congress concerning funding for such construction.

Endorsed the use of the following naming conventions for federal courthouses:

a. For a facility occupied solely by a federal court, the title "United States Courthouse" should be used;

1B

April 30, 2007

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendment to the Federal Rules of Appellate Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 30, 2007

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein an amendment to Appellate Rule 25.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendment to the Federal Rules of Appellate Procedure shall take effect on December 1, 2007, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 30, 2007

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 30, 2007

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, 7007.1, and new Rules 6003, 9005.1, and 9037.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2007, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

April 30, 2007

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 30, 2007

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 1 through 86 and new Rule 5.2.

2. That Forms 1 through 35 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended to become restyled Forms 1 through 82.

[See infra., pp. ___ ___ ___.]

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2007, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 30, 2007

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 30, 2007

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 11, 32, 35, 45, and new Rule 49.1.

2. That the Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue under Section 2254 of Title 28, United States Code, be, and hereby is, abrogated.

[See infra., pp. ___ ___ ___.]

3. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2007, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 11-12, 2007
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

Joan E. Meyer, Senior Counsel to the Deputy Attorney General, participated in the meeting on behalf of Deputy Attorney General Patrick J. McNulty, *ex officio* member of the committee. The Department of Justice was also represented at the meeting by Elizabeth U. Shapiro of the Criminal Division.

Also in attendance were Justice Charles Talley Wells, Judge J. Garvan Murtha, and Dean Mary Kay Kane (former members of the committee); Judge Patrick E. Higginbotham (former chair of the Advisory Committee on Civil Rules); Justice Andrew D. Hurwitz (member of the Advisory Committee on Evidence Rules); Patricia Lee Refo, Esquire (former member of the Advisory Committee on Evidence Rules); and Professor Stephen C. Yeazell.

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs of the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; Matthew Hall, law clerk to Judge Levi; and Joseph F. Spaniol, Jr., Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the committee.

Representing the advisory committees were:

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

INTRODUCTORY REMARKS

Judge Levi welcomed Chief Justice George, Judge Teilborg, and Professor Meltzer as new members of the committee. He noted that Chief Justice George had served at every level of the California state courts, been a very successful prosecutor, and served on the Judicial Conference's Federal-State Jurisdiction Committee. He explained that Judge Teilborg had built and led a great Arizona law firm and now sits as a U.S. district judge in Phoenix. He pointed out that Professor Meltzer teaches at the Harvard Law School, is a truly gifted legal scholar, authors the Hart and Wechsler text book, and serves on the council of the American Law Institute.

Judge Levi expressed regret that the terms of three outstanding members of the committee had expired on October 1, 2006 – Justice Wells, Judge Murtha, and Dean Kane. He presented them with plaques for their service signed by the Chief Justice. He praised Justice Wells for his great wisdom and for the unique perspective that he brought to the committee on issues affecting federalism and the state courts. He thanked Judge Murtha for his enormous contributions to the civil rules restyling project over the last several years, for chairing the committee's style subcommittee, and for his work as advisory committee liaison. He honored Dean Kane for her indefatigable work over several years on the civil rules restyling project and for her outstanding scholarship and uncanny problem-solving ability.

Judge Levi announced that he would be leaving the federal bench on July 1, 2007, to accept the position of dean of Duke Law School. He said that he would sorely miss the challenging work of the federal judiciary. But he would miss even more the people with whom he has worked. He said that the federal judiciary is comprised of the most astonishing group of men and women in the country. He added that he was excited about his new job, but would like to continue to be of assistance to the federal judiciary in the future.

Judge Levi reported that the September 2006 meeting of the Judicial Conference had been uneventful in that all the rule amendments recommended by the committee had been approved on the Conference's consent calendar without discussion. The approved rules included the complete package of restyled civil rules and the amendments to the civil, criminal, bankruptcy, and appellate rules to protect privacy and security interests under the E-Government Act of 2002. Judge Levi also reported that the controversial FED. R. APP. P. 32.1, allowing citation of unpublished opinions in all the circuits, had gone into effect on December 1, 2006.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on June 22-23, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on two legislative matters of interest to the committee. First, he said, Representative F. James Sensenbrenner, Jr., former chairman of the House Judiciary Committee, had asked the Judicial Conference to initiate rulemaking to address certain issues arising from the waiver of evidentiary privileges through disclosure. He reported that the Advisory Committee on Evidence Rules had drafted a proposed new FED. R. EVID. 502 that would explicitly address waivers of attorney-client privilege and work product protection. But, he explained, the Rules Enabling Act specifies that any rule amendment affecting an evidentiary privilege requires the affirmative legislative approval of Congress. Mr. Rabiej added that with the recent change in control of Congress from the Republicans to the Democrats, it will be necessary for representatives of the judiciary to discuss the proposed Rule 502 with the new leadership of the judiciary committees.

Second, Mr. Rabiej reported that on December 6, 2006, the Senate Judiciary Committee had conducted an oversight hearing on implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He said that the judiciary had not sent a witness to testify at the hearing, but had submitted a statement from Judge Zilly, chair of the Advisory Committee on Bankruptcy Rules. The statement reported on the actions of the advisory committee in developing rules and forms to implement the Act, and it included extensive attachments documenting the enormous efforts made by the judiciary to implement the new statute.

Mr. Rabiej added that Senator Grassley had made a remark at the hearing complaining that the advisory committee had not faithfully carried out the intent of the law in drafting the new means test form for consumer bankruptcy cases. He said that Judge Zilly sent a letter to the senator explaining in detail that the advisory committee had faithfully executed the plain language of the statute in drafting the form. The committee will consider his letter at its April 2007 meeting, along with other suggestions submitted during the public comment period.

Mr. Rabiej reported that the proposed rule amendments approved by the Judicial Conference had been hand-carried to the Supreme Court in December 2006. He added that all the proposed rules, as well as public comments and other committee documents, have been posted on the judiciary's web site. He said that the Administrative Office is

working with the committees' reporters to give them direct access to all the documents in the rules office's electronic document management system.

Mr. McCabe added that all the records of the rules committees since 1992 are in the electronic document management system and fully searchable. In addition, all committee reports and minutes since 1992 have been posted on the judiciary's public web site, and all committee agenda books back to 1992 will soon be posted. In addition, he said, a majority of committee reports and minutes before 1992 have been located, converted to electronic form, and posted on the web site. But, he said, many rules records before 1992 are not available in the files of the Administrative Office. The staff has been searching the archives of law schools and the papers of former reporters and members to locate the missing documents. The ultimate goal of the rules office, he said, is to find and post on the web site all the key rules documents from the beginning of the rules system to the present and to make them readily searchable with a good search engine.

REPORT OF THE FEDERAL JUDICIAL CENTER

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

First, he said, judges have a great personal interest in how their courtrooms are being used. He reported that the Center was working with the Court Administration and Case Management Committee of the Judicial Conference on a comprehensive courtroom usage study in response to a specific request from Congress. Among other things, he said, members of Congress have noticed that the number of trials in the district courts has been declining steadily, and they question whether courtrooms are being used fully and effectively.

Second, Mr. Cecil said, the Center is developing educational materials for judges on special case management challenges posed by terrorism cases, based on lessons learned by judges who have already handled terrorism cases.

Third, he reported that the Center is continuing to gather information for the Advisory Committee on Civil Rules regarding summary judgment practices in the district courts. He added that Center researchers are examining summary judgment motions filed in 2006, how they were handled by the district courts, and what their outcomes were.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 6, 2006 (Agenda Item 5).

Informational Items

Judge Stewart reported that the advisory committee had met in November 2006 and had decided to approve in principle amendments to two rules.

First, a proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would eliminate an ambiguity created in the 1998 restyling of the appellate rules. The current rule might be read to require an appellant to amend its notice of appeal in any case in which the district court amends the judgment after the notice of appeal has been filed. Judge Stewart said that the advisory committee believed that the problem could be cured by fine tuning the language of the rule. He said that the committee would take another look at the exact language at its next meeting.

Second, Judge Stewart reported that the advisory committee had received a suggestion to amend FED. R. APP. P. 29 (brief of an amicus curiae). Modeled after Supreme Court Rule 37, the amended appellate rule would require the filer of an amicus brief to disclose whether the brief is authorized or funded by a party in the case. He said that the advisory committee had decided that a uniform national rule was preferable in this area to a variety of local circuit rules. He reiterated that the committee had approved the Rule 29 amendment in principle, subject to further refinements. One member suggested, though, that the Supreme Court rule may not be particularly helpful and is not strictly enforced.

Judge Stewart noted that the advisory committee had been busy with the time-computation project. He pointed out that Professor Struve, the advisory committee's reporter, was also serving as the reporter for the overall time-computation project and had compiled a huge amount of valuable information. He added that a special Deadlines Subcommittee, chaired by Judge Jeffrey S. Sutton (6th Circuit), had reviewed each time limit in the appellate rules, especially the short periods that would be affected by the change in time-computation approach under the proposed new uniform rule.

Judge Stewart said that the advisory committee had also looked into whether it would be useful for the new time-computation rule to include a provision addressing dates certain, as opposed to dates that require computation, and it had concluded that such a provision was not necessary. He added that some members of the committee had

misgivings about the very need for the time-computation project, particularly with regard to its impact on deadlines set forth in statutes. Nevertheless, he said, the committee would proceed with the project at its April 2007 meeting.

Judge Stewart reported that the advisory committee was continuing to consider whether too many briefing requirements are set forth in the local rules of the courts of appeals. He said that the Federal Judicial Center had completed an excellent study identifying and analyzing all the briefing requirements of the circuits, and he had written a letter to the chief judges of the circuits expressing the advisory committee's concern over local requirements and whether all were necessary. He said that the letter to the chief judges referred to the work of the Federal Judicial Center and emphasized the need to make all local procedural requirements readily accessible to practitioners. He added that the chief judges of six of the circuits had responded to his letter, and the advisory committee would consider the responses at its April 2007 meeting. Professor Capra added that, in the course of reporting the results of the district court local rules project, the chief district judges had been very positive in responding to the letters from the Standing Committee identifying local rules that appeared to be inconsistent with the national rules.

One member pointed out that some local rules are of substantial benefit to the circuit courts, and there will be a great deal of opposition to eliminating them. But, he said, some of the beneficial provisions now contained in local rules might well be incorporated into the national rules. Judge Stewart responded, though, that there are a great many variations among the circuits in their local rules, and it would be very difficult to reach agreement on the contents of the national rules. A member observed that circuit courts do not hear many complaints from the bar about their local rules because attorneys who practice regularly before a particular court get used to the local requirements. Courts, he added, rarely hear from attorneys who have a national practice.

Another member noted that he finds it increasingly difficult as a practitioner to know how to prepare briefs because of the proliferation of local rules. Many local requirements, he said, are little more than busy work and create potential traps for the bar. Moreover, the staff of the clerks' offices waste time kicking the papers back to lawyers for noncompliance with the local rules. He encouraged the advisory committee to continue its work in the area. But he concluded that local briefing requirements, while annoying, do not rise to the level of importance in the overall scheme of the advisory committee's work, for example, as the new FED. R. APP. P. 32.1, which has overridden local circuit rules that had barred lawyers from citing unpublished opinions.

Judge Levi pointed out that the rules committees should continue to be concerned about local rules. He noted that some local rules affect substance, and many increase costs and create confusion for the bar. Professor Coquillette added that Congress, too,

has expressed concerns regarding local court rules – as opposed to the national rules – because local rules do not go through the Rules Enabling Act process, which affords Congress an opportunity to review and reject the rules.

Judge Stewart reported that the advisory committee had on its study agenda a proposal from the Virginia State Solicitor General to amend FED. R. APP. P. 4 (notice of appeal – when taken) and FED. R. APP. P. 40 (petition for panel rehearing) to treat state-government litigants the same as federal-government litigants for the purpose of giving them additional time to take an appeal or to seek rehearing. He mentioned that members of the advisory committee had questioned the need for the changes, as well as the scope of the proposed amendments. He said that the committee would study the proposal further.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of November 30, 2006 (Agenda Item 8).

Amendments for Publication

FED. R. BANK. P. 7052, 7058, and 9021

Judge Zilly reported that the advisory committee was seeking authority to publish amendments to FED. R. BANK. P. 7052 (findings by the court) and FED. R. BANK. P. 9021 (entry of judgment) and a proposed new FED. R. BANK. P. 7058 (entry of judgment). The package of three rules would address the requirement of FED. R. CIV. P. 58(a) that every judgment be set forth on a "separate document" and coordinate the bankruptcy rules with recent revisions to the civil rules.

He explained that when a court fails to enter a judgment on a separate document, revised FED. R. CIV. P. 58 provides a default 150-day appeal period, rather than the normal 30-day appeal period in the civil rules. Bankruptcy matters, he said, usually require prompt finality, and the bankruptcy rules provide for a shorter 10-day appeal period generally. The key questions for the advisory committee, thus, are: (1) whether the bankruptcy rules should continue to contain the separate document requirement; and (2) whether the bankruptcy system can live with the default 150-day appeal period of the civil rules. He explained that the advisory committee had decided to retain the separate document requirement for adversary proceedings because they are similar to civil cases. But the more difficult question is whether to retain the separate document requirement for contested matters.

Judge Zilly noted that the advisory committee had a heated discussion on the matter. Half the members favored enforcing the separate document requirement for all judgments in bankruptcy cases, including judgments in contested matters, because it provides certainty to the litigation process. The other half argued, though, that many bankruptcy courts simply do not comply with the present rule, finding it administratively difficult to enter separate judgments on every matter when bankruptcy judges commonly dispose of large numbers of contested matters on a single calendar. Judge Zilly reported that the committee had decided ultimately, on his tie-breaking vote, that contested matters should no longer be subject to the separate document rule. Thus, in contested matters, the docket entry of the judge's decision will be sufficient to start running the appeal period.

As a matter of drafting, Professor Morris explained that Part VII of the Bankruptcy Rules applies the Federal Rules of Civil Procedure to adversary proceedings. There is, however, no counterpart to FED. R. CIV. P. 58 in Part VII. Instead Civil Rule 58 is made applicable to both adversary proceedings and contested matters through FED. R. BANKR. P. 9021. The advisory committee's proposal would confine the separate document requirement of Rule 58 to adversary proceedings by: (1) creating a new FED. R. BANKR. P. 7058 just for adversary proceedings; and (2) eliminating the reference to Civil Rule 58 in FED. R. BANKR. P. 9021.

Several committee members suggested changes in the language of the proposed amendments, and Judge Zilly agreed that the advisory committee would address the suggestions at its March 2007 meeting.

Judge Hartz moved to approve the proposed amendments in principle, with the understanding that the advisory committee would consider additional changes in language. The committee by voice vote unanimously approved the motion.

Informational Items

Judge Zilly reported that the advisory committee had published a large package of rules amendments and forms in August 2006 designed to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Most of the rules, he said, were derived from the interim rules used in the bankruptcy courts since October 2005. He noted that the public hearing on the amendments had been cancelled because no witnesses had asked to appear. The committee, he said, would consider all the written public comments at its March 2007 meeting and return to the Standing Committee in June 2007 for final approval of the package.

Judge Zilly reported that the advisory committee had created a subcommittee to apply the proposed new time-computation proposals to the bankruptcy rules. He noted that the subcommittee already had identified more than a hundred time limits in the

bankruptcy rules that would be affected by the proposals. He noted, moreover, that the bankruptcy rules currently differ from the other federal rules because they exclude weekends and holidays in computing time periods of fewer than 8 days, rather than periods of fewer than 11 days.

Judge Zilly explained that the advisory committee would be prepared to present appropriate amendments dealing with time limits for approval at the June 2007 Standing Committee meeting. But, he said, members of the committee had expressed concern over going forward with more changes to the bankruptcy rules so soon after having published a large package of proposed amendments in August 2006. Moreover, many of the time-limit changes arise in rules already being amended for other reasons.

Judge Zilly noted that the advisory committee had also identified a modest number of provisions in the Bankruptcy Code that impose time limits of fewer than 8 days. He said that legislation to amend the Code should be pursued because the new time-computation rules will effectively shorten these short statutory periods even further by including weekends and holidays in the count.

Judge Zilly reported that the advisory committee was considering potential changes in the bankruptcy rules to implement section 319 of the 2005 bankruptcy legislation. Section 319 would enhance the obligations of debtors' attorneys (and pro se debtors) regarding the papers they file with the court and with trustees. It states that it is the sense of Congress that FED. R. CIV. P. 9011 (sanctions) should be modified to require that all documents, including schedules, submitted on behalf of a debtor under all chapters of the Code contain a verification that the debtor's attorney (or a pro se debtor) has "made reasonable inquiry to verify that the information contained in [the] documents" is well grounded in fact and warranted by existing law or a good faith argument to extend, modify, or reverse the law. He noted that the language of the statute is different from that of the current Rule 9011.

Judge Zilly pointed out that a separate section of the new law, now codified at 11 U.S.C. § 707(b)(4)(C) and (D), made similar, but not identical, changes affecting the obligations of attorneys in Chapter 7 cases only. Section 707(b)(4)(C) provides that a debtor's attorney's signature on a Chapter 7 petition, pleading, or written motion constitutes a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion" to determine that the document is well grounded. Section 707(b)(4)(D) provides that an attorney's signature on a Chapter 7 petition constitutes a "certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Zilly explained that the advisory committee had decided originally not to propose an amendment to FED. R. BANKR. P. 9011 (signing of papers, representations to the court, and sanctions) to mirror the statute because the statute itself is so specific regarding the obligations of debtors' attorneys. But, he said, the committee had agreed to change the official petition form to include a warning alerting attorneys to the new obligations imposed on them by the 2005 legislation.

Judge Zilly added that letters had been received from Senators Grassley and Sessions urging the advisory committee to amend the bankruptcy rules to reinforce the statutory provision. Judge Zilly pointed out that the advisory committee was continuing to study the issue and might change its original position. He noted that because the statute was designed by Congress to push more debtors from Chapter 7 into Chapter 13, the committee might recommend that the same debtor-attorney verification now applicable in Chapter 7 cases by statute be extended by rule to filings under all chapters of the Code.

Judge Zilly reported that a Senate Judiciary Committee subcommittee had held an oversight hearing in December 2006 to review implementation of the 2005 bankruptcy legislation. He noted that he had been invited to speak, but had been tied up in a criminal trial and could not attend. He did, however, submit a written report documenting the enormous efforts of the judiciary to implement all the requirements of the legislation.

At the hearing, he noted, Senator Grassley had submitted written comments criticizing the advisory committee for including an entry on the new means-testing form that allows a debtor to claim certain expenses that the debtor may not have actually incurred. Judge Zilly pointed out, though, that the committee had scrupulously followed the language of the statute in drafting the form. He added that he had sent a response to Senator Grassley explaining that the plain language of the statute compelled the language adopted by the advisory committee. Moreover, he added, the form in question was part of a package of rules and forms still out for public comment.

Judge Levi pointed out that the advisory committee had faithfully complied with its obligation to implement the statute as written. He congratulated Judge Zilly, Professor Morris, and the entire advisory committee for a monumental achievement in producing a comprehensive package of rules and forms to implement the 2005 legislation.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of December 12, 2006 (Agenda Item 9).

Judge Rosenthal pointed out that most of the items in the advisory committee's report had been brought to the Standing Committee's attention previously, some of them in connection with the project to restyle the civil rules. She noted that the advisory committee had delayed moving on the proposals until it had completed its work on the restyling and electronic discovery projects.

Amendments for Final Approval

SUPPLEMENTAL RULE C(6)(a)

Judge Rosenthal reported that the proposed changes to Supplemental Rule C(6)(a) (statement of interest) were purely technical and did not have to be published. They would correct a drafting omission occurring during the course of adopting Supplemental Rule G, which took effect on December 1, 2006. The new Rule G abrogated portions of other supplemental rules and gathered in one place the various provisions of the supplemental rules dealing with civil forfeiture actions in rem.

In amending Rule C, though, the committee forgot to capitalize the first word of subparagraph (6)(a)(i). Judge Rosenthal explained that the omission could be cured simply by inserting the capital letter, but the advisory committee had decided to make some additional minor changes to improve the way the rule reads and to make it parallel with other subdivisions of the rule.

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

Amendments for Publication

FED. R. CIV. P. 13(f)

Judge Rosenthal reported that the advisory committee was recommending deletion of Rule 13(f) (omitted counterclaim). The committee, she added, had considered eliminating the rule as part of the restyling process, but had decided that the change was substantive in nature.

Rule 13(f) allows a court to permit a party to amend its pleading to add a counterclaim if justice so requires. She explained that it is largely redundant of Rule 15(a) (amended and supplemental pleadings) and is potentially misleading. She noted that the standards in the two rules for permitting amendments to pleadings sound different, but they are administered identically by the courts. Deletion of Rule 13(f), she said, will bring all pleading amendments within Rule 15 and ensure that the same amendment standards apply to all pleading amendments.

The committee without objection by voice vote approved deletion of Rule 13(f) for publication.

FED. R. CIV. P. 15 (a)

Judge Rosenthal reported that the advisory committee was proposing a change in Rule 15(a) (amendments to pleadings before trial) that would give a party 21 days after service to make one pleading amendment as a matter of course. The change, she said, would make the process of amending pleadings less cumbersome for the parties and the court. She noted that the committee had also considered making changes to Rule 15(c), dealing with the relation back of amendments to pleadings, but had decided not to do so because the subject matter is enormously complicated and the textual problems in the current Rule 15(c) do not seem to have caused significant difficulties in practice.

Judge Rosenthal pointed out that the proposed revision in Rule 15(a) would set a definite time period within which a party may amend a pleading as a matter of right. Under the current rule, serving a responsive pleading terminates the other party's right to amend as a matter of course. On the other hand, serving a motion attacking the pleading delays the time to file a responsive pleading and thus extends the time within which a party may amend a pleading as a matter of right. The rule causes problems because the party filing a motion attacking the complaint – and the judge – may invest a good deal of work on the motion only to have the pleader amend its pleading as a matter of right. In many cases, she noted, after an opponent points out an error in a pleading, the pleader will simply admit the error and amend the pleading.

Judge Rosenthal said that the advisory committee had decided that there was no reason to continue that distinction. Accordingly, the proposed amendment gives a party the right to amend its pleading within 21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f). She added that the amendment recognizes the current reality that courts readily give pleaders at least one opportunity to amend.

In addition, Judge Rosenthal explained that the advisory committee had extended a party's response time from 20 days to 21 days in light of the general preference of the time-computation project to fix time limits in 7-day intervals. The amended rule also

eliminates the current reference to a "trial calendar" because few courts today maintain a central trial calendar. Finally, she noted, a party may also continue to seek leave to amend under Rule 15(a)(2) or Rule 15(b).

Professor Cooper mentioned that the advisory committee for several years had been looking at recommendations to reconsider notice pleading as one of the basic features of the civil rules. But, he said, it had always decided that the time was not right to make such a change. Allowing the parties great flexibility to amend pleadings reflects the spirit of the current notice-pleading system. Since the courts freely allow parties to amend pleadings, the advisory committee decided that it would make considerable sense to give a pleader 21 days to amend as a matter of course.

Professor Cooper said that the proposed rule would take something away from plaintiffs by cutting off their automatic right to amend after 21 days in all cases. It would also take something away from defendants by eliminating their right to cut off the plaintiffs' automatic right to amend by filing an answer. The advisory committee, he said, had concluded that the current distinction may make some sense, but on balance it is not needed. In most cases when a motion to dismiss is filed, it is filed before an answer is filed. The proposed rule, therefore, would increase the plaintiff's freedom to amend only when a motion to dismiss accompanies or comes after an answer,

Judge Rosenthal reported that, following the advisory committee meeting, a Standing Committee member had submitted thoughtful comments questioning the wisdom of the proposed amendment. She pointed out that his comments, together with a response from the advisory committee's Rule 15(a) Subcommittee, had been included in the agenda book for the information of the Standing Committee.

The member asserted that it is important for defendants to have the ability, by filing an answer, to cut off a plaintiff's right to amend a complaint without leave of court. He said that the proposed rule takes this right away from defendants, and in so doing alters the current balance between plaintiffs and defendants. He acknowledged that in the normal case, a defendant will challenge a defective pleading by filing a motion to dismiss, rather than an answer. But in the infrequent case where the defendant believes that it has a complete defense on the law, it will file an answer first and only then file a motion to dismiss.

By removing this possibility, the proposed rule would do more than restrict the defendant's options in those infrequent cases where the defendant would file an answer first. The proposed rule would have broader negatives consequences in a wide range of other cases.

He explained that some commercial litigation is initiated by badly drafted, badly conceived complaints, often in complete ignorance of the law. The first motion filed by the defendant is often a treatise in the form of a motion to dismiss, requiring the plaintiff to file a whole new complaint. By this tactic, the plaintiff manages to impose on the defendant the cost of educating the plaintiff about the applicable law. Then the defendant has to incur the further expense of filing a second motion to dismiss the new complaint.

The current Rule 15, however, gives plaintiffs cause to pause before filing their complaint, because if the defendant files an answer instead of a motion to dismiss, the plaintiff needs leave of court to amend the complaint, and the plaintiff cannot be certain that leave will be granted. Plaintiffs have to take into account the possibility that the defendant can cut off their right to amend their defective complaint by filing an answer first, followed by a motion to dismiss. This, he said, makes some plaintiffs more careful in preparing the complaint. It is a benefit that accrues to the system in a wide range of cases, not only to the particular defendants in those few cases where an answer actually is filed first. The impact is hard to quantify, he said, but it is real. The rules should encourage plaintiffs to put formality and forethought into their filings, and the proposed change would undercut that.

Under the proposed rule, he said, there will be no means by which the defendant can cut off the plaintiff's right to amend, and plaintiffs will know that. The proposed rule will have the effect of requiring defendants, even if they have a strong legal defense, to incur the costs of filing two motions to dismiss without any corresponding burdens on the plaintiff.

Another member pointed out that the problem raises the more fundamental issue of reconsidering the whole concept of notice pleading. Judge Levi responded that the issue was on the long-term agenda of the advisory committee. But, he said, the committee was not inclined to address the matter as a global issue. Rather, he said, it is was looking at modifying the practice of notice pleading in specific situations.

Judge Rosenthal added that the advisory committee had looked at notice pleading when it drafted the 2000 amendments to the discovery rules, tying discovery to the pleadings and encouraging more specific pleadings. She added that the committee was also considering whether motions for a more definite statement under FED. R. CIV. P. 12(e) could be made more vigorous. She said that a motion for a more definite statement is rarely granted today because the standard for granting them is so high. The committee might want to make the motion more readily available. That way, she said, the committee would address the impact of notice pleading in specific situations without having to rebuild the whole structure.

One member reported that by local rule in his district, discovery does not begin until the defendant files an answer. As a result, defendants simply do not file answers. Instead, they always file motions to dismiss, which leads to a good deal of unnecessary effort on the part of the judges. They are often faced with starting all over again when the plaintiffs exercise their right to file an amended pleading. Thus, he said, the proposed amendments to Rule 15 are enormously attractive to him because they will avoid judges having to waste efforts on motions to dismiss. Second, he complimented the advisory committee for the brevity of the committee note. He said that it was a model of what a note should be – identifying the changes in the rule and succinctly explaining the reasons for the changes.

Judge Rosenthal responded that these anecdotes highlight the incentives and tactics of modern civil litigation and the shifting of costs. It is rare, she said, that both a motion and an answer are filed. She said that the advisory committee would like the Standing Committee to authorize publication of the proposal, and the particular problems raised in the discussion could be highlighted in the publication with an invitation for the public to comment on them. She added that the proposed amendments to Rule 15 do not represent major changes, given the fact that circuit law across the country liberally gives, or requires, one amendment as a matter of right.

Some members agreed with the suggestion to publish the proposals for public comment and said that it could produce valuable information. One shared the concern that the change in Rule 15 might cause a burden to defendants, but only in very rare cases. He concluded that it is probably not a significant issue, but it would be helpful to get more information during the public comment period.

The committee with one objection voted by voice vote to approve the proposed amendments for publication.

FED. R. CIV. P. 48

Judge Rosenthal reported that the proposed new Rule 48(c) (polling) would provide a procedure for polling jurors in civil cases. It is modeled after FED. R. CRIM. P. 31(d), but also includes a provision referring to the ability of the parties in a civil case to stipulate to less than a unanimous verdict.

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

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the proposed new Rule 62.1 (indicative rulings) had its origin in a suggestion several years ago to the Advisory Committee on Appellate Rules from the Solicitor General. Since the basic question addressed by the proposed rule involves the authority of a district judge to act when an appeal is pending, the appellate rules committee concluded that the rule would be better included in the Federal Rules of Civil Procedure.

The proposed rule adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) (relief from judgment or order) to vacate a judgment that is pending on appeal. The rule, though, goes beyond Rule 60(b) and would apply to all orders that the district court lacks authority to revise because of a pending appeal. It would give a district judge authority to "indicate" that he or she "might" or "would" grant the motion if the appellate court were to remand for that purpose. Judge Rosenthal added that the procedure is well established by case law, but it is not explicit in the current rules and is often overlooked by lawyers. Moreover, some district judges are unaware of its existence.

Judge Rosenthal pointed out that the advisory committee would publish the proposed rule with alternative language in brackets. The choice for public comment would be between having the district court indicate that it "might" grant relief or indicate that it "would" grant relief. She said that good arguments can be made for either formulation. The advantage of the "might" language, she pointed out, is that it would likely preserve judicial resources because the trial judge would not have to do all the work to resolve the motion in advance of remand.

Judge Rosenthal noted that members of the Standing Committee had raised a couple of questions about the proposed rule at the June 2006 meeting. The first was whether the location of the rule as new Rule 62.1 was appropriate. The advisory committee, she said, had considered the location anew and had concluded that Rule 62.1 made the most sense. She noted that it belonged in Part VII of the rules, dealing with judgments, but because of its broad scope, it did not fit in with the other judgment rules – Rules 54, 58, 59, 60, 61, or 62. Moreover, Rule 63 shifts to another topic.

The second concern expressed was whether the title "indicative ruling" was appropriate. She said that it had been selected because it is a term of art familiar to appellate practitioners and embedded in the case law, although it may not be recognized by lawyers whose practice is not centered on appeals. The advisory committee, she noted, had reached no firm conclusion on an alternative caption. One suggestion, she said, was to expand the caption of the rule to "Indicative Ruling on Motion for Relief Barred by Pending Appeal."

Judge Rosenthal noted that the Advisory Committee on Appellate Rules had suggested that it might want to make a cross-reference to the new rule in the appellate rules. She said that this would be very helpful. Judge Stewart said that his committee had discussed the matter and would add a cross-reference. He added that the committee had not expressed a preference between "might" and "would." He noted that the court of appeals would be more likely to remand a case back to the district court if the trial judge were to indicate that he or she "would" grant the relief than if the judge merely indicated that he or she "might" grant it. But, he said, his committee recognized the additional burden that would be imposed on the district judge in the former case.

One member supported the rule and said that it would provide helpful clarification in a difficult area. But he expressed concern that it might provide district judges with open-ended authority once a matter is pending on appeal and could give lawyers an opportunity to amend the record.

Professor Cooper responded that the key point is that the court of appeals remains in control. He noted that the advisory committee had been very cautious in expanding the authority from its basis in Rule 60(b) to other kinds of relief. The district court, he said, should be allowed to deny a motion that does not have merit and get it over with. Judge Rosenthal emphasized that the rule permits better coordination between the two courts.

One participant pointed out that there are a number of limited remands in his court. He asked whether it might be better for the rule to state that the only options for the court of appeals are either to deny the remand or order a limited remand. This would institutionalize the concept of a limited remand, under which the court of appeals keeps the case, but remands solely for the purpose of deciding one issue. He suggested that the language of Rule 62.1(c) might be amended to track the language of the committee note on this point. Professor Cooper agreed that the advisory committee might want to consider adjusting the language.

Judge Levi pointed out that the Standing Committee did not have to approve the rule for publication at the current meeting. Moreover, since the rule involves two advisory committees and some helpful language suggestions had been made, the advisory committee could work further on the language and come back for authority to publish in June 2007.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 18, 2006 (Agenda Item 6).

Informational Items

Judge Bucklew reported that the advisory committee had held its regular autumn meeting in October 2006. It also had held a teleconference meeting in September 2006 specifically to address the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection).

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

Judge Bucklew reported that the Standing Committee in June 2006 had returned a proposed amendment to FED. R. CRIM. P. 32(h) (sentencing – notice of possible departure) to the advisory committee for reconsideration in light of specific comments offered by Standing Committee members. The proposal, she said, was part of a package of amendments designed to conform the criminal rules to the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005). The current Rule 32(h) requires a court to give reasonable notice to the parties that it is considering imposing a non-guidelines sentence based on factors not identified in the presentence report or raised in pre-hearing submissions. The proposed amendment would also require reasonable notice when the court is considering imposing a non-guideline sentence based on a factor in 18 U.S.C. § 3553(a).

She explained that the Standing Committee had asked for further consideration for a number of reasons. Some members, she said, had pointed to a difference in case law among the circuits, counseling that it would be premature to attempt to codify a rule. Others expressed concerns that the proposed rule might interfere with orderly case management by causing unnecessary continuances and adjournments. Other members suggested that since the sentencing guidelines are now advisory, there should be no expectation of a guideline sentence. Therefore, there is no reason for the court to give notice. Judge Bucklew reported that the advisory committee had taken all these arguments into consideration, and it had specifically considered correspondence from the federal defenders urging the committee to proceed with the proposed amendment. In conclusion, she said, the advisory committee was continuing to review the case law and consider a proposed amendment. Professor Beale added that the Supreme Court had recently granted certiorari in two sentencing cases that might shed some light on the wisdom of proceeding with the amendment.

FED. R. CRIM. P. 49.1

Judge Bucklew reported that the Standing Committee had approved new Rule 49.1 (privacy protections for filings made with the court), but it had asked the advisory committee to give further consideration to two concerns raised by the Court Administration and Case Management Committee. First, that committee had suggested that the new criminal rule require redaction of the grand jury foreperson's name from indictments filed with the court. Second, it had suggested that personal information be redacted from search and arrest warrants filed with the court.

Judge Bucklew said that the advisory committee had decided not to require redaction of the grand jury foreperson's name because the indictment is the formal charging document that initiates the prosecution, and other rules require that it be signed by the foreperson, be returned in open court, and be given to the defendant. Moreover, she pointed out, a recent survey of U.S. attorneys' offices and the U.S. Marshals Service had demonstrated that disclosure of the names of jurors has not created security difficulties. Professor Beale added that the survey had revealed no more than two instances of juror-related threats or inappropriate contacts in any recent year. Fear of juror intimidation, moreover, is most likely to center on the defendant himself or herself – who is entitled to a copy of the indictment in any event – and not from persons discovering a juror's name through an electronic posting by the court.

Judge Bucklew said that the advisory committee was continuing to study whether personal information should be redacted from warrants. She noted that there was strong sentiment among committee members to retain the information in the public file because the public has a right to be aware of government activities and to know who has been arrested and what property has been searched. She added that warrants are not generally filed until they are executed, and the committee was considering the feasibility of redaction once a warrant has been executed. In any event, there may be no need to require redaction in the rule because relief is always available on a case-by-case basis.

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had met by teleconference on September 5, 2006, to continue work on a proposed amendment to Rule 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeachment evidence favorable to the defendant. The proposal, she noted, had come from the American College of Trial Lawyers in 2003, had been drafted by an ad hoc subcommittee of the advisory committee, and had been discussed at every recent meeting of the advisory committee. She pointed out that the Department of Justice was strongly opposed to the proposal, but had been very helpful in drafting changes to the U.S. Attorneys' Manual to elaborate on the government's disclosure obligations. It had been

suggested, she said, that the manual revisions might serve as an alternative to an amendment to FED. R. CRIM. P. 16.

Judge Bucklew explained that the advisory committee had before it at the teleconference a nearly final revision of the U.S. Attorneys' Manual, as well as a nearly final version of the proposed amendment to Rule 16 and an accompanying committee note. The key question for the committee, therefore, was whether to proceed with the proposed rule or accept the revised text of the manual as a substitute. In the end, she said, the committee voted to go forward with the rule, partly because the revised text of the manual continued to give prosecutors discretion and was not a complete substitute for the proposed rule and also because advice in the manual is entirely internal to the Department of Justice and not judicially enforceable.

Judge Bucklew and Professor Beale said that the revisions to the U.S. Attorneys' Manual were a major achievement, and the Department of Justice deserved a great deal of credit for its efforts. Judge Bucklew added that the advisory committee would likely return to the Standing Committee in June 2007 with a proposed amendment to Rule 16, and the Department of Justice would likely offer its strong objections to the rule.

One member suggested that it was important for the advisory committee to develop sound empirical information to support its proposal. He suggested that the Standing Committee needs to know how serious and widespread the problems of nondisclosure may be in order to justify the rule. Judge Bucklew responded that members of the defense bar can describe individual examples of improper withholding of information, but hard empirical data is very difficult to compile.

Professor Beale added that there is no way to quantify all the cases in which disclosure is not made. The obligations of prosecutors are subjective and depend on the particular facts of a case. Individual acts of nondisclosure are difficult to document because the defense usually has no knowledge of the exculpatory information, which is in the hands solely of the government. The few cases that are litigated are brought after conviction. She explained that the proposed rule goes beyond simply codifying existing *Brady* obligations, and the advisory committee will compare it to the rules of the state courts, the standards of the American Bar Association, and the rules of local federal district courts.

One member pointed out that there are great variations among the rules of the district courts, especially as to the timing of disclosures. He said that one good argument for the proposed rule is the need for national uniformity in the face of the current cacophony in local rules. Another suggested that although the revisions in the U.S. Attorneys' Manual are not judicially enforceable, they are being noticed by the defense bar, as well as by prosecutors, and more issues related to disclosure will be raised.

Judge Levi urged caution. He noted that with an issue as highly contentious as this, the committee's work will be placed under a microscope. The stakes in the matter, he said, are very high, and any proposed rule presented to the Judicial Conference needs to be fully justified. He pointed out that the proposed rule raises issues that will have to be decided by case law, such as what constitutes impeachment information and how the rule affects the burden of proof on appeal. It is predictable, he said, that some members of the committee, and the Judicial Conference, will see the proposal as a policy shift that needs to be justified clearly. He suggested that the committee might want to monitor experience with the revisions in the U.S. Attorneys' Manual before going forward with the rule.

FED. R. CRIM. P. 37

Judge Bucklew reported that the advisory committee was considering proposals by the Department of Justice for a new FED. R. CRIM. P. 37 (review of the judgment) to restrict the use of ancient writs, and changes in the §§ 2254 and 2255 rules to prescribe deadlines for filing motions for reconsideration. She noted that the committee had appointed a Writs Subcommittee, chaired by Professor Nancy King, that is considering whether it is advisable – or even possible under the Rules Enabling Act – to propose a rule, modeled on FED. R. CIV. P. 60(b), that would abolish all the ancient writs other than coram nobis.

Some participants urged caution and questioned whether there was authority to abolish the writs through the rules process. They also suggested that the writs may have Article III constitutional dimensions. Members also discussed the extent to which the ancient writs, especially coram nobis, are still used in federal and state courts.

FED. R. CRIM. P. 32.2

Judge Bucklew reported that the advisory committee was considering amendments to Rule 32.2 (criminal forfeiture), with the help of a subcommittee chaired by Judge Mark Wolf. She noted that the subcommittee was considering the advice of the Department of Justice, the federal defenders, and the National Association of Criminal Defense Lawyers in this very difficult area.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee was considering proposed amendments to Rule 41 (search and seizure) to deal with search warrants for information in electronic form. She noted that the members of the committee had attended a full-day tutorial presented by the Department of Justice walking them through the mechanics of how electronic materials may be stored, copied, and searched.

Judge Bucklew noted that the advisory committee was working on implementing the proposed new time-computation rule and considering proposals by the Department of Justice to permit the examination of a witness outside the presence of the court and by the Federal Magistrate Judges Association for a rule to cover warrants for violation of supervised release or probation. Finally, she noted that the committee would be conducting a public hearing in Washington on January 26, 2007, at which five witnesses had signed up to testify on the proposed amendments to the criminal rules published in August 2006.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2006 (Agenda Item 7).

Informational Items

FED. R. EVID. 502

Judge Smith reported that the advisory committee had been devoting most of its time to the proposed new Rule 502 (attorney-client privilege and work product; limits on production), published for public comment in August 2006. He pointed out that a substantial number of witnesses had signed up to testify at the committee's two scheduled public hearings – one in Phoenix immediately following the Standing Committee meeting and the other in New York on January 29, 2007.

Judge Smith explained that the advisory committee was proceeding in accordance with the limitation of the Rules Enabling Act that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). He pointed out that proposed Rule 502 had been drafted in response to a request from former Chairman Sensenbrenner of the House Judiciary Committee asking the committee to initiate rulemaking to address issues arising from disclosure of matters subject to attorney-client privilege or work product protection. He said that the new Democratic leadership of the Congress had not yet been consulted on the proposal.

Judge Smith highlighted four preliminary actions taken by the advisory committee at its November 2006 meeting in response to public comments on the rule. First, he said, the committee had voted to retain the words "should have known" in the proposed language of Rule 502(b). It would condition protection against inadvertent waiver on whether the holder of the privilege took reasonably prompt measures "once the holder

knew or should have known of the disclosure." He said that a comment had been made that the language might give rise to litigation over exactly when the producing party should have known about a mistaken disclosure. But, he said, it was the sense of the committee that the language had substantial merit and should be retained.

Second, Judge Smith pointed out that proposed Rule 502(b) would provide protection from waiver against third parties when a disclosure is "inadvertent" and made "in connection with federal litigation or federal administrative proceedings." Proposed Rule 502(c) would provide protection when the disclosure is "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." He said that a comment had recommended that the language of the two provisions be made identical by extending the protection for mistaken disclosures occurring during proceedings to those occurring during investigations.

Judge Smith said that a majority of the advisory committee was of the view that the difference between the language of the two subdivisions was justified. The committee, thus, decided that the protections of Rule 502(b) should continue be limited to mistaken disclosures made during court and administrative proceedings.

Third, Judge Smith said that the advisory committee had not decided whether to approve the "selective waiver" provision set forth in proposed Rule 502(c). It specifies that disclosure of privileged information to a government regulator does not constitute a waiver in favor of third parties. He explained that the committee had published this provision in brackets in order to emphasize that it was undecided about the matter and was seeking the views of the public as to the merits of including it in proposed Rule 502. He noted that the selective waiver provision had attracted strong opposition from lawyers and bar association representatives.

One participant noted that several public comments had opposed the selective waiver proposal on the grounds that it would erode the attorney-client privilege. A number of comments also referred to an alleged "culture of coercion" under which the Department of Justice considers a corporation's cooperation, including waiver of the attorney-client privilege and work product protection, as a factor in deciding whether to prosecute and on which criminal charges.

Judge Smith noted, too, that concern had been expressed by state judges that a federal selective waiver provision would subsume state waiver rules. He pointed out that Justice Hurwitz, a member of the Advisory Committee on Evidence Rules, had attended the most recent meeting of the Federal-State Jurisdiction Committee of the Judicial Conference and had had an opportunity to discuss with fellow state Supreme Court Justices the proposed rule and pertinent federal-state issues.

Fourth, Judge Smith reported that the advisory committee was in general agreement that arbitration proceedings should be covered by the protection of Rule 502 only if they are court-ordered or court-annexed arbitrations.

Judge Smith pointed out that these issues – and others listed in the agenda book and raised in the public comments and hearings – would be taken up again at the advisory committee's April 2007 meeting.

ADAM WALSH CHILD PROTECTION ACT

Judge Smith reported that the Adam Walsh Child Protection Act of 2006 had directed the advisory committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or 2) a child under the custody or control of either spouse."

The statutory provision, he said, appears to have been motivated by one aberrant circuit court decision allowing a criminal defendant's wife to refuse to testify even though the defendant had been charged with harming a child in the household. He said that the advisory committee had concluded that the case was of questionable authority and was even contrary to the precedent of its own circuit. Therefore, the Federal Rules of Evidence need not be amended to take account of it. Almost all other reported opinions, he said, have held that the protections provided by the marital privileges do not apply in cases where the defendant is charged with harm to a child.

Professor Capra noted that he had reached out to advocates for battered women for their views on whether it is good policy to have an exception to the privileges in a case where there may be harm to a child. He awaits responses from them.

Professor Capra added that the advisory committee would prepare a report for the Standing Committee to send to Congress. The report, he said, would include appropriate draft language of a rule amendment in case Congress disagrees with the conclusion that no rule change is necessary.

RESTYLING THE EVIDENCE RULES

Judge Smith reported that Chief Justice Rehnquist had expressed opposition to restyling the rules of evidence. Nevertheless, in light of the success in restyling the other federal rules and the presence of awkward language in the evidence rules, the advisory committee was taking a second look at the advisability of proceeding with a restyling effort. He noted that a couple of evidence rules had been restyled as samples for the

advisory committee's review, and it was the general sense of the members that the committee should continue with the effort at a modest pace, as long as the new chief justice agrees. Professor Capra added that an important argument in favor of restyling is that the evidence rules are strongly geared to the use of paper. Judge Levi asked whether it would be possible at the next Standing Committee meeting for the advisory committee to bring forward a couple of examples of restyled evidence rules. Judge Smith agreed to do so.

Judge Smith said that the advisory committee was doubtful that there was any need for changes in the evidence rules to take account of the new time-computation rules. He suggested that a reference to the evidence rules might better be included in the other rules. He also reported that the advisory committee was continuing to monitor the case law in the wake of *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with testimonial hearsay. He observed that the courts are addressing the issues in a very professional manner, and it is far too early for the advisory committee to act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 14, 2006 (Agenda Item 11).

Judge Kravitz reported that a great deal of work had been undertaken on the time-computation project by the subcommittee, the advisory committees, and the committee reporters. He pointed to the text of the proposed template rule in the agenda book and said that it would be adopted in essentially identical form for the civil, criminal, appellate, and bankruptcy rules. Its central focus is to simplify counting for the bench and bar by eliminating the current two-tier system of computing time deadlines, under which weekends and holidays are excluded in calculating time periods of fewer than 11 days (8 days in bankruptcy), but included in calculating periods of 11 (or 8) days or more. Under the new template rule, all days will be counted as days. Only the last day of a time period will be excluded if it happens to falls on a weekend or holiday.

Judge Kravitz noted that the template rule provides a method for counting both forward and backward and a method for counting time periods expressed in hours. The rule defines the "last day" for filing as: (1) midnight, in the case of electronic filing; and (2) the time the clerk's office is scheduled to close, in the case of filing by other means.

He also noted that there are some issues that the new rule does not address. For example, the rule applies only when a time period must be computed. It does not apply when a court fixes a specific time to act. It also does not change the "three-day rule," under which a party served by mail or certain other forms of service is given three extra

days to respond. Moreover, it does not address explicitly whether litigants can file papers at a judge's home or a clerk's home after hours in light of 28 U.S.C. § 452, which states that courts "shall be deemed always open for the purpose of filing proper papers." He pointed out that Professor Struve had prepared an excellent memorandum on that particular issue in the agenda book.

The proposed rule, he said, also does not attempt to define the "inaccessibility" of a clerk's office for filing, although it does eliminate language that limits "inaccessibility" to weather conditions. He reported that the Standing Committee had asked the subcommittee to consider defining the term, but the subcommittee's memorandum to the Standing Committee contained a lengthy explanation as to why additional time and experience are needed in the electronic filing world before this issue can be addressed properly. He noted that most courts have adopted a local rule specifying what lawyers should do when there is a technical failure of the court's computers. The local rules vary greatly, but most require affidavits by lawyers and permission by the court on a case-by-case basis. They do not give parties an automatic extension for filing.

Finally, Judge Kravitz reported that the subcommittee had decided to continue to include state holidays in the rule, but he noted that it had seriously considered eliminating them because federal courts tend to remain open on state holidays. A member of the Standing Committee repeated his earlier view that state holidays should not be included in the definition of a "legal holiday." Judge Levi suggested that the subcommittee's decision to retain state holidays as an exception in the rule might be highlighted in the publication as a means of soliciting the views of the public on the issue. Other members suggested that the committee note also include a reference to national days of mourning.

Judge Kravitz added that additional suggestions for improvement in the language of the proposed rule had been offered recently by Professor Kimble, the committee's style consultant. He noted that the advisory committees were using the template and revising the specific time limits in their respective rules to make sure that the ultimate net effect of the new rule would be neutral to attorneys. Thus, the advisory committees will likely increase the 10-day time limits in their rules to 14 days because a 10-day deadline in the current rule normally gives a party 14 days to act because of intervening weekends. Judge Kravitz pointed out that the advisory committees were also attempting to express rules deadlines in multiples of 7 days, for all deadlines of fewer than 30 days.

He pointed out that some reservations had been expressed as to the wisdom of proceeding further with the time-computation project. He noted, in particular, that some members of the appellate rules committee had suggested that the current system for counting time is not broken, the proposed changes are not needed, and problems are created with regard to deadlines expressed in statutes. Nevertheless, even though some members believe that the project is unnecessary, the appellate advisory committee was

proceeding to make appropriate changes in the appellate rules in light of the proposed template rule.

Judge Kravitz reported that the Federal Rules of Bankruptcy Procedure pose a number of additional complications. First, he said, there are many more short deadlines in bankruptcy. Second, bankruptcy is heavily impacted by statutory deadlines, including the many deadlines set forth in the Bankruptcy Code and state statutes. Third, he explained, the bankruptcy advisory committee had been extremely active recently in publishing a large number of rules changes and making wholesale revisions in the bankruptcy forms in order to implement the omnibus 2005 bankruptcy legislation. In light of all the proposed changes already underway, he said, more rule changes at this point would impose an additional burden both on the advisory committee and on the bankruptcy bench and bar.

Judge Kravitz suggested the possibility of proceeding with the time-computation changes in the civil, criminal, and appellate rules at this point, but delaying any changes to the bankruptcy rules. This approach would not be ideal, though, since it would make the bankruptcy rules inconsistent with the other rules for a while. Nonetheless, it might be the most practical approach in light of the sheer volume of rule changes being presented to the bankruptcy community.

Judge Kravitz noted that a good deal of angst had been expressed at the last Standing Committee meeting over the issue of changing the method of counting time limits fixed in statutes. He noted that, except for the criminal rules, the federal rules specify that the method of counting time applies to national rules, local court rules, and statutes. In addition, he said, case law in bankruptcy holds that the counting method prescribed by the bankruptcy rules applies when counting deadlines set forth in statutes. Professor Morris noted the additional complexity that the Rules Enabling Act does not extend its supersession authority to the bankruptcy rules.

Judge Kravitz noted that the feedback received from the bar – other than the bankruptcy bar – is that lawyers generally do not rely on the counting method specified in the federal rules when calculating statutory deadlines – unless they miss a deadline and have to argue to a court for additional time. Therefore, although statutory deadlines are a concern to the rules committees, a large body of the bar does not in fact rely on the two-tiered rules method for counting statutory deadlines. He added that the subcommittee was considering preparing a list of the most common short statutory deadlines that actually arise in court proceedings and then drafting a package of legislative amendments for Congress to consider. He noted that the chair had raised the issue of potential statutory amendments, on a preliminary basis, with leadership of the former Congress and had received a good reception.

Judge Kravitz noted another complication flowing from the text of the current rule. FED. R. CIV. P. 6(a) specifies a method for computing time for both rules and statutes. The next subdivision of the rule, FED. R. CIV. P. 6(b), gives a court authority to extend deadlines for cause, but it applies on its face only to rules, not statutes. He said that the committee might want to give a court explicit authority for good cause shown to extend a deadline set forth in a statute.

Judge Kravitz concluded that the committee needed to make three decisions: (1) whether to keep moving forward and present a package of amendments to the Standing Committee in June 2007 for publication; (2) whether to include the bankruptcy rules in that package or defer them for publication at a later date; and (3) whether to amend the rules to give a court explicit authority to grant extensions of statutory deadlines for good cause shown.

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had not yet decided whether to make all the time-computation changes at its March 2007 meeting. The committee, he said, had been very much concerned about further publication of rule changes and possible confusion in light of the proposed changes to 40 rules just published in August 2006. Moreover, he said, a substantial number of the bankruptcy rules would be impacted by the time-computation changes – many of them the same rules that had just been published. He added, though, that it would be relatively easy for the advisory committee to make all the changes, adding that it would make the changes in the revised rules out for publication, rather than in the existing rules. The advisory committee, he said, would not ask for an extension of time, and it could have the changes ready for the June 2007 Standing Committee meeting. But, he explained, the key decision was whether to risk creating confusion by publishing another large package of bankruptcy rule changes on the heels of a comprehensive package of changes approved by the Judicial Conference in September 2006 to implement the 2005 legislation.

As for statutory deadlines, Judge Zilly reported, the advisory committee had identified 10 statutes imposing short time limits in bankruptcy cases, most of them deadlines of 5 days. One approach, he said, would be to specify in the bankruptcy rules that the existing counting method will continue to be used for those specific code sections. An alternative would be to ask Congress to change all the 5-day deadlines to 7 days in order to reflect the new counting method, because 5 days actually means 7 days under current bankruptcy case law. He said that some additional confusion had been added in the 2005 bankruptcy legislation because Congress had used the term "business days" in a couple of sections, but not in other places.

Judge Levi suggested that the bankruptcy advisory committee should discuss all these matters further at its March 2007 meeting. He saw no problem with delaying the

changes in the bankruptcy rules for a year or two in light of the practical difficulties and confusion that might result from publishing additional bankruptcy changes now.

One member pointed out that proposed template FED. R. CIV. P. 6(a) mandates that all time periods be computed according to Rule 6. Thus, the rule would trump any other time period specified in the federal rules, any statute, local rule, or court order. Thus, he questioned the purpose of proposed Rule 6(a)(4), defining the end of the last day of a time period "unless a different time is set by statute, local rule, or court order." Judge Kravitz and Professor Struve responded that the provision takes account of 28 U.S.C. § 452, which states that all federal courts "shall be deemed always open for the purpose of filing proper papers . . . . " Some court decisions, they noted, have held that section 452 and FED. R. CIV. P. 77(a) (district courts always open) permit a paper to be filed after hours by handing it to a judge or clerk at their home. In addition, Judge Kravitz noted that some courts maintain a box at the courthouse for lawyers to drop pleadings after hours. He explained that Rule 6(a)(4) was designed to deal with the ordinary course of events, and it does not address explicitly a court's authority to permit after-hours filings under the statute. The language "unless a different time is set by statute, local rule, or court order" was intended to leave room for particular courts to treat issues of after-hours filing as they see fit.

One member suggested that the last sentence of the first paragraph of the committee note was not needed. It specifies that a local rule of court may not direct that a deadline be computed in a manner inconsistent with Rule 6(a). He said that this might imply that other local rules can conflict with the national rules, given that the same limitation on local authority is not repeated in every other committee note. Judge Kravitz responded that the subcommittee simply wanted to emphasize the importance of national uniformity and to make it clear that local rules cannot alter the time-computation method specified in the new rule. But, he said, if the sentence causes any confusion, it could be eliminated. Another member suggested substitute language for the committee note that would reiterate the general principle that local rules may not conflict with national rules, but point out that a court may specify a time for the end of the last day.

Another member said that the proposed rule does not work in counting backwards when the last day of a time period is one in which the clerk's office is inaccessible. Under the proposed rule, one must continue to count backwards. This produces the impossible result that if the office is not accessible, the filing is due yesterday. As a matter of logic, one should count forward to the next accessible day, rather than continue to count backwards. Professor Struve responded that the subcommittee had struggled with that situation and would be open to suggestions for better language. Judge Kravitz cautioned, however, that it would be difficult for the rule to deal with every conceivable situation.

Professor Capra pointed out that there are no time-computation provisions and no relevant time deadlines in the Federal Rules of Evidence. Thus, he asserted, there was no need for the proposed time-computation template rule to be added to the evidence rules. He added that, nevertheless, the evidence advisory committee could draft a variation of the template rule and include it as FED. R. EVID. 1104. But, he said, time computation issues do not arise in evidence, and there is no need for any provision in the evidence rules.

Judge Levi suggested that it would be helpful to have the sense of the Standing Committee that the time-computation project is beneficial before asking the advisory committees to proceed with proposing specific amendments.

The committee without objection by voice vote agreed to encourage the advisory committees to proceed with the project.

PANEL DISCUSSION ON THE DECLINE IN THE NUMBER OF CIVIL TRIALS

The committee participated in a panel discussion on the decline in the number of civil trials and whether anything can, or should, be done to amend the federal rules to address the phenomenon. The panel was moderated by Patricia Lee Refo, Esquire of Snell & Wilmer in Phoenix – a prominent member of the Arizona bar and the American Bar Association and a former member of the Advisory Committee on Evidence Rules. The other panelists were: Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former chair of the Advisory Committee on Civil Rules; Professor Stephen C. Yeazell of the University of California at Los Angeles Law School; and Justice Andrew D. Hurwitz of the Supreme Court of Arizona, a member of the Advisory Committee on Evidence Rules.

Ms. Refo distributed a series of tables and charts documenting the "vanishing trial." She showed that from 1962 to 2005, the number of civil cases disposed of by the federal district courts increased more than five-fold, but the number of civil trials actually decreased by a third. Bench trials have declined by 45% since 1985, and consent civil trials by magistrate judges have decreased by nearly 50% since 1996. As a result, the percentage of civil cases resolved by a trial has dropped from 11.5% in 1962 to the current rate of 1.4%.

She showed tables breaking out cases by nature of suit. Civil rights cases are the most likely category of civil cases to go to trial in the federal courts, counting for 33% of all civil trials in 2002. Nevertheless, only 3.8% of civil rights cases were decided after a trial. Tort cases accounted for 23% of all civil trials in 2002, although only 2% of tort cases went to trial. And in 2005, she said, almost no contract cases went to trial.

She noted that fewer cases are being terminated during the course of a trial, and the data strongly suggest that trials are not increasing in length. She noted, too, that the decline in trials has also occurred in criminal cases, though for different reasons. She pointed out that during the same time period that trials have declined, the country has experienced substantial population growth and increases in gross domestic product, the number of lawyers, the number of pages in federal court opinions, and the number of pages in the Federal Register. Finally, she showed a table demonstrating that civil trials have also declined noticeably in the state courts.

Judge Higginbotham reported that in the early 1970s, federal district judges were conducting over 30 trials per judge each year, many more than today. Even so, the time for filing to trial was shorter than it is now. Although there has been a decline in both bench and jury trials, he noted, there has been a reversal in the proportions between the two. Bench trials used to predominate by 2-1, but jury trials now outnumber bench trials by 2-1. In criminal cases, he said, the number of guilty pleas has increased substantially, as a direct result of the additional power given to prosecutors over charging decisions by the federal sentencing guidelines.

Judge Higginbotham attributed the decline in trials to the growth of the "administrative model" of decision-making – a set of administrative alternatives to the traditional civil trial. He traced this trend to enactment of the Administrative Procedure Act in 1946, regularizing administrative decision-making in the executive branch, leading to great growth in administrative law judges and an administrative, bureaucratized approach to case-by-case decision-making. He said that the trend began to spread to the federal judiciary in the 1970s with the growth of the federal magistrate judges system. Since then, the court system itself has been moving more and more to this kind of administrative, bureaucratized decision-making, as part of which judges have adopted a series of procedures designed to avoid trials. In this sense, trials are not "vanishing," but moving – from the traditional approach to an administrative model. He noted that most observers account for this phenomenon, including the decline of trials, by pointing to the high costs of civil litigation in the federal courts, the fear of juries, and the indeterminacy of the judicial process.

He warned that this trend has dangerous effects. Lawyers and judges, he said, used to focus on fact questions and present them to the jury at trial. Outcomes, therefore, tended to depend very closely on the applicable normative standards of law. But now, the system has abandoned trials in order to focus on settlements, which are strongly affected by factors other than normative standards. The system, thus, has distanced itself from normative standards of law.

He complained that courts have become hostile to the trial of cases. He referred to two seminars for judges in which the faculty had expressed the attitude that a trial

represents a "failure" of the system. The judges were instructed by the faculty to work hard at obtaining settlements. An agreed-upon settlement is seen as better than a trial. In addition, there is now a much greater focus on alternative dispute resolution. He acknowledged that a settlement in the face of an impending trial may be perfectly acceptable – because it will be strongly influenced by normative standards of law – but not a settlement that occurs in the absence of any likelihood that there will ever be a trial.

Judge Higginbotham pointed out that the federal court system has been a great success because of its fairness, independence, and transparency. But, he said, there is a fundamental lack of transparency in both settlements and arbitration. Discovery materials, moreover, are not filed. Ms. Refo added that many cases that used to be disposed of with bench trials have now migrated to arbitration for largely this reason, because the parties do not have to reveal information to the public. Judge Higginbotham lamented that the courts have validated and embraced arbitration.

Professor Yeazell said that most of what would need to be done to produce a substantially increased rate of trials probably lies beyond the power of the rules process to affect. He strongly endorsed Judge Higginbotham's comments regarding the lack of transparency in settlements and the resulting diminishment of the integrity and legitimacy of the legal system. He noted, though, that it might be possible to address the transparency problem to some extent through rules.

He emphasized two points based on the empirical data presented by Ms. Refo. First, he said, the rate of trials has also been dropping in the state courts. But the rate of trials in state courts is still several times higher than in the federal courts, including the 35 states that use the federal rules as their procedural code. That, he said, leads one to believe that the principal causes of the decline lie in something beyond the federal rules and what rule changes might accomplish.

Second, he noted that the federal sentencing guidelines, with all their perceived defects, are superior to civil settlement practices as far as transparency is concerned. A criminal defendant, he said, may not think that his sentence is fair, but he knows that it will be probably the same sentence that the defendant in the next courtroom receives for the same offense.

That consistency, however, is simply not the case with civil settlements. There are enormous differences from case to case. The results may well be acceptable in individual cases because they are based on the consent of the parties. But for the legal system as a whole, the lack of uniformity and norms is very troubling. He pointed out that a great deal of research has been undertaken in this area. In these studies, a standard set of facts is given to experienced judges, lawyers, and insurance representatives, and they are asked what the case should settle for. They all believe that they know from

experience the value of a case. But the settlement figures they produce are in fact very different from each other. And the differences among similar cases are compounded by the lack of transparency, as no one really knows what other similar cases have settled for.

Professor Yeazell said that this is one problem that the rules process might be able to address in some manner. The justice system ought to be able to provide some notion of what similar cases have settled for. The federal rules might provide that settling parties must register, in some form, the outcome of a settlement in order to provide some notion to third parties regarding the range of settlement outcomes. This would bring about a greatly needed increase in transparency, and it may be something that could properly be done within the ambit of the Rules Enabling Act. The philosophy would be that however much some parties may want to keep outcomes private, this level of transparency would be the price – and an appropriate price – of entering the civil justice system.

Ms. Refo pointed out that there are now certain categories of cases in which trials never take place. Accordingly, a civil litigator has no benchmarks to determine what a case is worth or what the risks of trial may be. As a result, settlements are uninformed, and the uncertainty is a factor in the decline of civil trials.

Judge Hurwitz suggested that trying to pinpoint the causes for the decline in trials is akin to distinguishing between the chicken and the egg. The most important factor in the decline of trials, he said, is cost. He noted that when he and his colleagues used to try cases 30 years ago, they routinely tried small cases at low cost. Today, he said, the cost of litigation is so high that lawyers no longer try any small cases. They have become non-trial lawyers. As a result, a trial is scary to them because they have no experience in trying cases. So it is hard to tell whether uncertainty is the cause or the other factors that have led to the uncertainty. All have been combined to create a culture that avoids trials and views them as a failure. He noted from his personal experience in Arizona that many distinguished candidates applying for state judgeships have had many years of legal experience, but no trials.

Justice Hurwitz noted that trials in state courts are also decreasing, but they are declining at a lesser rate than in the federal courts. He suggested that the perceived unfriendliness of the federal forum is responsible in part for chasing cases from the federal courts into the state courts. He said that a civil case can normally be tried in the Arizona state courts in one year – a much shorter time than in the federal court. So, when plaintiffs have a choice of forum, they will normally choose the state court. Many of the cases, moreover, will remain in the state courts and not be removed to the federal court. He explained that when a case is filed in the federal court, it is randomly assigned to one of 13 very busy district judges, some of whom do not come from a civil background. On the other hand, in Maricopa County, a complex civil case in state court will be assigned to

a judge with substantial civil trial experience. That special procedure of guaranteeing experienced judges for complex cases also offers an attractive choice for plaintiffs.

Judge Higginbotham observed that there is a clear relationship between the decline in the number of trials and the increase in the amount of time it takes to get a case to trial. He noted the example of a federal district judge in Texas who receives an unusually large number of patent cases because he is able to bring them to trial very quickly. The attraction for the bar is the certainty that the judge will give them a firm trial date and a good trial.

Justice Hurwitz raised the fundamental question of whether the decline in civil trials is really a bad thing at all. Surely, he said, fewer lawyers today are able to try a civil case, but maybe all those small civil cases that used to be tried in the past would have been better resolved through settlement. In the past, moreover, lawyers almost never asked for summary judgment in small cases. He said that the legal culture had changed fundamentally, and it may be that not much can be done to change it through the rules process. He suggested that judges and lawyers may be overly nostalgic. Just because they liked the good old days does not mean that the system should return to them.

Ms. Refo pointed out that it was very difficult to conduct empirical research in this area, but her sense was that corporate America has lost confidence in jury results. She said that jury trials cost too much, and the results are too uncertain. She said that consideration might be given to two possible rules changes. First, the pretrial rules might be amended to move the parties to trial faster and more efficiently. Second, something might be done through rules changes to improve the fact finding at trials.

Judge Higginbotham said that the emphasis today is on summary judgment, rather than trial. He said that the traditional way of running a docket is the most effective. The judge makes key decisions early in the case after asking the lawyers when the case will be ready for trial. The judge sets a real trial date, and the parties concentrate on moving forward towards it. If the case is complex, the judge and the parties focus on the specific questions that are going to be asked in front of the jury, rather than on the details of the discovery process. The lawyers and the judge focus on the trial as the end target and work backwards from there. He recognized that most civil cases will settle in any event, but the whole process, he said, should be refocused from discovery to the trial.

As for juries, he said, all the literature proves that a 12-person jury is much more reliable than a smaller jury. He noted that the Standing Committee had approved an amendment to the civil rules that would have mandated a return to 12-person juries in civil cases, but it was not approved by the Judicial Conference. Ms. Refo added that the American Bar Association had issued jury principles in 2005 that urge a return to 12-person juries, and it is actively encouraging the states to return to 12-person juries.

Judge Higginbotham also pointed out that substantive developments have had an impact on the decline in trials, particularly punitive damages. The uncertainty of a jury result has been intensified by the very real fear of substantial punitive damages. He noted that court decisions have been cutting back on punitive damages, but the risk of them continues to deter corporations from opting for a jury trial. Corporate officers, he concluded, generally do what they are told to do by their lawyers, most of whom have not tried any cases themselves.

He suggested that the federal district courts are losing their distinctiveness and are becoming part of a bureaucratic enterprise. The phenomenon presents a serious challenge to Article III of the Constitution and to judicial independence. Increasingly, he said, trial judges are becoming processors of paper, and the court system has become more of an administrative process than a trial process. The bureaucratization, moreover, feeds on itself. He noted that the federal sentencing guidelines in criminal cases have contributed to uniformity in sentencing, but they have created a large bureaucracy in Washington that produces a large volume of manuals and statistics. He noted that the sentencing guidelines have led to substantially more appeals in federal criminal cases, but he pointed out that the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) was very helpful because the Supreme Court has helped to put the focus back on the jury.

Ms. Refo asked the panelists to compare state court rules with the federal rules to see whether any differences might be of help in revitalizing trials in the federal courts. For one thing, she noted, Arizona requires much broader disclosure in civil cases. And it has different rules on how trials are conducted, including a provision allowing juries to ask questions.

Justice Hurwitz said that the Arizona state rules were basically similar to the federal rules, but a number of innovations in Arizona might help the federal courts, at least at the margin. The size of the jury, he said, is a factor, but most plaintiffs do not want a 12-person jury. He noted that in the state court, unlike the federal court, the parties can pick the judge. Guaranteeing federal lawyers that they will get an experienced judge would be a very helpful improvement, but he noted that there is a price to pay for it in terms of judicial independence.

One of the members echoed the observation that there is a culture of hostility to trying cases – both in the federal courts and the state courts. He noted that substantial pressure had been placed on him by judges to settle, even in cases that have deserved to go to trial. He also noted that it takes much too long to reach trial in the federal court, and cases go to trial much more quickly in the state courts. Clients, he said, are resistant to waiting so long and facing uncertainty.

He noted that Arizona had organized a specialized civil court division for complex civil cases – as in New York, Delaware, North Carolina, and California – staffed by very experienced, highly regarded judges. The state bar, he said, has made the decision not to remove cases to federal court because they are pleased to have them stay in the complex civil division of the state courts. He noted that the judges in the special court conduct an early pretrial conference to lock in all dates. They also impose limits on disclosure and discovery that would otherwise apply in normal civil cases. The bar believes that the system works, at least in complex civil cases, both for plaintiffs and defendants. He noted that a similar system works very well in California.

Another member suggested that lawyers on both sides see state courts as much more lawyer-friendly places than federal courts. Federal courts are seen as very formal, and the lawyers do not have an opportunity to see the judge in person until late in the process. Another difference between the state and federal courts is that the lawyers get to select the jury in state courts, a matter of great importance to them.

Judge Rosenthal observed that the Advisory Committee on Civil Rules had drafted a set of simplified procedural rules to expedite smaller federal cases and provide prompt, economical trials. Under the proposal, parties opting into the simplified rules would be guaranteed a prompt trial, less discovery, fewer motions, and fewer expert witnesses. But, she said, when the advisory committee floated the idea, it encountered resistance from virtually every quarter. She said that the draft rules had substantial merit, and the advisory committee might wish to revisit them. She noted, too, that specialized rules are becoming more common in certain kinds of cases, such as patent cases.

One member suggested that the courts lose a great deal if complex civil cases vanish from the judicial system. He noted that California, Arizona, and New York make special provision for complex civil cases, including special courtrooms and training for the judges. One of the dangers of settlements, he said, that there is no development of stare decisis and no transparency in the system. Large cases simply are diverted to alternative dispute resolution, and small cases remain in the courts, creating a dual system of justice. Corporations, he said, need to see themselves as stakeholders in the court system. Because of the special efforts now being made in some states, lawyers and corporations are preferring to keep complex civil cases in the state courts, rather than removing them to the federal courts or turning to arbitration or other alternative dispute resolution.

Another member echoed the theme that it is bad for the country when litigants believe that the court system is more of a dispute resolution mechanism than a justice system. It is also wrong, he said, when lawyers and clients believe that a judge will punish them for not settling a case and when corporations choose private litigation over the court system. The net result, he said, is that the judicial system is losing social

capital. One of the foundations of the American judicial system, he emphasized, is that the public participates in it. But that participation has been declining, as courts have reduced the number of jurors used in civil cases and have reduced the number of trials. He suggested that there may be problems in the future when the courts need public support.

Ms. Refo noted that, as a practical matter, lawyers today almost never try a case. Associates, moreover, never get fired for taking depositions or serving interrogatories. They can only get in trouble for not taking depositions or serving interrogatories. In effect, the culture encourages too much discovery. She added that the system as a whole has lost a great deal through the growth of private litigation. Among other things, she said, great strides have been made to diversify the federal bench. The same development, however, has not occurred in private litigation, as only white males seem to preside. That, she said, is another hidden cost to the system.

Judge Higginbotham added that the privacy implications of discovery are a serious problem. He said that there is a value in openness and important social benefits in trials. Cases, he said, do not belong solely to the litigants. Even in private litigation, he said, the parties want discovery. What they want to avoid is public disclosure of their records and activities.

One participant noted that his court is moving towards allowing fewer matters to be filed under seal. On the one hand, he said, disclosure of documents and depositions may encourage parties to leave the court system for private litigation. But on the other hand, there is also a fundamental value in openness and public records.

One member said that his clients increasingly are resisting arbitration. The arbitration alternative, he said, was sold to parties on the basis of its being cheaper and faster. But, he said, it is neither. Moreover, decisions in arbitration usually involve the arbitrator splitting the baby, and there is no appeal from the decision. As one suggestion for change, he said that the committee might want to consider amending 28 U.S.C. § 1292(b) to allow more decisions to be brought to the courts of appeals.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held in Washington, D.C. on June 11-12, 2007.

Respectfully submitted,

Peter G. McCabe,
Secretary

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May18, 2007

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Sixteen bills were introduced in the 110th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters.

Privilege Waiver

On January 4, 2007, Senator Arlen Specter (R-PA) introduced the "Attorney-Client Privilege Protection Act of 2007" (S. 186, 110th Cong., 1st Sess.). The legislation would, among other things, prohibit federal prosecutors and investigators from requesting waivers of attorney-client privilege and work-product protection from an organization or a person affiliated with that organization in any federal investigation, criminal proceeding, or civil enforcement proceeding. The legislation would also prohibit federal officials from conditioning a charging decision in a civil or criminal proceeding on whether an organization: (1) asserts the attorney-client privilege or work-product protection, (2) provides counsel or pays attorney's fees for an employee, (3) enters into a joint-defense, information-sharing, or common-interest agreement with an employee, (4) shares information relevant to the investigation or enforcement matter with the employee, or (5) fails to terminate or sanction an employee because the employee invokes his or her constitutional rights in response to a government request. There has been no further action on the legislation.

On March 8, 2007, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing titled, "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations."[1]

[1]The "Thompson Memorandum," written by former Deputy Attorney General Larry Thompson, sets forth a number of factors a federal prosecutor must consider in determining whether to seek an indictment against a corporation. A subsequent clarification was issued by Associate Deputy Attorney General Robert McCallum. (The memoranda require prosecutors to consider, among other things, a corporation's payment of employees' legal fees, retention of personnel who assert the Fifth Amendment privilege against self-incrimination during a government investigation, and refusal to waive the attorney-client privilege or work-product protection.) On December 12, 2006, Deputy Attorney General Paul McNulty issued new policy guidelines superseding the "Thompson" and

In August 2006, the rules committees published for comment proposed new Evidence Rule 502, which would govern the consequences of disclosing privileged or protected matter. The Evidence Rules Committee invited comment on whether to include in the rule a selective waiver provision governing disclosures made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority. The advisory committee received 73 comments on the proposed new rule and also heard testimony from more than 30 witnesses at two public hearings, which included extensive comments on the proposed selective waiver provision.

Civil Rule 11

On February 13, 2007, Representative Vern Buchanan (R-FL) introduced the "Small Business Growth Act of 2007" (H.R. 1012, 110th Cong., 1st Sess.). The legislation contains a proposed amendment to Civil Rule 11, which is similar to earlier bills that were passed by the House of Representatives but not taken up by the Senate during the last two Congresses. Title IV of H.R. 1012 would, among other things: (1) reinstate sanctions provisions deleted in 1993 from Civil Rule 11 and require a court to impose sanctions for every violation of the rule; (2) make the rule applicable in state cases affecting interstate commerce; (3) alter the venue standards for filing tort actions in state and federal court; (4) require a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney had violated Rule 11 three or more times; (5) create a rebuttable presumption of a rule violation whenever a party relitigates an issue that had previously been decided; (6) provide for enhanced sanctions for anyone who "influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede" a pending federal court case through the willful and intentional destruction of documents that are "highly relevant" to the case; and (7) prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety. The bill was referred to the House Judiciary Committee Subcommittee on Courts, the Internet, and Intellectual Property on March 19, 2007. There has been no further action on the legislation.

Cameras in the Courtroom

On January 22, 2007, Senator Specter introduced S. 344 (110th Cong., 1st Sess.) that would, among other things, amend title 28, United States Code, "[t]o permit the televising of Supreme Court proceedings." The legislation requires the Supreme Court to allow television coverage of all open sessions unless the Court decides, by a majority vote, that such coverage would violate a party's due process rights. On the same day, Senator Chuck Grassley (R-IA) introduced the "Sunshine in the Courtroom Act of 2007" (S. 352, 110th Cong., 1st Sess.), which

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"McCallum" memoranda. (See Attachment A.) The new policy requires the approval of the Deputy Attorney General before a government prosecutor may request a corporation to waive its attorney-client privilege or work-product protection. If the requested privileged or protected matter consists only of "purely factual information," the approval of the assistant Attorney General for the Criminal Division is required.

provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. The bills are similar to legislation approved by the Senate Judiciary Committee in the last Congress.

Associate Justice Anthony Kennedy testified against televising Supreme Court proceedings at a hearing before the Senate Judiciary Committee on February 14, 2007. There has been no further action on the legislation.

The Judicial Conference generally opposes cameras in the courtroom (*see, e.g.,* JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.) There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

Journalists' Shield

On May 2, 2007, Representative Rick Boucher (D-VA) introduced the "Free Flow of Information Act of 2007" (H.R. 2102, 110th Cong., 1st Sess.). Senator Richard Lugar (R-IN) introduced identical legislation on the same day, the "Free Flow of Information Act of 2007" (S. 1267, 110th Cong., 1st Sess.) The bills are similar to legislation introduced in the 109th Congress and generally give journalists a limited privilege to withhold the identity of a confidential informant or other confidential information. A party seeking to overcome the privilege must generally show, by a preponderance of the evidence, that the information is relevant and critical and cannot reasonably be obtained from any other source. The bills differ from legislation introduced in the last Congress in that H.R. 2102 and S. 1267 expand the category of protected journalists to include individuals maintaining web logs ("blogs") on the internet. (See Attachment B.)

Bail Bonds

On May 10, 2007, Representative Robert Wexler (D-FL) introduced the "Bail Bond Fairness Act of 2007" (H.R. 2286, 110th Cong., 1st Sess.). The bill is similar to legislation introduced in the 108th Congress and several previous Congressional sessions. Among other things, H.R. 2286 amends Criminal Rule 46(f)(1) limiting the authority of the court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond.) H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only when the person actually fails to appear physically before a court as ordered, and not when the person violates some other collateral condition of release.

Other Developments of Interest

American Samoa. On March 29, 2007, Representative Eni F.H. Faleomavaega (D-AS) introduced H.R. 1785 (110th Cong. 1st Sess.). Among other things, the bill requires that the Secretary of the Interior place certain questions on the ballot of the 2008 general election in American Samoa, including whether a federal court with limited jurisdiction should be established for American Samoa. The bill was referred to the House Committee on Natural Resources. No further action has been taken on the legislation.

In August 2006, the rules committees published for comment a proposed amendment to Criminal Rule 41(b), which authorizes a magistrate judge to issue a search warrant for property located within United States jurisdiction, but outside any state or federal judicial district. At the request of the Ninth Circuit Judicial Council's Pacific Islands Committee, the proposal excluded American Samoa although comments were invited on its exclusion. No comments were submitted on the proposed exclusion of American Samoa. At its April 2007 meeting, the Criminal Rules Committee approved the proposed amendment to Rule 41(b), and it revised the amendment to include American Samoa. The proposed amendment is on the Standing Committee's agenda for this meeting.

James N. Ishida

Attachments

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

The Department experienced unprecedented success in prosecuting corporate fraud during the last four years. We have aggressively rooted out corruption in financial markets and corporate board rooms across the country. Federal prosecutors should be justifiably proud that the information used by our nation's financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts. The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.

Though much has been accomplished, the work of protecting the integrity of the marketplace continues. As we press forward in our enforcement duties, it is appropriate that we consider carefully proposals which could make our efforts more effective. I remain convinced that the fundamental principles that have guided our enforcement practices are sound. In particular, our corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals. Like federal prosecutors, corporate leaders must take action to protect shareholders, preserve corporate value, and promote honesty and fair dealing with the investing public.

We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department, encourage corporate fraud prevention efforts, and clarify our goals without sacrificing our ability to prosecute these important cases effectively. The new language expands upon the Department's long-standing policies concerning how we evaluate the authenticity of a corporation's cooperation with a government investigation.

This memorandum supersedes and replaces guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson entitled Principles of Federal Prosecution of Business Organizations (January 20, 2003) (the "Thompson Memorandum") and the Memorandum from the Acting Deputy Attorney General Robert D. McCallum, Jr. entitled Waiver of Corporate Attorney-Client and Work Product Protections (October 21, 2005)(the "McCallum Memorandum").

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations[1]

I. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in

[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (I) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated--at least in part--by an intent to benefit the corporation). In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Furthermore, in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969-70 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to -- and did in fact -- defraud [the corporation], not benefit it." According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, "however befuddled," to further the interests of his employer. *See also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; *quoting Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq*. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section IV, *infra*);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, *infra)*;

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);

5. the existence and adequacy of the corporation's pre-existing compliance program (see section VIII, *infra*);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see section IX, *infra*);

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, *infra*);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra)*.

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*,voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. *See* USSG §8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a

corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.*, subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment.(n. 6).

VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.

1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

2. Waiving Attorney-Client and Work Product Protections[2]

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated "its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely

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[2] The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5(g). The reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006. *See* USSG §8C2.5(g), comment. (n.12).

desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation.

Whether there is a legitimate need depends upon:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request to the United States Attorney for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product ("Category II"). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney's request for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

(1) legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and

(2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.[3] This prohibition is not meant to prevent a prosecutor from asking questions about an

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[3] In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. *See discussion in* Brief of Appellant-United States, *United States v. Smith and Watson*, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, *infra*).

attorney's representation of a corporation or its employees.[4]

4. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VIII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is

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[4] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.

not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. According to the court, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Similarly, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held

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[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

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[6] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG §8B2.1.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (*e.g.*, publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was *engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right* to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VIII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VII, *supra*.

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Statement of Congressman Rick Boucher

Introduction of Free Flow of Information Act

May 2, 2007

I am pleased today to join with Mike Pence in introducing the Free Flow of Information Act of 2007. We are joined in co-authoring the bill by Judiciary Committee Chairman John Conyers, Howard Coble, the Ranking Member of the Subcommittee on Courts, and John Yarmuth from Kentucky, who has a strong commitment to our effort.

The bill provides a privilege in federal court proceedings for reporters to refrain from revealing their confidential sources of information.

The privilege is similar in nature to that currently offered by 32 states and the District of Columbia.

The ability to assure confidentiality to people who provide information is essential to effective news gathering and reporting on highly sensitive and important issues.

Typically, the best information about corruption in government or misdeeds in a private organization will come from someone on the inside who feels a responsibility to bring the information to light.

But that person has a lot to lose if his or her identity becomes known. In many cases, the person responsible for the corruption or the misdeeds can punish the source through dismissal or more subtle forms of punitive action if the source's identity becomes known.

And so it is only by assuring anonymity to the source that a reporter can gain access to the information in order to bring it to public scrutiny.

I have long thought that the ability to protect the confidentiality of sources is so essential to effective news gathering that a privledge to refrain from revealing sources should be interpreted to be extended to reporters by the 1st Amendment.

Since to date the 1st Amendment has not been so interpreted, and given the increasing use of subpoenas in recent years to extract confidential source information in federal court proceedings, the time has clearly arrived for Congress to enact this statutory privilege.

While extending a broad privilege, we have included some exceptions for instances in which source information can be disclosed where a strong public interest compels the disclosure. The exceptions are:

- to prevent an imminent and actual harm to national security;
- to prevent imminent death or significant bodily harm; or,
- to determine who has disclosed trade secrets, personal health, or financial information in violation of law.

An exception to the privilege will only apply if the court determines that the public interest in disclosing the information outweighs the public interest in news gathering and maintaining the free flow of information.

The bill is a carefully constructed measure which will provide a broad new and much needed privilege for reporters to refrain from revealing confidential sources.

It protects the public's right to know. Its passage should be a priority in this Congress.

I am pleased to note this afternoon that a measure identical to the House bill will be introduced in the Senate by Senators Lugar and Dodd. We have coordinated our efforts closely with them.

I want to commend Mike Pence who has devoted substantial personal time and attention to this effort.

He has done much to bring the need for the privilege to public attention, and he is a highly effective advocate for the cause.

It was a pleasure co-authoring a similar bill with Mike in the last Congress and in this Congress writing the bill we are introducing today.

I also want to thank our Judiciary Committee colleagues, Chairman Conyers and Howard Coble, for their helpful suggestions and their co-sponsorship of the bill.

Given the broad bi-partisan support this measure enjoys, I am optimistic that it will be reported by the Judiciary Committee and passed by the House this year.

I also want to thank the many journalistic organization and public interest groups that have worked with us and have urged passage of the bill.

The Newspaper Association of America, the NAB, and the Reporter's Committee for Freedom of the Press deserve special recognition for their efforts and have a place on our program this afternoon.

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LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
110th Congress

SENATE BILLS

- S.186 - *Attorney-Client Privilege Protection Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 1/4/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/4/07).
  - Related Bills: None
  - Key Provisions:

    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- S. 344 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Specter
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Judiciary Committee held hearing (2/14/07).
  - Related Bills: S. 352, H.R. 1299
  - Key Provisions:

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

— Section 1 amends **Chapter 45, Title 28, U.S.C.**, requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- S. 352 - *Sunshine in the Courtroom Act of 2007*
  - Introduced by: Grassley
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Senate Judiciary Committee held hearing (2/14/07).
  - Related Bills: S. 344, H.R. 1299
  - Key Provisions:

— Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

- S. 456 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Feinstein
  - Date Introduced: 1/31/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/31/07).
  - Related Bills: S. 990, H.R. 880, H.R. 1582, H.R. 1692
  - Key Provisions:

— Section 205 directs the Standing and Evidence Rules Committee to consider

"the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S. 990 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Menendez
  - Date Introduced: 3/26/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/26/07).
  - Related Bills: S. 456, H.R. 880, H.R. 1582, H.R. 1692
  - Key Provisions:

    — Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- S. 1267 - *Free Flow of Information Act of 2007*
  - Introduced by: Lugar
  - Date Introduced: 5/2/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/2/07).
  - Related Bills: H.R. 2102
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

HOUSE BILLS

- H.R. 851 -*Death Penalty Reform Act of 2007*
  - Introduced by: Gohmert

- Date Introduced: 2/6/07
- Status: Referred to House Committee on the Judiciary (2/6/07).
- Related Bills: H.R. 1914
- Key Provision:

  — Section 8 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 880 - *Gang Deterrence and Community Protection Act of 2007*
  - Introduced by: Forbes
  - Date Introduced: 2/7/07
  - Status: Referred to the House Committee on the Judiciary (2/7/07). Referred to House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (3/1/07).
  - Related Bills: H.R. 1582, H.R. 1692, S. 456, S. 990
  - Key Provisions:

    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 1012 - *Small Business Growth Act of 2007*
  - Introduced by: Buchanan
  - Date Introduced: 2/13/07
  - Status: Referred to the House Committees on Education and Labor, Small Business, Judiciary, Oversight and Government Reform, and Ways and Means (2/13/07). Referred to House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property (3/19/07).
  - Related Bills: None
  - Key Provisions:

    — Title IV amends **Civil Rule 11** by: (1) imposing additional, mandatory sanctions on attorneys, law firms, and parties; (2) making the rule applicable in state cases affecting interstate commerce; (3) imposing a "three-strike" rule on attorneys who commit multiple violations of the rule; (4) creating a presumption of a rule violation when the same issue is relitigated; (5) providing enhanced sanctions for the willful and intentional destruction of documents in a pending federal court proceeding; and (6) by limiting a court's discretion in sealing a Rule 11 proceeding.

- H.R. 1299 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Poe
  - Date Introduced: 3/1/07
  - Status: Referred to the House Committee on the Judiciary (3/1/07).

- Related Bills: S. 344, S. 352
- Key Provisions:

— Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- H.R. 1582 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07).
  - Related Bills: H.R. 880, H.R. 1692, S. 456, S. 990
  - Key Provisions:

— Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- H.R. 1592 - *Local Law Enforcement Hate Crimes Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Reported (Amended) by the Committee on Judiciary. H. Rept. 110-113. (4/30/2007). Passed by the House by a vote of 237-180 (5/3/2007). Received in the Senate, read twice, and referred to the Committee on the Judiciary (5/7/2007).
  - Related Bills: None
  - Key Provisions:

— Section 6 amends **Chapter 13, Title 18, U.S.C.**, by including the following provision: "In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness."

- H.R. 1692 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Pallone
  - Date Introduced: 3/26/07
  - Status: Read twice and referred to the House Committees on the Judiciary, Education and Labor, and Financial Services (3/26/07).
  - Related Bills: H.R. 880, H.R. 1582, S. 456, S.990
  - Key Provisions:

— Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- H.R. 1914 -*Terrorism Death Penalty Act of 2007*
  - Introduced by: Carter
  - Date Introduced: 4/18/07
  - Status: Referred to House Committee on the Judiciary (4/18/07).
  - Related Bills: H.R. 851
  - Key Provision:

    — Section 3 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 2102 - *Free Flow of Information Act of 2007*
  - Introduced by: Boucher
  - Date Introduced: 5/2/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/2/07).
  - Related Bills: S. 1267
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

- H.R. 2286 - *Bail Bond Fairness Act of 2007*
  - Introduced by: Wexler
  - Date Introduced: 5/10/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/10/07).
  - Related Bills: None

• Key Provisions:

— Section 3 amends **Criminal Rule 46(f)(1)** limiting the authority of the court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond. H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only where the person actually fails to appear physically before a court as ordered, and not where the person violates some other collateral condition of release.)

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

- H.J. Res.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May18, 2007

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

Automation Projects

Last year, Committee Reporters Capra, Struve, and Coquillette were given a demonstration of Documentum, the office's document-management system, and agreed to participate in a pilot project allowing remote access to the system. We are finalizing internal preparations and the pilot project is expected to begin soon. The professors will be able to access thousands of rules documents in Documentum, including committee minutes, reports, memoranda, and drafts of proposed rules amendments. The system will, among other things, allow multiple users to prepare, edit, and finalize documents; search for documents in the database using enhanced indexing and search capabilities; and track different versions of documents to ensure the quality and accuracy of work products, which will facilitate the preparation and reformatting of agenda materials, committee minutes and reports, and other rules-related documents. Upon successful completion of the project, we hope to expand the program to allow remote access to Documentum by committee members and reporters.

Federal Rulemaking Website

We received, acknowledged, forwarded, and followed up on 161 comments submitted on the proposed amendments published for comment in August 2006. The comments and transcripts of three public hearings are posted on the judiciary's Federal Rulemaking internet website (www.uscourts.gov/rules). The rules website, which was recently redesigned, continues to be one of the most popular sites on the judiciary's website. Over the six-month period from October 1, 2006, to March 31, 2007, users viewed over 840,000 pages on the website.

Rules Committees' Records

Last year, the office completed a major project retrieving, scanning, and posting to the Federal Rulemaking website all available rules committees' minutes and reports contained on microfiche from 1935-present. *See* <http://www.uscourts.gov/rules/newrules7.html>. These primary rules records allow users to conduct comprehensive research on the "legislative history" of rules amendments. We are now working with a number of law libraries across the country to locate missing committee minutes and reports, which we will add to our collection and post on the website. Recently, we retrieved missing rules records from the University of Pennsylvania, University of Texas, and Yale Law School libraries.

This summer, we will begin posting to the website all of the committees' agenda materials from 1992 to present.

Committee and Subcommittee Meetings

For the period from December 1, 2006, to May 1, 2007, the office staffed 13 meetings and hearings, including one Standing Committee meeting, six advisory rules committee meetings, a meeting of the informal working group on mass torts, two mini-conferences, and three public hearings. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

On April 30, 2007, the Supreme Court approved proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, which were approved by the Judicial Conference at its September 2006 session. The rules package included the comprehensive restyling of the Civil Rules. The entire package was large, exceeding 900 pages, and required extensive formatting and proofreading. The amendments were transmitted to Congress and will become effective on December 1, 2007, unless Congress enacts legislation to reject, modify, or defer the amendments.

James N. Ishida

Committee on Rules of Practice and Procedure
June 2007
Agenda Item Tab 4
Informational

The Federal Judicial Center is pleased to provide this report on recent and upcoming education and research activities that may be of interest to the Committee.

Highlights

In response to actions taken at the September 2006 meeting of the Judicial Conference of the United States, the Center increased its already substantial offerings on ethics. In cooperation with the Administrative Office, the Center produced a video on using conflict-screening software. The Center expanded the time devoted to the Code of Conduct at orientation programs for new judges, and has consulted with the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders about implementing recommendations in the Breyer Committee report. It has provided additional ethics training materials for court staff, including *Avoiding Ethics Pitfalls*, an interactive e-learning program for federal clerks' office employees and judicial assistants, which was released earlier this year; this program complements the *Maintaining the Public Trust* program for law clerks that was released last fall. The Judicial Conference Committee on Codes of Conduct and the Administrative Office's Office of the General Counsel reviewed both programs.

At the request of the Judicial Conference Committee on Information Technology, the Center, in coordination with the Administrative Office, convened a February 2007 Roundtable on the Effective Uses of Information Technology (IT) for Judges. The 31 appellate, district, magistrate, and bankruptcy judge participants focused on identifying, evaluating, and supporting new IT resources for judges, and how to best make judges aware of, and educated in the use of, these technologies. The roundtable focused on technology related to five judicial tasks: case management; writing and tracking opinions; calendaring; working remotely; and courtroom technologies. The Center is working closely with the Committee on Information Technology and the Administrative Office to follow up on recommendations made at the roundtable.

The Center formally announced its Professional Education Institute (PEI), a resource for court staff seeking to improve their leadership and management skills. PEI enhances staff development by identifying key leadership practices, providing curricula to help staff learn and hone those practices, and providing professional development assessment and custom learning plan tools. The PEI virtual campus is available through the PEI portal on the Center's website on the courts' intranet.

The Center's research efforts have been directed at the four large research projects. The courtroom use study is being conducted in 26 districts for the Committee on Court Administration and Case Management; it has an interim draft report deadline of October 2007. A study, with the Administrative Office, of over 600 capital habeas appeals of state capital convictions, was undertaken at the request of six Judicial Conference committees with preliminary findings to be discussed at the June 2007 meeting of the Committee on Federal-State Jurisdiction. Research continues on a multi-year project examining the impact on the resources of the federal courts of the Class Action Fairness Act of 2005. The fourth study examines summary judgment practices in support of the Advisory Committee on Civil Rules' consideration of possible amendments to Rule 56 of the Federal Rules of Civil Procedure. The status of each of these projects is described in the Research Highlights section of this report.

I. Education

The Center presents most judicial education through in-person workshops and seminars. Most staff education is offered through distance education programs that facilitate local attendance and give individual court units greater flexibility in selecting topics and requesting in-house training for their staff.

A. Education for Federal Judges

Recent and upcoming programs for judges are listed below.

1. Seminars and Workshops:

- Circuit workshops for the judges in the Fourth Circuit (March 2007), Sixth Circuit (May 2007), and the First and Fifth Circuits (both in October 2007);
- A conference for all chief district judges, which was preceded by an executive team development workshop for new chief judges and their court unit executives (April 2007);

- Two Phase I orientations for newly appointed district judges (June and August 2007), and a death penalty workshop for all district judges (August 2007);
- Two national workshops for bankruptcy judges (April and September 2007), as well as a mediation workshop (June 2007);
- A bankruptcy appellate panel workshop (September 2007);
- Two national workshops for magistrate judges (April and July 2007), as well as a Phase II orientation program (October 2007);
- A mediation workshop for district and magistrate judges (September 2007);
- Special-topic seminars to address legal and societal issues involved in humanities and science (April and June 2007) and recovery from natural disasters (May 2007), as well as seminars on intellectual property (May 2007), Section 1983 litigation (June 2007), and environmental law (September 2007). (Many special-topic programs are conducted in collaboration with law schools or other educational organizations.)

Several educational projects for judges, including those mentioned in the highlights section of this report, are ongoing. At the request of the Judicial Conference Committee on Information Technology's IT Training Subcommittee, the Center and the Administrative Office develop and deliver IT instructional programs for appellate, district, bankruptcy, and magistrate judges at national and local levels.

The Center has been helping the Department of Justice's Executive Office for Immigration Review to improve its training for immigration judges and members of the Board of Immigration Appeals. Improved training of these judges will ultimately serve the needs of those U. S. courts of appeals with large numbers of asylum cases on their dockets.

2. In-court Programs

A variety of in-court programs for judges are available on request. The Center pays for travel for faculty to present an in-court seminar. Current program topics address slavery and the American revolutionary era; improving the writing and editing of opinions; intellectual property cases with an emphasis on modern patent law; law and the Holocaust; and law and literature.

3. Federal Judicial Television Network (FJTN) and Video Programs

New FJTN programs for judges and their law clerks follow:

- three live programs in the new *Advanced Sentencing Guideline Issues* series with the United States Sentencing Commission: a June 2007 program will focus on relevant conduct; the topics of the other programs have not yet been determined (the March 2007 inaugural program discussed firearms);
- *Budgeting Criminal Cases: High Cost CJA Panel Representations* (requested by the Committee on Defender Services);
- reviews of the Supreme Court's 2006-2007 term and of key bankruptcy decisions in 2006 by the Ninth Circuit (programs on Fourth and Eighth Circuit decisions aired earlier this year); and
- two new programs for law clerks: an update to the *Basics of Employment Discrimination Law* and an October 3, 2007 orientation video for bankruptcy law clerks that will be complemented by a live, interactive FJTN program.

Among the new videos in development are a program for judges on fundamentals of evidence, a program on handling motions for new bankruptcy judges, and a grand juror orientation program to be used by district court jury administrators.

4. Manuals and Monographs

The Center recently published *Managing Discovery of Electronic Information: A Pocket Guide for Judges* and released *Patent Law and Practice, Fifth Edition,* which the Center makes available to federal judges and court employees through an agreement with the author (Professor Herbert Schwartz) and the publisher (BNA). The Center also published on its website a summary table of the federal courts of appeals' local rules on citations to their unpublished opinions issued before 2007. Some of these local rules recently have been modified to accommodate changes to Federal Rule of Appellate Procedure 32.1 regarding citation of unpublished opinions.

A new edition of the *Law Clerk Handbook* will be available for distribution in May 2007, and an update to the *Benchbook for U. S. District Court Judges* is being prepared. Works in progress include a new monograph on the Employment Retirement Income Security Act (ERISA), a monograph on major issues in Immigration Law, and a new edition of the *Manual on Recurring Problems in Criminal Trials.*

B. Education for Legal Staff

A national seminar for federal defenders was conducted in late May 2007 and a law and technology seminar will be held for federal defender staff in August 2007. Circuit mediators will be invited to a November 2007 workshop.

C. Education for Court Staff

Recent and upcoming programs for court staff.

- A new national conference for circuit executives and deputy and assistant circuit executives (August 2007);
- A biennial national conference for appellate clerks of court, chief deputy clerks, and bankruptcy appellate panel clerks (October 2007);
- A biennial national conference for bankruptcy clerks of court, chief deputy clerks, and bankruptcy administrators (October 2007);
- A workshop for bankruptcy administrators (July 2007), (with the Administrative Office);
- Two Administrative Office-Center case management-electronic case files forums: one for district courts (July 2007), and one for bankruptcy courts (August 2007) (the latter program includes a national Web-audio conference);
- Two leadership institutes: for chief deputy clerks and deputy chief probation and pretrial services officers (May 2007), and for new court unit executives (November 2007);
- Two workshops for experienced supervisors and managers in clerks' offices and one workshop for those new to the position (March and Fall 2007);
- A concluding workshop for the eighth class of the three-year Leadership Development Program (LDP) for Probation and Pretrial Services Officers and a mid-program workshop for the sixth class of the Federal Court Leadership Program, the LDP counterpart for clerks' office personnel (both programs will be conducted in June 2007).
- For probation and pretrial services officers:
  - audio conferences for new chiefs (as needed);
  - an executive team seminar for chiefs and their deputy chiefs (May 2007);

- several web-audio conferences (April–June, July–September 2007) and an in-person workshop (August 2007) for participants in the Center's multi-tiered program for new supervisors;
- two regional symposia for experienced supervising officers (May and July 2007);
- a five-session web-audio conference for all officers concerning cyber crime investigation and supervision (September–October 2007); and
- a four-session web-audio conference (June 2007) and a live workshop (August 2007) for designated PEI court contacts to help them implement the probation and pretrial services PEI tracks (one for supervisors, one for line officers) in their districts.

- A multi-session web-audio conference for new court trainers (May–June 2007).

In our continuing efforts to maximize economies of staff time and budgets, the Center offers training sessions to court staff attending meetings hosted by the courts, the Administrative Office, or national associations. Recent examples include sessions for senior staff attorneys, circuit librarians, bankruptcy clerks of court, and probation and pretrial services officers.

In-court and E-learning Programs:

The Center's in-court programs for court staff, available on request, include curriculum packages and training guides. The packaged programs are usually taught by Center-trained court staff. Seven in-court *Planning for Strategic Workforce Management* programs were requested after the Center trained court staff to deliver the three versions of the program (district, bankruptcy, and probation-pretrial services) at the beginning of the year. The Center appreciates the assistance provided by the Administrative Office's Office of Human Resources with the development of this program.

E-learning programs in development include district and bankruptcy court versions of *Is It Legal Advice?* for court staff and *Everyday Ethics* for probation and pretrial services officers.

FJTN and Video Programs for Court Staff:

New FJTN programs for all court staff discuss innovative court practices, coaching for leaders, and transformational change and innovation. A new program for probation and pretrial services officers will cover updates to the Judicial Conference substance abuse policy.

On-line Resources:

Two timelines have been posted to the Center's site on the court's intranet: *History of Probation and Pretrial Services in the Federal System* and *The Evolution of U. S. Bankruptcy Law.*

II. Research Highlights

Courtroom Use Study. This project continues on schedule and with excellent cooperation from the courts. During November and December 2006, members of the study team traveled to the 13 districts—the Wave 1 districts—to speak with judges about the study and to teach court staff how to use the Center's data-collection software. The study team has recently completed the same process for the 13 Wave 2 districts, visiting each of them during February and March 2007. An interim report on the study's findings is scheduled to be delivered to the Committee on Court Administration and Case Management in October of this year.

The Wave 1 districts started tracking the scheduling data (i.e., study-relevant events on judges' calendars) on December 18, 2006, and started recording actual use data (i.e., all events held in courtrooms and selected events held elsewhere) on January 15, 2007. The Wave 1 districts completed their data collection on April 15, 2007. The Wave 2 districts started tracking their judges' calendars on March 19, 2007, and began recording actual use data on April 16, 2007. They will complete their data collection on July 15, 2007.

The Center is sending a questionnaire to all district and magistrate judges in all district courts. The questionnaire is designed to determine how judges use courtrooms and other courthouse space, the circumstances under which judges currently share courtrooms, and judges' views about how any changes in current courtroom allocation policies might affect caseload and case-management procedures.

Processing of Habeas Corpus Appeals of State Capital Convictions in the Federal Courts. Last year, the chairs of seven Judicial Conference Committees (Federal-State Jurisdiction, Criminal Law, Defender Services, Administration of the Magistrate Judges System, Judicial Resources, Civil Rules, and the standing Committee on Rules of Practice and Procedure) unanimously endorsed a proposal to study the processing of capital habeas petitions filed by state prisoners in federal court. With assistance from the Administrative Office, Center researchers designed a study that relies on docket-level data from the courts that are downloaded via

PACER. The research design focuses on case-related time associated with a number of standard events that are docketed in capital habeas cases, along with an analysis of the correlation between certain docketed events or issues and disposition times.

The study sample includes all capital habeas cases reported to the Administrative Office as being filed in district court in fiscal years (FYs) 2000 or 2001, and all other such cases reported as pending at the end of FY 2006 for longer than the median pending time for such cases. The sample includes cases filed in all but the First, Second, and District of Columbia Circuits. The data collection phase of the project has now concluded. The research team, which included Center researchers and Administrative Office staffers, has collected data on approximately 600 capital habeas petitions filed by state prisoners in the federal courts.

Our preliminary findings are scheduled to be discussed at the June 2007 meeting of the Committee on Federal-State Jurisdiction. The preliminary findings will include information on time associated with standard docketed events in the processing of capital habeas cases, such as the time between the filing of a case in federal court and the appointment of counsel in a capital habeas case. The Center is also analyzing the frequency and effect on overall processing times in district courts of discovery and stays to permit petitioners to return to state court to exhaust claims ("stay and abeyance"). These analyses will be supplemented by interviews with samples of judges, attorneys, court administrators, and death penalty law clerks to shed light on how a variety of factors, such as the litigation strategies of state prosecutors and habeas petitioners, might help to explain some of the perceived extended processing times that are associated with these cases. A follow-on effort will include analysis of the processing of capital habeas cases in the courts of appeals.

Impact of the Class Action Fairness Act of 2005 (CAFA) on the Resources of the Federal Courts. The Advisory Committee on Civil Rules, acting in consultation with the chairs of the Committees on Rules of Practice and Procedure, Federal-State Jurisdiction, Judicial Resources, Court Administration and Case Management, and Administration of the Bankruptcy System, asked the Center to conduct a thorough study of the impact of the Class Action Fairness Act of 2005 (CAFA) on the federal courts. The Center's research is divided into two major components. First, the Center is examining the impact of the Act on new class actions filed in or removed to the federal courts after the Act became effective on February 18, 2005, in comparison with pre-CAFA filings or removals of class actions between July 1, 2001 and

February 17, 2005. Second, the Center is looking at the impact of the Act on changes in class action litigation activity taking place before and after CAFA's effective date.

The Center's most recent interim report concludes that CAFA has already had a significant impact on the federal courts. In the first six months after CAFA went into effect, the filing and removal of class actions in the 88 study courts increased in a way that was clearly related to CAFA. The Center's analysis of the relevant data indicate that CAFA resulted in 364 additional diversity class actions being filed in the federal courts during the first year after CAFA, compared to a comparable pre-CAFA period. Most of the new class action filings were based on state law, such as contract and common law fraud claims.

The Center expects to complete the pre-CAFA phase of the study by the end of this year, but completion of the entire study will have to await the termination of the vast majority of post-CAFA cases.

Summary Judgment Practices. The Center is collecting information on summary judgment activity in the district courts to aid the Advisory Committee on Civil Rules as it considers proposed amendments to Rule 56. The Center is using case management-electronic case files replication data to identify cases in which motions for summary judgment were filed in FY 2006. By examining the resulting orders, the Center is then able to determine the frequency and outcome of motions for summary judgment on a district-by-district basis for specific types of cases. This information helps to extend the earlier study of summary judgment practices in six federal district courts over the past 25 years. As part of a related inquiry, staff are examining docket sheets and case files for instances where the court considered or imposed sanctions for "bad faith" affidavits under Rule 56(g).

Third Edition of the Reference Manual on Scientific Evidence. The next edition of the reference manual will be produced in cooperation with the National Academies, with funding from the Carnegie Foundation.

Case Management Challenges Posed by the War on Terrorism. The Center continues its work to develop web-based educational materials for judges on special case management challenges posed by terrorism cases, such as dealing with classified evidence and arguments and serving and taking testimony from foreign witnesses. Thus far, staff have completed interviews with seven district judges who have been assigned major, widely publicized, terrorism cases.

Motions for a More Definite Statement. As mentioned in our last report, the Committee on Civil Rules has under consideration possible amendments to Rule 12 to require more detailed pleadings. To assist the Committee, the Center is examining the frequency and outcome of motions for a more definite statement, under Rule 12(e) of the Federal Rules of Civil Procedure, to determine the types of cases in which such motions may be common. In a sample of those instances in which a motion for a more definite statement was filed but not granted, the Center is examining docket sheets to determine if the plaintiff filed an amended complaint before the motion was decided.

National Sentencing Policy Institute. The Center is beginning plans for the next sentencing institute to be held early next year. The Center, along with the Administrative Office, United States Sentencing Commission, and Federal Bureau of Prisons, plans and conducts sentencing institutes at the direction of the Committee on Criminal Law. Institutes provide an opportunity for representatives of all of the major components of the federal criminal justice process— judges, prosecutors, defense attorneys, probation and corrections staff, along with members and staff of the United States Sentencing Commission—to focus on sentencing policy-related matters.

III. Federal Judicial History and International Rule of Law Functions

Pursuant to a statutory mandate, the Center provides assistance to federal courts and others in developing information, and teaching about, the history of the federal judiciary.

Six units of its "Federal Trials and Great Debates in United States History" project are available on the Center's sites on the courts' intranet and the Internet, with materials related to key federal trials. This program, supported by grants to the Federal Judicial Center Foundation, can enhance community outreach programs and help educators incorporate federal trial court history into courses at the secondary and college levels.

Also available on line are three teaching modules designed for judges and court staff who wish to present students and other public audiences with historical information about the federal courts. The modules examine the constitutional origins of the judiciary, historical debates on judicial independence, and the establishment of a federal judiciary.

The "History of the Federal Judiciary" website remains one of the most frequently consulted government sites, with many links to it from legal education, judicial reform, and news

organizations. Recent additions to the site include a collection of nearly 600 photographs of historic courthouses and a survey of judicial salaries since 1789.

In compliance with another statutory mandate, the Center provides information about federal courts to officials of foreign judicial systems and acquires information about foreign judicial systems that will help the Center perform its other missions. From November 8, 2006 through May 14, 2007, the Center hosted 110 judges, court officials, and scholars from 35 countries for 19 informational briefings. For example, the Center hosted a judicial delegation from Turkmenistan for an overview of the U. S. judicial system and a discussion of the Center's judicial education programs. Center staff discussed developments in the field of Alternative Dispute Resolution with a delegation from Saudi Arabia and described the Center's distance education initiatives with visiting magistrates from Spain. The Center arranged a series of meetings with Center and Administrative Office staff and U. S. judges for Judge Shinya Onodera from the Tokyo District Court. Judge Onodera was in the United States to study the techniques employed by the U. S. courts in managing civil litigation.

Recent Center international technical assistance projects included:

- participation in a conference in Amman, Jordan arranged under the auspices of the Arab Council for Judicial and Legal Studies and the American Bar Association;
- continued work with the Russian Academy of Justice in the field of court staff education; and
- workshops in Argentina addressing judicial education and scientific evidence.

The Center's Director, Judge Barbara Rothstein, recently met with officials from the Ecole Nationale de la Magistrature in Paris, France, to exchange strategies for developing and delivering judicial education.

The Center also undertakes a small number of international technical assistance projects, funded by U. S. government agencies and other donors. The Center's Research Division Director, James Eaglin, traveled to Kazakhstan to consult with the Kazakh Supreme Court about developing a Kazakh Center for Research on the Judiciary. Other technical assistance projects included programs in Kosovo and Algeria. None of the Center's appropriation is used to fund technical assistance projects.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 9, 2007

TO: Judge David F. Levi
Standing Committee on Rules of Practice and Procedure

CC: John K. Rabiej

FROM: Judge Mark R. Kravitz
Catherine T. Struve

RE: Time-Computation Project

We write on behalf of the Time-Computation Subcommittee to report on the progress of the Time-Computation Project. Part I of this memo summarizes the Time-Computation Subcommittee's recommendations and requests. Part II summarizes developments in the Project since the Standing Committee's January 2007 meeting. Subsequent parts provide more detail on each outstanding issue.

As you know, we are on track to publish the proposed time-computation amendments for comment in August 2007 if the Standing Committee approves them for publication. The Advisory Committees, their Chairs and the Reporters have worked hard to bring the project to this point. We are grateful for their support and hard work. Throughout, we have tried to pursue the goals of uniformity, clarity and simplicity in drafting the template rule. The template rule abandons the current practice of omitting intermediate holidays and weekends when computing short time periods, and it refines some other aspects of the time-computation rules such as the definition of the end of a period's last day. The Advisory Committees are recommending Rule amendments (and a limited package of statutory changes) to ensure that, in general, the change to a days-are-days time-computation approach does not disadvantage practitioners.

I. Summary of recommendations and requests

Approval of proposed amendments to the Appellate, Bankruptcy, Civil and Criminal Rules. Each Advisory Committee (other than the Evidence Rules Committee) is

requesting permission to publish for comment proposed amendments that adopt the time-computation template and that adjust the Rules' short deadlines in order to account for the proposed change in time-computation approach. More detail can be found in each Advisory Committee's report to the Standing Committee. The Advisory Committees have taken a uniform approach – adopting the same version of the template – except where necessary to account for peculiarities in the relevant set of Rules. (The Appellate Rules Committee's report details the reasons why proposed Appellate Rule 26(a)(4)'s definition of "last day" differs from that in the other sets of rules.)

Statutory deadlines. The Advisory Committees have made substantial progress in preparing a draft list of statutory deadlines that Congress should be asked to amend in the light of the shift to the days-are-days computation method. Some of those amendments are needed because the statute sets a time period that parallels a time period set in the relevant set of Rules. Other amendments are advisable because the statute sets a key deadline that could pose a hardship if not lengthened to offset the shift in computation method. Part III of this memo discusses the question of statutory deadlines in more detail.

The availability of extensions under subdivision (b). As noted in our December 14, 2006 memo, any attempt to draft general but simple time-computation rules will likely yield an approach that, at least in rare situations, generates some problems of application. At the January meeting, you encouraged us to investigate whether subdivision (b) of the time-computation rules could be amended to authorize court extensions of statutory deadlines in such circumstances. We are not recommending that the Standing Committee pursue that course at this time. Part IV below explains our reasoning in more detail.

Coordination with Congress and with local rulemaking bodies. Assuming that the Time-Computation Project proceeds, it will be necessary to seek changes to a number of statutes and also to a number of local rules. Thus, we recommend that the Standing Committee should alert both legislators and local rulemakers to the Project's progress, so as to encourage coordination between the Rules amendments and the necessary changes to statutes and to local rules. This is discussed in Part V.

Legal holidays. Part VI discusses the treatment of days that are subject to a presidential proclamation, such as the National Day of Mourning for President Ford. We do not recommend a change in the template's text, but if the Committee wishes, a sentence could usefully be added to the Committee Note to address this question.

As discussed in Part II.A., the template defines "legal holiday" to include state holidays; for purposes of the time-computation rule, we believe that "state" should include other jurisdictions, such as the District of Columbia and U.S. territories and commonwealths. The Criminal Rules already contain such a definition. The Civil Rules Committee proposes to adopt a Rules-wide definition of the term "state." The Appellate Rules Committee is not yet ready to adopt a Rules-wide definition (because it desires further study), and proposes instead to include

the definition in the proposed amendment to Rule 26(a). The Bankruptcy Rules Committee has decided not to define the term because 11 U.S.C. § 101(52) already defines "state" to include the District of Columbia and Puerto Rico.

II. Recent developments

As you know, at the January 2007 Standing Committee meeting, we reported on the Project's progress, and the Committee directed us to continue with the Project. This part discusses our subsequent work and that of the Advisory Committees.

A. Changes to the template

The template has undergone some revisions in response to feedback received by the Subcommittee over the past four months. The enclosed copy of the template is redlined to show the changes made to the template since the time of the Standing Committee's January meeting; clean versions of the template as adopted by each Advisory Committee are included in the Advisory Committee reports.

New subdivision dealing with inaccessibility. One issue discussed at the January meeting was the question of backward-counted filing deadlines. Under the template as it stood at the time of the January meeting, difficulties would have arisen when a backward-counted filing deadline expired on a day when it turned out that the clerk's office was unexpectedly inaccessible.[1] After the January meeting, we considered various ways to redraft the template to account for this problem. Judge Hartz pointed out that subdivisions (a)(1)(C) and (a)(2)(C) conflated two different types of issues: Foreseeable counting problems (concerning weekends and holidays) simply function differently than issues of inaccessibility (which can be unplanned and unforeseen). This insight led us to create a new subdivision which deals specifically with the issue of inaccessibility.[2] We deleted the existing references to inaccessibility from subdivisions (a)(1) and (a)(2). We also reversed the order of the subdivisions defining the "last day" and the "next day," to reflect the order in which the defined terms appear in the Rule.

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[1] For example, under current Appellate Rule 31(a)(1) a reply brief must be filed at least 3 days before argument unless the court for good cause allows a later filing. Suppose the argument date is Friday December 22, and the due date (under the January 2007 version of the template) is thus Tuesday December 19. And suppose that an unexpected snowstorm (and accompanying power failure) renders the clerk's office both physically and electronically inaccessible on December 19. Under the January 2007 version of the template, subdivisions (a)(1)(C) and (a)(3) indicated that these circumstances would yield a due date of December 18 – which seems unfair to the filer since this due date would only become apparent on December 19.

[2] At the time, we numbered this subdivision (a)(6). We later renumbered it (a)(3).

Further consideration of deadlines stated in hours. The redrafting process led us to give further thought to some of the choices made concerning deadlines stated in hours. What is now subdivision (a)(3)(B) extends the period only if inaccessibility occurs during the last hour of the period – not, for example, if the court is inaccessible two hours before but accessible during the last hour. Some might consider this hard on the filer, but we did not come up with a better alternative. On the other hand, once subdivision (a)(3)(B)'s extension kicks in, it continues the period for a full 24 hours (or more, if the next day is a weekend or holiday or inaccessible day). Some might consider this an excessive extension. But it is difficult to fashion an alternative, since lawyers should not be put in the position of monitoring the court's servers (and/or the weather) to determine the precise time when inaccessibility ends and accessibility returns. The difficulty would be especially acute for non-local lawyers who are making paper filings. Thus, we decided that the presumptive approach should be a 24-hour extension; but as the text and note make clear, the court can shorten the extension.

Statutes that specify a time-computation method. In March, we revised the opening language of subdivision (a) to state that it applies "in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time." We made this change in order to account for statutory provisions that both set a time period for use in litigation and provide explicit instructions on how the period should be computed. Our subcommittee's master list of short statutory time periods omits periods that explicitly instruct that weekends and holidays not be counted. Those periods were omitted based on the assumption that since the statute specifies the manner of counting, no court would apply a contrary time-counting Rule. But it occurred to us recently that this assumption might have been hasty. An argument could be made that, as to statutes that predate the adoption of the template in the time-counting Rules, the later-adopted Rule trumps the previously-adopted statutory time-counting provision. It would arguably rise to the level of absurdity to apply a days-are-days time-counting Rule to calculate a period explicitly set in "business days" or "working days." But even if this line of reasoning ultimately leads courts to reject the notion that the new time-counting Rules supersede explicit statutory directives concerning the method of computation, we decided it would be best to draft the Rules to preempt litigation on this point.

Defining "state" for purposes of the definition of "legal holiday." We also decided that the template's reference to "state holidays" ought to extend to other places where the Rules would apply, such as the District of Columbia and Puerto Rico. The template rule defines "legal holiday" to include the listed holidays plus "any other day declared a holiday by the President, Congress, or the state where the district court is located." The background definitional principles vary. Civil Rule 81(e) provides that "When the word 'state' is used, it includes, if appropriate, the District of Columbia." Criminal Rule 1(b)(9) provides that "'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Appellate Rules contain no such definitional provision. The Bankruptcy Rules themselves contain no relevant definition (but 11 U.S.C. § 101(52) defines "state" to include D.C. and Puerto Rico). We asked the Advisory Committees (other than the Criminal Rules Committee) to consider whether they wish to adopt a general definition such as that in Criminal Rule 1(b)(9). We

understand that the Civil Rules Committee is considering whether to seek publication of a proposed general definition or whether, instead, to include a definition in subdivision (a)(6) of the time-computation rule. The Appellate Rules Committee chose the latter approach because it wishes to engage in further study of the advisability of a general definition. The Bankruptcy Rules Committee decided that neither measure is needed in the light of the definition in 11 U.S.C. § 101(52).

C. Spring Advisory Committee meetings

The Bankruptcy Rules Committee, at its March 2007 meeting, decided to move ahead with the time computation project in sync with the other Advisory Committees. The Committee approved for publication an amendment to Bankruptcy Rule 9006(a) that adopts the time-computation template. The Committee also approved amendments to the Bankruptcy Rules to adjust short time periods set by the Rules. The Committee did not adopt a definition of the term "state"; it was felt that an adequate definition is provided by 11 U.S.C. § 101(52), which defines "state" to include the District of Columbia and Puerto Rico.

The Criminal Rules Committee, at its April 2007 meeting, approved for publication an amendment that would adopt the template as Criminal Rule 45(a). The Committee also approved amendments that will extend various time periods set in the Criminal Rules. The Committee discussed statutory deadlines. It was noted that a few of the Rules-based deadlines are also reflected in statutes; apart from that, there are other statutory deadlines that should also be considered for amendment. The Department of Justice has stressed the importance of seeking congressional amendments to lengthen a number of key statutory deadlines. The DOJ also noted the importance of working to ensure that local rules are appropriately revised to account for the new time-computation method.

At its April 2007 meeting, the Civil Rules Committee approved for publication amendments that adopt the template as Civil Rule 6(a) and that adjust various time periods set by the Civil Rules. The Committee discussed the issue of statutory time periods, giving particular attention to 28 U.S.C. § 636(b). That statute sets a ten-day period for serving and filing written objections to a magistrate judge's proposed findings and recommendations; the ten-day period is now also reflected in Civil Rule 72. The Committee proposes to amend Rule 72 to lengthen the period to 14 days to offset the change in time-computation method. A corresponding amendment to Section 636(b) would thus be advisable. The Committee considered a list of other possible candidates for legislative amendment, but understood that it was not required to reach any final recommendations at the spring meeting.

At its spring meeting, the Appellate Rules Committee approved for publication a package of amendments that adopts the template as Appellate Rule 26(a) and that lengthens short Rules-based time periods to offset the change in time-computation approach. The Committee decided to define "state" in Rule 26(a)(6) rather than adopting a general definition at this time; the latter

question will await further study. The Committee considered the statutory deadlines that affect appellate practice, and decided to recommend that the following statutes be considered for amendment in the light of the proposed shift in time-computation approach: 28 U.S.C. § 2107(c); 18 U.S.C. § 3771(d); Classified Information Procedures Act § 7(b); and 28 U.S.C. § 1453(c).

At its fall meeting, the Evidence Rules Committee had noted that the Evidence Rules contain a few deadlines and had suggested that a reference to the Federal Rules of Evidence be placed in the Civil and Criminal Rules versions of the template. As discussed in our December 14, 2006 memo, the Subcommittee does not favor placing such a reference in the template. Members of the Subcommittee suggested to the Evidence Rules Committee that a provision be added to the Evidence Rules that would incorporate by reference the time-computation provision in the set of rules that applies to the relevant proceeding. At its spring meeting, the Evidence Rules Committee determined that there is no need for the Evidence Rules to address the question of time computation.

III. Statutory deadlines

As you know, there are more than 170 statutory time periods that could theoretically be affected by the shift in time-computation approach. The universe of statutory provisions to which existing caselaw has applied the time-computation Rules, however, is smaller. And within that smaller universe, not all the provisions will necessarily require amendment in order to avoid hardship to the bar. The Advisory Committees are each giving particular attention to the statutes that affect their area of practice, and they will update the Committee on their ongoing evaluation of those statutes. We would suggest that the materials that are published for comment should include a tentative list of the statutory provisions that would be most significantly affected by the change in time-computation approach; the materials could also provide a link to a website where the public can peruse the spreadsheet that contains the full list of 170+ provisions of which we are aware.

Current Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) explicitly apply to statutory time periods. Prior to the 2002 restyling, Criminal Rule 45(a) covered "any period of time"; Rule 45(a) now governs "any period of time specified in these rules, any local rule, or any court order." Under the template's proposed approach, Criminal Rule 45(a) would once again apply to statutory periods.

A number of courts have applied Civil Rule 6(a) to compute federal statutes of limitations,[3] but courts have not been willing to apply Civil Rule 6(a) to the computation of state

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[3] Thus, for instance, a number of courts of appeals have applied Civil Rule 6(a) to determine the running of AEDPA's one-year statute of limitations on habeas petitions. *See Bronaugh v. Ohio*, 235 F.3d 280, 284 (6th Cir. 2000) ("applying Federal Rule of Civil Procedure 6(a)'s standards for computing periods of time to § 2244(d)' s one-year statute of limitations");

statutes of limitations. Some courts have applied the pre-restyling version of Criminal Rule 45(a) to compute requirements set by the Speedy Trial Act[4] or the Bail Reform Act,[5] though such an approach is not universal.[6] Courts have applied Bankruptcy Rule 9006(a) to some statutory

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Hernandez v. Caldwell, 225 F.3d 435, 439 (4th Cir. 2000) (same); *Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998) (same); *Wright v. Norris*, 299 F.3d 926, 927 n.2 (8th Cir. 2002) (same); *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (same); *Newell v. Hanks*, 283 F.3d 827, 833 (7th Cir. 2002) (same). Rule 6(a) has also been applied to the computation of other limitations periods. *See Wirtz v. Peninsula Shipbuilders Ass'n*, 382 F.2d 237, 240 (4th Cir. 1967) (applying Rule 6(a) to determine time limit under 29 U.S.C. § 482(b) for Secretary of Labor to bring civil action against labor union under Labor Management Reporting and Disclosure Act of 1959).

[4] *See, e.g., U.S. v. Bruckman*, 874 F.2d 57, 62 (1st Cir. 1989) ("[B]ecause October 17, 1987 fell on a Saturday, the application of Fed.R.Crim.P. 45(a) did not require trial to commence until the following Monday, in this case, October 19, 1987."); U.S. v. Arbelaez, 7 F.3d 344, 348 (3d Cir. 1993); *U.S. v. Wright*, 990 F.2d 147, 149 (4th Cir. 1993) ("We also rely on an alternate analysis which supports the holding of the district court. Because the last day of the Speedy Trial period fell on a Sunday, Federal Rule of Criminal Procedure 45(a) applied, which made Monday, September 16th, the 30th day (not counting statutory exclusions) to indict Wright."); *U.S. v. Salgado*, 250 F.3d 438, 454 (6th Cir. 2001) ("Rule 45(a) is properly applied to extend the time period in § 3161(b) where the last day would otherwise fall on a day when the courthouse is not open for business and the government has no access to the grand jury or the clerk of court."); *U.S. v. Montoya*, 827 F.2d 143, 147 n.4 (7th Cir. 1987) (noting that a Judicial Conference Committee's guidelines for administering the Speedy Trial Act "adopt Rule 45's time computations as the appropriate measures for computing time under the Speedy Trial Act"); *U.S. v. Vickerage*, 921 F.2d 143, 147 (8th Cir. 1990) ("[T]he seventieth day fell on November 5, 1989, a Sunday. Because Vickerage's trial began on the next working day, there was no speedy trial violation. See Fed.R.Crim.P. 45(a)...."); U.S. v. Daly, 716 F.2d 1499, 1504 n.3 (9th Cir. 1983).

[5] *See U.S. v. Melendez-Carrion*, 790 F.2d 984, 991 (2d Cir. 1986) ("We agree with the Government that time computation for the short intervals set forth in [18 U.S.C. §] 3142(f) is governed by Rule 45(a)."); *U.S. v. Aitken*, 898 F.2d 104, 106 (9th Cir. 1990) ("Thus, we hold that Rule 45(a) applies to the computation of time periods under section 3142(f).").

[6] The Eleventh Circuit has applied Rule 45(a) to the Speedy Trial Act's requirements but not to those set by the Bail Reform Act. *Compare U.S. v. Hurtado*, 779 F.2d 1467, 1474 n.8 (11th Cir. 1985) ("While Congress expressly provided in Section 3142(d) that in counting days for temporary detention we should exclude weekends and holidays, it did not include a similar provision in subsection (f). By expressly providing in one section for such an exclusion Congress obviously assumed that Rule 45(a) would not otherwise apply."), *with U.S. v. Skanes*, 17 F.3d 1352, 1354 (11th Cir. 1994) ("Any doubt as to whether to count the day of arrest in computing the speedy trial calendar is put to rest by Fed.R.Crim.P. 45 .... Several circuits have used Rule 45

time periods[7] but not to others.[8] Appellate Rule 26(a) has been applied to statutory periods such

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in interpreting other provisions of the Speedy Trial Act ... and we see no reason that Rule 45 should not apply here.").

In one recent case, the Ninth Circuit refused to apply Rule 45(a) to the Speedy Trial Act's requirements because of Rules Enabling Act concerns. *See U.S. v. Daychild*, 357 F.3d 1082, 1092 n.13 (9th Cir. 2004) ("Because applying Fed.R.Crim.P. 45 to the speedy trial calculation would alter the substantive meaning that Congress gave to the Speedy Trial Act, Fed.R.Crim.P. 45 cannot properly be interpreted to supersede or contradict the Speedy Trial Act. The language of 18 U.S.C. § 3161(h)(1)(F) makes clear that Congress meant to count as excludable the day a motion is filed."). *Daychild* did not mention prior circuit precedent applying Criminal Rule 45(a) to the computation of other Speedy Trial Act provisions. See U.S. v. Daly, 716 F.2d 1499, 1504 n.3 (9th Cir. 1983). The *Daychild* court applied the restyled version of Criminal Rule 45(a), but did not discuss whether the restyling of the Rule's language affected the court's analysis.

[7] For example, the Ninth Circuit has applied Rule 9006(a) when calculating the 60-day period then set by 11 U.S.C. § 365(d)(4) for assuming leases of nonresidential real property. *See In re Victoria Station, Inc.*, 840 F.2d 682, 684 (9th Cir. 1988).

[8] In *In re Greene*, the Ninth Circuit held that Rule 9006(a) should not be used to compute the 90-days-pre-filing period concerning preferential transfers. First, the court held that 11 U.S.C. § 547 was not an "applicable statute" within the meaning of Rule 9006(a): "The occurrence and timing of a pre-petition transfer that later becomes the subject of a § 547 action do not constitute 'procedure in [a case] under title 11 of the United States Code,' since the transfer is made independently of any judicial action and thus is not an 'act[] to be done [or] proceeding[] to be had' in a bankruptcy case. Most importantly, a transfer can take place on any day of the week, including a weekend or holiday, and therefore does not require the bankruptcy court to be open for business." *In re Greene*, 223 F.3d 1064, 1069 (9th Cir. 2000). Second, the court held that applying Rule 9006(a) to Section 547 would violate the Rules Enabling Act's scope limitation because "[a]pplying Rule 9006(a) to § 547(b)(4)(A) would bestow upon the Trustee an avoidance power greater than what he is entitled to under the statute." *Id.* at 1071. By contrast, the First Circuit applied Rule 9006(a)'s predecessor to determine the 90-day period, *see Harbor Nat. Bank of Boston v. Sid Kumins, Inc.*, 696 F.2d 9, 10-11 (1st Cir. 1982).

as those for seeking review of agency action,[9] but the D.C. Circuit has refused to apply the Rule when the relevant statute specifies a different computation method.[10]

From a survey of the caselaw it is evident that courts' willingness to apply the Rules' computation provisions to statutory time periods varies depending on the nature of the deadline and the wording of the statute. It is also apparent that in many of the instances when courts have applied the Rules' computation method, the effect has been to determine the start and/or end points of the period. The time-computation project's most dramatic change – namely, the shift to the days-are-days computation approach – would leave such applications unaffected.

IV. Possible use of extensions under subdivision (b) to address anomalous applications of subdivision (a)

Pursuant to the Standing Committee's guidance, we considered whether subdivision (b) of the time-computation rules could be used to authorize extensions of statutory deadlines. We considered three options. First, we considered a modest use of subdivision (b) to address difficulties the bar might face in connection with the transition to the new time-computation system. Second, we considered a more far-reaching use of subdivision (b) to mitigate the effects of any unanticipated and problematic applications of the new time-computation method. Third, we considered the possibility of not extending subdivision (b) to cover statutory deadlines. For the reasons that follow, we recommend the third option. In sum, the use of subdivision (b) to extend statutory deadlines would add further uncertainty to the project. Moreover, we are hopeful that many transitional issues can be addressed through a package of legislative amendments to extend key statutory deadlines.

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[9] *See Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163, 166 (6th Cir. 1995) (statutory period for seeking review of decision by Secretary of Labor dismissing complaint under whistleblower provision of the Energy Reorganization Act); *United Mine Workers of America, Intern. Union v. Dole*, 870 F.2d 662, 665 (D.C. Cir. 1989) ("The [Mine Safety and Health Act of 1977] ... makes no separate provision for the computation of time and was enacted subsequent to the adoption of Rule 26(a); we conclude therefore that Congress intended its time periods to be computed in accordance with the federal rule."); *Funbus Systems, Inc. v. State of Cal. Public Utilities Com'n.*, 801 F.2d 1120, 1124 (9th Cir. 1986) ("Rule 26(a) is applicable to appellate review of agency orders."); *Miller v. U.S. Postal Service*, 685 F.2d 148, 149 (5th Cir. 1982) (applying Rule 26(a) to "statutory period within which to file a petition to review a final order or final decision of the Merit Systems Protection Board").

[10] *See Slinger Drainage, Inc. v. E.P.A.*, 237 F.3d 681, 683 (D.C. Cir. 2001) (refusing to apply Rule 26(a) to determine the period's start date because "the statute currently before us clearly establishes a separate provision for the computation of time: a person may obtain review by filing 'within the 30-day period *beginning on the date the civil penalty issued.*' 33 U.S.C. § 1319(g)(8)(B) (emphasis added)").

Subdivisions (b) in the Bankruptcy, Appellate, and current Civil time-counting Rules do not cover statutory deadlines. Subdivisions (b) in the current Criminal and restyled Civil time-counting Rules could be read to cover statutory deadlines, but there is no reason to think that the rulemakers intended such a reading and to our knowledge no court has adopted such a reading.

The extension of subdivision (b) to statutory deadlines could prompt at least three objections. First, such extensions might be argued to violate the scope limitations in the Rules Enabling Act ("REA"). Second, such extensions might be viewed as running afoul of some principle that limits courts' discretion with respect to the scope of their own jurisdiction. Third, authorizing such extensions in Bankruptcy Rule 9006(b) could require legislation in the light of the fact that there is no supersession authority for bankruptcy rulemaking.

It could nonetheless be possible to use subdivision (b) to address transitional difficulties in adjusting to the new time-counting system. That is, a court might be authorized to extend a deadline so that the deadline falls where it would have fallen under the prior time-counting approach; such extensions might be made available to a litigant who shows good cause and excusable neglect.[11] Such an extension might be viewed as avoiding the REA, jurisdictional-

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[11] Because a limited transitional provision might be thought of as a provision concerning the effective date of the Rules amendments, we considered whether an effective date provision might be an alternative way to address the transitional issue. As to the Civil, Criminal, and Appellate Rules, 28 U.S.C. § 2074 provides:

> The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

Section 2075, concerning the Bankruptcy Rules, provides simply that "[t]he Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law." 28 U.S.C. § 2075.

The Supreme Court's orders customarily provide that amendments "shall take effect on December 1, [year], and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See, e.g., Order of April 12, 2006, 234 F.R.D.

deadline and bankruptcy supersession concerns, for the following reason: The transitional extension of statutory deadlines under subdivision (b) would by definition only affect deadlines that have changed as a result of the Rules' shift to a days-are-days approach. And if a statutory deadline is affected by the Rules' shift to a days-are-days approach, that must mean that the statutory deadline in question is an appropriate candidate for definition under the time-computation Rules. In other words, statutory periods that are not a fit subject for definition through rulemaking will be unaffected by the change in the Rules' time-computation approach, and thus will not occasion a need for transitional extensions under subdivision (b).

The use of subdivision (b) for the transitional extensions discussed above would be limited in two ways. First, because this use of the Rule would be justified as a way to ease the bar's adjustment to the Rules' new time-computation approach, it would be appropriate for this use to sunset after a suitable period of time. Second, such a use would merely permit the calculation of the statutory time period using the Rules' prior time-computation approach instead of the Rules' new approach. The difference between these two approaches would generally be limited to at most four days (or a few more than four if the period spans a holiday), so that the extension would be limited in length.

By contrast, another possible use of subdivision (b) might be more expansive. As we have observed previously, when one adopts any simple, broadly applicable time-counting approach, there will likely be at least a few situations in which the approach's application yields odd results.[12] It may not be possible to anticipate all such situations; and even if they could all be anticipated, drafting a rule that addresses all such situations might be difficult and could result in a longer and more complex rule than one might otherwise want. If courts could be given discretion to extend deadlines when necessary to avoid such odd results, one could preserve the

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221. As to proceedings pending on the relevant amendment's effective date, this formulation could provide a court with a justification for applying the old rather than the new time-computation approach if a litigant showed good cause and excusable neglect. The same would not be true, however, with respect to proceedings commenced after the amendment's effective date. Theoretically, the Court's order adopting the proposed time-computation amendments could depart from the customary formulation by stating that even as to pending proceedings, for the first year (or two years) after the amendments' effective date courts can apply the former rather than the new time-computation approach if a litigant shows good cause and excusable neglect. But such a provision does not appear to have been used before (a search through the Orders adopting amendments to the Civil and Criminal Rules disclosed nothing similar), so it is not readily apparent whether such an approach would be deemed suitable.

[12] The example that we have used to illustrate this point is that of backward-counted filing deadlines. The recent revisions to the template appear to have taken care of this particular oddity.

simplicity of the rule but also avoid injustice in the (one hopes, rare) cases where odd results occur.[13]

We have argued above that transitional extensions could be seen as merely empowering the courts – for a limited transitional period – to apply the old time-computation system rather than the new if a litigant shows good cause. If the rulemakers can permissibly prescribe the old and then the new time-computation approaches with respect to statutory deadlines, then it should also be permissible for the rulemakers to authorize courts to grant such limited transitional extensions. But it is not obvious that this rationale would be available for non-transitional extensions of the sort just mentioned. Extensions designed to mitigate an untoward application of the new time-computation rules might not be limited to the time that would have been available under the old time-computation system; rather, the extension in a given case would be tailored to address whatever the particular difficulty might be. Such extensions might still fall within the range of appropriate gap-filling measures that define how to count for purposes of the relevant statutory deadline – but in some instances the extension might be significant enough that it would seem less a gap-filling measure and more a departure from the time originally set by Congress. In that event, two questions arise. First, can the rulemakers ever give courts discretion to depart from deadlines set by Congress? Second, even if the rulemakers can do so in general, are there specific constraints that would apply to certain types of statutory deadlines?

The rulemakers have no supersession authority for bankruptcy procedure. For the other sets of rules, supersession authority exists, and the question is whether a rule that gives a court discretion to depart from a statutory deadline can constitute a valid exercise of supersession authority. It is a commonplace that the Rules confer a great deal of discretion on courts. The question here is whether such latitude can include discretion to supersede statutory deadlines. Where supersession authority exists, a valid Rule – i.e., one that does not overstep the REA's scope limits – could itself vary the time set by a statute. For example, if a statute set a 10-day deadline for some litigation filing, a valid Rule could provide that the deadline is, instead, 14 days. But can the rulemakers, instead of specifying the new superseding time limit, provide that the court has discretion to do so? It might be argued that this would be improper, because the supersession authority assumes that the specific superseding measure will itself be adopted through the rulemaking process. The rulemaking process provides a notice-and-comment period, a series of vetogates through which amendments must pass, and, importantly, the opportunity for congressional rejection before a proposed rule takes effect. These safeguards are, of course, absent when a court makes an ad hoc decision during the course of litigation. In any event, even if a rule delegating to courts the discretion to supersede a statutory deadline in an ad hoc fashion could be a valid exercise of supersession, it is unclear that it would be a wise one.

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[13] From a litigant's perspective, the subdivision (b) solution might be less desirable than a specific fix in the Rule's time-counting provisions; the latter would operate automatically, while an extension under subdivision (b) would lie within the court's discretion.

Assuming that one might argue that the rulemakers could, in general, validly empower courts to depart from statutory deadlines in appropriate cases, the question remains whether specific constraints on the rulemaking authority would place some statutory deadlines off limits. In addition to bankruptcy procedure – where there is no supersession authority – limits would exist with respect to deadlines implicating substantive rights, and could also exist with respect to deadlines that define a court's jurisdiction. Rules promulgated pursuant to the REA cannot abridge, enlarge or modify substantive rights. A rule that purported to authorize departure from statutory deadlines generally would likely be interpreted not to apply to deadlines affecting substantive rights, in order to avoid questions of invalidity under the REA. As of this writing, it is currently somewhat unclear which deadlines may have jurisdictional significance.[14] To the extent that a deadline constrains the court's subject matter jurisdiction, it seems likely that any authorization for court extensions of that deadline should be narrowly drawn.

Non-transitional extensions, then, present a tougher question than transitional extensions. Non-transitional extensions, to be useful, must be flexible enough to cover a variety of as yet unforeseen eventualities. But that flexibility would increase the chance that authorizing such extensions would be seen as authorizing supersession. Such an authorization would clearly be unavailable in the bankruptcy context unless it were implemented via legislation. And such an authorization, even if it surmounted questions about the validity of authorizing ad hoc supersession through a grant of discretion to courts, would not necessarily be wise.

The extent of any concerns about supersession, or about modifying substantive rights, or about affecting subject matter jurisdiction, depends on the nature and extent of the potential deadline extension. With respect to non-transitional extensions these attributes are impossible to predict with precision; the problem that gave rise to this analysis was our recognition of our inability to predict, in advance, the problems that may arise concerning all the possible applications of the new computation system.

In sum, our analysis suggests that there is good reason to be wary of employing subdivision (b) to authorize extensions of statutory deadlines. We do not recommend that the Standing Committee pursue such a course at this time.

V. Coordination with Congress and with local rulemaking bodies

We know that the Committee is well aware of the need to coordinate with Congress as the Project moves ahead, and that you have already engaged in some discussions with legislators and their aides about these issues. As discussed above, the Advisory Committees are working to compile a tentative list of statutes that are strong candidates for revision in the light of the shift in

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[14] When the Court decides *Bowles v. Russell* (which was argued in March), it may shed more light on the questions raised by its recent decisions in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. U.S.*, 546 U.S. 12 (2005).

time-computation method. Assuming that Congress is willing to enact legislation along those lines, it would be advisable to coordinate the effective dates of the legislation and the Rules amendments.

It will also be important to raise awareness of the impending change in time-computation approach among the entities that are responsible for local rulemaking. The shift in time-computation approach may cause hardship if time periods set in local rules are not adjusted accordingly. Thus, local rulemakers should be alerted to review short time periods in their local rules. In addition, they should be encouraged to give particular attention to the treatment of inaccessibility of the clerk's office, especially with respect to electronic filing; though the Time-Computation Subcommittee does not recommend that we attempt to address this issue in the time-computation rules, we are aware that members of the bar desire clarity and certainty in this area.

VI. Legal holidays and national days of observance

Pursuant to the Standing Committee's suggestion, we have investigated how national days of observance are treated under the time-computation rules' definition of "legal holiday." The caselaw on this question is sparse, but that which does exist indicates that when the President declares the government closed for business on a day of national observance, that should count as a holiday for purposes of the time-computation rules.

The Seventh Circuit has adopted "a rule that says that when the President closes the government for celebratory or commemorative reasons... rather than because of a budgetary crisis ... or for a snow emergency, terrorist act, or some other force majeure, the presumption is that he has declared a legal holiday." *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005). In reaching this conclusion, the *Hart* court relied on "the natural understanding of what the President is doing when he closes the executive branch on the day after Christmas: he is extending the Christmas holiday," and the court observed that "[i]t would be positively Grinch-like for the President to say, 'you can have December 26 off, but don't think it's a legal holiday.'" *Id.*

The D.C. Circuit faced a similar issue with respect to Christmas Eve in 2001. The President had "directed that 'all executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty' on December 24, 2001, with exceptions for national security. Exec. Order No. 13,238, 66 Fed.Reg. 63,903 (Dec. 5, 2001). The President's order also provided that December 24 would fall within the scope of various laws governing holiday pay and leave for federal workers." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003). The *Mashpee* court concluded – based on the goals served by Civil Rule 6(a) – that December 24, 2001 should count as a legal holiday:

> Rule 6(a) specifically is intended to alleviate the "hardship" of allowing days of rest to shorten already tight deadlines, Fed. R. Civ. P. 6 advisory committee's note.

> When the President gives all employees in the Executive Branch a day off, we believe Rule 6(a) contemplates a break for federal litigators. To penalize the Secretary (rather drastically, by dismissing her appeal) because the President did not use the word "holiday" in the executive order would quite plainly run counter to the purpose of the Rule.

Mashpee, 336 F.3d at 1099.[15] (The *Hart* court noted that though the *Mashpee* court "bolstered its analysis by pointing out that one of the litigants was a federal agency, which would be closed on December 26[,] the court did not make that observation the linchpin of its analysis. It would have been odd had it done so; it would have meant that the opposing litigants in the case had different filing deadlines, since the plaintiff was not a federal agency." *Hart*, 396 F.3d at 890-91.)

In both *Hart* and *Mashpee*, it was irrelevant whether the clerk's office was inaccessible on the day in question, because the cases concerned the rule that intermediate holidays are omitted for purposes of counting short periods, and that rule does not mention inaccessibility of the clerk's office. Neither case's reasoning turned upon whether the courts (as opposed to the executive branch) were closed on the relevant day.

If the Standing Committee wishes the Note to address this question, the following could usefully be added to the Note's discussion of subdivision (a)(6):

> Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." On the application of this provision to days when the President orders the government closed for purposes of celebration or commemoration, see *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003).

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[15] The district court in *Tusino v. International Brotherhood of Teamsters*, 2004 WL 2827643 (S.D.N.Y. 2004), considered an executive order providing that "[a]ll executive departments, independent establishments, and other governmental agencies shall be closed on June 11, 2004, as a mark of respect for Ronald Reagan," but exempting "departments, independent establishments, and governmental agencies that the heads thereof determine should remain open for reasons of national security or defense or other essential public business." Citing *Mashpee*, the *Tusino* court concluded that June 11, 2004 should count as a legal holiday for purposes of computing a short time period under Civil Rule 6(a). *See Tusino*, 2004 WL 2827643, at *1 n.1.

VII. Conclusion

Thanks to the hard work and input of many participants, we are ready to seek publication of the amendments that implement the Time-Computation Project. We look forward to the Committee's consideration of the proposed amendments.

Encl.

Rule 6. Computing and Extending Time

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

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

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

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

(C) include the last day of the period~~[unless it]~~, but if the last day is a Saturday, Sunday, or legal holiday~~[, or — if ...s excluded]~~, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday~~[, or day w...accessible]~~.

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

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

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

(C) if the period would end on a Saturday, Sunday, or legal holiday~~[, or — if ...accessible]~~, then continue the period until the same time on the next day that is not a Saturday, Sunday, ~~[legal holi.....accessible]]~~or legal holiday.

~~[(3) *"Next ...an event.*]~~

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

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

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

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

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

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

(~~5~~6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located. [The word 'state,' as used in this Rule,

includes the District of Columbia and any commonwealth, territory or possession of the United States.]

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 15, 2007**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules ("the Evidence Rules Committee" or "the Committee") met on April 12th and 13th in Rancho Santa Fe, California. The Evidence Rules Committee approved one proposed amendment to the Evidence Rules — ultimately for direct enactment by Congress — with the recommendation that the Standing Committee approve it and recommend to the Judicial Conference that it be proposed to Congress. The proposed Rule 502 is discussed as an action item in this Report, along with the accompanying report to Congress and a separate report on selective waiver.

The Evidence Rules Committee also approved a report to Congress on the necessity and desirability of codifying a "harm-to-child" exception to the marital privileges. This report was prepared pursuant to the Adam Walsh Child Protection Act, which requires the Standing Committee to report to Congress on the necessity and desirability of codifying such an exception. The report is drafted as a report from the Standing Committee to Congress, and the Evidence Rules Committee recommends that the Standing Committee approve the report and send it to Congress. The report on the harm-to-child exception is discussed as a second action item in this Report.

The Evidence Rules Committee also discussed a proposal to add a time-counting rule to the Evidence Rules; it voted unanimously to take no action on the proposal, on the grounds that a time-counting rule was not necessary in the Evidence Rules and that implementation of such a rule, in the context of parallel amendments to the Civil and Criminal Rules, would lead to confusion and litigation. The Evidence Rules Committee further decided to proceed with a restyling project. Finally, the Committee has decided to consider a possible amendment to Rule 804(b)(3), the hearsay exception for declarations against penal interest. The decisions on time-counting, restyling, and Rule 804(b)(3) are discussed as separate information items in this Report.

The draft minutes of the April 2007 meeting set forth a more detailed discussion of all the matters considered by the Evidence Rules Committee. Those minutes are attached to this Report. Also attached is the proposed amendment to Rule 502 and the accompanying reports to Congress, and the proposed report to Congress on the harm-to-child exception to the marital privileges.

II. Action Items

A. Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product.

The Evidence Rules Committee has found a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. One major problem is that significant amounts of time and effort are expended during litigation to preserve the privilege, even when many of the documents are of no concern to the producing party. Parties must be extremely careful, because if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Enormous expenses are put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. After a number of public hearings and extensive public comment, the Committee has determined that the discovery process would be more efficient and less costly if waiver rules are relaxed.

Another concern expressed to the Committee involves the production of confidential or work product material by a corporation that is the subject of a government investigation. Most federal courts have held that such a disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a "selective waiver" is enforceable.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chair of the House Judiciary Committee requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. It was recognized that any

rule prepared by the Advisory Committee would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

In 2006 the Evidence Rules Committee prepared a draft rule that would address the problems of subject matter waiver, inadvertent disclosure, enforceability of confidentiality orders, and selective waiver. This draft rule was distributed to selected federal judges, state and federal regulators, members of the bar, and academics. On the first day of its April 2006 meeting, the Committee held a mini-hearing on the proposed rule 502 and Committee Note, inviting presentations from those who reviewed the rule. Based on comments received at the hearing, the Evidence Rules Committee revised the draft. Most importantly, the draft was scaled back so that it would not apply when a disclosure is made in state court and the waiver determination is made by a state court (the so-called "state to state" problem).

After discussion and review of the draft rule on waiver at its Fall 2006 meeting, the Committee unanimously agreed on the following basic principles, as embodied in the proposed Rule 502:

1. A subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure "ought in fairness" to be required in order to protect against a misrepresentation that might arise from the previous disclosure.

2. An inadvertent disclosure should not constitute a waiver if the holder of the privilege or work product protection acted reasonably to prevent disclosure and took reasonably prompt measures to rectify the error.

3. A provision on selective waiver should be included in any proposed rule released for public comment, but should be placed in brackets to indicate that the Committee had not yet determined whether a provision on selective waiver should be sent to Congress.

4. Parties to litigation should be able to protect against the consequences of waiver by seeking a confidentiality order from the court; and in order to give the parties reliable protection, that confidentiality order must bind non-parties in any federal or state court.

5. Parties should be able to contract around common-law waiver rules by entering into confidentiality agreements; but in the absence of a court order, these agreements cannot bind non-parties.

6. Rule 502 must apply in state court actions where the question considered by the state court is whether a disclosure previously made in federal court constitutes a waiver. If Rule 502 did not apply in such circumstances, then parties could not rely on it, for fear that any disclosure of privilege or work product in compliance with Rule 502 could nonetheless be found to be a waiver — even a subject matter waiver — in a subsequent action in state court.

After substantial discussion at the Spring 2006 meeting, the Evidence Rules Committee unanimously approved a proposed Rule 502 and the accompanying Committee Note for release for public comment. The Standing Committee released the rule for public comment. The public comment period ended in February 2007.

The Evidence Rules Committee received more than 70 public comments on proposed Rule 502, and held two public hearings at which more than 20 witnesses testified. At its April 2007 meeting, the Committee carefully considered all of the public comment, as well as other issues raised by Committee members after extensive review of the text of proposed Rule 502. The following changes were made to proposed Rule 502 as it was issued for public comment:

1. Changes were made by the Style Subcommittee of the Standing Committee, both to the text as issued for public comment, and to the changes to the rule made at the April 2007 Evidence Rules Committee meeting.

2. The text was clarified to indicate that the protections of Rule 502 apply in all cases in federal court, including cases in which state law provides the rule of decision.

3. The text was clarified to stress that Rule 502 applies in state court with respect to the consequences of disclosures previously made at the federal level — despite any indication to the contrary that might be found in the language of Rules 101 and 1101.

4. Language was added to emphasize that a subject matter waiver cannot be found unless the waiver is intentional—so that an inadvertent disclosure can never constitute a subject matter waiver.

5. The Committee relaxed the requirements necessary to obtain protection against waiver from an inadvertent disclosure. As amended, the inadvertent disclosure provision assures that parties are not required to take extraordinary efforts to prevent disclosure of privilege and work product; nor are parties required to conduct a post-production review to determine whether any protected information has been mistakenly disclosed.

6. The protections against waiver by mistaken disclosure were extended to disclosures made to federal offices or agencies, on the ground that productions in this context can involve the same costs of pre-production privilege review as in litigation.

7. The selective waiver provision — on which the Evidence Rules Committee had never voted affirmatively — was dropped from the Proposed Rule 502. The Evidence Rules Committee approved a separate report to Congress on selective waiver, setting forth the arguments both in favor and against the doctrine, and explaining the Committee's decision to take no position on the merits of selective waiver. The Evidence Rules Committee also prepared language for a statute on selective waiver to accompany that separate report to Congress; while the Committee took no position on the merits, it determined that the

language could be useful to Congress should it decide to proceed with a separate selective waiver provision.

8. The Committee deleted the language conditioning enforceability of federal court confidentiality orders on agreement of the parties. It concluded that a federal order finding that disclosure is not a waiver should be enforceable in any subsequent proceeding, regardless of party agreement.

9. The definition of work product was expanded to include intangible information, as the work product protection under federal common law extends to all materials prepared in anticipation of litigation, including intangibles.

After considering and approving these changes, the Evidence Rules Committee voted unanimously in favor of 1) Proposed Rule 502 as amended from the version issued for public comment; 2) a cover letter to Congress to accompany and explain Proposed Rule 502; and 3) a separate letter to Congress concerning selective waiver, taking no position on the merits, but including language for a selective waiver statute should Congress decide to proceed with separate legislation. Each of these documents is set forth in an appendix to this Report.

Recommendation: The Evidence Rules Committee unanimously recommends that the Standing Committee 1) approve Proposed Evidence Rule 502, the cover letter to Congress accompanying the Proposed Rule, and the separate letter to Congress on selective waiver, and 2) refer those documents to the Judicial Conference with the recommendation that they be submitted to Congress.

B. Report on the Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, directs the Evidence Rules Committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or (2) a child under the custody or control of either spouse."

At its last two meetings, the Evidence Rules Committee researched and analyzed the necessity and desirability of amending the Evidence Rules to provide a "harm-to-child" exception

to the marital privileges. The Committee has determined that almost all courts to consider the question have already adopted an exception to the marital privileges for cases in which the defendant is charged with harm to a child in the household. One recent federal case, however, refused to adopt a harm-to-child exception to the adverse testimonial privilege; that court allowed the defendant's wife to refuse to testify even though the defendant was charged with sexually abusing a child in the household. The Committee has concluded, however, that this recent case is dubious authority, because its sole expressed rationale is that no court had yet established a harm-to-child exception, even though reported cases do in fact apply a harm-to-child exception in identical circumstances — including a previous case in the court's own circuit.

The Evidence Rules Committee determined that it would not itself propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit. Committee members also noted that an amendment to establish a harm to child exception would raise at least four other problems: 1) piecemeal codification of privilege law; 2) codification of an exception to a rule of privilege that is not itself codified; 3) difficulties in determining the scope of such an exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and 4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The Evidence Rules Committee prepared a draft report to submit to the Standing Committee, styled as a report by the Standing Committee to Congress. The report concludes that an amendment to the Evidence Rules to codify a harm-to-child exception is neither necessary nor desirable. The Committee also decided, however, that the report should include draft language for a harm-to-child exception should Congress decide to consider codification of the exception. The following draft language was approved by the Evidence Rules Committee:

> **Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child.** – The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft report of the Standing Committee to Congress is attached as an appendix to this Report.

Recommendation: The Evidence Rules Committee recommends that the Standing Committee adopt the draft report on the harm-to-child exception to the marital privileges and refer the report to Congress.

III. Information Items

A. Time-Counting Project

The Evidence Rules Committee carefully considered the time-counting template prepared by a Subcommittee of the Standing Committee. The Committee voted unanimously that it would take no action on an amendment to add a rule on time-counting to the Evidence Rules. The Committee determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because 1) there is no existing problem that would be resolved by such an amendment, and 2) adding the template to the Evidence Rules is likely to create confusion and unnecessary litigation.

There are only a handful of Evidence Rules that are subject to day-based time-counting: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield, unless good cause is shown; and 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial, unless good cause is shown. There are only two year-based time periods that could potentially be subject to a time-counting rule that would govern when a time period begins and ends: 1) Rule 609(b) provides a special balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 2) Rules 803(16) and 901(b)(8) work together to provide for admissibility of documents over 20 years old.

The Evidence Rules Committee concluded first that there is no need to change the number of days in any time periods in the Evidence Rules, because they are 14 days or longer and so will not be shortened or otherwise affected by the time-counting template. Nor did the Committee find a need to specify when the time periods in the Evidence Rules begin or end. The Committee was unable to find any reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules. The Committee noted that the day-based time periods in the Evidence Rules are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. As to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. Any dispute on time-counting as to the two year-based time periods in the Evidence Rules could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

The Evidence Rules Committee also noted the anomalies that could arise in trying to match a time-counting rule in the Evidence Rules with parallel time-counting provisions in the Civil and Criminal Rules. Most of the provisions in the time-counting template have no applicability to the Evidence Rules — examples include the subdivisions on counting hour-based time periods and on inaccessibility of the clerk's office. The Committee was concerned that the inclusion of provisions with no applicability to the Evidence Rules could create confusion; lawyers who assume quite properly that Evidence Rules are written for a purpose may think that there must be some hour-based

time period or some need to determine inaccessibility that they have overlooked. The problems could perhaps be addressed by tailoring the text of the template and deleting the provisions that have no utility in the Evidence Rules. But the Committee found that solution to raise problems of its own. If a time-counting Evidence Rule were not identical to the time-counting Civil and Criminal Rules, there is likely to be confusion and an invitation to litigation — one party arguing that the Evidence Rules count the time in one way and the other arguing that the Civil/Criminal rule comes out differently. And this is especially problematic because the template covers not only time-counting under the rules, but also time-counting under statutes, local rules and court orders. Under that language, the time-counting rule in the Evidence Rules would make it applicable not only to the few time-based Evidence Rules, but also to any statute or local rule that may be raised in the litigation — making it all the more important that the time-counting Evidence Rule track the Civil and Criminal Rules exactly.

For all these reasons, the Evidence Rules Committee voted unanimously to take no action on an amendment that would add a time-counting rule to the Evidence Rules.

B. Proposed Restyling Project

The Evidence Rules Committee has decided to undertake a project to restyle the Evidence Rules. The project is intended to be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. Many of the Evidence rules are "paper-based"; they refer to evidence in written and hardcopy form. The Committee determined that a restyling project can be used in part to update the paper-based language used throughout the Evidence Rules. Members also reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

Professor Joseph Kimble, the Standing Committee's consultant on Style, has already prepared a restyled version of three Evidence Rules — Rules 103, 404(b) and 612. The Evidence Rules Committee looks forward to working with Professor Kimble and the Style Subcommittee of the Standing Committee on this important project. The Evidence Rules Committee has set no timetable for completion of the restyling project.

C. *Crawford v. Washington* and the Federal Rules Hearsay Exceptions

The Evidence Rules Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against the accused violates the right to confrontation unless the

declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. Recently in *Whorton v. Bockting,* the Court held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause; thus, the only guarantee of reliability of non-testimonial hearsay is in the rules of evidence.

The decision in *Bockting* raises the question of whether any amendments should be proposed to the hearsay exceptions on the ground that as applied to non-testimonial hearsay, a particular exception may not be sufficiently reliable to be used against an accused. Before *Bockting*, it could still be argued that reliability-based amendments would not be necessary in criminal cases because the Confrontation Clause still regulated the reliability of non-testimonial hearsay. But that is no longer the case after *Bockting.*

The Evidence Rules Committee tentatively noted that one possibly questionable exception is Rule 804(b)(3), which provides that a hearsay statement can be admitted against the accused upon a finding that a reasonable declarant could believe that making the statement could send to subject him to a risk of penal sanction. There is no requirement in the Rule that the government provide any further corroborating circumstances indicating that the statement is trustworthy — even though the accused must provide corroborating circumstances to admit such a statement in his favor. The Committee will consider at its next meeting whether it is necessary to amend Rule 804(b)(3) to require that the government provide corroborating circumstances guaranteeing trustworthiness before a declaration against penal interest can be admitted against an accused.

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

Attachments:

Proposed Evidence Rule 502 and Committee Note.
Draft cover letter to Congress on Rule 502.
Draft cover letter to Congress on selective waiver.
Draft report to Congress on the harm-to-child exception to the marital privileges.
Draft minutes of the April 2007 meeting of the Evidence Rules Committee.

Advisory Committee on Evidence Rules
Proposed Amendment: New Rule 502

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver. — When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

*New material is underlined.

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

(c) Disclosure made in a state proceeding. — When the disclosure is made in a state proceeding and is not the

subject of a state-court order, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling effect of court order. — A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court. The order binds all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation.

(e) Controlling effect of party agreement. — An agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless it is incorporated into a court order.

(f) Controlling effect of this rule.—Notwithstanding Rules 101 and 1101, this rule applies to state proceedings in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. — In this rule:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of

production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege

with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b).The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle

is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair).

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145

F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, a communication or information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which are dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to

prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of communications or information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is

more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the

outset of discovery to a 'nonwaiver' agreement, which they can adopt as a case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the rule provides a party with a predictable protection — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of

waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection in a separate litigation from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

Moreover, the costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible inforation. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product").

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The following changes were made from the Proposed Rule 502 as issued for public comment:

1. Stylistic changes were provided by the Style Subcommittee of the Standing Committee

2. The text was clarified to indicate that the protections of Rule 502 apply in all cases in federal court, including cases in which state law provides the rule of decision.

3. The text was clarified to stress that Rule 502 applies in state court to determine whether a disclosure previously made at the federal level constitutes a waiver — despite any indication to the contrary that might be found in the language of Rules 101 and 1101.

4. Language was added to subdivision (a) to emphasize that a subject matter waiver cannot be found unless the waiver is intentional.

5. The Committee relaxed the requirements necessary to obtain protection against waiver from an inadvertent disclosure. As amended, the inadvertent disclosure provision assures that parties are not required to take extraordinary efforts to prevent disclosure of privilege and work product; nor are parties required to conduct a post-production review to determine whether any protected information has been disclosed inadvertently.

6. The protections against waiver by inadvertent disclosure were extended to disclosures made to federal offices or agencies, on the ground that productions in this context can involve the same costs of privilege review as in litigation.

7. The selective waiver provision — on which the Evidence Rules Committee had never voted affirmatively — was dropped from the Proposed Rule 502.

8. Language conditioning enforceability of federal court confidentiality orders on agreement of the parties was deleted.

9. The definition of work product was expanded to include intangible information.

SUMMARY OF PUBLIC COMMENTS

Matthew R. Gemello and Steven B. Stokdyk on behalf of the Corporations Committee Business Law Section of the State Bar of California (06-EV-001) "applaud and support the Advisory

Committee's efforts to advance proposed Rule 502 and the Advisory Committee's objectives of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to a discovery request." They oppose, however, the bracketed selective waiver provision released for public comment "because, among other things, we believe that (1) it will not fully protect the confidentiality of the attorney-client relationship, and (2) it will not advance the Advisory Committee's objective of reducing the burden and expense of litigation." Among other arguments, they contend that the language of the selective waiver provision covering an "investigation" is unclear because it may or may not extend to an inspection of a facility; and that it is unclear whether the holder of the protected information must be the target of the investigation.

Susan Hackett, Esq., (06-EV-002 and 06-EV-045), on behalf of the Association of Corporate Counsel, opposes the bracketed selective waiver provision that was issued for public comment. The Association concludes that it may have a "negative impact" in light of a "culture of waiver" that has been "created by government enforcement officials and prosecutors who have abused their discretion by routinely coercing companies to waive their privileges." The Association argues that a selective waiver protection "might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances . . . given that the government can now offer protection against third party disclosures." It states that selective waiver "addresses the collateral impact of the government's inappropriate waiver practices, but does nothing to encourage the necessary abstention from engaging in the underlying practice in the first place."

Gregory P. Joseph, Esq., (06-EV-003) argues that Rule 502(a), which limits subject matter waiver, provides a "problematic conflation of attorney-client privilege and work product protection."

He states that under Rule 502(a), the use of a witness statement may result in a waiver of a memorandum of the lawyer's evaluation of the witness statement, on the ground that the memorandum "ought in fairness to be considered" with the statement. Mr. Joseph agrees that the "ought in fairness" language accurately captures the better law on subject matter waiver of attorney-client privilege. But he concludes that the "ought in fairness" language may lead to more and not less subject matter waivers as applied to disclosure of work product. Mr. Joseph generally supports other aspects of the Rule, including the provisions on inadvertent disclosure, selective waiver, and the enforceability of court orders. He argues, however, that if selective waiver protection is not enacted, then the inadvertent disclosure provision of Rule 502 (b) should be extended to disclosures made to public offices or agencies. Finally, he argues that the definition of work product in Rule 502 as released for public comment should be expanded because it applies only to "materials", whereas "a great deal of work product is oral or otherwise intangible, and it is protected."

Robert E. Leake, Jr., Esq. (06-EV-004) endorses proposed Rule 502, concluding that "Got ya" is "a game that should be discouraged."

Douglas G. House, Esq. (06-EV-005) supports proposed Rule 502 and favors rules permitting "the selective/potential waiver of the attorney-client privilege."

Phillip R. Sellinger, Esq., (06-EV-006) endorses proposed Rule 502 but urges that its provisions be extended to govern disclosures made in state proceedings even when the consequence of the disclosure is to be determined by a state court. He argues that complete uniformity of privilege law is necessary to assure predictability and to avoid conflicting outcomes in essentially identical matters.

Paul R. Rice, Esq. (06-EV-007) opposes proposed Rule 502 for the reasons stated in his many publications that he cites throughout his critique. In his view, Rule 502 is evidence that the "this Advisory Committee" has sold out to corporate interests.

George L. Paul, Esq., (06-EV-008 and 06-EV-052) generally supports proposed Rule 502, because the costs of discovery have "strangled" the process of commercial litigation and privilege reviews impose "phenomenal" expense. He recommends, however, that the Rule be extended to cover disclosures made in state proceedings, because the vast majority of litigation occurs in state courts. He is also concerned that the standard for avoiding waiver by inadvertent disclosure — that the party took "reasonable precautions" to avoid disclosure — may be difficult to apply without more guidance in the Rule or Committee Note. Mr. Paul concludes that "reasonable precaution does not necessarily mean eyes on review" and that "search and retrieval technology might be a reasonable alternative."

Thomas Y. Allman, Esq., (06-EV-009) supports Rule 502 as issued for public comment, but opposes a proposal considered by the Advisory Committee that would provide for enforceability of court confidentiality orders that are not based on agreement between the parties. He argues that parties should not be "compelled to surrender the right to conduct privilege reviews on realistic schedules so that a case management order can provide expedited and inexpensive review." Mr. Allman suggests that the Committee Note contain an "admonition to the effect that it is not essential to the validity of the court order on non-waiver that an accelerated discovery schedule be agreed to or ordered by the court in the initial proceeding and that courts should refrain from measures designed to coerce or require accelerated privilege review absent agreement of the parties."

Richard A. Baker, Jr., Esq. (06-EV-010) suggests that the selective waiver provision be expanded to provide protection for disclosures to foreign regulators.

Michael R. Nelson, Esq. (06-EV-011) states that the inadvertent disclosure provision, Rule 502(b), "effectively addresses the challenges that the growth of electronic discovery has placed upon the ability of litigants to perform a thorough and accurate privilege review." He contends, however, that the rule would more effectively address the problem of discovery costs if it were extended to cover disclosures in state proceedings. He further suggests that the language in the Rule conditioning protections on having taken "reasonable precautions" against disclosure is "somewhat vague." He states that the term "reasonable steps" is preferable because it "serves to better express the idea that a litigant must implement procedures to limit the disclosure of privileged material." Mr. Nelson recommends that the Committee Note explain that the determination of whether reasonable steps have been taken "should focus on the volume of material to be reviewed and the time frame in which the review must be performed." Mr. Nelson opposes the bracketed selective waiver provision, arguing that it "will only serve to encourage the recent tendency of . . . agencies to demand the production of privileged documents in order to avoid prosecution or enhanced administrative penalties." Finally, Mr. Nelson states that the subject matter waiver provision, Rule 502(a), should specify that a subject matter waiver is limited to "intentional efforts to mislead the opposing party by introducing incomplete information." Mr. Nelson supports the provisions concerning court orders and party agreements but state that "the Committee Note to Rule 502(d) should clarify that the provision does not authorize selective waiver agreements."

John Vail, Esq., on behalf of the Center for Constitutional Litigation, (06-EV-013) states that "[n]o compelling circumstances justify the proposed rule on inadvertent disclosure, which pre-empts state privilege law" — though Mr. Vail did not respond to a request by the Committee to provide a single example of a state law on inadvertent disclosure that is in conflict with Proposed Rule 502(b). The Center also complains that a rule requiring a party to take reasonable precautions to prevent disclosure of privileged information is unlikely to reduce the costs of discovery. The Center supports the proposal on enforceability of court confidentiality orders (Rule 502(d)), as it "addresses concerns voiced by both the plaintiffs' and defendants' bars" and "has the potential to yield benefits to civil litigants and their counsel who choose to waive certain rights in return for quicker, easier access to information." The Center opposes the bracketed selective waiver provision as the "wrong solution to the problem of prosecutorial overreaching."

Carol Cure, Esq., (06-EV-014) "strongly" supports the inadvertent disclosure provision (Rule 502(b)) because the burdens of protecting against inadvertent disclosure in electronic discovery cases are all but insurmountable. She argues, however, that the "reasonable precautions" standard that must be met to protect against waiver "may well be too high for most companies." She would substitute "reasonable steps" for "reasonable precautions" and contends that the change "would allow the court to consider each case on its own facts and to take into account whether the organization has taken appropriate steps to implement an effective compliance program such as writing an effective policy, providing training to employees, providing sufficient resources, and monitoring the program to remediate any deficiencies." She also suggests that the inadvertent disclosure provision should be extended to disclosures made to regulators and to disclosures made in arbitration proceedings. Ms. Cure recommends that the provision on court orders (Rule

502(d)) be expanded to cover all court orders on confidentiality, whether or not they incorporate an agreement of the parties. As to the bracketed selective waiver provision, Ms. Cure states that if it is to be adopted, it should be made clear that it applies only if the waiver to the regulator is "completely voluntary and not coerced", and it should apply to disclosures made to state regulators where the information is proffered in a subsequent federal proceeding.

Paul J. Neale, Esq., on behalf of Doar Litigation Consulting (06-EV-017) supports Rule 502, stressing the importance of amending the rules to address the mounting costs of pre-production privilege review, especially in electronic discovery cases. He recommends that the bracketed selective waiver provision include "privilege protection at the state and federal levels." He also suggests that the Committee should "clarify" the term "reasonable precautions to prevent disclosure" as used in the inadvertent disclosure provision (Rule 502(b)). In his view, the Committee should address "the use of advanced analytical software applications and related methodologies to assist in the determination of privilege and to facilitate a more efficient production of relevant documents. . . . Given the increasing use of these applications even in their relative infancy and the inevitable wide-scale use of them in the future, the Committee should specifically include their use and litigants' reliance on them as reasonable precautions."

Thomas P. Burke, Esq., (06-EV-019) makes the following suggestions: 1) the "should have known" language of Rule 502(b) should be deleted, because the promptness of a party's efforts to retrieve mistakenly disclosed information should be determined from when the party actually knew of the disclosure; 2) the Rule should clarify that if a mistaken disclosure is found to be a waiver, it can never be found to be a subject matter waiver; 3) the bracketed selective waiver provision should specify that only voluntary waivers

will receive the protection afforded against private parties; and 4) the Committee should add language to the Note indicating that there is no intent to encourage waiver of privilege or work-product to public agencies.

Michael J. O'Connor, Esq. (06-EV-020) supports proposed Rule 502 as it will help to limit the "staggering costs" of pre-production privilege review. He notes that privilege review can even be costly in a case with relatively small stakes, because without the protection of Rule 502, counsel will have to worry that a mistaken disclosure in a small litigation might later be used in major litigations.

Daniel J. McAuliffe, Esq., (06-EV-021), on behalf of the State Bar of Arizona, "commends the Advisory Committee on Evidence Rules for coming forward with a proposed solution for what has become a vexing and costly problem in the conduct of civil litigation in the federal courts – the efforts required to protect attorney-client and work product privileges in the course of honoring discovery obligations in the production of requested and relevant documents." The State Bar recommends that the relationship between the scope of waiver provision (Rule 502(a)) and the inadvertent disclosure provision (Rule 502(b)) be clarified, to indicate that if a court finds that a mistaken disclosure is in fact a waiver, it will not constitute a subject matter waiver. It also contends that if a waiver for failure to take "unspecified 'reasonable precautions' is to result in the wholesale waiver of the privilege in question, then little will be accomplished by subpart (b). Corporate parties will continue to expend exorbitant amounts, and engage in extraordinary efforts, to avoid inadvertent disclosure of privileged materials, for fear that a subsequent determination that it did not take 'reasonable precautions' will result in a blanket privilege waiver." On selective waiver, the Arizona State Bar "would be in favor of the adoption of a selective waiver provision if it could be crafted in a

fashion that makes clear that the decision whether or not to engage in a selective waiver must remain a wholly voluntary one on the part of the holder of the privilege."

Patrick A. Long, Esq. (06-EV-022) believes that Rule 502 "should apply to both Federal and State proceedings as this would be the most effective way to protect both attorney-client privilege and work product." He also states that a waiver of undisclosed materials "should only occur in those situations where it is necessary to explain privileged materials which the disclosing party seeks to introduce into evidence." Mr. Long is opposed to the bracketed selective waiver provision because it does not provide "sufficient protection to allow full and frank communications between client and counsel."

Steven K. Hazen, on behalf of the Executive Committee of the Business Law Section of the State Bar of California (06-EV-023) and (06-EV-071), "applaud[s] the activities of the Committee in seeking to establish clarity and uniformity as to inadvertent disclosure of confidential information and the impact that has on the vitality of the attorney-client privilege." The Executive Committee opposes the bracketed selective waiver provision. It notes that selective waiver is not recognized by most courts under Federal common law; it will chill candid discussions between corporate counsel and corporate agents, because the agents will be concerned that their statements will be turned over to a regulator and used against them individually; it will allow corporations to use the privilege as a sword and not a shield; it will lead to confidentiality becoming "nothing more than a commodity"; and its application to subsequent state proceedings will serve to undermine federalism.

Bruce R. Parker, Esq., on behalf of the International Association of Defense Counsel (06-EV-025), "commends the efforts of the Advisory Committee on Evidence Rules and generally

supports Rule 502", but opposes the bracketed selective waiver provision and recommends some textual revisions to other parts of the Rule. The Association suggests that the scope of waiver provision (Rule 502(a)) should specify that it covers only waiver by "voluntary" disclosures; it states that the text of the rule as issued for public comment "leaves open the possibility that a court could order subject matter waiver where a party inadvertently disclosed privileged information by failing to take reasonable precautions to prevent disclosure." It further suggests that the "reasonable precautions" language in the inadvertent disclosure provision (Rule 502(b)) should be changed to state that a party who takes "reasonable steps considering the circumstances of the document production" will be protected from a finding of waiver. The Association further suggests that the Committee Note "should discuss specific factors that may bear on a determination as to whether a party acted reasonably under the circumstances of a particular review. The most obvious circumstance is the volume of documents or electronically stored information involved in the review. Another significant circumstance is the amount of time that a party has to conduct the review." The Association also asserts that the standard for protecting against inadvertent disclosure in Rule 502(b) sets forth two factors (reasonable precautions and reasonably prompt efforts to retrieve) while the predominant Federal case law also mentions the scope of discovery, the extent of disclosure, and the overriding issue of fairness. The Association suggests that "the Committee should state with specificity that all five factors are to be given equal consideration when a court assesses the question of waiver through inadvertent disclosure." Finally, the Association objects to the language in the Rule assessing the disclosing party's attempt to retrieve mistakenly disclosed information from the time when the party "should have known" of the disclosure. It states that "some courts may determine that if a party had taken reasonable steps under the circumstances of the particular review, then it should have known

about the inadvertent disclosure as soon as it occurred." It concludes that steps taken to rectify the error should be evaluated from when the party had "actual knowledge, or with reasonable diligence after production should have discovered" the inadvertent disclosure.

Douglas L. Christian, Esq. (06-EV-027), in testimony, enthusiastically supported proposed Rule 502. He suggested that the term "reasonable precautions" in Rule 502(b) be changed to "reasonably prompt measures." He further suggested adding language to the Committee Note to state that the rule does not affect the lawyer's ethical obligations with respect to receipt of inadvertently disclosed information.

Linda Chatman Thompson, Esq., Director, Division of Enforcement, U.S. Securities and Exchange Commission, (06-EV-029), states that enactment of a selective waiver provision "is important to the Commission's enforcement program." If adopted, "the selective waiver provision would help the Commission gather evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation who might otherwise be inclined to produce important information voluntarily." Ms. Thompson states that any concern that adopting a selective waiver provision would lead to demands for waiver "is unfounded" because "the Commission does not view a company's waiver as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff." She also contends that providing protected information to the Commission can result in "significant resource savings for the companies by limiting the number of executives and other employees whose testimony has been sought by the Commission staff and reducing the length of the investigation." Ms. Thompson concludes that a selective waiver provision "would be helpful to the Commission in carrying out its mission because the Commission is currently not

receiving all of the relevant privileged and protected information that parties want to provide due to their concerns about waiver. The Enforcement Division's experience has been that entities and their counsel consider carefully whether to produce privileged materials to us and a significant consideration for them is the risk that they run in waiving the privilege as to private parties if they do so." She reports that corporate counsel and executives state "that they would be more willing to provide privileged information to us if they could have greater assurance that the information would remain privileged." Ms. Thompson argues that concerns of private parties that selective waiver will deprive them of information is unfounded because "a rule of evidence establishing that producing privileged or protected documents to the Commission does not waive privilege or protections as to private parties would leave private litigants in the same position that they would have been if the Commission had not obtained the privileged or protected materials." Thus, selective waiver "would benefit the Commission significantly without harming private litigants. Also, private litigants may benefit from the Commission's ability to conduct more expeditious and thorough investigations." Ms. Thompson concludes a selective waiver provision "would enable parties to make the decision to provide privileged or protected information to the Commission without fear that, by virtue of such a production alone, they will be deemed to have waived the privilege or protection as to anyone else" and accordingly that selective waiver "is in the public interest because it would enable the Commission to conduct its investigations more expeditiously and would promote the Commission's interest in protecting investors."

Cyril V. Smith, Esq., (06-EV-030), opposes the bracketed selective waiver provision, arguing that selective waiver protection is not needed to encourage corporations to cooperate with government investigations. He states: "Having represented targets, subjects and witnesses in federal white-collar investigations, I can tell

you that the risk of broader subsequent waiver for non-government parties has never been a factor in the ultimate decision whether or not to disclose information to a prosecutor or regulator. . . . The reason is simple: the threat of prosecution or regulatory action (including debarment proceedings and similar actions) to a public company or a company in a regulated industry, or indeed most business entities, is so great that the business' first priority is always to attempt resolution of the criminal investigation or regulatory proceeding. No further incentive is necessary to promote cooperation with government regulators; the business is already fully incentivized to cooperate." Mr. Smith contends that selective waiver protection "would provide a windfall to companies who are the targets of regulatory proceedings. Such businesses would be permitted to resolve their regulatory or criminal matters while fending off claims and subsequent civil proceedings — including claims such as those advance by *qui tam* plaintiffs, who provide direct benefit to the government."

Mr. Smith supports all of the other provisions of Rule 502, noting that it "performs several valuable functions in dealing with truly inadvertent disclosures of privilege or protected material, and brings the Federal Rules of Evidence into conformity with modern electronic discovery."

Patrick Oot, Esq., (06-EV-031) and Anne Kershaw, Esq. (06-EV-049), made a powerpoint presentation to the Advisory Committee at its public hearing on Proposed Rule 502 in New York City. The presentation illustrated the expenditures that were made for pre-production privilege review in one particular production. The expenses included review of each email by as many as three sets of attorneys; the total expenditure was more than $5,000,000.00. They estimated that if the review had been for relevance only, the expenditure would have been reduced by 80%. They suggest that

Rule 502 could be used to permit less stringent review for privilege, for example by allowing searches for domain names of law firms as an initial cut, disclosing the remaining information subject to a clawback agreement, and reviewing the material that went to law firms on an individual basis for privilege. They state that for Rule 502 to be truly effective in limiting the costs of electronic discovery, it must apply to disclosures in both federal and state proceedings.

Henry M. Sneath, Esq., (06-EV-032), in testimony before the Committee, recommends that the court order provision (Rule 502(d)) be expanded to cover confidentiality orders that are not the product of party agreements. He notes that in some cases the parties may disagree about certain provisions in a confidentiality order, and in others one of the parties might not want any confidentiality agreement — yet any resulting order protecting against waiver must be enforceable against third parties in order for litigants to be able to rely upon it and reduce the costs of discovery.

Charles W. Cohen, Esq. (06-EV-033), supports Rule 502 as necessary to limit the costs of pre-production privilege review — costs that have skyrocketed with the advent of electronic discovery. He suggests that the Rule should apply to state as well as federal disclosures, because "[n]o matter how strong the rules are in one forum, if the rule is not in place in all forums, then the protection is illusory." With respect to subject matter waiver (Rule 502(a)), Mr. Cohen approves of the "ought in fairness" test taken from Rule 106, but suggests that the Committee Note specify that "it is only the rare case where there would be any waiver beyond the specific documents, and even the waiver would be of the narrowest scope that is fair." He also states that "the text of the Rule should state that it is only a voluntary waiver that could result in the waiver being extended beyond the specific materials disclosed." With respect to the inadvertent disclosure provision (Rule 502(b)) Mr. Cohen states that

"the Committee Notes should reflect that a document review policy not wholly inappropriate for the scope and volume of the document production meets the 'reasonable precautions' standard. Similarly, the Notes should reflect that a party is not under a duty to re-review its document productions, and therefore it could be long after the production is made when a party first learns or should have learned of an inadvertent disclosure, possibly even just before trial. No matter when the disclosure is discovered, the protection against waiver should be enforced." Mr. Cohen objects to the bracketed selective waiver provision because it "does not further the purposes of the attorney-client privilege and it erodes the ability of the parties to rely on their privilege protections." Finally, he suggests that the court order provision (Rule 502(d)) be extended to situations in which the court enters a confidentiality order even though the parties are not in agreement. He notes that in "asymmetrical cases, in which side has substantially more material to produce in discovery than the other, there may be little incentive for one side to agree to a non-waiver provision. If a court grants a party's request for a non-waiver order to govern its production, the court order should have the same effect as if the parties agreed to it."

Keith L. Altman, Esq. (06-EV-034), argues that the Rule should take account of the obligations of, and the costs to, the party who receives privileged information that has been mistakenly disclosed during discovery. He argues that the Rule should specify that in order to obtain a finding of no waiver, the producing party should bear the reasonable costs incurred by the receiving party in retrieving all copies of the mistakenly produced material.

Taysen Van Itallie, Jr., Esq. (06-EV-035), supports Proposed Rule 502, with the exception of the bracketed selective waiver provision, which he believes "will further erode the attorney-client privilege." He is also concerned that the concept of "reasonable

precaution" in the inadvertent disclosure provision (Rule 502(b)) is an invitation to "satellite litigation that could swallow the benefits of the rule." He would "substitute a standard which would be less of an invitation to litigation, such as providing that if the holder of the privilege 'took reasonable steps in light of the extent and schedule for the review' there would be no waiver." He would also "eliminate the 'should have known' component of reasonable promptness, limiting the start of the clock to when the holder of the privilege 'knew' of the inadvertent disclosure." Mr. Van Itallie expresses his "strong support" for the court order provision (Rule 502(d)), because "the utility of a confidentiality order in reducing discovery costs is unquestionably diminished if it provides no protection outside the particular litigation in which the order is entered."

Russel Myles, Esq., (06-EV-036), in testimony before the Committee, supported Proposed Rule 502. He suggested three changes to the Rule as issued for public comment: 1) The Rule should extend to disclosures made in state proceedings, because the benefits of the rule, in limiting the costs of discovery, will be "substantially reduced" if state disclosures are not covered; 2) Subject matter waiver (Rule 502(a)) should be limited to situations in which a party intentionally offers privileged material in a litigation in an attempt to make a misleading presentation of the evidence; and 3) The "should have known" language of Rule502(b) should be deleted.

Howard A. Merton, Esq., (06-EV-037), in testimony before the Committee, supported the efforts of the Evidence Rules Committee to limit the costs of electronic discovery. He argued that Rule 502 should extend to state disclosures, because "attorneys are driven by the uncertainties and have to look to the lowest common denominator." He also noted that if Rule 502 does not cover disclosures initially made in state proceedings, the parties could end up in a "race to the Federal courthouse to get the benefits of 502."

Mr. Merton concludes that the court order provision (Rule 502(d)) is "exactly right." He opposed the bracketed selective waiver provision on the ground that its enactment would lead to more waivers of privilege.

Dabney J. Carr, IV, Esq., (06-EV-038), expresses concerns about the rising costs of electronic discovery, and supports the Committee's efforts to address this critical problem. He states that the Rule must be extended to disclosures initially made in state proceedings, otherwise the goal of reducing costs will be undermined: "If there is a substantial possibility that the client will be sued in a jurisdiction that applies a broad subject matter waiver rule or holds that any inadvertent disclosure constitutes a waiver, a client has no choice but to comply with those standards, and so Rule 502 will be of no benefit." With respect to the inadvertent disclosure provision (Rule 502(b)), Mr. Carr suggests that the Committee Note provide "that the time period for the holder of the privilege to rectify an inadvertent disclosure does not begin to run until the holder discovered, or with reasonable diligence should have discovered, the inadvertent disclosure." He explains that in most cases, "a party will not learn of an inadvertent disclosure until the receiving party brings the disclosure to the holder's attention, and the holder should not be penalized if the receiving party does not promptly notify the holder of the inadvertent disclosure."

Desmond T. Barry, Jr., Esq., (06-EV-039), states that the inadvertent disclosure provision (Rule 502(b)), should be included in the Rule "to protect important privileges." He also states the the Rule should be extended to disclosures initially made in state proceedings, in order "to achieve uniform treatment of privileged materials."

Dan D. Kohane, Esq., (06-EV-041), on behalf of the Federation of Defense and Corporate Counsel, recommends that

Rule 502 be extended to govern disclosures initially made in state proceedings, because treating parties differently in state and federal forums puts the privilege and work product protections "in jeopardy and provides inconsistent guidance to attorneys and clients alike." The Federation strongly supports the Rule insofar as it protects parties who mistakenly disclose privileged material:

> "Corporations and their counsel, struggling to comply with short deadlines, are compelled to locate, secure and produce thousands of documents, many of which have not yet been screened for privilege or have been given only cursory review. Using document filters and 'people on the ground,' fair attempts are made to identify documents which are privileged so as to produce a privilege log. However a document or a number of document or a classification of documents slip through despite best efforts, under the time constraints provided, to prevent that disclosure. Once discovered, the corporation and its counsel immediately notify the opposing side of the error and seek to retrieve those documents. Are the interests of justice served by not allowing the error to be corrected? We think not and support Rules changes that would protect the privilege here."

The Federation suggests that the term "reasonable precautions" in the inadvertent disclosure provision (Rule 502(b)) "is unclear" and recommends "other, less pejorative words" to describe the efforts that must be made to try to protect against a mistaken disclosure. Finally, the Federation opposes the bracketed selective waiver provision, because it would "encourage waiver and underscore the protocols which lead to a *forced* sacrifice of protected materials and communication." (emphasis in original).

Anthony Tagliagambe, Esq. (06-EV-042), states that Rule 502 should be amended "to apply in federal and state court, and in diversity and federal question cases, to ensure that the Rule is

effective." He supports the provisions on subject matter waiver, mistaken disclosures, and court orders (Rule 502(a)(b) and (d)), but he opposes the bracketed selective waiver provision. He argues that selective waiver "does not enhance and protect the attorney-client privilege or work product protection."

Lawrence S. Goldman, Esq., (06-EV-043), on behalf of the National Association of Criminal Defense Lawyers, opposes the bracketed selective waiver provision. The Association contends that selective waiver "would not solve, but rather would exacerbate, what most observers and practitioners agree are real and undeniable problems caused by privilege waivers that are made during the course of government investigations." The Association states that "selective waiver will not operate in a vacuum but must be inserted into a legal environment already tainted by the culture of waiver." It argues that selective waiver "purports to alleviate a symptom (third party lawsuits made possible by privilege waiver in government investigations) while leaving the actual problem (frequent and coercive demands for confidential material) untreated." The Association further argues that 1) selective waiver allows a party to use the privilege as a sword and a shield, which is improper; 2) selective waiver creates an "unlevel playing field" because it benefits corporations and leaves individuals without protection and without access to confidential material disclosed to the government; and 3) applying selective waiver to state courts runs afoul of federalism principles.

Richard J. Wolf, Esq., (06-EV-044), supports the mistaken disclosure provision (Rule 502(b)), noting that it is a "complex and expensive undertaking" to isolate privileged and work product materials from "the mass of electronic information corporations amass and store." He notes, however, surveys indicating that many corporations have not yet implemented effective records management programs, and that to do so "could take eighteen months and up to

three years in a large company." He concludes that the "reasonable precautions" standard in Rule 502(b) "is likely too high for most corporations to meet." He concludes that the test of reasonableness "should take into account whether an organization has followed the steps necessary to have an effective compliance program for records management, which should include an enforceable policy, adequate resources, training and awareness, regular monitoring, and proper remediation." On the bracketed selective waiver provision issued for public comment, Mr. Wolf states that the opposition in the Bar "is not representative of or consistent with corporate interests in general. Organizations have always wanted the type of protections envisioned under the proposed rule." He suggests that the Rule take account of "the prospect for prosecutorial abuses and coerced waivers by adding the word 'proper' before the phrase 'exercise of its regulatory, investigative or enforcement authority." He also suggests that the Committee Note address "the importance of considering the totality of circumstances, including the effectiveness of an ethics and compliance program, before parties resort to extreme measures such as requesting waiver of attorney-client privilege or attorney work product."

Alfred W. Cortese, Esq., (06-EV-047), states that the Committee "is to be commended for recommending a rule that on the whole should help save significant amounts of time and effort spent in litigation to avoid waiver of the attorney-client privilege, and that will help make the discovery process more efficient and less costly." Mr. Cortese recommends that either the Rule be extended to cover disclosures initially made in state proceedings, or that separate legislation be recommended to extend such coverage. Mr. Cortese opposes selective waiver, stating that "the Committee's and judiciary's priority should be strengthening and protecting privilege and work product, not elevating the interest in efficient government investigations and prosecutions over the rights of individuals and

companies to confidential communications with their attorneys." He hopes that the Committee "will report to Congress that public comment has demonstrated that selective waiver is not a viable or workable concept and should be withdrawn from consideration."

Lawyers for Civil Justice (06-EV-047), submitted a lengthy comment on proposed Rule 502. LCJ generally supports the Rule, with the exception of the bracketed selective waiver provision. LCJ "applauds the Committee's attempts to safeguard and more clearly define the scope of the attorney-client privilege and work product protection through proposed Federal Rule of Evidence 502." LCJ provides the following suggestions for change to the Rule:

1. The waiver standards embodied in Rule 502 should be applicable to both state and federal proceedings. Otherwise, "the Advisory Committee's goal of increasing efficiency and lowering the costs of discovery will be substantially lost" because "parties would not be able to predict in advance the consequences of a decision to disclose privileged information." LCJ concludes that "[s]ince Congress has the authority to enact federal legislation governing the substantive scope of attorney-client privilege and work product materials [under its Commerce Clause powers], it has the power to take the lesser step of creating a uniform federal law governing waivers by disclosure." LCJ recommends as an alternative to amending the rule that separate legislation be recommended to extend identical provisions on waiver to disclosures initially made in state proceedings.

2. The Committee should clarify in the Note that Rule 502 applies to both diversity and federal question cases. "Because under Rule 501 a federal district court sitting in diversity must apply state law to determine issues of privilege waiver, practitioners might

question whether a court should apply Rule 502 in a diversity case, even though new Rule 502 would supersede 501 on such matters."

3. The Committee Note on the subject matter waiver provision (Rule 502(a)) should be strengthened "to make sure that subject matter waiver is limited to truly rare situations and to define more clearly the scope of undisclosed communications that 'ought in fairness' to be produced." LCJ asserts that "a subject matter waiver should not occur unless and until a party discloses privileged materials in an attempt to mislead the court or other litigants."

4. The mistaken disclosure provision (Rule 502(b)) should be amended to require "reasonable steps" to prevent disclosures rather than "reasonable precautions", and "the Committee Note should clarify that a party must only act with reasonable promptness upon learning of a disclosure." LCJ contends that a requirement of "reasonable steps" is "less subjective and adequately accomplishes the Committee's goal of ensuring that parties establish reasonable procedures to protect against the disclosure of privileged information." LCJ further suggests that the Note specify that "the reasonableness of steps taken to prevent disclosure of privileged information will vary according to the circumstances presented, such as the number of documents involved and the time constraints for production. Where a large number of documents must be reviewed within a relatively short period of time, a party should be permitted to employ procedures that otherwise would not satisfy the producing party's burden. Conversely, where a party is not burdened by time constraints, more comprehensive measures might be required to reduce the possibility of inadvertent disclosures."

5. The Committee should withdraw the selective waiver provision, as it will "encourage a growing and questionable presumption amongst government investigators and prosecutors that

it is appropriate and 'harmless' for corporations to waive the attorney-client privilege and work product protection." LCJ asserts that selective waiver "would make it difficult for a company to assert the right not to waive the privilege in any government investigation" and "might incorrectly be viewed as ratification by [the] Committee of government policies that even now are coming under increased attack."

6. LCJ "believes that there is an urgent need for the real, substantive protection afforded by proposed Rule 502(d)" because without that provision "parties will be forced to conduct the type of burdensome and expensive review of disclosed documents for privilege to ensure that sensitive information does not become freely available to other litigants." LCJ suggests that the Note to Rule 502(d) "make clear that parties cannot use the rule to enter into selective waiver agreements."

The Federal Magistrate Judges Association (06-EV-051), supports the provisions of Rule 502 that the Committee has proposed for adoption. The Association takes no position on the bracketed provision on selective waiver. The Association notes that "[a]n important goal of recent amendments to the Federal Rules of Civil Procedure is the reduction of the cost and delay to discovery arising from the need to screen voluminous electronic information, and these amendments specifically encourage parties to enter into non-waiver and clawback agreements." The Association "believes that new Rule 502 will support this goal by providing predictable and uniform standards under which parties can determine the consequences of disclosure of information." The Association states that the rule, "to be fully effective, must regulate the consequences of disclosure at both the state and federal levels" and "supports the effort of the Advisory Committee to encourage Congress to enact the rule directly so that it would be binding on the states."

William McGuinness, Esq., and Michael Russ, Esq., (06-EV-052), on behalf of the Committees on Attorney-Client Relations and Federal Rules of Evidence of the American College of Trial Lawyers, unanimously support the provisions of proposed Rule 502, with the exception of the bracketed provision on selective waiver. The Committees acknowledge the benefits that selective waiver would provide to some parties, but they are concerned that "the mounting pressure to waive" that would be "encouraged" by selective waiver protection "unduly pits the interests of the corporate entity against the interests of the individual employee." The Committees conclude that in an environment of a "culture of waiver," "the imperative of protecting and preserving the attorney-client privilege should take precedence over the ancillary benefits of selective waiver."

Russell J. Wood, Esq. And Bruce R. Deming, Esq. (06-EV-053), on behalf of the Corporations Committee, Business Law Section of the State Bar of California, "support and applaud the Advisory Committee's efforts to advance most of the provisions of Rule 502 and the Advisory Committee's objective of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to discovery requests." The Committee opposes the bracketed selective waiver provision, however, because if enacted it "1) will not encourage cooperation with government investigations; 2) improperly interferes with the attorney-client relationship; 3) will lead to unintended disputes between government agencies and private corporations; and 4) will not be applied uniformly in all jurisdictions."

Matthew J. Walko, Esq., (06-EV-054), has the following suggestions for change to Proposed Rule 502 as it was issued for public comment: 1) the definition of work product should be expanded to cover "tangible as well as intangible information of

parties— whether pro se or represented by counsel"; 2) the court order provision (Rule 502(d)) "should not hinge on whether parties can reach an agreement" because the "primacy of the court's order should not be undermined by making its wider applicability hinge on whether parties embroiled in litigation decide to be agreeable"; 3) Rule 502(d) should be rephrased to incorporate language from the full faith and credit statute; and 4) the Rule must clarify that it applies to diversity actions and therefore supersedes Rule 501 on that point.

Jinjian Huang, Esq. (06-EV-055), argues that proposed Rule 502 gives the parties to a litigation too much authority to determine whether a waiver will be found. He suggests that the Rule be amended to specify that court orders are not enforceable unless they are fair, and that agreements should not be enforceable between the parties unless they are fair.

Perry Goldberg, Esq., (06-EV-056), on behalf of himself and a number of partners at Irell & Manella who frequently litigate in federal court, commends the Advisory Committee's efforts "to make litigation more efficient and less costly." He suggests that the Rule could be improved by the following:

1) The standard for avoiding waiver by mistaken disclosure — "reasonable precautions" — "likely would spawn significant litigation" and "would not change how discovery is actually conducted". "To give the proposed Rule greater clarity, and to give producing parties greater comfort," the Note should include examples of precautions that are considered reasonable. "For instance, with respect to electronic discovery, it would be helpful to specify that searching for key words — such as attorney names and 'privilege' — is a reasonable precaution against disclosure."

2) The requirement of "reasonably prompt" measures to retrieve mistakenly disclosed should be explained in the Note. Specifically the Note should state that "action within a 14-day

window generally would be considered prompt" and the Note should further state that the "should have known" standard "should be construed narrowly so that the 14-day clock would not start running until a party is on actual notice of the problem."

3) The "ought in fairness" standard for subject matter waiver (Rule 502(a)) should be limited to inadvertent disclosures, and the current jurisprudence for determining the scope of waiver for intentional disclosures "should not be disturbed."

4) The definitions section is "unnecessary and may become an unintentional source of confusion."

Bernstein Litowitz Berger & Grossman (06-EV-057), opposes the bracketed provision on selective waiver. The firm states that "the majority view under the existing case law in this area is correct and should not be reversed through rulemaking. The proposed Rule 502(c) does not serve the legitimate purposes of the attorney-client privilege and work product doctrine and should not be adopted." The firm argues that existing law properly bars defendants "from picking and choosing among their adversaries when waiving privilege." The firm notes its experience in representing shareholders who did not benefit from a regulatory activity in which a corporation turned over privileged information, but did benefit from the use of that information in a subsequent private lawsuit. The firm concludes that "reversal of the law on selective waiver is a question best left to Congress without the implied judicial endorsement that would be perceived if it was proposed by the Advisory Committee"and that adoption of selective waiver "would be a controversial, value-laden political decision."

Kim J. Askew, Esq. (06-EV-058) on behalf of herself and nine other members in the leadership of the ABA Section of Litigation, supports the court order provision (Rule 502(d)) as "a valuable addition that would help fill the gap created by Rules

16(b)(6) and 26(f)(4) of the Federal Rules of Civil Procedure" as it would "solve the problem of the order not binding non-parties in other actions and/or jurisdictions." They also "support the Committee's efforts to limit the scope of waiver" in Rule 502(a). Ms. Askew and the other lawyers oppose the bracketed selective waiver provision. They are concerned that support for selective waiver "would be construed as tacit approval of the governmental practice of demanding waiver." They suggest that if selective waiver is to be proposed, language should be added to specify that "[n]othing in this rule authorizes a government agency to require or request a person or entity to disclose a communication covered by the attorney-client privilege or work product protection."

Professor Liesa L. Richter, (06-EV-059), states that the bracketed selective waiver provision, if adopted, would represent "a salutary change to waiver doctrine: one that will simultaneously protect corporations cooperating with the federal government from the damaging effect of third party waivers *and* serve the public interest in the effective oversight of business entities." (emphasis in original). She argues that a system of voluntary cooperation with the protection of selective waiver is vastly preferable to "the continuation of federal policies that generate privileged disclosures to the government with no selective waiver protection to provide cover for corporations faced with massive civil exposure." She notes that "a doctrine of selective waiver to federal entities can fit comfortably within the evolving flexible view of privilege and waiver recognized in the case law and academic commentary." For example, under the provisions of Proposed Rule 502(d), waiver doctrine "is being adjusted to permit greater flexibility and less rigid adherence to common law confidentiality requirements" by permitting claw-back and quick peek agreements. Accordingly, "it would be both counterintuitive and counterproductive to tell private litigants that they may share with their allies, they may share with their private

adversaries, but they will be punished for sharing with the federal government in pursuit of its law enforcement responsibility. Such a disfavored status for cooperation with government investigations does not serve the public interest any more than the needless waste of private resources to review millions of documents for privileged communications."

The New York County Lawyers' Association, (06-EV-060), makes the following recommendations with respect to Proposed Rule 502:

1) Rule 502(a) should be adopted as a reasonable limitation on subject matter waiver. The Association notes that most disclosure of privileged material is "probably inadvertent" and the disclosing party "usually has no plans to make unfair adversarial use of the privileged matter so produced and, in the absence of such contemplated unfair use, requiring that other materials be produced is an excessive sanction for what is generally nothing more than carelessness.."

2) Rule 502(b) should be adopted because it is important to have one uniform rule on waiver with respect to mistaken disclosures; Rule 502(b) proposes the majority rule under existing law, and so is the rule to which most practitioners are already accustomed.

3) The Association makes no recommendation on the bracketed selective waiver provision, as it has not yet had the opportunity to consider the arguments of those who might be expected to oppose the provision. It notes, however, that "[t]o the extent that a culture of waiver exists and is undesirable, it exists under the present rule forbidding selective waiver, and government and regulatory officials have not seemed sympathetic to pleas that revelation of privileged matter to them could result in disclosures to private plaintiffs." The Association concludes that if selective waiver is desirable on its own merits, "it should be adopted regardless of the 'culture of waiver.'"

The State Bar of California Committee on Federal Courts (06-EV-061) opposes the subject matter waiver provision (Rule 502(a)), concluding that the "ought in fairness" test in the Rule will give rise to litigation and will allow gamesmanship. The Committee concludes that "the current subject matter waiver rules operate fairly for both producing and receiving parties" and "there is no need to change the current standard."

The United States Securities and Exchange Commission (06-EV-062) supports enactment of selective waiver protection. It states that selective waiver "significantly enhances the Commission's ability to conduct expeditious investigations and, where appropriate, to obtain prompt relief for defrauded investors." The Commission cites as examples five complex, fact-intensive corporate investigations in which the corporations turned over privileged material, which "saved the Commission months of work, as well as large amounts of money." The Commission also notes that "the companies themselves can benefit from providing privileged and protected materials" because it "can reduce overall disruption for the companies by limiting the number of executives and other employees whose testimony will be sought by the Commission staff and by reducing the length of the investigation." The Commission states that selective waiver protection is necessary because many corporations are deterred from cooperating by the concern that disclosure to the Commission will result in use of the information in private litigation. The Commission suggests the following improvements to the bracketed selective waiver provision as issued for public comment: 1) the Rule or Committee Note should provide "that a receiving government agency may use the privileged or protected materials without waiving the privilege or allowing third parties to use the materials"; 2) "The Advisory Committee should state expressly in the Notes that, even if the communications or information are disclosed or become available to non-governmental persons or

entities through the use of the material during an enforcement proceeding, the communications or information will continue to be protected."; 3) the Committee Note should provide that a government agency is not required to disclose Rule 502(c) material under the Freedom of Information Act; and 4) the Committee Note should emphasize that selective waiver preempts any conflicting state rule of privilege.

The Federal Bar Council, (06-EV-063), "supports the policy decisions made by the Advisory Committee . . . to ease the burden of discovery and to make uniform the law concerning the waiver of privilege." The Council makes the following suggestions:

1) Rule 502 should be amended to add a new subsection "to clarify that it governs state courts and to overcome the potential ambiguities arising from the scope provisions of Rules 101 and 1101." The Council suggests a subsection stating: "Notwithstanding Rules 101 and 1101, and unless otherwise provided in this Rule, this Rule shall be binding in state court proceedings."

2) The scope of the subject matter waiver provision (Rule 502(a)) "should be broadened to create a federal one-rule analysis to use when determining the scope of privilege waivers." Specifically, the subdivision should be amended to clarify that it applies to federal and state proceedings, and a separate subdivision should be added to cover disclosures initially made in state proceedings when the question of subject matter waiver arises in subsequent federal court proceedings.

3) The "knew or should have known" test of Rule 502(b) "should be replaced with a totality of circumstances approach." The Council states that a "should have known" standard "would invite arguments that parties should make a post-production review to determine whether any privileged information was inadvertently produced."

4) The mistaken disclosure provision should be extended to apply to regulatory investigations, because "disclosures made to federal agencies in connection with their investigations are as onerous — if not moreso — than discovery in litigation."

5) The bracketed selective waiver provision should be deleted "as it is very controversial and might bog down enactment of the remainder of the Rule."

The United States Commodity Futures Trading Commission, (06-EV-064), supports the bracketed selective waiver provision because it "would serve the public interest by enhancing the Commission's ability to conduct expeditious investigations resulting in more timely enforcement, at a reduced cost to taxpayers as well as witnesses." The Commission "agrees with other commenters that, if the provision is adopted, private litigants will not be harmed. Indeed, they will be in precisely the same position under the proposed rule as they would be if the government had not obtained the privileged or protected documents. That is, if the privileged or protected documents were not produced to the government, private third-party litigants would not be able to argue that the individual or entity had waived attorney-client privilege or work product protection; similarly, they would not be able to make those arguments under the proposed rule." The Commission urges that "the rule prevent waiver under both federal and state law."

David Booth Alden, Esq. and Ted S. Hiser, Esq, (06-EV-065), suggest that Rule 502(a) is not clear on whether the proposed rule on subject matter waiver applies to disclosures of privileged or protected communications in state court proceedings. They suggest that the rule expressly bar a state court from finding a subject matter waiver with respect to a disclosure in a federal court proceeding; otherwise Rule 502(a) will be inconsistent with Rule 502(d), which binds state courts to respect federal court confidentiality orders. They

also suggest that the Committee make clear that "notwithstanding the language of Rule 101 and 1101, proposed Fed.R.Evid. 502(b) may apply in state court proceedings under some circumstances." Finally, they state that "the interplay" between Rules 501 and 502 in diversity actions "may create uncertainty" and that the Rule should be changed to state expressly that Rule 502 governs in diversity actions.

Kenneth L. Mann, Esq., (06-EV-066), is opposed to the bracketed selective waiver provision and recommends that the Committee "should abstain" from recommending adoption of the selective waiver provision by Congress.

The American Bar Association (06-EV-067), suggests that the two-part test of the mistaken disclosure provision (Rule 502(b)) be changed to add two extra factors: the scope of discovery and the extent of inadvertent disclosure. The ABA recognizes that those two factors "could be construed" as falling within the standard in Rule 502(b)— reasonable precautions. But the ABA states that the best way to assure that these factors are considered by the courts is to include them in the text of the Rule. The ABA also suggests that an "interest of justice" standard be added because it is important for courts to consider other relevant facts that are not encompassed within "reasonable precautions", the scope of discovery, and the extent of inadvertent disclosure. The ABA recognizes that an open-ended "interests of justice" factor could add a level of unpredictability to the question of whether a mistaken disclosure constitutes a waiver — but it contends that this risk is "outweighed by the benefit gained by giving judges flexibility to adapt the rule to each set of unique circumstances presented." The ABA also opposes the "should have known" standard for recovery of the privileged material as "subjective" and likely to lead to litigation. Its policy is that the duty to seek return of the information is triggered only when the disclosing party "actually discovers that a mistake has been made." Finally, the

ABA is opposed to the requirement that the holder take "reasonably prompt" measures to seek return of the mistakenly disclosed information. It states that this standard is subjective. The ABA suggests as an alternative that "within a specified period of days after learning of the inadvertent production, the producing party should be required to raise the privileged status of the documents by simply giving notice to the opposing party that the materials are protected and amending its discovery responses to identify the materials and the privileges."

The American Bar Association (06-EV-068), in a comment submitted on the last day of the public comment period, proposes an extensive amendment to Rule 502 to cover a topic that is not addressed in the Rule; was never intended to be part of the Rule; was not the subject of any other public comment; and was not one of the issues on which Congress sought rulemaking. The ABA's proposed addition to the Rule would codify federal cases determining whether disclosure of underlying factual information constitutes a waiver of the attorney-client privilege. The ABA also prepared an elaborate Committee Note on the implied waiver provision.

The Commercial and Federal Litigation Section of the New York State Bar Association (06-EV-069), provided the following comments on Proposed Rule 502:

1. The Section does not support the subject matter waiver provision (Rule 502(a)). It argues that different standards for subject matter waiver should apply to privilege and work product. It also states that the "ought in fairness" standard will spawn litigation.

2. The Section supports the adoption of the mistaken disclosure provision (Rule 502(b)), noting that "parties spend large, perhaps inordinate, amounts of time" reviewing discovery materials prior to production to determine whether they are privileged, "which can substantially delay access for the party seeking discovery."

3. The Section opposes the bracketed selective waiver provision, "given the lack of evidence as to whether it will actually have the desired impact." The Section states that caution is required because those "who would presumably stand to gain from the potential decrease in cost referenced by the Committee . . . have expressed serious concerns that the proposal will be harmful to the very corporate parties it ostensibly is designed to protect." The Section is "unaware of any situation where concern over privilege waiver vis-a-vis third parties resulted in diminished cooperation with the government. Moreover, this possibility seems unlikely to occur with any significant frequency given the weight of the incentives motivating parties to cooperate with government investigations."

4. The Section supports Proposed Rules 502(d) and (e), "as necessary adjuncts to the limitations on inadvertent disclosure contained in proposed Rule 502(b)."

5. The Section concludes that "if enacted by Congress under its Commerce Clause powers, the proposed Rule will quite likely withstand constitutional scrutiny."

Jeffrey J. Greenbaum, Esq., (06-EV-070), submitted a column from the *New Jersey Lawyer* entitled "Proposed Rule 502: An Important Step Forward."

Mark Jordan (06-EV-072) argues that the focus of Rule 502 is too narrow and that it will have a negative impact on small-scale civil litigation and non-corporate criminal prosecutions. He also argues that inadvertent waiver should never be found where the mistake is made by counsel, because the privilege is held by the client.

Kevin N. Ainsworth, Esq. (06-EV-073) states that Rule 502(d) "should explicitly state a good-cause requirement and should give federal courts the power, even in the absence of agreement of the

parties, to enter 'privilege protection' orders based on a showing of good cause."

Draft of Cover Letter to Congress on Proposed Rule 502.

The Judicial Conference respectfully submits to the United States Congress a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress consider adopting this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Under 28 U.S.C. § 2074(b), rules governing evidentiary privilege must be approved by an Act of Congress rather than adopted through the process prescribed by the Rules Enabling Act, 28 U.S.C. § 2072.

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested the proposal of a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more that 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Evidence Rules Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference and is attached to this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.,* House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

The Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

- *Limitations on Scope of Waiver:* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

• *Protections Against Inadvertent Disclosure:* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

• *Effect on State Proceedings and Disclosures Made in State Courts:* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

• *Orders Protecting Privileged Communications Binding on Non-Parties:* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

• *Agreements Protecting Privileged Communications Binding on Parties:* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings — and even when the disclosed material is then offered in a state proceeding (the so-called "state to state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal to state" problem). The Conference of Chief Justices withdrew its objection to Rule 502 after the rule was scaled back to regulate only the "federal to state" problem.

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.

- In the Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

In light of the public comment, however, Congress may wish to consider separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court. The Conference takes no position on the merits of such separate legislation.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502 — against mistaken disclosure and subject matter waiver — would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of Proposed Rule 502 did not determine the question of what rule would

apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is set forth in a separate report.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee on Federal Rules, as well as their reporters and consultants, are ready to assist Congress in any way its sees fit.

Respectfully submitted,

Draft of Cover Letter to Congress on Selective Waiver

The Judicial Conference has respectfully submitted proposed Federal Rule of Evidence 502. As submitted in a separate letter, Proposed Rule 502 governs scope of waiver, inadvertent disclosure and the enforceability of court orders, all with the goal of limiting the costs of privilege review in production of materials during litigation or to federal offices or agencies. The House Judiciary Committee Chair also asked the Advisory Committee on Evidence Rules (the "Advisory Committee") to consider the possibility of proposing a rule that would "allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation." Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity. In response to the Chair's request, the Advisory Committee prepared a selective waiver provision, and it was submitted for public comment. It provided for protection for disclosures made to federal offices or agencies only — but it bound state courts to enforcing selective waiver when a disclosure to a federal office or agency was offered in a subsequent state proceeding.

The selective waiver provision proved to be very controversial. The public comment from the legal community (including lawyer groups such as the American Bar Association, Lawyers for Civil Justice, and the American College of Trial Lawyers) was almost uniformly negative. The negative comments can be summarized as follows:

- Lawyers expressed the concern that if selective waiver is enacted, corporate personnel will not communicate confidentially with lawyers for the corporation, for fear that the corporation will be more likely to produce the information to the government and thereby place the individual agents at personal risk.

- Public interest lawyers and lawyers for the plaintiffs' bar were concerned that selective waiver would deprive individual plaintiffs of the information necessary to bring meritorious private litigation.

- Selective waiver was criticized as inappropriate in the alleged current environment of what some have called the "culture of waiver." Lawyers expressed the belief that corporations are currently being indicted unless they turn over privileged or protected information; they contended that selective waiver could be expected to increase government demands to produce protected information.

- Selective waiver was criticized as unfair, because it allows corporations to waive the privilege to their advantage, without suffering the risks that would ordinarily occur with such a waiver.

- Critics emphasized that under the federal common law, every federal circuit court but one has rejected the notion of selective waiver, those courts reasoning 1) that corporations do not need any extra incentive to cooperate, and 2) that selective waiver protection could allow the holder to use the privilege as a sword rather than a shield. Those critics contended that a doctrine roundly rejected under federal common law should not be enacted by rule.

- Judges of state courts objected that selective waiver raised serious federalism problems, because in order to be effective it would have to bind state courts, and as such it would change the law of privilege in virtually every state, because most of the states do not recognize selective waiver.

- Critics argued that selective waiver does not really protect the privilege because nothing prohibits the government agency from publicly disclosing the privileged information.

In sharp contrast, federal agencies and authorities (including the Securities Exchange Commission, the Commodity Futures Trading Commission, and the Department of Justice) expressed strong support for selective waiver. Those agencies made the following arguments.

- The agencies doubted that a selective waiver rule would discourage candid conversations between corporate counsel and employees. They noted that even in the current world without selective waiver, employees must already be advised by corporate counsel that the corporation holds the privilege and may choose to waive it, so the agencies concluded that an employee's candor will not be affected by a change in the rules on whether such a waiver is "selective" or not.

- The agencies contended that private parties will in the end benefit from selective waiver, as it will lead to more timely and efficient public investigations.

- The agencies asserted that government practices have not created a "culture of waiver." They also argued that the selective waiver rule addresses only the evidentiary consequences that flow in a later litigation from an earlier disclosure. This is a problem distinct from how often waiver is sought, and is a problem that will exist even if the government never seeks a waiver but companies still provide them, a possibility that even critics acknowledge will continue.

- The protection of selective waiver was asserted to be necessary because corporations are otherwise deterred from cooperating with government investigations, and such

cooperation serves the public interest by substantially reducing the cost of those investigations.

- The complaint from private parties about lack of access to information was dismissed on the ground that the information they sought would not even be produced in the absence of selective waiver.

- The agencies noted that even if the government can disclose the information widely, this did not undermine the doctrine of selective waiver; under selective waiver, private parties could not use the information in court, no matter how widely it is distributed in public.

- The agencies found nothing in the federal common law to indicate that legislation on selective waiver would be improper or unjustified.

The Advisory Committee carefully considered and discussed all of the favorable and unfavorable comments on the selective waiver provision. The Advisory Committee finally determined that selective waiver raised questions that were essentially political in nature. Those questions included: 1) Do corporations need selective waiver to cooperate with government investigations? 2) Is there a "culture of waiver" and, if so, how would selective waiver affect that "culture"? These are questions that are difficult if not impossible to determine in the rulemaking process. The Advisory Committee also noted that as a rulemaking matter, selective waiver raised issues different from those addressed in the rest of Rule 502. The basic goal of Rule 502 is to limit the costs of discovery (especially electronic discovery), whereas selective waiver, if implemented, is intended to limit the costs of government investigations, independently of any discovery costs. Thus, the selective waiver provision was outside the central, discovery-related focus of the rest of the rule.

The Advisory Committee determined that it would not include a selective waiver provision as part of proposed Rule 502. The Judicial Conference approves that decision. The Conference recognizes, however, that Congress may be interested in considering separate legislation to enact selective waiver, as evidenced by the enactment of the Financial Services Regulatory Relief Act of 2006, Pub.L.No. 109-351, § 607, 120 Stat. 1966, 1981 (2006), which provides that disclosure of privileged information to a banking regulator does not operate as a waiver to private parties.

The Advisory Committee prepared language to assist Congress should it decide to proceed with independent legislation on selective waiver. This suggested language is derived from the Financial Services Regulatory Relief Act and also incorporates some drafting suggestions received during the public comment period on Rule 502. The draft language includes a Committee Note that explains the drafting choices that were made. The draft language is as follows:

Statutory language on selective waiver

(a) Selective waiver. — In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney client privilege or as work product — when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal office or agency.

(b) Rule of construction. — This rule does not:

1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law; or
2) limit any protection against waiver provided in any other Act of Congress.

(c) Definitions. — In this Act:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for tangible material or its tangible equivalent, prepared in anticipation of litigation or for trial.

Committee Note on Selective Waiver

Courts are in conflict over whether disclosure of privileged or protected communications or information to a government office or agency conducting an investigation of the client constitutes a general waiver of the communications or information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected communications or information to a government office or agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government office or agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of privileged or protected communications or information to the government does not constitute a general waiver, so that the privilege or protection remains applicable against other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule resolves this conflict by providing that disclosure of protected

communications or information to a federal office or agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to any person or entity other than a [the] federal public office or agency; that protection of selective waiver applies when the disclosed communication or information is subsequently offered in [either] federal [or state] court.

The rule does not purport to affect the disclosure of protected communications or information after receipt by the federal office or agency. The rule does, however, provide protection from waiver in favor of anyone other than federal offices or agencies, regardless of the extent of disclosure of the communications or information by any such office or agency. Even if the communications or information are used in an enforcement proceeding and so become publicly available, the communications or information will continue to be protected as against other persons or entities.

The rule provides that when protected communications or information are disclosed to a "federal office or agency" the disclosure does not operate as a waiver to any person or entity other than a [the] federal office or agency. As such, a disclosure covered by the rule does not operate as a waiver in any congressional investigation or hearing.

The rule is not intended to limit or affect any other Act of Congress that provides for selective waiver protection for disclosures made to government agencies or offices. *See, e.g.,* Financial Services Regulatory Relief Act of 2006, Pub.L.No. 109-351, § 607, 120 Stat. 1966, 1981 (2006).

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Memorandum To: Standing Committee on Rules of Practice and Procedure
From: Daniel Capra, Reporter, Advisory Committee on Evidence Rules
Re: Draft report to Congress on "harm-to-child" exception to the marital privileges
Date: May 15, 2007

Attached is the draft of a report to Congress on the necessity and desirability of codifying the "harm-to-child" exception to the marital privileges. This report is in response to the Congressional directive in the Adam Walsh Child Protection Act. At its Spring 2007 meeting the Evidence Rules Committee discussed the merits of amending the Evidence Rules to provide for a harm-to-child exception to the marital privileges. The Committee decided that such an amendment was not needed, but that a report to Congress should contain suggested language for an amendment should Congress decide to proceed.

The attached report explains the Evidence Rules Committee's determinations and recommends against an amendment, and also includes suggested language for amendment should Congress decide to proceed. It is styled as a report by the Standing Committee, because the Adam Walsh Act directs the Standing Committee to study the matter. The Evidence Rules Committee has approved the report, with the recommendation that the Standing Committee adopt it and send it to Congress.

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

Judicial Conference Committee on Rules of Practice and Procedure

June 15, 2007

Introduction

Public Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, was signed into law on July 27, 2006. Section 214 of the Act provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--
>
> (1) a child of either spouse; or
>
> (2) a child under the custody or control of either spouse.
>
> * * *

This report of the Judicial Conference Committee on Rules of Practice and Procedure ("the Rules Committee") is in response to the Section 214 directive. The Advisory Committee on Evidence Rules ("the Advisory Committee") has conducted a thorough inquiry of the existing case law on the exceptions to the marital privileges that apply when a defendant is charged with harm to a child (the "harm to child" exception). The Advisory Committee has also reviewed the pertinent literature and considered the policy arguments both in favor and against a harm to child exception; and it has relied on its experience in preparing and proposing amendments to the Federal Rules of Evidence. The Advisory Committee has concluded — after extensive consideration and deliberation — that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The Rules Committee has reviewed the Advisory Committee's work on this subject and agrees with the Advisory Committee's conclusion.

This Report explains the conclusions reached by the Rules Committee and the Advisory Committee. It is divided into three parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses whether the costs of amending the Federal Rules of Evidence are justified by any benefits of codifying the harm to child exception; it concludes that the costs substantially outweigh the benefits. Part III sets forth suggested language for an amendment, should Congress nonetheless decide that it is necessary and desirable to amend the

Federal Rules of Evidence to codify a harm to child exception to the marital privileges.

I. Federal Case Law on the Harm to Child Exception

Basic Principles

There are two separate marital privileges under Federal common law: 1) the adverse testimonial privilege, under which a witness has the right to refuse to provide testimony that is adverse to a spouse; and 2) the marital privilege for confidential communications, under which confidential communications between spouses are excluded from trial. The rationale for the adverse testimonial privilege is that it is necessary to preserve the harmony of marriages that exist at the time the testimony is demanded. The adverse testimonial privilege is held by the witness-spouse, not by the accused; the witness-spouse is free to testify against the accused but cannot be compelled to do so. *See Trammel v. United States,* 445 U.S. 40 (1980). The rationale of the confidential communications privilege is to promote the marital relationship at the time of the communication. The confidential communications privilege is held by both parties to the confidence. Thus, an accused can invoke the privilege to protect marital confidences even if the witness-spouse wishes to disclose them. *See United States v. Montgomery,* 384 F.3d 1050 (9th Cir. 2004).

These marital privileges are not codified in the Federal Rules of Evidence; they have been developed under the Federal common law, which establishes rules of privilege in cases in which Federal law provides the rule of decision. *See* Fed.R.Evid. 501.

The question posed by the Adam Walsh Child Protection Act is whether the Evidence Rules should be amended to codify an exception, under which information otherwise protected by either of the marital privileges would be admissible in a federal criminal case in which a spouse is charged with a crime against a child of either spouse or under the custody or control of either spouse. If such an exception were implemented, the following would occur in cases in which the defendant is charged with such a crime: 1) a spouse could be compelled, on pain of contempt, to testify against the defendant; and 2) a confidential communication made by an accused to a spouse would be disclosed by the witness over the accused's objection.

Case Rejecting the Harm to Child Exception to the Adverse Testimony Privilege

There is only one reported case in which a Federal court has upheld a claim of marital privilege in a prosecution involving a crime against a child under the care of one of the spouses. In *United States v. Jarvison,* 409 F.3d 1221 (10th Cir. 2005), the accused was charged with sexually abusing his granddaughter. The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting a witness from

being compelled to testify against a spouse. After holding that the marriage was valid, the court refused to apply a harm to child exception to the adverse testimonial privilege, and upheld the witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows:

> The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe,* 128 F.3d 1440 (10th Cir.1997). In *Bahe,* we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. *See Trammel,* 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442; *see also Jaffee v. Redmond,* 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony"). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception--not currently recognized by any federal court--allowing a court to compel adverse spousal testimony.

409 F.3d at 1231.

The court in *Jarvison* notes that its circuit had recognized a harm to child exception to the marital communications privilege in *United States v. Bahe,* 128 F.3d 1440, 1445-46 (10th Cir. 1997). The court in *Bahe* applied that exception to allow admission of the defendant's confidential statements to his wife concerning the abuse of an eleven-year-old relative. The *Jarvison* court made no attempt to explain why a harm to child exception should apply to the marital confidential communications privilege, but not to the adverse testimonial privilege.

It is notable that the court in *Jarvison* did not cite relatively recent authority from its own circuit that applied the harm to child exception to the adverse testimonial privilege – the precise privilege involved in *Jarvison.* In *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* and found no error when the defendant's wife testified against him in a case involving abuse of the couples' daughters. The defendant argued that his wife should have been told she had a privilege not to testify against him. But the court found that no warning was required because the defendant was charged with harm to a child of the marriage, and therefore the spouse had no adverse testimonial privilege to assert. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

It should also be noted that the *Jarvison* court implied more broadly that no Federal court had ever applied an exception that would compel adverse spousal testimony. In fact at least one Federal court has upheld an order compelling a witness to provide adverse testimony against a spouse. *See, e.g., United States v. Clark,* 712 F.2d 299 (7th Cir. 1983) (affirming a judgment of criminal contempt against a witness for refusing to testify against his spouse; holding that privilege could not be invoked to prevent testimony about acts that occurred before the marriage).

Cases Recognizing Harm to Child Exception

All of the other federal cases dealing with the harm to child exception — admittedly limited in number — have applied it to both the adverse testimonial privilege and the confidential communications privilege.

Marital Communications Privilege

In *United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) the court permitted the defendant's wife to testify to a threat made to her by the defendant that he would kill both her daughter and her. The defendant was accused of killing his two-year-old stepdaughter, his wife's natural daughter. The court found that the marital communications privilege did not apply to the defendant's communication. The court stated:

> The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege. *See Untied States v. Roberson,* 859 F.2d 1376, 1370 (9th Cir. 1988). When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve [sic] in such a case. . . . [T]he marital communications privilege should not apply to statements relating to a crime where a spouse of a spouse's children are the victims.

974 F.2d at 1138.

In *Bahe, supra,* the court relied upon the reasoning in *White* to apply a harm to child exception to the marital communications privilege. It noted as follows:

> Child abuse is a horrendous crime. It generally occurs in the home. . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

138 F.3d at 1446.

The court also noted the strong state court authority, both in case law and by statute, for a harm to child exception to both of the marital privileges.

Similarly, in *United States v. Martinez,* 44 F. Supp. 2d 835 (W.D. Tex. 1999), the court held that the marital communications privilege was not applicable in a prosecution against a mother charged with abusing her minor sons. The court stated:

> Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy. 25 Wright & Graham, Federal Practice and Procedure § 5593 at 762 (1989). "A contrary rule would make children a target population within the marital enclave." *Id.* at 761. *See also* 2 Louisell & Mueller, Federal Evidence, at 886 (1985). Society rightly values strong, trusting, and harmonious marriages. Yet, a strong marriage is more than the husband and wife, and it is more than merely an arrangement where spouses may communicate freely in confidence. A strong marriage also exists to nurture and protect its children. When children are abused at the hands of a parent, any rationale for protecting marital communications from disclosure must yield to those children who are the voiceless and powerless in any family unit.
>
> The Court has made a thorough search of the law in this circuit and has found no authority that would preclude this exception to the communications privilege in the context of a child abuse case. Nor has the Court found any law in our nation's jurisprudence that would extend the privilege under these circumstances. * * *
>
> The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. "Reason and experience" dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

44 F. Supp. 2d at 837.

Adverse Testimonial Privilege

In *United States v. Allery,* 526 F.2d 1362 (8th Cir. 1975), the court held that the adverse testimonial privilege was not available because the defendant was charged with the attempted rape of his twelve-year-old daughter. The court declared as follows:

> We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that

a serious crime against a child is an offense against that family harmony and to society as well.

Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 Geo. L. J. 257, 258 (1974).

526 F.2d at 1366.

In addition, as discussed above, the Tenth Circuit in *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), found that the adverse testimonial privilege was not applicable in a prosecution against a defendant for the abuse of his children.

Summary on Federal Case Law

The federal cases generally establish a harm to child exception for both marital privileges. The only case to the contrary refuses to apply the exception to the adverse testimonial privilege. But that case, *Jarvison*, is dubious on a number of grounds:

1. Its analysis is perfunctory.

2. It fails to draw any reasoned distinction between a harm to child exception to the marital communications privilege (which it recognizes) and a harm to child exception to the adverse testimonial privilege (which it does not recognize).

3. It is contrary to a prior case in its own circuit that applied the harm to child exception to the adverse testimonial privilege.

4. Its rationale for refusing to establish the exception to the adverse testimonial privilege is that no federal court had yet established it. But the court ignored the fact that the exception had already been established not only by a court in its own circuit but also by the Eighth Circuit in *Allery.*

5. Its assertion that no federal court had ever compelled a witness to testify against a spouse is incorrect.

II. The "Necessity and Desirability" of Amending the Federal Rules of Evidence to Include a Harm to Child Exception to the Marital Privileges.

A. General Criteria for Proposing an Amendment to the Evidence Rules

The Rules Committee and the Advisory Committee have long taken the position that amendments to the Evidence Rules should not be proposed unless 1) there is a critical problem in the application of the existing rules, and 2) an amendment would correct that problem without creating others. Amendments to the Evidence Rules come with a cost. The Evidence Rules are based on a shared understanding of lawyers and judges; they are often applied on a moment's notice as a trial is progressing. Most of the Evidence Rules have been developed by a substantial body of case law. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency and confusion in legal proceedings. Changes to the Evidence Rules may also create a trap for unwary lawyers who might not keep track of the latest amendments. Moreover, a change might result in unintended consequences that could lead to new problems, necessitating further amendments.

Generally speaking, amendments to the Evidence Rules have been proposed only when at least one of three criteria are found:

1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it;

2) the existing rule is simply unworkable for courts and litigants; or

3) the rule is subject to an unconstitutional application.

B. Application of Amendment Criteria to Proposed Harm to Child Exception

Under the accepted criteria for proposing an amendment to the Evidence Rules, set forth above, there is only one reason that could possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. The current common law approach is workable, in the sense of being fairly easily applied to any set of facts; if there is an exception, it applies fairly straightforwardly, and if there is no exception, there is no issue of application, because the privilege would not apply. Nor is the current state of the common law subject to unconstitutional application, as there appears to be no constitutional issue at stake in the application of a harm to child exception to the marital privileges. So the split in the courts is the only legitimate traditional basis for proposing an amendment to codify a harm to child exception to the marital privileges.

But the split in the courts over the harm to child exception, discussed above, is different from the usual split that supports a proposal to amend an Evidence Rule. Two recent amendments are instructive for comparison. The amendment to Evidence Rule 408, effective December 1, 2006, was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The admissibility of civil compromise evidence in a subsequent criminal prosecution is a question that arises quite frequently, given the often parallel tracks of civil and criminal suits concerning the same misconduct. The circuits were basically evenly split on the question, and ten circuits had written decisions on the subject; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the admissibility of compromise evidence in criminal prosecutions was one on which reasonable minds could differ. The disagreement was close on the merits and it was unlikely that any circuit would re-evaluate the question and reverse its course. Finally, the dispute among the circuits was at least 15 years old, so it appeared that the Supreme Court was unlikely to intervene as it had not already done so.

The amendment to Evidence Rule 609, effective December 1, 2006, was similar. The circuits disagreed on whether a trial court could go behind a conviction and review its underlying facts to determine whether the crime involved dishonesty or false statement, and thus was automatically admissible under Rule 609(a)(2). Every circuit had weighed in, and there was a reasonable disagreement on the question. Again, the disputed question was one that arose frequently in federal litigation, and the dispute was at least 10 years old.

In contrast, the split among the circuits over the harm to child exception is not deep; it is not wide; it is not longstanding; the issue arises only rarely in Federal courts; and the dispute is not one in which courts on both sides have reached a considered resolution after reasonable argument.

It is notable that there is no disagreement at all about the applicability of the harm to child exception to the marital privilege for *confidential communications.* All of the reported federal court cases have agreed with and applied this exception. So there is no conflict to rectify, and accordingly there would appear to be no need to undertake the costs of amendment the Evidence Rules to codify a harm to child exception to the confidential communications privilege.

As to the adverse testimonial privilege, there is a conflict, but it is not a reasoned one. As discussed above, the court in *Jarvison* created this conflict without actually analyzing the issue; without proffering a reasonable distinction between the two marital privileges insofar as the harm to child exception applies; and without citing or recognizing two previous cases with the opposite result, including a case in its own circuit. Indeed it can be argued that there is no conflict at all, because a court in the Tenth Circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, *Castillo*, which applied a harm to child exception to the adverse testimonial privilege.

In sum, an amendment providing for a harm to child exception to the marital privileges does not rise to the level of necessity that traditionally has justified an amendment to the Evidence Rules.

C. Other Problems That Might Be Encountered In Proposing an Amendment Adding a Harm to Child Exception

Beyond the fact that an amendment establishing a harm to child exception does not fit the ordinary criteria for Evidence Rules amendments, there are other problems that are likely to arise in the enactment of such an amendment.

1. Questions of Scope of the Harm to Child Exception

Drafting a harm to child exception will raise a number of knotty questions concerning its scope. The most difficult question of scope is determining which children would trigger the exception. Questions include whether the exception should cover harm to stepchildren, foster-children, and grandchildren. Strong arguments can be made that the exception should cover harm to children who are not related to the defendant or the witness, but who are within the custody or control of either spouse. But the term "custody or control" may raise questions of application that need to be considered, because it can be argued that a child was by definition within the defendant's custody or control when victimized by the defendant.

Another difficult question of scope is whether the harm to child exception should cover crimes against children older than a certain age. If a judgment is made that the exception should not be so broad as to cover, say, a father defrauding his adult son in a business transaction, then the question will be where to draw the line — adulthood, 16 years of age, etc.

Another question of scope is whether the harm to child exception should apply to *any* crime against a child. Certainly some crimes are more serious than others and so consideration might need to be given to distinguishing between crimes that are serious enough to trigger the exception and crimes that are not. A possible dividing line would be between crimes of violence and crimes of a financial nature. But even if that distinction has merit, the dividing line would have to be drafted carefully.

As discussed above, there are only a few federal cases on the subject of the existence of a harm to child exception, and none of these decisions provide analysis of the scope of such an exception. State statutes and cases are not uniform on the scope of the exception; for example, some states do not apply the exception where the crime is against an adult, while others set the age at 16. Codifying the harm to child exception runs the risk that important policy decisions about the scope of the amendment will have to be made without substantial support in the case law, and without the benefit of empirical research. Without such foundations, it is possible that an amendment could create problems of application that could lead to the necessity of a further amendment and all its attendant costs.

2. Policy Questions in Adopting the Harm to Child Exception to the Adverse Testimonial Privilege

Besides these questions of scope, the harm to child exception raises difficult policy questions as applied to the adverse testimonial privilege. The adverse testimonial privilege is held by the witness-spouse; if there is an exception to that privilege, the spouse can be compelled to testify, and accordingly, can be imprisoned for refusing to testify. The harm to child exception would apply to cases in which the defendant-spouse is charged with intrafamilial abuse. In at least some cases, it is possible that the child is not the only victim of abuse at the hands of the defendant — the witness-spouse may be a victim as well. It is commonly estimated that such overlapping abuse occurs in 40-60% of domestic violence cases; for example, a national survey of 6,000 families revealed a 50% assault rate for children of battered mothers. M.A. Straus and R.J. Gelles, *Physical Violence in American Families* (1996). In such cases, if the victim of domestic abuse is compelled to testify, the witness may suffer a risk of further harm from the defendant for providing adverse testimony. Application of the harm to child exception could place the spouse in the difficult circumstances of choosing between physical harm at the hands of the accused and a jail sentence for contempt.

Another problem is that the witness-spouse may suffer a personal risk of incrimination in testifying, because the witness-spouse may be subject to criminal prosecution for neglect or complicity. See *State v. Burrell*, 160 S.W.3d 798 (Mo. 2005) (prosecution of mother for endangering her child by permitting the child to have contact with an abusive father). In such cases, the harm to child exception will not assure the witness's testimony, because the witness who is reluctant to testify can still invoke her Fifth Amendment privilege.

However these policy questions should be resolved, they raise difficult issues and would seem to counsel caution (and perhaps empirical research) before a harm to child exception to the adverse testimonial privilege is codified. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 Harv. L.Rev. 1849 (1996) (discussing the debate and research on whether forcing a victim of domestic abuse to testify against the abuser will be beneficial or detrimental to the victim).

3. Departure from the Common Law Approach to Privilege Development

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. When the Federal Rules were initially proposed, Congress rejected codification of the privileges, in favor of a common law, case-by-case approach. Given this background, it does not appear to be advisable to single out an exception to the marital privileges for legislative enactment. Amending the Federal Rules to codify such an exception would create an anomaly: that very specific, and rarely applicable,

exception would be the only codified rule on privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law — including the very privilege to which there would be a codified exception. The Rules Committee and the Advisory Committee conclude that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving a harm to child exception to the marital privileges. Granting special legislative treatment to one of the least-invoked exceptions in the federal courts is likely to result in confusion for both Bench and Bar.

The strongest argument for codifying an exception to a privilege is that the courts are in dispute about its existence or scope and this dispute is having a substantial effect on legal practice. But as stated above, any dispute in the courts about the existence of a harm to child exception is the result of a single case that is probably not controlling in its own circuit. Moreover, the application of the harm to child exception arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.[1]

III. Draft Language for a Harm to Child Exception to the Marital Privileges

As stated above, the Rules Committee concludes that the benefits of codifying a harm to child exception to the marital privileges are substantially outweighed by the costs of such an amendment to the Federal Rules of Evidence. The Rules Committee recognizes, however, that there are policy arguments supporting such an exception, and is sympathetic to the concern that the *Jarvison* case raises some doubt about whether there is a harm to child exception to the adverse testimonial privilege, at least in the Tenth Circuit. Accordingly, the Rules Committee has prepared language that could be used to codify a harm to child exception to the marital privileges, in the event that Congress determines that codification is necessary.

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[1] The situation can be usefully contrasted with the proposed Rule 502 that has been approved by the Advisory Committee and is currently being considered by the Rules Committee. That rule is intended to protect litigants from some of the consequences of waiver of attorney-client privilege and work product that arise under federal common law. The Rules Committee has received widespread comment from the Bench and Bar that such protection is necessary in order to reduce the costs of pre-production privilege review in electronic discovery cases — dramatic costs that arise in almost every civil litigation. And federal courts are in dispute both on when waiver is to be found and on the scope of waiver.

The draft language is as follows:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child

The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft language raises a number of questions on the scope of the harm to child exception. Those questions include:

1) Should the exception apply to harm to adult children? The draft puts the term "minor" in brackets as a drafting option. Another option is to provide a different age limit, such as 16. The Rules Committee notes that some state codifications limit the exception to harm to children of a certain age. *See, e.g.,* Mich. Comp. Law. Ann. § 600.2162 (18 years of age). Other states provide no specific age limitation. *See, e.g.,* Wash.Rev.Code § 5.60.060(1) (no age limit for harm to child exception).

2) Should the exception cover harm to children who are not family members but are present in the household at the time of the injury? The draft language covers, for example, harm to children who are visiting the household, so long as they are within the custody or control of either spouse. The draft language also covers harm to step-children, foster-children, etc. The Rules Committee notes that the states generally apply the harm to child exception to cover cases involving harm to a child within the custody or control of either spouse. See, *e.g., Daniels v. State,* 681 P.2d 341 (Alaska 1984) (harm to child exception applied to foster-child); *Stevens v. State,* 806 So.2d. 1031 (Miss. 2001) (exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State,* 711 P.2d 852 (Nev. 1985) (statute providing exception to spousal testimony privilege for child in "custody or control" covered children spending the night with defendant's daughters); *State v. Waleczek,* 585 P.2d 797 (Wash. 1978) (term "guardian" in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian). As discussed above, however, some consideration might be given to whether "custody or control" might be so broad as to cover harm to any child that is allegedly injured by an accused.

3) Should the exception be extended to crimes involving harm to the witness-spouse? The draft language does not cover such crimes, as the mandate from the Adam Walsh Child Protection and Safety Act was limited to the harm to child exception. The Rules Committee notes, however, that a number of states provide for statutory exceptions to the marital privileges that cover harm to spouses as well as harm to children. See, e.g., Colo. Rev. Stat. § 13-90-107 (exception to adverse testimonial privilege where the defendant is charged with a crime against the witness-spouse); Wis.

Stat. § 905.05 (providing an exception to both marital privileges in proceedings in which "one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either"). *See also United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) (confidential communications privilege did not apply because the defendant was charged with harming his spouse); Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim-Spouse Exception in the Texas Rules of Criminal Evidence,* 28 Hous. L.Rev. 1095 (1991). .

4) Should the exception cover all crimes against a child? The draft language contains a bracket if the decision is made to specify the crimes that trigger the exception.

Conclusion

The Rules Committee and the Advisory Committee conclude that it is neither necessary nor desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges. The substantial cost of promulgating an amendment to the Evidence Rules is not justified, given that Federal common law (which Congress has mandated as the basic source of Federal privilege law) already provides for a harm to child exception — but for a single decision that is probably not good authority within its own circuit. Codifying a harm to child exception would also raise difficult policy and drafting questions about the scope of such an exception — questions that will be difficult to answer without reference to the kind of particular fact situations that courts evaluate under a common-law approach.

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 12-13, 2007

Rancho Santa Fe, California

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 12-13, 2007 in Rancho Santa Fe, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joan N. Ericksen.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
William W. Taylor, III, Esq.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Elizabeth Shapiro, Esq., Department of Justice

Also present were:

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Matthew Hall, Esq., Law Clerk to Hon. David Levi, Chair of the Standing Committee on Rules of Practice and Procedure

Opening Business

Judge Smith asked for approval of the minutes of the Fall 2006 Committee meeting. The minutes were approved with minor amendments suggested by the Department of Justice

representative. Judge Smith also reported on the January 2007 meeting of the Standing Committee.

Waiver of Attorney-Client Privilege and Work Product: Proposed Evidence Rule 502

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, or even a waiver of the document disclosed, then the discovery process could be made less expensive.

Another concern considered by the Committee the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product. Most federal courts have held that this disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. The Committee sought to determine whether the protection of selective waiver is necessary to encourage cooperation with government investigations.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chair of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate a rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Evidence Rules Committee complied with this request and prepared a draft rule to address waiver of privilege and work product — a proposed Rule 502. The Committee recognized that unlike other evidence rules, a rule governing privilege would eventually have to be enacted directly by Congress. See 28 U.S.C. § 2074(b). The first draft of Rule 502 was the subject of a hearing conducted at Fordham Law School in April 2006. In response to comments at that hearing and discussion at the subsequent Committee meeting, the draft rule was substantially revised. The Committee unanimously approved the redrafted proposal for release for public comment, and the Standing Committee voted unanimously to issue the revised proposed Rule 502 for public comment.

For the Fall 2007 meeting, the Reporter prepared a discussion memorandum that highlighted the public comments and other suggestions concerning possible changes to the draft of Rule 502 that

was released for public comment. The Committee discussed these comments and suggestions at the meeting, and voted to implement a number of changes.

The comments considered by the Committee, and the Committee's discussion and vote, were as follows:

1. Recommendations by the Style Subcommittee of the Standing Committee: The Style Subcommittee of the Standing Committee proposed a number of changes to the Proposed Rule 502 as it was released for public comment. The most important change was to add an introductory sentence describing the disclosures that were covered by the Rule. Under the protocol established by the Standing Committee, recommendations for style changes by the Style Subcommittee are dispositive unless the Advisory Committee determines that the recommendation would change the substance of the rule.

In advance of the Committee meeting the Reporter discussed a number of the style suggestions made by Professor Kimble, the consultant the Style Subcommittee. Some of Professor Kimble's recommendations were dropped as possibly affecting the substance of the Rule. At the Committee meeting, members discussed the suggested style changes that had not been dropped. The Committee focused mainly on whether the description in the initial sentence, added by the Style Subcommittee, was sufficiently comprehensive to cover all disclosures intended to be covered by the Rule. After discussion, the Committee determined that none of the suggested style changes would have any effect on the substance of the rule. The restyled version then became the template upon which to evaluate all other suggested changes made in the public comment.

The restyled template reads as follows:

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;

(2) the holder of the privilege or work-product protection took reasonable precautions to prevent disclosure; and

(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following

Fed. R. Civ. P. 26(b)(5)(B).

[**(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of non-governmental persons or entities. State law governs the effect of disclosure to a state or local-government agency; with respect to non-governmental persons or entities. This rule does not limit or expand a government agency's authority to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless it is incorporated into a court order.

(f) Definitions. — In this rule:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for materials prepared in anticipation of litigation or for trial.

2. Application to Diversity and Pendent Jurisdiction Cases: A number of public comments suggested that there was an ambiguity on whether Rule 502 as issued for public comment applies to diversity and pendent jurisdiction cases. They noted a possible tension between Rule 502, which provides a federal law of privilege for a "federal proceeding" (without distinguishing between federal question and diversity or pendent jurisdiction cases) and Rule 501, which provides that the state law of privilege applies when state law provides the rule of decision. Committee members reviewed these public comments and noted that any tension between the two Rules could be resolved by concluding that Rule 502 supersedes Rule 501 because it is later in time. But it would also be plausible to argue that Rule 502 is not applicable to diversity or pendent jurisdiction cases, because supersession on such an important question should not be inferred, but rather should be found only if the supersession is express.

After discussion, the Committee resolved to clarify that Rule 502 is applicable to diversity and pendent jurisdiction cases. The Committee voted unanimously to add a subdivision to Rule 502 to provide that:

"Notwithstanding Rule 501, this rule applies even if State law supplies the rule of decision."

The Committee also unanimously approved a Committee Note providing as follows:

The costs of discovery can be equally high for state and federal causes of action, and

the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state causes of action brought in federal court.

3. Relationship to Rules 101 and 1101: Rule 502 as issued for public comment would have an effect on state court proceedings. If a disclosure of privilege or work product is made at the federal level, the existence and extent of the waiver is governed by Rule 502, even if the protected information is offered in a state court proceeding. Some public comment suggested that Rule 502's impact on state court proceedings creates some tension with Evidence Rules 101 and 1101. Rule 101 provides that the Evidence Rules "govern proceedings in the courts of the United States . . . to the extent and with the exceptions stated in rule 1101." Rule 1101 provides that the Evidence Rules apply to "the United States district courts" and other federal courts in all proceedings, with the exceptions stated in Rule 1101(d) (which exceptions include grand jury proceedings, sentencing proceedings, etc.). Thus, it can be argued that Rule 502 cannot extend to state proceedings because the applicability of the Evidence Rules is limited to federal proceedings by Rules 101 and 1101.

The Committee began its consideration of the relationship between Rule 502 and Rules 101 and 1101 by discussing whether Rule 502 should in fact apply to state proceedings. A Committee member expressed concern that Congress may react negatively to any perceived encroachment on state law objectives. Another member suggested that any applicability to state proceedings should be muted — that a direct statement that Rule 502 applies to state proceedings would constitute a red flag. But after extensive discussion, the Committee unanimously resolved that Rule 502, in order to be effective, must have some effect on state proceedings — at least where the disclosure of protected information occurred at the federal level — and that there was no reason to hide that fact. Rule 502 must govern state proceedings with respect to disclosures initially made at the federal level, or else lawyers in *federal* court would not be able to rely on the protections of Rule 502, for fear that a waiver will be found in a subsequent state court proceeding under a less protective state law. Thus, binding state courts to the federal law of waiver as to disclosures made at the federal level promotes a legitimate federal interest. Members noted that Rule 502 makes no attempt to regulate state court determination of waiver when disclosures are initially made at the state level; it is thus limited to situations in which there is a substantial federal interest at stake.

After determining that Rule 502 properly governs the consequences of disclosures at the federal level when the protected information is later offered in a state proceeding, the Committee next considered whether it was necessary to clarify that Rule 502 would apply in such circumstances despite the limitations on the applicability of the Evidence Rules set forth in Rules 101 and 1101. The Committee determined unanimously that the tension between Rules 502 and 101/1101 should be addressed, because otherwise litigation could arise in state court proceedings where a disclosure of relevant privileged information had been made at the federal level. A litigant could argue that the state court is not bound by the federal waiver rule, despite its specific language, because Rule 502 was subject to a jurisdictional limitation imposed by Rules 101 and 1101. The Committee concluded

that clarification was necessary to forestall that threat of litigation; it voted unanimously to add the following language to the Rule:

> "Notwithstanding Rules 101 and 1101, this rule applies to state proceedings in the circumstances set out in the rule."

The Committee also unanimously approved an addition to the Committee Note to correspond to the added text. The addition to the Committee Note is as follows:

> The protections against waiver provided by Rule 502 must be applicable when disclosures of protected communications or information in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

3. Applicable Law When State Disclosures Are Offered In Federal Proceedings: Rule 502 as released for public comment did not (with one exception) specify which law of waiver applies when a disclosure is made in a state proceeding and the disclosed information is subsequently offered in a federal proceeding. (The exception was the provision on selective waiver, which specifically provided that state law would govern the effect of disclosure made to a state office or agency). The Reporter's memo to the Committee indicated that if Rule 502 was not changed to cover the question of applicable law in a federal proceeding as to disclosures made in state proceedings, then the applicable law would be provided by Rule 501 — meaning that the state law of waiver would apply in diversity and pendent jurisdiction cases, and the federal law of waiver would apply in federal question cases. The Reporter suggested that Rule 502 as issued for public comment should be changed to provide a specific rule on applicable law in federal proceedings for disclosures initially made at the state level — otherwise the choice of law questions would be extremely complicated and difficult for the parties and the court to navigate.

After extensive consideration, the Committee determined unanimously that the best rule on applicable law (state or federal) would be to apply the law of waiver that is the most protective of privilege. That is, if state law would find no waiver but Rule 502 would, then the state law of waiver would apply; conversely, if Rule 502 would find no waiver but state law would, then Rule 502 would apply. The Committee determined that this result made the most sense for both state and federal interests. Parties in state court should be able to rely on a more protective state law of waiver, without fear that it will be undermined subsequently by a less protective federal rule. And if Rule 502 were more protective under the circumstances, the federal interest in applying that rule and protecting the privilege outweighs any state interest, given that the information is being offered in a federal court.

The Committee voted unanimously to add the following language to the text of Rule 502:

Disclosure made in a state proceeding. — When the disclosure is made in a state proceeding and is not the subject of a state-court order, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

The Committee also agreed to a Committee Note to the new provision, stating as follows:

Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. Where the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, where the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of discovery.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

The Committee then considered a proposal from a Committee member to expand the above subdivision to treat not only state disclosures offered in federal proceedings, but also to treat the effect of federal disclosures later offered in state proceedings. The Committee member proposed the following subdivision:

> Application to federal and state proceedings.
>
> (A) When the disclosure is made in a federal proceeding or to a federal public office or agency, the disclosure is not a waiver in any federal or state proceeding, if it is not a waiver under this rule.
>
> (B) When the disclosure is made in a state proceeding or to a state or local government office or agency, the disclosure is not a waiver in any federal proceeding if:
>
> (1) it would not be a waiver under this rule if it had been made in a federal proceeding or to a federal public office or agency;
>
> (2) it is not a waiver under the law of the state where the disclosure occurred; or
>
> (3) it is subject to an order of the state court finding that the disclosure was not a waiver.

After extensive discussion, the Committee determined that the proposal would create a number of problems and should not be added to the Rule. One problem was that subdivision (A) refers to "the disclosure" as "not a waiver", but this language would not cover Rule 502's provision on subject matter waiver, where the question is not whether disclosure is a waiver but whether a waiver extends to other privileged information that has not yet been disclosed. The Committee also concluded that any reference in the text of the rule to the enforceability of state court orders on waiver would be problematic, because such enforceability is already governed by the Full Faith and Credit Act and extensive case law.

4. Consideration of Suggested Changes to Rule 502(a) on Subject Matter Waiver: The Committee considered several suggestions made during the public comment for change to Rule 502(a), the provision on subject matter waiver.

Limiting Subject Matter Waiver to Intentional Disclosures:

The first suggestion was that the text should be changed to clarify that a subject matter waiver can never be found unless the waiver is intentional. The purpose behind this change would be to make it clear that an inadvertent disclosure of privileged information during discovery would never lead to the drastic consequences of a subject matter waiver. In response to this suggestion, one Committee member posited that there may not need to be a need for protection against subject matter waiver for mistaken disclosures, because the provision on inadvertent disclosure (Rule 502(b)) would grant protection against any finding of waiver so long as the producing party acted with reasonable care and took prompt and reasonable steps to get the mistakenly disclosed information returned. But other members noted that protection against subject matter waiver was necessary even with the protections provided by Rule 502(b) — otherwise parties will be likely to increase the costs

of preproduction privilege review in order to avoid even the remote possibility of a drastic subject matter waiver.

Committee members also considered whether the language on intentionality should refer to the intent to disclose the information or to the intent to waive the privilege. After discussion, the Committee determined that subject matter waiver should not be found unless it could be shown that the party specifically intended to waive the privilege by disclosing the protected information. The Committee voted unanimously to amend proposed Rule 502(a) to provide that subject matter waiver could only be found if "the waiver is intentional."

Applying the Subject Matter Waiver Provision to Subsequent State Court Proceedings:

Some public comments suggested that Rule 502(a) should be changed to clarify that its subject matter waiver rule binds state courts reviewing disclosures of protected information made in federal court. After discussion, the Committee unanimously determined that Rule 502(a) should expressly bar a state court from finding a subject matter waiver with respect to a disclosure made at the federal level. The Committee concluded that without such a change, Rule 502(a) would be inconsistent with the other effective subdivisions of the Rule, all of which bind state courts to respect federal law on waiver when the disclosure is made at the federal level. The Committee reasoned that binding state courts to Rule 502(a) as to disclosures made at the federal level was necessary, otherwise parties could not rely on the protections of the rule for fear that a disclosure would be found to be a subject matter waiver under some state's law.

5. Consideration of Suggested Changes to the Inadvertent Disclosure Provision, Rule 502(b): The Committee considered several suggestions made during the public comment for change to Rule 502(a) on subject matter waiver.

Concerns expressed in public comment about the "reasonable precautions" standard, necessary for a finding that an inadvertent disclosure is not a waiver:

1. Public comments suggested that the "reasonable precautions" standard is subject to being interpreted to require the producing party to take such strenuous efforts to avoid waiver that there will be no cost-savings, and thus the goal of the rule would be undermined. Those expressing this concern argued that the textual language should be softened, and that the note should clarify that herculean efforts in pre-production privilege review are not required, allowing for the use of such procedures as scanning software can be found to be reasonable precautions. Other suggestions included clarification that the court should take into account factors such as the scope of discovery and the discovery schedule.

2. Public comments noted that the reasonable precautions standard provides a single factor test, whereas the predominant test in the federal courts is to employ a multi-factor test.

3. One public comment noted that the reasonable precautions standard does not take into account the burdens of retrieval on the party receiving the protected information.

The Committee considered and discussed each of these concerns. It made the following determinations:

1. The standard in the Rule should be changed from "reasonable precautions" to "reasonable steps" in accordance with a number of public comments.

2. Language should be added to the Committee Note to indicate that the standard of "reasonable steps" is not intended to require multiple levels of eyes-on privilege review, and takes into account the scope of discovery, the time for production, and other relevant factors.

3. Language should be added to the Committee Note to indicate that the multi-factor test of federal common law is not explicitly codified in the text of the rule, because it is not really a test of admissibility but more akin to a grab bag of factors that are not properly placed in the text of a codified evidence rule. The language in the Committee Note should emphasize, however, that the standard of "reasonable steps" is flexible enough to accommodate a variety of factors that are discussed in the federal case law.

4. Language concerning burdens on receiving parties should not be added to the Rule or the Note, as the burden on a receiving party cannot be predicted by the producing party, and it is important for the Rule to provide criteria that can be relied on by the producing party in deciding the extent of preproduction privilege review that is reasonable.

Two suggestions in the public comment for change to the language in Rule 502(a) requiring "reasonably prompt measures" to retrieve the mistakenly disclosed information from the time that the holder "knew or should have known" about the mistaken disclosure:

1. The ABA expressed concern that "reasonably prompt" does not give enough guidance and so will be the subject of litigation. The ABA suggested that the duty to seek return should be expressed in terms of a specific time period, e.g., the producing party must ask for return within [14] days of the time the duty is triggered.

The Committee considered this suggestion and unanimously rejected it. A specific time period for seeking return would create a number of problems, including: 1) how to count days; 2) the anomaly of a specific time period that cannot by definition start at any specific time, but only at the time that it is reasonable under the circumstances; and 3) the difficulty of picking a specific time period that would not be too short for some circumstances and too long for others.

2. A number of comments expressed concern about the duty to seek return being triggered at the time that the holder "should have known" about the mistaken disclosure. At its last meeting, held before receipt of any public comments, the Committee tentatively decided to retain the "should have known" language in Rule 502(b) — as issued for public comment, the producing party must take reasonably prompt measures from the time it knew or should have known of the mistaken disclosure. The Committee considered the argument, expressed by a member of the Standing Committee, that the "should have known" language was subjective and malleable, and could lead to a finding that a party in an electronic discovery case should have known about the mistaken disclosure at the time it was made, given the likelihood that mistakes will occur during electronic discovery. The Committee tentatively decided that the "should have known" standard is probably less subjective and less malleable than a standard based on the producing party's actual knowledge.

In public comment and at the New York hearing, however, a different argument was made against the "should have known" requirement. Commenters noted that the term "should have known" implies that the producing party must take reasonable steps *after production,* to determine whether a mistaken disclosure has been made. If the language could be construed to impose that kind of duty on the producing party, that party may be required to do another privilege review for all information *that it has already produced.* And if that is the case, then the goal of the Rule — to reduce the costs of discovery — would be undermined, because post-production review would clearly add to discovery costs.

After extensive discussion the Committee determined that the comments on the "should have known" language had merit. The Committee voted unanimously to delete that language from the text of the Rule, and also to amend the Committee Note to emphasize that the producing party is not required to conduct a post-production review to determine whether any mistaken disclosures have been made.

Extending the protections of Rule 502(b) to disclosures made to federal offices and agencies:

A number of public comments asked the Committee to consider extending the protections of Rule 502(b) beyond disclosures in federal proceedings, to disclosures made to federal offices and agencies. They noted that the cost of pre-production privilege review can be as great with respect to a production to the government as it is in litigation; in the public comment, the Committee received information that a single production to a government regulator cost a corporation more than $5,000,000 in costs of pre-production privilege review.

Most Committee members agreed that extending the protections of Rule 502(b) to productions to federal offices and agencies was a sensible means of limiting the costs of privilege review, which is the basic goal of proposed Rule 502. These members further argued that the protection against mistaken disclosure should apply to any production made to a federal office or agency. They contended that there was no reason to limit the protection to disclosures made in the course of regulatory investigations or enforcement. They reasoned that any limitation in the rule —

such as that the production must be made "to a federal office or agency in the exercise of its regulatory, investigative, or enforcement authority" — might give rise to questions about when the office or agency is in fact exercising that authority, a question that would often be difficult for the producing party to determine.

The Department of Justice representative expressed the Department's opposition to extending inadvertent disclosure protections to disclosures made to a federal office or agency, and then further extending that protection by removing the limitation of the disclosure being made in the exercise of regulatory, investigative or enforcement authority. The Department agreed that there may be some benefits to this extension in limiting the costs of production of information, but it argued that extending the protection beyond litigation might lead to negative ramifications that were not considered or raised in the public comment period. The Department representative argued that extending the inadvertent disclosure protections would require actions by people well downstream of any "proceeding" in which the inadvertent disclosure would be judged. For example, where the government is reviewing a proposed take-over of two companies, or a company proposing to take over a government function, and the company inadvertently submits privileged material to the government, the parties may disagree over whether there is a waiver, and there is no proceeding at that point in which to adjudicate the issue. The government might rely on the document to make an administrative decision, which, if challenged, raises the question of whether a court could overturn a decision if it found that there was an inadvertent disclosure. And once out of the investigatory or regulatory context, Rule 502 could reach so far as to require government contractors to consult the Rules of Evidence in their negotiations with the government, even though no proceeding is contemplated, and may never occur. The cautious party may believe that "reasonably prompt steps" to recover an inadvertently produced document might include bringing a proceeding where none existed. Otherwise, if nothing is done other than a demand, there could be the concern that down the road, the party will be found not to have taken reasonably prompt steps to rectify the mistaken disclosure.

The Committee discussed and considered the Department's concerns. Members responded that the examples raised by the Justice Department could arise under the existing federal common law of waiver. As that is so, it made sense to have that law of waiver in one place, i.e., Rule 502, rather than having parties (including the government) search the non-uniform federal common law to determine whether a mistaken disclosure constitutes a waiver when disclosures are made to federal offices or agencies. Committee members also argued that disclosures to federal offices or agencies, in any context, raise a sufficient federal interest to justify extending the protection of Rule 502(b).

The Committee voted to extend the protection of Rule 502(b) to all mistaken disclosures made to federal offices or agencies. The Department of Justice representative was the only dissenter.

Finally, the Committee discussed briefly whether it made sense to extend the protection of Rule 502(b) to *any* mistaken disclosure or privilege or work product, where the information is later offered in a federal proceeding. The example given was that of a privileged letter mistakenly sent to a friend or employee, completely outside the context of a federal proceeding or production to a

federal office or agency. Committee members resolved that there would not be a sufficient federal interest in protecting these disclosures, and that extending the protections of Rule 502 to such disclosures could create conflicts with legitimate state interests. Such an extension was found especially unwarranted in the absence of public comment.

The revised version of Rule 502(b), as approved by the Committee, reads as follows:

(b) Inadvertent disclosure. — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

The Committee Note to Rule 502(b), as approved by the Committee, reads as follows:

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, a communication or information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to such disclosures as they are in litigation.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss* & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver– the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those factors. Other relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a holder that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected communications or information. Efficient systems of records management implemented before litigation will also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of communications or information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

6. Selective Waiver: Rule 502(c) as issued for public comment stated that a waiver by disclosure to federal offices or agencies exercising investigatory or prosecutorial authority would not constitute a waiver in favor of private parties. The Committee did not approve this "selective waiver" provision on the merits. Rather, it placed the language in brackets in order to elicit public comment on the subject of selective waiver — a subject that the Committee had been asked to address.

During the public comment period, the selective waiver provision was without question the most controversial part of proposed Rule 502. It was adamantly opposed by bar groups and private lawyers; it was enthusiastically favored by government offices and agencies. The basic arguments expressed in favor of selective waiver were 1) it is a necessary tool for corporations to be able to cooperate with government investigations when they would not otherwise do so for fear that the information disclosed to the government could be used by private parties; and 2) it will decrease the costs of government investigations. The basic arguments expressed against selective waiver were 1) it would add more pressure on corporations to waive the privilege— pressure that would only feed into the alleged "culture of waiver" already established by federal agencies; and 2) it would deprive private parties of relevant information that may be necessary for private recovery. (Other arguments for and against selective waiver are described in the summary of public comment attached to proposed Rule 502, as submitted to the Standing Committee as an action item).

At the Spring meeting Committee members discussed whether the selective waiver provision should be retained in proposed Rule 502. The discussion (and the public comment) indicated that selective waiver raised empirical questions that the Committee was not in a position to determine — most specifically whether selective waiver protection is necessary to encourage corporations to cooperate with government investigations, or instead whether corporations are sufficiently incentivized to cooperate so that selective waiver would be an unjustified protection. Committee members also noted that much of the debate on selective waiver was in essence political. For example, most of those opposed to selective waiver argued that it would only aggravate the "culture of waiver" that currently exists when public agencies seek privileged information from corporations. And most of those in favor denied the existence of a "culture of waiver". But the Committee determined that 1) whether a culture of waiver was a good or bad thing was essentially a political question, and 2) whether such a culture existed was an empirical question. Neither question could be determined by the Committee during the rulemaking process.

Some members opposed to selective waiver emphasized that the doctrine has been rejected by almost all federal courts, and therefore any rule adopting selective waiver should bear a heavy burden of justification — one that had not been met during the public comment. Finally, members noted that if a selective waiver provision were included in Rule 502, it would probably have to require state courts to adhere to selective waiver protection for disclosures made to federal regulators. Otherwise the provision could not be relied upon for sufficient protection from the consequences of disclosure. But binding state courts to selective waiver would raise significant problems of federalism, because most states do not recognize selective waiver.

After extensive discussion, the Committee voted unanimously to drop the provision on selective waiver from Proposed Rule 502.

The question for the Committee, after this vote, was whether the selective waiver provision should be made part of a separate report to Congress, and if so, whether the Committee should take any position in that report on the subject of selective waiver. The Committee unanimously determined that it would be appropriate to make some report to Congress on selective waiver.

Members reasoned that Congress requested that the Committee consider selective waiver, and so Congress was entitled to some report on the Committee's extensive work on the subject. The Committee resolved that it would submit to the Standing Committee a separate report to Congress on selective waiver, with the recommendation that the report be submitted to the Judicial Conference and referred to Congress as a report of the Conference.

The next question for the Committee was whether it should take some position on selective waiver in the report to Congress. As the Committee had already decided to drop selective waiver from Proposed Rule 502 because it could not support the provision on the merits, the three options remaining for the Committee in the report to Congress were: 1) provide language that Congress might use for a statute on selective waiver but take no position on the merits; 2) provide language that Congress might use, but recommend against any enactment of a selective waiver statute; and 3) recommend against a selective waiver statute and provide no language for Congress to use.

The Committee quickly rejected the third option — providing no statutory language for Congress to consider — on the ground that this option would not fully respond to the request for a rulemaking procedure on selective waiver. The Committee held three hearings in which much of the testimony focused on selective waiver, and the Committee spent many hours drafting and reviewing language for a selective waiver provision. Under these circumstances, the Committee determined that it was appropriate to refer this work product to Congress, in the event that Congress should decide to proceed with separate legislation on selective waiver.

One member argued in favor of the second option — recommending against selective waiver. That member reiterated many of the arguments against selective waiver that were raised in the public comment. In response, many members emphasized that while they may not personally support selective waiver, it would not be appropriate to take a position on the merits recommending against such legislation. To take such a position would involve the Committee in the political disputes and unresolved empirical questions that led the Committee to drop the selective waiver provision from Rule 502 in the first place.

At the end of the discussion, the Committee voted 1) to propose the submission of a report to Congress that would set forth the arguments before and against selective waiver that were raised in the public comment; 2) to take no position on the merits of selective waiver in that report, while explaining that selective waiver raises controversial issues that the Committee was not in a position to resolve; and 3) to set forth draft language for separate legislation, for Congress to consider should it decide to implement selective waiver. One member dissented.

The Committee next considered whether the language for a statute on selective waiver should be changed in any respect from the selective waiver provision that was released for public comment as Rule 502(c). The Committee unanimously agreed that the suggested statutory language should cover disclosures made to federal agencies only. Members reasoned that the federalism issues attendant to controlling disclosures to state agencies are extremely serious, and that including

language even in brackets to cover state disclosures might suggest that covering disclosures was simply a question of drafting.

7. Extending Rule 502(d) to Confidentiality Orders Not Based Upon the Agreement of the Parties: At the Fall 2006 meeting, the Committee tentatively agreed to amend the court order provision of Rule 502 so that the enforceability of a court order would not depend on agreement between the parties. Members thought it anomalous that a court order memorializing an agreement between the parties would be entitled to more respect than other court orders on waiver generally. Public comment also noted that court orders on confidentiality would be useful to limit the costs of discovery even where all parties do not agree to such an order (e.g., when only one party has most of the discovery obligations) or when the parties disagree on certain provisions.

At the Spring meeting, the Committee agreed unanimously that the court order provision should be amended to delete the language making enforceability of a confidentiality order dependent on the agreement of the parties.

8. Amendment to Definition of Work Product: Two public commenters argued that the definition of work product in Rule 502 as issued for public comment was too limited, because the work product protection extends to intangibles under federal common law. Thus, a definition limited to "materials" may be construed as not protecting intangible work product.

The law on this subject indicates that while Rule 26 protects only tangible "materials," the federal common law extends equivalent protection to intangibles such as facts learned from work product, and electronic data not in hardcopy. The Committee agreed with the public comment and voted unanimously to amend the definitions section to provide coverage of intangible work product. The definitions section approved by the Committee reads as follows:

> **(g) Definitions**. — In this rule:
>
> 1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
>
> 2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The Committee also unanimously approved a Committee Note to the definitions section to read as follows:

> **Subdivision (g).** The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges,

remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product").

9. ABA Proposal on Implied Waiver: At the very end of the public comment period, the ABA proposed an amendment to proposed Rule 502 to cover a purported problem that had not been addressed in any of the hearings on the rule and is not treated by the rule: whether waiver of privileged communications can be implied by disclosing underlying factual information. The proposal was to add an entirely new and lengthy section to Rule 502 on this separate subject matter. The ABA also proposed an extensive Committee Note to accompany this major change to Rule 502.

The Committee voted unanimously to take no action on the ABA proposal regarding implied waiver. Substantial changes to an Evidence Rule, such as proposed by the ABA, require significant research and careful consideration by the Committee. The Committee determined that it could not, under the circumstances presented, simply add the ABA proposal to proposed Rule 502.

Final Committee Determination on Rule 502:

The Committee voted unanimously to recommend to the Standing Committee that Proposed Rule 502 and its Committee Note (both as amended at the meeting), together with a cover letter to Congress (as approved at the meeting), be approved and referred to the Judicial Conference for eventual recommendation to Congress. The text of proposed Rule 502, the Committee Note, and the cover letter to Congress are attached to these minutes. The text of the separate cover letter to Congress on selective waiver, approved unanimously by the Committee is also attached to these minutes, as is the draft language for a selective waiver statute, on which the Committee takes no position.

Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, Section 214, provides:

The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of

the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--

(1) a child of either spouse; or

(2) a child under the custody or control of either spouse.

* * *

The Reporter and the consultant on privileges prepared a memorandum to assist the Committee in assessing the necessity and desirability of amending the Evidence Rules to provide a harm to child exception to the marital privileges. That memo indicated that almost all courts considering the question had in fact refused to apply either the confidential communications privilege or the adverse testimonial privilege to cases in which the defendant is charged with harm to a child in the household. In other words, a harm to child exception to both marital privileges is already recognized in the federal case law. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege. The memorandum concluded that this recent case was dubious authority, because it provided no analysis; relied on a purported lack of case law on the subject, even though other federal cases apply the exception; and failed to cite a previous case in its own circuit that applied a harm-to-child exception to the adverse testimonial privilege (and accordingly the new case is not even controlling in its own circuit).

The Committee reviewed and discussed the necessity and desirability of an amendment to implement a harm to child exception to the marital privileges. Most members agreed that if it were the Committee's decision, it would not and should not propose an amendment to implement the harm to child exception. This is because the Committee ordinarily does not propose an amendment unless one of three conditions is established: 1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it; 2) the existing rule is simply unworkable for courts and litigants; or 3) the rule is subject to an unconstitutional application. With respect to the existence of a harm to child exception, there is no risk of unconstitutional application, and there is no problem of workability, because the exception either applies or it does not. With respect to a split in the circuits, the courts are in fact uniform about the existence of a harm to child exception to the privilege for confidential communications. It is true that there is a split of sorts on the application of the harm to child exception to the adverse testimonial privilege, but that split was only recently created, and by a single case — a case that ignores the fact that its own circuit had previously established the exception. Thus, the Evidence Rules Committee would not ordinarily propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit.

Committee members also noted that an amendment to establish a harm to child exception

would raise at least four other problems: 1) piecemeal codification of privilege law; 2) codification of an exception to a rule of privilege that is not itself codified; 3) difficulties in determining the scope of such an exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and 4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The Department of Justice representative noted, however, that the question for the Committee was not whether it would propose an amendment, but rather how to respond to Congress's request for input on the necessity and desirability of such an amendment. Because privilege rules must be enacted by Congress, the standard for proposing a rule of privilege might be different from that used by the Evidence Rules Committee for other rules.

After discussion, the Committee voted to recommend to the Standing Committee a report to Congress concluding that an amendment to the Evidence Rules to codify a harm-to-child exception was neither necessary nor desirable. The Committee approved the draft report prepared by the Reporter, which explains why the exception is neither necessary nor desirable. The Department of Justice representative dissented.

The Committee then reviewed and approved language for a harm-to-child exception to be included in the report to Congress, for its consideration should Congress decide to proceed with the exception. The draft language as approved by the Committee is as follows:

> **Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child.** – The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

Time-Counting Project

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. That template takes a "days are days" approach to time-counting, meaning that weekend days and holidays are counted for all time periods measured in days. It also provides for uniform treatment on when to begin and end counting of any time period, and a uniform method of counting when the period ends on a weekend or holiday.

The question for the Evidence Rules Committee at the Spring meeting was whether a version of the Time-Counting template should be proposed as an amendment to the Evidence Rules. The Committee noted that there are only a handful of Evidence Rules that are subject to day-based time-

counting: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield, unless good cause is shown; and 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial, unless good cause is shown. There are only two year-based time periods that could potentially be subject to the time-counting rule that would govern when a time period begins and ends: 1) Rule 609(b) provides a special balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 2) Rules 803(16) and 901(b)(8) together provide for admissibility of documents over 20 years old.

The Committee reviewed a memorandum from the Reporter which indicated that 1) the day-based time periods in the Evidence Rules will not be shortened or otherwise affected by the time-counting template, because they are all 14 days or longer — the time-counting template takes a "days are days" approach, and that is the approach currently taken in the rules for time periods 14 days or longer — so there is no reason to change those periods; and 2) there appears to be no reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules. Perhaps this is because the day-based time periods in the Evidence Rules are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. And as to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. For example, how likely is it that a document will be 20 years old, depending on how one counts the first or last day of the period? Any dispute on time-counting could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

Committee members noted another problem with adding a time-counting rule to the Evidence Rules: If the template is adopted as an Evidence Rule and kept uniform with the Civil and Criminal Rules on time-counting, some anomalies may arise. For example, the template contains an entire subdivision on counting hour-based time periods. But there are no hour-based time periods in the Evidence Rules. It seems unusual to have a rule on counting hour-based periods when there is no such period in the Evidence Rules — nor is there likely ever to be one. Including such a provision may well create confusion; lawyers who assume quite properly that Evidence Rules are written for a purpose may think that there must be some hour-based time period that they have overlooked. Also, the template provides extensive treatment of what to do if the clerk's office is inaccessible. But the clerk's availability is essentially irrelevant to the time-based periods in the Evidence Rules. Similarly, the "last day" provision, which is tied to when something can be filed with the clerk, is unlikely to have any applicability to any time-based question in the Evidence Rules.

Committee members noted that the anomalies raised above (of having provisions with no practical utility) could be addressed by tailoring the text of the template and deleting the provisions that have no utility in the Evidence Rules. But that solution raises problems of its own. Any time-counting Evidence Rule would have to co-exist with the time-counting Civil and Criminal Rules. To the extent those rules do not match, there will be confusion and an invitation to litigation — one

party arguing that the Evidence Rules count the time in one way and the other arguing that the Civil/Criminal rule comes out differently. And this is especially problematic because the template covers not only time-counting under the *rules*, but also time-counting under statutes, local rules and court orders. Under that language, the time-counting rule in the Evidence Rules would make it applicable not only to the few time-based Evidence Rules, but also to any statute or local rule that may be raised in the litigation — making it all the more important that the time-counting Evidence Rule track the Civil and Criminal Rules exactly. The alternative, perhaps, is to change the template version to provide that the time-counting Evidence Rule is applicable only to time-counting under the Evidence Rules themselves. But disuniformity would still create a problem if the Evidence Rule counted one way as to the time-based Evidence Rules, but the Civil or Criminal Rule came out differently.

The Committee unanimously determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because there is no existing problem that would be addressed by such an amendment, and adding the template to the Evidence Rules is likely to create confusion and unnecessary litigation.

Restyling Project

At a previous meeting the Committee directed the Reporter to prepare restyled versions of a few Evidence Rules, so that the Committee could consider the desirability of undertaking a project to restyle the Evidence Rules. That project would be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. Many of the Evidence rules are "paper-based"; they refer to evidence in written and hardcopy form. A restyling project could be used to update the paper-based language used throughout the Evidence Rules, and more broadly it might be useful in making the Evidence Rules more user-friendly. The general sense of the Committee at previous meetings was that a restyling project had merit and was worthy of further consideration. Members reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

The Reporter asked Professor Joseph Kimble, the Standing Committee's consultant on Style, to restyle three rules of evidence — Rules 103, 404(b) and 612. Professor Kimble graciously agreed to do so. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. They raised questions such as: 1) whether updating certain language would be a substantive or stylistic change; 2) whether adding subdivisions within a rule would be unduly disruptive; and 3) whether certain substantive changes that would improve the rule could be proposed for amendment along with the style changes. After Professor Kimble restyled the three rules, the Reporter reviewed the changes and provided suggestions for change, on the ground that some of the proposed style changes would have substantive effect. Professor Kimble incorporated the Reporter's suggestions in a second draft, and it was that draft that was reviewed by

the Committee at a previous meeting.

The Committee recognized that before any more work was done on a restyling project, the Committee would need to determine whether the Chief Justice supported restyling of the Evidence Rules. At the Spring 2007 meeting, John Rabiej reported that the Chief Justice was informed about the possible project to restyle the Evidence Rules and had no objection to the project.

In light of the Chief Justice's position, the Committee voted unanimously to begin a project to restyle the Evidence Rules. No timetable was placed on the project. The Reporter stated that he would work with Professor Kimble to prepare some restylized rules for the Committee's consideration at the next meeting.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial." It also implied, but did not decide, that the Confrontation Clause imposes no limitations on hearsay that is not testimonial. Subsequently the Court in *Davis v. Washington* held that statements are not testimonial, even when made to law enforcement personnel, if the primary motivation for making the statements was for some purpose other than for use in a criminal prosecution. The Court in *Davis* also declared, but did not hold, that non-testimonial hearsay is unregulated by the Confrontation Clause. Most recently, however, the Court in *Whorton v. Bockting* explicitly held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause.

The Reporter stated to the Committee that the Court's recent decision in *Bockting* raised the question of whether any amendments should be proposed to the hearsay exceptions on the ground that as applied to non-testimonial hearsay, a particular exception may not be sufficiently reliable to be used against an accused. Before *Bockting*, it could still be argued that reliability-based amendments would not be necessary in criminal cases because the Confrontation Clause still regulated the reliability of non-testimonial hearsay. But that is no longer the case after *Bockting*. The Reporter noted that one possibly questionable exception is Rule 804(b)(3), which provides that a hearsay statement can be admitted against the accused upon a finding that a reasonable declarant could believe that making the statement could send to subject him to a risk of penal sanction. There is no requirement in the Rule that the government provide any further corroborating circumstances indicating that the statement is trustworthy — even though the accused must provide corroborating circumstances to admit such a statement in his favor.

The Committee directed the Reporter to prepare a memorandum for the next meeting, on whether it is necessary to amend Rule 804(b)(3) to require that the government provide corroborating circumstances guaranteeing trustworthiness before a declaration against penal interest can be

admitted against an accused.

Closing Business

The Committee noted that the Spring 2007 meeting was Judge Smith's last meeting as Chair of the Committee. The Committee expressed its deep gratitude and appreciation for Judge Smith's outstanding work as Chair. Members and the Reporter emphasized that without Judge Smith's guidance and leadership, the Committee could not have tackled such difficult and important issues as waiver of attorney-client privilege and offers of compromise; Judge Smith was responsible for the Committee's success on these projects, and he will be sorely missed.

The meeting was adjourned on April 13, 2007, with the time and place of the Fall 2007 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
June 11-12, 2007
Volume I-B

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 11-12, 2007

VOLUME I-A

1. Opening Remarks of the Chair

   A. Report on the March 2007 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2007 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Time-Computation Subcommittee

6. Report of the Evidence Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed new Evidence Rule 502 on waiver of attorney-client privilege and work-product protection and draft letters to Congress accompanying the proposed new rule
   B. **ACTION** – Approving draft report to Congress on harm-to-child exception to marital privileges required under Adam Walsh Child Protection Act
   C. Minutes and other informational items

VOLUME I-B

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 60, and new Rule 61 implementing the Crime Victims' Rights Act
   B. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendment to Criminal Rule 41(b) authorizing issuance of search warrants
   C. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases on time computation.
   D. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 7, 16, 32, 32.2, 41 and Rule 11 of the Rules Governing §§ 2254

and 2255 Cases.

E. Minutes and other informational items

VOLUME II-A

8. Report of the Bankruptcy Rules Committee

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011.

B. **ACTION** – Approving and transmitting to the Judicial Conference proposed technical amendments to Bankruptcy Rules 7012, 7022, 7023.1, and 9024.

C. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 4008, 7052, 9006, and 9021, and proposed new Bankruptcy Rules 1017.1 and 7058.

D. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 on time computation.

VOLUME II-B

E. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, 24, and Exhibit D to Official Form 1, and new Official Forms 25A, 25B, 25C, and 26.

F. **ACTION** – Approving publishing for public comment proposed revisions to Official Forms 8 and 27.

G. Minutes and other informational items

VOLUME III

9. Report of the Civil Rules Committee

A. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 59, 62, 65, 68, 71.1, 72, 81, and Supplemental Rules B, C, and G on time computation.

B. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rules 56 and 81, and proposed new Rule 62.1
C. Minutes and other informational items

10. Report of the Appellate Rules Committee

A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 on time computation.
B. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 4, 22, 26, 29, and 40, and new Rule 12.1
C. Minutes and other informational items

11. Report on Standing Orders

12. Report on Sealing Cases

13. Long-Range Planning Report

14. Next Meeting: January 2008

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

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

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

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

Date: **May 19, 2007**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 16-17, 2007 in Brooklyn, N.Y. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items:

(1) approval of published Rules 1, 12.1, 17, 18, 32, 41(b)(5), 60, and 61 for transmission to the Judicial Conference;

(2) approval for publication and comment of a proposed amendment to time computation Rule 45(a) and related amendments to Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases; and

(3) approval for publication and comment of proposed amendments to Rules 7, 16, 32.2, 41, and Rule 11 of the Rules Governing §§ 2254 and 2255 Cases.

In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, most notably the Committee's recommendation that published Rule 29 not be transmitted to the Judicial Conference.

II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

The first seven amendments discussed below implement the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771. As explained when these rules were proposed for publication, they reflect two basic decisions. The first decision concerns the scope of the proposals.

The CVRA reflects a careful Congressional balance between the constitutional rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims. Given that careful balance, the Committee generally sought to implement, but not go beyond, the rights created by the statute. For the same reason, the Committee adopted the statutory language whenever possible. The second decision concerns the structure of the proposed amendments. The Committee believed it would be easier for victims and their advocates (as well as judges, prosecutors and defense counsel) to identify the new provisions regarding victims if they were placed in a single rule. Therefore where possible the Committee placed many of the new provisions in a single rule (new Rule 60) rather than scattering them throughout the rules.

The proposed amendments generated a large number of written comments (as well as testimony at the public hearing) including both criticism that the proposed rules went too far, tipping the adversarial balance and depriving the defense of critical rights, and criticism that the proposed rules did not go far enough to implement the specific provisions of the CVRA and the fundamental policies that it reflects. Of particular note were letters from Senator Kyl, one of the sponsors of the CVRA, and Representatives Poe and Costa, co-chairs of the Congressional Victims' Rights Caucus. In addition to concerns focusing on specific amendments, some comments urged that the Committee begin the drafting process anew, rather than moving forward with the proposed amendments.

The Committee devoted a great deal of time, attention, and thought to the public comments, hearing testimony, and the important issues raised therein. After the public comment period closed, a subcommittee met several times by teleconference and exchanged many preliminary memoranda and e-mails. Its work was incorporated into a detailed report to the full Advisory Committee, which then discussed the CVRA rules for more than five hours at its April meeting.

After careful consideration, the Advisory Committee recommends that the full slate of proposed rules, as modified in response to the public comments, be approved and forwarded to the Judicial Conference. These proposals implement core requirements of the CVRA. The Committee favors proceeding on a step-by-step basis, beginning generally with amendments that implement the clear requirements imposed by the statute, leaving many other issues that are less clear for additional development by judicial decisions that will provide concrete examples of the factual situations in which the issues arise and give us the benefit of thoughtful treatment by the judges who confront these issues.

The Committee recognized that further amendments may also be desirable, but concluded that need not and should not delay the adoption of the proposed amendments. The Committee will treat the question of victim rights as a continuing agenda item, allowing for consideration of amendments to other rules (or revisions, as needed in light of experience, to the rules that would be amended by our proposal). Several additional amendments have been suggested by Senator Kyl, Representatives Poe and Costa, Judge Paul Cassell, and the Federal Public and Community

Defenders, among others. Additional proposals may come to the Committee's attention as a result of developments in judicial decisions.

It is important to note that proceeding in this fashion will expedite the implementation of core requirements of the CVRA, and will not prevent the immediate implementation of any other provisions of the Act. The courts are already bound to follow the statute. But where the statute's dictates are not clear, or its directives may be accommodated in more than one way, the Committee felt it best to allow some judicial development of the issues which will guide the rulemaking process. (The same course of action is being followed, for example, with the forfeiture rules that will be discussed later in this report.)

1. ACTION ITEM–Rule 1. Scope; Definitions; Proposed Amendment Defining "Victim"

This amendment incorporates by reference the definition of the term "crime victim" found in the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771(e). The statutory definition provides that a victim is "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the court has the power to decide any dispute as to who is a victim. The Committee concluded that it was not necessary at this point to create detailed procedures for this determination, though something of this nature could be added in the future if experience indicates it would be desirable.

The Committee considered but did not adopt two other suggested changes. Although some comments suggested that the definition should be expressly limited to the specific rules adopted to implement the CVRA, these concerns seemed misplaced. The definitions in Rule 1 are applicable only to the Criminal Rules themselves[1]; they do not govern, for example, rights to obtain restitution, to bring civil actions, and so forth. Accordingly, the Committee declined to add a listing of the rules to which the definition would be applicable. The Committee also declined to add additional

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[1]In addition to the proposed rules, the new definition would apply to current Rules 12.4 and 38, which use the term "victim" or "victims." The adoption of the general definition does not appear to pose a problem for the interpretation or application of either provision. Rule 12.4(a)(2) requires the government to file a statement identifying an organizational victim. Rule 38(e) authorizes a court to stay a sentence providing for notice to victims under 18 U.S.C. § 3555. Section 3555 gives the court discretion to require that the defendant give victims notice and an explanation of his conviction of fraud or other intentionally deceptive practices.

language limiting the definition to a person injured by a crime that is the subject of a pending prosecution. The only instances in which the present and proposed Criminal Rules provide rights to victims--Rules 12.1, 12.4, 17, 18, 32, 38, and 60--are those in which a prosecution is pending. Moreover, proposed Rule 60(b)(4) requires the rights provided therein to be asserted in the district in which the defendant is being prosecuted.

With the modifications noted above, the Committee voted 10 to 1 in favor of recommending approval of the amendment to Rule 1.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 1 be approved as amended and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 12.1. Notice of Alibi Defense; Proposed Amendment Regarding Victim's Address and Telephone Number.

This amendment implements the victim's right under the Crime Victims' Rights Act 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 amended rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion either to order its disclosure to the defense 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.

At the suggestion of the Standing Committee, we requested public comment on the question whether the rule should assume that a defendant must demonstrate need to get the name and contact information for a victim who will testify to rebut his alibi defense, or should instead require a case-by-case showing of the need to withhold this information. Several comments urged that the published rule struck the wrong balance, and that the proposed amendment to Rule 12.1 tips the adversarial balance too far as a policy or constitutional matter by requiring a showing of need. Critics argue that this violates the fundamental requirement that discovery be reciprocal, which is a condition of requiring the defendant to produce information about his defense in advance of trial; the defendant must provide the names and contact information for his alibi witnesses, but he may be denied the same information about victims who will be called as alibi witnesses. Many other comments argued that the proposed rule does not go far enough. These comments argued the amendment gives too little weight to victim interests in providing--upon a showing of need–for either disclosure of the name and contact information to the defense or providing some other reasonable procedure to allow the preparation of the defense as well as the protection of the victim's interests.

The Committee considered these concerns at length before approving the rule by a 9 to 2 vote. It concluded that the rule, as published, strikes an appropriate balance and does not violate the requirement that discovery be reciprocal. The rule triggers a judicial determination in any case where the defendant meets the low threshold standard of showing a "need" for the name and contact information of a victim who will testify to rebut his alibi. Generally the defense will be able to meet this standard, though there will be occasional cases in which the defense is already aware of the name and contact information of a victim who will be called to rebut his alibi. Once there has been a showing of "need," the rule requires the court either to provide this information to the defense or to fashion some other reasonable procedure that allows the preparation of the defense while protecting the victim's interest. The rule fairly puts the burden, in the first instance, on the defendant to bring the issue before the court. In a normal case, the victim is not likely to be in a position to raise a timely objection or establish a basis for non- disclosure, and the government may not be privy to all of the relevant facts. If the defendant establishes a need for this information, the amendment gives the government or the victim time to weigh in before disclosure can occur. The "need" threshold is an appropriate basis to trigger the court's consideration of all aspects of the need and risk analysis. Finally, the proposed amendment does provide ample authority to protect the victim. In the exceptional case in which the authority to fashion an alternative to disclosure is not sufficient for this purpose, the court has the authority under Rule 12.1(d) for good cause to grant relief from any of the requirements in the Rule 12.1.

The Committee voted 9 to 2 to forward proposed Rule 12.1 to the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12.1 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 17. Subpoena; Proposed Amendment Regarding Personal or Confidential Information About Victim.

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

The amendment seeks to protect the privacy and dignity interests of victims without unfair prejudice to the defense. During the comment period it drew criticism from both advocates of victims, who argued that it did not go far enough, and persons concerned that it unduly restricted defense access to critical information during preparation for trial. More general concerns were also expressed about ex parte judicial action.

At present, all subpoenas are issued by the court in blank at the request of a party under Rule 17(c), and served without notice to opposing counsel. As published, the amendment authorized the court to approve the issuance of the subpoenas ex parte, and made notice to the victim discretionary. This portion of the amendment was revised to omit the reference authorizing ex parte action, and to provide that the court must, absent exceptional circumstances, give notice to the victim prior to approving such a subpoena. The Committee approved this language after an extended discussion that included consideration of substituting the "good cause shown" standard (which was rejected by a vote of 8 to 4). The Committee also added language to the note leaving to the judgement of the district court the determination whether to permit the matter to be decided ex parte without notice to anyone in a particular case. This clarifies the point that in exceptional cases the subpoena can be served without notice to either the government or the victim. The note references as examples of such exceptional circumstances situations where evidence might be lost or destroyed without immediate action, or where providing notice would unfairly prejudice the defense by premature disclosure of sensitive defense strategy.

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

After extended discussion the Committee voted 9 to 3 in favor of recommending the approval of the proposed amendment to Rule 17.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 17 be approved as amended and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 18. Place of Trial Within District; Proposed Amendment Requiring Court to Consider Convenience of Victims.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the defendant and witnesses – in setting the place for trial within the district. It is intended to implement the victim's "right to be treated with fairness" under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(8). Because the interests of victims who will testify are

already considered when setting the place for trial within a district, the amendment's focus is on victims who will not testify. In response to public comments, the Committee revised the note to delete some language that might be misconstrued and to state that the court has substantial discretion to balance any competing interests.

The Committee voted 9 to 2 in favor of recommending approval of the proposed rule.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 18 be approved as amended and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 32. Sentencing and Judgment; Proposed Amendment Deleting Definition of Victim, Amending Scope of Presentence Investigation and Report, and Providing for Victim's Opportunity to Be Heard at Sentencing.

Several amendments to Rule 32 are proposed to implement various aspects of the Crime Victims' Rights Act.

First, Rule 32(a) is amended by deleting the definitions of "victim" and "[c]rime of violence or sexual abuse." These provisions have been superseded by the CVRA. As noted above, a companion amendment to Rule 1 incorporates the CVRA's broader definition of victim. The amendment would delete all of the text in Rule 32(a). The Committee proposes reserving Rule 32(a), rather than renumbering all of the subdivisions of this complex rule.

Second, the Committee proposes amending Rule 32(c)(1) to make it clear that the presentence investigation should include information pertinent to restitution whenever the law permits the court to order restitution, not merely when it requires restitution. This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6).

Third, Rule 32(d)(2)(B) is amended to make it clear that victim impact information should be treated in the same way as other information contained in the presentence report. The amendment deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

Fourth, amended Rule 32(i)(4)(B) deletes language which refers only to victims of crimes of violence or sexual abuse. As noted above, these provisions have been superseded by the CVRA.

Fifth, subdivision (i)(4)(B) has been amended to incorporate the statutory language of the CVRA, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). This proposed change prompted the greatest number of public comments. One concern that was expressed repeatedly was that the statutory language might be interpreted to cut back on the victim's right to be heard at sentencing because the statutory phrase replaced language giving victims of crimes of violence or sexual offenses the right "to speak." The Committee added language to the note stating that absent unusual circumstances any victim who is in the courtroom should be allowed a reasonable opportunity to speak directly to the judge. Other comments requested changes falling outside the bounds of the published amendments, such as adding a requirement that victims be given the right to disclosure to all or part of the presentence report. A change of this nature would require publication for notice and comment, and thus could not be considered as part of this amendment.

After extended discussion and votes on preliminary matters, the Committee voted 10 to 2 to forward the proposed Rule 32 amendments to the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32 be approved as amended and forwarded to the Judicial Conference.

6. ACTION ITEM–Rule 60. Victim's Rights. Proposed New Rule Providing for Notice to Victims, Attendance at Proceedings, the Victim's Right to Be Heard; Enforcement of Victim's Rights; and Limitations on Relief.

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts. It contains provisions regarding the notice to victims regarding judicial proceedings, the victim's attendance at these proceedings, and the victim's right to be heard, as well as provisions governing the enforcement of victims' rights, including who may assert these rights and where they may be asserted. The Rule also incorporates the statutory provisions limiting relief. Following publication, the Rule was amended throughout to use consistent language to describe its application to the rights of victims "described in these rules." That change responds to concerns that the Rule might be thought to apply to other contexts where victim interests are considered, where there are distinct bodies of statutory or decisional law.

Rule 60, like other CVRA amendments, was criticized both for going too far and not going far enough. A number of commentators proposed additions which were not considered on the merits because they would require publication for comment. These include the following: (1) a provision governing the time when victim rights must be raised, (2) a provision requiring victims to assert their rights under the same procedural rules applicable to the parties, (3) a provision applying waiver to

victim rights not asserted in a timely manner, (4) a provision requiring victims to be notified of their rights at proceedings, and (5) a provision giving the victims the right to be heard at any proceeding affecting their rights, not just at bail, plea, and sentencing hearings. Other comments suggested that some or all of the provisions in Rule 60 were unnecessary because they were already provided for by statute, or were beyond the scope of the Enabling Act. Finally, there was support for adding a provision that would indicate that the victim's rights under the Criminal Rules do not override the constitutional rights of the defendant or third parties, and do not override statutory rights in the absence of a showing of compelling need. These proposals, and others, can be considered by the Committee in the future. Finally, support was also expressed for unpacking Rule 60 and distributing its changes throughout the rules. As noted above, the Advisory Committee has reaffirmed its view that it is desirable to group these key provisions in a single rule.

Subdivision (a)(1) implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." The proposed amendment requires "the government" to use its best efforts to notify victims of public court proceedings.

Subdivision (a)(2) implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding. It closely tracks the statutory language.

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

Subdivision (b) implements the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). It provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims' Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted. Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

In response to public comments, proposed Rule 60 was amended to state that the "victim's legal representative" may raise the victim's rights, as specified by the CVRA. The note has been revised to state the Committee's understanding that counsel may present the views of the victim or the victim's lawful representative. The rule was also revised to state that a victim's rights can be raised by "any other person as authorized by 18 U.S.C. § 3771(d) and (e)." This incorporates the statutory provisions regarding victims who are minors and other victims who are incompetent,

incapacitated or deceased, and it also recognizes the statutory limitations on a defendant's assertion of rights as a victim, which are found in 18 U.S.C. § 3771(d)(1) and (e).

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged. (The term "highest offense charged" was drawn from the CVRA, 18 U.S.C. § 3771 (d)(5)(C).)

The Committee voted 10 to 2 in favor of recommending the proposed Rule 60 be approved.

Recommendation–The Advisory Committee recommends that proposed Rule 60 be approved as amended and forwarded to the Judicial Conference.

7. ACTION ITEM–Rule 61. Title. Proposed New Rule.

This amendment renumbers current Rule 60 as Rule 61 to accommodate the new victims' rights rule. The Committee approved the amendment without objection.

Recommendation–The Advisory Committee recommends that the proposal to renumber Rule 60 as Rule 61 be approved and forwarded to the Judicial Conference.

8. ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.

This amendment responds to a problem that affects the investigation of cases involving corruption in United States embassies and consulates around the world. Often the most important evidence is located in the offices or residences associated with the consulate or embassy. Problems of this nature have arisen in cases involving embassies and consulates in many countries, and similar difficulties have arisen in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are all within U.S. control, they are not in any State or U.S. judicial district. As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. (Although the USA PATRIOT Act amended Rule 41(b)(3) to provide magistrate judges with the authority to issue

warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses.)

The language of the proposed amendment was based upon Rule 41(b)(3), added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, in contrast, is limited to property within any of the following: (1) a territory, possession, or commonwealth of the United States; (2) the premises of a United States diplomatic or consular mission in a foreign state, and related buildings and land; and (3) the residences and related property owned or leased by the United States and used by United States personnel assigned to United States diplomatic or consular missions in foreign states. These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The amendment was intentionally drafted narrowly to avoid any thorny international issues. It addresses only search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The published draft incorporated the language of 18 U.S.C. § 7(9), the statutory provision granting jurisdiction over crimes committed in diplomatic and consular missions, as well as the residences and related property owned or leased by the United States for United States personnel assigned to diplomatic or consular missions. At the urging of the Committee's Style Consultant, the statutory language was simplified. The committee note was also amended to include a statement that the Rule is intended to authorize a magistrate judge to issue a warrant in all locations where the statute provides for jurisdiction, and that the differences in language reflect only differing style conventions.

At the request of the Standing Committee a reference to American Samoa was added to the rule and placed in brackets, and public comment was sought on whether American Samoa presented a special case. The Pacific Islands Committee of the Judicial Council of the Ninth Circuit opposed the application of the rule to American Samoa, suggesting that the matter requires further study, and that a different amendment that would treat the High Court of Samoa as the equivalent of a state court would be preferable to the current proposal.

The Advisory Committee concluded that the rule should apply to American Samoa. A gap in the Government's ability to enforce the law is plainly present in American Samoa, and that gap should be remedied. The Department is presently conducting investigations involving possible federal criminal activity in American Samoa, and the Federal Bureau of Investigation has established a Resident Agency there to address criminal activity. Because American Samoa is not located within any federal judicial district, violations of Title 18 that occur in American Samoa must be prosecuted in districts outside of American Samoa, consistent with the venue provisions of 18 U.S.C. § 3238. The proposed amendment of Rule 41(b) would simply provide United States magistrate judges located in those other federal districts with the authority to issue search warrants to gather evidence that pertains to those federal criminal violations. The suggestion of the Pacific Islands Committee for a different amendment to Rule 41 addresses distinct issues of comity that are beyond the focus of the current proposal; this suggestion should not delay the implementation of the current proposal.

The Committee unanimously approved the proposed amendment for transmittal to the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be approved as amended and forwarded to the Judicial Conference.

III. Action Items–Recommendations to Publish Amendments to the Rules

A. Time Computation Rules

1. ACTION ITEM-Rule 45(a)

The Advisory Committee recommends that Rule 45(a) be amended to track the time computation template developed by Judge Kravitz's committee. Only minor changes (such as the substitution of references to criminal rather than civil rules in the committee note) were needed to adapt the template to the Criminal Rules.

Only one aspect of the proposed rule deserves special mention. Following the template, proposed Rule 45(a) applies to statutory time periods as well as to periods stated in the rules, with the exception of statutes that provide for a different time counting rule (such as "business days" or "excluding Saturdays, Sundays, and holidays"). At present it is not clear that Rule 45(a) has any application to statutory time periods. Unlike the comparable provisions in the other rules (such as Civil Rule 6(a)), Rule 45(a) currently contains no reference to statutory time periods, nor did it retain the general language "any time period" used prior to restyling. Accordingly, the proposed committee note recognizes that the new language may broaden the applicability of Rule 45. It states that the

general time computations do not apply to Rule 46(h), because that rule is based upon a statute that provides for a different time-counting method.

The Committee discussed the need for legislative action in tandem with the rulemaking process, and noted that the need for legislative action is particularly acute in several instances where statutory time periods underlie the time periods specified in the Criminal Rules. For example, the time specified in Rule 5.1(c) for preliminary hearings is based upon the requirements of 18 U.S.C. § 3060(b). If the "new days are days" time computation rule is not applicable to statutory periods, it would leave open the argument that actions that would be timely under particular rules would not meet statutory requirements like those in § 3060(b). The Committee is working to develop a list of statutory provisions where legislative action is most needed.

The Committee also discussed the need to develop a process for revising local rules to accommodate the new time counting rules, and urged Judge Kravitz and his committee to make this part of the implementation process.

The Committee voted unanimously to forward the Rule 45(a) amendment to the Standing Committee for publication. After the meeting changes were circulated and approved by e-mail to bring Rule 45(a) and the committee note into conformity with the most recent draft of the time computation template and accompanying rule, so that all of the rules would be as consistent as possible.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 45(a) be published for public comment.

The Committee was also unanimous in recommending the following amendments to time periods that are intended to compensate for the change to a "days are days" method of counting time. Rules Committee–to accompany these amendments. The Committee approved the addition of these Subsequent to the meeting, committee notes were drafted–paralleling those adopted by the Civil notes by e-mail.

2. ACTION ITEM-Rule 5.1

Rule 5.1 requires a preliminary hearing to be held within 10 days after a defendant's initial appearance if the defendant is in custody or 20 days if the defendant is not in custody. The Committee recommends extending these periods to 14 and 21 days if proposed Rule 45(a) is adopted, but notes that these periods are based upon 18 U.S.C. § 3060(b). Because of the statutory basis of the time periods in the current rule, this proposal is contingent upon the adoption of a

statutory amendment. If the statute can be amended, conversion to 14 and 21 days would be the rough equivalent of the times under the current rule.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 5.1 be published for public comment.

3. ACTION ITEM-Rule 7

The Committee unanimously concluded that the time for motions for a bill of particulars should be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 7 be published for public comment.

4. ACTION ITEM-Rule 12.1

Rule 12.1 (alibi defense) establishes time periods for responses and disclosure. The Committee concluded that if proposed Rule 45(a) is adopted the 10 day periods for the defendant's response and the government's disclosure under Rule 12.1(a)(2) and (b)(2) should be increased from 10 to 14 days.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 12.1 be published for public comment.

5. ACTION ITEM-Rule 12.3

Rule 12.3 (public authority defense) establishes time periods for responses, requests, and replies. The Committee concluded that if proposed Rule 45(a) is adopted the 10 days periods in Rule 12.3 should be increased to 14 days, and the 20 day period be increased to 21 days.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 12.3 be published for public comment.

6. ACTION ITEM-Rule 29

Rule 29(c)(1) requires motions for post-verdict acquittal to be filed within 7 days after a verdict or the discharge of the jury. The Committee recommends increasing the time to 14 days if proposed Rule 45(a) is adopted. At present, excluding weekends and holidays from the 7 day period means that the defense has at least 9 days for such motions. Requests for continuances are frequent, and often the motions are filed in a bare bones fashion requiring later supplementation. Rather than increasing the need for continuances, it would be preferable to set the general time at 14 days (a multiple of 7).

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 29 be published for public comment.

7. ACTION ITEM-Rule 33

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for a new trial under Rule 33(b)(2).

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 33 be published for public comment.

8. ACTION ITEM-Rule 34

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for arrest of judgment under Rule 34.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 34 be published for public comment.

9. ACTION ITEM-Rule 35

Rule 35(a) currently allows the court to correct a sentence for arithmetic, technical, or other clear error within 7 days after sentencing (which is, in practical terms, approximately 9 days under the current counting rules). The Committee concluded that this period should be increased to 14 days if proposed Rule 45(a) is adopted. Sentencing is now so complex that minor technical errors are not uncommon. Extension of the period to 14 days will not cause any jurisdictional problems if an appeal has been filed because FRAP 4(b)(5) expressly provides that the filing of a notice of

appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a). There was some sentiment on the committee for a rule that would allow the court to correct such errors at any time, but the Committee did not pursue this line of thought because it falls beyond the scope of the current computation project.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 35 be published for public comment.

10. ACTION ITEM-Rule 41

Rule 41(e)(2)(A)(i) now states that a warrant must command that it be executed within a specified time no longer than 10 days (which can be up to 14 days under the current time computation rules). The Committee recommends that the period be increased to 14 days, although it noted that the considerations here are significantly different than those pertinent to many of the other rules. First, warrants can and often are executed on nights and weekends. Second, there is a real concern that warrants not be executed on the basis of stale evidence. For that reason, the courts often set a time for execution that is shorter than 10 days. On the other hand, there are situations in which more time may be needed for the proper execution of a highly complex warrant. After weighing these various considerations, the Committee concluded that designating a 14 day period was appropriate because it was the rough equivalent of the present period, followed the multiples of 7 rule of thumb, and still left the court with discretion to set a shorter time period in individual cases, as is frequently done at present.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

11. ACTION ITEM-Rule 47

The Committee recommends that the current requirement under Rule 47(c) that motions be served 5 days before the hearing date be increased to 7 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 47 be published for public comment.

12. ACTION ITEM-Rule 58

Rule 58(g) governs appeals from a magistrate judge's order or judgment in cases involving petty offenses and misdemeanors. The Committee recommends that the time under Rule 58(g)(2) for interlocutory appeals and appeals from a sentence or conviction of a misdemeanor be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 45(a) be published for public comment.

13. ACTION ITEM-Rule 59

The Committee concluded that the 10 day period for objections to nondispositive determinations, findings, and recommendations by a magistrate judge under Rule 59(a) and dispositive matters under 59(b) should be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 59 be published for public comment.

14. ACTION ITEM-Rule 8 of the Rules Governing § 2254 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2254 Proceedings be published for public comment.

15. ACTION ITEM-Rule 8 of the Rules Governing § 2255 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2255 Proceedings be published for public comment.

B. Rule 16

ACTION ITEM–Rule 16 Discovery and Inspection; Proposed Amendment Exculpatory and Impeachment Information

The proposed amendment to Rule 16 is the result of four years of discussion and consideration by the full Advisory Committee and by two subcommittees. This portion of my report provides a summary of the justifications for and issues raised by the proposed amendment.

I have provided the following related materials as attachments: (1) an American College of Trial Lawyers 2003 position paper; (2) the Federal Judicial Center's 2004 Report on the Treatment of *Brady v. Maryland* Material and supplemental 2005 data; (3) a letter from the Federal and Community Defenders; (4) excerpts from the American Bar Association's Model Rules of Professional Conduct and Criminal Justice Standards; (5) the Department of Justice's new *Brady* policy; (6) two lists of *Brady* cases, one covering the period through July 2001, and the other listing more recent cases; and (7) excerpts from an ALR annotation discussing other cases. In addition, the Federal Judicial Center is completing a new research report that should be available in time for inclusion in the materials distributed to the Standing Committee, and I understand that the Department of Justice expects to submit additional materials.

The proposed amendment reflects the Advisory Committee's conclusions that (1) there is a strong case for codifying the prosecution's duty to disclose exculpatory and impeachment evidence in the Federal Rules, and (2) the disclosure under the rules should be broader in scope than the constitutional obligation imposed by *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny. The proposed amendment makes the prosecution's disclosure to the defense of exculpatory and impeachment material a standard part of pretrial discovery in federal prosecutions.

The Committee did not come to the decision to recommend this amendment lightly. The Department of Justice has consistently opposed the idea of amending Rule 16 to encompass exculpatory and impeachment material. The Committee has considered the Department's concerns, and it revised the draft amendment, narrowing it substantially in several respects, in an effort to be responsive to these concerns. During the time the amendment was under consideration, as discussed below, the Department also adopted an internal policy intended to address many of the concerns that prompted the consideration of an amendment. The Advisory Committee welcomed the new policy, but ultimately concluded that it did not take the place of a judicially enforceable amendment to the Federal Rules. The proposed rule and the Department's policy are not in conflict. Rather, they would complement one another and focus appropriate attention on the importance of providing exculpatory and impeachment evidence and information to the defense in a timely fashion.

After the Department's presentation of its new internal policy, the Committee voted 8 to 4 to forward the proposed amendment to the Standing Committee for publication.

The need to address the issue in Rule 16

The failure of the Federal Rules of Criminal Procedure to provide a duty to disclose exculpatory evidence is an anomaly that should be remedied. Although the Federal Rules contain very detailed provisions requiring pretrial disclosure of a wide variety of material and information, there is a gap within the rules. They contain no requirement that the government disclose evidence that would tend to establish the defendant's innocence or tend to cast doubt on key elements of the government's case. In contrast, virtually all states define the prosecutor's obligation to disclosure evidence favorable to the defendant by court rule or statute,[2] and approximately one third of federal districts have local rules that codify the obligation, define what constitutes *Brady* material, and/or set requirements for timing and conditions of disclosure.[3]

There is strong support for amending Rule 16 to include a requirement that the government disclose exculpatory evidence. The Advisory Committee's consideration of this issue was prompted by its receipt of a lengthy 2003 position paper from the American College of Trial Lawyers that advocated an amendment to Rule 16 (as well as a companion amendment to Rule 11). The position paper--which was adopted by the College's Board of Regents--reported the experience of the members of the College's Federal Criminal Procedure Committee. In essence, the College concluded that defense efforts to obtain *Brady* material are often unsuccessful because neither the scope of the obligation nor the timing requirements are clear. In the absence of a clear definition, federal prosecutors have adopted various interpretations of their obligations under *Brady* that improperly restrict disclosure, and disclosure has often been delayed or even denied. The practitioners on the Advisory Committee reported that similar experiences are common. A letter from the Federal and Community Defenders that is included as an attachment and additional communications from individual Federal Defenders also support this view.

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[2]The state rules are described in 2004 report of the Federal Judicial Center, which is included as an attachment. Because it is not critical to know the precise count of states that have each variation of the rules in question, the Federal Judicial Center has not been asked to update that portion of its report. This could, of course, be done during the comment period if it were deemed helpful.

[3]In its 2004 report the Federal Judicial Center found (p. 4) that 30 of the 94 districts had a relevant local rule, order, or procedure governing disclosure of *Brady* material. As noted above, the FJC is presently updating this report to provide a completely current count, and its new report will be included in the agenda materials.

The Committee is also aware of a significant number of cases in which the courts have found *Brady* violations, as well as many more cases in which the courts have found that exculpatory material was not disclosed–or was not disclosed in a timely fashion–but nevertheless found no constitutional violation because the failure to provide the evidence did not deprive the defendant of due process. In many cases, the court found that the undisclosed evidence was favorable to the defendant–and material in the sense that term is generally used under Rule 16–but not material in a narrower constitutional sense. In order to meet this elevated constitutional standard of materiality, the defense must establish a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, *Kyles v. Whitley*, 514 U.S. 419 (1995). The attached materials include brief descriptions of cases considering *Brady* issues,[4] as well as an annotation collecting cases.[5]

The reported cases are not, however, a true measure of the scope of the problem, which it is impossible to measure precisely. The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light. There is, however, no way to determine how frequently this occurs. For that reason, the Advisory Committee places substantial weight on the experience of highly respected practitioners, such as the members of the American College of Trial Lawyers and the practitioner members of the Advisory Committee, who strongly support the need for an amendment to Rule 16. Similarly, the Federal and Community Defenders believe that a rule is needed. One of the values of publishing the proposed rule, of course, would be to gain further information on this point.

It is also important to note that in a large number of districts the local rules or standing orders require disclosure of some or all of the information that would be addressed by the proposed amendment. The local rules, it should be noted, vary widely regarding both the scope of the material to be disclosed, as well as the timing. These variations will be described in the forthcoming Federal Judicial Center report, which will be distributed with the agenda materials. For present purposes, it is sufficient to note two points. First, the development of numerous local rules supports

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[4]Cases prior to July 2001 are summarized in an excerpt from the Habeas Assistance and Training Project. Later cases were summarized by Professor Beale.

[5]This annotation is of interest because it contains not only cases in which the court found that exculpatory or impeachment information was "material" in the sense that term is used in *Brady*, but also a large number of cases in which the court found that exculpatory material was not provided, but that the error was not of constitutional dimensions because the defendant was unable to show a reasonable probability that the result of the trial would have been different if the evidence has been disclosed.

the Advisory Committee's view that exculpatory and impeachment evidence and information can and should be addressed by rulemaking. Second, the variety of these rules suggests that it may be time to replace the patchwork of varying local rules with a single uniform rule.

One new factor emerged during the course of the Committee's consideration of this issue: the Department of Justice, under the leadership of Assistant Attorney General Alice Fisher, adopted a new policy in the United States Attorneys Manual (USAM) requiring disclosure. This is the first time that the Department's written policies have mandated disclosure of exculpatory and impeachment evidence and information, and the Committee was extremely supportive of the Department's action. Moreover, the Department took the unusual step of providing Committee members with drafts of the policy and seeking their comments. The Committee applauded the Department's action, and specifically its broad statement of the duty of disclosure. In the end, however, the Advisory Committee concluded that the new policy, though a major step forward, did not obviate the need for the proposed rule, which differs from the USAM policy in two key respects. First, the USAM policy retains a subjective limitation on the duty to disclose information that is exculpatory or impeaching, but which the prosecutor concludes is "not significantly probative of the issues before the court." USAM § 9-5.001(E)(C). Second, the new policy, like the remainder of the USAM, is not judicially enforceable; it "does not create a general right of discovery," "[n]or does it provide defendants with any additional rights and remedies." USAM § 9-5.001(E). *See also* USAM § 9-5.100 (Preface) ("GIGLIO POLICY") (same). The Committee considered deferring consideration of the amendment to give the new policy time to take effect, but felt that it would not be feasible to monitor compliance. As noted above, the defense is generally unaware when the prosecution fails to provide exculpatory or impeachment information. Accordingly, although it welcomed the Department's recognition of the prosecution's constitutional and professional obligations in the United States Attorneys Manual, the Committee concluded that the new policy did not eliminate the need for a rule making disclosure a part of pretrial discovery.

The rationale for the scope of the proposed Amendment

The proposed amendment is not intended simply to codify the prosecution's constitutional duty under *Brady*. Under *Brady* and the cases that followed it, due process is denied and reversal of a conviction required only if the defense establishes a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667, 682 (1985), or that the trial did not result in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). Although the Supreme Court refers to this as a "materiality" requirement, it is not the same standard of materiality used in Rule 16, which requires disclosure of documents, objects, reports and examinations that are "material to preparing the defense." *See* Rule 16(a)(1)(E)(I) & (F)(iii). Under *Brady*, materiality is a requirement that the defense show prejudice.

The proposed rule requires disclosure of "all ... exculpatory or impeaching information" that is known to the attorney for the government or law enforcement agents who are involved in the investigation of the case. The committee note defines information as exculpatory "if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information." The note also states what is implicit in the text of the rule: there is no additional requirement of materiality as that term is used in cases such as *Kyles v. Whitley*. As a policy matter, this is desirable for several reasons. First, the materiality standard in *Brady* and its progeny was developed for the purpose of appellate review and collateral attack, and it focuses on the impact of undisclosed evidence in light of the record as presented at trial. This standard is obviously ill suited to application prior to trial, particularly in light of the fact that full discovery is not available to either the prosecution or the defense. It is nearly impossible to assess before trial the likelihood that particular information would change the outcome of trial. Second, the materiality standard in the *Brady* line of cases is a constitutional minimum, imposed in state as well as federal cases, not a rule of best practice. Showing a "true" *Brady* violation is an extremely difficult burden for the defense to bear, because it encompasses only a narrow range of information. *Cf. Strickler v. Green*, 527 U.S. 263, 281-82 (1999) (recognizing the distinction between "so-called *Brady* violations" – violations of a "broad obligation to disclose exculpatory evidence" – and "true" *Brady* violations, which occur only when the defendant can show a reasonable probability that the result would have been different if exculpatory or impeachment evidence had been disclosed).

Codifying a requirement that the prosecution disclose all evidence that casts doubt on the defendant's guilt as to any essential element of the case as well as information that impeaches the government's case would bring the Federal Rules in line with current statements of the prosecution's ethical responsibilities and professional statements of good practice, which go substantially beyond the constitutional requirements under *Brady*. The American Bar Associations's Model Rules of Professional Conduct and the ABA Criminal Justice Standards both articulate a broad standard for pretrial discovery. The Model Rules state that the prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor *that tends to negate the guilt of the accused or mitigates the offense....*" AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(d) (2002) (emphasis added).[6] Similarly, the ABA Standards for Criminal

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[6]The American Bar Association's Criminal Justice Standards for Discovery states the same obligation. It provides that the prosecution should disclose:

> (viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, Standard 11-2.1 (a)

Justice: Prosecution and Defense Function provide that broad disclosure is required at the earliest possible time "of the existence of all evidence or information *which tends to negate the guilt of the accused* or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.11 (3 ed. 1993) (emphasis added).

Codifying a general discovery obligation that goes beyond the constitutional minimum would also bring the Federal Rules in line with state procedural rules. A 2004 study by the Federal Judicial Center (included as an attachment) found that most states have adopted procedural rules codifying the prosecution's duty to disclose exculpatory and impeachment evidence, and that many states have adopted the language of the ABA's Model Rules and the Criminal Justice Standards. According to the FJC study, twenty three states have adopted rules that require disclosure of "any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused's punishment therefore." LAUREL L. HOOPER, ET AL., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES, REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (October 2004). Ten additional states provide for a duty to disclose "exculpatory evidence" or "exculpatory material." *Ibid.* Five states require the disclosure of evidence "favorable to the accused" that is also "material and relevant to the issue of guilt or punishment." *Id.* at 20. Many states also provide for the disclosure of types of evidence and information, not included in Rule 16, that would be helpful to the defense. *Id.* at 21.

Specific aspects of the proposed rule

There are two critical features of the proposed rule: the scope of required disclosure, and the timing of the disclosure.

Scope of required disclosure. As noted above, the proposed rule is stated without any separate "materiality" requirement, though evidence is certainly material in the general sense used in Rule 16--"material to preparing the defense"--if it "is ... either exculpatory or impeaching." The proposed rule further defines exculpatory in the committee note as information "that tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment." This is similar to the ABA Standards noted above and many state statutes and court rules based upon them, all of which refer to evidence or information that tends to negate the guilt of the accused. The committee note does not define the term impeachment.

(3rd Ed. 1996).

The rule refers to "information." This word was chosen, instead of evidence, to make it clear that the discovery obligation was not limited to admissible evidence. The Advisory Committee discussed whether to use the phrase "evidence and information," which is used in many of the state provisions as well as the ABA Standards and Model Rules. The Committee felt that the term information was broad enough to encompass both, but can rephrase the amendment following notice and comment if there is any confusion on this point.

The rule refers to information "known to" the prosecution team, without limiting it to information that is within the prosecution's "possession, custody, and control," as is the case with several other parts of Rule 16. *See, e.g.*, Rule 16(a)(1)(E). Since the rule is phrased in terms of "information," rather than evidence or material, it is fair to ask the government to provide exculpatory information even if it does not have custody of any specific piece of evidence (because, for example, it is in the custody and control of state officials). Providing the defense with the information that such exculpatory evidence exists would permit the defendant to subpoena the evidence from a third party or to investigate in an effort to find admissible evidence.

Timing. The Committee considered at length the issue of the timing of disclosure, which is a critical issue for both prosecution and defense. From the defense perspective, the earliest possible disclosure is desirable, and one of the key objections from both the American College of Trial Lawyers and other practitioners is that if disclosure is made, it often occurs on the eve of, or even during trial. As a result, it is difficult for the defense to make use of the information without a continuance, if one can be obtained. The defense seeks exculpatory and impeachment information as part of routine pretrial disclosure, and that is, in fact, how it is treated in many jurisdictions (including a number of federal districts). The Department of Justice, however, expressed grave concern that disclosure significantly in advance of trial could have adverse consequences. The most pressing concern, from the Department's perspective, is the need to protect witnesses from intimidation and even physical harm. Accordingly, the Department placed a high priority on deferring the disclosure of any information that would identify witnesses, directly or indirectly, in order to limit the time during which any prospective witness is subject to coercion or threats. Moreover, deferring disclosures about witnesses until the eve of trial means that the identity of many prospective witnesses will never be disclosed, since most cases do not go to trial.

The rule proposed by the Committee reflects a compromise on timing. It distinguishes between the timing for exculpatory information and information that merely goes to impeachment. It is impeachment information, by definition, which raises most of the concerns about revealing the identity of prospective government witnesses. The rule defers the duty to provide impeachment information, providing that "[t]he court may not order disclosure of impeachment information earlier than 14 days before trial." In the case of exculpatory information, in contrast, the rule states that prosecution must make this information available "[u]pon a defendant's request," without setting a particular time. This follows the pattern of other pretrial discovery obligations under Rule 16.

Thus the rule would permit the district courts to include such disclosure within the other timing requirements applicable to pretrial discovery. In contrast, the American College of Trial Lawyers proposed a requirement that disclosure be provided within 14 days after the defendant's request. The College noted (p. 23) that early discovery is especially important in the federal system, where the Speedy Trial Act requires cases to be brought to trial quickly, and the time for pretrial preparation is limited, even in complex cases which may have been under investigation for years.

Other features not included. The American College of Trial Lawyers also proposed (pp. 23-24) a due diligence certification, which would require the government attorney to certify in writing that he or she has exercised due diligence in locating all information favorable to the defendant, provided all such information to the defendant, and acknowledged the continuing obligation to disclose such evidence until final judgment has been entered. This certification requirement was intended to avoid a situation where evidence known to investigators was never known to the prosecutor or disclosed to the defense, and to highlight the critical importance placed upon compliance with this requirement. The Committee's proposal does not include a certification requirement.

The Committee also discussed, but did not include in this proposal, a requirement to provide information that would be relevant to sentencing. The Committee has received proposals for disclosure requirements related to sentencing, but did not make that part of this proposal.

Effect on appellate review and collateral attack

One issue that concerned members of the Advisory Committee was the effect that the amendment would have on cases on direct appeals and collateral attack. The short answer is that (1) defendants who could establish a violation of Rule 16 would likely find it somewhat easier to obtain a new trial on direct appeal than if they had to prove a constitutional violation, but (2) it is doubtful that there would be any difference on collateral attack.

Direct appeals. The adoption of the proposed rule would have two effects in cases on direct appeal. First, because the rule would define the duty to provide exculpatory and impeachment material more clearly and more broadly, it should simplify the court's task in determining whether a violation occurred. The rule would also change the standard of review, though there is sufficient variation in law at the circuit level that the picture is not entirely clear. A showing of prejudice is a necessary element of a constitutional violation under *Brady* and the cases that follow it. To establish a constitutional violation the defendant must demonstrate a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, *Kyles v. Whitley*, 514 U.S. 419 (1995). In contrast, once a defendant has established that a violation of the Rules of Criminal Procedure, the burden in on the government to demonstrate that any error raised in a timely fashion

was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002). In *Vonn* and *United States v. Olano*, 507 F.3d 725, 733 (1993), the Supreme Court stated that the government has the burden of persuasion on the prejudice issue under Rule 52(a), but a defendant who did not raise the issue in a timely fashion bears the burden of persuasion on prejudice under the plain error provision of Rule 52(b). Although both *Vonn* and *Olano* were plain error cases, and the discussion of Rule 52(a) was technically dicta, the Court was clear on the point that in contrast to Rule 52(b) the government has the burden of showing harmlessness under Rule 52(a).

Many circuit decisions, however, still cite older precedents and hold that the defendant seeking relief on appeal from a discovery violation must always show prejudice. *See, e.g., United States v. Rosario-Peralta*, 199 F.3d 552 (1st Cir. 1999), and *United States v. Figure on-Lopez*, 125 F.3d 1241 (9th Cir. 1997). It is doubtful whether these cases can be squared with the Supreme Court's decisions in *Vonn* and *Olano*.

Collateral attacks. In § 2255 proceedings a defendant must establish "a violation of the Constitution or laws of the United States." Nonconstitutional claims can be raised, however, only if the error is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). Since *Hill* involved a violation of the Federal Rules of Criminal Procedure, the same standard should be applicable to a violation of Rule 16. It seems likely that the "complete miscarriage of justice" and "rudimentary demands of fair procedure" standards would be similar the principles the Court has articulated in the *Brady* line of cases. If so, then the adoption of the amendment would have no effect in collateral proceedings.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 16 be published for public comment.

C. Forfeiture Rules

Working through a subcommittee, and with the substantial assistance of forfeiture specialists in the Department of Justice and Mr. David Smith (an authority on forfeiture who presented the views of the National Association of Criminal Defense Lawyers), the Committee developed and approved a package of amendments intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000. Although the Committee heard proposals for more fundamental changes, in general it chose not to break new ground, and adopted what are largely consensus proposals. All members of the Committee concurred in recommending that the proposed amendments be forwarded to the Standing Committee for publication. Three rules are affected: Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture).

1. ACTION ITEM-Rule 7

The proposal to amend Rule 7 removes a provision that duplicates the same language in Rule 32.2, which was intended to consolidate the forfeiture related provisions.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 7 be published for public comment.

2. ACTION ITEM-Rule 32

The proposed amendment provides that the presentence report should state whether the government is seeking forfeiture. This is intended to promote timely consideration of issues concerning forfeiture as part of the sentencing process.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 32 be published for public comment.

3. ACTION ITEM-Rule 32.2

Several changes to Rule 32.2 are proposed. In subdivision (a) the Committee proposes new language to respond to uncertainty regarding the form of the required notice that the government is seeking forfeiture. The amendment states that the notice should not be designated as a count in an indictment or information, and that it need not identify the specific property or money judgement that is sought. Where additional detail is needed, it is generally provided in a bill of particulars. After extensive consideration in the subcommittee of language that would provide more detail about the use of bills of particulars, the Committee determined that the better course at this point is to leave the matter to further judicial development guided by general comments in the committee note.

In subdivision (b)(1) the Committee proposes to add language clarifying the point that the court's forfeiture determination may be based on additional evidence or information accepted by the court in the forfeiture phase of the trial. The amendment also states that the court must conduct a hearing when requested to do so by either party, and notes that in some instances live testimony will be needed. The Committee noted that the present rule, which refers to "evidence or information," does not limit the court to considering evidence that would be admissible under the Rules of Evidence (which themselves provide that they are not applicable to sentencing). Whether this is a good policy can be debated, but it reflects a decision made in 2000 and the Committee did not seek to reopen the matter.

Proposed subdivision (b)(2) requires that the court enter a preliminary order of forfeiture sufficiently in advance of sentencing to permit the parties to suggest modifications before the order becomes final as to the defendant, and also expressly authorizes the court to enter a forfeiture order that is general in nature in cases where it is not possible to identify all of the property subject to forfeiture at the time of sentencing. Recognizing the authority to issue a general reconciles the requirement that the court make the forfeiture order part of the sentence with Rule 32.2(e), which allows the court on motion of the government to amend the forfeiture order to include property "located and identified" after the forfeiture order was entered. The committee note cautions that the authority to enter a general order should be used only in unusual circumstances, and not as a matter of course.

The proposed amendments to subdivisions (b)(3) and (4) clarify when the forfeiture order becomes final as to the defendant (as opposed to third parties whose interests may be affected), what the district court is required to do at sentencing, and how to deal with clerical errors.

Proposed subdivision (b)(5) clarifies the procedure for requesting a jury determination of forfeiture, and requires the government to submit a special verdict form.

Proposed subdivisions (b)(6) and (7) govern technical issues of notice, publication, and interlocutory sale. They are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure.

Recommendation--The Advisory Committee recommends that the proposed amendments to Rule 32.2 be published for public comment.

D. Electronically Seized Evidence

ACTION ITEM-Rule 41

After study by a subcommittee and a tutorial on the technology for storing and recovering electronic information, the Advisory Committee approved two changes in Rule 41.

The first change acknowledges that the very large volume of information that can be stored on computers and other electronic storage media generally requires a two-step process in which the government first seizes the storage medium and then reviews it to determine what information within it falls within the scope of the warrant. In light of the enormous quantities of information that are often involved, as well as the difficulties often encountered involving encryption and booby traps, the Committee concluded that it would be impractical to set a definite time period during which the

offsite review must be completed. The committee note emphasizes, however, that the court may impose a deadline for the return of the medium or access to the electronically stored information.

The second proposed change provides that in a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information the inventory may be limited to a description of the physical storage media seized or copied. Similarly, when business papers or other documents are seized, the inventory will often refer to a file cabinet or file drawer, rather than seeking to list each document.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

E. Motions For Reconsideration and Certificates of Appealability in Actions Under §§ 2254 and 2255

ACTION ITEM-Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

The amendments to Rule 11 of the Rules governing 2254 proceedings, and to Rule 11 of the Rules Governing 2255 proceedings are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under those rules. The efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Civil Procedure 60(b) – have generated a good deal of confusion.

The amendments to Rule 11 seek to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a §§ 2254 or 2255 order is the procedure provided by Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amendments provide disappointed litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 545 U.S. 524, 532 & n.5, but within an appropriate and definite time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 532 & nn.4-5, 538 (emphasis by Court). Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2254 and 2255 as well as the finality of criminal judgments.

The proposed amendment also makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 and § 2255 Proceedings in the District Courts. Rule 11(a) also requires the

district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Committee voted unanimously to forward the proposed amendments to Rule 11 to the Standing Committee. After a lengthy discussion of a related proposal to amend Rule 37 to regularize coram nobis relief and to provide that other ancient writs may not be used to seek relief from a criminal judgment, the Committee voted 7 to 4 not to forward the proposed rule to the Standing Committee.

Recommendation--The Advisory Committee recommends that the proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings be published for public comment.

IV. Information Items

A. Rule 29

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. The subject of amending Rule 29 has been under active consideration for more than four years, leading to the current amendment that was published for comment in August of 2006. After extensive discussion of the public comments and the difficult issues raised by the proposed amendment, the Rules Committee voted 9 to 3 to recommend that the Standing Committee not forward the proposed amendment to Rule 29 to the Judicial Conference. After further discussion of other possible changes that might be responsive to the concerns that prompted the amendment, the Committee voted 7 to 5 to table other amendments to Rule 29 indefinitely, *sine die*.

This report will first review the background and then describe the Committee's recommendation and its reasoning.

Background. For several years the Department of Justice has pressed for an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

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

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information was intended to show the frequency of preverdict acquittals, and selected case studies were presented to show the impact erroneous and unreviewable preverdict acquittals have had on the administration of justice. The Department presented the new information at the January 2005 meeting of the Standing Committee and strongly urged the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. The Department indicated that it would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

Following this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee whether the Advisory Committee recommended such an amendment.

In response to the Standing Committee's request, the Advisory Committee developed and refined a draft amendment at a series of meetings in 2005 and 2006. The Committee considered but ultimately rejected the option of prohibiting all preverdict acquittals, because they serve a number of important functions. They provide the trial court with a valuable case-management tool, especially in complex cases involving a large number of defendants and/or counts. In complex cases it is very helpful to be able to simplify the case by eliminating some defendant(s) or count(s) from the jury's consideration if there is no evidence that could support a conviction. Retaining the option of preverdict acquittals is also highly desirable from the defense perspective, since there are obvious costs to continued participation in the latter stages of what may be a lengthy and costly trial.

The published amendment addressed the problem by retaining the option of preverdict acquittals, but allowing them only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. The amended rule sought to protect both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous preverdict judgments of acquittal. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and/or multiple defendants, the amendment permitted any defendant to move for a judgment of acquittal on any count (or counts).

The Advisory Committee was closely divided on the question whether to recommend publication of the amendment, and approved doing so by a vote of 6-5. This vote reflected serious reservations regarding the merits of the proposed amendment, rather than concerns about the language or form of the amendment. The discussion at the Committee focused on the policy issues. Members of the Committee who opposed the amendment saw it as inconsistent with the public policy underlying the Double Jeopardy Clause and as unduly restricting the trial court's authority. They were not persuaded that erroneous preverdict acquittals have been a sufficient problem to warrant such a restriction of constitutional rights and judicial authority. Additionally, since the rule contemplates a government appeal from a preverdict acquittal, they expressed concern that government appeals could create new problems, complicating the continuation of the trial of related counts or defendants, or possibly denying the district courts of jurisdiction to continue such trials.

Action Following Publication and Comment. After publication of the amendment in August 2006 many written comments were received, and several speakers at the public hearing addressed the proposed amendment at length. The amendment generated very substantial opposition from both the bench and the bar (though there were some positive comments). The main themes in the statements opposing the amendment were the following:

- The amendment subverts the defendant's immediate interest in finality, which is protected by both Due Process and the Double Jeopardy clause.

- The amendment intrudes upon judicial independence and unduly restricts the historic powers of the trial court to protect the interests of individual defendants and to manage its docket.

- The amendment exceeds the authority granted by the Rules Enabling Act.

- The amendment's waiver provision imposes an unconstitutional condition.

- The data provided by the government do not show the need for an amendment, because the statistical information failed to isolate pre-trial acquittals, which are quite rare.

- A close examination of the records in the selected case studies upon which the Department of Justice relied to show the impact of erroneous acquitials demonstrates that the court in each case acted properly.

The public comments and hearing testimony were considered by both a subcommittee, which discussed them in two teleconferences, and by the full Committee.

There was a substantial agreement within both the subcommittee and the full Committee that the current proposal should not be adopted. After discussion, the Advisory Committee voted 9 to 3 not to recommend the published Rule 29 amendment to the Standing Committee.

The more difficult question was whether to continue the effort to find an alternative means of providing appellate review for some or all of the cases of greatest concern to the Department of Justice and members of the Committee. The Committee voted 7 to 5 to table the proposal to amend Rule 29 indefinitely, *sine die*. Because of the interest expressed by the Standing Committee and the high priority the Department of Justice has placed on this issue, each member of the Committee was asked to state briefly the reasons for his or her vote. Those voting to table cited two main reasons. First, they felt that there had not been a showing of a sufficient need for the amendment. The record developed during the public comment period and at the hearing shed new light on both the sample cases cited by the Department and the statistical information it provided. Moreover, the judges and practitioners on the Committee (and those who testified) concurred in the view, expressed in the public comment and hearings, that midtrial acquittals are extraordinarily rare. The district courts use this power very sparingly, granting midtrial acquittals only in what they identify as the clearest cases. Second, those voting against the amendment cited concerns that it might exceed the powers granted by the Rules Enabling Act, affecting substantive rather than procedural matters. Moreover, it was noted that the Committee had attempted for more than four years to craft the best mechanism to provide appellate review, and many of the suggestions now being put forth had been rejected in the past as inferior to the published proposal. Those voting against tabling expressed the view that even if the number of midtrial acquittals is small, some are so problematic that they warrant a remedy. Also there are one or more alternatives that could be explored. The Department of Justice, which has consistently advocated the need for an amendment, expressed its strong continuing support for some mechanism providing appellate review. Assistant Attorney General Alice Fisher expressed great disappointment that neither a prohibition on midtrial acquittals nor the current waiver amendment was being recommended to the Standing Committee.

B. Rule 49.1; Redaction of Arrest and Search Warrants

When it approved Rule 49.1 (which will become effective December 1, 2007) the Standing Committee asked the Rules Committee to revisit the rule's treatment of arrest and search warrants. Rule 49.1 provides for the redaction of certain personal and sensitive information that would

otherwise become generally available over the Internet when documents are filed with the district court. Rule 49.1(b)(8) exempts from the general redaction requirements "an arrest or search warrant." In addition, arrest and search warrants may also be exempted under Rule 49.1(b)(7)'s exemption of "a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case." The question is whether arrest and search warrants should remain exempt from the redaction requirements, with the result that the personal information in such warrants will be available absent a protective order in a particular case.

Despite the general policy, reflected in Rule 49.1(a), of protecting certain categories of personal information by requiring redaction, the Committee concluded that exempting this information from redaction is warranted. Since search and arrest warrants may pose different issues, the Committee analyzed them separately.

(1) Search Warrants. A search warrant must identify the person or property to be searched, and in some circumstances this requires the inclusion of information that would ordinarily be redacted, particularly a financial-account number or an individual's home address. Redacting this information would require a major change in current procedures. In many districts, search warrants are executed and then returned without any involvement of the U.S. Attorney's Office. There is thus no prosecutorial screening of these documents before filing, and it would be burdensome to require such screening in order to redact the documents. In addition, there was support on the Advisory Committee for the view that the public has an interest in some of this information, such as the locations that were searched.

(2) Arrest Warrants. In addition to the practical difficulty of requiring the redaction of arrest warrants (which, like search warrants, may be returned without the involvement of the U.S. Attorney's Office), there are several additional reasons not to require redaction of arrest warrants. Personal information in arrest warrants, much like the account information in forfeiture proceedings documents, is generally included for the purpose of identifying the individual to be arrested. In some cases, the Social Security Number will be the critical information to determine whether the person arrested is the same person named in the warrant. With tens of thousands of federal arrests annually, a significant number of cases will involve defendants with common names. In such cases, the defendant's name, city and state of residence, and even date of birth may simply not provide sufficient information to conclusively identify the defendant. In these cases, the full Social Security Number may be necessary to ensure proper identification. To the extent that including Social Security Numbers or other confidential identifying information in arrest warrants raises concerns in a specific case, a court is explicitly authorized to issue a protective order to limit the distribution of the arrest warrant (for example, ordering that warrant not be accessible over the Internet).

The identifying information contained in the body of the warrant may also play an important role in several later stages in the criminal process, and it would interfere with those later stages to redact the information in question. For example, if a defendant is arrested in a judicial district other than where the crime occurred, he or she will be removed to the charging district pursuant to the provisions of Rule 40. As part of that procedure, the defendant is entitled to a removal hearing at which identity is a key issue, and such hearings can take place well after arrest and long after the original issuance of an arrest warrant. Redaction of the identifying information would be disruptive to that process, as well as to the overall interest in ensuring that the right person is arrested. Similarly, arrest warrants can play a vital role in identifying defendants who have jumped bail or fled after arrest; in many cases, agents, deputy marshals or police officers in other jurisdictions obtain copies of the warrants directly from the courthouse. Unlike arrest warrants, bench warrants issued by the Court are often deficient in identifying information.

Finally, there is a strong societal interest in learning the identity of those charged and arrested with criminal activity, and such information is routinely published in newspapers or through the media. Once again, there is a need to make sure that the identifying information is as accurate as possible so that the correct people are reported as being arrested. Finally, the identifying information on arrest warrants is less sensitive than that in other court documents because it pertains solely to the defendant who has been charged, and does not include any innocent third party information.

C. Rule 32(h)

An amendment to Rule 32(h) was proposed as part of the Booker package of amendments. Following the public comment period the Criminal Rules Committee revised the language of the amendment and recommended that it be approved. The Standing Committee, however, raised concerns and asked the Rules Committee to study the matter further. After discussion, the Rules Committee voted 7 to 4 at its October 2006 meeting to reexamine the proposed amendment. That reexamination was intended to take account of a number of issues, including the relationship between the Guidelines and other sentencing factors. After the meeting, the Supreme Court granted review in two cases that may resolve some of the issues, Rita v. United States, No. 06-5754, and Claiborne v. United States, No. 06-5618. For that reason, the Committee deferred further consideration of Rule 32(h) pending the Supreme Court's decision in these cases. Rita and Claiborne have been argued, and decisions are expected before the end of the term. We anticipate returning to this issue at the Rules Committee's October meeting.

D. Indicative Rulings

The Committee deferred consideration of the indicative rulings project, being led by the Civil Rules Committee and coordinated with the Appellate Rules Committee, until the Rules Committee's October meeting.

Attachments:

Appendix A. Rules 1, 12.1, 17, 18, 32, 60, 61
Appendix B. Rule 41(b)(5)
Appendix C. Rules 45(a), 5.1, 7(f), 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases
Appendix D. Rule 16
Appendix E. Rules 7(c), 32, 32.2
Appendix F. Rule 41(e)(2)
Appendix G. Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

APPENDIX A

Rules 1, 12.1, 17, 18, 32, 60, 61.

- **Copy of Rules**
- **Committee Notes**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope; Definitions

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

* * * * *

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

* * * * *

Committee Note

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e). It provides that ". . . the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the Court has the power to decide any dispute as to who is a victim.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) expressed concern that the definition of victim did not also refer to the victim's representative.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) expressed several concerns: (1) the definition should apply only to listed rules to avoid unintended consequences, including the possibility that persons who claim to be victims of crimes not yet charged could assert rights under the rules, (2) the rule provides no procedure for determining whether an individual claiming to be a victim is entitled to assert the victim's rights, and (3) the language deeming the accused not to be a victim is not an appropriate way to implement the statutory directive that a person accused of a crime cannot obtain any relief under the Crime Victims' Rights Act.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) suggests that the reference to representatives for minors, deceased, and incapacitated victims should be moved to Rule 60, where it could be added to the provisions regarding "who may assert" the rights of victims. He

opposes the second sentence of the rule, since an accused may in some circumstances be a victim, and he suggests that addition of language stating that a government agency may not be a victim for this purpose. He also supports the Federal Defenders' proposal for new procedures determining how and by whom victims' rights may be asserted.

The **Federal Magistrate Judges Association (06-CR-015)** supports the proposed amendment, noting that incorporating the statutory definition by reference means that any statutory changes will become effective immediately without the necessity of amending the rule.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) opposes the amendment because it "would equate 'crime victim' under the CVRA with 'victim' under the Rules, present and future, independent of the CVRA." She fears that this would affect rights and privileges under other statutes, such as the Victim and Witness Protection Act and the Victim's Restitution Act. In her view, this rule exceeds the authority conferred by the Rules Enabling Act. She also objects to the proposed language stating that the defendant was not a victim of the crime, noting that co-defendants may each claim to be the other's victim. She urges that a procedure is necessary to determine who is a victim for this purpose.

The State Bar of California Committee on Federal Courts [hereinafter State Bar of California] (06-CR-023) opposes the second sentence of the draft rule, which provides that a accused of an offense is not a victim, since in cases such as alien smuggling a person who has some degree of culpability may also be a victim, and the usual labeling of defendant and victim may not be applicable.

Rule 12.1. Notice of an Alibi Defense.

* * * * *

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

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

(i) ~~(A)~~ the name~~, address, and telephone number~~ of each witness --and the address and telephone number of each witness other than a victim--that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense, and

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

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

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

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

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended

alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

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

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

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

(2) ***Address and Telephone Number of an Additional Victim Witness.*** The address and telephone

number of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

* * * * *

Committee Note

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

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

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee made very minor changes in the text at the suggestion of the Style Consultant. The Committee revised the Note in response to public comments, omitting the suggestion that the court might upon occasion have the defendant and victim meet.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) opposes the amendment as drafted, arguing that the rule should be revised to eliminate any requirement that the government provide the defense with the name and contact information for a victim whom it expects to call to rebut an alibi defense. The proposed rule is inadequate, in his view, on several grounds: (1) it requires only a showing of "need" to overcome the blanket protection for this information, (2) if a showing of need is made, the rule does not adequately protect victims because it does not clearly require the court to give priority to the victim's safety concerns, and it does not expressly provide that the court may decline to turn over this information if necessary to protect the victim, and (3) it does not provide that the victim has a right to be heard on the question whether this information will be provided to the defense. Although the language "the court may" gives the court discretion, it is troublesome that the rule authorizes disclosure to the defendant as well as defense counsel. Moreover, it is inappropriate to suggest in the notes that the court could order a face to face meeting rather than providing the defense with the victim-witness's name and contact information.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) opposes the amendment on the ground that it upsets the constitutional balance between prosecution. The present rule properly presumes that the defendant who presents an alibi defense needs to locate, interview, and investigate a witness who will place him at the scene of an crime, and requires disclosure of those witnesses' names and contact information to facilitate that process. The Supreme Court has recognized the witnesses may be asked their names and addresses, because they are necessary in order to open various avenues of cross examination as well as out of court

investigation. Yet the proposed amendment would force the defendant to provide the names and contact information for his alibi witnesses, on pain of having them excluded at trial, though he would not be given the name and contact information for a victim whose testimony would place him at the scene of the crime unless he could make a showing of his need for the information. This violates due process, which prohibits notice of alibi rules that are not reciprocal. It also rule sets a dangerous precedent by giving an interpretation to the statutory rights under the CVRA that abridges defendants' constitutional rights. There is no need for such a procedure, since the victim's right to be reasonably protected from the accused and to be treated with fairness and dignity can be accommodated adequately under current Rule 12(d), which provides for exceptions from disclosure for good cause. If necessary, Rule 12(d) could be amended to provide expressly for situations when disclosure of this information would violate the victim's right to be reasonably protected from the accused.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) opposes the amendment on the grounds that it is not reasonable to restrict the opportunity of all defendants to investigate and prepare their cases on the assumption that all victims needs this protection, rather than requiring a showing of a special need for secrecy. The proposed rule goes too far in creating a burdensome procedure for victims that is not available even for confidential informants or cooperating co-defendants. It is unhelpful to suggest that the court might authorize the defendant and his counsel to meet with the victim rather than providing the victim's contact information. The fact that a witness is also a victim does not, by itself, justify protecting that person from being approached, in a lawful manner, for purposes of pretrial investigation and preparation.

The Federal Magistrate Judges Association (06-CR-015) supports the amendment.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) opposes the amendment because (1) it is not required by the CVRA, (2) it will operate unfairly, denying defendants necessary information, and (3) it is not reciprocal. Nondisclosure should be the exception, not the rule, and must be justified on a case-by-case basis by clear and convincing evidence.

The State Bar of California (06-CR-023) indicates that its membership was divided on the wisdom of this amendment. Some felt that requiring the defendant to show need to get this information was not necessitated by the CVRA, would impose undue burdens on the courts, and would improperly accelerate the required disclosure of defense strategies. Thus the rule should continue to assume defendants need this information, and provide that it should be limited only when there is a showing of a special need to do so. Others, however, support the amendment, noting that defendants may be able to make the required showing of need ex parte. They also suggested that some prosecutors have already adopted similar practices.

Monika Johnson Hostler on behalf of the National Alliance to End Sexual Violence (06-CR-021) opposes the amendment on the ground that it provides only a "negligible" standard for releasing the name and contact information of a victim who would be called to rebut the defendant's alibi defense. Moreover, it does not provide for the victim to be heard on the question whether this information should be released.

Mary Lou Leary on behalf of the National Center for Victims of Crime (06-CR-024) emphasizes the seriousness of the problem of intimidation, and supports the proposal's requirement that a defendant show a need for the name and contact information of a victim who will be called to rebut an alibi defense.

Rule 17. Subpoena

* * * * *

(c) Producing Documents and Objects

* * * * *

(3) ***Subpoena for Personal or Confidential Information About a Victim.*** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require that notice be given to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

* * * * *

Committee Note

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase "personal or confidential information," which may include such things as medical or school records, is left to case development. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the matter to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed, or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no

application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment omits the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim's personal or confidential information can be served upon a third party. It was also revised to add the language "or otherwise object" to make it clear that the victim's objection might be lodged by means other than a motion, such as a letter to the court.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) opposes the amendment as drafted, on the ground that it gives too much discretion to the trial court, and he objects to allowing the court to grant a motion permitting such a subpoena ex parte. A victim whose personal or confidential information is being sought should be given notice and be heard in every case before the court permits the subpoena to be served. The published rule does not, in his view, reliably protect defense strategy, and alternative approaches would treat both prosecution and defense interests equitably. Judge Cassell also favors more detailed language that would clarify the standards as well as the

procedures for authorizing the service of subpoenas for private or confidential information about the victim. In his view, the amendment could be read to expand the scope of a defendant's power to subpoena information about a victim.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) states that no amendment is needed, and that the published amendment will result in wasteful litigation, and undermine effective cross examination at trial, prematurely disclose defense strategy to the government, and give the government (whose grand jury subpoenas are not subject to this rule) an unfair advantage.

Russell Butler, on behalf of the Maryland Crime Victims' Resource Center, Inc. (06-CR-006) states that the proposed amendment does not adequately protect the victim's rights to privacy and fairness. Victims are entitled to notice of such subpoenas.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) opposes the amendment on the grounds that is unnecessary, and that it trenches on the defendant's Sixth Amendment rights to confront and cross examine witnesses, to have compulsory process, and to have the effective assistance of counsel in preparing and presenting a defense. The information sought in subpoenas of this nature is used to impeach credibility, and privacy is not a legitimate basis to restrict cross examination or impeachment of character. Such cross examination requires an element of surprise which would be defeated by notice and judicial prescreening.

Professor Wendy J. Murphy (06-CR-011) advocates preventing pre-trial discovery of privileged third party information.

The Federal Magistrate Judges Association (06-CR-015) supports the amendment but urges that the terms "personal" and "confidential" be defined.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) concurs with the Federal Public and Community Defenders that the amendment is unnecessary and unwise.

The State Bar of California (06-CR-023) indicates that its membership was divided on this amendment. Some opposed it because it adds one more onerous burden, impinging on the ability of the defense to challenge the veracity of victim-witnesses, particularly in the absence of a definition of the broad terms personal and confidential. Others believe "the benefit of avoiding unjustified harassment of victims outweighs the burden on the court and the defendant."

Monika Johnson Hostler on behalf of the National Alliance to End Sexual Violence (06-CR-021) opposes the provision allowing ex parte approval of subpoenas because "victims should be informed and have the opportunity to oppose such intrusions into their confidentiality."

Mothers Against Drunk Driving (06-CR-022) support notification of victims when their private records are subpoenaed.

Mary Lou Leary on behalf of the National Center for Victims of Crime (06-CR-024) opposes "permitting the defense to obtain personal information about the victim in an ex parte manner." The rule should require that the victim be notified and have the right to be heard in every case when the subpoena is requested.

Robert Johnson on behalf of the American Bar Association (06-CR-028) expresses concern that the rule, as published, violates several ABA Standards by permitting attorneys to obtain evidence by means that violate the rights of third parties, by not allowing the victim or the victim's attorney to be heard, and by permitting ex parte contact with the court.

Rule 18. Place of Prosecution and Trial

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

Committee Note

The rule requires the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district. The Committee recognizes that the court has substantial discretion to balance any competing interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

There were no changes in the text of the rule. The Committee note was amended delete a statutory reference that commentators found misleading, and to draw attention to the court's discretion to balance the competing interests, which may be more important as the court must consider a new set of interests.

SUMMARY OF PUBLIC COMMENTS

Comments Supporting the Amendment

The Federal Magistrate Judges Association (06-CR-016) (p.4) supports the amendment "because it implements the victim's right to attend proceedings under the CVRA."

Judge Cassell (06-CR-002) (p. 59) supports the amendment, which was, as he notes, based upon his original submission to the Committee. He notes that the Committee Note grounds the amendment on the right to be treated with fairness under the CVRA and questions why the same analysis was not adopted in the case of other amendments he proposed.

Amy Sousa for the National Organization for Victim Assistance (06-CR-025) generally supports Judge Cassell's comments.

Comments Opposing the Amendment

Peter Goldberger for the NACDL (06-CR-010) (p. 9) argues that the amendment does not, as stated in the Committee Note,

implement the victim's right to attend proceedings under 18 U.S.C. § 3771(b). In calling upon courts to make every effort to permit the fullest attendance of victims, he argues, subsection (b) merely implements18 U.S.C. § 3771(a), which he describes as a right not to be excluded, rather than a right to attend judicial proceedings. Thus the proposed amendment actually creates a new substantive right, which exceeds the scope of the authority granted by the Rules Enabling Act. Moreover, the provision is unwise because it allows a non-testifying victim "to press, under threat of a mandamus action, for a place of trial that may be hundreds of miles from the courthouse that is convenient to the judge, testifying witnesses and the defendant."

Thomas Hillier of the Federal Public and Community Defenders (06-CR-003)(p. 23) agrees with NACDL that 18 U.S.C. § 3771 precludes exclusion but does not create a right to attend judicial proceedings and thus does not provide a basis for the amendment, which would create a new substantive right to decide where the trial is to be held–enforceable by mandamus–that may cause hardship and expense for the defendant, witnesses, court, and prosecution.

Barbara Adkins and Mark Jordan of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019)(p. 4-5) concur with the comments of the Federal Public and Community Defenders; the proposed amendment could cause "judicial inefficiency and potential chaos in cases involving numerous self-proclaimed victims advocating different venues." The qualified right of victims to attend proceedings does not require the courts to "bring such proceedings to their living rooms."

The **State Bar of California (06-CR-023)** (p.5) argues that the amendment is an "overbroad reaction" to 18 U.S.C. § 3771(b).

It would be difficult to implement in complex cases and cases in involving many non-testifying victims, such as those involving Ponzi schemes. The amendment might lead to burdensome and unnecessary litigation.

Rule 32. Sentencing and Judgment

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

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

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

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

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

* * * * *

(c) **Presentence Investigation.**

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

* * * * *

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

* * * * *

(d) Presentence Report.

* * * * *

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

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

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

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

* * * * *

(i) Sentencing.

* * * * *

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

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

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

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

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

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

~~address the court may be exercised by the following persons if present:~~

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

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

* * * * *

Committee Note

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

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

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771. The amendment employs the term "victim," which is now defined in Rule 1. The amendment also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

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

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the text of the rule. In response to public comments, the Committee Note was amended to make it clear that absent unusual circumstances any victim who is in the courtroom should have a reasonable opportunity to speak directly to the judge.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) (pp. 66-78) opposes the amendment because the government should be required to disclose "relevant" portions of the presentence report (PSR) to victims, and victims should be able to object on disputed issues therein. This argument proceeds in several steps. First, the right to be "reasonably heard" encompass not only the right to provide information regarding the impact of the crime upon the victim, but also the right to make sentencing recommendations. Second, since the guideline calculation will likely be a significant factor in the ultimate sentence, the right to make sentencing recommendations should be interpreted to include the right to be heard on relevant guideline issues. This, in turn, requires access to relevant portions of the report. Judge Cassell bases these arguments on Senator Kyl's statement in the legislative history describing the right to be reasonably heard on the sentence as including the right to make sentencing recommendations, as well as the victim's statutory right to be treated with fairness. He distinguishes *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006), which affirmed the district court's refusal to provide a victim with the PSR, on the ground that it involved a request for the whole report, not merely the relevant portions. He rejects as inadequate the notion that the prosecutor should have discretion to determine what information from the PSR should be provided to the victim, on the ground that the

CVRA gives the victim an independent statutory right to the information in question.

Judge Cassell also takes issue with the Committee's position that courts should gradually define the contours of the right to be reasonably heard, reasoning that Congress intended a paradigmatic shift expanding and defining victim rights, including the right to dispute sentencing issues.

Judge Cassell couples these objections with suggestions that would increase procedural protections for defendants. For instance, he suggests requiring notice be given to the defendant when an upward departure might rest on information provided by the victim, an issue upon which there is currently a split in the circuits.

Finally, Judge Cassell opposes section (i)(4) for changing the victim's right to "speak or submit any information" to the right to be "reasonably heard" at sentencing. He argues that this section should directly state that victims have the right to speak at sentencing, as suggested by the legislative history and "as the only courts to have reached the issue have held."

Thomas W. Hillier, II (06-CR-003) (pp. 24-26) opposes the revision of (c)(1)(B) for requiring the Probation Officer to conduct an investigation and submit a report on restitution merely if the law "permits restitution," as opposed to if the law "requires restitution."

He opposes the revision of (d)(2)(B) for deleting the requirement that information regarding the impact on the victim to be "verified" and "stated in a nonargumentative style." Indeed, he argues these requirements should apply to all information in the presentence report, which should be added as (d)(4).

He opposes the revision of (i)(4)(B) for requiring the court to address any victim at sentencing, and for implying (with the word "address") that the victim has the right to "speak" at sentencing. He believes the rule should specifically reference Rule 60(a)(3). He also suggests that the title of (i)(4) should be changed from "Opportunity to Speak" to "Opportunity to be Heard" to avoid confusion.

Russell P. Butler on behalf of Maryland Crime Victims' Resource Center (06-CR-006) (pp. 4-8) opposes the amendment because victims should have the right to speak, rather than to be "reasonably heard," regarding sentencing. He believes that the court should have an affirmative obligation to ask the victim if he wishes to speak at sentencing and, where the victim is absent, to ask the government if the victim has been notified. Also, he believes that the presentence report should be required to identify victims, the victim's representative should be able to assert the victim's rights, and the victim's standing should be incorporated under sections (f)-(i).

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 11-14) opposes section (c)(1)(B) for making a presentence report mandatory, even when the interests of justice dictate otherwise. He believes restitution should not be addressed at all in the rule, and should be left to the distinct statutory scheme. He also opposes (d)(2)(B) for eliminating the requirement that victim impact information be verified and stated in a nonargumentative style. He also argues that section (i)(4)(B) should make clear that the trial judge has broad discretion and that the section should note that the right to be "heard" does not grant the right to "speak."

Federal Magistrate Judges Association (06-CR-015) (p.3) broadly supports the amendment.

Barbara Adkins on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) (p. 6) opposes the deletion of the requirements that information in the presentence report be verified and stated in a nonargumentative style (otherwise, she suggests eliminating reliance on presentence reports altogether). She also objects to section (i)(4)(B) for failing to require that notice of a victim's evidence be given to the defendant. She believes that courts should not be required to address victims (as some may prefer not to be addressed), and should retain broad discretion over courtroom decorum and protocol. She notes that these changes would be more appropriately incorporated into a new Rule 60.

The State Bar of California Committee on Federal Courts (06-CR-023) (pp. 5-6) opposes the amendment for deleting the requirements that presentence report information be verified and stated in a nonargumentative style. It also opposes the (i)(4)(B) changes, preferring that victim statements be submitted as part of the written presentence report.

Senator Jon Kyl (06-CR-026) protests that the revisions do not go far enough to advance the purposes of the CVRA and poses this question: "Does Rule 32 treat victims fairly in failing to guarantee victims a chance to review the presentence report and the Sentencing Guidelines calculation that will control the sentence and provide an opportunity to speak directly to the judge, rights criminal defendants already enjoy? He suggests that the answer is "no."

Rule 60. Victim's Rights

1 **(a) In General.**

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

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

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

(b) Enforcement and Limitations.

(1) ***Time for Deciding a Motion.*** The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) ***Who May Assert the Rights.*** A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of them their rights described in

these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) ***Where Rights May Be Asserted.*** A victim's rights described in these rules must be asserted in the district in which a defendant is being prosecuted for the crime.

(5) ***Limitations on relief.*** A victim may move to reopen a plea or sentence only if:

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

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

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

(6) ***No New Trial.*** A failure to afford a victim any right described in these rules is not grounds for a new trial.

Committee Note

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

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

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

and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

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

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

Subdivision (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim, the victim's lawful representative, and the attorney for the government, and any other person as authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights. In referring to the victim and the victim's lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of and victims who are incompetent, incapacitated, or deceased, and it also provides that "[a] person accused of a crime may not obtain any form of relief under the Crime Victims' Rights Act." Similarly, 18 U.S.C. § 3771(d)(1) provides that "[a] person accused of a crime may not obtain any form of relief under this chapter."

The statute provides that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred).

Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

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

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Subsection (a)(2) was revised to make it clear that the duty to permit fullest attendance arises in the context of the victim's possible exclusion.

Subsection (b)(2) was revised to respond to concerns that the amendments did not clearly state that the victim's lawful representative could assert the victim's rights. The Committee Note makes it clear that a victim or the lawful representative of a victim may generally participate through counsel, and provides that any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights, such as persons authorized to raise the rights of victims who are minors or are incompetent.

References throughout subsection (b) were revised to indicate that they were applicable to victim's rights described in the Federal Rules of Criminal Procedure, not merely subsection (a) of Rule 60.

Other minor changes were made at the suggestion of the Style Consultant to improve clarity.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) (pp. 86-99) recommends that some of the issues dealt with in Rule 60 would be better treated in other sections. He also specifically opposes the following subsections:

> (a)(1) because the rule should also require that victims be notified of their rights at proceedings, specifically the right to make a statement, rather than being notified merely of the existence of proceedings. Additionally, he states that the rule should include a section detailing how courts should proceed when victims lack notice of a hearing.
>
> (a)(3) because victims should have the right to heard at any proceeding affecting their rights, not just at bail, plea, and sentencing hearings (as the amendment suggests).
>
> (b)(1) because the proposed rule uses the term "promptly" rather than the statutory term "forthwith."
>
> (b)(2) because the proposed rule does not state that the victim's lawful representative can assert the victim's rights.

(b)(4) (where rights may be asserted) because it omits key language from 18 U.S.C. § 3771(d)(3) providing venue, if no prosecution is underway, in the district in which the crime occurred.

(b)(5)(a-c) because these provisions should be qualified, following the CVRA, to note that they do not affect a victim's right to restitution.

Judge Cassell supports subsection (a)(2). He opposes the NACDL's proposal for a full evidentiary hearing to determine victim status, which is not in the published rule.

Thomas W. Hillier, II (06-CR-003) (pp. 26-41) opposes restating the statutory right to not be excluded in the rules, arguing that the proper role of the rules is to provide a procedure for implementing that right, and to clarify which "determination described in subsection (a)(3)" is being referenced. He also argues that the court should be required to state its rationale for denials of exclusion.

Hillier criticizes (a)(3) because it should do more than merely restate the victim's statutory right to be "reasonably heard," and should, instead, clarify the breadth of the district court's discretion to restrict victim input. The rule should also afford the defendant adequate notice of a victim's statement and sufficient opportunity to respond.

Hillier also opposes subdivision (b) because it should require victims to assert rights by motions and should specify where, when, and by whom rights may be asserted – including a procedure for determining victim status. He argues that a court should be required to state, on the record, the reasons for any CVRA decision, not just

those denying relief. The rule should direct readers to the applicable Federal Rules of Appellate Procedure, should properly implement the "motion to re-open a plea or sentence" rule, and should make clear that relief afforded a victim under the statute should not violate others' constitutional rights.

Hillier supports (a)(1).

Russell P. Butler on behalf of Maryland Crime Victims' Resource Center (06-CR-006) (pp. 12-15) opposes the proposed rule on the grounds that it does not safeguard, with sufficient clarity, the court's obligations to victims. For example, he asserts that courts should inquire about the presence of and notice given to victims at every proceeding, and should inform victims of their rights whenever those rights are implicated. Also, he argues that the rules should provide for appointment of counsel for victims in appropriate circumstances. Additionally, he proposes that the right to be reasonably heard should apply in any proceeding and that the victim's attorney should be able to assert the victim's rights.

Professor Douglas E. Beloof, of Lewis & Clark Law School (06-CR-009) (pp. 1-3) generally supports Judge Cassell's rule proposals and argues that the CVRA should be integrated into the rules more thoroughly.

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 4-9) opposes the amendment because a fact-finding determination of victim status would be the only way to safeguard the defendant's due process rights. He argues that such a finding would have to involve a determination that (1) a federal crime had occurred and (2) that the crime directly and proximately harmed the putative victim. He also

proposes changing the amendment to refer to the "rights under § 3771(a)" and not the "rights under these rules."

Goldberger agrees that it should be the government's responsibility to notify victims under (a)(1).

He opposes (a)(2), arguing that it largely restates substantive rights that do not belong in the Rules of Procedure, except for a requirement that the court articulate its reasons for deciding a motion. He agrees with the Federal Public and Community Defenders that this section should include a procedural framework for how to exclude a victim from the proceedings.

He similarly opposes much of (a)(3) as improperly restating substantive law. He argues that this subsection should clarify and expand the district court's discretion to manage its caseload, permitting it to hear the victim only in writing, to hear the victim before public proceedings, and to control the victim's oral statement within reason (including discretion to allow the defendant's counsel to question the victim).

He opposes section (b) because it does not currently specify that the victim's rights must be asserted by motion, as if the victim were a party, allowing the defendant to participate.

Federal Magistrate Judges Association (06-CR-015) (p.3) supports the proposed amendment.

Barbara Adkins on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) (pp. 4, 6-8) generally concurs with the analyses of the Federal Public and Community Defenders and the NACDL, though not necessarily with their recommended alternatives. She states that Rule 60 should be re-

titled "Rights of Crime Victims" or "Rights of Victims and Crime Victims" to distinguish the CVRA's use of the word "victim" from other uses in the United States Code and Federal Rules. She also argues that the breadth of the victim's right to attend proceedings under (a)(2) is unconstitutional, violating the separation of powers and due process.

She opposes (b)(2) for permitting the government to assert the victim's rights because the government often has conflicting interests. She also opposes the reopening of pleas or sentences, especially when the defendant lacks the right to thereafter withdraw the plea. Finally, she argues for the addition of a provision stating that no assertion of rights by a victim may prejudice the rights of the accused or be contrary to the interests of justice.

Mothers Against Drunk Driving (MADD) (06-CR-022) (p.1) broadly supports Judge Cassell's rule proposals.

The State Bar of California Committee on Federal Courts (06-CR-023) (pp. 7-8) generally opposes this proposed rule as a restatement of the CVRA that both expands and limits the provisions of § 3771. However, the Committee believes that alterations to certain sections can remedy the problem by bringing the Rule into accord with the precise statutory language.

The Committee believes that (b)(1) should clarify the time limits placed on motion rulings and stays of proceeding, that (b)(2) should allow the victim's lawful representative to assert the victim's rights, that (b)(4) should include statutory language on where the victim's rights may be asserted, and that (b)(5)(B) should not include the language "of the denial and the writ is granted."

The Committee notes that sections (a)(2), (a)(3), (b)(3), and (b)(6) are generally consistent with the statute, but that they "seem[] redundant."

Amy C. Sousa on behalf of the National Organization for Victim Assistance (06-CR-025) (p. 1) advocates for the wholesale adoption of the CVRA according to Judge Cassell's rule proposals.

Senator Jon Kyl (06-CR-026) (pp. 2-3) concludes that many of the amendments are inconsistent with the CVRA. He criticizes (b)(2) for preventing the victim's representative from asserting the victim's rights. He opposes (a)(3) for confining the matters on which victims may be heard to release, plea, and sentencing proceedings, as opposed to all matters relevant to crime victims. This seems to provide no mechanism for a victim to raise other rights under the CVRA, such as the right to proceedings free from unreasonable delay. The Senator stressed that the CVRA enjoyed bipartisan support and that legislative intent, as present in the Congressional Record, demands full implementation of the "sweeping" changes of the CVRA. He also endorses Judge Cassell's approach.

Representatives Poe and Costa, co-chairs of the Congressional Victim's Rights Caucus (06-CR-027) (p. 1) endorse a "meaningful incorporation of the CVRA rights into the federal rules."

Rule 61~~60~~. Title

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

FEDERAL RULES OF CRIMINAL PROCEDURE

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made.

SUMMARY OF PUBLIC COMMENTS

No comments were received.

APPENDIX B

Rule 41(b)(5).

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure

* * * * *

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

* * * * *

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth[,except American Samoa];

(B) the premises—no matter who owns them—of a United States diplomatic or consular

mission in a foreign state, including any appurtenant buildings, parts of buildings, and land used for the mission's purposes; or

(C) residences and any appurtenant land owned or leased by the United States and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

* * * * *

Committee Note

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The rule is intended to authorize a magistrate to issue a search warrant in any of the locations for which 18 U.S.C. § 7(9) provides jurisdiction. The difference between the language in this rule and the statute reflect the style conventions used in these rules, rather than

any intention to alter the scope of the legal authority conferred. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

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

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

With the assistance of the Style Consultant the Committee revised (b)(5)(B) and (C) for greater clarity and compliance with the style conventions governing these rules. Because the language no longer tracks precisely the statute, the Committee Note was revised to state that the proposed rule is intended to have the same scope as the jurisdictional provision upon which it was based, 18 U.S.C. § 7(9).

SUMMARY OF PUBLIC COMMENTS

The **Pacific Islands Committee of the Judicial Council of the Ninth Circuit (06-CR-001)** opposes the application of the rule to American Samoa. If an amendment permitting a federal magistrate

judge to issue a warrant in American Samoa is to be adopted, the proposal should be reviewed first by the judiciary of American Samoa and have the support of the Chief Justice of the High Court of American Samoa. Additionally, because American Samoa's representative to Congress has requested that the GAO conduct a study of the judiciary system in American Samoa, the committee suggests that the Advisory Committee should await such a report before taking a position on the proposed amendment. Instead of authorizing a federal magistrate to issue warrants, the committee states that Rule 41(b)(1) should be amended to allow issuance by a High Court Justice in American Samoa, which would put that court on the same footing as state courts in the United States.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-101) opposes proposed subsection 41(b)(5)(A) as unnecessary, on the ground that there has been no showing of a gap that needs filling, and no need to grant the authority to issue warrants to a magistrate far from the scene of the proposed search.

The **Federal Magistrate Judges Association (06-CR-015)** supports the amendment and states that it is aware of no reason why it should not apply in American Samoa.

The **California State Bar Association (06-CR-023)** has no objection to the proposed amendment.

APPENDIX C

Rules 45(a), 5.1, 7(f), 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases.

- **Copy of Rules**
- **Committee Notes**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~Rule 45. Computing and Extending Time~~

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

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

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

~~**(3) *Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is~~

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

~~not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

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

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

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

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

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

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

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

~~**(b) Extending Time.**~~

~~**(1)** ***In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:~~

~~(A) before the originally prescribed or previously extended time expires; or~~

~~(B) after the time expires if the party failed to act because of excusable neglect.~~

~~**(2)** ***Exception.*** The court may not extend the time to take any action under Rule 35, except as stated in that rule.~~

~~**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period~~

~~after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).~~

* * * * *

Rule 45. Computing and Extending Time

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

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

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

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

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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

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

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

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

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

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

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

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

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

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

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

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

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

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Criminal Procedure, a statute, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

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

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and

holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

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

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

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

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on

a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

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

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

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not

attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

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

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking

time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 7 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 5 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

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

Rule 5.1. Preliminary Hearing

* * * * *

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody.

* * * * *

Committee Note

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

Rule 7. The Indictment and the Information

* * * * *

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Committee Note

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

Rule 12.1. Notice of an Alibi Defense

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

* * * * *

(2) ***Defendant's Response.*** Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

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

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

(b) Disclosing Government Witnesses.

* * * * *

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an

intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial.

* * * * *

Committee Note

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

Rule 12.3. Notice of a Public-Authority Defense

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

* * * * *

(3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

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

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.

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

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

* * * * *

Committee Note

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

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion***. A defendant may move for a judgment of acquittal, or renew such a motion,

within ~~7~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Committee Note

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

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

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

Committee Note

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

Rule 34. Arresting Judgment

* * * * *

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

Committee Note

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

period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

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

* * * * *

Committee Note

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

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

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

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

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

* * * * *

Committee Note

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

Rule 47. Motions and Supporting Affidavits

* * * * *

(c) **Timing of a Motion.** A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

* * * * *

Committee Note

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

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) **Appeal.**

* * * * *

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

(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district

judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

* * * * *

Committee Note

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

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

* * * * *

Committee Note

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

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

* * * * *

Rule 8. Evidentiary Hearing

* * * * *

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

* * * * *

Committee Note

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

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

* * * * *

Rule 8. Evidentiary Hearing

* * * * *

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

* * * * *

Committee Note

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

APPENDIX D

Rule 16.

- **Copy of Rule**
- **Committee Note**
- **American College of Trial Lawyers Report - March 2003**
- **Federal Judicial Center Report**
- **May 14, 2007 Letter from Thomas Hillier to Peter McCabe**
- **ABA Model Rules of Professional Conduct (2002)**
- **DOJ Policy**
- **Summaries of Federal Cases Raising Brady Issues After 2001**
- **ALR Annotations**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

(a) **Government's Disclosure.**

(1) ***Information Subject to Disclosure.***

* * * * *

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

* * * * *

Committee Note

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense

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

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

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

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

March 2003

American College of Trial Lawyers

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October 14, 2003

Honorable Ed E. Carnes
United States Circuit Judge
U. S. Courthouse, Room 408
15 Lee Street
Montgomery, Alabama 36104

Re: Advisory Committee on
Federal Rules of Criminal Procedure

Dear Judge Carnes:

I write to you as Chair of the Advisory Committee and I enclose a copy of the American College's paper regarding disclosure of Brady material. This paper was adopted by the College's Board of Regents this year, and I hope that you can include its recommendations on your Committee's agenda for its spring meeting.

Please let me know if you have any questions regarding the College's position on this important subject.

Best regards,

Warren B. Lightfoot

WBL/ds
Enclosure
cc: Robert B. Fiske, Jr., Esquire
Executive Committee
David J. Beck, Esquire
Mr. Dennis J. Maggi

American College of Trial Lawyers

PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

Approved by the Board of Regents
March, 2003

American College of Trial Lawyers

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PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16*

BACKGROUND AND SUMMARY

In the 1963 landmark decision of *Brady v. Maryland*,[1] the Supreme Court held that prosecutors have a constitutional duty to turn over "evidence favorable to an accused. .... where the evidence is material either to guilt or to punishment."[2] Four decades later, Federal Rules of Criminal Procedure 11 and 16, which govern federal plea negotiations and criminal discovery respectively, still do not address, let alone require, the government to timely disclose favorable information to the defendant that is material to either guilt or sentencing.

Without a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently and too often disclosed favorable information on the eve, during or after trial or not at all. Timely disclosure of favorable information can greatly impact the plea decision, trial strategy, the presentation of evidence and sentencing.

Since approximately ninety-five percent of federal criminal cases are resolved through pleas of guilty,[3] the timely disclosure of information favorable to punishment is particularly important to fair and open plea negotiations and the honest and consistent implementation of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). Information that tends to diminish the degree of the defendant's culpability or Offense Level under the Guidelines can significantly affect a defendant's punishment. Still, prosecutors have recently sought to require defendants to enter into knowing and voluntary plea agreements in which the defendants have not received information favorable to punishment or worse, have been required to waive the constitutional right to exculpatory material without knowing what favorable evidence may exist. This practice threatens to deprive defendants and courts of information critical to a fair and honest sentencing process.

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* The principal draftsman of this report was Robert W. Tarun, Chicago, Illinois, assisted by a subcommittee of the Federal Criminal Procedure Committee of the American College of Trial Lawyers consisting of Locke T. Clifford, Greensboro, North Carolina, William F. Manifesto, Pittsburgh, Pennsylvania and Jordan Green, Phoenix, Arizona.

[1] 373 U.S. 83 (1963).

[2] *Id.* at 87.

[3] United States Sentencing Guidelines (U.S.S.G.), Ch. 1, Pt. A.; *Judicial Business of the United States Courts, Annual Report of the Director* (2000) (available at: http://www.uscourts.gov/judbus2000/contents.html).

Nothing is more essential to a fair criminal trial or sentence than the disclosure of information favorable to the defendant in sufficient time for the defendant to receive due process as guaranteed by the Fifth Amendment, and effective assistance of counsel as guaranteed by the Sixth Amendment. No defendant should be forced to go to trial or plead guilty without having access to favorable information as to guilt or sentencing. Any system of jurisprudence which fails to require as much condones and "shapes a trial that bears heavily on the defendant"[4] and lays the groundwork for wrongful conviction of the innocent and unfair sentencing of the guilty.

The proposed amendments to Federal Rules of Criminal Procedure 11 and 16 will ensure that defendants receive the full and consistently applied benefit of the Supreme Court's pronouncements in *Brady* and its progeny. They codify the rule of law first propounded in *Brady v. Maryland,* clarify both the nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.

This Committee believes that the constitutional mandate of *Brady v. Maryland* has been undermined by varying prosecutorial interpretations of "favorable information," delayed disclosure of this information in both guilt and punishment stages, and recent government plea policies that have the potential to deprive defendants of information essential to the sentencing process. The amendments will not only promote greater fairness and integrity in criminal discovery generally, but also foster earlier, forthright plea negotiations and a more balanced and informed administration of the Guidelines. Specifically, the Committee proposes amendments to Fed. R. Crim. P. 11 and 16 which:

1. define favorable information to an accused;

2. require, upon a defendant's request, that the government disclose in writing within fourteen days, all known favorable information to the defense;

3. impose a due diligence obligation on the government attorney to consult with government agents and locate favorable information; and

4. require disclosure of all favorable information to a defendant fourteen days before a guilty plea is entered.

Part I of this report discusses the background and evolution of the Supreme Court's decision in *Brady v. Maryland.* Part II summarizes federal criminal discovery practice under Rule 16 as it currently exists. Part III discusses Rule 11(e) and federal plea negotiations. Finally, Part IV contains the proposed Rule 11(e)(7) and Rule 16(f) amendments and a discussion of their key provisions.

[4] 373 U.S. at 87.

I. *BRADY v. MARYLAND* BACKGROUND

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.
>
> Justice William O. Douglas
> Brady v. Maryland, 373 U.S. 83, 87 (1963)

A. *Brady v. Maryland*

Brady v. Maryland represented the first time the Supreme Court created a bright-line constitutional duty on the part of prosecutors to turn over "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment[.]"[5] In *Brady*, the defendant had been convicted of first degree murder and sentenced to death.[6] Although he had admitted to participating in the crime, Brady maintained that his accomplice had done the actual killing, and therefore asked to be spared the death penalty.[7] In an attempt to prove as much, Brady's lawyer requested that the prosecution show him several of defendant's accomplice's statements.[8] Despite this request, a statement in which Brady's accomplice admitted to the actual homicide was not provided.[9] The government's behavior prompted Justice Douglas to comment:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. [...] A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.][10]

The Court held "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[11]

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[5] *Id.*

[6] *Id.* at 84.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 87-88.

[11] *Id. See also Moore v. United States*, 408 U.S. 786, 794-95 (1972).

B. *Brady* Evolution

Five major Supreme Court cases since *Brady* have construed the prosecutor's obligation to disclose favorable evidence to a criminally accused. In *Giglio v. United States*,[12] the Court applied *Brady*'s mandate to impeachment evidence as well as classically exculpatory evidence.[13] Giglio had been convicted of passing forged money orders, and while his appeal was pending, his attorney learned that the government had failed to disclose a promise of immunity made to its key witness.[14] Chief Justice Burger ordered a new trial as a result of the prosecution's misconduct, stating that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within" the rule of *Brady*.[15]

In *United States v. Agurs*,[16] the Court reviewed for *Brady* violations the second-degree murder conviction of a defendant whose sole defense had been self-defense. The defendant had not requested, and the government had not disclosed, evidence that the victim possessed a criminal record which included prior convictions for assault and possession of deadly weapons.[17] The Court found that a prosecutor's constitutional duty to disclose favorable evidence was not limited to situations in which the defendant had specifically requested the evidence.[18] Nevertheless, noting that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"[19] Justice Stevens observed:

> [T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.[20]

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[12] 405 U.S. 150 (1972).

[13] *Id.* at 153-54.

[14] *Id.* at 150.

[15] *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

[16] 427 U.S. 97 (1976).

[17] *Id.* at 101.

[18] *See also United States v. Bagley*, 473 U.S. 667, 682 (1985), discussed *infra* at text accompanying notes 23 through 27, holding that regardless of whether a request had been made, the suppression of material evidence favorable to an accused is unconstitutional.

[19] 427 U.S. at 108.

[20] *Id.* at 110-11 (citations omitted).

The Court concluded that undisclosed evidence would be deemed material, and therefore violative of *Brady*'s dictates, if it "create[d] a reasonable doubt that did not otherwise exist."[21] It nonetheless upheld the conviction because the trial judge remained convinced of the defendant's guilt notwithstanding the newly discovered evidence.[22]

In *United States v. Bagley*,[23] the Supreme Court revisited the issue of "materiality" and held that undisclosed evidence is "material" for purposes of a *Brady* violation where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[24] Bagley, charged with violations of federal narcotics and firearms statutes, filed a motion requesting "any deals, promises or inducements to witnesses in exchange for their testimony."[25] In response, the government provided affidavits from two government witnesses who asserted that their statements had been given without any threats, rewards, or promises of reward.[26] Following his conviction, Bagley filed a Freedom of Information Act request with the Bureau of Alcohol, Tobacco and Firearms and learned that the agency had entered into contracts with the two witnesses under which the government had promised to pay them money for their cooperation.[27] Finding that the prosecutor's response had misleadingly induced defense counsel into believing the witnesses could not be impeached on the basis of bias, the Court remanded the case to the trial court to decide whether there was a "reasonable probability" that had the evidence been disclosed to the defense, the result might have been different.[28]

A decade later in *Kyles v. Whitley*,[29] the Court, in construing *Brady*, explained that the materiality standard does not require a defendant to demonstrate that disclosure of the suppressed material would have ultimately resulted in his acquittal.[30] Instead, such a standard requires a defendant to show that suppression of the relevant evidence caused him to receive a trial which did not "result[] in a verdict worthy of confidence."[31] In *Kyles*, the defendant faced first-degree murder charges for the alleged shooting of an elderly woman in a grocery store parking lot.[32] When his counsel filed a lengthy *Brady* motion requesting "any exculpatory or impeachment evidence," the government responded that there was "no exculpatory evidence of any nature."[33] In fact, however, the prosecution knew of no fewer than seven key pieces of

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[21] *Id.* at 112.

[22] *Id.*

[23] 473 U.S. 667 (1985).

[24] *Id.* at 682.

[25] *Id.* at 669.

[26] *Id.* at 670.

[27] *Id.* at 671.

[28] *Id.* at 684.

[29] 514 U.S. 419 (1995).

[30] *Id.* at 434.

[31] *Id.*

[32] *Id.* at 423, 428.

[33] *Id.* at 428.

exculpatory evidence, including substantial evidence affirmatively inculpating its star witness.[34] After analyzing the prosecution's failure to disclose this evidence, the Court reversed the defendant's conviction and death sentence, finding that "fairness [could not] be stretched to the point of calling this a fair trial."[35] The *Kyles* Court held that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[36]

In *Strickler v. Greene*,[37] the Supreme Court reviewed a prosecutor's failure to disclose in a capital murder case exculpatory materials in police files consisting of detective notes about a key witness and a letter written by the witness.[38] Justice Stevens clarified that "there are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[39] Finding that no prejudice had ensued from the non-disclosure, the Court declined to reverse the defendant's conviction.

C. The Special Role of the Prosecutor in Ensuring a Fair Trial

In *Berger v. United States*,[40] Justice Sutherland outlined the unique role and responsibilities of the federal prosecutor:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[41]
>
> (Emphasis supplied.)

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[34] *Id.* at 447.

[35] *Id.* at 454.

[36] *Id.* at 437.

[37] 527 U.S. 263 (1999).

[38] *Id.* at 266.

[39] *Id.* at 281-82.

[40] 295 U.S. 78 (1935).

[41] *Id.* at 88.

Woven throughout each of the major Supreme Court decisions construing *Brady* has been the theme that responsibility for ensuring the accused receives a fair trial rests not with the judge, jury, defense counsel, police, or some combination thereof, but with the prosecutor. In *Kyles,* the Court made clear that the prosecution has the "responsibility to gauge the likely net effect of all [favorable] evidence and make disclosure when the point of 'reasonable probability' is reached."[42] This meant, stated the Court, that individual prosecutors are required to learn:

> of any favorable evidence known to the others acting on the government's behalf in the case, including the police [... for] since ... the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[43]

The *Kyles* Court further observed that:

> [u]nless ... the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence ... And (disclosure) will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.[44]

Both the American Bar Association ("ABA") Standards of Criminal Justice and the Model Rules of Professional Conduct recognize the unique role of the prosecutor and the importance of timely disclosure of favorable evidence to the defense. The ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) provide:

> A prosecutor should not intentionally fail to make *timely* disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
>
> (Emphasis supplied)

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[42] *Kyles*, 514 U.S. at 437.

[43] *Id.* at 437-38.

[44] *Id.* at 439 (citations omitted).

The ABA Model Rule of Professional Conduct 3.8(d) (1984) provides:

> The prosecutor in a criminal case shall . . . make *timely* disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense.
>
> (Emphasis supplied)

Thus, the two most pertinent ethical guidelines to address criminal discovery make clear that timely disclosure of favorable evidence by the prosecution is essential in a criminal case.

Codification of *Brady v. Maryland* will assist federal prosecutors and law enforcement officers in better understanding the disclosure responsibility, instill far greater confidence that this constitutional obligation is being uniformly satisfied and, above all, work to ensure that wrongful convictions and unlawful sentences do not occur. Because the prosecutor alone can know and weigh what is undisclosed,[45] he is faced with the serious and possibly conflicting responsibility of deciding what is exculpatory and, if so, whether it should be disclosed to the accused, and finally when to disclose this information. A rule of criminal procedure can only provide welcome guidance in carrying out a responsibility that ensures fair trials and sentencings.

II. FEDERAL DISCOVERY PRACTICE

A. Federal Rule of Criminal Procedure 16 Does Not Address, Let Alone Require, Disclosure of Favorable Information

Unlike the Federal Rules of Civil Procedure, which provide for wide-ranging discovery and disclosure in the form of depositions, disclosure statements, requests for production, inspections and requests for admissions, interrogatories and expert reports, the Federal Rules of Criminal Procedure afford the defendant extremely limited access to government information.

Federal Rule of Criminal Procedure 16 governs discovery in federal criminal cases.[46] It requires, upon a defendant's request, disclosure of statements made by the defendant within the government's possession, control or custody,[47] disclosure of the defendant's prior criminal record,[48] inspection and copying of documents and tangible objects intended to be used by the government at trial or material to the defendant's defense,[49] inspection of physical and

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[45] *Id.* at 438.

[46] Fed. R. Crim. P. 16 is reprinted in its entirety in Appendix A.

[47] Fed. R. Crim. P. 16 (a)(1)(A).

[48] *Id.* at 16 (a)(1)(B).

[49] *Id.* at 16 (a)(1)(C).

mental examinations and scientific tests,[50] and summaries of any expert testimony that the government intends to offer in its case-in-chief.[51] The rule affords the government reciprocal discovery upon its compliance with and request of the defendant.[52] Rule 16 also imposes a continuing duty to disclose if prior to or during a trial a party discovers additional evidence or material previously requested or ordered and subject to discovery or inspection under the rule.[53] Over its fifty-year evolution, Federal Rule of Criminal Procedure 16 has metamorphosed the spectacle of the criminal trial from a game of "blind man's bluff"[54] into a "serious inquiry aiming to distinguish between guilt and innocence."[55]

Although Rule 16 has gradually expanded the scope of discovery required in criminal cases,[56] it still does not address, let alone require, the government to timely disclose favorable information to the defendant that is material either to guilt or sentencing. This limited disclosure makes the defense of a federal criminal case especially difficult, considering the government's ability to control the flow of information to the defendant, attributable largely to the close relationships between the prosecutor and law enforcement, and the inability of the defense to compel disclosure.

In addition to disclosure under Rule 16, criminal defense lawyers can try to obtain Brady and Giglio material by filing a motion with the court. Most criminal defense lawyers file a *Brady-Giglio* motion as a matter of course in federal and state court proceedings. Some file a general request for exculpatory evidence while others tailor the discovery motion to the particulars of the case. Types of information not only favorable, but essential, to the defense in a criminal trial and at sentencing include:

- promises of immunity or other favorable treatment to government witnesses;[57]

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[50] *Id.* at 16 (a)(1)(D).

[51] *Id.* at 16(a)(1)(E).

[52] *Id.* at 16(b).

[53] *Id.* at 16(c).

[54] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L. Q. 1, 3 (1990) (citing Justice Douglas' opinion in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958), in which Justice Douglas noted that tools which result in broad discovery "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

[55] *See* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L. Q. 279 (1963) (quoting Williams, *Advance Notice of the Defense*, 1959 Crim. L. Rev. (Eng.) 548, 554 (1959)).

[56] See, e.g., the 1966 Amendment to the Rule (noting that "[t]he rule has been revised to expand the scope of pretrial discovery"), the 1974 Amendment ("Rule 16 is revised to give greater discovery to both the prosecution and the defense."), and the 1993 Amendment ("New subdivisions ... expand federal criminal discovery[.]")

[57] *See United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (conviction reversed where prosecution's key witness lied about the nature of his deal with the prosecution); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for immunity while arguing to jury that witness had no motive to lie); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealed evidence that key witness was coerced into testifying against defendant and/or argued to the jury that no one had threatened the witness); *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974) (convictions reversed where defendants were deprived of evidence reflecting promises of leniency).

- prior criminal records of government witnesses;[58]
- prior inconsistent statements of government witnesses regarding the defendant's alleged criminal conduct;[59]
- prior perjury or false testimony of government witnesses;
- monetary rewards or inducements to government witnesses;
- confessions to the crime in question by others;
- information reflecting bias or prejudice by government witnesses against the defendant;
- witness statements that others committed the crime in question;
- information about mental or physical impairments of government witnesses;[60]
- inconsistent or contradictory examinations or scientific tests;[61] and
- the failure of any percipient witnesses to make a positive identification of the defendant.

Brady-Giglio motions, however, often fail to unearth evidence which is critical to the defense. Federal prosecutors, largely keying on the word "exculpatory," have interpreted the *Brady* disclosure obligation in a variety of ways. A number of prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision that requires disclosure of evidence that *tends to* exculpate or reduce one's penalty.[62] Others, knowing of favorable evidence, have tried to predict its effect on the outcome of the case in deciding whether to disclose it. Still others do not view *Giglio* or impeachment material as part of the *Brady*

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[58] *See Carriger v. Stewart*, 132 F.3d 463, 479-82 (9th Cir. 1997) (conviction reversed where prosecution failed to disclose witness's prior criminal history); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) *cert denied*, 489 U.S. 1032 (1989) (same); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (prosecutor's lack of knowledge of witness' criminal record was no excuse for *Brady* violation).

[59] *See United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994) (kidnapping conviction reversed where government failed to disclose key witness' letter which seriously undermined her credibility); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975) (*Brady* violation found for failure to disclose grand jury testimony contradicting testimony of government witnesses).

[60] *See United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (new trial granted where government failed to reveal drug use and dealing by prisoner-witnesses during trial).

[61] *See United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (prosecutor's ignorance of ballistics worksheet indicating that gun defendant was accused of firing was inoperable did not excuse failure to disclose); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1966) (conviction reversed where government failed to disclose FBI report of victim's physical examination).

[62] 373 U.S. at 87.

exculpatory disclosure obligation. And yet others have separated the timing of the disclosure of exculpatory or guilt evidence from the disclosure of mitigating or punishment evidence.

The majority of this Committee's members practice in federal courts, and based on their experiences, believe that across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court and often reply to both general and case-specific *Brady-Giglio* motions with boilerplate responses such as "none known," or "the government is aware of its obligations" - often producing little, if any, favorable information for months, in some cases not until trial is underway and in other cases not at all. Without a procedural rule containing a clear definition of *Brady* material, requiring prosecutors to consult with law enforcement officers, and mandating a firm compliance timetable, the duty to disclose favorable information has become blurred and at best of secondary importance to the explicit discovery obligations and procedures found in Rule 16.

It is anomalous that in civil cases, where generally all that is at stake is money, access to information is assured; however, in contrast, in criminal cases, where liberty is at issue, the defense is provided far less information. More significantly, in a civil case, violation of the discovery rules is punishable in extreme cases by dismissal. There is no comparable sanction in criminal cases. The amendments proposed here are consistent with the unique role of the prosecutor in ensuring that the accused receives a fair trial.

B. Most Local Rules Do Not Fully Address the Disclosure of Favorable Information

Most local rules that address *Brady-Giglio* disclosure obligations neither define the nature and/or scope of favorable information, nor require consultation with law enforcement officers, nor provide clear pre-trial or pre-plea deadlines for disclosure.[63] The most notable exception is the District of Massachusetts[64] which in 1998 promulgated the most extensive local

[63] Some local criminal rules require attorneys for the government and defense to confer with respect to a schedule for disclosure and provide that, in the absence of a stipulation, the court may intervene. *See, e.g.*, N.D. Ca. Criminal Local Rule 16-1(a). Many are silent as to *Brady* obligations (*see, e.g.*, E.D. Tn. L.R. 16.2 (Pre-trial Conferences in Criminal Cases); S.D. Tx. Criminal Rule 12 (Criminal Pretrial Motion Practice); S.D. Ca. Criminal Rule 16.1 (Pleadings and Motions Before Trial, Defenses and Objections); and M.D. Ala. L. Cr. R. IV (Arraignment and Preparation for Trial)), or address Federal Rule Criminal Procedure 16 obligations only. *See, e.g.*, E.D. Pa. Criminal Rule 16.1 (Pretrial Discovery and Inspection); D.Wy. L. Cr. R. 16.1. Still others encourage parties to meet and confer on discovery topics beyond Fed. R. Crim. P. 16 but not *Brady* material. *See, e.g.*, N.D. Ill. L. Cr. R. 16.1 (Pretrial Discovery and Inspection). Finally, some federal courts have no local criminal rules. *See, e.g.*, D.S.D. Local Rules of Practice.

[64] The Southern District of Florida has also promulgated extensive local criminal discovery rules which addresses *Brady* information. *See* S.D. Fla. General Rule 88.10 (requiring the government to disclose, within fourteen days of arraignment, not only the information required under Federal Rule Criminal Procedure 16, but also "all information ... favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland* ... and *United States v. Agurs*," as well as "the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States* ... and *Napue v. Illinois*").

criminal discovery rules in the nation. Massachusetts Local Rule 116.2[65] was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations.

United States v. Mannarino,[66] frequently credited with precipitating the enactment of Massachusetts's Local Rule 116.2, decried "a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office."[67] *Mannarino* addressed a police officer's destruction of a star informant's self-authored narrative of his criminal history, before it could be produced to defendants, and in violation of the Jencks Act.[68] Calling the case "yet another example of concerted indolence in pursuing disclosure by the United States Attorney's Office and a willful blindness to the failure of its agents who had disclosure duties to fulfill them,"[69] Judge Woodlock cited a decade's worth of case law detailing "lame," "sloppy," "negligen[t]," "illusory," and "insensitiv[e]" criminal discovery practices by the U.S. Attorney's Office in Boston.[70] Declining to enter a judgment of acquittal, the court ordered the deposition of the government's key witness to be taken by defense counsel, to be followed by a new trial.[71] *Mannarino* highlights the practice of some prosecutors of ignoring the constitutional obligation to disclose favorable information material to guilt and punishment in a timely fashion.[72]

The Massachusetts local criminal rules establish a series of "automatic" discovery obligations imposed upon prosecutors and defendants alike.[73] The rules also require the government to disclose, under a mandated timeframe, any information that could "cast doubt" on the defendant's guilt, the admissibility or credibility of any evidence, or the degree of the defendant's culpability under the Guidelines.[74] This information expressly includes, *inter alia*, inducements rendered to government witnesses to testify, criminal records of and cases pending against such witnesses, and the failure of any such witnesses to positively identify the defendant.[75] The rules further require the government to inform "all federal, state, and local law enforcement agencies formally participating in the criminal investigation" of the local rules'

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[65] Massachusetts Local Rule 116.2 is reprinted in its entirety in Appendix B.

[66] 850 F. Supp. 57, 59 (D. Mass. 1994).

[67] *Id.* at 59. *See also id.* at 71 (stating that repeated prosecutorial discovery violations are "of sufficient concern that the District of Massachusetts has determined to review its present local rules governing criminal discovery with a view toward increased prescriptiveness in discovery responsibilities").

[68] *Id.* at 59. *See also* 18 U.S.C. § 3500 (Jencks Act).

[69] 850 F. Supp. at 71.

[70] *Id.* at 71-72 (citations omitted). The court went on to call the government's current discovery practices "unwilling[]" and "rescusan[t]," among other adjectives. *Id.* at 72.

[71] *Id.* at 73.

[72] *See, e.g.*, Moushey, *Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*, Pittsburgh Post-Gazette, November 24, 1998, at A-1; Goldberg, *Your Clients'* Brady-Giglio *Rights Are Not Protected*, 22 Champion 41 (September/October 1998).

[73] *See* D. Mass. L.R. 116.1-117.1, *infra*, Appendix B. The rules require the government to provide not only all materials required by Fed. R. Crim. P. 16, but also the fruits yielded from any search warrants, electronic surveillance, and investigative identification procedures, as well as the names of all unindicted co-conspirators. *See id.* at 116.1(C).

[74] *Id.* at 116.2.

[75] *Id.*

discovery obligations, to obtain from such law enforcement agencies any information they have which would be subject to disclosure, and to require participating law enforcement agencies to preserve their "notes" and other relevant documents.[76] Finally, Massachusetts Local Rule 1.3 provides that failure to comply with any obligation or direction set forth by the rules of the district may result in dismissal.[77]

III. FEDERAL PLEA PRACTICE

A. Federal Rule of Criminal Procedure 11(e) Does Not Address Let Alone Require Disclosure of Favorable Information

The vast majority of federal criminal cases are resolved by pleas of guilty under Fed. R. Crim. P. 11. Plea agreements are governed by the law of contracts.[78] Most pleas are negotiated and involve bargained for consideration. The parties - the United States and the defendant(s) - may bargain for particular charges, sentences, sentencing ranges or the application of USSG guidelines, policies, factors or provisions.

Federal Rule of Criminal Procedure 11(e) governs the conduct of the government and the defendant during plea negotiations. Rule 11[79] establishes guidelines to ensure that a guilty plea is made knowingly and voluntarily.[80] Before accepting a plea of guilty, a court must address the defendant personally in open court and inform the defendant that he has a right to plead not guilty, the right to be tried by a jury and at that trial he has the right to assistance of counsel, the right to confront and cross examine adverse witnesses and the right against compelled self-incrimination.[81] A waiver of an important constitutional or statutory right must be known and voluntary to be valid,[82] but Rule 11 does not require the court to specify each and every constitutional right that the defendant waives by pleading guilty.[83]

A defendant who acknowledges his plea is knowingly and voluntarily entered at his plea hearing must overcome a strong presumption of voluntariness when he subsequently seeks to challenge that plea.[84] A plea entered into without the benefit of *Brady* information is inherently suspect in this regard. Without *Brady* information, the defendant and counsel may not

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[76] *Id.* at 116.8, 116.9. Massachusetts's local rules promote enforcement by requiring the magistrate and presiding judges to hold at least three pre-trial conferences designed to effect compliance with the local rules.

[77] D. Mass. L.R. 1.3.

[78] *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

[79] Fed. R. Crim. P. 11(e) is reprinted in its entirety as Appendix C.

[80] Fed. R. Crim. P. 11(c)-(d).

[81] Fed. R. Crim. P. 11(c)(3).

[82] *See United States v. Mezzanatto,* 513 U.S. 196 (1995).

[83] Fed. R. Crim. P. (c)(4). *See, e.g., Brady v. United States*, 357 U.S. 742, 748 (1970) (waiver of the constitutional rights to a trial and to remain silent); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970) (waiver of the right to contest the admissibility of evidence the government may have offered against the defendant).

[84] *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

be able to make informed decisions about whether and when to plead guilty. The common argument that a defendant knows whether he is guilty and whether there is mitigating evidence is simply not true in many cases.[85] A defendant may not know all the elements of an offense or understand that certain evidence known only to the prosecutor may negate an essential element. Further, a defendant may not know of facts that establish a legal defense and without disclosure a defendant's counsel may not become aware of facts that establish a legal defense.[86] A defendant with limited mental faculties or a significantly reduced mental capacity may not be able to fully communicate with counsel or appreciate the importance of facts critical to the defendant's guilt or innocence.

The federal circuits are split on whether *Brady* applies to plea negotiations. The Fifth[87] and Eighth[88] circuits have held that defendants waive their rights to *Brady* material in pleading. However, the Second,[89] Sixth,[90] Ninth[91] and Tenth[92] circuits have held that *Brady* does apply to guilty pleas. The Ninth Circuit in *Sanchez*, taking the strongest position, has concluded that a plea "*cannot* be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[93]

B. Federal Plea Agreement Policies Which Require the Defendant to Waive the Right to *Brady* Material Undermine the Due Process Goal of Ensuring a Fair Sentencing Process

A closely related question is whether a defendant can waive his right to receive *Brady* information. Some United States Attorneys Offices, notably the Southern and Northern District of California, have expressly incorporated into plea agreements a *Brady* waiver. A representative sample states:

> The defendant understands that discovery may have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendants agree to waive his right to receive additional

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[85] Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery Waivers"*, 51 Stan. L. Rev. 567 (1999).

[86] *Id.*

[87] *Matthew v. Johnson*, 201 F.2d 363 (5th Cir. 2000).

[88] *Smith v. United States*, 876 F.2d 655 (8th Cir. 1989).

[89] *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988).

[90] *Campbell v. Marshall*, 769 F.2d 313 (6th Cir. 1985), *cert. denied* 475 U.S. 1058 (1986).

[91] *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995).

[92] *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994).

[93] 50 F.3d at 1453 (emphasis added).

> discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.[94]

In *United States v. Ruiz* the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence to a defendant prior to entering a plea agreement.[95] In *Ruiz*, the defendant rejected a plea offer from the U.S. Attorney's Office in the Southern District of California which required her to waive her rights to *Brady* material in exchange for a downward departure at sentencing.[96] The trial court refused to grant the departure following her subsequent guilty plea made without a plea agreement.[97]

The Ninth Circuit in *Ruiz* had found that plea agreements and any waiver of *Brady* rights contained therein "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[98] In reversing the Ninth Circuit, the Supreme Court focused on impeachment evidence rather than exculpatory or mitigating evidence. It pointed out that in *Ruiz's* proposed plea agreement, the government had agreed to provide "any information establishing the factual innocence of the defendant."[99]

The difficulty with a complete *Brady* waiver is that a defendant cannot knowingly waive something that has not been made known to him and that may exclusively be in the possession of the government. The Supreme Court has made clear that there must be an "intentional relinquishment or abandonment of a known right or privilege."[100] When a plea is made without the knowledge of all its direct consequences, it may not stand.[101]

In an analogous situation to the waiver of *Brady* material, many federal prosecutors have insisted that defendants also waive the right to appeal a sentence as part of a plea agreement even though a sentence has yet to be imposed. In this context, a District of Columbia district court held that "a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant had no knowledge as to what will occur at the time of sentencing."[102]

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[94] Banoun, *Preface: The Year in Review, reprinted in* White Collar Crime 2000, at x (ABA 2000) (quoting San Francisco U.S. Attorney's Office plea agreement provision).

[95] 122 S. Ct. 2450 (June 24, 2002).

[96] 241 F.3d 1157, 1160-61 (9th Cir. 2001).

[97] *Id.* at 1161.

[98] *Id.* at 1164 (quoting *Sanchez*, 50 F.3d at 1453).

[99] *Id.* at 2451-2452.

[100] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[101] *Brady v. United States*, 397 U.S. 742 (1970).

[102] *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1998). *But see United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990) (permitting waiver of sentence appeals).

In sum, the bargaining leverage of the United States in plea negotiations is enormous. The government drafts the plea agreement, usually dictates the factual basis for the plea and often pronounces *de facto* office plea policies, e.g., that the defendant must waive his right to all *Brady* material or his right to appeal a sentence. There is no compelling reason to ignore or make a defendant waive his constitutional right to information favorable to guilt or sentencing. Indeed, any policy that discourages disclosure of exculpatory material may well encourage prosecutors to elicit guilty pleas improperly.[103]

IV. *BRADY V. MARYLAND* AND FEDERAL SENTENCING

Even though *Brady v. Maryland* explicitly requires disclosure of favorable information relevant to punishment, prosecutors frequently focus only on favorable information relevant to the guilt or trial phase and view a defendant's decision to plead as extinguishing the right to favorable evidence.[104] Ironically, *Brady* involved a situation in which favorable evidence as to punishment and not guilt was at issue. Disclosure of favorable evidence as to punishment is arguably even more critical today as a result of the United States Sentencing Guidelines.

A comprehensive review of the United States Sentencing Guidelines' structure and methodology is beyond the purpose and scope of this report. However, there is no doubt that federal prosecutors wield enormous influence in determining what sentence a convicted defendant receives under the Guidelines. In particular, government attorneys at the outset calculate the offense level which is designed to "measure the seriousness of the crime."[105] They routinely formulate the specific offense characteristics such as an offense involving sophisticated means[106] or a loss exceeding certain dollar levels[107] that can significantly increase the defendant's period of incarceration. They frequently argue that for offenses committed by more than one participant, the court should consider the defendant's aggravating[108] or mitigating[109] role in the offense. In each of these instances, government attorneys may have access to, and in some cases the only access to, favorable information that diminishes the defendant's culpability or lowers the offense level under the Guidelines.

For example, witnesses may differ in describing the role of a defendant as a manager, supervisor, organizer or leader[110] - designations that can greatly affect the ultimate sentence. Similarly, government witnesses may dispute whether the loss claimed by the United

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[103] *Sanchez*, 50 F.3d at 1453.

[104] Joy & McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 15 FALL Crim. Just. 41 (2001).

[105] Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutor Indiscipline*, 29 Stetson L. Rev. 79 (1999).

[106] U.S.S.G. § 3B1.1(b)(8)(C).

[107] U.S.S.G. § 2B1.1(b)(1).

[108] U.S.S.G. § 3B1.1.

[109] U.S.S.G. § 3B1.2.

[110] U.S.S.G. § 3B1.1.

States was "reasonably foreseeable pecuniary harm,"[111] and the final calculation of the actual losses in fraud cases similarly affects a sentence.[112] Because witnesses who have provided exculpatory evidence to the government are less likely to make themselves available to the defendant or his counsel, there is a serious risk that absent disclosure by the prosecution, the defense may never learn of material exculpatory evidence that would mitigate the offense or reduce the punishment.

Timely disclosure of favorable information can not only diminish the degree of the defendant's culpability or Offense Level under the Guidelines, its receipt or the government's certificate in writing that none exists, can lead to an earlier decision to plead guilty whereby he receives credit for that plea by the court.[113] Thus, when the government denies a defendant *Brady* information at an early stage of the process, it may well deny him the opportunity to prove to the government that a lesser sentence is fair based on evidence in the government's possession and that he is also then entitled to receive significant credit for acceptance of responsibility in timely pleading to the offense.

V. PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16 AND OFFICIAL COMMENTARY

A. Proposed Amendment to Rule 16

Fed. R. Crim. P. 16(f)

(f) Information Favorable to the Defendant as to Guilt or Punishment.

(1) Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing all information favorable to the defendant which is known to the attorney(s) for the government or to any government agent(s), law enforcement officers or others who have acted as investigators from any federal, state or local agencies who have participated in either the investigation or prosecution of the events underlying the crimes charged. Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: a) exculpate the defendant; b) adversely impact the credibility of government witnesses or evidence; c) mitigate the offense; or d) mitigate punishment.

(2) The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant within the files or knowledge of the government; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

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[111] U.S.S.G. § 3B1.1, Commentary 2.

[112] U.S.S.G. §2B1.1(B)(1).

[113] See U.S.S.G. § 3E1.1 (Acceptance of Responsibility).

Official Commentary

This amendment is intended to codify and clarify the prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, 514 U.S. 419 (1995). These Supreme Court precedents and others require the prosecutor to provide to the defense not only directly exculpatory evidence (*Brady*) but also evidence impeaching the credibility of the Government's witnesses (*Giglio*); not only evidence specifically requested by the defense (*Brady*) but also that which is not requested (*Agurs*); not only evidence relevant to guilt or innocence (*Giglio*) but also evidence relevant to sentencing (*Brady*); and not only evidence known to the prosecutor (*United States v. Bagley*, 473 U.S. 667 (1985)) but also evidence known to agents of law enforcement (*Kyles*). Proposed Rule 16(f) creates a necessary analytical and procedural framework for the prosecution to carry out its constitutional responsibilities.

Examples of favorable information include but are not limited to: promises of immunity (*see, e.g., United States v. Butler*, 567 F.2d 885 (9th Cir. 1978)); prior criminal records (*see, e.g., United States v. Auten*, 632 F.2d 478) (5th Cir. 1980) and *United States v. Owens*, 933 F. Supp. 76, 87-88 (D. Mass. 1996)); prior inconsistent statements of government witnesses (*see, e.g., United States v. Payne*, 63 F.3d 1200, 1210 (2d Cir. 1995)); *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975)); information about mental or physical impairment of government witnesses (*see, e.g., United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995)); inconsistent or contradictory scientific tests (*see, e.g., United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985)); pending charges against witnesses (*see, e.g., United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999)); monetary inducements (*see, e.g., United States v. Mejia*, 82 F. 3d 1032, 1036 (11th Cir. 1996); *United States v. Fenech*, 943 F. Supp. 480, 486-87 (E.D. Pa. 1996)); bias (*see, e.g., United States v. Schledwitz*, 169 F.3d 1003 (6th Cir. 1999)); proffers of witnesses and documents relating to negotiation process with the government (*see, e.g., United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1203 (C.D. Ca. 1999)); and the government's failure to institute civil proceedings against key witnesses (*see, e.g., United States v. Shaffer*, 789 F.2d 682, 690-91 (9th Cir. 1986)).

Despite the fact that *Brady v. Maryland* recognized the prosecutor's duty to disclose evidence favorable to the defense in 1963, the decades since then have seen repeated instances of prosecutors overlooking or ignoring this obligation. *See, e.g., Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001) (granting habeas petition after state failed to produce evidence impeaching the victim's identification, statements of other eyewitnesses, and reports regarding other possible suspects); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (overturning appellant's cocaine possession conviction because prior criminal record of prosecution witness was not turned over to the defense); *United States v. Pelullo*, 105 F.3d 117 (3d Cir. 1997) (reversing denial of collateral relief from wire fraud and RICO convictions upon showing that the government had withheld evidence of prior inconsistent statements by a key witness, there were changes to FBI incident reports, and contradictions existed regarding the appellant's attendance at a

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particular meeting); *Spicer v. Roxbury*, 194 F.3d 547 (4th Cir. 1999) (upholding petition for writ of habeas corpus because state failed to turn over evidence of conflicting statements by main prosecution witness); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealment of coerced testimony of key witness); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (granting petition for writ of habeas corpus when petitioner showed that the prosecution failed to turn over a report indicating that a key witness could not positively identify the petitioner as the shooter in a murder case); *Carriger v. Stewart*, 132 F.3d 463, 479-482 (9th Cir. 1997) (reversing conviction where prosecution failed to disclose witness's prior criminal history); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (overturning drug trafficking convictions for government's *Brady* violation in not turning over a law enforcement official's report that raised serious doubts regarding the truthfulness of the prosecution's key witness); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (prosecution's failure to disclose immunity to key witness); and *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (overturning conviction for misuse of banking funds because of the failure to disclose prosecutorial intimidation of witnesses).

The proposed Rule 16(f) requires the prosecutor to turn over all information favorable to the defendant within 14 days of the date the defendant requests it. Timely disclosure of favorable information to the defense is essential to meaningful compliance with *Brady*. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984). It is anticipated that, like many other discovery deadlines, this one can be extended by agreement of the parties, and if necessary, the government may apply to the court for a protective order, under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time. The proposed rule requires a request from the defense in order to trigger the 14-day time frame, but the rule is not intended to obviate the prosecution's obligation to provide information favorable to the defense even in the absence of a defense request, *United States v. Agurs, supra.*

The drafters anticipate that before or at the time of guilty pleas, government attorneys will furnish to the defense favorable information that mitigates the offense or punishment. As a result of the promulgation of the United States Sentencing Guidelines and the increased importance of even minor facts that can affect punishment by diminishing the degree of a defendant's culpability or Offense Level, the drafters believe that timely production of *Brady* information in the sentencing context is far more significant and critical today than ever before.

Proposed Rule 16(f) requires government attorney(s) to turn over "all information, in any form, whether or not admissible . . ." The rule thus contemplates disclosure of not only written documents but also of tape recordings, computer data, electronic communications, and oral information acquired through interviews or any other means. The proposed rule does not burden the government with the responsibility of assessing whether information is likely admissible.

The proposed Rule 16(f) contains no requirement that the information be "material" to the defense. The drafters believe that the Rule's definition of "Information favorable to the defendant" is sufficiently clear to guide the government attorneys at the pre-trial stage. A materiality standard is only appropriate in the context of an appellate review since determinations of materiality are best made in light of all the evidence addressed at trial. A materiality analysis cannot realistically be applied by a trial court facing a pre-trial discovery request. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Sudikoff*, 39 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999). In cases where a failure to disclose favorable information is uncovered after the trial or sentencing, of course, the reviewing court will presumably employ concepts of materiality in determining the degree of prejudice, if any, suffered by the defense as a result of the government's failure.

Proposed Rule 16(f)'s requirement of a written disclosure and certification by the government attorney is, the drafters believe, critical to its operation. It is anticipated that government attorneys will describe the disclosures being made in sufficient detail to permit the defense to investigate the information. Likewise, the government's certification should specifically confirm that the attorney signing it has exercised due diligence in locating and attempting to locate all information favorable to the defendant within the files or knowledge of the government. There is due diligence precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant: Rule 16(a)(1)(B), Defendant's Prior Record, and Rule 16(a)(1)(D), Reports of Examinations and Tests.

It may be prudent for the government to maintain a record of the manner in which this due diligence inquiry was conducted so as to facilitate its response in any post-trial proceedings, but the Rule does not require this nor does it require the government to turn any such record over to the defense at the time of the certification. The drafters anticipate that in the event any government agency refuses to respond to a request from the prosecutor for information favorable to the defendant, the prosecutor's certification will identify the refusing agency and official so as to permit the defense to investigate and, if necessary, seek redress from the court.

The proposed rule contains no separate provision for sanctions for intentional violations or inadvertent noncompliance. The drafters anticipate that the full range of remedial and punitive sanctions, ranging from a trial or sentencing continuance to dismissal of the indictment, is already available to the court under Rule 16(d)(2) as is the Court's general-supervisory power to craft a remedy or punishment appropriate to the circumstances. Few courts have dismissed criminal charges as a result of *Brady* violations. *See, e.g., United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). The drafters believe that the far more common remedy of a new trial for *Brady* violations has in many instances proven impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government of a retrial is under most circumstances inconsequential. Second, the remedy of a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.

* * *

1. **Discussion**

a. **Definition of Favorable Evidence**

Proposed Language:

Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate punishment.

Without a clear definition of what constitutes *Brady* material, prosecutors have exercised a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants.[114] A clear definition of favorable information will help eliminate disparate interpretations of the *Brady* obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law.

The definition clarifies the nature and scope of favorable information by providing that favorable information includes evidence or information, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate the punishment. The first category addresses classic *Brady* or exculpatory evidence. The second category makes clear that *Giglio* or impeachment material must also be produced. Categories three and four are intended to cover the disclosure of evidence favorable to punishment or sentencing. This definition makes clear that the admissibility and nature or form of the information, i.e., written, oral or electronic, is irrelevant in the determination of both its exculpatory nature and disclosability.

There may be instances where fairness requires that the defense make specific *Brady* requests for information from the government. Such requests must be sufficiently clear and directed to give reasonable notice about what is sought and why the information may be material to the case.[115] Absent specific defense requests the government may, notwithstanding the proposed definition, be able to fully respond to *Brady* requests and provide responsive material.

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[114] Section II.A., *infra*.

[115] *United States v. McVeigh*, 954 F. Supp. 1441, 1451 (D. Colo. 1997).

b. **Timing of Disclosure**

Proposed Language:

Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing and provide all information favorable to the defendant.

Absent local rules with a *Brady* disclosure timetable, there is no uniformity as to when federal defendants receive exculpatory information as to guilty or punishment. The Judicial Members of the District of Massachusetts Committee that recommended the local criminal rule changes observed that "cases too often go to trial without legally required discovery having been provided."[116] Almost invariably *Brady* material is disclosed well after the explicit Rule 16 obligations have been satisfied by the government. A major criticism of the current federal discovery practice is that prosecutors too often disclose favorable information at a stage well after it can benefit the defense. Unfortunately, the case law has left the prosecution and defense with little precise timing guidance.

In *United States v. Coppa*,[117] the Second Circuit recently addressed whether as a general rule due process of law requires that the government, disclose all exculpatory and impeachment material immediately upon demand by a defendant. In reversing a district judge's order to immediately supply this material to the defendants, the Second Circuit noted that as long as a defendant possesses *Brady* evidence in time for its effective use at trial or at a plea proceeding, the government has not deprived the defendant of due process of law.[118] *Coppa* granted the government's mandamus petition and remanded the cause to "afford the District Court an opportunity to determine what disclosure order, if any, it deems appropriate as a matter of case management."[119]

Because disclosure of favorable information affects a defendant's plea decisions, trial strategy, and sentencing, it is critical to the fair administration of justice that this discovery take place as early as practicable in the criminal process. There is no discernible benefit to fair-minded prosecutors in delaying the disclosure of constitutionally-mandated favorable information. To the extent the government has favorable evidence and is required to timely disclose it, the disclosure may affect the government's charging decision and properly lessen its sentencing position. This in turn may cause the defendant and counsel to compromise, to plead and to receive the benefit of acceptance of responsibility under the Guidelines.[120] Thus, prompt disclosure may well foster an earlier exchange of favorable information and guilty plea decisions. Furthermore, a criminal justice system with a *Brady* definition, a due diligence

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[116] *Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the U.S. District Court in the District of Massachusetts Concerning Criminal Cases*, at 8 (October 28, 1998).

[117] 267 F.3d 132 (2d Cir. 2001).

[118] *Id.* at 144.

[119] *Id.* at 146.

[120] U.S.S.G. § 3E1.1 (acceptance of responsibility).

requirement, a disclosure timetable and clear sanctions may promote a system that parties have confidence in both the rule's compliance and effective sanctions. Under that system defendants and counsel, who timely have received the required disclosure or have been assured in writing that the United States possesses no exculpatory information, are more likely to reach plea decisions earlier and lessen the congestion of the trial dockets.

While timely disclosure of favorable information is mandated and essential to the defense in all cases, it is of particular importance in complex federal prosecutions where defendants and their counsel can be forced to trial with comparatively inadequate time to prepare. Federal authorities often investigate complex cases for years. The Speedy Trial Act of 1974[121] requires that a trial must begin within seventy days of an indictment or initial appearance. While defense requests for continuances are frequently granted to meet "the ends of justice,"[122] pre-trial defense preparation time is often limited. The United States will in most cases still have had at least twice as long a time to prepare for trial as the defendant. The government usually also has far more investigative resources. Fourteen days following a defense request is not an unreasonable period of time for the government to disclose in writing favorable evidence as to guilt or punishment. By the time of indictment, the government has concluded most of its investigation and is in a position to disclose any information known to be exculpatory or mitigating for the defendant. It will be thereafter under a continuing obligation to disclose additional evidence or material subject to discovery under the rule.[123]

c. **Due Diligence**

Proposed Language:

> The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

This due diligence requirement ensures that government attorneys will fully consult with law enforcement agents by the time of indictment about potential favorable information and that the former will address not only federal agents, but law enforcement officers or joint federal-state local investigators about the nature and scope of the information required to be turned over. Several decisions have upheld the duty of the prosecution to consult

[121] 18 U.S.C. §§ 3151-3174 (2000).

[122] *Id.* § 3151(h)(8)(A).

[123] Fed. R. Crim. P. 16(c).

with the appropriate law enforcement personnel or agency[124] as simply determined that the prosecution includes law enforcement officers[125]

The due diligence language requires that government attorneys exercise due diligence in locating all favorable information. The language is intended to avoid *Kyles*-type situations where favorable evidence is known to law enforcement officers, but not to the prosecutor. The due diligence language finds precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant; Rule 16(a)(1)(B), Defendant's Prior Record; and Rule 16(a)(1)(D), Reports of Examinations and Tests.

The certification requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post-sentencing litigation about what may have been orally communicated. As important, this requirement conveys to the government attorney the importance of accuracy, consultation and prompt disclosure. This requirement too has precedent in Rule 16(e) Expert Witnesses which requires both parties to provide a written summary of testimony they intend to use.

Finally, the due diligence provision does not mandate an "open file" by the government, as favored by some commentators.[126] Open file cases do not cure *Brady-Giglio* problems,[127] and in particular, do not compel prosecutors to consult with law enforcement agents about the nature or existence of information favorable to the accused[128] or to disclose in writing favorable evidence that has not been memorialized. The provision does not impose upon the court the burden of reviewing government files for favorable information, as recommended by other legal commentators.[129] While such a review might be ideal, courts have neither the time nor the resources for such reviews, and they cannot be expected at the pre-trial stage to be familiar enough with the case or likely trial issues to appreciate which information is favorable.[130]

d. Sanctions

In addressing failures to comply with discovery requests, Fed. R. Crim. P. 16 (d)(2) provides that the court may order a party to permit the discovery or inspection, grant a

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[124] *See, e.g., Kyles*, 527 U.S. at 266; *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995).

[125] *United States v. Boyd*, 833 F. Supp. 1277, 1357 (N.D. Ill. 1993), *aff'd* 55 F.3d 239 (7th Cir. 1995); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

[126] *See* Bass, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 113 (1972).

[127] *See, e.g., United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.C. Cir. 1998) (stating that "open file discovery does not relieve the government of its *Brady* obligations by claiming [the defendant] had access to 600,000 documents and should have been able to find the exculpatory information in the haystack").

[128] *See Strickler*, 527 U.S. 263.

[129] *See, e.g.*, Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (Dec. 1984).

[130] *McVeigh*, 954 F. Supp at 1451.

continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. Few courts have dismissed indictments as a remedy for the government's failure to disclose exculpatory information.[131] At present prosecutional misconduct must not only be flagrant, but must prejudice the defendant such that he does not receive a fair trial, or be intended to abort the trial to result in a dismissal.[132] Some circuits do not even permit dismissal of an indictment for a *Brady* violation.[133]. The less drastic and far more common remedy for a *Brady* violation is the granting of a new trial.[134] This remedy has been impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government is under most circumstances inconsequential. Second, a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.[135] For these reasons, the Official Commentary to Rule 16(f) urges courts to consider dismissal of an indictment for failure to comply with Rule 16 upon a showing of substantial prejudice to the defendant or intentional misconduct by the government.

e. **Regulation of Discovery.**

Rule 16(d) will continue to provide that a party may under a sufficient showing demonstrate that particular discovery or inspection should be denied, restricted or deferred. The government may still seek a protective or modifying order if it can establish that disclosure of exculpatory information within the time contemplated by the amendment will create an unacceptable risk of facilitating obstruction of justice or of discouraging the testimony of witnesses.

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[131] *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). See generally, *United States v. Carter*, 1 Fed. Appx. 716, 2001 WL 32068 (9th Cir. Jan. 12, 2001) (unpublished); *United States v. Manthei*, 979 F.2d 124, 126-27 (8th Cir. 1992); *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991); *United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979), discussing the requirements for a defendant to obtain a dismissal of the indictment for a *Brady* violation. *Cf. Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (vacating a denaturalization and extradition order because the government failed to disclose *Brady* information).

[132] *United States v. Vozzella*, 124 F.3d 389 (2d Cir. 1997); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993); *United States v. McLaughlin*, 89 F. Supp. 2d 617 (E.D. Pa. 2000) (failure to disclose witness' exculpatory grand jury testimony necessitated new trial); *United States v. Patrick*, 985 F. Supp. 543 (E.D. Pa. 1997).

[133] *See, e.g., United States v. Davis*, 578 F.2d 277, 279-80 (10th Cir. 1978) ("[A] violation of due process under *Brady*, does not entitle a defendant to an acquittal, but only to a new trial in which the convicted defendant has access to the wrongfully withheld evidence.").

[134] *See United States v. Blueford*, No. 00-10210, 2002 WL 193023 (9th Cir. Feb. 8, 2002); *United States v. Service Deli, Inc.*, 151 F.3d 938 (9th Cir. 1998); *United States v. Arnold*, 117 F. 3d 1308 (11th Cir. 1997); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995); *United States v. Peterson*, 116 F. Supp. 2d 366 (N.D.N.Y. 2000); *United States v. McLaughlin*, 89 F. Supp. 2d (E.D. Pa. 2000).

[135] *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989) (pattern of United States attorneys not providing exculpatory evidence until very late only warranted two week continuance).

B. Proposed Amendment to Rule 11

Fed. R. Crim. P. 11(e)(7)

(7) Disclosure of Favorable Evidence

The attorney for the government shall disclose in writing to the defendant all exculpatory and mitigating information as provided in Rule 16(f) fourteen days before the defendant enters a plea of guilty or nolo contendere to a charged offense.

Official Commentary

This amendment is intended to ensure that a party intent on pleading guilty timely receives favorable information. The emphasis on *Brady* material by the government is too often focused on the guilt aspect rather than the sentencing impact of mitigating evidence. Since over ninety percent of all federal criminal cases are resolved by plea dispositions, it is essential that prosecutors not only provide information that can significantly affect punishment but also that they do so in time to make the information meaningful at sentencing. Belated disclosure or inadvertent nondisclosure of mitigating evidence undermines the fairness essential to the sentencing process. This proposed amendment reduces the likelihood that favorable evidence will not be disclosed or disclosed too late.

1. Discussion

a. Purpose and Cross Reference

This amendment is designed to ensure that favorable information is made known to the defendant during the plea negotiation process and to the court in the sentencing process. Rather than restate the five-part definition of favorable information, the due diligence obligation and the available sanctions, Rule 11(e)(7) cross references Fed. R. Crim. P. 16(f). The Rule 11(e)(7) amendment is also designed to avoid plea agreements where the United States requires a defendant to waive his right to exculpatory information without knowing what that information is.

b. Timing of Disclosure

Fourteen days is a reasonable period for the government to disclose in writing information favorable to the defendant on either guilt or punishment. As a practical matter, the majority of criminal cases have been investigated by the time of indictment. To the extent that investigation is ongoing, the government is required to only disclose favorable information to the defendant then known through the exercise of due diligence. Any subsequent discovery of additional favorable evidence or material can be later disclosed to the defendant.

Furthermore, to the extent some districts have in place "fast track" programs,[136] there is nothing in Rule 11(e)(7)'s language that prevents the government from providing favorable information to the defendant before an indictment. Thus, the government may still comply with this rule and enable the defendant to plead guilty at the initial arraignment and plea and receive credit under a fast track program. As with the companion Fed. R. Crim. P. 16(f) amendment, the writing requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post sentencing litigation about what may have been orally communicated.

c. Sanctions

A guilty plea can be set aside in limited circumstances if a defendant can establish prejudice from prosecutorial misconduct.[137] Normally, the withheld information must be material to the prosecution of the defendant.[138] The proposed Rule 11(e)(7) is silent with respect to sanctions but does cross reference proposed Rule 16(f) which provides for a variety of sanctions, including dismissal.

In most instances the appropriate remedy for non-disclosure of information that reduces punishment will be resentencing. While the Guidelines have a basic objective of enhancing the ability of the criminal justice system to combat crime through an effective, fair sentencing system,[139] they do not at present directly provide a remedy to a defendant who has not been provided mitigating evidence under *Brady v. Maryland*. The only remedy available to federal prisoners who have been deprived of *Brady* evidence favorable to sentencing is a motion under 28 U.S.C. §2255 alleging an error that involves "a fundamental defect which results in a complete miscarriage of justice."[140]

CONCLUSION

The American College of Trial Lawyers respectfully recommends that the Judicial Conference of the United States Committee on Rules of Practice and Procedure amend Federal Rules of Criminal Procedure 11 and 16 to codify *Brady* and its progeny. The proposed amendments will ensure the timely, fair and consistent application of *Brady v. Maryland* and will aid Federal Courts in the sound administration of justice.

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[136] *See Ruiz*, 241 F.2d at 1160-61 ("fast track" programs are designed to minimize the expenditure of government resources and expedite the processing of more routine cases).

[137] *See, e.g., Banks v. United States*, 920 F. Supp. 688 (E.D. Va. 1996)

[138] *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *United States v. Kates*, 174 F.3d 580, 583 (5th Cir. 1999).

[139] U.S.S.G. Ch. 1, Part A - Introduction at 2.

[140] *Davis v. United States*, 417 U.S. 333, 346 (1974).

APPENDICES

A. Federal Rule of Criminal Procedures 16

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

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(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) The Defendant's Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which

the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

B. Federal Rule of Criminal Procedure 11(e)

(e) Plea Agreement Procedure.

(1) **In General.** The attorney for the government and the attorney for the defendant -- or the defendant when acting pro se -- may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(!)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussion, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

C. District of Massachusetts Local Rules 116.02 and 1.3

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its, case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) *Within the time period designated in L.R. 116.1(C)(1):*

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. 5 3731.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

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(2) *Not later than twenty-one (21) days before the trial date established by the judge who will preside:*

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its casein-chief.

(f) A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) *No later than the close of the defendant's case:* Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) *Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs:* A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

RULE 1.3 SANCTIONS

Failure to comply with any of the directions or obligations set forth herein or obligations set forth herein, or authorized by, these Local Rules may result in dismissal, default or the imposition of other sanctions as deemed appropriate by the judicial officer.

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FEDERAL JUDICIAL CENTER REPORT

RE:
TREATMENT OF *BRADY v. MARYLAND* MATERIAL

TO BE DISTRIBUTED SEPARATELY

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

May 14, 2007

Peter G. McCabe
Secretary, Committee Rules of Practice and Procedure
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Rule 16, Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I write on behalf of Federal Public and Community Defenders to support the proposal to amend Rule 16, Fed. R. Crim. P. The proposal is modest and simply requires the government, upon request, to make available to the defense evidence that is exculpatory or impeaching. As the Committee Notes indicate, the proposal is founded on the principle of fundamental fairness and does little more than supplement what is ethically required of prosecutors. Because the proposal seemed uncontroversial, we did not comment when it was first published. The Advisory Committee for the Criminal Rules of Procedure recommended it be adopted. We understand that the Department of Justice (DOJ) hopes to persuade the Standing Committee to reject that recommendation. We believe the Standing Committee should support the proposed amendment.

We understand DOJ believes it is in the best position to monitor its *Brady* obligations and to that end has modified its manual to emphasize the importance of its obligation. This is not enough! The significance of a prosecutor's obligation to disclose exculpatory or impeaching information has been signaled by courts and commentators for decades. Nonetheless, Federal Reporters are pocked with examples of *Brady* violations, law review articles have been devoted to the problem and full chapters in treatises on prosecutorial misconduct detail the regularity and variety of *Brady* miscues. There is no reason to believe an amendment to DOJ's manual will heighten compliance with *Brady* obligations given the government's history of relentless non-compliance.

The frequency of *Brady* violations suggests that the problem is a product, in part, of prosecutorial indifference and even inability to grasp what exculpatory or impeaching evidence is. Judge Jon Newman's famous observations made before the Second Circuit Judicial Conference in 1967 illustrate this point. At the time he was a United States Attorney and he told the Conference:

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> I recently had occasion to discuss [*Brady*] at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: you are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a lineup, and they have said, "This is the man." In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, "This is *not* the man."
>
> The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said "That is not the man"? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt that they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case – the clearest case for disclosure of exculpatory information![1]

Judge Newman's observations were manifest in my district several years ago when the district court questioned a federal prosecutor's failure to provide to the defense the statement of a witness who said the defendant was not the perpetrator of the crime. The prosecutor explained that he did not believe the witness was telling the truth and if it wasn't the truth, then it wasn't exculpatory. This is how advocates think and why the court, not the government, should be in charge of monitoring and enforcing *Brady* obligations.

We have provided the Advisory Committee's Reporter with a number of examples of Brady violations that have resulted in sanctions. It is important to emphasize **and recognize** that sanctions occur infrequently but *Brady* violations occur often. Critics of *Brady* jurisprudence argue this disparity results from the judiciary's retrospective approach

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[1]J. Newman, *A Panel Discussion Before the Judicial Conference of the Second Circuit* (September 8, 1967), reprinted in *Discovery in Criminal Cases*, 44 F.R.D. 481, 500-501 (1968); quoted in *United States v. Bagley*, 473 U.S. 667, 697 (1985) (Justice Marshall dissenting).

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to deciding the materiality of nondisclosures.[2] Significantly, the proposed amendment to Rule 16 does not require that the exculpatory or impeaching information be "material." The Committee Notes emphasize this point and its salutary purpose: prosecutors will be less likely to "play the odds" by withholding information felt to be of marginal value to the defense.[3] The clearer the rule the more likely compliance.[4]

This proposal will not cure problems associated with *Brady* evidence. Anachronistic limitations on discovery in federal criminal cases have spawned a culture of non-disclosure. *See, e.g., United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files."), *vacated sub nom. United States v. Pflaumer*, 473 U.S. 922 (1985) (mem.). But the proposal can only assist in ameliorating the harm that is part and parcel of our controversial and archaic system of criminal discovery.

The proposal has no down side. It embraces the rule of law and the principle of fairness. Despite the government's belief that it is in the best position to monitor compliance with *Brady*, the evidence overwhelmingly demonstrates otherwise. For these reasons, we urge the Standing Committee to accept the proposed amendment to Rule 16.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender

TWH/mp

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[2]Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 690 (2006).

[3]*United States v. Bagley*, *supra* at 701 (Justice Marshall dissenting).

[4]Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 428-430 (2006).

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AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT (2002)

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal....

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, 3RD, STANDARD 3-3.11 (1993)

Standard 3-3.11 Disclosure of Evidence by the Prosecutor

1. (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

DISCOVERY OBLIGATIONS OF THE PROSECUTION AND DEFENSE

Standard 11-2.1 Prosecutorial disclosure

(a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons and of scientific tests, experiments or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial.

(vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2006

MEMORANDUM

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: THE DEPUTY ATTORNEY GENERAL PJM

SUBJECT: Principles of Federal Prosecution

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected sections.

AFFECTS: 9-5.000

PURPOSE: The Department of Justice is proud of the long record of federal prosecutors meeting or exceeding their obligation, pursuant to *Brady v. Maryland* and *Giglio v. United States*, to disclose exculpatory and impeachment evidence to criminal defendants in preparation for trial. The purposes of this amendment to the U.S. Attorneys' Manual are to ensure that all federal prosecutors are fully aware of their constitutional obligation to disclose exculpatory and impeachment evidence, and to further develop the Department's guidance to federal prosecutors in relation to disclosure of information favorable to a defendant. The policy embodied in this bluesheet requires prosecutors to go beyond the minimum obligations required by the Constitution and establishes broader standards for the disclosure of exculpatory and impeachment information. It requires prosecutors to take the necessary steps to fulfill their constitutional disclosure obligation and further, to make disclosure in a manner and to an extent that promotes fair proceedings. At the same time, the policy recognizes the need to safeguard witnesses from harassment, assault, and intimidation and to make disclosure at a time and in a manner consistent with the needs of national security.

The policy embodied in this bluesheet is intended to be flexible yet produce regularity. As first stated in the preface to the original 1980 edition of the Principles of Federal Prosecution, "they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility." Through the use of circumscribed standards and principles outlined herein, federal prosecutors must exercise their judgment and discretion so as to build confidence in criminal trials and the criminal justice system, while protecting national security, keeping witnesses safe and allowing for efficient resolution of cases.

The bluesheet creates a new section 9-5.001 and amends section 9-5.100 in your United States Attorneys' Manual.

Attachment

[NEW SECTION] USAM § 9-5.001

POLICY REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION

A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, *see* USAM § 9-21.000, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, *see* USAM § 9-11.233.

B. **Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

1. **Materiality and Admissibility.** Exculpatory and impeachment evidence is material to a finding of guilt – and thus the Constitution requires disclosure – when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

C. **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.** Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

3. **Information.** Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

D. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

1. **Exculpatory information.** Exculpatory information must be disclosed reasonably promptly after it is discovered. This policy recognizes that exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act).

2. **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests – such as witness security and national security – and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

3. **Exculpatory or impeachment information casting doubt upon sentencing factors.** Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.

4. **Supervisory approval and notice to the defendant.** A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

E. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case. As the Supreme Court has explained, disclosure is required when evidence in the possession of the prosecutor or prosecution team is material to guilt, innocence or punishment. This policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element

of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. Under this policy, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

POLICY REGARDING THE DISCLOSURE TO PROSECUTORS OF POTENTIAL IMPEACHMENT INFORMATION CONCERNING LAW ENFORCEMENT AGENCY WITNESSES ("GIGLIO POLICY")

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface, below. On October 19, 2006, the Attorney General amended this policy to conform to the Department's new policy regarding disclosure of exculpatory and impeachment information, *see* USAM § 9-5.001.

The Secretary of the Treasury has issued the same policy for all Treasury investigative agencies.

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

Preface: The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purposes of this policy are to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), and to ensure that trials are fair, while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior

to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

1. **Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.

2. **Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.

3. **Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.

4. **Request to Agency Officials.** When a prosecutor determines that it is necessary to request potential impeachment information from an Agency Official(s) relating to an agency employee identified as a potential witness or affiant ("the employee") in a specific criminal case or investigation, the prosecutor shall notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").

5. **Agency Review and Disclosure.** Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official(s), the OIG and DOJ-OPR shall advise the Requesting Official of: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

6. **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration. NOTE: With regard to allegations disclosed to a prosecuting office under this paragraph, the head of the prosecuting office shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraph 13 below. At the conclusion of the case, if such information was not disclosed to the defense, the head of the prosecuting office shall ensure that all materials received from an investigative agency regarding the allegation, including any and all copies, are expeditiously returned to the investigative agency. This does not prohibit a prosecuting office from keeping motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence, in the relevant criminal case file(s).

7. **Prosecuting Office Records.** Department of Justice prosecuting offices shall not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit Department of Justice prosecuting offices from keeping motions and Court orders and supporting documents in the relevant criminal case file.

8. **Copies to Agencies.** When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information and to the employing Agency Official for retention in the employing agency's system of records. The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court but not to the defense in a manner that allows expeditious access upon the request of the Requesting Official.

9. **Record Retention.** When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, may be retained by the Requesting Official, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.

10. **Updating Records.** Before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.

11. **Continuing Duty to Disclose.** Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.

12. **Removal of Records Upon Transfer, Reassignment, or Retirement of Employee.** Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee.

13. **Prosecuting Office Plans to Implement Policy.** Within 120 days of the effective date of this policy, each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the agency about the disclosure of potential impeachment information to the Court or defense counsel, including allowing the agency to express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the

security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte*, *in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; and, (e) allowing the relevant agencies the timely opportunity to fully express their views.

14. **Investigative Agency Plans to Implement Policy.** Within 120 days of the effective date of this policy, each of the investigative agencies shall develop a plan to effectuate this policy.

Summaries of Federal Cases Raising *Brady* Issues After 2001

This list (which is not exhaustive) includes both cases where relief granted, and cases where exculpatory or impeaching evidence was not disclosed (or was disclosed belatedly), but no relief was granted.

United States Courts of Appeals

United States v. Oruche, 2007 WL 1296601 (D.C. Cir. 2007). District court's grant of new trial was reversed. Government's failure to disclose information that a prosecution witness had previously lied to police and that she had another possible drug source was not material because the witness was already thoroughly impeached at trial.

United States v. Velarde, 2007 WL 1252482 (10th Cir. 2007). Defendant was entitled to either a hearing on whether the government suppressed the information or discovery on the veracity of the victim's supposed accusations. Evidence of prior false accusations made by the victim may be material, even if not admissible, because discovery could have led to facts that the defense could use to cross-examine the victim about her truthfulness.

Unites States v. Barraza Cazares, 465 F.3d 327 (8th Cir. 2006). Government's failure to disclose co-defendant's statement that he did not previously know the defendant was clearly exculpatory. However, the information had not been not suppressed because it was otherwise available to the defense and was not material because it would not have undermined the government's strong case against the defendant, so the defendant's conviction was affirmed.

United States v. Conley, 415 F.3d 183 (1st Cir. 2005). Brady violation warranting new trial occurred when government withheld FBI memorandum indicating that key witness had expressed uncertainty about his recollection of incident.

United States v. Blanco, 392 F.3d 382 (9th Cir. 2004). Brady violation found where the government failed to disclose highly relevant impeachment information that its confidential informant was given a special visa in return for his cooperation with the DEA. The government must turn over all information related to the confidential informant.

United States v. Sipe, 388 F.3d 471 (5th Cir. 2004). Cumulative effect of government's suppression of evidence regarding its star witness warranted a new trial.

United States v. Rivas, 377 F.3d 195 (2nd Cir. 2004). Defendant's conviction reversed because government withheld a critical piece of evidence – that government's chief witness, not defendant, brought drugs onto ship – that supported the defense theory.

Unites States v. Casas, 356 F.3d 104 (1st Cir. 2004). No prejudice when government delayed

disclosing witnesses' cooperation agreements and a failed drug test, because both were disclosed at trial. Defendant's conviction affirmed.

United States v. Martinez, 78 F.App'x 679 (10th Cir. 2003). Defendant's conviction was affirmed. Court concluded he was not prejudiced by the delay in discovering evidence uncovered by the defense on cross examination, because, considering the totality of the evidence, the impeachment value was slight.

United States v. Jackson, 345 F.3d 59 (2d Cir. 2003). Suppression of evidence favorable to the defendant was not material when the government failed to disclose statements made by a non-testifying confidential informant. Because the verdict was supported by compelling evidence, there was not a reasonable probability of a different result. Defendant's conviction affirmed.

United States v. Winston, 55 F.App'x 289 (6th Cir. 2003). Defendant's conviction was affirmed, because the government's failure to disclose that a prosecution witness had earlier fabricated letters of good character to the court was not material. When considered in conjunction with the rest of the evidence, this witness's testimony was incidental.

Unites States v. Gil, 297 F.3d 93 (2d Cir. 2002). Government's belated disclosure of exculpatory and impeachment evidence on the eve of trial violated Brady. Evidence was material and prejudicial when the evidence would have shown that a meeting could have occurred which would have born directly on the central issue of the defendant's authorization. The district court's denial of defendant's motion for a new trial was reversed.

United States District Courts

United States v. Safavian, 233 F.R.D. 12 (D. D.C. 2005). Because the definition of "materiality" discussed in Strickler and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. Before trial the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed--with the benefit of hindsight--as affecting the outcome of the trial.

Ferrara v. United States, 372 F. Supp. 2d 108 (D. Mass. 2005). Defendant resentenced because prosecution withheld evidence that its only direct source of information on murder charge had twice stated that defendant did not order the murder; disclosure of this information would have led defendant not to plea bargain murder charge.

United States v. Koubriti, 336 F. Supp. 2d 676 (E.D. Mich. 2004). Conviction for providing material support to terrorists reversed after government informed court that *Brady* and *Giglio* materials had not been disclosed.

St. Germain v. United States, 2004 WL 1171403 (S.D.N.Y. 2004). Defendant was granted a new trial for a Brady violation when the government delayed in producing grand jury testimony that could have been used to impeach the government's key witness. The evidence was turned over immediately before trial and not identified as Brady material.

United States v. Washington, 294 F.Supp.2d 246 (D. Conn. 2003). Late disclosure of evidence prejudiced the defendant and warranted a new trial when the government waited until trial began to disclose that its key witness had previously been convicted for making a false police report.

United States v. Diabate, 90 F.Supp.2d 140, 148-49 (D.Mass. 2000). Case dismissed because of delayed Brady disclosures.

Excerpts from Summaries of Successful Cases Under *Brady v. Maryland*, Through July 2001, A Publication of the Habeas Assistance and Training Project

UNITED STATES COURTS OF APPEALS

United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974). Convictions reversed where defendants were deprived of all evidence of promise of leniency by prosecutor, and prosecutor failed to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

United States v. Pope, 529 F.2d .112 (9th Cir. 1976). Conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for testimony and compounded the violation by arguing to the jury that the witness had no reason to lie.

United States v. Auten, 632 F.2d 213 (5th Cir. 1980). Prosecutor's lack of knowledge of witness's criminal record was no excuse for Brady violation.

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Conviction reversed due to failure of government to timely produce statement of key prosecution witness where not only was the witness critical to the conviction, but defense and prosecution argued his credibility at length, and the statement at issue differed from witness' trial testimony in many significant ways.

United States v. Herberman, 583 F.2d 222 (5th Cir. 1978). Testimony presented to grand jury contradicting testimony of government witnesses was Brady material subject to disclosure to the defense.

United States v. Fairman, 769 F.2d 386 (7th Cir. 1985). Prosecutor's ignorance of existence of, ballistic's worksheet indicating gun defendant was accused of firing was inoperable does not excuse failure to disclose.

United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986). Written statement defendant made to coast guard boarding party should have been disclosed under Brady, and failure to disclose warranted new trial. The statement tended to negate the defendant's intent, which was the critical issue before the jury.

United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989). Information in government witness' probation file was relevant to witness' credibility and should have been released as Brady material. Criminal record of witness could not be made unavailable by being part of probation file. District court's failure to release these materials required reversal.

United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989). Impeachment evidence which was withheld would have allowed defendant to challenge evidence presented as to amount of narcotics sold, was material to sentencing and required remand for new sentencing hearing.

United States v. Tincher, 907 F.2d 600 (6th Cir. 1989). "Deliberate misrepresentation" where prosecutor withheld grand jury testimony of cop, after defense requested any Jencks Act or Brady material and prosecutor responded that none existed. Convictions reversed.

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990). Government's failure to disclose Brady material required new trial where drug transaction records would have aided cross-exam of key witness.

United States v. Tincher, 907 F.2d 600 (6th Cir. 1990). Prosecutor's response to Jencks Act and Brady request was deliberate misrepresentation in light of knowledge of testimony of government agent before grand jury. Reversal was required since misconduct precluded review of the agent's testimony by the district court.

United States v. Spagnoulo., 960 F.2d 990 (11th Cir. 1992). New trial ordered on basis of Brady violation where prosecution failed to disclose results of a pre-trial psychiatric evaluation of defendant which would have fundamentally altered strategy and raised serious competency issue.

United States v. Minsky, 963 F.2d 870 (6th Cir. 1992). Government improperly refused to disclose statements of-witness that he did not make at trial. Disclosure could have resulted in loss of credibility with jury based on false statements to FBI.

United States v. Gregory, 983 F. 2d 1069 (6th Cir. 1992) (unpublished). Habeas petitioner, in fourth petition, claimed that state suppressed crucial evidence that its only eyewitness had originally identified a third party, and that third party had been arrested. Petitioner demonstrated "good cause" because state failed to disclose the info despite repeated requests. [Case remanded for resentencing.]

United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1992). Where government failed to disclose agreement with potential witness and later request for missing witness instruction was denied because counsel was unaware of the agreement, Brady required disclosure.

United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993). Brady violation where government failed to disclose memo indicating that informant lied to DEA, had undue influence over DEA agents, and thwarted investigation of evidence crucial to his credibility.

United States v. Kelly, 35 F.3d 929 (4th Cir. 1994). Kidnapping conviction reversed where government failed to furnish an affidavit in support of an application for a warrant to search key witness's; house just before trial, and failed to disclose a letter written by same witness which would have seriously undermined her credibility.

United States v. Robinson, 39 F.3d 1115 (10th Cir. 1994). District court did not abuse discretion in ordering new trial where, in violation of Brady, government failed to disclose evidence tending to identify former codefendant as drug courier; conviction was based largely on testimony of codefendants and defendant had strong alibi evidence.

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995). Failure of prosecutor to correct representations he made to the jury which were damaging to defendant's duress defense, despite having learned of their falsehood during the course ofthe trial, was Brady violation and required granting of new trial motion.

United States v. Boyd, 55 F.3d 239 (7th Cir. 1995). Trial court did not abuse discretion by granting new trial based on government's failure to reveal to defense either drug use and dealing by prisoner witnesses during trial or "continuous stream of unlawful" favors prosecution gave those witnesses.

United States v. O'Connor, 64 F.3d 355 (8th Cir. 1995), cert. denied, 116 S.Ct. 1581 (1996). Brady violation occurring when government failed to inform defendant of threats by one government witness against another and attempts to influence second government witness' testimony was reversible error with respect to convictions on those substantive drug counts and conspiracy counts where testimony of those government witnesses provided only evidence; evidence of threats, combined with undisclosed statements from interview reports, could have caused jury to disbelieve government witnesses.

United States v. David, 70 F.3d 1280 (9th Cir. 1995) (unpublished). New trial ordered where defendant had been convicted of operating a continuing criminal enterprise solely on the strength of testimony of two prisoners serving life sentences in the Philippines. Subsequent to the conviction, these two prisoners were released, and defendant discovered previously undisclosed evidence of a deal between the government and the two prisoners.

United States v. Lloyd, 71 F.3d 408 (D.C.Cir. 1995). Defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to new trial where prosecution: (1) withheld, without wrongdoing, tax return of defendant's client for year which defendant did not prepare returns; and (2) failed to disclose prior tax returns for four of defendant's clients. The *first* item would probably have changed the result of the trial, and the second group of items were exculpatory material evidence.

United States v. Smith, 77 F.3d 511 (D.C.Cir. 1996). Dismissal of state court charges against prosecution witness, as part of plea agreement in federal court, was material and should have been disclosed under due process clause, even though prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether or not witness was intentionally

concealing agreement. Armed with full disclosure, defense could have pursued devastating cross-exam, challenging witness' assertion that he was testifying only to "get a fresh start" and suggesting that witness might have concealed other favors from government.

United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996). Undisclosed evidence that prosecution witness, who testified that defendant paid him to keep drugs in his apartment, had previously lied under oath in proceeding involving same conspiracy was material where witness was impeached on basis that he was a cocaine addict and snitch, but not on basis of perjury, and where his testimony provided only connection between defendant and drugs found in witness' apartment.

United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996). New trial ordered where prosecution failed to disclose information indicating that its key witness, an informant, was involved in two different illegal transactions around the time he was working as a CI, and that the informant owed the defendant money, thus giving him incentive to send the defendant to prison. Although the prosecutor did not know about the exculpatory information until months after the trial, nondisclosure to the defense of this material evidence required a new trial.

United States v. Pelullo, 105 F.3d 117 (3rd Cir. 1997), Denial of § 2255 motion reversed where government failed to disclose surveillance tapes and raw notes of FBI and IRS agents. The notes contained information supporting defendant's version of events and impeaching the testimony of the government agents, who provided the key testimony at defendant's trial for wire fraud and other charges.

United States v. Fisher, 106 F.3d 622 (5th Cir. 1997). New trial ordered where government failed to disclose FBI report directly contradicting testimony of a key government witness on bank fraud charge. Because the witness' credibility was crucial to the government's case, there was a reasonable probability that the result would have been different if the report had been disclosed.

United States v. Frost, 125 F.3d 346 (6th Cir. 1997). Reversal required where government represented to defense that the substance of a witness' testimony would be adverse to the defendant, but in fact the testimony would have been exculpatory.

United States v. Vozzella, 124 F.3d 389 (2nd Cir. 1997). Conviction for conspiring to extend extortionate loans reversed where prosecution presented false evidence and elicited misleading testimony concerning that evidence which was vital to prove a conspiracy.

United States v. Service Deli, Inc., 151 F.3d 938, 943-944 (9th Cir. 1998). The court reversed the defendant government contractor's conviction for filing a false statement with the United States Defense Commissary Agency because the government failed to disclose notes taken by one of its attorneys during an interview with the state's most important witness. The notes contained "three key pieces of information" useful in impeaching the witness: (1) the witness' story had changed; (2) the change may have been brought on by the threat of imprisonment; and (3) that the witness explained his inconsistent stories by claiming that he had suffered "a stroke which affected his memory." This information was material, the court explained, because "the government's entire case rested on [the] testimony" of the witness who was the subject of the undisclosed notes, and that witness' credibility

"essentially was the only issue that mattered." Finally, the court rejected the government's contention that the undisclosed impeachment evidence was merely cumulative because the defendant had gone into the same areas on cross examination of the witness. The court explained: "It makes little sense to argue that because [defendant] tried to impeach [the witness] and failed, any further impeachment evidence would be useless. It is more likely that [defendant] may have failed to impeach [the witness] because the most damning impeachment evidence in fact was withheld by the government."

United States v. Mejia-Mesa, 153 F.3d 925, 929 (9th Cir. 1998). The court reversed the district court's denial of §2255 relief and remanded for an evidentiary hearing to determine whether petitioner had procedurally defaulted his claim "that the government withheld, suppressed or destroyed a page or *pages* from the deck log of ... the vessel carrying the cocaine [which formed the basis of one of petitioner's convictions]," and if so, whether he could show cause and prejudice sufficient to overcome the default.

United States v. Scheer, 168 F.3d 445 (11th Cir. 1999). The court granted relief in this bank fraud case on the ground that the government violated Brady by failing to disclose that the lead prosecutor in the case had made a statement to a key prosecution witness, who *was* himself on probation as a result of a conviction arising out of the same set of facts, "that reasonably could be construed as an implicit -if not explicit -- threat regarding the nature of [the witness'] upcoming testimony . . .." 168 F.3d at 452. In granting relief, the court made clear that, to succeed, the appellant was not required to prove that the witness actually changed his testimony as a result of the prosecutor's threat, nor was he required to establish that, had evidence of the threat been disclosed, the remaining untainted evidence would have been insufficient to support his conviction.

Schledwitz v. United States, 169 F.2d 1003 (6th Cir. 1999). The government violated Brady by failing to disclose that its key witness, who was portrayed as a neutral and disinterested expert during petitioner's fraud prosecution, had for years actually been actively involved in investigating petitioner and interviewing witnesses against him.

United States District Courts

United States v. Turner, 490 F.Supp. 583 (E.D.Mich. 1979), aff'd, 633 F.2d 219 (6th Cir. 1980), cert. denied, 450 U.S. 912 (1981). New trial granted where DEA agent, who had entered into a leniency agreement with the defense counsel for a prosecution witness, not only failed to correct the witness' testimony disclaiming any such arrangement but took the stand and buttressed the witness' false testimony through an affirmative material misrepresentation that no agreement existed, and such conduct was an affront to the court's dignity and honor and to the nation.

United States v. Tariq, 521 F.Supp. 773 (D.Md. 1981). Government violates defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process when it acts unilaterally in a manner which interferes with defendant's ability to discover, to prepare, or to offer exculpatory or relevant evidence, by deporting a witness who is an illegal alien, if the Government

knows or has reason to know that the witness' testimony could conceivably benefit defendant and if deportation occurs before defense counsel has had notice and a reasonable opportunity to interview and/or depose the illegal alien.

United States v. Stifel, 594 F.Supp. 1525 (N.D.Ohio 1984). Conviction for willfully and knowingly mailing infernal machine with intent to kill another vacated where prosecution failed to disclose evidence/ implicating another suspect, statement by defendant's girlfriend attesting to his innocence in contradiction to her trial testimony, and results of investigation tending to show that defendant did not buy the switch used in the bomb.

United States v. Burnside, 824 F.Supp. 1215 (N.D. Ill. 1993). Brady requires disclosure of impeachment information of which government personnel, but not prosecutors personally, are aware. Knowledge of warden and others at facility housing witnesses could be imputed to prosecution.

United States v. Ramming, 915 F.Supp. 854 (S.D.Tex. 1996). Motion to Dismiss for, inter alia, prosecutorial misconduct granted where, in multi-count bank fraud indictment, government failed to disclose, despite court order to the contrary, numerous items of evidence tending to support defendants' claims of innocence and refute government's theory of the case.

United States v. French, 943 F.Supp. 480 (E.D.Pa.1996). New trial ordered where government's undisclosed file on informant indicated that his motivation for cooperating was monetary, yet prosecution elicited testimony from him at trial that he did not cooperate for the money, but rather because he felt that he was "doing something real good for the world."

United States v. Taylor, 956 F.Supp. 622 (D.S.C. 1997). Federal extortion and conspiracy indictments against state legislators dismissed due to government's repeated and flagrant misconduct including failure to disclose exculpatory and impeachment evidence bearing on credibility of government's cooperating witness, who was allowed to assume an unusual amount of control over the sting operation resulting in the defendants' indictments, and undermining reliability of government's case as a whole.

United States v. Patrick, 985 F.Supp. 543 (E.D.Pa. 1997). Motion for a new trial granted when government failed to disclose evidence which would have impeached one of its main witnesses. This evidence could not have been obtained by the defendant through the exercise of due diligence as the government never identified the information that was contained in the withheld documents. Thus, the defendant could not have known of the essential facts that would have permitted him to make use of the evidence.

United States v. Colima-Monge, 978 F.Supp. 941 (1997), Defendant's due process rights would be violated if the INS withheld information concerning the co-defendant which may be relevant to defendant's motion to dismiss. Motion for protective order denied.

United States v. Dollar, 25 F.Supp. 2d 1320, 1332 (N.D.Ala. 1998). The district court dismissed charges of conspiracy and concealing the identity of firearms purchasers as a result of the government's repeated, egregious violations of its disclosure obligations under Brady. These

violations centered on nondisclosure of materially inconsistent pre-trial statements of several of the government's key witnesses. The court explained that, "[f]rom the outset of this case, defense counsel have been unrelenting in their effort to obtain Brady materials. The United States' general response has been to disclose as little as possible, and as late as possible--even to the point of a post-trial Brady disclosure. * * * [A]fter having assured the court that it had produced all Brady materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses."

United States v. Locke, 1999 WL 558130 (N.D. Ill. July 27, 1999). The government violated Brady in connection with defendant's federal trial for conspiracy to import heroin by suppressing a statement made by a co-defendant at his change-of-plea hearing, in which the co-defendant indicated that neither he nor defendant had knowledge that their travel abroad with another co-defendant was for the purpose of importing heroin. Noting the weakness of the government's case against defendant at trial, the court found this statement material and granted defendant's motion for new trial. In reaching this conclusion, the court rejected the government's contention that it did not "suppress" the statement since defendant's attorney was free to have attended the co-defendant's change-of-plea hearing, at which he would have heard the statement first hand. The court reasoned that a defendant's counsel had not failed to act with reasonable diligence in not attending the hearing, since such hearings do not ordinarily produce exculpatory evidence for co-defendants.

United States v. McLaughlin, 89 F.Supp.2d 617 (E.D.Pa. 2000). The court granted defendant's motion for a new trial in this federal tax evasion case, finding that the government's nondisclosure of a witness' grand jury testimony contradicting the trial testimony of defendant's accountant on the critical point of whether the accountant had knowledge of defendant's bank account, and nondisclosure of documents supporting defendant's claim that certain income was legitimately entitled to tax deferred status, violated Brady.

United States v. Peterson, 116 F.Supp.2d 366 (N.D.N.Y. 2000). The district court granted a new trial in this federal prosecution, finding that the prosecution violated the Jencks Act by inadvertently suppressing investigators' notes which, if disclosed, would have revealed discrepancies with the government's trial testimony relating to petitioner's statement. These discrepancies created a significant possibility that the jury would have had a reasonable doubt as to defendant's guilt.

United States v. Lin, 143 F.Supp.2d 783 (E.D.Ky. 2001). The district court dismissed the indictment in this federal prosecution for employing illegal aliens after finding that the government deported witnesses prior to disclosing statements taken from those witnesses indicating that the witnesses would have been favorable to the defense. After acknowledging that "it is impossible for the defendants to make an avowal as to the deported aliens' testimony because they were denied any opportunity to interview them before the government rendered them unavailable," the court noted that the witnesses' statements indicate they would have testified favorably on the key question whether defendants knew they were employing illegal aliens, and recognized that the deported witnesses were "perhaps the only witnesses who may have information the defense could use to impeach the material witnesses' testimony." Based on its findings concerning the government's misconduct and the prejudice suffered by the defense, the court concluded that "the only appropriate remedy is the dismissal of the [71 count] indictment."

CONSTITUTIONAL DUTY OF FEDERAL PROSECUTOR TO DISCLOSE BRADY EVIDENCE FAVORABLE TO ACCUSED

Jason B. Binimow

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Annotation

CONSTITUTIONAL DUTY OF FEDERAL PROSECUTOR TO DISCLOSE BRADY EVIDENCE FAVORABLE TO ACCUSED

Jason B. Binimow, J.D.

The United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), held that the suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. In the case of U. S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Supreme Court explicitly extended the principle of Brady to the due process clause of the Fifth Amendment to the Constitution, and the Court held that a federal prosecutor has a constitutional duty to volunteer exculpatory matter to the defense, even in the absence of a specific request for Brady material, and the Court addressed the standard of materiality that gives rise to the duty to disclose Brady evidence. Subsequently, the Supreme Court held in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that evidence is material for Brady purposes only if reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The court in U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), held that the prosecutor's revelation of exculpatory material just prior to the end of the trial did not violate the defendant's right to due process under the Fifth Amendment to the Federal Constitution, since the constitutional standard of materiality was not met, as the defendant did not show that an earlier disclosure of the exculpatory material by the federal prosecutor would have created any greater doubt about the defendant's guilt or affected the result of the trial.

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[b] Held not material

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§ 5. Statements of defendant

[a] Held material

[b] Held not material

§ 6. Statements of witnesses

[a] Held material

[b] Held not material

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§ 2. Summary and comment

[a] Generally

The United States Supreme Court stated that within the federal system a United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it win a case, but that justice be done. [FN9] The Supreme Court accordingly, as noted in the decisions below, set forth constitutional rules under the Fifth and Fourteenth Amendments to the Constitution ensuring and protecting the special role played by the American prosecutor in the search for truth in criminal trials. [FN10]

The United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a case arising under the Fourteenth Amendment, held that the suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [FN11] Thus, the government's Brady obligation to disclose evidence extends only to favorable evidence that is material. [FN12] Since Brady interpreted the constitutional guaranty of due process, it applies alike to federal and state prosecutions. [FN13]

The Supreme Court in Giglio v. U. S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), a case arising under the Fifth Amendment, held that when the reliability of a given witness may well be determinative of guilt or innocence, the nondisclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution. Further, the Supreme

Court in Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), reh'g denied, 409 U.S. 897, 93 S. Ct. 87, 34 L. Ed. 2d 155 (1972), a case arising under the Fourteenth Amendment, held that a valid Brady complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense.

The Supreme Court in U. S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), a case arising under the due process clause of the Fifth Amendment, described "three quite different situations" in which the rule of Brady v. Maryland applies and set forth varying tests of materiality to determine whether a criminal conviction must be overturned. The Agurs court stated that in the first situation, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury, and the Court imposed a strict standard of materiality where the prosecution uses evidence that it knew, or should have known, was false so that in such a case, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The second situation in which Brady applies, according to the Agurs court is characterized by a pretrial request for specific evidence followed by noncompliance, and the Court also imposed a strict standard of materiality in this situation, with the defendant being entitled to a new trial if there is any reasonable likelihood that the evidence could have affected the outcome of the trial. The Agurs Court also extended the holding of Brady to the situation where the prosecutor failed to volunteer exculpatory evidence never requested, or requested only in a general way, but only when suppression of the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial. One federal circuit has described the relevant standard of materiality where the government failed to volunteer exculpatory evidence never requested, or requested only in a general way, with the statement that the defendant will be entitled to a new trial only if the undisclosed evidence, viewed in the context of the entire record, creates a reasonable doubt that otherwise would not exist. [FN14]

The Court in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), a case arising under the due process clause of the Fifth Amendment, held that regardless of the type of the defendant's request for Brady material, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. [FN15] The Bagley Court also disavowed any difference between exculpatory and impeachment evidence for Brady purposes. [FN16]. Due to the Supreme Court's abandonment of the distinction between "specific request" and "general or no request" situations in Bagley, the government's responsibility to produce Brady materials is neither heightened nor relaxed by the presence or absence of a written Brady request or a motion to compel, and the government has an ongoing burden to provide material exculpatory evidence whenever it discovers that it has such information in its possession. [FN17]

The Court noted that it is not clear whether the Bagley Court intended to subsume the prosecutor's knowing use of or failure to disclose perjured testimony under this new test, or whether the old Agurs test is still applicable in that situation. [FN18] The Court also noted that, when a court finds that the government knowingly, recklessly, or negligently used false testimony, or if the prosecution knowingly fails to disclose that testimony used to convict a defendant was false, the Agurs "any reasonable likelihood" standard applies. [FN19] Thus, under the Brady analysis, the standard of materiality is less stringent when the prosecutor knowingly uses perjured testimony or fails to correct testimony the prosecutor learns to be false, in which instance the falsehood is deemed material if a "reasonable likelihood" exists that the false testimony could have affected the jury's verdict. [FN20] The "reasonable probability of a different result" materiality standard is substantially more difficult for a defendant to meet than the "could have affected" standard. [FN21] The Court also held that when undisclosed Brady material undermines the credibility of specific evidence that the government otherwise knew, or should have known, to be false, this strict standard of materiality applies, and the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. [FN22] Evidence of perjury not released to the defendant by a federal prosecutor has been (§ 16[a], infra) and has not been (§ 16[b], infra) held to warrant a new trial under the Agurs standard of materiality for such evidence.

The Court in Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), a case arising under

the Fourteenth Amendment, explicitly stated that the Bagley Court had abandoned the distinction between the second and third Agurs circumstances, the specific request and the general or no request situations, in favor of the reasonable probability test of materiality. The Kyles Court did not address the first Agurs category, undisclosed evidence of perjury. The Kyles Court also expanded on Bagley's definition of materiality. The Kyles Court held that while the constitutional duty of Brady is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, but rather whether in the absence of the undisclosed evidence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Thus, according to the Kyles Court, a reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. [FN23] The Kyles Court also emphasized that Bagley materiality is to be defined in terms of suppressed evidence considered collectively, and not item by item, as the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. Since, as the Kyles Court pointed out, the Constitution does not demand an open file policy on the part of the prosecutor, the rule in Bagley and Brady requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. [FN24]

The Court held that the suppression of exculpatory evidence by the government constitutes a material violation of the due process principles of Brady and its progeny, and thus warranted a new trial or other remedial action (§ 3[a], § 4, § 5[a], § 6[a], § 8[a], § 9). The Court also held that suppression of exculpatory evidence by the government does not constitute a material violation of the due process principles of Brady and its progeny, thus not warranting a new trial or other remedial action (§ 3[b], § 5[b], § 6[b], § 7, § 8[b], § 10-12).

Evidence can be exculpatory, for purposes of compelling disclosure under Brady, although the evidence is not directly about the defendant; there are many cases where impeachment evidence concerning a witness or codefendants leads to reasonable doubt about the defendant's guilt or innocence. [FN25] Because impeachment is integral to a defendant's constitutional right to cross-examination, there exists no pat distinction between impeachment and exculpatory evidence under Brady. [FN26] Impeachment evidence is subjected to the same materiality analysis as is purely exculpatory evidence. [FN27] In a Brady materiality inquiry, the evidence is "material" if the undisclosed evidence could have substantially affected the efforts of the defense counsel to impeach a witness, thereby calling into question the fairness of the ultimate verdict. [FN28] Evidence of impeachment is material if the witness whose testimony is attacked supplied the only evidence linking the defendants to the crime, or where the likely impact on the witness' credibility would have undermined a critical element of the prosecution's case. [FN29] Similarly, impeaching matter may be found material where the witness supplied the only evidence of an essential element of the offense. [FN30] Impeachment evidence is material where the undisclosed matter would have provided the only significant basis for impeachment. [FN31] Undisclosed impeachment evidence is not material in the Brady sense when, although possibly useful to the defense, it is not likely to have changed the verdict. [FN32] Where a witness' credibility is not material to the question of guilt, failure to disclose impeachment evidence does not violate Brady. [FN33] Suppressed impeachment evidence is also not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. [FN34] However, the fact that other impeachment evidence was available to the defense counsel does not necessarily render undisclosed impeachment evidence "immaterial" for Brady purposes; undisclosed impeachment evidence can be "immaterial," because of its cumulative nature only if the witness was already impeached at trial by the same kind of evidence. [FN35] Courts have held that undisclosed impeachment evidence was (§ 13[a], § 14[a], § 15, infra) and was not (§ 13[b], § 14 [b], infra) a material violation of Brady.

Information withheld by the prosecution is not material, for Brady purposes, unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes. [FN36] Inadmissible evidence is by definition not material for Brady purposes, because it never would have reached the jury and therefore could not have affected the trial outcome. [FN37] To determine whether evidence that could be used to impeach a prosecution witness that the prosecution does not disclose to the defendant is material to the

defendant's case, an appellate court must determine what evidence would technically be admissible and what portion of that evidence the trial court would allow under the discretion granted to it under the evidentiary rule. [FN38] regarding the admissibility of evidence of specific acts of a witness for impeachment purposes. [FN39] Exculpatory (§ 8[b], infra) and impeachment (§ 13[b], infra) evidence has been held to be inadmissible, and thus immaterial for Brady purposes.

The Supreme Court has never explicitly pinpointed the time at which the disclosure under Brady must be made for materiality purposes. [FN40] The Court held that Brady is not violated when the Brady material is made available to the defendants during the trial. [FN41] When Brady evidence is disclosed at trial in time for it to be put to effective use, a new trial will not be granted simply because the evidence was not disclosed as early as it might have and, indeed, should have been. [FN42] Moreover, even if the prosecution's disclosure of exculpatory evidence in accordance with Brady was impermissibly delayed, reversal will not obtain unless such evidence was material. [FN43] The relevant standard of materiality does not focus on the trial preparation, but instead on whether earlier disclosure would have created a reasonable doubt of guilt that did not otherwise exist. [FN44] The Court also stated, however, that in considering the delayed disclosure of Brady material, the critical question is whether the delay prevented the effective use of the material by the defense, and the defendant is required to show some prejudice beyond mere assertions that the defendant would have conducted the cross-examination differently. [FN45] Thus, a Brady violation can occur if the prosecution delays in transmitting evidence during trial, but only if the defendant can show prejudice, e.g., that the material came so late that it could not be effectively used. [FN46] A Brady violation based on the inability to adequately investigate or to develop additional evidence is not sufficient to establish prejudice per se. [FN47] The Court also stated that the standard to be applied under Brady and Agurs in determining whether a delay by the prosecutor in disclosing material evidence to the defense violates due process is whether the delay prevented the defendant from receiving a fair trial, and as long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence, due process is satisfied. [FN48] Another variation on the test for constitutional error in the delayed release of Brady evidence is that no violation of due process occurs if the evidence is disclosed to the defendant at a time when the disclosure remains of value. [FN49] The Court also stated that the government's failure to timely disclose Brady information warrants reversal only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. [FN50] While Brady material must ordinarily be disclosed in time for its effective use at trial, and while Brady material includes information that may be used to impeach the credibility of a prosecution witness, the government is not obligated to disclose such information prior to trial, as the defendant's due process rights will be fully protected if the disclosure of information that may be used to impeach the credibility of a prosecution witness is made on the day that the witness testifies. [FN51] The Jencks Act requires the Federal Government to produce a witness' statement only after that witness has testified on direct examination. [FN52] The Supreme Court did not address the inherent conflict between the principles of due process underlying Brady and the Jencks Act, as Brady was a case arising under the Fourteenth Amendment, and there is a split of authority over whether the due process principles of Brady and its progeny or the Jencks Act control the timing of the disclosure of evidence which is subject to both Brady and the Jencks Act. Some courts hold that Brady and Jencks material need not be disclosed by the government until after direct examination, as directed by the Jencks Act. [FN53] Other courts have held that compliance with the Jencks Act does not necessarily satisfy the due process requirements for Brady material. [FN54] The belated disclosure of exculpatory evidence during trial has been held to not constitute a material violation of Brady (§ 17-23).The belated disclosure of impeachment evidence during trial has been (§ 24[a], infra) and has not been (§ 24[b], infra) held to constitute a material violation of Brady.

The government's obligation to make Brady disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether to plead guilty. [FN55] The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. [FN56] Thus, some courts have concluded that a federal prosecutor's nondisclosure of Brady/Giglio material may be sufficient to invalidate a guilty plea. [FN57] In the guilty plea context, a defendant establishes the "materiality" of undisclosed Brady/Giglio evidence by showing a reasonable probability that, but for the failure to disclose the evidence, the defendant would have refused to plead and would have opted for trial. [FN58] The test for whether a defendant

would have chosen to go to trial if the defendant had received Brady material is an objective one that centers on the likely persuasiveness of the withheld information. [FN59] While a defendant seeking to withdraw his plea under Federal Rule of Criminal Procedure 32(e) normally bears the burden of demonstrating both that there are valid grounds for withdrawal and that such grounds are not outweighed by any prejudice to the government, where a Brady violation is established, that is, the court found that the government withheld favorable information from the defendant and ruled that there is a reasonable probability that the information, if disclosed, would have led the defendant not to plead guilty, a court has no discretion to deny the motion; rather, if the undisclosed evidence could in any reasonable likelihood have affected the judgment of the jury, a new trial is required, since in the context of a proven Brady violation, it would be entirely inappropriate to allow the government to defeat the motion by arguing that the warranted remedy for its own constitutional violation is likely to cause it prejudice. [FN60] Based on the circumstances present, a defendant's guilty plea has been held to be invalid due to the nondisclosure of material impeachment evidence (§ 14[a], infra). In other situations, a defendant's guilty plea has been held to be valid despite the nondisclosure of impeachment evidence (§ 14[b], infra). The Court also held a defendant's guilty plea to be valid despite the nondisclosure of exculpatory witness statements (§ 6 [c]).

The Brady requirement that the government disclose exculpatory information applies to sentencing. [FN61] The due process requirement that a defendant receive a fair sentencing hearing has been held to be violated by the nondisclosure of material Brady exculpatory [FN62] and impeachment (§ 15, infra) evidence.

[b] Practice pointers

The United States Supreme Court, in Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), a case arising under the Fourteenth Amendment, held that while a showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more, the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Thus, according to the Kyles Court, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. [FN63] Accordingly, the Brady obligation extends only to material evidence that is known to the federal prosecutor. [FN64] An individual federal prosecutor is presumed, however, to have knowledge of all information gathered in connection with his office's investigation of the case. [FN65] Nonetheless, knowledge on the part of persons employed by a different office of the Federal Government does not in all instances warrant the imputation of knowledge to the federal prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would require the adoption of a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis. [FN66]

The Kyles Court also held that once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review, as assuming arguendo that a harmless error inquiry were to apply, a Bagley error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict.

A court of appeals reviews de novo a claim of failure to disclose evidence in violation of Brady. [FN67] While a court of appeals conducts an independent examination of the record to determine whether Brady has been violated by nondisclosure, and the court likewise makes an independent review of the district court's determination of materiality, which is a mixed question of fact and law, [FN68] the trial judge's conclusion as to the effect of the government's nondisclosure of evidence on the outcome of the trial is entitled to great weight. [FN69] A court of appeals reviews a district court's denial of a defendant's Brady challenge on grounds of materiality for an abuse of discretion, [FN70] and a court of appeals reviews for abuse of discretion a district court's denial of a motion for a new trial based on newly discovered evidence claimed to violate Brady. [FN71]

Absent a mistake of law, a court of appeals reviews a district court's finding that the prosecution's delayed disclosure of evidence favorable to the defense was harmless under the abuse-of-discretion standard. [FN72] A defendant who claims that his hand was prematurely forced by the delayed disclosure of favorable evidence cannot rely on wholly conclusory assertions, but must bear the burden of producing, at the very least, a prima facie showing of a plausible strategic option which the delay foreclosed. [FN73]

A court of appeals determines the existence of a reasonable probability that the proceeding would have been different had the government disclosed the evidence to the defendant based on the cumulative impact of all the evidence suppressed in violation of Brady. [FN74] For purposes of a new trial based on newly discovered Brady evidence, a showing of materiality does not require the suppressed evidence in question to establish the defendant's innocence by a preponderance of the evidence, and the question is not whether the defendant would more likely have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. [FN75]

The United States Attorney's Office for the District of Columbia prosecutes cases in both the federal district court and the local superior court, and the prosecutor is responsible, at a minimum, for all Brady information in the possession of that office. [FN76]

Evidence is "material" for Brady purposes, and thus must be disclosed by prosecution, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S.C.A. Const Amend V. U.S. v. Lemmerer, 277 F.3d 579 (1st Cir. 2002).

To prevail on a Brady claim, the defendant must show that (1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced at a time when it would have been of value to the accused; and (3) the suppressed evidence was material to his guilt or punishment. U.S. v. Blocker, 39 Fed. Appx. 543 (9th Cir. 2002)

To establish a Brady violation, the defendant must show: (1) that the government possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not obtain the evidence with reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different. U.S. v. Woodruff, 296 F.3d 1041 (11th Cir. 2002).

II. UNDISCLOSED EVIDENCE

A. Exculpatory Evidence

1. Documentary Evidence and Statements, Generally

§ 3. Nontestimonial evidence generally

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of the nontestimonial exculpatory evidence in question constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant or a hearing to determine whether the government withheld material exculpatory evidence, in violation of Brady.

The court in U.S. v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993), held that the prosecutor's failure to disclose salient information unearthed during an investigation into the defendant's claim that she had been coerced by a drug trafficker into carrying heroin into the United States violated the prosecutor's obligation under Brady, and

thus warranted a new trial, where the prosecutor learned that the source named by the defendant existed and was a prominent drug trafficker.

The court in U.S. v. Srulowitz, 785 F.2d 382 (2d Cir. 1986), held that evidence withheld by the government in a case under the Racketeer Influenced and Corrupt Organizations Act alleging that the defendant was a member of a RICO enterprise that engaged in arson-for-profit schemes, was material, thereby entitling the defendant to a new trial. The court concluded that the evidence in the undisclosed files must be considered material in the constitutional sense, as that concept was defined by the Supreme Court, since, although the defendant did not show that the evidence would more likely have resulted in his acquittal, the evidence was sufficient to create a "reasonable" probability that the outcome of the trial would have been different had the files been disclosed and to undermine confidence in the outcome of the trial.

For purposes of Brady claim, exculpatory evidence is considered "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Taus v. Senkowski, 293 F. Supp. 2d 238 (E.D. N.Y. 2003).

The court in U.S. v. Wilson, 135 F.3d 291, 48 Fed. R. Evid. Serv. (LCP) 883 (4th Cir. 1998), cert. denied, 118 S. Ct. 1852, 140 L. Ed. 2d 1101 (U.S. 1998), held that the prosecution's closing argument that the defendant murdered someone who stole or attempted to steal drugs from him was improper when the prosecution knew that a different man was in prison for the murder, but did not disclose that fact to the defense in violation of Brady, assuming that the defendant did not know about such exculpatory and impeachment evidence before the trial.

Undisclosed evidence is material for Brady purposes when its cumulative effect is such that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; "reasonable probability" is one sufficient to undermine confidence in the outcome. U.S. v. White, 238 F.3d 537 (4th Cir. 2001).

Evidence is material, for purposes of determining whether a prosecutor's failure to turn over allegedly exculpatory evidence is a Brady due process violation, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S.C.A. Const Amend V. Williams v. Puckett, 283 F.3d 272 (5th Cir. 2002).

Government's intentional withholding, in prosecution of a former Central Intelligence Agency (CIA) officer for illegally shipping plastic explosives to Libya, of information favorable to the former officer's defense that he had continued to be associated with the CIA after his formal employment ended, constituted a Brady violation; withheld material tended to be exculpatory and would have impeached government's denial of the continuing association, and there was a reasonable probability of a different verdict had the material been produced. U.S. v. Wilson, 289 F. Supp. 2d 801 (S.D. Tex. 2003).

The court in U.S. v. Ranger Electronic Communications, Inc., 22 F. Supp. 2d 667 (W.D. Mich. 1998), held that the prosecutor violated the Brady obligation to share exculpatory information, in a prosecution against a foreign manufacturer of radio equipment that ended in a dismissal with prejudice of the illegal importation charges, by failing to timely produce documents that would have provided the manufacturer with an argument that the imported radios were not prohibited by law and that the regulations in place did not provide adequate notice to importers that the radios were so prohibited.

Evidence is material under Brady if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S. v. Koubriti, 297 F. Supp. 2d 955 (E.D. Mich. 2004).

Government's failure, in prosecution for conspiracy to provide material support and resources to terrorists, conspiracy to engage in document fraud, and document fraud, to produce potential Brady and/or Giglio material,

required dismissal of terrorism related count and new trial on document fraud count; government's withholding of materials materially misled the Court, the jury, and the defense as to the nature, character, and complexion of critical evidence, violating defendants' due process, confrontation, and fair trial rights. U.S.C.A. Const. Amends. V, VI. U.S. v. Koubriti, 2004 WL 2022904 (E.D. Mich. 2004).

Under Brady, government must disclose evidence favorable to defense where evidence is material to either guilt or punishment of defendant. Ienco v. Angarone, 291 F. Supp. 2d 755 (N.D. Ill. 2003).

The court in U.S. v. Robinson, 39 F.3d 1115 (10th Cir. 1994), held that the district court did not abuse its broad discretion in ordering a new trial for a defendant convicted of distributing cocaine on the ground of a Brady violation in the government's failure to disclose evidence tending to identify a former codefendant, rather than the defendant, as the drug courier. The court found that the conviction was based largely on the testimony of the codefendant and another former codefendant, the defendant had a strong alibi defense, and the Brady evidence did not simply impeach the former codefendants, but instead exculpated the defendant by implicating one of the codefendants.

The court in U.S. v. Fernandez, 136 F.3d 1434 (11th Cir. 1998), held that the defendant, a police officer convicted of conspiracy to import and distribute cocaine for allegeding tipping off the leader of the conspiracy that a cocaine shipment from Venezuela was under surveillance, was entitled to a hearing to determine whether the government withheld material exculpatory evidence, in violation of Brady; the court found that post-trial news reports described a possible link between the Central Intelligence Agency and the shipment at issue, and evidence of such a link may have supported the defendant's theory that there were other possible tipsters.

In order to establish Brady violation, defendant must demonstrate that State possessed evidence favorable to him; that defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; that State suppressed the favorable evidence; and that had evidence been disclosed to defense, there was reasonable probability that outcome of proceedings would have been different. Chandler v. Moore, 240 F.3d 907 (11th Cir. 2001).

The court in U.S. v. Lloyd, 71 F.3d 408, 76 A.F.T.R.2d (P-H) ¶ 95-8019 (D.C. Cir. 1995), reh'g and suggestion for reh'g in banc denied, (Feb. 5, 1996), held that a defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to a new trial where the prosecution, without wrongdoing, withheld the tax return of the defendant's client for the year which the defendant did not prepare returns as the undisclosed return raised a reasonable probability of a different result had it been disclosed at trial.

The court in In re Sealed Case No. 99-3096, 185 F.3d 887 (D.C. Cir. 1999), held that, in granting a new trial for the defendant, who was convicted of unlawful possession of a firearm and ammunition by a convicted felon, the prosecution had a Brady obligation to disclose any co-operation agreements between a witness and the government, even if Brady disclosure obligations did not apply to evidence impeaching defense witnesses, as the witness effectively became a government witness when he "flipped" and started testifying against the defendant, and the defendant sought agreements not for impeachment purposes, but to show the witness' motive for planting firearms underlying the prosecution in the defendant's home, and thus corroborate his innocence defense. Thus, the agreement giving the witness motive to plant firearms in the defendant's home qualified as Brady material regardless whether the witness testified. The court noted that although the defendant, at the time of his pretrial motion, was not entitled to disclosure of co-operation agreements involving an informant who provided information leading to the defendant's arrest, given that the informant's identity was confidential and the helpfulness of the requested information was speculative, disclosure became necessary once the informant voluntarily revealed himself to the defense counsel, admitted planting evidence in the defendant's home, and stated that he was co-operating with the police to work off local charges; together with the search warrant affidavit stating the basis for the informant's reliability, such information eliminated the speculative nature of the possibility that a materially relevant co-operation agreement existed. The court found that despite its claim that it

should not have been required to "scamper" about searching for requested evidence during the middle of the trial, the government was not relieved of its Brady obligation to search for and disclose any co-operation agreements involving the witness under the theory that it was too late to compel production of such evidence when the witness testified, as the government could have gathered the evidence earlier, particularly when the defendant had requested the information earlier and had indicated the relevance of the witness' motive during opening statements. The Court also held that it was irrelevant, for purposes of the prosecution's Brady obligation to disclose material exculpatory and impeachment evidence, that the requested records could have been in possession of the local police department, the Federal Bureau of Investigation (FBI), or Drug Enforcement Administration (DEA), rather than the United States Attorney's Office, as the prosecutor had a duty to learn of favorable evidence known to others working on the case on the government's behalf, including the police. The government's failure to satisfy its Brady obligation to disclose the witness' co-operation agreements also was not excused by the court on the ground that the information was otherwise available to the defense when the government conceded that it had not yet conducted a full search of its own, and thus did not know the full details of any such agreements, and when the defense was seeking information from more trustworthy source than the witness.

Evidence is material for purposes of Brady only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Boone v. U.S., 769 A.2d 811 (D.C. 2001).

Favorable evidence is "material" within meaning of Brady doctrine only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different. Rowland v. U.S., 840 A.2d 664 (D.C. 2004).

A violation of Brady, which requires that a prosecutor disclose to defense counsel material information which is exculpatory, is one of due process, and a three-part test is used to evaluate whether a violation has occurred: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to the defendant; (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. U.S.C.A. Const. Amend. 14. Keeter v. State, 97 S.W.3d 709 (Tex. App. Waco 2003).

Evidence is "exculpatory," as element of prosecution's due process obligation under Brady to disclose material exculpatory evidence, if it is favorable to the accused. U.S.C.A. Const. Amend. XIV. Martinez v. Com., 590 S.E.2d 57 (Va. Ct. App. 2003).

[b] Held not material

The courts in the following cases held that the federal prosecutor's failure to disclose the exculpatory nontestimonial evidence in question did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

To state a valid Brady claim, a plaintiff must show that the evidence was (1) suppressed, (2) favorable, and (3) material to the defense, and evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense. Riley v. Taylor, 237 F.3d 300 (3d Cir. 2001).

Government's failure to inform defendant of disciplinary suit against police detective did not constitute Brady violation, where detective testified as defense witness, evidence was neither material or exculpatory, and evidence was contained in detective's lawsuit against employer, to which defendant had access. U.S. v. Coletta, 59 Fed. Appx. 492 (3d Cir. 2003).

In prosecution of highway contractor and purported subcontractor for misrepresentations concerning compliance

with disadvantaged business enterprise (DBE) requirements, there was no Brady violation in failing to disclose state agency's audit file on the project, as the file was available through sources other than the prosecutor, such as a Freedom of Information Act (FOIA) request, and it was readily apparent from the audit report, which was disclosed, that the audit was based, at least in part, upon documents maintained and collected by the agency, and where it was not explained how the information not disclosed was exculpatory. 5 U.S.C.A. § 552. U.S. v. Brothers Const. Co. of Ohio, 219 F.3d 300 (4th Cir. 2000).

In prosecution for felony murder and distribution of heroin, prosecution's failure to disclose evidence that key prosecution witness had an affair with a police officer did not constitute a Brady violation, though such evidence was favorable to defendant; defendant was not prejudiced, as testimony of another witness was enough to support a guilty verdict. Hillman v. Hinkle, 114 F. Supp. 2d 497 (E.D. Va. 2000), appeal dismissed, 238 F.3d 412 (4th Cir. 2000).

The court in U.S. v. McKellar, 798 F.2d 151 (5th Cir. 1986), held that the rights of the defendant under Brady to the requested exculpatory material were not violated by the failure of the prosecutor to turn over to the defendant, who was charged with making false statements to two federally insured lending institutions in connection with a development project, information that an employee of the company promoting the projects had raised the amounts on the defendant's financial statements to make the defendant appear more financially stable, where the defendant had confirmed that one statement at issue was a true copy of one he submitted, the other statement forming the basis of the charges reflected lower valuations than the statement adopted by the defendant, and the defendant never challenged the genuineness of the contents of the statements.

The court in U.S. v. Aubin, 87 F.3d 141, 78 A.F.T.R.2d (P-H) ¶ 96-5311 (5th Cir. 1996), reh'g and suggestion for reh'g in banc denied, 100 F.3d 955 (5th Cir. 1996) and cert. denied, 519 U.S. 1119, 117 S. Ct. 965, 136 L. Ed. 2d 850 (1997), held that the prosecution's failure to disclose a report of the state Savings and Loan Department that allegedly showed that the Department knew of the defendant's involvement in the loan transaction, in the prosecution of the defendant for bank fraud, did not violate the Brady rule requiring the disclosure of exculpatory evidence, as the court found that the defendant did not show any likelihood that the result of the trial would have been different if he had been in possession of the report prior to the trial.

The court in U.S. v. Burns, 162 F.3d 840 (5th Cir. 1998), cert. denied, 119 S. Ct. 1477, 143 L. Ed. 2d 560 (U.S. 1999), held that the government audit report showing that the corporation which contracted to provide management services for properties in receivership was owed back management fees by the receiver was not material in a prosecution of the corporation's chief executive officer for conspiracy, illegal participation in a transaction involving a federal credit institution, and making false statements, and thus, the prosecution's claimed failure to produce the audit during trial could not support the Brady claim, as the overwhelming evidence indicated that the defendant intentionally falsified and inflated invoices in a scheme to defraud the government, and the audit would have weakened testimony stating that the larger amount was still owed the corporation.

The court in U.S. v. Guerrero, 894 F.2d 261 (7th Cir. 1990), held that a downward revision of the amount of cocaine that the defendant personally delivered did not constitute material evidence under Brady for purposes of determining the defendant's sentence such that the defendant was entitled to a new sentence due to the government's alleged failure to disclose the postsentencing revision. The court found that the defendant was sentenced as a conspirator and the sentence was based on the amount of cocaine involved in the conspiracy, rather than merely the amount the defendant delivered.

The court in U.S. v. Carson, 9 F.3d 576 (7th Cir. 1993), held that the government's alleged withholding of documents, which would have shown that the government informant threatened or harmed others, did not constitute a Brady violation, on the theory that the evidence was relevant to the defendant's defense that the informant coerced him into joining the drug conspiracy, where no reasonable possibility existed that the material described by the defendant would have been sufficient to rebut the direct evidence of his participation in the scheme to deal cocaine.The court in U.S. v. Bolduc, 134 F.3d 374 (7th Cir. 1998), reh'g and suggestion for reh'g

en banc denied, (Apr. 14, 1998) and cert. denied, 119 S. Ct. 209, 142 L. Ed. 2d 171 (U.S. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 53(b)(2) of the Seventh Circuit, held that there was no indication that nondisclosure of the alibi evidence undermined the confidence in the verdict; instead, the court found that there was ample, independent corroborating evidence of the defendant's guilt, and therefore, there was no reasonable probability that the defendant's trial would have been different had the alibi evidence been introduced.

The court in U.S. v. Copple, 827 F.2d 1182, 23 Fed. R. Evid. Serv. (LCP) 1033 (8th Cir. 1987), held that even if the defendant was denied access to FDIC examinations of the bank and the person who prepared the examinations, there was not a reasonable probability that access to the reports would have brought a different result on the charge arising out of a scheme to finance a real-estate development by obtaining bank loans in violation of federal law, and thus, the evidence was not material for Brady purposes.

The court in U.S. v. Ryan, 153 F.3d 708 (8th Cir. 1998), reh'g denied, (Sept. 21, 1998) and cert. denied, 119 S. Ct. 1454, 143 L. Ed. 2d 541 (U.S. 1999), held that no reasonable probability existed that evidence of tests performed by government experts on samples from the floor of the building that had burned, and of the fact that one of the government's experts disagreed with other experts regarding the cause of the deep charring on the floors of the building, if disclosed, would have changed the outcome in the arson prosecution under 18 U.S.C.A § 844(i), and thus, the district court did not abuse its discretion in determining that the government's failure to disclose the evidence did not warrant a new trial under Brady; the court found that the presence of floor burn patterns was merely a small part of the government's well-supported theory that the fire was intentionally set, and the undisclosed evidence had limited exculpatory value.

The court in U.S. v. Lehman, 792 F.2d 899 (9th Cir. 1986), held that even assuming that the FBI report were "favorable" to the accused and "material" evidence, there was no reasonable possibility that the government's failure to disclose the report materially affected the verdict, and thus did not warrant reversal of the defendant's conviction under Brady, as the report stated only that footprint photographs were taken on the asphalt of the hangar area south of the airport terminal and did not say that that the photos were taken in an area where a car might have been waiting for the robbers, and thus did not provide support for the defendant's claim that the robbers met a waiting getaway car, instead of meeting the defendant's waiting plane.

The court in U.S. v. Amlani, 111 F.3d 705, 46 Fed. R. Evid. Serv. (LCP) 1422 (9th Cir. 1997), opinion after remand, 169 F.3d 1189 (9th Cir. 1999), held that the government's failure to produce a compliance letter written by an attorney, which outlined procedures to ensure that the defendant's telemarketing company complied with telemarketing laws, did not constitute a Brady violation in the prosecution for telemarketing fraud, absent a reasonable probability that the outcome would have been different had the letter been disclosed. The court found that although the defendant contended that the letter, which allegedly was seized during a search, would have allowed him to show that he intended to comply with the law and not to commit fraud, the letter was consistent with the prosecution as well as the defense theories.

The court in U.S. v. Cooper, 173 F.3d 1192, 48 Env't. Rep. Cas. (BNA) 1477, 29 Envtl. L. Rep. 21044 (9th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3138 (U.S. Aug. 23, 1999), held that a government report indicating that the investigation of the print shop identified by a witness as a source of falsified certificates revealed no evidence that the shop had ever printed certificates for the defendant or that the witness was not "material," for the purposes of the defendant's claim that the government failed to disclose the report in violation of Brady, given that the defense was able to impeach the witness extensively and there was ample evidence of guilt independent of the witness' testimony.

In wire fraud prosecution, failure to disclose the presentence report (PSR) of one of defendant's co-schemers, which revealed that co-schemer had been arrested several times and noted his history of alcohol use, was not sufficiently prejudicial to warrant a new trial on ground of Brady violation, because the evidence against defendant was overwhelming and he vigorously cross-examined co-schemer, who admitted that he had previously

been convicted of wire fraud and to having an impaired memory, and told jurors about his plea agreement. U.S.C.A. Const. Amend. 5. U.S. v. Ciccone, 219 F.3d 1078 (9th Cir. 2000).

Defendant failed to prove his claim of Brady violation, where he did not identify any exculpatory evidence that government had failed to produce or that it produced too late to be useful to defendant, and even if he had, he also failed to articulate a "reasonable probability" that the outcome of his case would have been different had certain information been provided or provided in a more timely manner. U.S. v. Carrillo, 81 Fed. Appx. 141 (9th Cir. 2003).

Evidence that witness had several traffic misdemeanor charges and that prosecutor in capital murder case personally helped him achieve favorable dispositions on those charges was not material, and thus, prosecutor's failure to disclose that evidence to defendant did not deprive defendant of due process, where there was no reasonable probability that outcome of trial would have been different if defense had known about undisclosed benefits, given that witness was impeached with his plea agreement on burglary charge in which state granted him immunity on murder charge in return for testimony against defendant, and his testimony was corroborated by other, disinterested witnesses. U.S.C.A. Const. Amend. 14. Belmontes v. Woodford, 335 F.3d 1024 (9th Cir. 2003).

The court in U.S. v. Conner, 752 F.2d 504 (10th Cir. 1985), held that in a prosecution for the robbery of a federally insured institution, the government's failure to reveal a third lineup to the defendant did not violate Brady, as that lineup related to the government's ongoing investigation into other potential defendants involved in the robbery and did not relate to the defendant, so that it was not material.

The court in U.S. v. Kluger, 794 F.2d 1579 (10th Cir. 1986), held that the denial of the motion for a new trial by the defendants, convicted of obtaining money by false promises of loans from European banks, was not an abuse of discretion where the government's failure to make available two letters and an FBI report concerning the legitimacy of a Belgian bank was not a "material" denial of the right to a fair trial, as the claim by the defendants that the evidence would establish their good-faith belief in the bank was a mere "thread in a tapestry" showing that the defendants fraudulently obtained money by false promises of loans from many European banks; thus, the court found that there was no reasonable probability that the introduction of the documents would have changed the result.

The court in U.S. v. Page, 828 F.2d 1476 (10th Cir. 1987), held that the financial records of the company, from which the defendant allegedly received bribes, were not material, and their suppression by the prosecutor did not require a new trial under Brady. The court found that the records would have merely provided cumulative evidence that payments to the defendant were described as past attorney's fees, rather than bribes, and the defendant could have obtained essentially the same evidence by calling the company's accountant to testify about the contents of the records.

The court in U.S. v. Hernandez, 94 F.3d 606 (10th Cir. 1996), held that the defendant failed to show there was a reasonable probability that the disclosure of evidence regarding the size of the drug organization in which he was involved and others' fear of the organization would have produced a different verdict had it been disclosed by the government in his prosecution on drug and continuing criminal enterprise (CCE) charges. The court found that the size of the organization was irrelevant to the defendant's CCE conviction, and evidence of others' fear did not create a reasonable probability of acquittal without any objective evidence of threats.

COMMENT:

The court in Hernandez noted that the Tenth Circuit had previously followed the Supreme Court case of Agurs in holding that in a case where specific information was not requested, materiality depends on whether the omitted evidence creates a reasonable doubt that did not otherwise exist. The court held, however, that in light of the Supreme Court case of Bagley, where a majority of the Supreme Court agreed that the proper standard

for materiality, at least in cases where the defendant's request was not specific, is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, the court would proceed to apply the Bagley standard, although the court suspected that the distinction between the Agurs standard and the Bagley standard might well be one without a difference.

The court in U.S. v. Hanzlicek, 1999 WL 638204 (10th Cir. 1999), held that the government's failure to produce the list of victims who received fraudulent checks from the leader of an antigovernment group and information regarding the cashing of those checks was not a Brady violation; the court found that the significance of whether banks actually cashed the checks was not material to the defendant's prosecution for mail fraud, conspiracy, and attempting to pass a counterfeit obligation of the United States.

The court in U.S. v. Nichols, 242 F.3d 391 (10th Cir. 2000), cert. denied, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001), affirming U.S. v. Nichols, 67 F. Supp. 2d 1198 (D. Colo. 1999), aff'd, 242 F.3d 391 (10th Cir. 2000), cert. denied, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001), rejected the defendant's contention that either a whole new trial or an evidentiary hearing should have been granted by the district court due to the failure of the prosecution during trial to turn over some 40,000 Federal Bureau of Investigation "lead sheets." In setting the issues for discussion raised by the defendant's post-trial motions, the district court described the universe of FBI reports compiled in this case as " 'information control' sheets, informally called 'lead sheets'." Routinely, FBI agents and other FBI personnel use a standard form, in triplicate, to record received information that may possibly be relevant to an investigation, identifying the source, method, date and time of contact and a narrative summary of what was heard from the source. This form is also used to document communications between agents. Each lead sheet is given a control number and the form provides a space for reporting what investigative steps were taken as a result of the information received or the agent's message. The follow-up to the lead is an interview of the source or of others who may have more information, the agent conducting the interview will report what was said on a Form 302 if the information is thought to be relevant to the investigation or in the form of an "insert" if the information is of no apparent value. Although all 302s and inserts were turned over by the government to the defense prior to trial, none of the more than 40,000 lead sheets were made available. The defendant claimed he was unaware of their existence prior to an incident during trial, and the government did not contest this assertion. The court noted that due process requires prosecutors to disclose "evidence favorable to the accused ... where the evidence is material either to guilt or to punishment," and to establish a violation of Brady, the defendant must show the evidence was: (1) suppressed by the prosecution; (2) favorable to him; and (3) material. The court noted that the prosecutors' duty to avoid suppression is an active one. It includes "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Moreover, the obligation to turn over evidence "stands independent of the defendant's knowledge." Evidence favorable to the accused includes exculpatory evidence, other information that provides important investigative leads, and impeachment evidence. In judging materiality, the focus must be on the cumulative effect of the withheld evidence, rather than on the impact of each piece of evidence in isolation. The cumulative effect of withheld evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Reasonable probability is not to be read as a requirement the defendant show by a preponderance of the evidence he would have been acquitted, id., instead, "significant possibility would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence ." The court further noted that ultimately, the policy animating Brady is the desire to ensure a fair trial and a verdict worthy of confidence, and thus, the key issue is whether the government's evidentiary suppression undermines confidence in the outcome of the trial. In making his Brady argument, the defendant asserted some 219 of the 12,000 lead sheets handed over to the defense contain information directly relevant to issues tried in the case yet not turned over to the defense prior to trial. The defendant did concede, however, most of this information was available in FBI 302's and inserts turned over to the defense. His motion for a new trial focused on 62 lead sheets he contends were exculpatory, directly relevant, and never turned over in any form. The court found that while the defendant argued the lead sheets pointed to the existence of conspirators other than himself who aided Mr. McVeigh and cast doubt on his participation in the overt acts which lead to his conspiracy conviction, even proof of the existence of a real John Doe # 2 and of his participation would not

contradict the government's indictment, as the indictment charged the defendant conspired with Mr. McVeigh and with others unknown. The participation of another conspirator disclosed by the evidence, therefore, would not relieve the defendant of culpability under the indictment. Thus, the court held that there was no reason to believe withholding this information from the defense violated the defendant's right to a fair trial.

COMMENT:

Denying certiorari, the United States Supreme Court in Nichols v. U.S., 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001), let stand the Tenth Circuit decision of U.S. v. Nichols, 242 F.3d 391 (10th Cir. 2000), cert. denied, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001) (unpublished table disposition--see 2000 WL 1846225), denying a retrial to the defendant Terry Nichols based on the failure of prosecution lawyers to turn over some 40,000 Federal Bureau of Investigation "lead sheets" during his prosecution for conspiring to bomb the Alfred P. Murrah Building in Oklahoma City on April 19, 1995. The "lead sheets," also known as "information control" sheets, are prepared by FBI personnel to record received information that may possibly be relevant to an investigation, and to document communications between agents. Among the 62 lead sheets that Mr. Nichols focused upon were those containing information about a possible additional conspirator known as "John Doe #2," and those purportedly showing that Timothy McVeigh, also convicted in connection with the bombing, had connections to militia groups that did not include Mr. Nichols. The Ninth Circuit analyzed each category of documents focused upon under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (U.S. 1963), which requires prosecutors to disclose exculpatory evidence. The Court of Appeals concluded that the government's evidentiary suppression did not undermine confidence in the outcome of the trial.

To succeed in a Brady claim, the defendant must prove the following: (1) that the State possessed evidence favorable to the defense; (2) that he did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. Hooper v. State, 554 S.E.2d 750 (Ga. Ct. App. 2001).

§ 4. Grand jury testimony

The court in the following case held that the federal prosecutor's suppression of the grand jury testimony in question constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a reversal of the defendant's conviction.

The court in U.S. v. Tincher, 907 F.2d 600 (6th Cir. 1990), reh'g denied, (Aug. 13, 1990), held that the prosecutor's statement in response to a request for Brady material not previously provided, that he did not know of any additional material, amounted to deliberate misrepresentation in light of his knowledge of the testimony of the government agent before the grand jury, and required reversal since the misconduct precluded review of the agent's testimony by the district court.

Even if grand jury testimony of certain alleged bookmakers indicated no illegal behavior on the part of a defendant charged with extortion and racketeering, it was not exculpatory as to the extortion charges that were in the indictment, which did not relate to any of these alleged bookmakers, and thus disclosure was not required under Brady, even if disclosure would have been helpful to the defense in making determinations about possibly calling some of these persons as witnesses, particularly where defendant made no showing that he would have been unable to identify, locate, and interview these individuals through reasonable efforts on his own part, and it was the defendants' own recorded conversations that brought these alleged bookmakers and gamblers to the government's attention. U.S. v. Corrado, 227 F.3d 528, 2000 FED App. 280P (6th Cir. 2000).

A Brady violation occurs only if the government withholds evidence that, had it been disclosed, creates a

reasonable probability that the result of the trial would have been different; the later inquiry is subjective: the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. U.S. v. Elem, 269 F.3d 877 (7th Cir. 2001).

§ 5. Statements of defendant

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of the statements of the defendant in question constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial or other remedial action for the defendant.

The court in U.S. v. Severson, 3 F.3d 1005 (7th Cir. 1993), appeal after remand, 49 F.3d 268 (7th Cir. 1995), reh'g denied, (#94-2287) (Mar. 14, 1995) and reh'g denied, (#94-2315) (May 4, 1995), held that the government's postsentencing disclosure of possible Brady material relating to the substance of the defendant's custodial statements required reconsideration of the defendants' sentences insofar as the sentencing court denied a reduction for acceptance of responsibility and increased the sentences for obstruction of justice. The court found that the new evidence referred to by the government might be consistent with one defendant's testimony at a pretrial hearing, and the sentencing court made its rulings in part based on a determination that the defendant lied at the pretrial hearing.

The court in U.S. v. Severdija, 790 F.2d 1556 (11th Cir. 1986), held that the captain's statement to a member of the coast guard boarding party, that he "knew a big load was coming up in a few days on a shrimper" and that the coast guard "should stick around the area because the fishing would be good," should have been disclosed, under Brady, to the captain who was convicted of conspiracy to possess with intent to distribute marijuana, and thus warranted a new trial. The court found that there was no evidence that the captain knew of the recordation of his statements, and the credibility of the captain on the question of intent was the critical issue before the jury at the trial.

[b] Held not material

The court in the following case held that the federal prosecutor's suppression of the statement of the defendant did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not warranting a new trial.

Government was not required to disclose to defendant charged with being a felon in possession of a firearm photograph and tape of defendant's meeting with detective, where defendant was aware of existence of photograph and tape prior to trial and neither photograph nor tape constituted exculpatory or impeachment evidence that would have had impact on outcome of trial. U.S. v. Lineberry, 93 Fed. Appx. 632 (5th Cir. 2004).

Government's failure to turn over information which amounted to nothing more than defendant's protestations of innocence was not Brady violation; defendant's statements withheld by government were neither favorable nor material within meaning of Brady. U.S. v. Danielson, 325 F.3d 1054 (9th Cir. 2003).

The court in U.S. v. Gutierrez-Hermosillo, 142 F.3d 1225, 152 A.L.R. Fed. 757 (10th Cir. 1998), cert. denied, 119 S. Ct. 230, 142 L. Ed. 2d 189 (U.S. 1998), held that the defendant was not deprived of due process, pursuant to the Brady rule, by the prosecution's alleged failure to disclose the defendant's statement to police officers that the truck in his possession was taken by its owner during the night, prior to the discovery of marijuana in the truck on which the charges against the defendant were based, since the disclosure of the evidence at issue would not have created a reasonable probability of acquittal.

§ 6. Statements of witnesses

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of the statements of the witness in question constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted remedial action for the defendant.

Prosecution's wrongful withholding of evidence, and in particular, of FBI memorandum which indicated that police officer, who had been present during incident in which undercover police officer was beaten by officers who mistook him for a suspect being pursued, had expressed some uncertainty about his recollection of incident, and contained request for authorization to take polygraph examination of officer, deprived second officer who had been at scene of a fair trial in prosecution for perjury and obstruction of justice in connection with investigation of beating, so that new trial was warranted under Brady; while other withheld evidence, standing alone, would not have warranted relief, memorandum contained significant data bearing on inability of officer, who was key witness at trial, to recall crucial events. U.S.C.A. Const. Amend. 5. Conley v. U.S., 332 F. Supp. 2d 302 (D. Mass. 2004).

The court in U.S. v. Frost, 125 F.3d 346, 1997 FED App. 274P (6th Cir. 1997), held that the defendant charged with mail fraud in connection with billing practices under public contracts made a sufficient showing of materiality to be entitled to a hearing on his claim that the government violated Brady by failing to disclose the statements by a federal contracting officer that he saw no evidence that bonuses were billed in a deceptive manner, that small businesses often made technical billing violations, and that the defendant knew that the contract would be audited.

The court in U.S. v. Locke, 1999 WL 558130 (N.D. Ill. 1999), held that the defendant convicted of conspiracy to import heroin into the United States in violation of 21 U.S.C.A. § 963 was entitled to a new trial, as the government knew of, and failed to disclose, exculpatory evidence that a codefendant stated at his change-of-plea hearing that their trip to Thailand was for some legitimate purpose and did not involve drug smuggling. Having found that the government "suppressed" the codefendant's guilty plea statement, the court found the codefendant's guilty plea statement material to issues at the defendant's trial. The government's principal witness against the defendant testified that the defendant knew the trip to Bangkok was a heroin smuggling trip and that he participated in the trip by carrying money overseas. In addition to impeaching the witness' testimony, the court found that the codefendant's guilty plea statement tends to exculpate the defendant from any knowledge of, or participation in, the heroin importation conspiracy, as according to the codefendant, the defendant did not know about the heroin smuggling operation when he took the trip to Bangkok. This court held that in light of the strong evidence that the defendant did not knowingly participate in the heroin importation conspiracy, a new trial would be granted.

The court in U.S. v. Dollar, 25 F. Supp. 2d 1320 (N.D. Ala. 1998), held that the government's failure to comply with the defendants' discovery request for Brady materials warranted dismissal of the indictment for conspiracy to defraud the government with respect to the defendants' sales of firearms, even though the evidence was sufficient to establish a conviction, as after having assured the court that it had produced all Brady materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses.

Brady doctrine requiring prosecutor to disclose exculpatory evidence is not intended to punish society for the misdeeds of the prosecutor, but to avoid unfair trial of the accused. People v. Mucklow, 35 P.3d 527 (Colo. O.P.D.J. 2000).

The failure to disclose a significant change in a witness's testimony is as much a discovery violation as a complete failure to disclose a witness. West's F.S.A. RCrP Rule 3.220(j). Scipio v. State, 867 So. 2d 427 (Fla.

Dist. Ct. App. 5th Dist. 2004).

Brady rule regarding the defendant's right to disclosure of exculpatory evidence applies to evidence impeaching the credibility of a state's witness. Martin v. State, 784 N.E.2d 997 (Ind. Ct. App. 2003).

Defendant, accused of molesting his wife's daughter, was denied due process by state's failure to correct investigating officer's testimony during his deposition that he had no personal interest in outcome of case when state knew officer and defendant's wife were involved in romantic relationship; there was material impeachment evidence that defense was denied by suppression of this information. U.S.C.A. Const Amend XIV. State v. White, 81 S.W.3d 561 (Mo. Ct. App. W.D. 2002).

Brady, which requires that a prosecutor disclose to defense counsel material information favorable to a defendant, includes both exculpatory and impeachment evidence. U.S.C.A. Const. Amend. 14. Keeter v. State, 97 S.W.3d 709 (Tex. App. Waco 2003).

[b] Held not material

The courts in the following cases held that the federal prosecutor's failure to disclose witness' statements did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The court in U.S. v. Rivalta, 925 F.2d 596 (2d Cir. 1991), reh'g denied, (Apr. 2, 1991), held that the witness' statement that she saw the original consignee of the stolen diamonds some 30 hours after the consignee was allegedly last seen talking to the defendant subsequently convicted of the transportation and sale of the diamonds was not material to the defendant's guilt for Brady purposes. The court found that although the defendant claimed that the statement showed that the consignee was alive and well at the time he and the codefendant were allegedly fleeing, the jury was never informed about the consignee's death or disappearance.

The court in U.S. v. Bryser, 10 F. Supp. 2d 392 (S.D.N.Y. 1998), held that a statement made to agents of the Federal Bureau of Investigation by a codefendant was not material, and thus, there was no Brady violation in the government's nondisclosure of the statement to the defendant, convicted of an armored car robbery; the court noted that any exculpatory statements by the codefendant were wholly incredible, and the statement on its face directly implicated the defendant, at least in efforts to conceal the robbery.

Defendant was not deprived of exculpatory evidence in violation of Brady, based on government's failure to provide him with form allegedly contradicting credibility of government witness, since form was not favorable evidence, where it would not have affected witness's credibility because he testified only that defendant was a party to murder, while form suggested only that victim was murdered and that codefendant was murderer. Ida v. U.S., 207 F. Supp. 2d 171 (S.D. N.Y. 2002).

The court in U.S. v. Alberici, 618 F. Supp. 660 (E.D. Pa. 1985), held that the eyewitness' failure to identify the alleged arsonist and statements that the persons they saw were approximately 25 to 30 years of age were relevant and potentially exculpatory in the defendant's trial for mail fraud for his part in a theater fire, but the government's failure to disclose such evidence prior to trial did not entitle the defendant to a new trial, in light of the overwhelming evidence of the alleged arsonists' involvement.

The court in U.S. v. Pungitore, 15 F. Supp. 2d 705 (E.D. Pa. 1998), certification denied, 1998 WL 966085 (E.D. Pa. 1998), held that no Brady violation occurred from the nondisclosure of evidence that a police officer saw a murder victim after the time when government witnesses claimed he was dead, which evidence the defendant learned from a book published many years after the murder and the conviction of the defendant for racketeering that was based in part thereon, where the officer was not assigned to the investigation, was not involved in the prosecution, and gave testimony at a postconviction hearing that contradicted the evidence.

The court in U.S. v. Curtis, 931 F.2d 1011 (4th Cir. 1991), held that the prosecution's failure to disclose an exculpatory memorandum of a police officer's interview with a witness, in which the witness exonerated the defendant of any connection with the crack cocaine possessed by the witness when he was arrested, did not create a reasonable probability that the outcome of trial would have been changed if the memorandum had been disclosed, and did not violate due process. The court found that the defendant was aware of the statement prior to trial, the witness testified consistently with the statement at trial, and the evidence against the defendant was overwhelming.

Witness's statements about murders were not material for Brady purposes, where there was no reasonable probability that result of trial would have been different if suppressed documents had been disclosed to defense; statements were incriminating, not exculpatory. Bramblett v. True, 59 Fed. Appx. 1 (4th Cir. 2003), cert. denied, 123 S. Ct. 1779 (U.S. 2003) (4th Cir. 2003).

The court in U.S. v. Gonzales, 121 F.3d 928 (5th Cir. 1997), held that any Brady violation arising from the government's purported suppression of the coconspirator's alleged statement that he did not believe that the defendant had been involved in the drug conspiracy of which he was convicted was harmless. The court found that other witnesses testified that the defendant was not a member of the conspiracy, and the evidence against the defendant was overwhelming.

The court in U.S. v. Kates, 174 F.3d 580 (5th Cir. 1999), in denying the defendant's motion for a new trial from his conviction of possession with intent to distribute crack cocaine, held that even if the government knew that the potential witness changed her story to claim that the defendant did not toss her the baggy of crack cocaine and that she did not know from where the crack came, the testimony to such effect was either not material or exculpatory, and therefore the government did not violate Brady by failing to disclose it, as the testimony that the defendant did not toss the baggy to the potential witness would have been contrary to her sworn statements at her guilty plea hearing, and thus would not be credible or exculpatory, and the testimony that the potential witness did not know the source of the baggy would not have contradicted the officers' testimony that the defendant tossed the baggy to the potential witness, who tried to throw it in a vacant lot.

The court in U.S. v. Clark, 988 F.2d 1459, 38 Fed. R. Evid. Serv. (LCP) 267 (6th Cir. 1993), held that there was no Brady violation in the government's failure to disclose the testimony of three witnesses who recanted seeing strangers seeking directions to the murder victim's street on the night of the murder, as there was no reasonable probability that the result of the trial would have been different had the witnesses been disclosed. The court found that the defense located two of the witnesses and called them to testify at the trial on the defendant's behalf, and the testimony gave little or no support to the defendant's claim of innocence.

There was no Brady violation in capital murder prosecution where witness statements alleged to have been withheld by state were neither exculpatory or material. Smith v. Anderson, 104 F. Supp. 2d 773 (S.D. Ohio 2000).

The court in U.S. v. Asher, 178 F.3d 486 (7th Cir. 1999), petition for cert. filed (U.S. Aug. 18, 1999), held that the statements given to the government by a witness who stole the vehicle to which the defendant allegedly transferred another vehicle's vehicle identification number (VIN) were not material within meaning of Brady, in a prosecution for various offenses arising from the transfer of the VIN, because they did not undermine confidence in the trial or show that the verdict would probably have been different, and the defendant thus was not entitled to a new trial on basis of the government's failure to disclose such statements.

The court in U.S. v. Whitehead, 176 F.3d 1030 (8th Cir. 1999), held that a pretrial statement by a commercial lender at one of the financial institutions involved in the scheme alleged in a bank fraud charge, opining that the defendant did not engage in check kiting, did not have to be disclosed under Brady, where the opinion was made available to the defense through a source other than the government, a defense interview with the lender himself, and the statement was not "material," in that the government's alleged suppression of the statement did not

prevent the statement from surfacing at trial, yet the jury found the defendant guilty.

The court in U.S. v. Zuno-Arce, 44 F.3d 1420 (9th Cir. 1995), as amended, (Feb. 13, 1995), held that in the defendant's prosecution for participating in a conspiracy to murder a drug agent, which murder was claimed by the government to be for the purposes of protecting a drug cartel, the trial court was justified in concluding that the government's withholding of exculpatory evidence in the form of statements allegedly providing an alternative motive for the murder did not affect the outcome of the trial so as to necessitate a new trial under Brady. The court found that although the defendant claimed that the statements showed that the motive for the murder was the agent's romantic relationship with the girlfriend of a member of the cartel, the tape recording of the interrogation and torture of the agent before his murder revealed that the interrogation related solely to the business of the cartel.

In prosecution for wire fraud and money laundering in connection with purported charitable fund-raising scheme, defendant suffered no prejudice from the government's failure to disclose the extent to which two of the donors worked with the FBI, and thus non-disclosure of this information did not give rise to a Brady violation, where the government used such donors only to authenticate tapes of conversations with defendant's solicitors, and they admitted before the jury that they had assisted the FBI. U.S.C.A. Const. Amend. 5. U.S. v. Ciccone, 219 F.3d 1078 (9th Cir. 2000).

Government did not violate defendant's due process rights under Brady when it failed to disclose existence of anonymous letter to coconspirator who testified against defendant, even if letter was favorable to defendant, inasmuch as overwhelming evidence against defendant made it likely that disclosure of letter would not have affected result of trial. U.S.C.A. Const.Amend. 5. U.S. v. Robison, 19 Fed. Appx. 490 (9th Cir. 2001), cert. denied, 122 S. Ct. 634 (U.S. 2001).

Failure to disclose impeachment material concerning false names used by government witness did not prejudice defendant, in prosecution for narcotics trafficking offenses, absent reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. U.S. v. Mendoza-Prado, 314 F.3d 1099 (9th Cir. 2002).

Drug defendant was not denied due process, despite government's inability to produce audible tapes of defendant's encounter with confidential informer, and informer's subsequent statement, absent showing of bad faith or that recordings were only means to prove defendant's innocence; multiple witnesses could have testified to contents of conversations. U.S.C.A. Const Amend 5. U.S. v. Smith, 118 F. Supp. 2d 1125 (D. Colo. 2000).

Government's failure to disclose prior to trial that federal agent had interviewed mail fraud defendant's adult step-daughter was not Brady violation; government did not suppress any Brady material, defendant could have easily obtained information in question, and there was no showing of reasonable probability that outcome of proceedings would have been different if government had disclosed allegedly suppressed information. U.S. v. Day, 405 F.3d 1293 (11th Cir. 2005).

Government's failure to disclose some information to defendant, regarding debriefings of government witnesses, violated neither Jencks Act nor government's Brady obligation, absent showing that government suppressed either exculpatory or impeachment evidence or material raising reasonable probability that result of proceeding would have been different. 18 U.S.C.A. § 3500(a); Fed. Rules Cr.Proc.Rule 16(a)(2), 18 U.S.C.A. U.S. v. Haire, 2004 WL 1379860 (D.C. Cir. 2004).

Prosecution's intent to impeach murder defendant's investigator if he testified was not "exculpatory" evidence, within meaning of prosecution's due process obligation under Brady to disclose material exculpatory evidence. U.S.C.A. Const. Amend. XIV. Martinez v. Com., 590 S.E.2d 57 (Va. Ct. App. 2003).

Prosecution made no Brady violation by failing to disclose to capital murder defendant that witness, whose

testimony was outlined in prosecution's opening statement, refused to testify at trial; even if knowledge of whether witness would testify constituted material evidence, thereby triggering Brady rule, and even if defendant would have changed his trial tactics, defendant did not request such information, and defendant's lack of knowledge had no effect on jury and therefore would not have affected outcome of trial. U.S.C.A. Const Amend XIV; CrR 4.7. State v. Thomas, 83 P.3d 970 (Wash. 2004).

[c] Effect on decision to plead guilty

The court in the following case held that the federal prosecutor's failure to disclose witness statements did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to withdraw his guilty plea.

The court in U.S. v. Patel, 1999 WL 675293 (N.D. Ill. 1999), in denying the defendant's motion under 28 U.S.C.A. § 2255, to vacate his sentence on the ground that the government suppressed information helpful to his claim that he was involved in the sale of 100 kilograms of cocaine that was included in the computation of his sentence and there is a reasonable probability that the result of the sentencing proceeding would have been different had the helpful information not been suppressed, rejected the defendant's contention that he would not have agreed to the sentence had he known that evidence in the government's possession showed that the $2 million in cash seized in the two traffic stops was not attributed to him by the drivers involved. The defendant stated that, had he known what he since discovered, he would have put the government to its proof regarding any drug transactions to be inferred from the seized cash. The defendant claimed that, if the government did not suppress the witness' statements, he would not have agreed that the cocaine equivalent of the cash carried by the witnesses should be attributed to him, resulting in a lower offense level and a lesser period of incarceration. The defendant claimed he would have instead been found to have engaged in an offense involving less than 50 kilograms of cocaine, giving him a base offense level of 34 rather than 36, and potentially, he could have received a sentence 33 months shorter in length than the one imposed. The court held that even assuming the alleged statements to the police occurred, the government knew of them and failed to disclose them, and the defendant had no other adequate access to the statements, his Brady claim failed, as the proffered evidence was not material. The court found that the omitted evidence here, to the extent there is any, did not undermine confidence in the outcome of the defendant's resentencing or his decision to agree to a guideline range on remand, since in light of the other evidence linking the defendant to the drug proceeds and the risks of getting a higher sentence without striking a deal, a reasonable person would have agreed to the government's offer and stipulated to the same sentencing guideline calculations, as the defendant's own words linked him to the seizures.

§ 6.5. Other exculpatory evidence

The following authority considered the constitutional duty of a federal prosecutor to disclose other exculpatory evidence.

Under Brady, the government is required to produce to defendants exculpatory and impeachment evidence that is in its custody, possession, and control. U.S. v. Rivera Rangel, 396 F.3d 476 (1st Cir. 2005).

Exculpatory evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, result of the proceeding would have been different. Bearse v. U.S., 176 F. Supp. 2d 67 (D. Mass. 2001)

Evidence is "material" for purposes of Brady violation if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Owens v. U.S., 236 F. Supp. 2d 122 (D. Mass. 2002).

The government must disclose evidence tending to exculpate defendant. U.S. v. Catalan Roman, 376 F. Supp. 2d 108 (D.P.R. 2005).

Government did not improperly suppress exculpatory evidence, within meaning of Brady doctrine, where defendant knew of essential facts permitting him to take advantage of such evidence. U.S. v. Maldonado, 112 Fed. Appx. 768 (2d Cir. 2004).

Basic rule of Brady v. Maryland and its progeny, which is grounded in due process, is that the government has a constitutional duty to disclose favorable evidence to the accused where such evidence is material either to guilt or punishment; "favorable evidence" includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness. U.S.C.A. Const Amend V. U.S. v. Holihan, 236 F. Supp. 2d 255 (W.D. N.Y. 2002).

Prosecution did not violate Brady by failing to disclose a statement by conspiracy's ringleader that implicated another coconspirator and exculpated defendant; statement was not material since the statement, even if credible, would not have made a difference in the trial because, while it may have come in to impeach the coconspirator, it could not come in for substantive consideration by the jury because it was inadmissible hearsay, and statement would also have been undercut by the fact that Del ringleader's initial inculpatory statement regarding defendant was fully and powerfully corroborated by the defendant's passport and travel itinerary as well as the testimony of other witnesses. U.S. v. Perez, 280 F.3d 318, 58 Fed. R. Evid. Serv. 913 (3d Cir. 2002), cert. denied, 2002 WL 1334943 (U.S. 2002).

Government did not violate its Brady obligation to disclose exculpatory evidence regarding fact that defendant was confidential informant identified by symbol "T-13" in search warrant application papers, where defendant received government's confidential informant file on defendant during discovery and defendant relied on his identity as "T-13" in seeking Franks hearing on warrant application. U.S.C.A. Const Amend V. Strube v. U.S., 206 F. Supp. 2d 677 (E.D. Pa. 2002).

No Brady violation resulted from failure to disclose prior to trial special agent's notes of interview with defendant's former part-time bookkeeper; there was nothing in the interview notes that was not already known or knowable by the defendant through the exercise of reasonable diligence, the interview notes were not exculpatory, and were not material. U.S. v. Ringwalt, 213 F. Supp. 2d 499, 90 A.F.T.R.2d 2002-5572 (E.D. Pa. 2002).

To demonstrate a Brady violation and obtain a new trial based on the suppression of evidence favorable to the accused, the defendant must show that the government suppressed evidence that would have been favorable to the defense and material to guilt or punishment. U.S.C.A. Const Amend V. Morelli v. U.S., 285 F. Supp. 2d 454 (D.N.J. 2003).

Speculation that evidence contained exculpatory material is insufficient to state a Brady violation. U.S. v. Stewart, 325 F. Supp. 2d 474 (D. Del. 2004).

Evidence is material, for purposes of Brady claim, only if there is a reasonable probability that were it disclosed to the defense, the result of the proceedings would be different. U.S.C.A. Const. Amend. 5. Hazel v. U.S., 303 F. Supp. 2d 753 (E.D. Va. 2004).

Evidence is "material," requiring prosecutor to disclose it under Brady, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Morrow v. Dretke, 367 F.3d 309 (5th Cir. 2004).

To assert successful Brady claim, defendant must show that: (1) evidence favorable to defendant (2) was suppressed by government and (3) therefore defendant was prejudiced. U.S.C.A. Const Amend V, XIV. Esparza v. Mitchell, 310 F.3d 414 (6th Cir. 2002).

The Brady rule encompasses both exculpatory and impeachment evidence. Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003).

Brady rule requiring prosecution to disclose exculpatory evidence requires exculpatory evidence to be material, such that there is a "reasonable probability" that, had the evidence been disclosed to the defense, the outcome would have been different, and reasonable probability means a probability sufficient to undermine confidence in the outcome. U.S. v. Jones, 399 F.3d 640, 2005 FED App. 0102P (6th Cir. 2005).

In order to establish a Brady violation, a defendant must show (1) that the government suppressed evidence, (2) that the evidence was favorable to his defense, and (3) that the evidence was material to an issue at trial. U.S. v. Tadros, 310 F.3d 999 (7th Cir. 2002).

Brady requires disclosure only of evidence that is both favorable to the accused and material either to guilt or to punishment. U.S.C.A. Const Amend XIV. Moore v. Casperson, 345 F.3d 474 (7th Cir. 2003).

A reasonable probability of a different result is shown, thus establishing materiality element of Brady claim, when the government's evidentiary suppression of Brady material undermines confidence in the outcome of the trial. U.S. v. Gillaum, 355 F.3d 982 (7th Cir. 2004).

A reasonable probability of a different result is shown, thus establishing materiality element of Brady claim, when the government's evidentiary suppression of Brady material undermines confidence in the outcome of the trial. U.S. v. Gillaum, 372 F.3d 848 (7th Cir. 2004).

In the context of a claim under Brady, that the government suppressed evidence, that the evidence was exculpatory, and that the evidence was material either to guilt or to punishment, materiality is to be determined not by a sufficiency of the evidence test, but rather by consideration of what the government's case would have looked like if the defense had access to the suppressed evidence; materiality is not established through the mere possibility that the suppressed evidence might have influenced the jury. U.S. v. Carman, 314 F.3d 321 (8th Cir. 2002).

To establish "materiality" in the context of Brady, the accused must show there is a reasonable probability that if the allegedly suppressed evidence had been disclosed at trial the result of the proceeding would have been different. Mandacina v. U.S., 328 F.3d 995 (8th Cir. 2003).

Due process violation occurs whenever the government suppresses or fails to disclose material exculpatory evidence. U.S. v. Chase Alone Iron Eyes, 367 F.3d 781 (8th Cir. 2004).

Evidence is material, for purposes of a Brady claim, if there is a reasonable probability that the disclosure of such evidence would have led to a different result at trial. U.S. v. Fox, 396 F.3d 1018 (8th Cir. 2005).

Brady violations are cause for reversal if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S. v. Vieth, 397 F.3d 615 (8th Cir. 2005).

Evidence is material under Brady if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; the critical question, however, is whether the defendant received a trial resulting in a verdict worthy of confidence. U.S. v. Almendares, 397 F.3d 653 (8th Cir. 2005).

Under the Brady rule, the government has a duty to disclose to a defendant, upon request, information that is favorable to an accused where the evidence is material to either guilt or punishment. U.S. v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003).

Defendant's right to discover exculpatory evidence under Brady does not include the unsupervised right to search through the government's files, nor does the right require the prosecution to deliver its entire file to the

defense; rather, Brady obligates the government to disclose only favorable evidence that is material. U.S. v. Jordan, 316 F.3d 1215 (11th Cir. 2003).

If the Government fails to disclose material evidence under Brady and Giglio, that is a constitutional violation which requires an affected conviction to be set aside; however, it is possible for such a Brady or Giglio violation to affect fewer than all the counts in a multi-count case. U.S. v. Lyons, 352 F. Supp. 2d 1231 (M.D. Fla. 2004).

In determining whether evidence was material with regard to the prosecution's duty to disclose evidence favorable to the defense, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond to a defense request for such evidence might have had on the preparation or presentation of the defendant's case. In re Steele, 85 P.3d 444 (Cal. 2004).

Evidence is "material," as element of State's Brady duty to disclose material exculpatory evidence, only if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, which is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const. Amend. 14. State v. Sells, 82 Conn. App. 332, 844 A.2d 235 (2004).

Evidence is "material" for Brady purposes only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Cook v. U.S., 828 A.2d 194 (D.C. 2003).

Undisclosed exculpatory evidence is material if, evaluated in the context of the entire record, it creates a reasonable doubt that did not otherwise exist. Com. v. Castro, 438 Mass. 160, 778 N.E.2d 900 (2002).

Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. State v. Van, 268 Neb. 814, 688 N.W.2d 600 (2004).

"Exculpatory evidence" is evidence which creates a reasonable doubt about the defendant's guilt. State v. Hutton, 595 S.E.2d 876 (S.C. Ct. App. 2004).

Defendant was not entitled to new trial based on alleged Brady violation for state's failure to disclose exculpatory evidence concerning murder victim's criminal history and violent character until voir dire, where, for two months between trial and hearing on motion for new trial, defendant failed to produce any witnesses to substantiate claims. Gutierrez v. State, 85 S.W.3d 446 (Tex. App. Austin 2002), reh'g overruled, (Oct. 3, 2002).

§ 7. Records regarding victim

The court in the following case held that the federal prosecutor's failure to disclose the victim's criminal record did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The United States Supreme Court in U. S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), held that the prosecutor's failure to tender the second-degree-murder victim's criminal record to the defense did not deprive the defendant of a fair trial under Brady where it appeared that the record was not requested by the defense counsel and gave no rise to an inference of perjury, the trial judge remained convinced of the defendant's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and the trial judge's firsthand appraisal of the entire record was thorough and entirely reasonable.

A "reasonable probability of a different result," as required to establish prejudice necessary to Brady violation, means that the overall effect of the undisclosed evidence would undermine confidence in the trial's outcome. U.S.C.A. Const Amend XIV. Mathis v. Berghuis, 202 F. Supp. 2d 715 (E.D. Mich. 2002).

COMMENT:

As noted supra § 2[a], the standard of materiality expressed in Agurs required to find constitutional error under Brady was altered by the Supreme Court in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

2. Physical Evidence and Test Results

§ 8. Tangible objects and crime scenes

[a] Held material

The court in the following case held that the federal prosecutor's suppression of the audio portion of a videotape constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new sentencing hearing for the defendant.

The court in U.S. v. Gregory, 983 F.2d 1069 (6th Cir. 1992), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, held that the government committed a Brady violation by withholding exculpatory information relating to the quantity of marijuana for which the defendants were being sentenced where during discovery, the government provided the defendants with the video portion of a videotape showing officers destroying the marijuana patches, and the defendants requested the audio portion of the tape, but the government declined, asserting that the audio portion was irrelevant. At the defendants' sentencing hearing, the government produced the audio portion of the tape. A detective's voice on the tape estimated the number of marijuana plants to be between 45 and 50, whereas earlier in the sentencing hearing, another detective testified that he counted 112 plants. After hearing the tape, the defendants inquired whether the detective heard on the tape was available to testify, and were told that he was not, and the district court sentenced the defendants on the basis of 112 plants. The court found that the suppressed audiotape was material, since if the government had provided the audio portion of the tape to the defendants earlier, the defendants could have attempted to prove that the lower estimate was more reliable than the higher count, and at a minimum, they could have called the detective heard on the tape to explain how he arrived at an estimate so much lower than the other detective's count. Since the court found that the government withheld material exculpatory information relating to the defendants' punishment, it vacated the defendants' sentences and remanded for resentencing so that they could have an opportunity to develop the basis for the lower plant estimate.

[b] Held not material

The courts in the following cases held that the federal prosecutor's failure to disclose evidence of the tangible objects and crime scenes in question did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The court in U.S. v. Lau, 828 F.2d 871, 23 Fed. R. Evid. Serv. (LCP) 881 (1st Cir. 1987), denial of habeas corpus aff'd by, 39 F.3d 1166 (1st Cir. 1994), held that the government's failure in a prosecution for importation of cocaine to produce taped conversations between the defendant and government agents in which the defendant stated that he strongly opposed any drug dealing and that he suspected someone was using the plane to transport drugs did not constitute a Brady violation.

The court in Maravilla v. U.S., 901 F. Supp. 62 (D.P.R. 1995), aff'd without published op, 95 F.3d 1146 (1st Cir. 1996), cert. denied, 520 U.S. 1202, 117 S. Ct. 1564, 137 L. Ed. 2d 710 (1997), held that suppressed evidence of a bullet found near the murder victim's body was not material, and thus no Brady violation occurred in the defendant's prosecution for robbery and other offenses related to the killing. The court found that the bullet, which appeared to have been used in target practice with a nearby can, was found over 2 1/2 years after

the murder, and the ballistics did not pertain to the main thrust of the government's case.

The court in U.S. v. Phillip, 948 F.2d 241, 34 Fed. R. Evid. Serv. (LCP) 441 (6th Cir. 1991), held that a videotaped interview with the six-year-old brother of the child victim was not material for Brady purposes, in that it was not admissible as evidence and contained no information leading directly to favorable, admissible evidence. The court found that any exculpatory statements by the brother on the videotape could be useful to the defendant only if offered for their truth, and, thus, they would be inadmissible hearsay, and further, the statements were not admissible for impeachment purposes, because the brother did not testify at the trial.

Prosecution's failure to produce log book did not constitute Brady violation, absent any evidence showing reasonable probability that outcome of murder trial would have been different had prosecution produced log book. Davis v. Mitchell, 110 F. Supp. 2d 607 (N.D. Ohio 2000).

Government did not violate its Bradyobligation to disclose material, favorable evidence to defense when it failed to provide information regarding payments made to informant who testified at trial, given district court's pretrial determination that such evidence was irrelevant to defendant's trial. U.S. v. Cruz-Velasco, 224 F.3d 654 (7th Cir. 2000), reh'g and reh'g en banc denied, (99-2425)(Sept. 13, 2000).

The court in U.S. v. Pedraza, 27 F.3d 1515 (10th Cir. 1994), appeal after remand, 73 F.3d 374 (10th Cir. 1995), held that the government's alleged failure to turn over tapes of some of the phone calls between an informant and the drug defendants was not a Brady violation warranting a mistrial, absent convincing evidence that any undisclosed tapes contained evidence that would have altered the outcome of the trial.

The court in U.S. v. Sneed, 34 F.3d 1570 (10th Cir. 1994), held that evidence of a taped conversation between an undercover federal law enforcement officer and a securities fraud suspect was not material to the prosecution of the defendant for securities fraud and, thus, the government's failure to disclose the taped conversation to the defendant pursuant to a discovery request did not violate Brady where the securities fraud suspect was not involved with the defendant's securities fraud scheme.

Drug defendant was not denied due process, despite government's inability to produce audible tapes of defendant's encounter with confidential informer, and informer's subsequent statement, absent showing of bad faith or that recordings were only means to prove defendant's innocence; multiple witnesses could have testified to contents of conversations. U.S.C.A. Const Amend 5. U.S. v. Smith, 118 F. Supp. 2d 1125 (D. Colo. 2000).

The court in U.S. v. Arango, 853 F.2d 818 (11th Cir. 1988), held that evidence of the government's illegal search of the defendant's apartment was not material in the narcotics prosecution, for purposes of the claim that the failure to disclose that evidence violated due process, since it was reasonably probable that pretrial disclosure of the government's warrantless entry into one defendant's apartment would not have resulted in a different jury verdict as to any of the defendants, and that entry could not have been used for impeachment or credibility purposes.

Investigating officer's failure to disclose that she overlooked a rusted gun later found in the vehicle from which defendant fled, or that she had been subjected to disciplinary proceeding for submitting erroneous item descriptions of her investigation, was not so serious that there would have been a reasonable probability that the suppressed evidence would have produced a different result in prosecution for assault with a deadly weapon (ADW) so as to trigger Brady or Jencks Act sanctions, where only evidence of the assault was testimony of other officers, who identified defendant as person who shot at one of them, and retrieved operable pistol from defendant's flight path. 18 U. S.C.A. § 3500. Bell v. U.S., 801 A.2d 117 (D.C. 2002).

§ 9. Psychiatric evaluation

The court in the following case held that the federal prosecutor's suppression of the results of the psychiatric

evaluation of the defendant constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant.

The court in U.S. v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992), held that the narcotics defendant was entitled to a new trial on the basis of a Brady violation resulting from the government's failure to provide the defense with the results of the psychiatric evaluation of the defendant performed at a pretrial detention facility after his unprovoked attack on another inmate recommending that no disciplinary action be taken against the defendant because a mental disorder characterized as paranoid delusional thinking motivated the assault. The court found that the report could have fundamentally altered the defense strategy and raised serious questions concerning the defendant's competence to stand trial.

§ 10. Fingerprint reports

The courts in the following cases held that the federal prosecutor's failure to disclose a fingerprint report did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

Department of Justice solicitation for research proposals directed at validating the reliability of latent fingerprint identification evidence was not material and therefore withholding of solicitation by the government did not violate Brady; in view of other evidence favorable to the government about the reliability and operation of latent fingerprint identification, there was not a reasonable probability that the outcome of the trial would have changed had such evidence been admitted substantively to undermine government's claim that latent fingerprint identification was reliable or to impeach government's principal fingerprint expert witness at trial. U.S. v. Mitchell, 365 F.3d 215 (3d Cir. 2004).

The court in U.S. v. Lawrence, 1988 WL 32242 (E.D. La. 1988), an unpublished opinion, denied the defendant's motion that he was deprived of due process of law in violation of Brady because the government suppressed a fingerprint analysis report that indicated that his fingerprints were not found on the truck or weapon involved in the attempted theft. The court found that the defendant's contention that the alleged suppression of fingerprint analysis was Brady, material was belied by the defendant's testimony at trial that he had pulled on the door of the truck and placed his gun on the ground prior to the arrival of the police, and thus the presence or absence of the defendant's fingerprints on either the gun or the truck on a fingerprint analysis report was immaterial to his conviction.

The court in U.S. v. Sumner, 171 F.3d 636 (8th Cir. 1999), held that in a robbery prosecution under 18 U.S.C.A. § 2111, involving the taking of the victim's automobile, no Brady violation occurred in the prosecutor's failure to disclose that the fingerprint analysis of an envelope found in the car failed to match the defendant's prints; in light of testimony of the victim and two other witnesses that the defendant attacked the victim and left with her car, the court found that there was no reasonable probability that the verdict would have been different had the results of the fingerprint analysis been made known to the defendant prior to trial.

§ 10.2. Ballistics reports

The following authority adjudicated whether the failure of a federal prosecutor to disclose allegedly exculpatory ballistics reports violated due process.

Government's failure to provide defendant charged with carjacking with ballistics reports that would support his theory that shooting was accidental did not deprive defendant of fair trial, even if such reports existed, where intent element of carjacking statute was met regardless of whether shot that killed victim was accidental. 18 U.S.C.A. § 2119. Resto-Diaz v. U.S., 182 F. Supp. 2d 197 (D.P.R. 2002).

§ 10.5. Polygraph results

It has been held that the state did not err in failing to disclose to the defendant the results of a polygraph examination.

Prosecutor's failure to reveal to murder defendant the results of a polygraph examination administered to person who accompanied defendant to murder scene did not violate Brady,though the defense trial theory was that the other person was the murderer and defendant maintained that such person failed his polygraph examination, as the evidence was not shown to be favorable in that the record did not reveal whether such person in fact failed his polygraph examination or what statements he made were judged to be untruthful, and in any event the polygraph results were not material to either guilt or punishment because polygraph results are inadmissible, even for impeachment purposes, in Virginia, and it was unlikely that trial counsel's strategy would have been significantly different had they learned that such person failed the polygraph examination. Goins v. Angelone, 226 F.3d 312 (4th Cir. 2000).

Brady violation did not occur in murder case when state failed to disclose in discovery lie detector test results of its primary corroborating witness; since witness passed the test, the evidence was not favorable to the defendant, and the evidence was disclosed during trial. Pantazes v. State, 141 Md. App. 422, 785 A.2d 865 (2001).

3. Identification of People Other Than Defendant

§ 11. Third party

The court in the following case held that the federal prosecutor's failure to disclose the identity of a third party did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

The court in U.S. v. Ortiz-Miranda, 931 F. Supp. 85 (D.P.R. 1996), held that the prosecution did not violate Brady in failing to disclose to the defendant in a narcotics conspiracy prosecution the draft of the probable cause affidavit prepared by the agent for the arrest of a third party who allegedly had the alias of "Cano Beeper," which alias the identification witness had attributed to the defendant, or to produce the final page of the criminal history report indicating that the computer database showed that no one other than the third party had that alias, as such evidence, collectively, would not have affected the outcome of the trial with any probability. The court found that the witness had visually identified the defendant, the information in the affidavit did nothing to exculpate the defendant, the alias had a meaning similar to that of a nickname shown in the defendant's criminal history, and other evidence linked the defendant with a criminal organization.

Failure of government to identify potential witness to capital murder defendant and to provide him with copy of notes taken in interview with witness did not constitute Brady violation such as would entitle defendant to new trial; co- defendant's statement to witness that he "would kill whoever the f---" he wanted to kill, made in heat of confrontation with another inmate, provided no information as to any specific motive on part of co-defendant in murders and no information regarding defendant's involvement in murders, statements to witness did not indicate that co-defendant acted alone or that defendant was not involved, statement had no impeachment value, and evidence of defendant's guilt was overwhelming. U.S. v. Higgs, 2004 WL 835795 (4th Cir. 2004).

Mistakes in police reports, by which defendant's companion, rather than defendant, was identified as the person found in possession of large amounts of cash when stopped by drug interdiction agents, were both inculpatory and exculpatory, thus requiring government to disclose the mistakes to defense under Brady rule; fact that two separate police reports contained an identical error as to a critical piece of evidence raised opportunity to attack the thoroughness and good faith of the investigation, and mistakes constituted textbook examples of impeachment evidence. U.S. v. Howell, 231 F.3d 615 (9th Cir. 2000).

§ 12. Informant

The court in the following case held that the federal prosecutor's failure to disclose the identity of an informant did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

The court in U.S. v. Hayes, 120 F.3d 739 (8th Cir. 1997), held that the prosecution did not violate Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), in a bank robbery prosecution by refusing to disclose the identity of the confidential informant who provided to the authorities the names of three possible suspects for the robbery, none of whom was either defendant. The court found that the defendants made no showing that the disclosure of this informant's identity was material to the outcome of their case, as they were provided with the names, addresses, dates of birth, social security numbers, and criminal histories of each suspect identified by the informant, they offered no explanation concerning why the information provided was insufficient or what more they expected to learn from the informant, and there simply was no showing to indicate a reasonable probability that disclosure of this informant's identity would have changed the outcome of the trial.

B. Impeachment Evidence

§ 13. Generally

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of evidence impeaching the credibility of witnesses constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant.

The United States Supreme Court in Giglio v. U. S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), held that where the government's case depended almost entirely on the testimony of a witness who was named as a coconspirator but was not indicted, and without it there could have been no indictment and no evidence to carry the case to the jury, such witness' credibility was an important issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to such witness' credibility and the jury was entitled to know of it. Thus, the government's failure to disclose an alleged promise of leniency made to its key witness in return for his testimony constituted a violation of due process and required a new trial.

On remand from the United States Supreme Court's holding in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that evidence withheld by the government is "material," as would require the reversal of a conviction under Brady, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different, the court in Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986), held that the Federal Government's failure to disclose to the defendant that its two key witnesses were paid by the Bureau of Alcohol, Tobacco and Firearms to conduct an investigation of the defendant deprived the defendant of a fair trial, where such evidence could have been used by the defendant to show possible bias on the part of the witnesses and to show that they lied under oath when they indicated that they were not rewarded for testifying.

The court in U.S. v. Latham, 874 F.2d 852 (1st Cir. 1989), held that the government was obligated to provide the defendant with tape recordings of the drug transactions with the officers, as the issue of the officers' credibility was material to the outcome of the trial.

Under Brady requirement to disclose favorable evidence to an accused, "favorable evidence" includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness. U.S. v. Jackson, 345 F.3d 59 (2d Cir. 2003).

The materiality test under Brady is not met, as to the government's omission of exculpatory evidence, unless the non-disclosure of evidence undermines confidence in the outcome of the trial, which can occur if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Walker v. U.S., 306 F. Supp. 2d 215 (N.D. N.Y. 2004).

Under Brady, government has a constitutional duty to disclose favorable evidence to the accused where such evidence is material either to guilt or to punishment; favorable evidence includes evidence that is useful to impeach the credibility of a government witness, and touchstone of materiality is a reasonable probability of a different result. U.S.C.A. Const. Amend. 5. U.S. v. Stewart, 323 F. Supp. 2d 606, Fed. Sec. L. Rep. (CCH) ¶ 92861 (S.D. N.Y. 2004).

Brady duty to disclose favorable evidence that is material either to guilt or punishment covers not only exculpatory material, but also information that could be used to impeach a key government witness. U.S.C.A. Const. Amend. V. U.S. v. Thompson, 349 F. Supp. 2d 369 (N.D. N.Y. 2004).

The court in U.S. v. Perdomo, 929 F.2d 967 (3d Cir. 1991), held that the criminal record of the key prosecution witness was exculpatory and material, for purposes of requiring disclosure under Brady, as illustrated by fact that an acquittal resulted in a case where the criminal history was available regarding the same key prosecution witness. The court found that the fact that the jury had an opportunity to evaluate the credibility of the witness due to other damaging testimony concerning government payments and prior drug usage did not render the criminal history information immaterial.

The court in U.S. v. Pelullo, 105 F.3d 117 (3d Cir. 1997), on remand to, 6 F. Supp. 2d 403 (E.D. Pa. 1998), aff'd, 173 F.3d 131 (3d Cir. 1999), held that not only did the government's failure to disclose the rough notes of a Federal Bureau of Investigation (FBI) agent taken during the interview with the defendant, rough notes of an Internal Revenue Service (IRS) agent taken during the interview with the defendant, and a series of FBI surveillance tapes of the home of the reputed Mafia boss constitutes a Brady violation in a prosecution for wire fraud, as the withheld evidence could have been utilized by the defendant during his first trial to undermine the government's case by way of impeaching the testimony of three government witnesses, but the government's nondisclosure of such potential impeachment evidence, which was both favorable to the defense and material, required reversal of the conviction for wire fraud. The court found that each piece of withheld evidence could have been used by the defense to undermine the credibility of government witnesses, the testimony of the government witnesses was the linchpin of the government's case, and the jury very well could have reached a different verdict had the defendant been armed with the impeachment evidence.

The court in U.S. v. Galvis-Valderamma, 841 F. Supp. 600 (D.N.J. 1994), held that in a prosecution for conspiracy to possess and distribute heroin, the prosecutor's failure to disclose a report containing the postarrest statements of each defendant and the statements made by the arresting officer to the special agent indicating that the bag of heroin found in the automobile driven by the defendant was not actually in plain view violated the defendants' rights under the Brady doctrine, and thus warranted a new trial. The court found that the statements directly contradicted the officer's trial testimony and were exculpatory, the prosecutor had actual knowledge of the report and constructive knowledge of the special agent's statements prior to trial and, even though there was substantial evidence of the defendant's guilt introduced at trial, the undermining of the officer's credibility could have created a reasonable doubt.

The court in U.S. v. Fenech, 943 F. Supp. 480 (E.D. Pa. 1996), held that the government's failure to reveal an information card indicating that the informant's motivation for co-operating with the government was monetary, was a Brady violation, where the government's case rested to a large degree on the testimony of the informant, the credibility of the informant was crucial to the prosecution, and the defense would have been in a much stronger position to impeach the credibility of the informant if the government had provided the defense with the information card prior to trial.

The court in U.S. v. Patrick, 985 F. Supp. 543 (E.D. Pa. 1997), aff'd without published op, 156 F.3d 1226 (3d Cir. 1998), an unpublished opinion, held that the undisclosed documents in question were material because there was a reasonable probability that, had these documents been disclosed to the defendant, the result of his trial would have been different. After collectively reviewing the undisclosed documents in light of the entire trial record, the court concluded that there was a reasonable probability that the outcome of the trial would have been different because the documents would have provided the defendant with information that could have been used to impeach one of the main prosecution witnesses. The court found that the undisclosed documents, if they had been disclosed and used effectively by the defendant's trial counsel, could have made the difference between a conviction and acquittal for the defendant because the undisclosed documents provided the defendant with information that could have been effectively used to impeach the witness' credibility, which could have tipped the scales in favor of the defendant in light of the record of the case, since the evidence against the defendant was anything but overwhelming.

The court in U.S. v. Kelly, 35 F.3d 929 (4th Cir. 1994), held that the government's affidavit for the search warrant for the victim's residence, for purposes of an Internal Revenue Service investigation of the victim, contained material evidence that seriously undermined the victim's credibility and, thus, the government's failure to produce the affidavit to the defendant was a Brady violation requiring reversal for a denial of due process. The court found that the evidence against the defendant was not overwhelming and the question of guilt depended on the credibility of the defendant and the victim. The Court also held that the government's failure to produce a letter written by the victim was a Brady violation requiring reversal for the denial of the defendant's due process rights, in light of the material nature of the letter on the critical issue of the victim's credibility concerning the kidnapping charge, as the victim admitted in the letter that she had feigned illness to remain on sick leave, which together with other evidence could have shown that she defrauded her employer and others to remain on paid sick leave for nine months while working in other capacities.

Impeachment evidence falls within dictates of Brady rule requiring disclosure of exculpatory evidence. Hillman v. Hinkle, 114 F. Supp. 2d 497 (E.D. Va. 2000), appeal dismissed, 238 F.3d 412 (4th Cir. 2000).

Although evidence that key prosecution witness had received a reduced sentence in exchange for favorable testimony in a prior prosecution was exculpatory for Brady purposes, failure to disclose such evidence did not violate Brady; given fact that both of petitioner's attorneys were aware of witness' assistance in the previous case prior to trial, there was no reasonable probability that, had the prosecution disclosed such information sooner, the result of petitioner's murder trial would have been different. U.S.C.A. Const. Amend. XIV. Lovitt v. True, 330 F. Supp. 2d 603 (E.D. Va. 2004).

The court in U.S. v. Fisher, 106 F.3d 622, 46 Fed. R. Evid. Serv. (LCP) 546 (5th Cir. 1997), held that the government's failure to disclose a law enforcement agency's report which contradicted the testimony of the government witness was a Brady violation, warranting a new trial, as the witness was the key witness against the defendant on the count on which the defendant was convicted, and the witness' believability was critical to the jury's finding of guilt on that count, such that disclosure of the report would have made a different result reasonably probable.

The court in U.S. v. Minsky, 963 F.2d 870 (6th Cir. 1992), reh'g denied, (Aug. 20, 1992), held that under Brady, the government improperly refused to disclose the witness' statements made to FBI agents on routine investigation forms, in which the witness stated that he conferred with a third party about the scheme in which the witness and the defendant were involved. The court found that without the statements on the investigation forms, the defense could not understand the significance of the results of a polygraph examination given to the witness, as the defense had no way of knowing that the witness claimed to have told the third party of the alleged scheme and that the third party had denied the conversation, and the jury might have disbelieved the witness' entire testimony if it had learned of his false statements to the FBI.

The court in Schledwitz v. U.S., 169 F.3d 1003, 51 Fed. R. Evid. Serv. (LCP) 352, 1999 FED App. 81P (6th

Cir. 1999), held that the government violated its Brady disclosure obligations by failing to disclose that its key witness was involved in investigating the defendant, was convicted of mail fraud, and interviewed potential witnesses in the case against him, where the government presented the key witness as a "neutral and disinterested" expert, when, in fact, the witness had been actively and intimately involved in the investigation against the defendant. Had the defense team known that the witness investigated the defendant for years, it would have sought to elicit that fact on cross-examination, and such impeachment would have dissipated the false impression that the witness was not a garden-variety, neutral expert, but an active investigator involved in the case.

Government's disclosure obligation under Brady extends to impeachment evidence, as well as to exculpatory evidence. U.S. v. Ridley, 199 F. Supp. 2d 704 (S.D. Ohio 2001).

The court in U.S. v. Boyd, 55 F.3d 239 (7th Cir. 1995), held that the trial court did not abuse its discretion by granting a new trial based on the government's failure, in violation of Brady v. Maryland, to reveal to the defense either the drug use and drug dealing by prisoner witnesses during the trial or the "continuous stream of unlawful" favors the prosecution gave those witnesses. The court found that there was a reasonable probability that the jury would have acquitted the defendants on at least some counts had it disbelieved the testimony by those witnesses, which the jury might have done if the witnesses had not testified falsely about their continued use of drugs and/or if the government had revealed the witness' continued use of drugs and favors that the prosecution extended.

The court in U.S. v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993), held that the suppressed information regarding continuing drug use and substantial undisclosed benefits provided to key government co-operating inmate witnesses was material evidence for Brady purposes, as it appeared that the lead prosecutor suppressed the information in bad faith to improve the government's chances of victory in the defendants' trial on RICO and narcotics charges for supplying illegal drugs to a Chicago street gang. Thus, the court held that a new trial for the defendants convicted of RICO and narcotics charges for supplying illegal drugs to the Chicago street gang was the proper remedy for the prosecutorial misconduct in failing to disclose information relating to the continuing illegal drug use by the key government co-operating inmate witnesses during the period of incarceration and postarrest, postplea co-operation with the government.

The court in U.S. v. Andrews, 824 F. Supp. 1273 (N.D. Ill. 1993), held that by failing to disclose evidence of drug-testing results and the discipline of government witnesses while in protective custody, as well as evidence regarding the conduct of and benefits conferred on the witnesses while in custody that might reflect on their credibility, the government prosecutors deprived the defense counsel of a reasonable opportunity to challenge the witnesses' credibility and to rebut misstatements during trial as to the conduct of the witnesses while in custody, in violation of due process, and the defendants were entitled to a new trial inasmuch as such evidence was material to the central defense strategy of attacking the government witnesses' credibility.

The court in U.S. v. Griffin, 856 F. Supp. 1293 (N.D. Ill. 1994), held that the government's failure to disclose unit log books from the correctional facility which contained evidence of illegal drug acquisition and illegal drug use by the co-operating government witnesses around the time of their testimony and its failure to disclose taped conversations involving the co-operating witnesses over the United States Attorney office's phone line revealing substantial drug trafficking was Brady material that should have been produced by government counsel. Even though the defendant was entitled to a new trial, the court held that the case should be dismissed based on the exercise of prosecutorial discretion that the case should not go forward.

The court in U.S. v. O'Conner, 64 F.3d 355 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Oct. 16, 1995), held that a Brady violation occurring when the government failed to inform the defendant of threats by one government witness against another and attempts to influence a second government witness' testimony was reversible error with respect to the convictions on those substantive drug counts and conspiracy counts where the testimony of those government witnesses provided the only evidence. The court found that the evidence of threats, combined with undisclosed statements from interview reports, could have caused the jury to disbelieve the government witnesses.

Prosecutors' duty to turn over all exculpatory evidence to criminal defendants includes evidence going to the credibility of a government witness, such as promises that may have been made to that witness. U.S. v. Rushing, 313 F.3d 428 (8th Cir. 2002).

To establish a Brady violation, a defendant must show that: (1) prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material. U.S. v. Mansker, 240 F. Supp. 2d 902 (N.D. Iowa 2003).

The court in U.S. v. Shaffer, 789 F.2d 682 (9th Cir. 1986), held that evidence regarding the government witness in a prosecution for a narcotics and income tax violation was material and should have been disclosed to the defendant who requested exculpatory information, and failure to disclose the impeachment evidence regarding the key government witness undermined confidence in the trial outcome, where the government allegedly failed to disclose the fact that the witness was a paid informant in a separate heroin operation, and the full benefits and promises that the witness received in exchange for his co-operation, including the government's failure to initiate asset forfeiture proceedings to acquire assets gotten through drug profiteering and the failure to enforce the witness' civil tax liability for unpaid taxes. Thus, the court held that since the government did not adequately disclose information which could have been used to impeach the credibility of the government witness whose testimony was critical to the conviction of the defendant, a new trial was warranted.

The court in U.S. v. Brumel-Alvarez, 991 F.2d 1452, 125 A.L.R. Fed. 675 (9th Cir. 1992), reh'g denied, (Apr. 22, 1993), held that the information in a memorandum written by a government witness, which the government failed to disclose to the defendants in a drug trafficking conspiracy, was "material" for purposes of establishing a Brady violation. The court found that the information in the memorandum indicated that the government informant was running the investigation and was in a position to manipulate Customs, the Drug Enforcement Agency (DEA), and the defendants, and given this information, the jury might have thought that the government's arguments that the informant was reliable were incredible and might have focused more on the arguments that tended to show that the informant might have lied. The court thus held that the government's withholding of the memorandum violated the defendants' right to due process under the Brady Rule since the memorandum was relevant to the informant's credibility.

The court in U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993), held that where the defense counsel had made a Brady request about whether the key witness signed a co-operation agreement, and a later request for a missing witness instruction foundered because the defense counsel was unaware of the agreement, the government was required under Brady to disclose its existence, since the evidence was favorable to the accused because it might have convinced the court to give the instruction, and the failure to do so was a material violation of Brady. The requested instruction would have told the jury that the key witness was not only available, but that the prosecution could compel his appearance if it so chose, and this might have led the jury to infer that his testimony would have been unfavorable to it. Even if the court refused to give the instruction, evidence of the agreement would have strengthened the defense counsel's argument to the jury that his live testimony would have explained away his hearsay testimony. The court found a "reasonable probability" that, had evidence of the co-operation agreement been disclosed, the result would have been different, and the evidence was therefore material. In light of the prosecutorial misconduct in the case, the court vacated the judgment of conviction and remanded for the district court to determine whether to retry the defendants or dismiss the indictment with prejudice as a sanction for the government's misbehavior.

The court in U.S. v. Maya-Azua, 30 F.3d 140 (9th Cir. 1994), a case not recommended for full text publication and which may be cited only in accordance with Rule 36-3 of the Ninth Circuit, reversed the defendant's convictions for conspiracy to possess with intent to distribute cocaine and possession with intent to distribute and distribution of cocaine based on the government's failure to disclose evidence that impeached the government's critical witness, a confidential informant, as required by Brady. The court found that the essential elements of the government's case against the defendant rested on the testimony of the confidential informant, and on his credibility. The prosecutor failed to disclose a file containing a report showing that the confidential informant

falsely claimed to border officials that he was a United States citizen, and that the officials released him into the custody of a DEA agent without prosecution. The court held that the result of the proceeding would have been different if the information in the confidential informant's file had been disclosed, as the evidence that he lied to border officials and then used his position as an informant for the DEA to avoid prosecution was strong impeachment evidence, as it demonstrated his propensity to lie to government agents, and his dependency on the DEA.

The court in U.S. v. Steinberg, 99 F.3d 1486, 45 Fed. R. Evid. Serv. (LCP) 1138 (9th Cir. 1996) (disapproved of on other grounds by, U.S. v. Foster, 165 F.3d 689 (9th Cir. 1999)), held that the withheld exculpatory evidence which could have been used to impeach the key witness was sufficiently material to create a reasonable probability of a different result had the evidence been disclosed and, thus, established a Brady violation and required a new trial. The court found that although the informant's credibility was explored through questions relating to his plea agreement, the informant was the key witness whose testimony was not otherwise corroborated, and the withheld evidence showed that the informant was engaged in ongoing criminal activities during the time he was acting as a government informant in the case, and that he owed the defendant money. The court also held, however, that the government's Brady violation for failure to disclose evidence that affected the credibility of the key witness was not so grossly shocking and so outrageous as to violate the universal sense of justice and, thus, did not rise to a level requiring dismissal of the indictment.

A panel of the Ninth Circuit in U.S. v. Wood, 112 F.3d 518 (9th Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 36-3 of the Ninth Circuit, after finding in U.S. v. Wood, 57 F.3d 733 (9th Cir. 1995), appeal after remand, 112 F.3d 518 (9th Cir. 1997), that the Food and Drug Administration's (FDA) Investigational New Drug applications (INDs) relative to gamma hydroxybutrate and gamma hydroxybutyric acid sodium salt (GHB) were Brady material that the government had a duty to disclose and the failure to do so denied due process of law to the defendant charged with a conspiracy to defraud the FDA by obstructing its function of ensuring that prescription drugs are safe and effective and dispensed pursuant to a prescription from a licensed practitioner and with aiding and abetting his codefendant in distributing GHB without labeling that stated the manufacturer, distributor, and quantity, and determining that Food and Drug Administration's (FDA) Investigational New Drug applications (INDs) relative to gamma hydroxybutrate and gamma hydroxybutyric acid sodium salt (GHB) were Brady material that should have been provided by the prosecution, and remanding to the district court to determine the materiality of the INDs, which held that the INDs were not material to the defendant's conviction on the GHB counts, [FN77] disagreed with the district court's finding of immateriality and reversed the defendant's conviction on the charged counts, the court found that the defendant's felony convictions depended on whether the jury believed his expert or the government's experts, and the undisclosed INDs would have helped the defendant to impeach one of the government's experts with "a reasonable probability of a different result." Thus, the reviewing court held that while the undisclosed material did not prove the defendant's innocence it did meet the threshold of Brady materiality as it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Mistakes in police reports, by which defendant's companion, rather than defendant, was identified as the person found in possession of large amounts of cash when stopped by drug interdiction agents, were both inculpatory and exculpatory, thus requiring government to disclose the mistakes to defense under Brady rule; fact that two separate police reports contained an identical error as to a critical piece of evidence raised opportunity to attack the thoroughness and good faith of the investigation, and mistakes constituted textbook examples of impeachment evidence. U.S. v. Howell, 231 F.3d 615 (9th Cir. 2000).

Brady encompasses impeachment evidence as well as exculpatory evidence. U.S. v. Antonakeas, 255 F.3d 714, 57 Fed. R. Evid. Serv. 266 (9th Cir. 2001).

Impeachment evidence is favorable Brady/Giglio material when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence. U.S. v. Blanco, 392 F.3d 382 (9th Cir. 2004).

Prosecution's Brady obligation to disclose to the accused material evidence favorable to the accused extends to impeachment evidence, and to evidence that was not requested by the defense. U.S. v. Park, 319 F. Supp. 2d 1177 (D. Guam 2004).

The court in U.S. v. Scheer, 168 F.3d 445 (11th Cir. 1999), in reversing the conviction of the defendant for misapplication of bank funds and making false statements for purpose of influencing a financial institution, held that the prosecutor's threatening remark to the key prosecution witness constituted material impeachment evidence that could have substantially undermined the critical value of the witness' testimony, and thus the government's failure to disclose this incident to the defendant sufficiently undermined the court of appeals' confidence in the integrity of verdict to warrant reversal, though the witness testified that he was not influenced by the prosecutor's threat, and there was other evidence against the defendant, where other witnesses gave less conclusive and noncumulative testimony, the threatened witness was central to the government's case, and his credibility was the focal point of the case.

The court in U.S. v. Smith, 77 F.3d 511 (D.C. Cir. 1996), held that the dismissal of superior court charges against the prosecution witness, as part of a plea agreement in federal court, was material and, therefore, should have been disclosed to the defendant under the due process clause, and thus warranted a new trial, even though the prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether the witness was intentionally concealing the agreement. The court found that armed with full disclosure, the defense counsel could have pursued a devastating cross-examination, challenging the witness' assertion that he was testifying only to "get a fresh start" and suggesting that the witness might have deliberately concealed other favors from the government.

The court in U.S. v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996), held that undisclosed evidence that the prosecution witness, who testified that the defendant paid him to keep drugs in his apartment, lied under oath in a previous court proceeding involving the same drug conspiracy was "material" for Brady purposes, and thus warranted a new trial, where the witness was impeached on the basis that he was a cocaine addict and a co-operating witness, but not based on the prior perjury, and where the witness' testimony was an essential part of the prosecution's case since it established the only direct connection between the defendant and the drugs found in the search of the witness' apartment.

Government's constitutional duty to disclose material evidence favorable to a criminal defendant in time for the defendant to make effective use of it at trial extends to evidence that could be used to impeach the credibility of a government witness. Ginyard v. U.S., 816 A.2d 21 (D.C. 2003).

If a court finds that a reasonable probability exists that had evidence been disclosed to defense, result of proceeding would have been different, then such evidence is material under Brady, and its suppression from the defendant results in constitutional error thereby warranting a new trial. U.S.C.A. Const. Amend. XIV. Turney v. State, 759 N.E.2d 671 (Ind. Ct. App. 2001).

State's failure to disclose prior statements of witness, in which witness stated she learned from defendant's girlfriend that defendant had taken victim into woods, hit victim on head, and shot victim in the head, constituted Brady violation; statement was inconsistent with witness's prior statement that defendant told her he killed victim by hitting her in the head, and thus was favorable to defendant for impeachment purposes. State v. Tate, 880 So. 2d 255 (La. Ct. App. 2d Cir. 2004).

To establish a Brady violation, the defendant must establish that: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the defendant did not possess the evidence nor could he have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. U.S.C.A. Const Amend XIV. State v. DuBray, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (2003).

The state's duty to disclose encompasses impeachment evidence as well as exculpatory evidence. State v. Holadia, 149 N.C. App. 248, 561 S.E.2d 514 (2002), writ denied, review denied, 562 S.E.2d 432 (N.C. 2002).

The duty of the state to produce evidence favorable to the accused can encompass impeaching material as well as exculpatory evidence. State v. Chalk, 816 A.2d 413 (R.I. 2002).

Impeachment evidence, as well as exculpatory evidence, is included within the scope of the Brady rule. Potter v. State, 74 S.W.3d 105 (Tex. App. Waco 2002).

[b] Held not material

The courts in the following cases held that the government's failure to disclose impeachment evidence did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

The court in U.S. v. Sanchez, 917 F.2d 607 (1st Cir. 1990), held that the government's failure to reveal that its informant received payments from state investigators for similar services was not the type of newly discovered evidence that would have required a new trial in a drug conspiracy prosecution, where the informant was extensively cross-examined about payments he received from federal agencies in connection with federal investigations, where the newly discovered payments by state investigators were small in comparison to the federal payments, where the defense made no specific pretrial discovery request for payments received by the informant from state or local sources in unrelated cases, and where the evidence was merely cumulative.

The court in U.S. v. Perkins, 926 F.2d 1271 (1st Cir. 1991), reh'g denied, (Mar. 19, 1991), held that the government's nondisclosure of an in camera submission which could have been used to impeach the prosecution witness during the prosecution on drug charges did not require reversal of the convictions where the nondisclosed evidence was of marginal materiality, was cumulative of other more powerful evidence revealed to the defense and used by it to impeach the witness, the witness was the lesser of two principal witnesses whose testimony was bolstered by tapes and other evidence, and the defendant was aware of the witness' status as a government informant.

The court in Barrett v. U.S., 965 F.2d 1184 (1st Cir. 1992), dismissal of postconviction relief aff'd, 178 F.3d 34 (1st Cir. 1999), held that a memorandum and related documents about a pending murder indictment against the prosecution witness in Arkansas and the possibility of a plea arrangement in exchange for the witness' agreement to testify against the defendant were cumulative and were not material to the defendant's voir dire examination of the witness, and, thus, due process was not violated by the government's failure to disclose the memorandum and documents. The court found that at the voir dire the defendant elicited the pending murder indictment in Arkansas, but relinquished the opportunity to examine the witness concerning any agreement or understandings or hopes for leniency.

The court in U.S. v. Stern, 13 F.3d 489 (1st Cir. 1994), held that a witness' testimony before the grand jury that he did not have any knowledge of a payment and performance bond for a government contract, which took on the character of impeachment evidence when the witness testified at trial that the defendant asked the witness to forge the bond, could not conceivably have altered the outcome of the defendant's trial on charges relating to counterfeit of the bond, even if the grand jury testimony were made available to the defendant before trial, and, thus, the government's failure to disclose such testimony did not constitute a Brady violation warranting reversal. The court found that the jury acquitted the defendant on the counterfeiting count despite the witness' direct inculpation of the defendant, and the knowledge element of the count of uttering a counterfeit bond was confirmed by the direct testimony of another witness and the defendant's conduct.

The court in U.S. v. Brimage, 115 F.3d 73 (1st Cir. 1997), cert. denied, 118 S. Ct. 321, 139 L. Ed. 2d 248 (U.S. 1997) and cert. denied, 118 S. Ct. 321, 139 L. Ed. 2d 248 (U.S. 1997), held that evidence that the charge

against the informant was reduced because the informant's sister worked as an informant for state police in the drug case was not material to the guilt of the defendants against whom the informant testified, and thus, the government's failure to disclose the allegedly impeaching information did not constitute a Brady violation, where the defendants knew prior to the trial that the informant was arrested and charged with cocaine trafficking, that the charge was reduced and that the informant was sentenced to time served and evidence other than the informant's testimony supported the defendants' convictions.

The court in U.S. v. Cunan, 152 F.3d 29 (1st Cir. 1998), held that the anticipated witness' claimed memory loss, which prevented him from testifying in the money laundering prosecution that he handed the defendant envelopes of cash in exchange for checks, was not "material" evidence that government had to disclose under Brady; the court found that the witness did not retract his statements that he laundered money through the defendants' business, the evidence had impeachment value only if the witness testified, and it was unlikely the defendants would call the witness themselves.

The court in U.S. v. Rodriguez, 162 F.3d 135, 50 Fed. R. Evid. Serv. (LCP) 1030 (1st Cir. 1998), reh'g and suggestion for reh'g en banc denied, (Jan. 20, 1999) and cert. denied, 119 S. Ct. 2034, 143 L. Ed. 2d 1044 (U.S. 1999), held that the government's alleged failure to disclose to the defendant evidence that the government witness, who testified that she was a financial consultant, actually made her living as a prostitute, or evidence that, at the time she testified, the witness was charged with operating a motor vehicle without a license, did not warrant a new trial under Brady; the court found that other evidence of the witness' past, including drug use and prostitution, put the jury on notice about the witness' tendency to commit perjury, the thrust of the witness' testimony was corroborated by others, and there was no reasonable possibility that evidence of a traffic citation would have influenced the verdict.

While government should have informed defense that one of its witnesses had been promised favorable treatment in related state court proceedings in exchange for his testimony, notwithstanding that this promise was never reduced to writing, government's failure to disclose this impeachment evidence was not prejudicial, where witness had admitted full extent of his arrangement with government during cross-examination. U.S. v. Soto-Beniquez, 356 F.3d 1 (1st Cir. 2004).

Suppressed impeachment evidence is immaterial under Brady if evidence is cumulative or impeaches on a collateral issue. U.S.C.A. Const Amend V. Conley v. U.S., 415 F.3d 183 (1st Cir. 2005).

Evidence in narcotics conspiracy case allegedly withheld by government concerning prosecution witness's aliases, fraudulent transactions, and involvement in drug dealings was immaterial, precluding finding of Brady violation, where record contained fertile ground for attack on witness's credibility and defense attorney mounted such attack. Reyes-Vejerano v. U.S., 117 F. Supp. 2d 103 (D.P.R. 2000).

The court in U. S. v. Provenzano, 615 F.2d 37 (2d Cir. 1980), held that assuming arguendo that all of the material sought by the defendant in the conspiracy prosecution was the subject of specific requests for production and was properly producible by the government, where the information related solely to the motivation of a single government witness, whose testimony helped identify the defendant's voice on a tape recording, but did not otherwise bear on evidence of the defendant's illegal activities, the failure of the government to produce the material was not violative of due process in that there was no reasonable likelihood that it would have affected the outcome of the trial.

The court in U. S. v. Provenzano, 615 F.2d 37 (2d Cir. 1980), relied on the Agurs standards of materiality,

The court in U.S. v. Helmsley, 985 F.2d 1202, 71 A.F.T.R.2d (P-H) ¶ 93- 1010 (2d Cir. 1993), held that no Brady v. Maryland violation occurred in a prosecution for income tax violations, despite the defendant's claim that the government made insufficient disclosure of materials concerning the defendant's accountant, with whom the government allegedly made a "deal." The court found that the prosecutor stated that the decision not to

prosecute the accountant was reached independently of any concern for the defendant's case, and the defendant showed no more than a slightly enhanced basis for challenging the accountant's credibility, which was already substantially attacked at trial.

The court in U.S. v. Gambino, 59 F.3d 353, 42 Fed. R. Evid. Serv. (LCP) 813 (2d Cir. 1995), held that although a letter implicating the government witness in narcotics trafficking was Brady material that should have been made available to the defense in the racketeering prosecution, the failure to disclose the letter did not violate due process and did not require a new trial. The court found that the disclosure of the letter would not have affected the result of the defendant's trial, since the witness was impeached with his plea agreement and criminal record. The Court also determined that a Brady violation occurred when the government failed to disclose a tape recording of the government witness instructing another witness to lie to the grand jury did not require a new trial in the racketeering prosecution. The Court found that the disclosure of the tape would not have changed the result of the trial, since the witness was cross-examined about his criminal history, including 19 murders.

While the court in U.S. v. Payne, 63 F.3d 1200 (2d Cir. 1995), held that the affidavit in which the prosecution witness, who was facing charges arising out of the same drug offenses, stated that she never conspired with anybody to sell drugs and never sold drugs from a particular apartment was relevant for Brady purposes where the defense counsel attempted to impeach her by showing her incentive to implicate the defendant as a means of gaining the government's support for a lesser sentence in her own case and the affidavit would have added concrete evidence that she previously lied under oath with respect to some of the questions which the jury was to decide, the court held that the failure of the government to disclose to the defense the fact that the prosecution witness filed an affidavit in court stating that she never conspired with anyone to sell drugs did not require reversal where her testimony was only a fraction of the evidence linking the defendant to the narcotics dealing.

The court in U.S. v. Wong, 78 F.3d 73 (2d Cir. 1996), held that a new trial was not warranted based on newly discovered evidence that, the defendant claimed, showed that the codefendant received an undisclosed consideration for testifying against the defendant of an unusually low bail figure set for the codefendant's cousin, who subsequently fled the country. The court found that even if the bail figure was unusually low, the defendant could not establish a cause and effect relationship between the codefendant's co-operation agreement and the setting of the bail amount, which occurred five months earlier, and the evidence was cumulative of the impeachment evidence presented at the trial of the codefendant's interest and bias, including his written agreement with the government.

The court in U.S. v. Amiel, 95 F.3d 135 (2d Cir. 1996), held that suppressed evidence that may have been used to impeach government witnesses was immaterial in the mail fraud prosecution of artwork distributors, precluding the finding of a Brady violation, where the impeachment evidence was cumulative of the information disclosed during cross-examination and independent evidence tied each defendant to the criminal conduct.

The court in U.S. v. Zagari, 111 F.3d 307, 46 Fed. R. Evid. Serv. (LCP) 1437, 27 Envtl. L. Rep. 20992 (2d Cir. 1997), held that evidence relating to the government witness' alleged insanity and neo-Nazi leanings was not material to the defendants' convictions, for purposes of a Brady claim. The court found that the jury had information with which to evaluate the witness' credibility, and, as to the convicted counts, the jury did not rely entirely on the witness' testimony.

The court in U.S. v. Orena, 145 F.3d 551 (2d Cir. 1998), cert. denied, 119 S. Ct. 805, 142 L. Ed. 2d 665 (U.S. 1999), held that evidence that the coconspirator who was also a government informant previously lied to the Federal Bureau of Investigation about his involvement with several murders was not "material evidence" under Brady, and thus, the government's failure to disclose that evidence did not warrant a new trial in the murder prosecution, despite the claim that the defendants could have used such evidence to impeach the credibility of the coconspirator's out-of-court statements that were admitted at trial; the court found that there was substantial evidence independent of the coconspirator's statements to link the defendants to the murders, including testimony from an accomplice witness that the defendants openly boasted that they had succeeded in murdering the victim,

and the defendants already possessed devastating evidence with which to assail the coconspirator's credibility.

The court in U.S. v. Austin, 1999 WL 627671 (2d Cir. 1999), an unpublished disposition, an appeal from the defendant's conviction for mail fraud, held that although the evidence of the postal inspector interviews of the person who received the fraudulent payments resulting from the defendant's mail fraud would have tended to discredit a witness' testimony that the defendant knew the recipient of the funds, held that such evidence could not have affected the verdict, and thus did not find a Brady violation. The court noted that the question whether the defendant met the recipient of the funds did not bear in any significant way on the defendant's role regarding the fraudulently mailed loan applications.

Defendant, who was convicted of conspiracy and possession of cocaine and cocaine base, failed to show that there was reasonable probability that disclosure of impeachment evidence at pretrial suppression hearing regarding confidential government informant's behavior would have resulted in suppression of cocaine seized upon defendant's arrest in reliance on informant's data, as required to support claim that government's violation of defendant's Brady rights resulted in prejudice; even if Brady applied to pretrial suppression hearings, government had probable cause to arrest defendant, and informant was known to be reliable and was not likely to be impeached by behavior evidence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1)(A, B), 21 U.S.C.A. § 841(a), 21 U.S.C.A. § 841(b). U.S. v. Barker, 69 Fed. Appx. 497 (2d Cir. 2003).

The court in Moses v. U.S., 1998 WL 255401 (S.D.N.Y. 1998), an unpublished opinion, rejected the defendant's contention that his due process rights were violated as a result of the government's failure to disclose evidence that could be used to impeach the testimony of the DEA agent. The United States conceded that the United States Attorney's Office commenced an investigation into allegations concerning misconduct of certain members of the DEA, the allegations against the DEA agent were that in March 1987, he and another agent beat up two defendants and, along with others, broke into a safe without the owner's consent, and the Assistant United States Attorney did not disclose any information regarding these allegations to the defendant. Since the defendant's role in the conspiracy, however, was overwhelmingly established by the testimony of his coconspirators, and the government presented evidence concerning the surveillance of the transaction through a DEA source other than the DEA agent in question, the court held that the Brady/Giglio material withheld would not have undermined the most essential evidence presented by the government in its case.

Government's failure to produce purely cumulative impeachment material did not violate Brady. U.S. v. Davidson, 308 F. Supp. 2d 461 (S.D. N.Y. 2004).

The court in U.S. v. Adams, 759 F.2d 1099, 17 Fed. R. Evid. Serv. (LCP) 1244 (3d Cir. 1985), held that a new trial was not merited on the theory that the government's failure to disclose the government witness' participation in a robbery violated Brady v. Maryland, since the information was merely impeaching and almost certainly would not have produced an acquittal, and thus the failure to disclose was harmless.

The court in U.S. v. Pflaumer, 774 F.2d 1224 (3d Cir. 1985), held that the prosecution's failure to disclose Brady material, consisting of information that the government witness received a promise of use immunity in return for information and testimony, did not warrant a new trial in a prosecution for mail fraud and conspiracy to commit mail fraud. The court found that other evidence of the defendant's guilt was substantial, the prosecution did not rely on the government witness' testimony in his closing argument, and the defense counsel used the witness' testimony in his closing argument as supportive of the defendant's defense.

CAUTION:

The United States Supreme Court in United States v. Pflaumer, 473 U.S. 922, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985), vacated the Third Circuit's original opinion in the Pflaumer matter, in light of its opinion of United States v. Bagley, 469 U.S. 1084, 105 S. Ct. 587, 83 L. Ed. 2d 697 (1984). The Oxman court held that the promise of use immunity was "significant impeachment evidence" and determined its materiality under U. S. v.

Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). The Oxman court held that the prosecutor should have appreciated that the disclosure of the existence of substantial benefits conferred on all of the government's principal incriminatory witnesses might have led the jury to doubt their truthfulness, and concluded that this gave rise to a substantial basis for claiming materiality of the use immunity agreement. On remand to the Third Circuit in light of the new Bagley standard of materiality, the circuit held in U.S. v. Pflaumer, 774 F.2d 1224 (3d Cir. 1985), that since the standard of "materiality" announced in Bagley is significantly different from the one that was previously applied in the case, the circuit had to review the record, the findings of the district court, and the contentions of the parties to determine whether, under the Bagley standard, the government's failure to disclose that use immunity granted to the government's witness would have engendered a reasonable probability that the result of the defendant's trial would have been different.

The court in U.S. v. Hill, 976 F.2d 132, 36 Fed. R. Evid. Serv. (LCP) 732 (3d Cir. 1992), held that the prosecutor's failure to supply the defendant with the grand jury testimony of two federal agents prior to trial did not constitute a material Brady violation where the defendant had access to hundreds of pages of reports compiled by the agents, the testimony of the agents before the grand jury tracked those reports nearly verbatim, and access to the agents' testimony would not have permitted the defendant to engage in any meaningful additional impeachment of his coconspirator's trial testimony concerning the defendant's presence at several drug transactions.

The court in U.S. v. Thornton, 1 F.3d 149 (3d Cir. 1993), held that the prosecutor's failure to disclose Drug Enforcement Administration (DEA) payments to the co-operating witnesses did not require a new trial even though the information not disclosed fell within the Brady rule and should have been disclosed, in light of the showing that the defendant was convicted on the basis of the strength of the government witnesses. The court found that there was no reasonable probability that the outcome of the trial would have been different if the DEA payments had been disclosed.

The court in U.S. v. Pelullo, 14 F.3d 881 (3d Cir. 1994), held that in the defendant's trial for wire fraud based on the diversion of funds, a Brady violation, resulting from the prosecutor's failure to divulge a memorandum detailing the interview with the witness which set forth facts inconsistent with the witness' testimony, did not warrant reversal. The court found that the violation did not undermine confidence in the outcome of the trial, inasmuch as some inconsistencies in dates would not devastate the thrust of the witness' testimony on the diversion of the funds.

The court in U.S. v. Veksler, 62 F.3d 544, 79 A.F.T.R.2d (P-H) ¶ 97-886 (3d Cir. 1995), held that evidence of a grand jury investigation was not "material," so its nondisclosure could not be a Brady violation, though the defendant contended that the undisclosed evidence could have led the jury to conclude that the witness' testimony was designed to further his own interests in connection with the ongoing grand jury investigation, where the witness was unaware of the ongoing nature of the investigation and never asked the government to intercede on his behalf in connection with any such investigation.

Government's failure to divulge tapes allegedly relevant to key prosecution witness' motive to falsify his connection to defendant to secure a reduced sentence or a financial windfall did not impair the integrity of the trial as a whole or put the case in such a different light so as to undermine confidence in the verdict; that evidence would have been merely cumulative since government disclosed to defendant a wealth of impeachment materials concerning witness, and thus defendant's attorney was not precluded from pursuing any theory of impeachment with respect to witness. U.S.C.A. Const Amend XIV. U.S. v. Milan, 304 F.3d 273 (3d Cir. 2002).

The court in U.S. v. Hankins, 872 F. Supp. 170 (D.N.J. 1995), held that cumulative evidence of inconsistencies in the van owner's testimony regarding the use of the van to transport and sell drugs was not sufficient to require a new trial even though the prosecutor's failure to turn over the file to the defendant was a clear Brady violation. The court found that the jury could totally disregard the owner's testimony and still have sufficient evidence to convict.

The court in U.S. v. Gonzalez, 938 F. Supp. 1199, 45 Fed. R. Evid. Serv. (LCP) 924 (D. Del. 1996), judgment aff'd without published op, 127 F.3d 1097 (3d Cir. 1997), cert. denied, 118 S. Ct. 1099, 140 L. Ed. 2d 154 (U.S. 1998), held that undisclosed Federal Bureau of Investigation (FBI) documents containing allegations about one of its former chemist's sloppy work environment and failure to follow FBI protocol for forensic analysis was not Brady material warranting a new trial in a prosecution for the interstate transportation of an explosive device where the former chemist testified as a government expert about the construction of the bomb recovered from the crime scene. The court found that the chemist's testimony was not critical to the government's case, because how the bomb was constructed was never disputed, and the case against the defendant was overwhelming.

The court in U.S. v. Terry, 1997 WL 438831 (E.D. Pa. 1997), an unpublished opinion, held that while the evidence about the FBI agent in question was (1) suppressed by the prosecution, and was (2) favorable to the defense, the evidence was not material. The court found that disclosure of the agent's besmirched reputation within the FBI would not have created a "reasonable probability" of a different result, and, therefore, while the allegations levied against the agent were serious, and the better course by the government would have been to disclose this information, there was no basis for vacating the conviction and sentence under Brady.

The court in U.S. v. Ellis, 121 F.3d 908, 47 Fed. R. Evid. Serv. (LCP) 729 (4th Cir. 1997), cert. denied, 118 S. Ct. 738, 139 L. Ed. 2d 674 (U.S. 1998), held that while the undisclosed report of the FBI interview of the witness implicating others in the robbery was favorable to the defendant, both as exculpatory and impeachment evidence, it was not material, and its nondisclosure did not violate Brady, where the report was consistent with the witness' testimony at trial that she initially lied to the FBI to protect her brother and the defendant, the witness was already subject to considerable impeachment, and there was additional testimonial evidence linking the defendant to the robbery.

The court in U.S. v. Nwankwo, 2 F. Supp. 2d 765 (D. Md. 1998), appeal dismissed, 173 F.3d 426 (4th Cir. 1999), held that the government's failure to disclose, in a trial for conspiring to distribute heroin, that no co-operating witness was ever prosecuted for perjury did not rise to the level of a Brady violation, as any such evidence was not material. The court found that further impeachment of the witnesses, with evidence that the government never brought a prosecution for perjury against a co-operating witness, would not, within a reasonable probability, produced a different result.

The court in U.S. v. Coleman, 11 F. Supp. 2d 689 (W.D. Va. 1998), held that, even assuming that the government's failure to find and then disclose a government witness' perjury conviction constituted a Brady violation, the error was harmless, as the witness' conviction and release occurred more than 10 years prior to his testimony, and therefore his conviction was presumptively inadmissible, and even if the interests of justice would have warranted admission of the conviction, a new trial would still be unwarranted because the conviction was not material.

The court in Hall v. U.S., 30 F. Supp. 2d 883 (E.D. Va. 1998), appeal dismissed, 1999 WL 587893 (4th Cir. 1999), held that the prosecutors' failure to disclose materials regarding an alleged discrepancy in the witnesses' testimony as to whether the defendant was the sole supplier of narcotics, was not a Brady violation, even though such information would have been favorable to the defendant in impeaching the witnesses, considering that such information was not material to the defendant's guilt or punishment, that there was voluminous testimony from other witnesses on the defendant's narcotics activities, and that the prosecutors' interview notes sought by the defendant were not verbatim and had not been adopted or approved by the witnesses.

Brady and its progeny do not create a general constitutional right to discovery in a criminal case, and no due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial. U.S.C.A. Const Amend XIV. U.S. v. Le, 306 F. Supp. 2d 589 (E.D. Va. 2004).

In U. S. v. Irwin, 661 F.2d 1063 (5th Cir. 1981), the court held that although in responding to the defense's

request for specific information as to payments to the informant the prosecution did not reveal payments of approximately $60 to $70 as reimbursement for expenses, such did not require reversal on Brady grounds as the informant's misstatement on the stand was relatively insignificant, probably unintentional, and perhaps not even heard as such by the drug investigator and the small point that might be scored by questioning the investigator about his failure to reveal the untruth in the informant's testimony would not be sufficient either to impeach the investigator or affect the result and the evidence supporting the finding of guilt was not dependent on an assessment of the investigator's credibility.

Assuming without deciding that Brady required the government to reveal the confidential informant's criminal record, even though the confidential informant did not testify, in order to permit his impeachment as a hearsay declarant, the court in U.S. v. Abadie, 879 F.2d 1260 (5th Cir. 1989), reh'g denied, (Sept. 7, 1989), held that automatic reversal was not required, as the defendants failed to show how they would have been able to use the confidential informant's record of arrests and indictments at trial and thus failed to show the materiality of the withheld information since none of the arrests and indictments resulted in a conviction.

The court in U.S. v. Washington, 44 F.3d 1271 (5th Cir. 1995), held that the prosecution's failure to disclose evidence that the detective asked the Texas Parole Board to stop its revocation proceedings against the confidential informant did not violate Brady. The court found that considerable other evidence was presented to the jury to show that the informant may have been biased or may have had an interest in testifying for the government, and the detective was a relatively insignificant witness.

The court in U.S. v. Scott, 48 F.3d 1389, 42 Fed. R. Evid. Serv. (LCP) 440 (5th Cir. 1995), reh'g and suggestion for reh'g en banc denied, 56 F.3d 1387 (5th Cir. 1995), held that the defendant did not establish that his conviction should be reversed because the government concealed materially favorable evidence from him in violation of Brady in the form of the transcript of the informant's sentencing which revealed that the informant was mistaken as to the severity of the sentence he faced unless he agreed to help the government investigation. The court found that because the informant could reasonably have believed, at time he agreed to aid in the investigation, that he faced a minimum of 10 years' imprisonment, evidence that the trial judge found differently at his sentencing hearing would not have affected the informant's credibility.

The court in U.S. v. Aubin, 87 F.3d 141, 78 A.F.T.R.2d (P-H) ¶ 96-5311 (5th Cir. 1996), reh'g and suggestion for reh'g in banc denied, 100 F.3d 955 (5th Cir. 1996) and cert. denied, 519 U.S. 1119, 117 S. Ct. 965, 136 L. Ed. 2d 850 (1997), held that the prosecution's failure to disclose impeachment evidence of the prosecution witnesses, in the prosecution of the defendant for bank fraud, did not violate the Brady rule requiring the disclosure of exculpatory evidence, as the court found that impeachment evidence was presented as to the witnesses, such that additional such evidence would have been merely cumulative.

The court in U.S. v. Sotelo, 97 F.3d 782, 45 Fed. R. Evid. Serv. (LCP) 1054 (5th Cir. 1996), reh'g denied, (Nov. 20, 1996) and cert. denied, 519 U.S. 1135, 117 S. Ct. 1002, 136 L. Ed. 2d 881 (1997) and cert. denied, 520 U.S. 1149, 117 S. Ct. 1324, 137 L. Ed. 2d 486 (1997), held that no reasonable probability existed that the result of the drug prosecution of multiple defendants would have been different had the government timely disclosed that the government witness who testified in the drug prosecution was still involved in drug trafficking at the time he testified, and reversal of the convictions was not warranted under Brady, where only two of the defendants were implicated in the witness' testimony, and the transaction involving those two defendants about which the defendant had testified was monitored by federal agents, who corroborated the witness' testimony.

The court in U.S. v. Lowder, 148 F.3d 548 (5th Cir. 1998), held that a government file regarding the narcotics activities of a third party was not material evidence under Brady, as the mere fact that a third party participated in the marijuana trade did not speak to the defendant's guilt or innocence of the drug crimes, and even if the information could have been used to impeach the agent, who testified that nobody moved marijuana the way the defendant claimed the third party did, the court did not raise a reasonable probability that the result of the proceeding would have been different, given the strength of the government's case against the defendant.

Expert witness's testimony that distance between muzzle of gun to victim's wound was few inches was not material in murder trial and, thus, prosecution's alleged suppression of testimony did not amount to Brady violation; muzzle-to-wound distance of few inches, rather than few feet, did not make it any more likely that co-defendant, who had been accidentally been wounded, shot gun at victim from sitting position rather than defendant from standing position. Clark v. Johnson, 227 F.3d 273 (5th Cir. 2000).

State did not violate Brady rule by failing to disclose that defendant's daughter was under felony indictment when she testified for prosecution at guilt/innocence phase of capital murder trial; evidence was not material, since indictment would not have been admissible to impeach, absent any representation by daughter that she was not in trouble with the law, or deal between prosecution and daughter for her testimony. Dowthitt v. Johnson, 230 F.3d 733 (5th Cir. 2000).

The court in U.S. v. Boykins, 915 F.2d 1573 (6th Cir. 1990), denial of postconviction relief aff'd by, 72 F.3d 129 (6th Cir. 1995), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, held that the defendant failed to show a reasonable probability that the outcome of the trial would have been different if the jury had been informed that the prosecution's witness was co-operating in exchange for not being prosecuted instead of an expectation of a reduced sentence. The court found that the defense attorneys repeatedly raised the issue of an alleged agreement before the jury and the jury had the opportunity to judge the witness' credibility in that regard, and the court accordingly rejected the defendant's Brady argument because even if there was an agreement which was not disclosed, the failure to disclose it was not "material" for purposes of the due process clause.

The court in U.S. v. Miller, 161 F.3d 977, 1998 FED App. 344P (6th Cir. 1998), cert. denied, 119 S. Ct. 1275, 143 L. Ed. 2d 369 (U.S. 1999), held that a handwriting report that was inconclusive as to whether the defendant wrote a threatening note placed on the windshield of one of the witnesses in his case did not fall within Brady, as it was not material to the case, despite the contention that the note was possible impeachment evidence because if the note had been written by one of the witnesses testifying against the defendant, it would have discredited the witness' testimony that the witness was threatened by the defendant, as further undermining of the credibility of any of the witnesses was not likely to change the outcome of the case where the defendant's counsel elicited testimony from each witness about committing perjury in a past trial, as well as evidence about a variety of prior bad acts, including drug use and trafficking.

Even taken together, alleged Brady violations regarding impeachment evidence did not create a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S.C.A. Const. Amend. 5. U.S. v. Stewart, 5 Fed. Appx. 402 (6th Cir. 2001), cert. denied, 122 S. Ct. 156 (U.S. 2001).

Undisclosed impeachment evidence of government witness was not material, for purposes of Brady claim, since attack of witness's credibility using undisclosed evidence would not have raised reasonable probability that results of proceeding would have been different, in light of overwhelming evidence of defendant's guilt. U.S. v. Winston, 55 Fed. Appx. 289 (6th Cir. 2003).

Defendant failed to establish Brady violation based on allegation that government failed to disclose a deal it made with witness in exchange for her testimony, where defendant merely pointed out fact that government did not revoke witness' probation despite her admitted probation violation, and that government witness changed story that she had planned to give to the jury, but about which she never actually testified. U.S. v. Benton, 64 Fed. Appx. 914 (6th Cir. 2003).

Any Brady violation in government's failure to disclose to defendant, before his cross-examination of his domestic partner, her prior statement contradicting her trial testimony, did not deprive defendant of his right to a fair trial; there was no reasonable probability that the outcome of the trial would have been different inasmuch as partner's testimony was not the only evidence which convicted defendant, her other testimony was corroborated

by an independent witness, and defendant was able to use her statement effectively at trial. U.S. v. Stamper, 91 Fed. Appx. 445 (6th Cir. 2004).

The court in U.S. v. Xheka, 704 F.2d 974, 12 Fed. R. Evid. Serv. (LCP) 1764 (7th Cir. 1983), held that although the government violated its obligations under Brady to disclose that an employee of the defendants charged with violation of a statute providing punishment for malicious damage or destruction of a building by means of an explosive, would give exculpatory testimony impeaching the credibility of a key government witness, the defendants were not entitled to a reversal of their convictions since that testimony was not "material" in that the jury chose to believe the government witness despite a wealth of impeaching evidence.

The court in U.S. v. Jackson, 780 F.2d 1305, 19 Fed. R. Evid. Serv. (LCP) 1383 (7th Cir. 1986), held that the prosecution's failure to disclose the key witness' employment relationship with the oil company did not violate the due process rights of the defendants charged with mail fraud in connection with their alleged theft of fuel oil where the defendants were not accused of stealing fuel from the witness' employer and other evidence calling the witness' credibility into question was provided.

The court in U.S. v. Herrera-Medina, 853 F.2d 564, 26 Fed. R. Evid. Serv. (LCP) 491 (7th Cir. 1988), reh'g denied, (Sept. 9, 1988) and postconviction relief granted, 1988 WL 142226 (N.D. Ill. 1988), held that the government's failure to disclose what portion of the money paid to the government informant was for the reward and what portion was for reimbursement of expenses did not constitute a Brady violation since such evidence was not "material," in the sense that, given the significant amount of impeachment evidence admitted against the informant, there was no reasonable probability that, had the amount of the reward been disclosed to the defense, the result of the proceeding would have been different.

The court in U.S. v. Veras, 51 F.3d 1365 (7th Cir. 1995), reh'g denied, (June 21, 1995), held that although the prosecution should have disclosed under Brady that the police officer who testified against the defendant was being investigated for fraud involving money used to pay informants, the information would not have made a difference in the result of the trial, as required to entitle the defendant to a new trial, since the officer denied the allegations, and the defendant could not have introduced extrinsic evidence to support the allegations.

The court in U.S. v. Maloney, 71 F.3d 645 (7th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Mar. 15, 1996), held that a statement made by a former client of the attorney/witness, that the attorney told the client to lie on the client's habeas petition, would have been merely cumulative impeachment evidence if introduced in the racketeering and conspiracy case against the county judge, and the county judge thus was not entitled to a new trial based on the prosecutor's failure to disclose the statement to the county judge. The court found that the attorney/witness admitted that he took witness recantation statements while suspecting that the witnesses was intimidated into making the statements, as well as taking statements with full knowledge of their falsity.

The court in U.S. v. Silva, 71 F.3d 667 (7th Cir. 1995), held that the prosecution was not required under Brady to disclose to the defense the "sordid" background of its confidential informant who told its agents that large quantities of cocaine were sold at the defendant's automobile repair shop. The court found that the informant only served to initiate the criminal investigation, but provided no evidence for trial, and thus evidence to impeach the informant would have been inadmissible.

The court in U.S. v. Gonzalez, 93 F.3d 311 (7th Cir. 1996), held that undisclosed evidence impeaching a government witness, a confidential informant, would not have changed the outcome of the trial, and thus, did not warrant a new trial on the narcotics charges, where the government produced, prior to trial, a quantity of impeachment materials relating to the witness, there was independent corroborating evidence of the defendants' guilt, and there was no evidence of entrapment.

The court in U.S. v. Hartbarger, 148 F.3d 777, 49 Fed. R. Evid. Serv. (LCP) 783 (7th Cir. 1998), reh'g and

suggestion for reh'g en banc denied, (July 20, 1998) and cert. denied, 119 S. Ct. 1117, 143 L. Ed. 2d 112 (U.S. 1999), held that the government's failure to turn over allegedly impeaching evidence did not entitle the defendant to a new trial on charges arising from the burning of a cross on the property of an interracial couple and their children; the court found that evidence that the government witness was threatened with prosecution for the same crimes if he continued to refuse to testify under the Fifth Amendment, that he received cab fare in addition to the standard witness' fee, and that the FBI made an offer "to put in a good word" for the witness regarding the charges pending against him would have had little or no impeachment value, and the impeachment of that witness would not have benefited the defendant in any event.

The court in U.S. v. Ducato, 968 F. Supp. 1310 (N.D. Ill. 1997), aff'd on other grounds, 148 F.3d 824 (7th Cir. 1998), held that evidence that the government witness conspired to defraud the coconspirator's client in an unrelated case was not material to the defendant's narcotics prosecution, as required to support a Brady claim. The court found that the witness' testimony was only part of the overwhelming case against the defendant, the witness was already been impeached at trial, and the allegedly suppressed evidence would only further impeach his testimony.

The court in U.S. v. Willis, 43 F.Supp.2d 873 (N.D.Ill. 1999), held that the alleged racist comments made by a supervisor of the Drug Enforcement Administration (DEA) during an investigation of drug conspiracy charges against the African-American suspects were not admissible or material in the subsequent conspiracy prosecution, and therefore, the government's failure to disclose evidence regarding such comments did not amount to a Brady violation; the court found that the defendants failed to prove that such comments resulted in prejudice to them, and the comments were not specific enough to render them material.

Cumulative evidence may properly be excluded in a criminal prosecution, even if it constitutes impeachment material under Brady. U.S. v. Carter, 313 F. Supp. 2d 921 (E.D. Wis. 2004).

The court in U.S. v. Risken, 788 F.2d 1361 (8th Cir. 1986), held that the prosecutor's failure to disclose, in a prosecution for witness tampering arising out of the defendant's attempts to hire a government informant to kill a grand jury witness, that the informant understood that he might be compensated for testifying against the defendant was error, but only harmless error, where the informant's testimony was strongly corroborated by tape recordings of conversations with the defendant.

The court in U.S. v. Peltier, 800 F.2d 772, 21 Fed. R. Evid. Serv. (LCP) 1017 (8th Cir. 1986), held that the fact that the prosecution withheld evidence favorable to the defendant which would allow the defendant to cross-examine the government's ballistic expert more effectively concerning a .223 casing found in the trunk of the car of the murdered FBI agent did not create a reasonable probability that the defendant would be acquitted if the evidence were disclosed and, thus, did not entitle the defendant to a new trial. The court also found that the fact that the prosecution withheld evidence favorable to the defendant that would allow the defendant to cross-examine certain government witnesses more effectively concerning inconsistencies in the ballistic evidence introduced at trial, such that the jury might give additional weight to the fact that there was more than one weapon like the murder weapon used on the day in question, did not create a reasonable probability that the defendant would be acquitted if the evidence were disclosed and, thus, did not warrant a new trial.

The court in U.S. v. Roberts, 848 F.2d 906 (8th Cir. 1988), reh'g denied, (July 14, 1988), held that the failure to disclose exculpatory Brady material, whereby the robbery defendant could impeach his accomplice who testified for the prosecution, was not reversible error where the availability of the evidence would not materially add to the effectiveness of the cross-examination of the accomplice.

The confidence of the reviewing court in Drew v. U.S., 46 F.3d 823 (8th Cir. 1995), in the outcome of the proceeding was not undermined by the omission of medical records of the mental illness of the government witness alleged to be improperly suppressed by the prosecution, and the records were not so "material" that their alleged suppression violated the defendant's due process rights, where even without the medical records the

defense effectively cross-examined the witness with respect to her treatment for drug addiction and attempted suicide, and the only novel fact revealed by the records was that the witness was diagnosed as having a "personality disorder" the bearing of which on the witness' credibility was not immediately apparent.

The court in U.S. v. O'Conner, 64 F.3d 355 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Oct. 16, 1995), held that a Brady violation occurred when the government failed to inform the defendants of threats by one government witness against another witness and attempts to influence the testimony of a second government witness was not reversible error with respect to the conviction of two defendants on conspiracy counts where other substantial evidence corroborated those government witnesses' testimony and linked the defendants to the conspiracy and there was no reasonable probability that the impeachment evidence would have altered the outcome.

The court in U.S. v. Jones, 160 F.3d 473 (8th Cir. 1998), held that the government did not violate its Brady obligation to disclose material, exculpatory impeachment evidence when it failed to disclose a witness' plea agreement and alleged improprieties surrounding his sentencing proceedings; the court found that the witness did not agree to testify against the defendants until after he was sentenced and incarcerated, the defendants were aware of the government's promise of a sentence reduction and cross-examined the witness on that subject, and a wealth of other testimony was used to obtain the convictions.

The court in U.S. v. Claiborne, 765 F.2d 784, 85-2 U.S. Tax Cas. (CCH) ¶ 9821, 18 Fed. R. Evid. Serv. (LCP) 1131, 56 A.F.T.R.2d (P-H) ¶ 85-6264 (9th Cir. 1985), held that in a prosecution for willfully underreporting taxable income, the prosecution's failure to deliver government summaries of interviews with the defendant's accountant pursuant to the defendant's general request for exculpatory information did not justify a new trial where disclosure of the summaries would not create any reasonable doubt, in that the defendant already had access to the most damaging impeachment evidence contained in the summaries, and the same result would be obtained even if the request were specific.

COMMENT:

The dissenting opinion from the order denying a hearing en banc to rehear U.S. v. Claiborne, 765 F.2d 784, 85-2 U.S. Tax Cas. (CCH) ¶ 9821, 18 Fed. R. Evid. Serv. (LCP) 1131, 56 A.F.T.R.2d (P-H) ¶ 85-6264 (9th Cir. 1985), reported at U.S. v. Claiborne, 781 F.2d 1325 (9th Cir. 1985), pointed out that the panel's Brady analysis ignored U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), announced six days before Claiborne. While under Bagley, since the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, and a "reasonable probability" is a probability sufficient to undermine confidence in the outcome, the dissenting opinion observed that the panel should have decided whether suppression of the interview material "undermined confidence in the outcome of the trial." Instead, as the dissenting opinion pointed out, the panel employed a two-part test: whether the evidence would have "created a reasonable doubt" or whether it "might have affected the outcome" of the trial. The dissenting opinion believed that ample evidence from the record supported the conclusion that suppression of the material undermined confidence in the trial outcome since the subject of the impeachment material was a key witness in the government's case, and evidence that a significant number of his clients' files had been discarded, directly contradicting his earlier testimony, would certainly have undermined his credibility sufficiently for the jury to conclude that the defendant had testified truthfully. Thus, according to the dissenting opinion from the refusal of the Ninth Circuit to rehear this case en banc, the defendant's conviction should have been reversed because the government withheld Brady impeachment evidence of one of its key witnesses.

The court in U.S. v. Polizzi, 801 F.2d 1543, 21 Fed. R. Evid. Serv. (LCP) 1257 (9th Cir. 1986), held that the government's failure to disclose an FBI agent's interview notes with a witness, even if required by Brady, did not constitute reversible error, since the defendant indicated that he would have used the notes to impeach the witness and, as impeachment evidence, the notes were merely cumulative, particularly in light of the thorough and

convincing impeachment of the witness.

The court in U.S. v. Marashi, 913 F.2d 724, 90-2 U.S. Tax Cas. (CCH) ¶ 50482, 31 Fed. R. Evid. Serv. (LCP) 262, 71A A.F.T.R.2d (P-H) ¶ 93-3898 (9th Cir. 1990), held that the nondisclosure of Internal Revenue Service interview notes did not constitute a Brady violation on the theory that the nondisclosure prevented the defendant in an income tax evasion case from effectively impeaching the government's star witness, where the virtually identical statement contained in other interview notes were disclosed to the defendant, so that the nondisclosed notes contained merely cumulative impeachment evidence and thus were not Brady material.

The court in U.S. v. Kearns, 5 F.3d 1251 (9th Cir. 1993), appeal after remand, 61 F.3d 1422, 42 Fed. R. Evid. Serv. (LCP) 1067 (9th Cir. 1995), held that the due process clause was not violated by the prosecution's failure to disclose the informant's written agreement and certain details of the witness' criminal record. The court found that although testimony did not fully bring out the extent of the time pressure on the informant, she testified that she was under time pressure to fulfill an agreement with the police, and evidence was provided to the defense regarding the witness' criminal history.

The court in U.S. v. Croft, 124 F.3d 1109, 47 Fed. R. Evid. Serv. (LCP) 1048 (9th Cir. 1997), held that the refusal of the defendants' request for the government's notes concerning the dates and content of meetings between government's agents and the government's co-operating witnesses was not a Brady violation, as there was no showing of materiality, despite the contention that the notes would have been useful to impeach the witnesses and to assist in an attack on the integrity of the investigation, as the government turned over 8,000 to 10,000 pages of Jencks materials to one defendant, and both defendants impeached the government witnesses with inconsistent statements numerous times.

The court in U.S. v. Ordaz Ruiz, 168 F.3d 503 (9th Cir. 1999), an unpublished table disposition, [FN78] in declining to reverse the defendant's conviction for conspiracy to distribute and possess with intent to distribute methamphetamine in violation of 21 U.S.C.A. § 846, denied his motion for a new trial on the basis of newly discovered evidence regarding the primary informant, as the defendant did not establish that the new evidence was material. The court found that although the evidence of the primary informant's impropriety in other contexts may have fatally impeached him as a witness, the government's case primarily relied on transcripts of conversations in which the defendant established his involvement, and after reviewing the record and transcript, the court found no evidence of the defendant's guilt that would be undermined by further impeaching the informant's character. Thus, the court held that the outcome of the trial likely would not have changed, even with the new evidence.

The court in U.S. v. Herman, 1999 WL 519004 (9th Cir. 1999), an unpublished disposition, held that a new trial was not warranted for the defendant, convicted of a violation of 18 U.S.C.A. § 1958 for use of interstate commerce facilities in the commission of a murder-for-hire, where the defendant alleged that the prosecution suppressed exculpatory Brady evidence which allegedly showed that, due to her co-operation with the Federal Government, the prosecution witness received favorable treatment from state authorities with respect to pending state forgery charges. The court held that although the Brady material uncovered by the defendant would have facilitated the impeachment of the prosecution's witness, there was no reasonable probability that the outcome of the trial would have been different had the information been disclosed to the defendant. The court found that the government would likely have minimized any impeachment of the witness' credibility by demonstrating that she was unaware of any special consideration. Moreover, in light of the weight of the other direct evidence implicating the defendant in the murder-for- hire scheme, the court found that it was not reasonably probable that the appellant's ability to impeach the witness would have altered the verdict, as in addition to the witness' testimony, the government presented audiotapes of several telephone conversations between the defendant and the witness discussing the plan to murder the intended victim, and after the investigators faked the intended victim's death, the witness met the defendant at a motel in Phoenix and brought "proof" of the murder, which included photographs of the intended victim's "dead" body, her driver's license, and her checkbook; the government admitted into evidence an audiotape and videotape of this meeting in which, after calmly reviewing the "proof" and listening to the witness recount the gruesome details of the murder, the defendant made numerous

incriminating statements. The court thus concluded that although the witness' testimony was certainly helpful to explain some of the background and provide context for the tapes, the government's case did not rest solely on circumstantial evidence and the witness' credibility, and in view of the substantial amount of other direct evidence of the defendant's guilt, there was no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.

Tape recording of interview between prisoner and investigators for district attorney's office, in which prisoner asserted that state's witness committed perjury when he testified in another, unrelated criminal case, was not material to defendant's guilt or punishment, and thus did not trigger state's duty to disclose exculpatory evidence to defense, as evidence would have been merely cumulative of other evidence that defense presented to impeach witness. Williams v. Woodford, 306 F.3d 665 (9th Cir. 2002).

Defendant could not prove Brady violation without showing that any withheld materials would have been of exculpatory or of impeachment value. U.S.C.A. Const Amend V. U.S. v. Jones, 56 Fed. Appx. 416 (9th Cir. 2003).

Even though government violated its Brady obligations in criminal conspiracy prosecution by not disclosing material regarding cooperating witness prior to trial, including evidence that he was international dealer in illicit substances, which constituted exculpatory material and impeachment material that government intentionally suppressed, reversal was not warranted; jury had heard testimony regarding possible life sentence witness faced for his crimes, and more evidence would do little to exculpate defendants on theory that they were witness' dupes, in light of other evidence, including techniques defendants used to evade authorities. U.S. v. Rosen, 94 Fed. Appx. 567 (9th Cir. 2004).

District court did not have to dismiss indictment or order new trial based on prosecution's alleged Brady violation, in failing to disclose that government had acted illegally in procuring "green card" for prosecution witness, where this evidence was cumulative of other impeachment evidence presented by defendant and thus did not prejudice him in his attempts to discredit witness' testimony, and where evidence, while perhaps indicating lengths to which government would go in order to obtain conviction, did not in any way undercut evidence of his predisposition to commit narcotics offenses, so that prosecution's failure to disclose evidence did not prejudice his entrapment defense. U.S. v. Ross, 372 F.3d 1097 (9th Cir. 2004).

The court in U. S. v. Jackson, 579 F.2d 553 (10th Cir. 1978), held that a new trial was not warranted for the failure to inform the defendants of an alleged $300 payment to the unindicted coconspirator by agents of the Drug Enforcement Administration where there was nothing in the trial transcript or papers and files on the case reflecting the $300 payment to the unindicted coconspirator and the situation was not one involving concealed information nor, for that matter, information not discoverable during the course of the trial itself.

The court in U.S. v. Page, 808 F.2d 723 (10th Cir. 1987), held that the failure of the prosecution to reveal that the informant had been arrested for burglary and assault with a deadly weapon did not justify a new trial where the defendant proved at trial that the informant had been convicted of seven felonies.

The court in U.S. v. Buchanan, 891 F.2d 1436 (10th Cir. 1989), held that evidence of a personal relationship between the petitioner's former wife and the investigator for the Bureau of Alcohol, Tobacco and Firearms (BATF) would not have raised a reasonable doubt as to guilt and was not material under Brady in a prosecution for the manufacture and possession of an unregistered firearm and conspiracy, even though the sensational nature of the evidence could have affected the verdict. The court found that the investigator testified that the firebomb used to destroy the trailer of the former wife's mother constituted a firearm under federal law, and the former wife's testimony was not necessary to convict.

CAUTION:

The court in Buchanan relied on the holding of the Supreme Court in U. S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), that the standard of materiality required to set aside a conviction on Brady grounds varies with the specificity of the defendant's request and the conduct of the prosecutor, which was superseded by the Supreme Court in U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The court in U.S. v. DeLuna, 10 F.3d 1529, 87 Ed. Law Rep. 428 (10th Cir. 1993), held that the government's failure to provide the defendant with a copy of the indictment against a witness, which was dismissed, did not result in a Brady violation, since the evidence was not material. The court found that the indictment would not have enabled the defendant to more effectively impeach the witness regarding his bias or interest in testifying for the government, and the record suggested that the defense counsel knew the substance of the indictment.

The court in U.S. v. Fleming, 19 F.3d 1325, 76 A.F.T.R.2d (P-H) ¶ 95-7578 (10th Cir. 1994), held that the alleged Brady violations arising from the government's withholding of evidence of similar schemes perpetrated by the participants in a sham transaction against other firearms dealers were not material, in a prosecution arising from a failure to pay the transfer tax under the National Firearms Act, where the defendant received investigatory statements and grand jury testimony before the trial, the defense counsel spent several days with the case agent and the entire prosecution file, and the participant was questioned during the trial about his involvement in similar schemes.

The court in U.S. v. Hughes, 33 F.3d 1248 (10th Cir. 1994), held that although information regarding the arresting officer's allegedly unstable mental condition at the time of the arrest, which information the government did not relay to the defendant, would have been favorable impeachment evidence for the defendant, the evidence was not material and, thus, there was no Brady violation given the great deal of inculpatory evidence presented in addition to the arresting officer's testimony, including a tape-recorded conversation between the defendant and the arresting officer during the stop in which the defendant admitted he was transporting drugs, that the substance in the trunk of his vehicle was methamphetamine, and the defendant attempted to bribe the arresting officer.

The court in U.S. v. Campos, 72 F.3d 138 (10th Cir. 1995), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.3 of the Tenth Circuit, held that undisclosed exculpatory evidence, which would have impeached a key government witness, which included a memo, written by a FBI special agent, revealing that the government would recommend granting the witness probation for co-operating in the FBI's public corruption investigation, details of the witness' plea bargain concerning tax evasion charges, and a tape of the interior of the witness' topless nightclub, did not violate Brady because there was no reasonable probability that the outcome of the trial would have been different if the defense had possessed the information, as the court found that there was abundant evidence incriminating the defendant apart from the in-court testimony of the witness in question.

The court in U.S. v. Molina, 75 F.3d 600, 43 Fed. R. Evid. Serv. (LCP) 1089 (10th Cir. 1996), held that the mere fact that prosecution witnesses entered into plea agreements after the defendant's trial was not evidence that the plea agreements were secretly reached prior to the witnesses' testimony and improperly withheld from the defense in violation of Brady.

The court in U.S. v. Johnson, 117 F.3d 1429 (10th Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.3 of the Tenth Circuit, held that the government's failure to disclose evidence that the arresting officer's credibility was questioned at two earlier federal suppression hearings and that a number of suspects arrested by the officer were not prosecuted, allegedly because there were questions concerning the legality of the arrests, did not deny the defendant due process at the suppression hearing, as had this evidence been disclosed, there was not a reasonable probability that the outcome of the suppression hearing would have been different. The court found that at the defendant's suppression hearing, the outcome did not rest solely on the credible testimony of the arresting officer, but instead, was predicated on the untruthful nature of the defendant's representations to the officers involved in his arrest.

Government's alleged failure to disclose impeachment evidence regarding arresting officer, including officer's demotion, information that the officer was defendant in a civil rights action, and a collection of five cases in which defendant during the course of his patrol duties, detected the odor of illegal drugs emanating from a suspect's vehicle, did not constitute Brady violation, in drug trafficking prosecution, where defendant had knowledge of all such impeachment evidence prior to trial. U.S. v. Arnulfo-Sanchez, 71 Fed. Appx. 35 (10th Cir. 2003).

Defendant did not show that government investigator's notes and reports of interviews with witnesses were material, so as to compel their disclosure under Brady; even assuming that interview notes would reveal additional inconsistencies in witness statements, defendant did not discuss the nature of the inconsistencies or whether they would be substantially impeaching so that they might make the difference between conviction and acquittal. Fed. Rules Cr. Proc. Rule 16(a)(2), 18 U.S.C.A. U.S. v. Daniels, 195 F.R.D. 681 (D. Kan. 2000).

The court in U.S. v. Burroughs, 830 F.2d 1574 (11th Cir. 1987), held that the government's failure to disclose information about the purported belief of its star witness that if he did not testify his wife would go to jail and their children would be placed in a state home did not entitle the defendants, in a prosecution for possession of heroin with intent to distribute, to a mistrial and a new trial on Brady grounds. The court found that not only was there no indication that the government had any advance knowledge of the witness' purported belief, but the additional information was not material to a determination of the defendants' guilt in that numerous witnesses corroborated much of the star witness' testimony and the star witness was impeached through other means.

The court in U.S. v. Newton, 44 F.3d 913 (11th Cir. 1994), held that the government's Brady violation, with regard to evidence tending to impeach the government witness' testimony concerning an uncharged murder in which the defendant was allegedly involved, did not affect the verdict in the prosecution of the defendant for drug trafficking offenses and, accordingly, did not warrant a new trial where the record was replete with proof of the defendant's involvement in the four crimes with which he was charged without regard to that witness' testimony.

The court in U.S. v. Mejia, 82 F.3d 1032 (11th Cir. 1996), held that the government's alleged failure to disclose that its confidential informant was permitted to take part of his payment from the government out of the country without filing the required paperwork, that the informant was given free lodging during the course of the investigation, that the informant failed to pay taxes on the money given to him for his co-operation, and that the informant previously was paid for his work on other cases, did not violate Brady. The court found that the government disclosed that the informant was paid for his work, and the information allegedly withheld was brought out on cross-examination, and thus there was no reasonable probability that the outcome of the trial would have been different had the information been disclosed.

To state a Brady claim, a defendant must show: (1) that the government possessed evidence favorable to the defendant, including impeachment evidence; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. U.S.C.A. Const. Amend. 5. U.S. v. Hansen, 262 F.3d 1217 (11th Cir. 2001).

The court in U.S. v. Graham, 83 F.3d 1466, 44 Fed. R. Evid. Serv. (LCP) 778 (D.C. Cir. 1996), held that the government's failure to disclose the deposition of the government witness in which he recounted his participation in several drug-related murders and the results of a polygraph test in which he admitted committing two murders, but allegedly gave several deceptive responses when asked about the involvement of others did not violate the Brady disclosure requirements, since the polygraph results would not have significantly aided impeachment in that the witness already admitted on direct examination to deceptions in other contexts and to participating in three murders.

The court in Johnson v. U.S., 537 A.2d 555 (D.C. 1988), held that the government's failure to disclose the

juvenile record of the government's witness did not violate the defendant's due process rights as defined by Brady v. Maryland. The court found that the records were not "material" because it was unlikely that their disclosure would have affected the outcome of the trial inasmuch as the witness was only one of seven eyewitnesses, in addition to the victim, and each of them testified positively to the defendant's participation in the assault. Moreover, both the jury and defense counsel had an independent awareness of the circumstances implying the bias of the witness and his questionable credibility.

While the prosecution is under a duty to disclose impeachment material that is favorable to a defendant, prosecution is not under an affirmative duty to disclose material that supports its witness' testimony and thus undermines a charge of recent fabrication. People v. Banks, 249 Mich. App. 247, 642 N.W.2d 351 (2002).

To establish a Brady violation mandating a new trial, defendant must prove: (1) that state possessed evidence favorable to the defendant, which may include impeachment evidence; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. Todd v. State, 806 So. 2d 1086 (Miss. 2001).

Impeachment evidence is considered exculpatory evidence for purposes of Brady.. Haygood v. State, 127 S.W.3d 805 (Tex. App. San Antonio 2003), reh'g overruled, (Jan. 5, 2004).

§ 14. Effect on decision to plead guilty

[a] Held material

The courts in the following cases held that the government's suppression of evidence impeaching the credibility of witnesses constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus entitled the defendant to withdraw a guilty plea.

The court in U.S. v. Millan-Colon, 829 F. Supp. 620 (S.D.N.Y. 1993), order aff'd on other grounds, 17 F.3d 14 (2d Cir. 1994), held that undisclosed information regarding the government's narcotics-related corruption investigation of the police officers involved in the investigation of the drug conspiracy was material to the defendants' decisions to plead guilty, and so entitled them to withdraw their guilty pleas, where the corruption investigation turned up evidence making incredible some of the government's assertions in its opening statement, brought into question the integrity of the undercover buys on which the drug conspiracy case hinged, and eliminated one of the government's key witnesses.

The court in Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996), held that Brady/Giglio evidence consisting of information regarding conjugal visits which federal agents allowed the government informant to receive, was "material" and the prosecution's failure to disclose it rendered the drug defendant's guilty plea invalid. The court found that the information could have been used by the defendant to attack the credibility of the informant and agents, who arranged the "sting" operation, and there was a reasonable probability that the information would have convinced the defendant to take the case to trial, particularly as the defendant's words and actions were only criminal when seen in context, which could only be supplied for the jury by the informant and agents.

[b] Held not material

The courts in the following cases held that the government's failure to disclose impeachment evidence did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to vacate his guilty plea.

The United States Supreme Court in U.S. v. Ruiz, 122 S. Ct. 2450 (U.S. 2002), held that federal prosecutors

are not required to disclose impeachment information relating to informants or other witnesses before entering into a binding plea agreement with a criminal defendant. The decision reverses the Ninth Circuit, which, in effect, held that a guilty plea is not "voluntary" unless prosecutors first make the same disclosure of impeachment information that would have been required if the defendant had insisted upon a trial. The case involved a defendant who was offered a "fast track" plea bargain after immigration agents found marijuana in her luggage. The prosecutors' "fast track" plea agreement acknowledged the government's continuing duty to turn over information establishing the defendant's factual innocence, but required that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defenses. When the defendant refused to agree to the later waiver, the prosecutors withdrew the plea offer. Defendant was later indicted and ended up pleading guilty. At sentencing, she sought the same two-level downward departure that the government had offered in the plea bargain. The district court denied the request, and defendant appealed. In vacating the district court's determination, the Ninth Circuit in U.S. v. Ruiz, 241 F.3d 1157 (9th Cir. 2001), cert. granted, 122 S. Ct. 803, 151 L. Ed. 2d 689 (U.S. 2002), held that the government's constitutional obligation to make certain impeachment information available before trial entitles defendants to the same information prior to entering into a plea agreement and prohibits waiver of the right to the information. Justice Breyer, writing for the Supreme Court, disagreed. Although the fair trial guarantee of the Fifth and Sixth Amendments provide that defendants have the right to receive exculpatory impeachment material for trial, as stated in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant who pleads guilty foregoes a fair trial and various other constitutional guarantees. Impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary. Justice Breyer found it particularly difficult to characterize such information as critical, given the random way in which it might, or might not, help a particular defendant. Justice Breyer also noted the absence of legal authority providing significant support for the Ninth Circuit's position. To the contrary, the Supreme Court had found that the Constitution, with respect to a defendant's awareness of relevant facts, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension on defendant's part, such as to the quality of the state's case, the admissibility of a confession, or a potential defense. It was difficult to distinguish, in terms of importance, Justice Breyer said, these varying forms of permissible ignorance and a defendant's ignorance of grounds for impeachment of potential witnesses at a future trial. Due process considerations also argued against the "right" that the Ninth Circuit found. The added value of the impeachment information is often limited, as it depends on defendant's independent awareness of the details of the government's case. In any event, the "fast track" plea bargain provided for full disclosure of all information related to factual innocence. Moreover, the Ninth Circuit's rule might seriously interfere with the government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm. Finally, the additional requirement of the "fast track" plea agreement, that the defendant waive her right to information regarding any affirmative defenses raised at trial, did not violate the constitution. The need for that information was also more closely related to the fairness of a trial than to the voluntariness of the plea.

The court in U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998), held that there was no reasonable probability that the additional information, which was not disclosed by the federal prosecutor permitting an inference that the government's key witness committed perjury at past trials, by testifying that he gave narcotics trafficking in order to join an organized crime family, would have changed the jurors' minds, and hence there was no reasonable probability that possession of such additional information would have led the defendant to elect to plead not guilty and to proceed to trial, thus precluding the defendant from vacating his guilty plea.

COMMENT:

The court in Avellino did not reach the defendant's contention that the Federal Government should have been charged with constructive knowledge of the evidence gathered in a prior state investigation prior to the Federal Government's plea agreement with the defendant, in part because that evidence was present in the office of an assistant United States attorney in the very district in which the defendant's case was contemporaneously being

prosecuted, since the undisclosed information did not meet the test for Brady materiality, and there was thus no need to reach the questions of actual or constructive knowledge, and, accordingly, no need for a remand.

Defendant has no constitutional right to the disclosure of impeachment information before entering a plea agreement. U.S. v. Cottage, 307 F.3d 494 (6th Cir. 2002).

The court in White v. U.S., 858 F.2d 416 (8th Cir. 1988), held that although information, that the government investigator intended to use the minor's burglary arrest--and, implicitly, the influence he might have on its disposition-- as leverage to gain the minor's co-operation in the investigation of the defendant, was not revealed to the defendant prior to entry of his plea, nor was the fact that the minor consistently denied interstate transportation until the minor's meeting with a state prosecutor, the defendant's knowledge of such undisclosed information would not have affected his decision to forego trial, and thus, the failure to disclose the information did not provide a basis to vacate his guilty plea to the charge of transporting a minor across state lines for the purpose of prostitution, where the defendant knew that the minor's credibility could be easily attacked and that the burglary charge was dropped after the minor testified before the grand jury, and numerous state charges were dismissed and other federal charges were not pursued as a result of the plea.

District court's reversal of discovery order requiring government to produce information on informant's activities, to extent that order required reports pertaining to informant's participation in unrelated investigations and redacted names and identifying information of unrelated individuals from reports about informant's past criminal activities, was not a Brady violation; redacted information was neither exculpatory nor impeachment evidence, and although withheld reports would constitute impeachment evidence, they were not material, since informant was cross-examined about his criminal activities and agreement with government. U.S. v. Si, 343 F.3d 1116 (9th Cir. 2003).

Impeachment evidence that government withheld in drug prosecution, consisting of amended version of agent's rough notes taken during post-arrest interview of defendant, was not "material" under Brady, and thus failure to disclose evidence did not require reversal of conviction, as there was no reasonable probability that disclosure of evidence would have altered outcome of proceeding. U.S. v. Guzman, 89 Fed. Appx. 47 (9th Cir. 2004).

Benefit that prosecution witness received from cooperation with police in another case was exculpatory evidence, but was not material for purposes of Brady claim of due process violation by failing to disclose the information; defense attorneys learned the information and used it during cross-examination, and the jury also was informed that witness had been convicted of 13 felonies. U.S.C.A. Const Amend XIV. Lovitt v. Warden, 585 S.E.2d 801 (Va. 2003).

§ 15. Effect on sentencing proceeding

The court in the following case held that the government's suppression of impeachment evidence constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus entitling the defendant to a new sentencing proceeding.

Following defendant's guilty plea, prosecution was not required under Brady to disclose to defendant, prior to sentencing hearing, that the cooperating witness, whom defendant called to give testimony at sentencing hearing, was paid by government for her assistance in investigating and prosecuting defendant. U.S. v. Kimley, 60 Fed. Appx. 369 (3d Cir. 2003).

The court in U.S. v. Weintraub, 871 F.2d 1257 (5th Cir. 1989), held that impeachment evidence improperly withheld in violation of Brady, which would have allowed the defendant to challenge only the evidence presented as to the amount of narcotics sold, was "material" to the sentence imposed and required remand for a new sentencing proceeding.

C. Use of False Evidence and Testimony

§ 16. Generally

[a] Held material

The courts in the following cases held that the government's failure to disclose the use of false evidence and testimony to convict the defendant constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus entitling the defendant to a new trial.

The court in U.S. v. Vozzella, 124 F.3d 389 (2d Cir. 1997), held that pursuant to Brady, convictions for conspiring to extend and collect extortionate loans had to be reversed, due to the government's introduction of alleged loan-sharking records of a purported coconspirator, even though it knew that the records were at least partially false, that the purported coconspirator claimed the records were entirely false, and that no adequate further inquiry was made into the records' veracity, as well as the government's solicitation of testimony about the records and what they represented that was so misleading as to amount to falsity.

A Brady claim may arise when the government has introduced trial testimony which was known to be, or should have been recognized as, perjury, when the government has not honored a defense request for specific exculpatory evidence, or when the government has not volunteered exculpatory evidence not requested by the defense, or requested only generally. U.S. v. Askanazi, 14 Fed. Appx. 538 (6th Cir. 2001).

The court in DeMarco v. U.S., 928 F.2d 1074 (11th Cir. 1991), held that vacation of the defendant's conviction was required where the prosecutor failed to correct the government's essential witness' perjured testimony that he would receive nothing in exchange for his testimony, and the prosecutor capitalized on that perjured testimony in her closing argument, even though the defense counsel also was aware of the perjury and did not object to it. The Agurs standard of materiality that a conviction must be overturned which rests in part on the knowing use of false testimony if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury was satisfied as the court found that the government agreed not to charge the witness with perjury from a different trial and to make his co-operation known to the sentencing court for a reduced sentence, and thus there were compelling facts that the jury should have had in order to properly evaluate the witness' credibility.

The court in U.S. v. Alzate, 47 F.3d 1103 (11th Cir. 1995), held that the failure of the prosecutor to correct his statements that there was not another box of cocaine in the room where the defendant was being interrogated was "material" to the defendant's duress defense to a cocaine importing charge, and thus, such failure was a Brady violation warranting a new trial. The court found that during interrogation, the defendant made a statement damaging to his duress defense, where the defendant, whose native language was Spanish, attempted to explain his statement by testifying he misunderstood the question by the interrogating officer, who spoke only English, as referring to a second cocaine container in the room, and the prosecutor referred eight times in his closing argument to the defendant's damaging statement.

The court in U.S. v. Arnold, 117 F.3d 1308 (11th Cir. 1997), held that the government's failure to produce tapes of conversations between a government witness, confined in a correctional center, and a government agent, with whom the witness was romantically involved, violated Brady to the extent that the tapes contained information known to contradict the witness' trial testimony denying any expectation of a reduced sentence and downplaying his desire for assistance from the agent and their discussion of the current case, and to the extent that the tapes included illustrations of the witness' merely "performing" for the prosecution, and included the agent's doubts as to the veracity of two governmental witnesses. The court found that a reasonable likelihood existed that had the evidence been disclosed to the defense, the trial outcome would have been different, and the appellants were thus entitled to a new trial.

[b] Held not material

The courts in the following cases held that the government's failure to disclose the use of false evidence and testimony to convict the defendant did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The court in U.S. v. Gotti, 171 F.R.D. 19 (E.D.N.Y. 1997), judgment aff'd, 166 F.3d 1202 (2d Cir. 1998), petition for cert. filed, 68 U.S.L.W. 3007 (U.S. June 18, 1999), held that the defendants who were convicted of crimes relating to organized criminal activity were not entitled to a new trial on the basis of newly discovered evidence that the government allegedly knew of a witness' alleged perjury relating to drug dealing, but failed to disclose it. The district court remained convinced of the defendants' guilt beyond a reasonable doubt and remained convinced that there was no reasonable probability of a different result or that the jury might acquit the defendants had it known.

COMMENT:

The court in U.S. v. Gotti, 171 F.R.D. 19 (E.D.N.Y. 1997), judgment aff'd without published op, 166 F.3d 1202 (2d Cir. 1998), petition for cert. filed, 68 U.S.L.W. 3007 (U.S. June 18, 1999), relied on the Bagley standard of materiality for impeachment evidence rather than the Agurs standard of materiality for the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false.

The court in U.S. v. Tierney, 947 F.2d 854, 91-2 U.S. Tax Cas. (CCH) ¶ 50509, 68 A.F.T.R.2d (P-H) ¶ 91-5742 (8th Cir. 1991), reh'g denied, (Dec. 23, 1991), held that even if the government negligently used the perjured testimony of four prosecution witnesses indicating that the defendant participated in a conference telephone call, the defendant failed to show any reasonable likelihood that the false testimony could have affected his conviction of tax offenses, and thus was not entitled to a new trial based on newly discovered evidence that the testimony was false, as the credibility conflict regarding the conference call was just one of many.

The court in U.S. v. Duke, 50 F.3d 571, 32 Fed. R. Serv. 3d (LCP) 555 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (May 25, 1995), held that no reasonable likelihood existed that the false testimony of the witness that he had never been arrested or convicted, which the government should reasonably have known was perjured, could have affected the jury's judgment, and the defendant's motion to vacate following his convictions for drug offenses was denied, where the defendant's nephew testified that the money for the drugs came from the defendant, much of the witness' testimony was corroborated by audio and video surveillance, and the credibility of the witness who committed perjury was impeached at trial and the jury was aware of the possibility that self-interest might have influenced the witness.

The court in U.S. v. Rabins, 63 F.3d 721 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Oct. 27, 1995), held that the defendant was not entitled to a new trial based on the government's failure to disclose Brady material concerning his codefendant's failure of a drug test at the time of his testimony, absent a reasonable likelihood that the false testimony affected the jury's verdict. The court found that the jury knew of the codefendant's prior drug use, and of possible bias from his plea agreement in exchange for the codefendant's testimony, and the testimony was largely cumulative of the testimony of another coconspirator.

Commonwealth's failure to provide murder defendant with evidence that witness had repeatedly denied he had witnessed defendant ingest cocaine and evidence that suggested witness was coerced into testifying that defendant ingested cocaine was not violation of Brady due process duty to disclose material exculpatory evidence; defense initiated discussion of defendant's drug use, witness's recanted testimony established only that defendant had used cocaine approximately eight years before the killing, and several experts had testified extensively and cumulatively to defendant's cocaine use. U.S.C.A. Const. Amend. 14; 42 Pa.C.S.A. § 9543(a)(2)(vi). Com. v. duPont, 2004 PA Super 364, 860 A.2d 525 (2004).

III. BELATEDLY DISCLOSED EVIDENCE

A. Exculpatory Evidence

1. Documentary Evidence and Statements

§ 17. Nontestimonial evidence generally

The courts in the following cases held that the government's belated disclosure of the exculpatory nontestimonial evidence in question during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Twomey, 806 F.2d 1136 (1st Cir. 1986), held that even if the Brady issue had been properly preserved for appeal, the defendant's fifth amendment due process rights were not violated by the trial court's ruling that the government need release certain pieces of exculpatory evidence only 24 hours in advance of testifying by a witness. The court found that the prosecution did not impermissibly delay turning over any exculpatory evidence that even remotely approached the level of significance contemplated in Bagley.

The court in U.S. v. Olmstead, 832 F.2d 642, 24 Fed. R. Evid. Serv. (LCP) 116 (1st Cir. 1987), held that the delayed disclosure by the government of exculpatory evidence did not deny the defendants--charged with falsely submitting claims for payment for products that failed to meet minimum government standards--a fair trial under the due process principles of Brady. The evidence at issue was a memorandum written by a special agent in which he stated that the government's quality assurance representative notified the defendants that all shipments were subject to reinspection at the packaging location. The memorandum was not disclosed to the defense counsel until well into the trial, and the defendants claimed that pretrial disclosure, in accord with the magistrate's discovery order, would have resulted in a different strategy. The court held, however, that where the defense counsel enjoyed a full day after disclosure to reconsider their strategy in light of the new evidence, but made limited use of this evidence in either the cross-examination of the quality assurance representative or in final argument, and it was unclear how early disclosure of the memorandum would have altered the defense strategy, the delayed disclosure did not deny the defendants an opportunity to use the memorandum effectively.

The court in U.S. v. Soto-Alvarez, 958 F.2d 473 (1st Cir. 1992), held that the defendant was not denied a fair trial by the prosecutor's withholding, prior to trial, the passport of the witness who claimed to have accompanied the defendant to Venezuela to buy drugs, even though the passport had no stamp for Venezuela, where the defense introduced the passport as a trial exhibit. The court found that the Brady rule did not apply since the passport was eventually entered into evidence and the defendant failed to establish that the withholding of the passport until trial prejudiced the defense.

The court in U.S. v. Innamorati, 996 F.2d 456, 39 Fed. R. Evid. Serv. (LCP) 112 (1st Cir. 1993), held that the delayed disclosure of an exculpatory notation in a federal agent's notes of an interview with the coconspirator in a drug conspiracy did not prejudice the defendant to the extent of requiring a new trial. The court found that the notation was produced early in the trial, prior to the cross-examination of the government's first witness, the notation was difficult to decipher and its exculpatory nature was not immediately apparent, the defendant never asked for a continuance to allow him to investigate the notation, and the defendant did not describe any specific avenue of investigation he would have pursued had the notation been disclosed earlier.

Even assuming that all Brady/Giglio information produced in delayed fashion was "material," defendants failed to show how the late production of the information adversely affected their trial strategy or defense; thus, late production did not violate due process or warrant dismissal on grounds of prosecutorial misconduct. U.S.C.A. Const Amend 14; Fed. Rules Cr. Proc. Rule 16, 18 U.S.C.A. U.S. v. Munoz Franco, 113 F. Supp. 2d 224 (D.P.R. 2000).

The court in U.S. v. Williams, 132 F.3d 1055, 48 Fed. R. Evid. Serv. (LCP) 777 (5th Cir. 1998), held that the defendant waived any prejudice caused by the government's tardy disclosure of its special agent's investigative notes, by electing to proceed with the trial without taking advantage of the court's offer to grant a continuance so that the defense could review its strategy and examine additional witnesses in connection with the newly disclosed evidence.

There was no reasonable probability, in prosecution for extortion in violation of the Hobbs Act, that outcome of trial would have been different had government disclosed witness's outstanding arrest warrant, and therefore alleged Brady violation was not material and did not warrant a new trial; sufficient corroborating evidence supported jury's verdict. 18 U.S.C.A. § 1951. U.S. v. Lee, 88 Fed. Appx. 682 (5th Cir. 2004).

The court in U.S. v. Walton, 217 F.3d 443 (7th Cir. 2000), held that in a prosecution for theft from an automatic teller machine (ATM), the government's failure to turn over telephone records relating to its investigation into a prior theft at the same ATM until the second day of trial did not constitute a Brady violation; the judge excluded any evidence relating to the prior ATM theft, and even if the records were material, they were turned over well before the prosecution had finished presenting its case.

The court in U.S. v. Wright, 218 F.3d 812 (7th Cir. 2000), an appeal from federal convictions for smuggling and distributing heroin, held that where the prosecutor orally alerted the defense counsel before trial to exculpatory evidence, the fact that the defense counsel did not follow up by obtaining more details could not be treated as a constitutional violation by the prosecutor under Brady.

The court in U.S. v. Manning, 56 F.3d 1188, 42 Fed. R. Evid. Serv. (LCP) 562 (9th Cir. 1995), appeal after remand, 145 F.3d 1342 (9th Cir. 1998), held that although an investigative report concerning a possible alternative suspect in the mail bombing incident was exculpatory material, which the government should have disclosed under Brady, the defendant was not prejudiced by the lack of timely disclosure, where the defense counsel was able to discuss this alternative suspect with the government investigator both during cross-examination and again on recross-examination.

The court in U.S. v. George, 778 F.2d 556, 19 Fed. R. Evid. Serv. (LCP) 1141 (10th Cir. 1985), held that the defendant in a manslaughter trial was not denied due process or a fair trial by the government's failure to disclose that there was evidence that another person might have committed the killing until after the defendant raised the issue of self-defense, when the defendant received the contended exculpatory material on the evening at the close of the first day of trial in sufficient time to cross-examine each government witness, use material in presentation of his own case, introduce expert testimony concerning the purpose and use of a nunchaku, and effectively weave that evidence into his closing statement in support of reasonable doubt.

The defendant in U.S. v. Rogers, 960 F.2d 1501, Fed. Sec. L. Rep. (CCH) ¶ 97735 (10th Cir. 1992), claimed that he filed a specific request for certain documents five years before trial, but they were not produced until the last day of trial, and he was given only three hours to review the documents, and had he been given the documents in a timely manner, he could have reviewed, investigated, and properly developed his defense, and that it was probable that the jury would have reached a different result; the court held, however, that the fact that the documents were received on the last day of the trial does not, in itself, indicate that the defendant did not receive a fair trial, as the record established that the government provided the requested documents to the defendant during the trial, and that the requested evidence was admitted by the court.

The court in U.S. v. Gonzales, 35 F. Supp. 2d 849 (D. Utah 1998), held that evidence that a third person was involved in prior crimes with the convicted co-defendant, which the prosecution did not reveal until late in the defendant's armed robbery prosecution, was not obviously exculpatory or clearly supportive of a claim of innocence, and thus was not material evidence subject to disclosure under Brady, where the third person's crimes with the codefendant involved bank robberies other than the credit union robbery in question.

There is no Brady violation, in which state fails to timely comply with discovery of exculpatory evidence, where the information in question could have been obtained by the defense through its own efforts. Ward v. State, 814 So. 2d 899 (Ala. Crim. App. 2000), cert. denied, 814 So. 2d 925 (Ala. 2001) and cert. denied, 122 S. Ct. 1208, 152 L. Ed. 2d 145 (U.S. 2002).

§ 18. Grand jury testimony

The courts in the following cases held that the government's belated disclosure of grand jury testimony during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U. S. v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979), held that in the absence of any showing of prejudice and where the defendants surely knew that a prospective government witness who had appeared before the grand jury under a grant of immunity was a potential witness at trial and might give exculpatory testimony, the government did not violate any duty of disclosure it owed to the defendants under Brady when it waited until the day before trial was scheduled to begin to disclose to the defendants the transcript of the witness' grand jury testimony.

The court in U. S. v. Baxter, 492 F.2d 150 (9th Cir. 1973), appeal dismissed, 414 U.S. 801, 94 S. Ct. 16, 38 L. Ed. 2d 38 (1973), held that although the government apparently did fail to comply with a pretrial order to provide the defendants with a transcript of a particular person's grand jury testimony at least 24 hours before the trial, since the defense attorney had four days to examine the grand jury's testimony and prepare to cross-examine such a person, the defendants were not denied due process.

The court in U. S. v. Behrens, 689 F.2d 154, 11 Fed. R. Evid. Serv. (LCP) 1149 (10th Cir. 1982), held that the defendants, who conceded that Brady material, consisting of grand jury testimony and police statements, which the government erroneously treated as Jencks material was produced during the course of the trial, had not demonstrated that the delayed disclosure of the evidence deprived them of a fair trial, notwithstanding that their attorneys' trial strategy and cross-examinations might have been enhanced had the exculpatory material been provided earlier, where no showing was made that the presentation of the evidence would have created a reasonable doubt of guilt that did not otherwise exist.

§ 19. Statements of witnesses

The courts in the following cases held that the government's belated disclosure of witness' statements during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

A delayed disclosure of evidence that is material either to guilt or to punishment under Brady or Giglio only leads to the upsetting of a verdict when there is a reasonable probability that, had the evidence been disclosed to the defense in a timeous manner, or had the trial court given the defense more time to digest it, the result of the proceeding would have been different. U.S. v. Perez-Ruiz, 353 F.3d 1 (1st Cir. 2003).

Defendant did not demonstrate a Brady violation resulting from government's belated disclosure of exculpatory identification testimony of witness in a prior trial because he was not prejudiced by the government's belated disclosure since defendant's cross-examination of the witness did not suffer from the belated disclosure. U.S. v. Casas, 356 F.3d 104 (1st Cir. 2004).

The court in U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 17 Fed. R. Evid. Serv. (LCP) 1168 (4th Cir. 1985), held that even if the engineer's testimony that he deliberately underestimated the sewer project's costs and expected the bids to exceed his estimate was exculpatory, its belated disclosure did not constitute reversible error in the prosecution of the defendants for bid rigging, where the exculpatory information was put before the

jury during the cross-examination of the very first trial witness, and the information was available for use in the defendants' cross-examination of all further governmental witnesses as well as the defendants' case in chief.

The court in U.S. v. Bencs, 28 F.3d 555, 94-2 U.S. Tax Cas. (CCH) ¶ 50347, 74 A.F.T.R.2d (P-H) ¶ 94-5271, 1994 FED App. 231P (6th Cir. 1994), held that the government's delayed disclosure of an allegedly exculpatory witness statement was not a Brady violation, where the requested evidence was disclosed during trial, despite the defendant's claim that his trial preparation was hindered and his cross-examination of the witnesses was not as effective as it otherwise would have been.

The court in U. S. v. Stone, 471 F.2d 170 (7th Cir. 1972), held that where the government called its witnesses to the stand and the witnesses testified that they could not identify the defendant, the failure of the government to inform the defendant prior to the trial that the witnesses could not identify him did not warrant setting aside the conviction under the holding of Brady in the absence of a showing of prejudice.

The court in U.S. v. Adams, 834 F.2d 632 (7th Cir. 1987), held that the government's failure to provide the defendant with a copy of the coconspirator's statement until the second day of the trial on the day before the coconspirator testified for the government did not deprive the defendant of the right to a fair trial and did not require suppression of the testimony or reversal of the conviction, where the defendant did not request a continuance or a recess to make use of the newly disclosed information, where the statement was received prior to the coconspirator's testimony, and where the defendant failed to recall a single witness despite the fact that he was given an opportunity to do so.

The court in U.S. v. Zambrana, 841 F.2d 1320, 25 Fed. R. Evid. Serv. (LCP) 55 (7th Cir. 1988), held that the government's failure to disclose the statement by the alleged coconspirator that he never dealt directly with the defendant when he bought and sold drugs until immediately prior to the commencement of the trial and two days before the alleged coconspirator testified did not amount to a violation of due process rights under Brady, absent evidence that the delay in disclosing the statement resulted in prejudice to the defendant's defense.

Even if certain statements made by alleged coconspirators during their plea colloquies constituted evidence favorable to defendant, undisclosed transcripts of plea colloquies as a whole were not "material" to defendant's case, given their overall inculpatory nature and evidence of guilt presented at trial, and therefore government was not required to disclose them pursuant to Brady. U.S. v. Irorere, 228 F.3d 816 (7th Cir. 2000).

The court in U. S. v. Miller, 529 F.2d 1125, 76-1 U.S. Tax Cas. (CCH) ¶ 9228, 37 A.F.T.R.2d (P-H) ¶ 76-756 (9th Cir. 1976), held that although the statement that an associate of the defendant, who was charged with preparing false income tax returns for clients and aiding in the presentation of false documents to the Internal Revenue Service, made to the effect that the associate prepared the false returns with respect to two clients whose returns were no longer subject of the indictment against the defendant was, in part, exculpatory material and should have been turned over to the defendant, whose main defense was that his associate had prepared all of the false returns, Brady did not require reversal, since unlike Brady, there was no complete suppression of the exculpatory evidence, but rather the appellant learned of the statement at trial, albeit not until towards the close of his defense. Thus, the court's inquiry on appeal was not whether the evidence, if disclosed, might reasonably affect the jury's judgment on some material point, but rather, whether the lateness of the disclosure so prejudiced the appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. Since the trial judge offered the defendant a continuance and to bring the associate in for an interview, but the defendant deemed both not necessary, and since the associate was known to the appellant at all times and the appellant was aware three weeks before trial of a statement implicating the associate, the court did not see how the late disclosure prejudiced the defendant, as this was not a case where the evidence, if promptly disclosed, would have opened the door for the defense to new witnesses or documents requiring time to be marshaled and presented.

The court in U.S. v. Johnson, 977 F.2d 1360, 36 Fed. R. Evid. Serv. (LCP) 1165 (10th Cir. 1992), held that in

a prosecution for, inter alia, using or carrying firearms during, or in relation to, a drug trafficking crime and for possession of an unregistered machine gun, in which a witness testified that the defendant had a rifle and the codefendant did not have a gun in his possession, the government did not violate Brady v. Maryland even if it failed to inform the defendant that the witness previously spoke with the marshal and stated that the codefendant fired on federal agents with an automatic weapon, as the record indicated that the defendant's counsel was aware of the marshal's conversation with the witness and was provided at trial with a copy of the marshal's synopsis on request.

The court in U.S. v. Kubiak, 704 F.2d 1545, 13 Fed. R. Evid. Serv. (LCP) 129 (11th Cir. 1983), reh'g denied, 712 F.2d 1419 (11th Cir. 1983), held that the failure of the prosecution to provide the defendant in a timely manner, with an exculpatory statement made by a jointly indicted coconspirator did not violate Brady, as the statement of the defendant's coconspirator was discovered and presented at trial, and consequently, the defendant's claim involved a mere delay in the transmittal of information or materials to the defense and not an outright omission that remained undiscovered until after the trial.

The court in U.S. v. Tarantino, 846 F.2d 1384, 26 Fed. R. Evid. Serv. (LCP) 164 (D.C. Cir. 1988), appeal after remand, 905 F.2d 458 (D.C. Cir. 1990), held that the government's failure to timely disclose the statements by witnesses that contradicted the version of events as provided by the key governmental witness, did not violate the due process clause of the Fifth Amendment as interpreted in Brady. Even though once the defendants obtained the statements of the witness in question, they were perfectly able to impeach his trial testimony if inconsistent, and during that witness' cross- examination or during final argument, the defendant's counsel could have called the jury's attention to any inconsistencies between that witness' version of the events and the key government witness' rendition, the defendant argued that because the material was unavailable for the cross-examination of the key witness, the force of the discrepancies was likely to have been lost on the jury. The court held that this argument was unavailing because witnesses are not impeached by prior inconsistent statements of other witnesses, but by their own prior inconsistent statements. The court then held that the defendant could not establish that had the statements been disclosed earlier, that there was a sufficient probability to undermine confidence in the actual outcome of the trial. Thus, the court found that since earlier discovery of the statements would not have appreciably increased the effectiveness of the cross-examination of the key witness, and because the defense was not foreclosed from arguing any inconsistencies to the jury at a later point in the trial, nothing approaching a Brady violation occurred.

The court in Catlett v. U.S., 545 A.2d 1202 (D.C. 1988), held that the government's failure to disclose to the defense a witness who would testify that he knew the defendant, but did not see the defendant in the alley during the crime did not violate Brady, even if the court did require the prosecutor to release to the defense the names of any eyewitnesses who knew the defendant before the crime and failed to identify the defendant as a participant. The court found that the defendant became aware of the witness' existence in time to use it fully to his benefit, and did so, and the testimony of four other government's witnesses placed the defendant at the scene of the crime, with three of those witnesses testifying that he had actively participated in the criminal acts.

The court in Edelen v. U.S., 627 A.2d 968 (D.C. 1993), held that the disclosure of Brady material, consisting of a statement by a witness tending to exculpate the defendant, before the parties made their opening statements was not a violation of the prosecutor's duty of seasonable disclosure where the defense counsel was able to incorporate the witness' statement into his initial address to the jury, and it appeared that the witness did not provide this information to the prosecutor until the beginning of the trial, and that the prosecutor promptly provided it to the defense.

The court in Curry v. U.S., 658 A.2d 193 (D.C. 1995), held that in a murder prosecution, while the prosecutor's failure to disclose to the defense until the eve of trial, more than 10 months after the indictment, an exculpatory statement made by a witness on the night of the murder violated the Brady rule, where the prosecutor admitted that the delay served no legitimate governmental purpose, but was simply an oversight, and in light of the discovery, before the defendant's indictment, that the witness was no longer living at his former address, and

thus might prove difficult to locate after such delay, the prosecution's violation of the Brady rule was not prejudicial, considering that the police in another state, where a bench warrant for the witness was outstanding since his disappearance, and the witness' landlord, to whom the witness owed back rent, could not find the witness.

2. Physical Evidence and Test Results

§ 19.5. Effect of conflict between Brady rule and Jencks Act

The following authority considered the effect of a conflict between the Brady rule and the Jencks Act upon the duty of a federal prosecutor to disclose before trial evidence concerning a witness statement negating guilt or mitigating the offenses charged. NOTE TO EDITOR: PLEASE PLACE IN IIIA1

Possibility of conflict between, on one hand, Brady/local rule imposing broad duty upon federal prosecutor to disclose before trial evidence negating guilt or mitigating offenses charged, and, on other hand, Jencks Act/rule of evidence requiring production of witness's statements only after witness has testified on direct examination at trial, did not necessitate invalidation of local rule; rather, any conflict arising when potential witness statement contained exculpatory or impeachment evidence within Brady/local rule could be resolved by government's going before magistrate judge to seek protective order. U.S.C.A. Const. Amend. 5; 18 U.S.C.A. § 3500(a); Fed. Rules Cr.Proc.Rule 26.2, 18 U.S.C.A.; U.S.Dist.Ct.Rules D.Nev., Rule IA 10-7(a). U.S. v. Acosta, 357 F. Supp. 2d 1228 (D. Nev. 2005).

§ 20. Tangible objects and crime scenes

The courts in the following cases held that the government's belated disclosure of the tangible objects in question during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Stephens, 964 F.2d 424 (5th Cir. 1992), held that the prosecution's delay in providing the defendant with copies of tape recordings of conversations between the defendant and other members of the conspiracy did not constitute a Brady violation, where the defendant had copies of the tapes at trial and was given time to listen to the tapes after jury selection and before the trial began and did not argue that he was unable to put the tapes to effective use due to the delay in providing the tapes.

The court in U.S. v. Deering, 179 F.3d 592 (8th Cir. 1999), petition for cert. filed (U.S. Sept. 1, 1999), held that the defendant, convicted of distributing, possessing with intent to distribute, and aiding and abetting the distribution and possession with intent to distribute, cocaine base, and conspiring to distribute, and to possess with intent to distribute cocaine base, was not entitled to a new trial, as the government did not violate the Brady rule by failing to turn over certain telephone records and photographs before trial, where the government provided the defendant with the documents during the trial, the parties stipulated that the defendant's phone number did not appear in the phone records, and the photographs were admitted in evidence at the defendant's request.

The court in U. S. v. Baxter, 492 F.2d 150 (9th Cir. 1973), appeal dismissed, 414 U.S. 801, 94 S. Ct. 16, 38 L. Ed. 2d 38 (1973), held that where the defendant learned of the existence of the valise and examined its contents at least two weeks prior to the conclusion of the trial for conspiracy to violate narcotics laws, the defendants had sufficient time to examine, evaluate and introduce any evidence they believed would help their case as a result of their examination of the valise so that the government's failure to supply the defendants with the valise earlier did not constitute suppression of the evidence denying due process.

The court in U.S. v. Woodlee, 136 F.3d 1399, 48 Fed. R. Evid. Serv. (LCP) 1156 (10th Cir. 1998), cert. denied, 119 S. Ct. 107, 142 L. Ed. 2d 85 (U.S. 1998), held that the government's failure to reveal the victims had a gun did not constitute reversible error under Brady where during cross-examination of the government's

first witness, the defense elicited testimony that he had a nine millimeter pistol in his car the night of the shooting. The court found that since the evidence was divulged with the first witness at trial, and each defendant had the opportunity to cross-examine every witness about the gun, and if any defendant felt prejudiced, he could have sought a continuance, and none did, earlier disclosure would not have created a reasonable doubt whether the defendant intimidated, interfered, or injured the victims, as there was ample direct evidence of his guilt, the jury knew about the gun with the first witness, and the defense had a full opportunity to exploit the belatedly disclosed evidence.

§ 21. Scientific experiments

The court in the following case held that the government's belated disclosure of information regarding scientific experiments during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Cardales, 168 F.3d 548 (1st Cir. 1999), petition for cert. filed (U.S. May 24, 1999), held that the government's failure to disclose pretrial a laboratory report showing that a carpet in the vessel tested negative for marijuana and the chemical found in marijuana, in alleged violation of Brady, did not warrant a mistrial, in a prosecution for aiding and abetting possession with intent to distribute marijuana on board a vessel subject to the jurisdiction of the United States, where the defense counsel effectively used the report during the presentation of the defendant's case.

The court in U. S. v. Goodman, 457 F.2d 68 (9th Cir. 1972), held that although information regarding scientific experiments that the court ordered the government to release to the defendant was in two instances not furnished to the defendant at the time required, the defendant was not prejudiced by the delay where his counsel was given ample time to examine the information before cross-examination.

§ 22. Fingerprint reports

The courts in the following cases held that the government's belated disclosure of fingerprint reports during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Johnson, 816 F.2d 918 (3d Cir. 1987), held that the government did not commit a Brady violation by failing to provide the defendant with exculpatory fingerprint reports prior to the trial. The court found that the defendant was able to and did make extensive use of the report at trial, and the district court precluded the government from presenting expert testimony concerning the report's significance to minimize the potential for unfairness.

The court in U.S. v. Clark, 538 F.2d 1236 (6th Cir. 1976), held that in an armed robbery prosecution, the fact that the defense counsel was not informed by the government until the third day of trial that there was a negative report on a fingerprint which during the trial a government's witness identified as being that of the defendant did not constitute an abuse of due process where the FBI agent disclosed the negative fingerprint report to the defendant himself, where full disclosure of the finding was made on the third day of the trial not only to the defense counsel, but subsequently before the jury, and where the district judge offered the defense counsel either a continuance or mistrial, both of which offers were refused after consultation with the defendant.

The court in U.S. v. Mack, 868 F. Supp. 207 (E.D. Mich. 1994), held that the government's failure to give pretrial notice to the trial defense counsel of the negative results of the test of the defendant's hands for luminescent powder used on sham cocaine was not a Brady violation requiring a new trial, absent any prejudice to the defendant, as the defense counsel was able to obtain the test results at the close of the government's case and bring the results before the jury.

The court in U.S. v. Morgan, 10 F.3d 810 (10th Cir. 1993), postconviction relief denied, 985 F. Supp. 1020 (D. Kan. 1997), appeal dismissed, 166 F.3d 349 (10th Cir. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.3 of the Tenth Circuit, held that the government did not violate Brady by not making available until the second day of trial the results of fingerprint testing conducted in the case. The court found that inasmuch as the defense counsel himself introduced the evidence before the jury, no showing could be made that there was a reasonable probability of a different result in the trial's outcome.

The court in U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied, 172 F.3d 880 (10th Cir. 1999), held that the government's late disclosure of exculpatory fingerprint evidence did not warrant dismissal under Brady, even though the material, if disclosed earlier, might have affected the defense strategy, given that the defendant extensively cross-examined the expert regarding the evidence and used it to strong effect in the closing argument, and failed to show that earlier disclosure would have affected the trial's result.

3. Identification of People Other Than Defendant

§ 23. Witnesses

The courts in the following cases held that the government's belated disclosure of the identities of witnesses during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Adames-Santos, 89 F.3d 824 (1st Cir. 1996), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.2(b)(6) of the First Circuit, held that the government's failure to disclose prior to trial the identity of the confidential informant did not violate Brady, as the court found that the defendant failed to show a reasonable probability that if he had been informed of the informant's identity prior to trial, the result of the proceeding would have been different, as the informant testified on cross-examination that the money he earned as an informant for the Drug Enforcement Administration ("DEA") was his main source of income, and the defendant failed to identify any additional evidence that could have been used to further impeach the witness.

COMMENT:

The court in Adames-Santos relied on the Supreme Court's holding in Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977), a case stemming from a state prosecution, that the Brady rule does not require the prosecution to reveal before trial the names of all witnesses who will testify against the defendant.

The court in U.S. v. Higgs, 713 F.2d 39 (3d Cir. 1983), held that the government's disclosure to the defendants of the names and addresses of government's witnesses who were offered immunity and/or leniency for their co-operation, as well as the substance of any promises made to the witnesses by the government, could be made the day that the witnesses were to testify and still satisfy Brady without violating the defendant's due process rights since disclosure at that time would fully allow the defendants to effectively use that information to challenge the veracity of the government's witnesses.

Government's failure to turn over list of 28 potential witnesses until late in trial did not constitute Brady violation, where list of potential witnesses was not exculpatory or impeaching, in that government had not interviewed individuals on the list and had no reason to believe such individuals could provide evidence favorable to defendant. U.S. v. Nguyen, 98 Fed. Appx. 608 (9th Cir. 2004).

B. Impeachment Evidence

§ 24. Generally

[a] Held material

The court in the following case held that the government's belated disclosure of impeachment evidence during the trial constituted a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant.

That defense counsel allegedly did not perceive any prejudice at trial from government's late disclosure of Brady impeachment evidence pertaining to prosecution's key witness did not establish lack of prejudice to defendant from late disclosure. U.S. v. Washington, 294 F. Supp. 2d 246 (D. Conn. 2003).

The court in U.S. v. Greichunos, 572 F. Supp. 220 (N.D. Ill. 1983), held that the defendants were entitled to a new trial where the government waited until the eve of the trial to disclose impeachment evidence within the scope of Brady and did not disclose other arguably exculpatory impeachment evidence until after the trial commenced in violation of its agreement to disclose exculpatory evidence "when discovered" and where the defendants were prejudiced with regard to certain material by the delay in receiving the exculpatory impeachment and potentially exculpatory impeachment evidence. The prosecution's witness pled guilty to conspiring to enter a bank to commit larceny, and he testified against the two defendants charged with the same federal offense. A statement supplied to the FBI was not provided to the defendants until after the start of the trial in which the witness, after taking a lie detector test, said that "[t]hey never did catch me, I really got away with it," and the government never produced two applications for life insurance made by the witness after the date of the conspiracy, which were discovered only after one of the undisclosed applications was mistakenly sent into the jury room for the jury's consideration during its deliberations, instead of the application about which the witness testified at trial. While the court recognized that the standard that is applied in the Seventh Circuit when the defendant claims that he did not receive Brady material in a timely fashion is whether the delay prevented the defendant from receiving a fair trial, the court held that where a defendant relied on the government's specific undertaking to disclose exculpatory evidence "when discovered," disclosure on the eve of trial of information, which the government had in its possession for months, is much more likely to prejudice the defendant than where he had no expectation of receiving the evidence at an earlier time. The court nevertheless recognized that the government's breach of its agreement did not in and of itself compel the granting of the defendants' motion for a new trial, as the proper inquiry is still whether the defendant was prejudiced by the delay in receiving the exculpatory impeachment and potentially exculpatory impeachment evidence. The court found that the defendants were utterly unable to make use of the insurance policies, because they did not become aware of them until after the jury began its deliberations, and as for the statement in question, while the defendants received it from the government during trial, and although the defendants' attorneys could have impeached the government's witness with his statement about getting away with the burglary, they indicated that they were reluctant to lay the foundation for that impeachment without knowing whether the person to whom the statement was made was available to be called as a witness should the government's witness deny making the statement. The court thus held that the government's callous disregard of its Brady obligations entitled the defendants to a new trial.

Impeachment evidence is material, and thus must be disclosed under Brady, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Payton v. Woodford, 258 F.3d 905 (9th Cir. 2001).

To establish a Brady due process violation, a defendant must prove the following: (1) that the government possessed evidence favorable to the defendant, including impeachment evidence; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. U.S.C.A. Const. Amend. 14. Manning v. State, 884 So. 2d 717 (Miss. 2004).

[b] Held not material

The courts in the following cases held that the government's belated disclosure of impeachment evidence during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Peters, 732 F.2d 1004, 15 Fed. R. Evid. Serv. (LCP) 1254 (1st Cir. 1984), held that the government's belated disclosure of the chief prosecution witness' grand jury testimony after four days of trial did not violate the defendants' due process rights, where the defendants had two full days, including one nontrial day, in which to prepare to cross-examine the witness with regard to his grand jury testimony, the grand jury testimony contained little exculpatory material, and the defendants' use of the material indicated that they were not prejudiced by the late disclosure.

The court in U.S. v. Drougas, 748 F.2d 8, 16 Fed. R. Evid. Serv. (LCP) 1002 (1st Cir. 1984), held that in view of the fact that the government's decision not to prosecute the primary witness in a drug smuggling and conspiracy case for a fraudulently obtained passport was a minor benefit compared to the other crimes for which the witness had received immunity, the impeachment value of the passport violation was minimal at best. The court noted that after the discovery of immunity on the passport charge, the defendants were afforded further cross-examination on the matter, and found that the defendant suffered no prejudice from the government's late disclosure of the nonprosecution agreement. The Court also held that although grand jury transcripts containing the government witness' alleged misidentifications of the defendants and boats used in the drug smuggling operations were not received until four days after cross-examination of the witness began, where the defendants were subsequently given a full opportunity to cross-examine the witness on the alleged misidentifications, no prejudice resulted from the government's late disclosure.

The court in U.S. v. Ingraldi, 793 F.2d 408 (1st Cir. 1986), held that the delayed disclosure of Brady material to be used to impeach the government's chief witness did not deprive the defendant of an opportunity to effectively cross-examine the witness where the defense counsel conducted an extremely effective cross-examination and succeeded in using tardily disclosed information to impugn his credibility, especially where the defendant failed to move for a continuance, indicating that he was satisfied that he had sufficient time to use the materials.

The court in U.S. v. Devin, 918 F.2d 280, 31 Fed. R. Evid. Serv. (LCP) 1329 (1st Cir. 1990), held that the delay in informing the defense counsel of the psychiatric history of the prosecution's main witness until midway through the witness' first full day of testimony did not deny the defendant a fair trial under the principles of Brady. The court found that the delay in disclosing the witness' history did not impair the effective use of the information, hinder the presentation of the defense, result in unfair prejudice, or cause an alteration in the defense strategy.

The court in U.S. v. Valencia-Lucena, 925 F.2d 506 (1st Cir. 1991), appeal after remand, 988 F.2d 228 (1st Cir. 1993) and postconviction relief denied, 933 F. Supp. 129 (D.P.R. 1996), held that in a cocaine conspiracy case, the government's failure to turn over evidence of the confidential informant's drug use was not a Brady violation where the issue was fully revealed at trial and extensively explored during cross-examination.

The court in U.S. v. Osorio, 929 F.2d 753 (1st Cir. 1991), denied the defendant's contention that the "astounding negligence" of the United States Attorney's Office in failing to notify defense counsel--until halfway through trial--that its chief witness was a major drug dealer was so egregious and so prejudicial that he was entitled to a new trial, as the court found that the defendant did not demonstrated the prejudice necessary to entitle him to a new trial, where in response to the delayed disclosure of this impeachment evidence, defense counsel made no objection, motion for dismissal, or motion for a continuance, either at the time he first became aware of it or the next day when it was brought to the court's attention.

The court in U.S. v. Jadusingh, 12 F.3d 1162 (1st Cir. 1994), postconviction relief denied, 1998 WL 264732 (D.P.R. 1998), held that although the government did not disclose the witness' prior misdemeanor drug conviction until just before the start of the first day of trial, there was no Brady violation. The court found that the government did not actually learn of the conviction until that same day, and the witness' other past substance abuse and outstanding traffic violations were fully disclosed during direct and cross-examination of the witness at trial.

The court in U.S. v. Catano, 65 F.3d 219, 43 Fed. R. Evid. Serv. (LCP) 88 (1st Cir. 1995), opinion supplemented, 66 F.3d 306 (1st Cir. 1995) and appeal after remand, 94 F.3d 640 (1st Cir. 1996), held that the government's delayed disclosure of notes, that would have allegedly helped the defense impeach a government's witness, until after the witness testified was not a Brady violation in a narcotics prosecution. The court found that the prosecution offered a reasonable explanation of its failure to find the notes earlier, stating that they were in the personal files of the government agent who was away from his office, and the defendants failed to show that the delay prevented them from using the materials.

The court in U.S. v. Walsh, 75 F.3d 1 (1st Cir. 1996), held that the defendant failed to show prejudice resulting from the delayed disclosure of calendars that the codefendant, who testified against the defendant at trial, used to refresh her recollection. The court found that although the defendant claimed that earlier receipt of the evidence would have allowed the trial counsel to focus at the outset on alleged inconsistencies between the codefendant's testimony and the calendars, the initial cross-examination did not focus on the codefendant's memory, but on her veracity, and when the codefendant was subject to further cross-examination after the calendars were produced, the defense counsel paid minimal attention to the supposed inconsistencies.

The court in U.S. v. Collazo-Aponte, 216 F.3d 163 (1st Cir. 2000), held that the federal prosecution's failure to disclose that the government witness failed to identify the defendant in a pretrial photograph array until the day after the witness testified that the defendant delivered cocaine did not warrant sanctions in the federal drug conspiracy prosecution, though such information was Brady material; the failed identification attempt was subsequently introduced by the prosecution on direct examination and by the defense on cross-examination, and the judge instructed the jury that the failure to identify was relevant to the witness' credibility and that the prosecution had the burden of proving the identity of the defendant.

While government should have informed defense that one of its witnesses had been promised favorable treatment in related state court proceedings in exchange for his testimony, notwithstanding that this promise was never reduced to writing, government's failure to disclose this impeachment evidence was not prejudicial, where witness had admitted full extent of his arrangement with government during cross-examination. U.S. v. Soto-Beniquez, 350 F.3d 131 (1st Cir. 2003).

Defendant failed to show prejudice resulting from delayed or nondisclosure of impeachment evidence, and therefore failed to establish a Brady violation; court acted promptly and appropriately to offset any potential harm to defendant with regard to the delayed disclosures, and defendant did not show what inconsistencies, if any, existed between government witness' testimony and his undisclosed testimony in earlier trial. U.S. v. Casas, 356 F.3d 104 (1st Cir. 2004).

The court in U. S. v. Brown, 582 F.2d 197 (2d Cir. 1978), held that the fact that the prosecution's witness started to "squirm" shortly before trial did not require the government instantly to make such vacillations of the witness known to the defense. The court found that there was no Brady violation especially since the government did not know whether the informant would testify, or what his testimony would be, until he was called and, also, the defendant made no showing of prejudice because of the belated disclosure, in that the defense failed to raise the Brady claim until after the informant testified that his earlier statements naming the defendant as a drug seller were false and nondisclosure had no effect on the defense's theory as described in its opening.

The court in U. S. v. Barnes, 604 F.2d 121 (2d Cir. 1979), held that where the alleged inconsistencies between

the undercover informant's testimony and the report of law enforcement agencies as to the activities of the informant and a defendant on a certain evening were not so great as to be completely contradictory and where, even if the testimony and the report were inconsistent, the law enforcement agent's surveillance report was given to the defendants at the end of the day on which the informant completed his testimony, so that the defendants could recall the informant for further cross-examination or call the agents who had conducted the surveillance or both, and the defense counsel took full advantage of the difference between the informant's testimony and the agent's report in attacking the informant's credibility during summations, there was no Brady violation by reason of the government's failure to disclose the report prior to the day on which the informant testified.

The court in U.S. v. Sperling, 726 F.2d 69, 14 Fed. R. Evid. Serv. (LCP) 1542 (2d Cir. 1984), held that even assuming that the government deliberately withheld the tape of a conversation between the informant and the United States attorney where the informant indicated that his primary motive in giving information was to get back at his "former friends," such action did not entitle the defendant to a new trial, where there was ample evidence at trial of the informant's revenge motive, and the tape was thus only cumulative.

The court in U.S. v. Bejasa, 904 F.2d 137 (2d Cir. 1990), held that the government's inadvertent failure to produce Brady material, consisting of a file created by a governmental agency on the prosecution witness, until after the witness' testimony did not prejudice the defendant, who had already cross-examined the witness extensively in the areas contained in the file.

The court in U.S. v. Thai, 29 F.3d 785, 40 Fed. R. Evid. Serv. (LCP) 1387 (2d Cir. 1994), held that the government's failure to produce a tape recording of the confidential informant's initial interview with police, on a defense's request under Brady for the government to produce all statements by the informant, was not reversible error in a prosecution for murder, robbery, extortion, racketeering, and other crimes in connection with participation in Vietnamese street gang activities, absent prejudice to the defendant, where the fact that the witness lied to law enforcement agents was already before the jury, and the court granted a recess prior to cross-examination of the informant for defense counsel to listen to the tape.

The court in U.S. v. Pong, 122 F.3d 1058 (2d Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 0.23 of the Second Circuit, affirmed the district court's finding that the defendants failed to establish a "reasonable probability" that the outcome of the trial would have been different had the government produced the DEA reports in question more quickly. The court found that there was no probability that the delay in producing the reports had any affect on the outcome of the trial, as the reports were produced two days prior to the prosecution's witness taking the stand, and the reports were available to impeach the witness, and in addition, the reports, when produced, did not alter the defense's theory that the witness was a money launderer, and the delay had no effect on the defense strategy.

The court in U.S. v. Diaz, 176 F.3d 52 (2d Cir. 1999), petition for cert. filed (U.S. June 28, 1999) and petition for cert. filed, 68 U.S.L.W. 3080 (U.S. July 23, 1999) and petition for cert. filed (U.S. Aug. 2, 1999) and petition for cert. filed (U.S. Aug. 2, 1999) and petition for cert. filed (U.S. Aug. 2, 1999) and petition for cert. filed (U.S. Sept. 10, 1999), held that even if evidence that the police detective referred the witness to the FBI was of some impeachment value, [FN79] it merely constituted cumulative impeachment material, and its nondisclosure did not violate Brady, where the defendant, convicted of various offenses related to a street gang's narcotics business, was able to cross-examine the witness extensively about the timing of her decision to co-operate and her reasons for such co-operation.

No Brady violation occurred as a result of the government's failure to disclose to defendants prior to trial that a key prosecution witness lied to the grand jury when he said he was present at victim's murder, where defendants ultimately learned the truth during witness' direct testimony at trial, early enough to make effective use of the information, and government's failure to disclose did not affect the outcome of the case. U.S. v. Rivera, 60 Fed. Appx. 854 (2d Cir. 2003), cert. denied, 123 S. Ct. 1639, 155 L. Ed. 2d 497 (U.S. 2003).

The court in U.S. v. Thomas, 894 F. Supp. 58 (N.D.N.Y. 1995), held that even if the government's failure to turn over to the defendant until two weeks before the trial information concerning the extent of the informant's drug use and payment by the government could be considered a Brady violation, no new trial was required absent any showing that the defendant was denied a fair trial as a result of the delay because the informant was effectively cross-examined by the defense counsel concerning the payments from the government and his drug habit.

Defendant was not entitled before trial to impeachment material including agreements between government and its witnesses, where he failed to point to special circumstances requiring early disclosure of such material. U.S. v. Vondette, 248 F. Supp. 2d 149 (E.D. N.Y. 2001).

Government's pretrial representation that it would disclose impeachment materials three days prior to trial was sufficient to satisfy its Giglio duties. U.S. v. RW Professional Leasing Services Corp., 2004 WL 944845 (E.D. N.Y. 2004).

Government did not violate requirement that it turn over exculpatory or witness impeachment material to defendant, imposed by Supreme Court's Brady decision, when file on confidential informant who accompanied defendant in initial stages of alleged attempt to rob drug dealer was not turned over to defendant until close of government's case in robbery conspiracy trial; absence of background information on informant, which would have been shown by file, was brought out during trial through other means. U.S. v. Ortiz, 367 F. Supp. 2d 536 (S.D. N.Y. 2005).

The defendant in U.S. v. Crawford, 121 F.3d 700, 80 A.F.T.R.2d (P-H) ¶ 97- 6171 (4th Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit, alleged that the prosecutor's failure to disclose information about the witness' status as a paid informant for the local police violated the Brady rule where this arrangement was first revealed to the defendant's counsel during the witness' direct examination, but the court held that when disclosure comes late in the game, no due process violation occurs as long as the Brady material is disclosed to the defendant in time for its effective use at trial, and the court found that the defendant's attorney was able to cross-examine the witness on her status as a paid informant and was able to recall her as an adverse defense witness later in the trial. Although, the information about her status as a paid informant was brought out and the defendant's attorney was able to use the information in the closing argument, he argued that he was (1) deprived of the opportunity to further investigate the witness' background for impeachment material; (2) denied the opportunity to explore an entrapment defense; (3) denied the opportunity to explore illegal search and seizure arguments; and (4) was unable to use the information in the opening statement. The court held, however, that the defendant's attorney must show that at least one of these avenues, if he had been allowed to explore it, would have resulted in a reasonable probability of a different outcome, and the court found that he made no such showing.

The court in U.S. v. McKinney, 758 F.2d 1036 (5th Cir. 1985), held that the defendant was not prejudiced by the prosecution's tardy disclosure of material relating to the credibility of the government's witness, where the defendant received the material one day before the government's direct examination of that witness and five days prior to cross-examination, and the defendant effectively used the material during cross-examination to thoroughly impeach the witness' credibility.

The court in U.S. v. McKinney, 758 F.2d 1036 (5th Cir. 1985), also held that although material bearing on the credibility of the government's witness was effectively suppressed because the defendant did not receive the material until after completion of the cross-examination of the witness, where there was substantial evidence supporting the defendant's conviction on the extortion charges, which was in no way dependent on the credibility of the witness, and the witness' credibility was effectively impeached by thorough cross-examinations when the witness' propensity to lie and to threaten people was fully explored, the suppression did not affect the outcome of the trial so as to warrant reversal of the conviction.

The court in U.S. v. Randall, 887 F.2d 1262 (5th Cir. 1989), reh'g denied, (Apr. 12, 1990) and postconviction relief denied, 1993 WL 70224 (E.D. La. 1993), related reference, 108 F.3d 331 (5th Cir. 1997), held that the government's failure to reveal the confidential informant's cocaine addiction in response to the defense attorney's Brady request did not violate the defendant's due process rights. The court found that the information was disclosed on the first day of trial, and the defendant was permitted to cross-examine the informant on the matter the following day, and the government claimed it only became aware of the evidence two days before trial.

The court in U.S. v. Garcia, 917 F.2d 1370 (5th Cir. 1990), reh'g denied, (Dec. 14, 1990), held that the government's failure to disclose information concerning the informant's credibility pursuant to discovery requests did not require reversal of the conviction under a Brady analysis, as the defense suffered no prejudice due to the failure to disclose the information, as the district court itself tested the limits of the informant's credibility, and brought out the fact that the informant was paid by the government, despite the informant's testimony to the contrary.

The court in U.S. v. Martinez-Perez, 941 F.2d 295 (5th Cir. 1991), held that the government's failure to make pretrial disclosure of a payment to the airport manager and her husband for information regarding the narcotics defendant's conduct at the airport did not violate the Brady rule. The court found that the payment was disclosed to the defendant and jury during the trial, and there was no reasonable probability that the jury's verdict would have been different had the information been disclosed earlier, especially in light of the relatively unimportant nature of the information vis-a-vis the elements of the offenses.

The court in U.S. v. Ellender, 947 F.2d 748, 34 Fed. R. Evid. Serv. (LCP) 395 (5th Cir. 1991), held that although the government did not produce certain letters having impeachment value as to the government's witness until some time after the trial started, the defendants were not prejudiced by any Brady violation where the defendants had copies of the letters six weeks before the witness testified.

The court in U.S. v. Neal, 27 F.3d 1035 (5th Cir. 1994), reh'g denied, (Sept. 22, 1994), held that the prosecution's tardy disclosure on the defendant's request of a memorandum criticizing the Drug Enforcement Administration's (DEA) handling of the defendant's drug conspiracy-related operations did not result in prejudice to the defendant so as to constitute a denial of due process under the Brady rule, that exculpatory evidence may not be withheld, where the defendant had the memorandum in advance of its author's testimony, the defendant effectively used the memorandum during cross-examination, and the defendant, in advance of receiving the memorandum, thoroughly questioned several witnesses about the DEA's involvement with the operations.

The court in U.S. v. Green, 46 F.3d 461 (5th Cir. 1995), held that the prosecution's failure to disclose before trial that a primary government witness previously made a misidentification did not violate Brady where law enforcement witnesses gave credible testimony as to the defendant's involvement in the cocaine distribution and the entire misidentification theory was fully tried before the jury so that the jury still would have found the defendant guilty regardless of whether the government's witness was discredited, and knowledge of the misidentification would not have changed the defense counsel's strategy to try to get a corroborating witness's testimony for the defendant's claim that he and the person misidentified looked alike.

The court in U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), cert. denied, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (U.S. 1998) and appeal after remand, 169 F.3d 281 (5th Cir. 1999), held that the prosecution did not violate Brady in a federal fraud prosecution by the delay in turning over to the defense notes of an interview with two witnesses who testified for the prosecution. The court found that the reports were provided within the time mandated by the Jencks Act, the defense counsel used the first witness' report to conduct a devastating cross-examination, and the defense counsel were also able to bring out inconsistencies in the second witness' testimony.

The court in U.S. v. Williams, 132 F.3d 1055, 48 Fed. R. Evid. Serv. (LCP) 777 (5th Cir. 1998), held that the defendant waived any prejudice caused by the government's tardy disclosure of a special agent's investigative notes, which disclosed the inconsistent statement of a witness, by electing to proceed with the trial without taking

advantage of the court's offer to grant a continuance so that the defense could review its strategy and examine additional witnesses in connection with the newly disclosed evidence, and the court did thus not find a Brady violation resulting from the tardy disclosure.

When the undisclosed evidence is merely cumulative of other evidence in the record, no Brady violation occurs; similarly, when the testimony of a witness who might have been impeached by undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not material for Brady purposes. U.S. v. Sipe, 388 F.3d 471 (5th Cir. 2004).

The court in U. S. v. Enright, 579 F.2d 980, 3 Fed. R. Evid. Serv. (LCP) 284 (6th Cir. 1978), held that the prosecution's failure to reveal to the defendant approximately two weeks before trial that the codefendant retracted previously incriminating and inculpatory statements was not prejudicial under Brady since, when the matter was first set forth before the trial judge, the defense counsel was apprised that he could have a full opportunity to interview the codefendant and that the codefendant would be made available for summons as a witness if the defense counsel so desired.

The court in U.S. v. Lochmondy, 890 F.2d 817, 29 Fed. R. Evid. Serv. (LCP) 486 (6th Cir. 1989), held that the government's failure to provide defendants with the bank records of the government's witness prior to trial was not a Brady violation that affected the defendants' ability to impeach the witness, although the witness indicated during pretrial interviews that he may have made a false statement on a bank loan application concerning his occupation where the defendants were given access to such records during the trial.

The court in U.S. v. Frost, 914 F.2d 756, 31 Fed. R. Evid. Serv. (LCP) 1081 (6th Cir. 1990), held that the defendants were not denied a fair trial by the prosecution's withholding of Brady material, where the court noted that defendants received the FBI reports, the claimed Brady material withheld, in time for cross-examination and offered to give defense counsel more time to examine the reports, if they wished, before cross-examination of the government's witnesses.

The court in U.S. v. Katsakis, 976 F.2d 734 (6th Cir. 1992), denial of postconviction relief aff'd by, 19 F.3d 1433 (6th Cir. 1994), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, held that the United States did not withhold evidence favorable to the defendants in violation of Brady and Giglio where the defendants asserted that the prosecution failed to disclose that its witness had an informal agreement with federal authorities immunizing him from federal prosecution in exchange for his testimony before a federal grand jury. In the proceedings in the district court, while the prosecution gave no indication that its witness had an agreement with federal authorities, during the course of cross-examination, the witness testified that he had a "verbal agreement" with federal authorities. Since counsel for the defendants were given the opportunity to cross-examine the witness regarding the existence and extent of the agreement, the court found that this was not a case where the defendants were denied the right to present vital impeachment evidence to the jury, and the fact that counsel were given a day to prepare this information for impeachment purposes made the defendants' claim of a due process violation particularly weak, and accordingly, the court held that the prosecution's failure to disclose its agreement with its witness did not deprive the defendants of a fair trial under Brady.

The court in U.S. v. Phibbs, 999 F.2d 1053, 38 Fed. R. Evid. Serv. (LCP) 881 (6th Cir. 1993), reh'g denied, (Oct. 4, 1993), held that the government did not violate its obligation to provide exculpatory information under Brady by its delay in providing the informant's prison records to the defense, where the government eventually provided such records to the defense just before the informant was cross-examined, and the records were exploited accordingly.

The court in U.S. v. Carter, 124 F.3d 200 (6th Cir. 1997), cert. denied, 118 S. Ct. 869, 139 L. Ed. 2d 766 (U.S. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, denied the defendant's contention that the prosecution's belated disclosure of

conflicting statements made by the key government's key witness prejudiced his ability to prepare a defense and prevented him from receiving a fair trial under Brady. The court found that the prosecution's delayed disclosure of the information concerning the witness' statements did not deny the defendant a fair trial, as the defendant had the relevant statement well before the witness took the stand and the trial transcript showed that the district court invited the defendant to move for a recess if he felt the need for more time to interview witnesses.

The court in U. S. v. McPartlin, 595 F.2d 1321, 4 Fed. R. Evid. Serv. (LCP) 416 (7th Cir. 1979), held that where the government's counsel, during his opening statement in a prosecution arising from the corporation's alleged bribery of city officials, revealed that the principal government's witness, an unindicted corporate officer, embezzled and applied to his own benefit $375,000 of the money he obtained from the corporation to pay off the city officials, said disclosure of the defalcations of the government witness did not come so late as to violate due process.

The court in U. S. v. Ziperstein, 601 F.2d 281, 4 Fed. R. Evid. Serv. (LCP) 838 (7th Cir. 1979), held that although the damaging character of the laboratory requisition documents was subject to serious question, where it was obvious that the ultimate disclosure of the possibility that the documents would impeach the witnesses was made before the close of the trial, and the defendants did not attempt to develop themselves any impeaching inferences from the documents, it could not be said that the government's timing of the disclosure caused any prejudice to the defendants in violation of their due process rights.

The court in U. S. v. Allain, 671 F.2d 248, 10 Fed. R. Evid. Serv. (LCP) 71 (7th Cir. 1982), held that the delay of the prosecutor in disclosing to the defendant prior inconsistent statements of the government's witnesses and the favorable treatment received by those witnesses in exchange for their testimony was not violative of due process where the defendant was not prejudiced thereby as evidenced by the ability of the defense counsel to make good use of the impeaching evidence in his vigorous cross-examination of those witnesses.

The court in U.S. v. Sweeney, 688 F.2d 1131, 11 Fed. R. Evid. Serv. (LCP) 665 (7th Cir. 1982), held that the defendants' complaint that the nondisclosure of evidence relating to the drug use of several government's witnesses was prejudicial in that the appellants would have used this information to impeach the witnesses was without merit, where the government witnesses and informers were extensively examined by the government and cross-examined by the defendants' counsel concerning their drug use and their deals with the government.

The court in U.S. v. Perez, 870 F.2d 1222, 27 Fed. R. Evid. Serv. (LCP) 948 (7th Cir. 1989), held that the government's delay in informing the defendant that the witness was unable to identify him as the purchaser of the car that was tied to the drug transactions at issue in the prosecution did not deny the defendant a fair trial, where disclosure was made in sufficient time to enable the defendant to make use of the information by successfully striking the in-court identification testimony of the witness and cross-examining the witness about his inability to identify the purchaser of the vehicle on two prior occasions.

The court in U.S. v. Rossy, 953 F.2d 321 (7th Cir. 1992), held that evidence that the officer who testified for the government made an unsuccessful trip to New York in search of the defendant's alleged employer was not material under Brady, and therefore the government's failure to disclose the evidence to the defendant before the trial on drug charges did not violate due process, where the officer's failure to find the employer did not necessarily prove that the officer's testimony was not credible, the officer was not the sole prosecution witness, and the defense counsel explicitly argued to the jury in closing that the officer's failed search demonstrated that the officer was not credible.

The court in U.S. v. Higgins, 75 F.3d 332 (7th Cir. 1996), held that no violation of Brady v. Maryland occurred where the prosecutor told the defense counsel six or seven days before the trial that a fingerprint found on the package of cocaine matched the defendant's recorded prints. The court found that the defense counsel interviewed the fingerprint expert and impeached him in cross-examination by pointing to the inconsistency between the expert's initial report, which did not mention any prints, and his testimony, and if counsel needed

more time, she had only to ask, yet she did not seek a continuance.

Criminal histories of five government witnesses, which constituted favorable impeachment evidence, were not "suppressed" for purposes of Brady rule where discovery of the information did not come too late to make use of it at trial. U.S. v. Carter, 65 Fed. Appx. 559 (7th Cir. 2003).

Government did not suppress impeachment evidence regarding prosecution witnesses' criminal histories and arrangements of testimony in exchange for leniency on their own charges, as would support defendants' Brady violation claim, although government disclosed such evidence only during course of fairly complex drug conspiracy trial, where it was no surprise to defense that witnesses had been convicted or faced pending drug-related charges and had been offered leniency in exchange for testimony, and defense therefore had enough time to incorporate government's rolling disclosures regarding impeachment evidence into their cross-examination of each witness. U.S. v. Knight, 342 F.3d 697 (7th Cir. 2003).

The court in U.S. v. Janis, 831 F.2d 773 (8th Cir. 1987), held that the government's late disclosure of its agreement with the paid informant, who was also the prosecution's principal witness, did not require reversal of the marijuana conviction, as the evidence concerning the agreement was not material, and the late disclosure did not prejudice the defendant.

The court in U.S. v. Kime, 99 F.3d 870, 45 Fed. R. Evid. Serv. (LCP) 1278 (8th Cir. 1996), held that in a robbery and drug conspiracy case, the government's failure to disclose evidence of a romantic entanglement between the prosecution witnesses and some of their female jailers did not violate the defendant's due process rights under Brady, though the witnesses apparently received special privileges while in jail, including sexual contact, and the irregularities were not brought to the attention of the defense until midway through cross-examination of the last witness, after the other two witnesses already testified, where the defense extensively cross-examined the witness on the subject, the defense extensively examined one of the offending female corrections officers, and the defense declined to recall the other two witnesses.

The court in U. S. v. Shelton, 588 F.2d 1242, 79-1 U.S. Tax Cas. (CCH) ¶ 9189, 43 A.F.T.R.2d (P-H) ¶ 79-600 (9th Cir. 1978), rejected the defendant's complaint that his conviction should be reversed because the government violated Brady v. Maryland in that it delayed turning over 500 pages of alleged Brady material until the eve of the trial. The defendant claimed that much of the 500 pages of information turned over to the defense the day before trial impeached the credibility of the government's witness. The court held that since assuming that all of this information was material within the meaning of Brady, the delay in disclosing it only required reversal if the lateness of the disclosure so prejudiced the appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial, There could be no claim of prejudice in this case insofar as the defendant was enabled to present to the jury favorable or impeaching evidence.

The court in U.S. v. Davenport, 753 F.2d 1460, 17 Fed. R. Evid. Serv. (LCP) 622 (9th Cir. 1985), held that because the defendant had access to exculpatory information that one lineup witness was previously been shown a photographic array and made use of it in cross- examining a witness, the prosecution's delay in disclosing that information until after the lineup was held did not amount to a suppression of exculpatory evidence in violation of Brady.

The court in U.S. v. Browne, 829 F.2d 760, 23 Fed. R. Evid. Serv. (LCP) 1089 (9th Cir. 1987), held that even though the government failed to release a report prepared prior to the trial by a police officer until several witnesses were called in the defendant's armed bank robbery and use of a weapon in the commission of a felony prosecution, vacation of the conviction was not warranted, where the evidence was not withheld from the defendant throughout the trial, the government apparently first became aware of the report during the trial and proceeded to immediately acquire it for the defendant's attorney on his initial request, and the defendant made effective use of the report to extrinsically impeach the prosecution's key witness.

The court in U.S. v. Gordon, 844 F.2d 1397, 25 Fed. R. Evid. Serv. (LCP) 1076 (9th Cir. 1988), held that the government's failure to make pretrial disclosure of evidence which could be used to impeach the prosecution witness did not violate the Brady due process rights of the conspiracy defendants where the government turned over the evidence to the defense during the trial, at a time when the disclosure was of value to the defendants, and the defendants declined the opportunity to recall the prosecution witness for further cross-examination.

The court in U.S. v. Juvenile Male, 864 F.2d 641 (9th Cir. 1988), held that even if impeachment evidence as to a crime committed by the victim, which came out during the trial although after the defendant's cross-examination of the victim, was material, the trial court's consideration of it as the trier of fact precluded the possibility of prejudice to the defendant's case.

The court in U.S. v. Aichele, 941 F.2d 761 (9th Cir. 1991), denial of postconviction relief aff'd by, 60 F.3d 835 (9th Cir. 1995), held that the government did not violate Brady with respect to its disclosure of impeachment materials relating to the government's witness where the government provided the defendant with a transcript of its interview with the witness and a copy of the witness' rap sheet before the trial, and the disclosure was made at a meaningful time because the three-week holiday break in the trial gave the defendant an ample opportunity to prepare the in-court examination of the witness.

The court in U.S. v. Vgeri, 51 F.3d 876, 41 Fed. R. Evid. Serv. (LCP) 1270 (9th Cir. 1995), held that no Brady violation occurred from the government's disclosure during trial that the informant had been involved in the burglary of the house of the codefendant's female companion, in light of the fact that the defendant was able to cross-examine the informant about the burglary, as the government disclosed the information at a time when it still was of value to the defendant.

The court in U.S. v. Alvarez, 86 F.3d 901 (9th Cir. 1996), cert. denied, 519 U.S. 1082, 117 S. Ct. 748, 136 L. Ed. 2d 686 (1997), held that the government's Brady violation in untimely disclosing impeachment evidence relating to the testimony of the surveilling officers was not reversible error, as the prosecutor did in fact disclose the statement to the defense and eventually reviewed the officers' rough notes and turned over those notes that contained the discrepancies, and the defendant was able to cross-examine the investigator fully regarding the discrepancies in his report.

The court in U.S. v. Zorio, 124 F.3d 215 (9th Cir. 1997), cert. denied, 118 S. Ct. 1402, 140 L. Ed. 2d 659 (U.S. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 36-3 of the Ninth Circuit, held that the prosecution's failure to disclose before trial an immunity agreement between a government's witness and an Assistant U.S. Attorney did not violate the requirements of Brady, since, under the controlling Ninth Circuit precedent, if the disclosure occurs at a time when it is of value to the defendant, and thus does not prejudice the defendant's case, no violation has occurred, and the court found that the defendant has an opportunity to cross-examine the government's witness about the scope of his immunity and his discussions with the prosecutor, and the district court also allowed him to re-examine the witness after reviewing the notes from the prosecution's debriefing. The reviewing court thus found that the defendant had a sufficient opportunity to cure any harm caused by the late disclosure.

Even if impeachment evidence that government initially withheld in drug prosecution, consisting of amended version of agent's rough notes taken during post-arrest interview of defendant, was "material" under Brady, any Brady violation was cured by the fact that government's belated disclosure of the amended notes 22 days before trial occurred at a time when disclosure would still have been of value to defendant. U.S. v. Guzman, 89 Fed. Appx. 47 (9th Cir. 2004).

The court in U. S. v. Alberico, 604 F.2d 1315 (10th Cir. 1979), held that the defendant was not denied due process by the prosecution's failure to advise him in advance of trial that the person with whom he dealt was an FBI undercover agent, where the identity and involvement of the agent were uncovered during the course of the trial.

The court in U.S. v. Johnson, 911 F.2d 1394 (10th Cir. 1990), held that the government's failure to disclose alleged Brady material relating to the credibility of the government's witness until after the commencement of the trial did not warrant the granting of a mistrial, where the defendant did not allege that the government acted in bad faith, the evidence was merely cumulative of other evidence of the witness' bad character, the defendant did not request a continuance, and the defendant was allowed to cross-examine the witness extensively after the disclosure.

The court in U.S. v. Adams, 914 F.2d 1404 (10th Cir. 1990), held that evidence relating to the informant's previous activities as a police informant was not material to the defendant's guilt in a prosecution for the sale of "crack" cocaine and, therefore, the untimely disclosure of the evidence did not violate the Brady rule requiring the production of material exculpatory evidence. The court found that the defendant's guilt was abundantly demonstrated by police officers without the need to rely on anything the informant said, discrepancies developed during cross-examination of the informant and police officers related to the informant's own criminal activities or his activities as an informant in other cases, and the jury was able to evaluate testimony about the drug deal orchestrated by the informant to obtain leniency for himself.

The court in U.S. v. Young, 45 F.3d 1405 (10th Cir. 1995), reh'g denied, (Feb. 24, 1995), held that the government's failure to disclose until after the defense rested evidence that would purportedly impeach a government's witness did not deprive the defendant of a fair trial, notwithstanding her contention that there was a significant tactical difference between the government's first putting on damaging evidence or the defendant using such evidence in cross-examination. The court found that the impeachment value of the evidence was marginal, and there was ample other evidence that supported the defendant's convictions.

The court in U.S. v. Gonzalez-Montoya, 161 F.3d 643, 50 Fed. R. Evid. Serv. (LCP) 959 (10th Cir. 1998), cert. denied, 119 S. Ct. 1284, 143 L. Ed. 2d 377 (U.S. 1999), held that the prosecutor's failure to timely disclose impeachment evidence, relating to the coconspirator's involvement in the drug transaction that occurred earlier than the coconspirator testified to, was not prejudicial and did not warrant a mistrial in the drug prosecution, as the defendant was given an opportunity to review the new evidence and question the coconspirator about it, but the defense counsel declined to interview the coconspirator or to examine him in front of the jury, and the counsel's reluctance to question the coconspirator about the earlier transaction, for fear of implicating the defendant, would not have abated with additional time to prepare.

The court in U.S. v. McCrary, 699 F.2d 1308, 12 Fed. R. Evid. Serv. (LCP) 1311 (11th Cir. 1983), held that the defendant in a prosecution for bribing a public official, aiding and abetting the introduction of contraband into a federal correctional institute, and aiding and abetting the unlawful distribution of a controlled substance, was not denied due process of law under Brady when the government refused to produce the requested evidence concerning certain other prison inmates who were called as government's witnesses. The court found that the suppressed evidence was not material, because while the defendant sought to show that the witnesses ran afoul of regulations, used drugs and that drugs and drug dealings were widespread before the defendant became an inmate, such facts were plainly before the jury at the trial due to the long rein given the defendant's attorney on cross-examination.

The court in U.S. v. Darwin, 757 F.2d 1193, 18 Fed. R. Evid. Serv. (LCP) 1215 (11th Cir. 1985), reh'g denied, 767 F.2d 938 (11th Cir. 1985), held that the disclosure by the government that it received information possibly connecting the government's witness to an ongoing drug transaction, which was made after the witness testified, was not untimely, since although the witness completed his testimony, the trial itself was far from over and the defendant could have recalled the witness for further questioning, but chose not to.

The court in U.S. v. Knight, 867 F.2d 1285 (11th Cir. 1989), held that in a narcotics prosecution, the defendants failed to demonstrate that the government's disclosure during the trial of the witness' grand jury testimony, which revealed that the witness lied to the grand jury, came so late that it could not be effectively used so as to violate Brady. The court found that after the grand jury testimony was made available to the defendants,

the defense counsel were given an opportunity to decide when they wanted the witness recalled, had an ample opportunity to prepare for the witness, and conducted an aggressive cross- examination of the witness challenging her credibility and stressing her lack of truthfulness.

The court in U.S. v. Beale, 921 F.2d 1412, 32 Fed. R. Evid. Serv. (LCP) 783 (11th Cir. 1991), held that the government's failure to make an earlier disclosure of grand jury testimony identifying its principal witness against the defendant as a supplier of stolen cars to a criminal organization did not amount to a Brady violation, though the defendant claimed that he would have conducted his cross-examination of the witness and his opening statement in a completely different manner had he received the grand jury testimony earlier, where the grand jury testimony was not based on any admission made by the witness, but rather was based on the statement of the codefendant, the defendant succeeded in emphasizing to the jury the fact that the witness was a car thief, and the grand jury testimony was only additional impeachment evidence against the witness and was not substantive proof that, contrary to the witness' testimony, the defendant did not supply the witness with stolen cars. The court found that the defendant failed to show that if the government disclosed the material earlier he probably would have been acquitted.

The court in U.S. v. Bueno-Sierra, 99 F.3d 375, 45 Fed. R. Evid. Serv. (LCP) 1346 (11th Cir. 1996), cert. denied, 520 U.S. 1110, 117 S. Ct. 1119, 137 L. Ed. 2d 319 (1997) and cert. denied, 520 U.S. 1161, 117 S. Ct. 1347, 137 L. Ed. 2d 505 (1997), held that as a result of the trial court's remedial measures of recessing for the remainder of the day and allowing additional cross-examination of the government's witness the next morning, the defendants were not prejudiced by the fact that impeachment testimony against the government's witness was not disclosed until the trial had began and, therefore, reversal was not required.

The court in U.S. v. Paxson, 861 F.2d 730, 27 Fed. R. Evid. Serv. (LCP) 104 (D.C. Cir. 1988), held that in a prosecution for making false declarations before a grand jury, although the prosecutors violated Brady by unduly delaying the production of information that tended to discredit the testimony of the chief co-operating witness, the trial court properly refused to grant a new trial since the defense received the evidence in time to make effective use of it in cross-examination of the witness at trial.

The court in Matthews v. U.S., 629 A.2d 1185 (D.C. 1993), held that there was no Brady violation based on the failure to disclose before trial the pretrial statements of a witness, where the statements were turned over to the defendant prior to the witness' cross-examination and the witness was recalled to the witness stand after the defense counsel had an opportunity to review the statements, and the defense counsel used the statements to impeach the witness at the trial.

Research References

Total Client-Service Library References

The following references may be of related or collateral interest to a user of this annotation.

Annotations

Encyclopedias and Texts

21 Am Jurisprudence 2d, Criminal Law §§ 1269-1274, 1288-1292.

23 Am Jurisprudence 2d, Depositions and Discovery §§ 428-461.

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:1166-22:1182.

9A Federal Procedure, L Ed, Criminal Procedure §§ 22:1631-22:1634.

Practice Aids

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:439, 20:455, 20:468.

Federal Statutes

U.S.C.A. Const Amend 5.

Digests and Indexes

ALR Digest Constitutional Law § 669.5.

ALR Digest Criminal Law § 110.

ALR Digest Trial § 32.

ALR Index Exclusion and Suppression of Evidence.

Research Sources

The following are the research sources that were found to be helpful in compiling this annotation.

West Digest Key Numbers

Constitutional Law ⚯ 257, 268(5).

Criminal Law ⚯ 273.1(1), 627.8(2,3,6), 627.9(5), 700(1-8), 706(2), 919(1), 938(1), 1139, 1166(10.10), 1171.1(1), 1171.8(1).

Encyclopedias

21 Am Jurisprudence 2d, Criminal Law §§ 784, 785.

16 CJS, Constitutional Law §§ 1055-1057.

22A CJS, Criminal Law §§ 486-490, 494.

Law Review Articles

Jones,The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence 25 U. Mem. L. Rev. 735 (1995).

[FN1]. So well known is the rule of basic constitutional criminal law that the suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution, that courts and the bar refer to exculpatory evidence in the hands of the prosecution by the shorthand term "Brady evidence." U.S. v. Paxson, 861 F.2d 730, 27 Fed. R. Evid. Serv. (LCP) 104 (D.C. Cir. 1988).

[FN2]. This annotation excludes cases discussing a federal prosecutor's affirmative duty to disclose evidence favorable to a defendant decided prior to the Supreme Court case of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), as all modern cases in this area are premised on Brady.

[FN3]. See 59 ALR Fed 657.

[FN4]. See U.S. v. Cargill, 134 F.3d 364 (4th Cir. 1998), on subsequent appeal, 1999 WL 427929 (4th Cir. 1999), a case not recommended for full-text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit.

[FN5]. See U.S. v. Monteiro, 857 F.2d 1479 (9th Cir. 1988) (unpublished disposition).

[FN6]. No Brady violation occurs if the defendant knew, or should have known, the essential facts permitting him to take advantage of any exculpatory evidence. U.S. v. Morales, 107 F.3d 5 (2d Cir. 1997), post-conviction relief denied, 25 F. Supp. 2d 246 (S.D.N.Y. 1998) (unpublished opinion).

[FN7]. See U.S. v. Dillman, 15 F.3d 384 (5th Cir. 1994), reh'g en banc denied, 20 F.3d 471 (5th Cir. 1994).

[FN8]. While in the ordinary Brady case, it is only after a judgment of conviction that a court reviews the failure of the prosecution to disclose material the defendant argues should have been admitted into evidence, the same standards apply to both an initial decision to disclose and a postconviction determination whether nondisclosure deprived a defendant of due process rights at trial. U.S. v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997), related reference, 962 F. Supp. 804 (E.D. Va. 1997).

[FN9]. See Berger v. U.S., 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN10]. See, generally, Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN11]. See also Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN12]. See U.S. v. Payne, 63 F.3d 1200 (2d Cir. 1995), postconviction relief denied, 1998 WL 32511 (S.D.N.Y. 1998), reconsideration denied, 1998 WL 71652 (S.D.N.Y. 1998), certification denied, 1998 WL 16083 (S.D.N.Y. 1998) and certification denied, 1998 WL 16083 (S.D.N.Y. 1998).

[FN13]. See U. S. v. Beasley, 576 F.2d 626, 78-2 U.S. Tax Cas. (CCH) ¶ 9586, 42 A.F.T.R.2d (P-H) ¶ 78-6360 (5th Cir. 1978), reh'g denied, 585 F.2d 796, 79-1 U.S. Tax Cas. (CCH) ¶ 9107, 42 A.F.T.R.2d (P-H) ¶ 78-6369 (5th Cir. 1978).

[FN14]. See U.S. v. Vozzella, 124 F.3d 389 (2d Cir. 1997).

[FN15]. See also Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN16]. See also Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN17]. See U.S. v. Blackley, 986 F. Supp. 600 (D.D.C. 1997).

[FN18]. See U.S. v. Alberici, 618 F. Supp. 660 (E.D. Pa. 1985).

[FN19]. See U.S. v. Vozzella, 124 F.3d 389 (2d Cir. 1997); U.S. v. Cargill, 134 F.3d 364 (4th Cir. 1998), on subsequent appeal, 1999 WL 427929 (4th Cir. 1999), a case not recommended for full text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit; U.S. v. O'Dell, 805 F.2d 637 (6th Cir. 1986); U.S. v. Jackson, 780 F.2d 1305, 19 Fed. R. Evid. Serv. (LCP) 1383 (7th Cir. 1986); U.S. v. Duke, 50 F.3d 571, 32 Fed. R. Serv. 3d (LCP) 555 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (May 25, 1995); U.S. v. Gonzales, 90 F.3d 1363, 45 Fed. R. Evid. Serv. (LCP) 226 (8th Cir. 1996), reh'g denied, (Sept. 16, 1996); U.S. v. Steinberg, 99 F.3d 1486, 45 Fed. R. Evid. Serv. (LCP) 1138 (9th Cir. 1996) (disapproved of on other grounds by, U.S. v. Foster, 165 F.3d 689 (9th Cir. 1999)); U.S. v. Arnold, 117 F.3d 1308 (11th Cir. 1997).

[FN20]. See U.S. v. Arnold, 117 F.3d 1308 (11th Cir. 1997).

[FN21]. See U.S. v. Cargill, 134 F.3d 364 (4th Cir. 1998), on subsequent appeal, 1999 WL 427929 (4th Cir. 1999), a case not recommended for full text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit (suggesting in dicta that the "any reasonable likelihood" standard is less strict than the already defense friendly "reasonable probability" standard); U.S. v. Alzate, 47 F.3d 1103 (11th Cir. 1995).

[FN22]. See U.S. v. Vozzella, 124 F.3d 389 (2d Cir. 1997).

[FN23]. See also Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN24]. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3- 3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

[FN25]. See Myatt v. U.S., 875 F.2d 8 (1st Cir. 1989); U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); U.S. v. Payne, 63 F.3d 1200 (2d Cir. 1995), postconviction relief denied, 1998 WL 32511 (S.D.N.Y. 1998), reconsideration denied, 1998 WL 71652 (S.D.N.Y. 1998).

[FN26]. See U.S. v. Johnson, 117 F.3d 1429 (10th Cir. 1997) (unpublished opinion).

[FN27]. See U.S. v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997); U.S. v. Duke, 50 F.3d 571, 32 Fed. R. Serv. 3d (LCP) 555 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (May 25, 1995).

[FN28]. See U.S. v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996).

[FN29]. See U.S. v. Amiel, 95 F.3d 135 (2d Cir. 1996); U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); U.S. v. Eubanks, 1997 WL 401667 (S.D.N.Y. 1997), reconsideration denied, 11 F. Supp. 2d 455 (S.D.N.Y. 1998) (unpublished opinion); U.S. v. Buchanan, 891 F.2d 1436 (10th Cir. 1989); U.S. v. Cook, 1999 WL 155964 (D. Kan. 1999) (unpublished opinion).

[FN30]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN31]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN32]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN33]. See U.S. v. Hart, 760 F. Supp. 653 (E.D. Mich. 1991); U.S. v. Buchanan, 891 F.2d 1436 (10th Cir. 1989).

[FN34]. See U.S. v. Amiel, 95 F.3d 135 (2d Cir. 1996); U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); U.S. v. Roman, 1997 WL 695537 (D. Conn. 1997) (unpublished opinion); U.S. v. Simone, 1998 WL 54387 (E.D. Pa. 1998), aff'd without published op, 172 F.3d 42 (3d Cir. 1998) (unpublished opinion); U.S. v. Maloney, 71 F.3d 645 (7th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Mar. 15, 1996) and related reference, 1998 WL 748265 (N.D. Ill. 1998).

[FN35]. See U.S. v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996).

[FN36]. U.S. v. Phillip, 948 F.2d 241, 34 Fed. R. Evid. Serv. (LCP) 441 (6th Cir. 1991); U.S. v. Kennedy, 890 F.2d 1056 (9th Cir. 1989).

[FN37]. See U.S. v. Kennedy, 890 F.2d 1056 (9th Cir. 1989).

[FN38]. Federal Rules of Evidence Rule 608(b), 28 U.S.C.A.

[FN39]. See U.S. v. Veras, 51 F.3d 1365 (7th Cir. 1995), reh'g denied, (June 21, 1995).

[FN40]. U.S. v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997).

[FN41]. See U.S. v. Manthei, 979 F.2d 124 (8th Cir. 1992), reh'g denied, (Dec. 22, 1992); U.S. v. Boykin, 986 F.2d 270, 37 Fed. R. Evid. Serv. (LCP) 25 (8th Cir. 1993), reh'g denied, (Apr. 21, 1993); U.S. v. Gonzales, 90 F.3d 1363, 45 Fed. R. Evid. Serv. (LCP) 226 (8th Cir. 1996), reh'g denied, (Sept. 16, 1996); U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied, 172 F.3d 880 (10th Cir. 1999).

[FN42]. See U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), cert. denied, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (U.S. 1998) and appeal after remand, 169 F.3d 281 (5th Cir. 1999).

[FN43]. See U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), cert. denied, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (U.S. 1998) and appeal after remand, 169 F.3d 281 (5th Cir. 1999).

[FN44]. See U. S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (footnote 20); U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied in unpublished op, 172 F.3d 880 (10th Cir. 1999).

[FN45]. See U.S. v. Walsh, 75 F.3d 1 (1st Cir. 1996); U.S. v. De La Cruz, 996 F.2d 1307, 37 Fed. R. Evid. Serv. (LCP) 1133 (1st Cir. 1993); U.S. v. Devin, 918 F.2d 280, 31 Fed. R. Evid. Serv. (LCP) 1329 (1st Cir. 1990); U.S. v. Diaz, 922 F.2d 998 (2d Cir. 1990); U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 17 Fed. R. Evid. Serv. (LCP) 1168 (4th Cir. 1985); U.S. v. McKinney, 758 F.2d 1036 (5th Cir. 1985); U.S. v. Bencs, 28 F.3d 555, 94-2 U.S. Tax Cas. (CCH) ¶ 50347, 74 A.F.T.R.2d (P-H) ¶ 94-5271, 1994 FED App. 231P (6th Cir. 1994); U.S. v. Bailey, 123 F.3d 1381 (11th Cir. 1997).

[FN46]. See U.S. v. Beale, 921 F.2d 1412, 32 Fed. R. Evid. Serv. (LCP) 783 (11th Cir. 1991).

[FN47]. See U.S. v. Glass, 819 F.2d 1142 (6th Cir. 1987) (unpublished opinion).

[FN48]. See U. S. v. Allain, 671 F.2d 248, 10 Fed. R. Evid. Serv. (LCP) 71 (7th Cir. 1982); U.S. v. Kime, 99 F.3d 870, 45 Fed. R. Evid. Serv. (LCP) 1278 (8th Cir. 1996).

[FN49]. See U.S. v. Vgeri, 51 F.3d 876, 41 Fed. R. Evid. Serv. (LCP) 1270 (9th Cir. 1995).

[FN50]. See Sterling v. U.S., 691 A.2d 126 (D.C. 1997).

[FN51]. See U.S. v. Yu, 1998 WL 57079 (E.D.N.Y. 1998) (unpublished opinion); U.S. v. Bissell, 954 F. Supp. 841 (D.N.J. 1996).

[FN52]. 18 U.S.C.A. § 3500(a).

[FN53]. See U. S. v. Scott, 524 F.2d 465 (5th Cir. 1975); U.S. v. Presser, 844 F.2d 1275 (6th Cir. 1988); U.S. v. Hart, 760 F. Supp. 653 (E.D. Mich. 1991) (holding that directly exculpatory material covered by both Brady

and Jencks need not be disclosed until after the witness whose statements are sought has testified on direct examination); U. S. v. Jones, 612 F.2d 453 (9th Cir. 1979).

[FN54]. SeeU.S. v. Owens, 933 F. Supp. 76 (D. Mass. 1996); U.S. v. Gallo, 654 F. Supp. 463 (E.D.N.Y. 1987); U.S. v. Ruiz, 702 F. Supp. 1066 (S.D.N.Y. 1989), decision aff'd, 894 F.2d 501 (2d Cir. 1990); U.S. v. Starusko, 729 F.2d 256, 15 Fed. R. Evid. Serv. (LCP) 228 (3d Cir. 1984); U.S. v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997), related reference, 962 F. Supp. 804 (E.D. Va. 1997)(adopting a "balancing approach"); U. S. v. Thevis, 84 F.R.D. 47 (N.D. Ga. 1979).

[FN55]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN56]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN57]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); U.S. v. Millan-Colon, 829 F. Supp. 620 (S.D.N.Y. 1993), order aff'd on other grounds, 17 F.3d 14 (2d Cir. 1994); Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996); U.S. v. Patel, 1999 WL 675293 (N.D. Ill. 1999), noting that while the Seventh Circuit has not yet ruled on whether Brady protections apply when a defendant has entered a plea before trial, several circuits have held that Brady may be invoked to challenge the voluntariness of a guilty plea; White v. U.S., 858 F.2d 416 (8th Cir. 1988); Sanchez v. U.S., 50 F.3d 1448 (9th Cir. 1995); U.S. v. Lagoye, 1995 WL 392542 (N.D. Cal. 1995) (unpublished opinion).

[FN58]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); U.S. v. Millan-Colon, 829 F. Supp. 620 (S.D.N.Y. 1993), order aff'd on other grounds, 17 F.3d 14 (2d Cir. 1994); Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996); U.S. v. Patel, 1999 WL 675293 (N.D. Ill. 1999); Sanchez v. U.S., 50 F.3d 1448 (9th Cir. 1995).

[FN59]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); Sanchez v. U.S., 50 F.3d 1448 (9th Cir. 1995).

[FN60]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN61]. See U.S. v. Severson, 3 F.3d 1005 (7th Cir. 1993), appeal after remand, 49 F.3d 268 (7th Cir. 1995).

[FN62]. See § 5.

[FN63]. See also Strickler v. Greene, 119 S. Ct. 1936 (U.S. 1999).

[FN64]. U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN65]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN66]. See U.S. v. Avellino, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN67]. See U.S. v. Pelullo, 14 F.3d 881 (3d Cir. 1994); U.S. v. Gonzales, 121 F.3d 928 (5th Cir. 1997), reh'g denied, (Oct. 1, 1997) and cert. denied, 118 S. Ct. 726, 139 L. Ed. 2d 664 (U.S. 1998) and cert. denied, 118 S. Ct. 1084, 140 L. Ed. 2d 141 (U.S. 1998); U.S. v. Phillip, 948 F.2d 241, 34 Fed. R. Evid. Serv. (LCP) 441 (6th Cir. 1991); U.S. v. Amlani, 111 F.3d 705, 46 Fed. R. Evid. Serv. (LCP) 1422 (9th Cir. 1997), opinion after remand, 169 F.3d 1189 (9th Cir. 1999); U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied, 172 F.3d 880 (10th Cir. 1999); U.S. v. Schlei, 122 F.3d 944, 48 Fed. R. Evid. Serv. (LCP) 143 (11th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 132 F.3d 1462 (11th Cir. 1997) and cert. denied, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (U.S. 1998); U.S. v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996); In re Sealed Case No. 99-3096, 185 F.3d 887 (D.C. Cir. 1999).

APPENDIX E

Rules 7(c), 32, 32.2.

- **Copy of Rules**
- **Committee Notes**

Rule 7. The Indictment and the Information

(c) Nature and Contents.

* * * * *

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

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

* * * * *

Committee Note

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

The committee's proposed Booker amendment to Rule 32(d)(2)(F) – shown as a single underline below -- has been approved by the Supreme Court. The Rules Committee has proposed a further amendment to the rule, which is shown below as a double underline.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

* * * * *

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

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

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

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

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

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

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

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

(G) whether the Government seeks forfeiture under Rule 32.2.

Committee Note

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

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture

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

(A) *Forfeiture Determination.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written

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

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

(A) *Contents of Order.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, ~~or~~ directing the forfeiture of specific property, and directing the forfeiture of any substitute assets if the government has met the statutory criteria, ~~without regard to any third party's interest in all or part of it~~.

The order must be entered without regard to any third party's interest in the forfeited property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) *Timing of Order.* Unless doing so is impractical, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

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

identified property, describing other property in general terms, and stating that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights. ~~At sentencing – or at any time before sentencing if the defendant consents – the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The

court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

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

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

(B) *Notice and Inclusion in Judgment.* The district court must include the forfeiture in the oral announcement of the sentence or otherwise ensure that the defendant is aware of the forfeiture at time of sentencing. The court must also include the order of

forfeiture, directly or by reference, in the judgment. The court's failure to include the order in the judgment may be corrected at any time under Rule 36.

(C) *Time for Appeal.* The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If after entry of judgment the court amends or declines to amend an order of forfeiture to include an additional asset under Rule 32.2(e), a party may file an appeal regarding that asset under Federal Rule of Appellate Procedure 4(b). The time to appeal will run from the date when the order granting or denying the amendment becomes final.

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

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

(B) *Special Verdict Form.* If a timely request to have the jury determine the forfeiture is made, the government must submit a proposed Special Verdict Form listing each asset subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the

property and the offense committed by the defendant.

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

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

(B) *Content of Notice.* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) *Means of Sending Notice.* The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

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

* * * * *

Committee Note

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

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought [if necessary] to enable the defendant to prepare a defense [or to avoid unfair surprise]. *See, e.g.*, *United States v. Moffitt, Zwerdling, & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996) (holding that government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp.2d 941, 944 (N.D. Ill. 2001) (directing government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

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

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

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated order of forfeiture, within seven

days after oral announcement of the sentence. During the seven day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless "it is not practical to do so" in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

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

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

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal.

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

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court

to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

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

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

APPENDIX F

Rule 41(e)(2) and (f)(1).

- **Copy of Rule**
- **Committee Note**

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

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

* * * * *

(B) *Warrant to Search for Electronically Stored Information.* A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes subsequent review of the storage media or electronically stored information consistent with the warrant. The time for the execution of the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the storage media or electronically stored information, and not to any subsequent

review of the media or electronically stored information.

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

* * * * *

(f) Executing and Returning the Warrant.

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

* * * * *

(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied. The officer may maintain a copy of the electronically stored information seized or copied.

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Committee Note

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

The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which defines it as " writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Advisory Committee Note to Rule 34(a) explains that the definition is intended to cover all current types of computer-based information and to encompass future changes and developments. This same broad and flexible definition is intended under Rule 41.

In addition to addressing the "two step process" inherent in searches for electronically stored information, the Rule limits the 10 [14]** day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive time period within which any subsequent offsite review of the media or electronically stored information would take place, the practical reality is that there is no basis for a "one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does

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

not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the Court for additional time.

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

Where the "person aggrieved" requires earlier access to the storage media or the electronically stored information than anticipated by law enforcement or ordered by the Court, the Court on a case by case basis can fashion an appropriate remedy taking into account the time needed to image and search the data, and any prejudice to the aggrieved party.

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

inventory, as opposed to making a document by document list of the contents.

APPENDIX G

Rules 11 of the Rules Governing §§ 2254 and 2255 Cases.

- **Copy of Rules**
- **Committee Notes**

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

Rule 11. Certificate of Appealability; Motion for Reconsideration; ~~Time to~~ Appeal

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

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the § 2255 proceedings. Federal Rules of Civil Procedure [52(b),

59(b),][***] and 60(b) may not be used in § 2255 proceedings.

(c) **Time for Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

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

The Rules Governing Section 2255 Proceedings have not previously provided a mechanism by which a litigant can seek

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[***]The Committee invites comment on the desirability of including these rules.

reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a

"defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

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

Rule 11. Certificate of Appealability; Motion for Reconsideration

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

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the petitioner's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may raise only a defect in the integrity of the § 2254 proceedings.Federal Rules of Civil Procedure [52(b),

59(b).][****] and 60(b) may not be used in § 2254 proceedings.

Committee Note

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2254. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re

[****]The Committee invites comment on the desirability of including these rules.

Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or

clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2254 and the finality of criminal judgments.

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

7E

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 16-17, 2007
Brooklyn, New York

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Brooklyn, New York, on April 16-17, 2007. All members participated during all or part of the meeting:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King (by telephone)
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee at the meeting was Judge Mark R. Kravitz. Also 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
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laurel L. Hooper, Senior Research Associate, Federal Judicial Center

The following officials from the Department's Criminal Division also participated:

William A. Burck, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Acting Director, Office of Policy and Legislation
Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section

Ovie Carroll, Chief, Cybercrime Laboratory, Computer Crime and Intellectual Property Section
Richard W. Downing, Assistant Deputy Chief for Technology and Procedural Law, Computer Crime and Intellectual Property Section

Also participating in the meeting, for the discussion of the Forfeiture Subcommittee's recommendations, was David Smith of the National Association of Criminal Defense Lawyers.

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

Judge Bucklew welcomed the committee to Brooklyn and thanked Judge Trager for hosting it. She noted that this would be her last meeting as chair and that the terms of Judge Trager, Judge Bartle, and Professor King would also expire on September 30, 2007. She announced that the committee's next meeting, on October 1-2, 2007, would be held in Park City, Utah. She thanked the reporter and subcommittee members for their especially hard work in recent months and thanked the Administrative Office staff for their coordination assistance.

B. Review and Approval of Minutes

Judge Tallman moved to approve the draft minutes of the October 2006 meeting.

The committee unanimously approved the motion.

C. Report of the Rules Committee Support Office

Mr. Rabiej said that the Rules Committee Support Office had nothing to report other than information relating to specific amendments, which he would relate later in the meeting.

II. CRIMINAL RULE CHANGES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court

Judge Bucklew reported that the three rule amendments relating to *United States v. Booker*, 543 U.S. 220 (2005), the new criminal privacy rule required by the E-Government Act of 2002, and the Rule 45 amendment, all previously approved by the Judicial Conference, were pending before the Supreme Court:

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

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

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

B. Proposed Amendment Approved by the Criminal Rules Committee for Consideration by the Standing Committee

Judge Bucklew noted that the committee had voted in October 2006 to forward to the Standing Committee for publication the proposed amendment to Rule 16 obligating prosecutors to disclose exculpatory or impeaching evidence without regard to its materiality. She said that Mr. Rabiej had advised Federal Judicial Center staff that the committee would like an update of its October 2004 study of local rules and how they treat a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Bucklew reported that the proposed rule amendment would be presented to the Standing Committee at its June 2007 meeting. Professor Beale noted that she was preparing a memorandum in support of the amendment.

C. Proposed Amendments Related to the Crime Victims' Rights Act Published for Public Comment

Judge Bucklew noted that the following published rule amendment proposals, relating to the Crime Victims' Rights Act (CVRA), had been the subject of significant public comment, including substantial testimony at the public hearing held on January 26, 2007, a letter from Senator Jon Kyl, and a law review article by Judge Paul Cassell:

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

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

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

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

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

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

7. Rule 61. Conforming Title. The proposed amendment simply renumbers the existing Rule 60.

After highlighting Professor Beale's written summary of the public comments, Judge Bucklew invited Judge Jones to report on the work of the CVRA Subcommittee in response to the public comments. Judge Jones began by acknowledging the hard work of the other subcommittee members: Judge Battaglia, Justice Edmunds, Professor King, Mr. Cunningham, and the Department's Mr. Wroblewski. In addition to participating in lengthy conference calls, the members had performed a significant amount of "homework," Judge Jones reported.

Complaints regarding the proposed CVRA rule amendments had been received at the public hearing "from both sides," he reported, some accusing the committee of showing indifference to victims' rights and others claiming that the committee's proposal violated a defendant's constitutional rights. After carefully reviewing all the comments received, the subcommittee recommended making certain changes to its original proposal. Two central principles that guided the original design of these amendments, however, were retained: first, the need to be prudent and wait for greater practical experience with the CVRA before a wholesale revision of the Federal Rules of Criminal Procedure is undertaken, particularly because these rules often serve as a model for state procedural rules; and second, the placement of most of the CVRA-related provisions in one central rule rather than sprinkling them throughout the rules, thereby emphasizing their importance and giving practitioners easy access.

The subcommittee continued urging adoption of the definitional provision in Rule 1, Judge Jones reported, but suggested moving a reference to the Act's ban on a defendant asserting victim's rights to the note accompanying proposed Rule 60(b)(2), where the rule discusses who may represent victims. The subcommittee recommended making clear in the note that courts have authority to determine who qualifies as a "victim" through appropriate fact finding and legal rulings. Professor Beale pointed out that certain commentators had urged broader substantive changes that, if adopted, would likely require republication and a new public comment cycle. Rather than delay the effective date of these proposed rule changes, she suggested that the committee maintain an ongoing list of additional CVRA-related proposals for consideration in future meetings. Judge Jones agreed and noted that republication of all the proposed CVRA-related rule amendment would cause a two-year delay, which seemed contrary to Congress's clear directive in 2004 that implementation of victims' rights be a high priority.

Professor Beale said that some commentators had expressed concern that giving the term "victim" the statutory definition in Rule 1 could have a broader, inadvertent impact on other areas of the law, such as restitution. Judge Jones suggested that the Rule 1 definition clearly governed the term only as used within the Federal Rules of Criminal Procedure, noting that Rule 1(b) begins as follows: "The following definitions apply to these rules: . . . ." It was noted, though, that courts often treat such definitions as gap fillers. Professor Beale suggested that courts could cite the CVRA's definition of "victim" directly without referring to Rule 1. After further discussion, a member recommended allowing the case law to sort out this issue.

The committee discussed the proposed Rule 12.1 amendment. Judge Jones noted that the proposal had been criticized for placing the burden on the defendant to show a need for witnesses' names and addresses. The subcommittee continued to believe, though, that the proposed language struck the proper balance. Reciprocal disclosure is maintained, he said, because once the defendant has shown a need for the information — not a heavy burden — the court is obligated to protect the defendant's right to trial preparation. Also, even now, he noted, the present rule allows an exception to disclosure obligations for good cause.

Mr. McNamara reported that the federal defenders community felt strongly that the proposed Rule 12.1 amendment was unconstitutional, because it would create a new right for victims and an unfair advantage for the government by requiring a defendant to disclose the names and addresses of alibi witnesses, but to wait before receiving the same information for the alleged victim. Professor Beale said that the question was who should bear the burden of showing that this is an unusual case. Judge Jones said that, in cases where the defendant knows the victim, disclosure of the name and address was unnecessary, and in most other cases, the defendant could easily show a need. The question, one member noted, was simply how to tee up the issue for the court's resolution. Another member questioned whether it made sense, though — particularly in the context of an alibi rule, one of the few circumstances where defendants must disclose aspects of their defense — to require defendants to show a need for basic contact information that they would nearly always require to carry out an investigation. Mr. Wroblewski suggested that the issue was not whether the government has to disclose whether the victim will be a rebuttal witness or whether the person must be produced, but simply the mechanism for

producing the person — whether the government is required to disclose the name and address to the defense or whether an alternate procedure could be followed. Referring to proposed Rule 12.1(b)(1)(B)(ii), one judge noted that he had often just required the government to bring the witness to the jury room and permit the defense to interview the person there.

A member reported that someone is currently being prosecuted for issuing threats against him, which gave him real concerns about having defendants know where victims live. Concern was expressed that not all judges would be as reasonable as those in the room and that some might refuse to give defendants access to addresses and phone numbers. It was suggested that sometimes the address should be given, but not the phone number. After further discussion, an alternative motion was made to amend the "Exceptions" provision in Rule 12.1(d) as follows:

> (1) In General. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).
>
> (2) Victim's Address and Telephone Number. If on motion in accordance with Rule 60(b)(1)-(4), the court finds that disclosure to the defendant of the address or telephone number of a victim whom the government intends to rely on a rebuttal witness to the defendant's alibi defense would violate the victim's right to be reasonably protected from the accused, the court shall fashion a reasonable alternative procedure that ensures effective preparation of the defense and also reasonable protection of the victim.

Professor Beale suggested that, because making this change could require republishing for a new round of public comment, it might make sense to proceed with the amendment as proposed and consider further adjustments at a future date. A participant questioned whether republication would be required. It was recommended that, given Senator Kyl's letter to the committee dated February 16, 2007, and the floor statements on the CVRA made by Senator Kyl and Senator Dianne Feinstein, the committee should preserve the careful balance between competing concerns that is struck in the Act itself, as the subcommittee's proposal does.

After further discussion, Judge Bucklew suggested that the committee vote on each proposed CVRA-related rule amendment separately instead of as a package and that, before considering the motion to revise the amendment to Rule 12.1, the committee first vote on the proposal as originally recommended by the CVRA Subcommittee. Judge Jones moved to forward to the Standing Committee the subcommittee's Rule 12.1 amendment proposal.

The committee voted 9-2 to forward the proposed Rule 12.1 amendment to the Standing Committee as drafted by the CVRA Subcommittee.

Judge Jones moved for adoption of the subcommittee's proposed Rule 1 amendment.

The committee voted 10-1 to forward the proposed Rule 1 amendment to the Standing Committee.

Following a break, Professor King, who was unable to travel to New York, joined the meeting by telephone. The committee discussed the proposed amendment to Rule 17(c)(3). In response to public comment, the CVRA Subcommittee recommended omitting the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. Also, the last sentence was revised to provide that, absent exceptional circumstances, the court must notify the victim before a subpoena for a victim's private or confidential information can be served upon a third party. This was a compromise. Victims should normally be notified. But without ex parte applications, the government could learn of the subpoena request, which might reveal defense strategy. The proposed rule amendment would also not deprive courts of their inherent power to entertain any application ex parte where good cause for doing so was shown.

One member suggested adding "or otherwise have the opportunity to be heard or object" to the end of the proposed language of Rule 17(c)(3), because victims may not have lawyers and may not know how to file a formal motion. Another member said that perhaps adding the words "or otherwise object" would be sufficient. Mr. McNamara reported that the defenders community considered the entire amendment proposal unnecessary and unwise, but that at the very least the phrase "unless there are exceptional circumstances" should be replaced with "for good cause shown." It was suggested that the rule acknowledge the fact that victims sometimes communicate directly with the court. Concern was expressed, though, about endorsing such informality in the rule, given the CVRA's effort to effect a paradigm shift and give victims formal status in the case and the need to give all parties proper notice. Judge Bucklew pointed out that, as a practical matter, she treated any request for relief contained in a letter from a victim as a motion. After further discussion, it was suggested that judges be allowed to sort out the proper application of this rule on a case-by-case basis. A motion was made to add the phrase "or otherwise object" at the end of the Rule 17(c)(3) amendment proposed by the subcommittee.

The committee voted 9-3 to add the phrase "or otherwise object" to the proposed Rule 17 amendment.

A motion was made to replace the phrase "there are exceptional circumstances" in the subcommittee's Rule 17 amendment proposal with the phrase "good cause is shown."

The motion was rejected by a vote of 8-4.

The committee then discussed the two-step process envisioned by the proposed Rule 17 amendment. Because the question for the judge was whether to require *any* notice to the victim, it was suggested that the rule set a high standard — "exceptional circumstances" — because normally victims should be informed when, say, their psychiatric records are being subpoenaed. The last sentence should therefore be changed to require that, absent exceptional circumstances, notice be given to both the victim and the government. This rule is all about notice, and most subpoenas are ex parte. Several members voiced support for addressing this issue in the committee note. After further discussion, a motion was made to add the following clarifying sentence to the note accompanying the proposed Rule 17 amendment: "The committee leaves to

the judgment of the district court the determination as to whether the judge will permit the matter to be decided ex parte and authorize service of the third-party subpoena without notice to anyone." A suggestion that the addition to the note refer simply to "court" rather than "district court" was readily accepted.

The committee voted 10-0 to add the sentence suggested by Judge Tallman, as modified, to the committee note.

The committee considered a suggestion that the phrase "would include" replace the phrase "might include" in the last sentence of the second paragraph of the note accompanying the proposed Rule 17 amendment. Mr. Wroblewski said that he agreed that "exceptional circumstances" would include "evidence that might be lost or destroyed if the subpoena were delayed," but disagreed that "would include" was proper to a "situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy." It was suggested that the note discuss the fact that "exceptional circumstances" may mean different things depending on the nature of the information sought. One member noted that retaining the phrase "exceptional circumstances" would make clear that the bias remained in favor of notification.

The committee voted 7-5 to replace the phrase "might include" with the phrase "would include" in the last sentence of the second paragraph of the note accompanying the proposed Rule 17 amendment.

Judge Jones moved to forward the proposed Rule 17 amendment and its accompanying committee note, as modified, to the Standing Committee.

The committee voted 9-3 to forward the proposed Rule 17 amendment and its accompanying note, as modified, to the Standing Committee.

The CVRA Subcommittee recommended adding the phrase "any victim" to Rule 18 to make clear that courts must consider the convenience of the victim(s) when setting the place of prosecution and trial. The defenders community opposed the change because the CVRA gives victims only a right "not to be excluded from any such public proceeding," not a right to attend them. Professor Beale agreed that there was a problem with the reference in lines 11 and 12 of the note to "right to attend proceedings under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(b)," because the statute indeed creates no such right. She also said that lines 16 and 17 of the note were included to underscore the court's need to balance competing interests. Judge Wolf moved that the Rule 18 amendment be adopted.

The committee voted 9-2 to forward the proposed Rule 18 amendment to the Standing Committee.

Three suggestions to the note were discussed. Professor Beale proposed revising the first sentence of the note accompanying the proposed Rule 18 amendment to read as follows: "The rule requires that courts consider the convenience of victims — as well as that of the defendant

and witnesses — in setting the place for trial within the district." It was suggested that the sentence in lines 13 and 14 of the note was unnecessary and should be omitted: "If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered." One member recommended rewording the final sentence to read, "The Committee recognizes that the court has substantial discretion to balance any competing interests."

The committee without objection approved the three suggested changes to the note.

The CVRA Subcommittee had decided to retain the statutory phrase "right to be reasonably heard" as originally proposed in the Rule 32 amendment. The subcommittee had considered a suggestion that the rule be amended to give victims an express right to disclosure of all or parts of a presentence report, but ultimately had concluded that this was another area where future experience would better inform the rulemaking process.

A motion was made to reject the subcommittee's proposal to change the term "permits" to "requires" in Rule 32(c)(1)(B). The rule currently provides: "If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution."

The motion was rejected by a vote of 9-3.

A motion was made to reject the CVRA Subcommittee's proposal to change the current requirement in Rule 32(d)(2)(B) that the presentence report contain "verified information." The subcommittee had proposed replacing the phrase "verified information, stated in a nonargumentative style" with the word "information." Professor Beale suggested that any concerns about the inclusion of unverified information in presentence reports could be addressed in a separate, future agenda item. It was noted that there was already a formal procedure affording both parties ample opportunity to object to statements in the presentence report.

One member suggested that perhaps more important would be to amend Rule 32 to require fair notice to defendants of what a victim intended to say at the sentencing hearing. It was suggested that any such requirement would raise serious practical difficulties. Mr. Wroblewski said that victim impact statements were included in most presentence reports. Professor Beale suggested that this was perhaps a topic for a future agenda item.

The motion was rejected by a vote of 10-2.

After a suggestion to revise the accompanying committee note was discussed and ultimately withdrawn, Judge Jones moved to forward the CVRA Subcommittee's Rule 32 amendment proposal to the Standing Committee.

The committee voted 10-2 to forward the proposed Rule 32 amendment to the Standing Committee.

Following lunch, the committee discussed proposed Rule 60. In response to the comments received, the subcommittee had revised paragraph (b)(2) to make clear that a victim's lawful representative could assert the victim's rights and had changed the note to clarify that a victim's representative could be counsel.

It was noted that paragraphs (3) and (4) of proposed Rule 60(b) incorrectly referred to "subsection" instead of "subdivision" in lines 30 and 34. Professor Beale added that the reference to the specific provision should be replaced by a broader reference to the rights described "in these rules." A motion was made that the phrase "under these rules" replace "described in subdivision (a)" in lines 30 and 34. Concern was raised about having paragraph (b)(3) apply to victim's rights other than those described in subdivision (a). Following substantial discussion, the committee decided to vote first whether to replace the reference to "described in subsection (a)" with "described in these rules" in line 34 of proposed Rule 60.

The committee voted 10-2 to replace the reference to "subsection (a)" with "these rules" in line 34 of proposed Rule 60.

It was noted that the rule included other instances where the phrase "under these rules" was used instead of "described in these rules." Professor Beale suggested that "under these rules" was broader and could include rights implied but not expressly "described" in the rules. A motion was made to change all references to "victim's rights under these rules" to "victim's rights described in these rules," including lines 23, 25, and 46, and that the chair and the reporter be given discretion to make similar wording changes elsewhere, as appropriate.

The committee voted 10-2 to replace all references to "victim's rights under these rules" with "victim's rights described in these rules" and to give the chair and the reporter discretion to make similar wording changes elsewhere, as appropriate.

The committee returned to a discussion of whether the "Multiple Victims" provision in paragraph (b)(3) should apply to victim's rights other than those described in subdivision (a). One member questioned whether the provisions set forth in subdivision (a) were actually "rights," particularly those in paragraph (a)(2). A motion was made to change the phrase "described in subdivision (a)" in line 30 to "described in these rules." One member voiced support for the change because 18 U.S.C. § (d)(2), the CVRA's "multiple crime victims" provision, includes rights other than those set forth in subdivision (a) of proposed Rule 60.

The committee voted 9-2 to change the phrase "described in subdivision (a)" in line 30 to "described in these rules."

It was suggested that the last two sentences of proposed Rule 60(a)(2) were unnecessary and should be deleted: "The court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record." Another member, though, recommended retaining the sentences so that a clearer record is created for purposes of appeal. Several

members defended the decision to import key language from the statute directly into the text of the Criminal Rules. One member questioned, though, whether the second sentence of paragraph (a)(2) really added anything to what is already stated earlier in proposed Rule 60. Another argued against including a phrase like "fullest attendance possible" in the rule.

A motion was made to change the beginning of the first sentence of paragraph (a)(2) as follows: "In determining whether to exclude a victim, the court must . . . ."

The committee voted 11-0 to insert the introductory phrase, "In determining whether to exclude a victim," at the beginning of the first sentence of paragraph (a)(2).

After a discussion of whether the statutory phrase "highest offense charged," incorporated in proposed Rule 60(b)(5)(C), was sufficiently clear, Judge Jones moved to forward proposed Rule 60 to the Standing Committee, as revised.

The committee voted 10-2 to forward proposed Rule 60, as revised, to the Standing Committee.

Judge Bucklew asked whether there was any objection to renumbering Rule 60.

The committee decided without objection to forward the proposal to renumber Rule 60 to the Standing Committee.

D. Other Proposed Amendments Published for Public Comment

Judge Bucklew noted that public comment had also been received with respect to the following two published rule amendment proposals:

1. Rule 29. Motion for Judgment of Acquittal. The proposed amendment prohibits a judge from entering a judgment of acquittal before verdict, unless the defendant waives his Double Jeopardy rights.

2. Rule 41. Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside of the United States.

Judge Bucklew noted that the overwhelming majority of the public comments opposed the Rule 29 amendment. Judge Tallman, who chaired the subcommittee that worked on the Rule 29 amendment proposal, reported that the subcommittee had voted 3-2 to recommend tabling the published proposal to revise Rule 29, which included a double jeopardy rights waiver. In response, the Department had submitted an alternative, which would essentially require a judge to defer ruling on a Rule 29 motion from mid-trial until after the jury announces its verdict or announces that it is unable to reach a verdict. The only remaining question was whether a defendant has some inchoate constitutional right, either under the Double Jeopardy or Due Process clauses, to have the court decide a Rule 29 motion promptly — mid-trial — rather than

have the ruling postponed until later. Judge Tallman noted that both he and Judge Wolf had prepared memoranda on the issue, which had been distributed to all committee members. Judge Tallman added that the new version would have to be published.

Judge Tallman requested additional time for his subcommittee to work on the Department's alternative version for consideration by the committee in October 2007. One member urged that the committee continue considering the Double Jeopardy waiver provision proposed by Judge David Levi, which he considered a sound and constitutional approach to solving the infrequent, but troubling problem of erroneous court acquittals. Ms. Fisher said that the Department was not walking away from the proposal due to constitutional concerns, but was mindful of the public comments and thought that it should offer an alternative as a further compromise to prevent its three-year effort to amend Rule 29 from dying.

Judge Wolf moved that the published Rule 29 amendment proposal be tabled, but that the subcommittee continue working on it for subsequent consideration by the full committee. It was suggested that an effort to limit the power of a district court judge required a statutory change rather than a rule amendment. Judge Wolf noted that his memorandum included a discussion of this and related legal issues. Judge Bucklew said that the Department had indicated at one point that it considered it appropriate to take this issue directly to Congress, but that it wanted to give the rules committees the opportunity to have input.

If public criticism had changed the committee's estimation of the published proposal's merits such that it wished to table it and consider an alternate, the Standing Committee would likely be interested in understanding the new timeline, Judge Kravitz said. He added that a coordinated memorandum analyzing the Rules Enabling Act question was needed. Professor Beale noted that the committee had voted to table this proposal once before and that the Department had then gone to the Standing Committee and persuaded that body to direct the advisory committee to resume its consideration. One member voiced opposition to the motion to table the rule amendment proposal, given how much time the committee had already invested in the effort to amend Rule 29. In light of the comments, the motion was withdrawn.

Judge Bucklew inquired whether the Department would once again take its case to the Standing Committee if the advisory committee decided to table the proposal. Ms. Fisher said that the Department considered this a very important effort and would continue working to have the advisory committee approve a version of the rule amendment that the Standing Committee could vote on. It was noted that the Standing Committee had asked the advisory committee to take a second look at the Department's proposal because it preferred that the Department come to the rules committees rather than go directly to Congress. The new proposal dropped the double jeopardy waiver provision and altered only the timing of the court's decision. Another member said that the most controversial aspect of the proposal remained, namely, elimination of the court's power to issue its ruling mid-trial and thereby relieve one or more defendants of the burden of sitting through a lengthy trial.

Judge Wolf moved that the committee recommend to the Standing Committee that it not adopt the proposed Rule 29 amendment as published for public comment.

The committee voted 9-3 to recommend that the Standing Committee not adopt the Rule 29 amendment as published.

Ms. Fisher moved to send the revised version to the Standing Committee instead.

Professor Beale said that the new version would likely need to be published for public comment first. After further discussion, Judge Tallman suggested that it would be a waste of the subcommittee's time to continue working on the revised amendment if it lacked committee support. One member noted that Judge Tallman's memorandum of March 28, 2007, had indicated that further research was required and expressly stated that the new materials were being circulated "for informational purposes only at this time." He added that if the Department was intent on pursuing the amendment, the committee should take the time needed to consider the Department's latest proposal properly. It was suggested, though, that if there was limited committee support for amending Rule 29 at all, investing more time would be pointless. Judge Bucklew and Professor Beale noted that the Department's new Rule 29 amendment proposal had not yet been properly reviewed by the subcommittee, much less by the full committee.

Judge Jones moved that the proposal to revise Rule 29 be tabled indefinitely, *sine die*.

After further discussion, Judge Bucklew sought and received Ms. Fisher's consent for postponing consideration of her motion until the committee had first voted on the motion to table the proposal. One member stated that, although the Department had initially persuaded her that a serious problem existed in certain cases and although she saw no constitutional problem with any of the Rule 29 amendment proposals, the recent public testimony had convinced her that this was not an issue that requires a change of this magnitude.

Ms. Fisher said that the committee had previously been furnished empirical data showing the significant scope of the problem that the proposed Rule 29 amendment was designed to solve. Mr. Wroblewski said that, although the defense community had raised certain questions, it was clear that between 50 and 150 mid-trial Rule 29 motions are granted each year. Mr. McNamara said that the defenders had examined every case cited by the Department and had concluded, after talking to the persons involved, that the Rule 29 judgments were proper down the line.

Procedurally, one member asked whether tabling the Department's new Rule 29 proposal would end the matter. It was noted that the Standing Committee could still decide to proceed. Indeed, Judge Bucklew noted that the Standing Committee had returned the proposal to the advisory committee with instructions that it draft a rule amendment. Asked whether he thought that the Standing Committee would do so again, Judge Kravitz recounted the historical circumstances of the Standing Committee's reasoning. Although it was impossible to predict what the Standing Committee would do this time, the Standing Committee traditionally would

not try to draft a rule itself. Professor Beale suggested, and Judge Bucklew agreed, that if the committee decided not to amend Rule 29 as proposed, it should make clear to the Standing Committee the basis for its decision not to do so.

Following a break, Judge Bucklew invited the members to announce their votes on the motion to table the proposed Rule 29 amendment, and, if supporting it and if they felt comfortable doing so, to identify the primary reasons motivating the vote. The members who voted in favor of the motion cited one or more of the following reasons:

- Because the value of having trial judges prune cases before they go to the jury outweighs the cost of a few improvident acquittals not being appealable.
- Because the proposed amendment is a substantive change that would, if approved, violate the Rules Enabling Act and which should instead be handled by Congress.
- Because there is insufficient evidence of a problem, there being only anecdotal, not empirical, data to justify disrupting Rule 29's careful balance of interests.
- Because courts rarely decide Rule 29 motions prior to verdict. (One member reported having recently granted his first such motion in 15 years on the bench.)
- Because the proposal has failed to garner support despite the Department being afforded four years to make a persuasive case.
- Because the problems created by not being able to appeal erroneous judgment of acquittal do not outweigh the costs of making this rule change.

***The committee voted 7-5 to table the proposal to revise Rule 29 indefinitely,* sine die.**

The committee then turned its attention to the proposed Rule 41(b) amendment, which, Judge Bucklew noted, would authorize magistrate judges to issue search warrants in locations under U.S. control but outside the jurisdiction of any U.S. judicial district. The only aspect of the proposal that elicited significant comment, she said, was whether to exclude American Samoa, as requested by the Pacific Islands Committee of the Ninth Circuit Judicial Council.

Judge Bucklew noted that, according to the Department's letter of March 7, 2007, "the High Court of American Samoa has now had an opportunity to review the proposed amendment . . . and has not objected to it." Mr. Wroblewski said that the court could have objected, but had not done so. Judge Tallman reported having made clear during his conversation with Judge J. Clifford Wallace, chair of the Ninth Circuit committee, that further action was needed if his committee was opposed to the inclusion of American Samoa in this proposed amendment. Because no such action was taken, Judge Tallman said he favored going forward with the proposed amendment without excluding American Samoa.

Professor Beale noted that the style consultant had felt strongly that the statutory phrase "ancillary and appurtenant to" is redundant and should not be imported into the rule. The language therefore had been simplified and the following sentence added to the note: "The difference between the language in this rule and the statute reflect the style conventions used in these rules, rather than any intention to alter the scope of the legal authority conferred." She

noted that the word "reflect" should actually be "reflects," and that "magistrate" in the previous sentence of the note should actually read "magistrate judge."

Justice Edmunds moved to forward the Rule 41(b) amendment to the Standing Committee with a request that it be adopted without the bracketed exclusion of American Samoa.

The committee voted unanimously to forward the Rule 41(b) amendment to the Standing Committee without the bracketed exclusion of American Samoa.

III. REPORTS OF THE SUBCOMMITTEES

A. Rule 45, Time Computation Amendment and Related Rules Changes

Mr. Cunningham reported on the work of the Time Computation Subcommittee, which he chaired. He noted that the time computation template proposed for Criminal Rule 45(a) was virtually identical to what is being considered for Civil Rule 6(a). The controversial issue, he added, was what to do about statutory deadlines. Professor Beale noted that because Civil Rule 6(a), unlike Criminal Rule 45, stated that its time counting method applied to "any applicable statute," the following language, not found in the general template, had been added in brackets to the first paragraph of the note accompanying the proposed Criminal Rule 45(a) amendment:

> In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nevertheless applied the restyled Rule 45(a) when computing various statutory periods.

It was noted that different courts count statutory periods differently, despite the fact that the Civil Rules expressly say that they apply to computation of statutory deadlines. Professor Beale noted that the proposed Rule 45(a) amendment would apply only to a "statute that does not specify a time-computation method." One member wondered whether the proposed rule would abrogate a recent Third Circuit decision and suggested that it might be preferable not to comment on whether the time counting rules applied to statutes. It was suggested, however, that providing greater uniformity on this issue was important, at least with respect to the hundreds of deadlines statutes where Congress did not specify a time counting method. A list would be compiled for Congress of non-controversial statutory changes that could be approved parallel to the rules changes, so that everything could take effect in December 2009. It was reported that staff on Capitol Hill had raised no objections to the proposal and in fact seemed to favor it.

There was a discussion about the circumstances under which a court would be considered inaccessible. It was noted that a decision had been made not to try to define inaccessibility in the electronic age. One member asked whether time counting in § 2254 and § 2255 habeas cases

was governed by Civil Rule 6(a) or Criminal Rule 45(a). It was later reported that the only deadline affected by the time counting change in the Rules Governing § 2254 and § 2255 Proceedings themselves is the 10-day deadline in Rule 8(b) referring to a magistrate judge's ruling, which would presumably be changed to 14 days.

Judge Tallman moved that the proposed Rule 45(a) amendment be forwarded to the Standing Committee for publication.

The committee voted unanimously to forward the Rule 45(a) amendment to the Standing Committee for publication.

The members discussed individual deadlines found in various criminal rules that the subcommittee recommended amending to account for the time computation change. Mr. Cunningham explained that, as illustrated in the proposed amendment to Rule 5.1(c), the rule of thumb was for time periods under 30 days to be expressed in multiples of seven. Professor Beale referred to the chart provided in the materials and noted that the time period in Rule 5.1 is derived from 18 U.S.C. § 3060(b). When the proposed rule change was published for public comment, it could be made clear that this change would only take effect if Congress changed the statute. Mr. Wroblewski noted that there were numerous changes that would all have to take place simultaneously, an approach that the Department supported.

Judge Bucklew reported that, in some instances where the existing deadline is 7 days, such as in Rule 12.3(a)(4)(B) and Rule 12.3.(a)(4)(C), the subcommittee had recommended leaving the deadline at 7 days rather than increasing it to 14 days. It was suggested that, if the Standing Committee decided to adopt the waiver version of the proposed Rule 29 amendment, it might need to consider changing the 7-day deadline to 14 days. A member questioned changing the 7-day deadline in Rule 32(g) to 14 days. Professor Beale said that this was an inadvertent error and that the subcommittee actually had recommended leaving that deadline unchanged.

The committee discussed the current 10-day deadline for executing warrants in Rule 41(c)(2)(A)(i). Professor Beale said that the subcommittee had discussed staleness concerns, but ultimately decided to follow the rule of thumb of increasing deadlines to 7-day multiples. It was suggested that the staleness issue be addressed in the note by stating that this deadline change was not intended to change the staleness analysis.

A member asked why references in Rule 41(f)(2)(B) and (C) to "10 calendar days" were not also being changed to 7-day multiples. After further discussion, Professor Beale suggested changing all "10 calendar days" references in the criminal rules to "14 days." One member recommended retaining 10-day deadlines throughout Rule 41, due to the staleness concerns mentioned. Mr. Wroblewski suggested bracketing the number for public comment. It was suggested that the proposed amendment be published as "14 [7] days."

Professor Beale said that the committee did not recommend changing the 10-day deadline in Rule 46(h)(2) because the time period is derived from 18 U.S.C. §§ 3142 and 3144, which

provide their own time counting rules. Judge Kravitz suggested explaining why the deadline in Rule 46 was not changed in the nearby note accompanying the proposed Rule 45 amendment.

Mr. Cunningham reported that the subcommittee recommended changing the 5-day deadline in Rule 47(c) to 7 days and the 10-day deadlines in Rule 58(g)(2)(A) and (B) and in Rule 59(a) and (B)(2) to 14 days. It was noted that the Appellate Rules Committee was proposing changing the 10-day deadline in Rule 58's appellate rules counterpart to 14 days.

Judge Bartle moved to forward the entire package of rule changes prompted by the time computation change to the Standing Committee. Judge Trager moved to include similar changes to the rules governing habeas corpus cases filed under 28 U.S.C. § 2254 and § 2255.

The committee voted unanimously to forward to the Standing Committee for publication all the time computation rule amendments identified in the Criminal Rules and in the Rules Governing § 2254 and § 2255 Proceedings.

The Department reported having circulated the proposed deadline changes to all U.S. attorneys' offices and had received a number of comments, including two significant ones. First, there was concern about the interaction between the changes in the federal rules and time periods found in local rules. Because the federal time computation rules would trump any local time computation rules, it was important that courts and local bars begin focusing on this issue over the next year so that all changes can be made in a coordinated fashion. Second, there was concern over certain statutory deadlines. By the end of June 2007, the Department planned to provide a complete list to the Standing Committee and the Criminal Rules Committee of all statutes that needed changing, and over the summer, it hoped to draft legislation that Congress could enact to effect the desired changes.

Judge Bucklew adjourned the meeting for the day.

B. Proposed Amendment to Rule 41, Warrants for Electronically Stored Evidence; Department of Justice Presentation

The meeting resumed on April 17 with a two-hour PowerPoint presentation by Messrs. Carroll and Downing, both of the Computer Crime and Intellectual Property Section of the Department's Criminal Division, on issues involving electronically stored information ("ESI") and the proposed amendment to Rule 41. Following the Department's presentation, Judge Battaglia, chair of the ESI Subcommittee, led a discussion of the proposal to modify Rule 41 to embrace the concept of searching for electronically stored information. As suggested by George Washington University Law Professor Orin Kerr, the process involved two stages: execution of an on-site search for the storage device, followed by an off-site search for the stored information.

Judge Battaglia said that the ESI Subcommittee was recommending that a new subparagraph (B) be added to Rule 41(e)(2), stating that the normal deadline "for execution of the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or

electronically stored information and not to any subsequent review of the media or electronically stored information." The subcommittee also suggested adding a provision to Rule 41(f)(1) permitting the inventory of seized electronic information to be limited to a description of the physical electronic device on which the information is stored. He noted that there were many related issues that the subcommittee ultimately decided not to try to address by rule amendment.

Originally, Judge Battaglia said, he had thought that the rule should include a presumptive time period limiting the search of the electronically stored information, but had been convinced that such matters were best decided on a case by case basis, depending on the circumstances. Judge Bucklew noted that how long these searches took varied considerably depending on the law enforcement resources in a particular area of the country. Judge Battaglia mentioned that the Department had reported experiencing a 7-month backlog in some regions.

Mr. Wroblewski said that the Department was pleased with the subcommittee's work. He said that this was an area that courts would likely be grappling with for years to come. He noted that the Ninth Circuit had recently issued an opinion relating to the issue. Although the Department was satisfied with the language of the proposed rule amendments, it had a few concerns with the accompanying notes. He suggested that the following two sentences, while currently true, should be deleted because they might soon be outdated: "Local technical offices that handle the forensic work vary in their capability, and backlog of media awaiting imaging and review. While in some major metropolitan areas, a sixty day time period might be generally feasible, it can be many months in other areas." Professor Beale responded that she thought that the committee should document its current reasoning so that if the facts prompting this rule amendment ever changed, another appropriate rule change could be considered.

Mr. Wroblewski also reported Department concerns with the first sentence of the third paragraph of the note accompanying the proposed Rule 41(e) amendment, which appeared to invite the imposition of deadlines: "The rule does not prevent a judge from imposing a deadline for the return of the property at the time the warrant is issued." In addition, the Department recommended changing the sentence that begins on line 31, "Recording a description at the scene is likely the exception," to read instead, "Recording a description of the electronically stored information at the scene is likely the exception."

The committee was asked whether it intended to adopt the civil rules' definition of electronically stored information. Professor Beale suggested clarifying this in the note.

One member recommended against deleting the first sentence of the third paragraph of the note accompanying the proposed Rule 41(e) amendment, because it was important for judges to understand that deadlines for the return of property could be issued when the warrant is issued. Another member agreed, adding that she had "serious reservations" with not providing any presumptive deadlines for searches of electronically stored information, given her recent experience filing a Rule 41(g) motion for the return of seized property. The government's response to her motion was that the property was the subject of an "ongoing investigation," and there seemed to be nothing else that she could do to recover the seized property. Judge Battaglia

said that he understood Rule 41(g) to be an interactive process where the court sought to balance the owner's and the government's interests. The Department reported that it supported Judge Battaglia's practice and opposed identifying any presumptive deadline in the rule.

One member noted that seizure of a company's computer server can sometimes force the entire business to shut down, raising concerns that a business could be improperly pressured to cooperate as a result. Professor Beale suggested stating in the note a preference for copying on-site or otherwise minimizing any interference. Mr. Wroblewski responded that the rule has to apply to a variety of situations, including child pornography cases where the electronic information is itself contraband, the owner has no right to possession, and the preference would actually be to take the electronic storage device off-site. It was noted that the proposed Rule 41(e)(2)(B) amendment simply provides that a warrant "may authorize" — not "must authorize" — "the seizure of electronic storage media or the seizure or copying of electronically stored information," so that a warrant can be limited if the judge believes that seizing a business' entire computer server, for instance, would be unnecessarily disruptive. It was suggested that the language in the note should be retained to remind judges of the option of imposing a deadline for the property's return.

Language was suggested that would discourage physical seizure of an electronic storage device whenever copying it is feasible. Mr. Wroblewski said that such language would be inappropriate in cases where the electronic information was contraband. It was suggested that, the government be required — *except* in contraband cases — to return the storage device as soon as feasible after being copied. Declaring "feasibility" a loaded term, one member recommended allowing judges to determine what is appropriate on a case-by-case basis.

It was suggested that a reference to "access to the media" be added after the word "property" in the first sentence of the third paragraph of the note accompanying the proposed change to Rule 41(e)(2). After some discussion, it was recommended that the sentence read as follows: "The rule does not prevent a judge from imposing a deadline for the return of the media or access to the electronically stored information at the time the warrant is issued."

After further discussion, Judge Trager moved to forward the proposed Rule 41 amendment to the Standing Committee for publication. It was clarified that the vote was limited to the rule, not the accompanying note. It was suggested that "upon a proper showing" be added between the word "may" and "authorize" in the proposed language of Rule 41(e)(2)(B). Another member recommended addressing such concerns in the note, not the rule. Mr. Wroblewski remarked that probable cause to obtain a warrant was already required under Rule 41(d)(1).

The committee voted 9-3 to forward the proposed Rule 41 amendment to the Standing Committee for publication.

The committee discussed a few suggested changes to the note accompanying the proposed Rule 41 amendment. Professor Beale noted that the Department had suggested deleting the two sentences on lines 27-30 from the note. One member expressed surprise at the

Department's request, because these were the reasons that the Department had given the committee in support of omitting from the rule a presumptive time period for searching electronic storage devices. Voicing skepticism about the Department's backlog claim, another member suggested that the sentences be deleted. It was noted that publishing the Department's backlog claim could prompt the public to comment on the issue. One member suggested that the second sentence added little to what preceded it, which adequately documented the committee's rationale for omitting a presumptive time period such that, were the Department's claimed backlog to disappear at a future point, the committee would then have a basis to revisit the issue.

The committee voted unanimously to delete the sentence beginning, "While in some major metropolitan areas."

A motion was made to delete the sentence beginning, "Local technical offices."

The committee voted unanimously to delete the sentence beginning, "Local technical offices."

It was noted that the 10-day period in Rule 41 was being changed to a 14-day period under the new time counting framework. It was suggested that the reference to "electronically stored data" in line 21 of the proposed amendment to Rule 41(f)(1) be changed to "electronically stored information." Professor Beale warned that further massaging of the note might be required, in which case a final version would be disseminated by e-mail for committee approval.

C. Rule 49.1, Redaction of Arrest and Search Warrants

The committee discussed the request of the Committee on Court Administration and Case Management that arrest and search warrants not be exempted in proposed Rule 49.1(b)(7) and (b)(8) from the general requirement in proposed Rule 49.1 that personal identifiers, such as home addresses and Social Security numbers, be redacted. Judge Bartle, who chairs the E-Government Subcommittee, reported that it was the group's unanimous conclusion that requiring redaction of arrest and search warrants would be impractical and ill-advised and that the language of the criminal privacy rule as originally recommended should be retained.

It was noted that an affidavit in support of a search warrant issued after a case has been filed would not appear to be covered under the exemptions in proposed Rule 49.1(b)(7) and (b)(8). It was suggested that the rule might need to address such a situation. Professor Beale pointed out that it was probably too late to change the current rule amendment at this point.

Judge Bartle moved that a recommendation be made to the Standing Committee that no change be made to proposed Rule 49.1's exemption of search and arrest warrants from the redaction requirement.

The committee decided without objection to recommend to the Standing Committee that no change be made to proposed Rule 49.1's exemption of search and arrest warrants from the redaction requirement.

D. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings; Proposed New Rule 37

The committee discussed the proposed amendments to Rule 11 of the Rules Governing § 2254 Proceedings and Rule 11 of the Rules Governing § 2255 Proceedings, and the proposed new Rule 37. Professor Bucklew noted that the Department's original proposal, submitted in January 2006, had been to abolish all writs other than habeas corpus. At the October 2006 meeting, the committee had voted initially to table the entire proposal, but then decided to continue working on it for reconsideration at the April 2007 meeting. Professor King, who chaired the Writ Subcommittee, noted that two different versions of proposed Rule 37 were provided for the committee's consideration: one favored by the subcommittee's majority, and an alternative minority-supported version.

It was emphasized that, unlike proposed Rule 37, the Rule 11 amendments had been unanimously supported by all the subcommittee members. The subcommittee had designed the proposed Rule 11 amendments to standardize the process for considering a certificate of appealability in § 2254 and § 2255 cases, requiring that the certificate be issued or denied at the time that the judge enters the final order. The bracketed language in subdivision (a) of the proposed Rule 11 amendments had been suggested by Professor Catherine Struve, Reporter for the Advisory Committee on Appellate Rules, who reported that appellate judges favored specific documentation of why a certificate of appealability had been denied. One member said that he saw no value in adding the sentence to the Rule 11 amendments, because the trial court would be denying the certificate of appealability after having just issued an opinion denying the habeas corpus petition. If required to state why he was denying a certificate, another member said, he would likely just incorporate by reference the reasons cited in his opinion. A motion was made not to include the bracketed language in the proposed Rule 11 amendments.

The committee voted by a clear majority not to include the bracketed language in the proposed Rule 11 amendments.

The committee discussed a second issue raised in Professor Struve's memorandum: the proposed amendment's lack of an express reference to post-judgment motions filed under Civil Rule 52(b) or 59(b). Following discussion, the consensus of the committee was to change the last sentence of Rules 11(b) as follows: "Federal Rule of Civil Procedure 52(b), 59(b), and 60(b) may not be used . . . ." One member questioned including the reference to motions for amendment of judgment under Civil Rule 52(b). Mr. Wroblewski said that everything should be funneled through this single rule. Another member said that there may be a problem where a judge holds a factual hearing in a § 2255 case and then makes an erroneous statement of facts. Professor King suggested addressing this in the note. It was questioned, though, whether Civil Rules 52(b) and 59(b) should be referenced in Rules 11(b). Professor Beale suggested flagging

this issue with brackets for public comment, an idea that was well-received. Following a discussion, it was determined that the 30-day provision in the proposed Rules 11(b) provisions did not need changing under the new time counting rules.

After further discussion, Professor King moved that the proposed amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings be forwarded to the Standing Committee with a recommendation that they be published for public comment.

The committee voted unanimously to forward the proposed Rule 11 amendments to the Standing Committee for publication.

Committee members discussed proposed new Rule 37. Professor King noted that, if a majority believed that the committee lacked authority under the Rules Enabling Act to go forward with the proposed rule change, there was no need to discuss the second issue, involving whether a statute of limitations should be imposed on writs of error coram nobis. Professor Beale suggested that the committee keep in mind both the technical legal questions raised by this proposal and the prudential question of whether this step should be pursued at this time. One participant suggested that if, as the Department's memorandum asserted, there is "considerable and increasing confusion in the courts" about the availability of these writs and their implementation, the amendment might be worth pursuing, but there is significant skepticism that this is truly a pressing problem. Mr. Wroblewski said that the goal was simply to regularize the process by which final judgments in criminal cases are challenged and that the subcommittee was recommending revised language that, rather than abolish these writs, would simply bar their use "to seek relief from a criminal judgment." Professor Beale said that the original language for the proposal had been patterned after Civil Rule 60(b).

Asked whether empirical support had been developed to demonstrate a significant problem, Mr. Wroblewski responded that the Department was seeing the coram nobis writ sought used with increased frequency and that it was the affirmative responsibility of the rules committees to adopt rules to regularize the process by which final criminal judgments are challenged. He added that the new proposed Rule 37 was simply the logical extension of the broad legal trend reflected in the Antiterrorism and Effective Death Penalty Act and that no one had been able to articulate the value of preserving, say, the writ of audita querela. He said that a person in custody could file a habeas corpus petition and someone out of custody could seek a writ of coram nobis, and that no other writs were needed.

One member said that he agreed with the Department that much of the resistance to the proposal was unfounded and that the rule should identify "the sole procedures for seeking relief from a judgment in a criminal case," as stated at the beginning of proposed Rule 37(a). But, he suggested, the committee might want to consider omitting the last sentence of proposed Rule 37(a), which states: "Writs of error coram nobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment."

Judge Kravitz suggested that the Standing Committee would likely be interested in how the writs had been used over the past decade. Noting that a significant amount of supporting data had been gathered and presented before the Civil Rules Committee even began considering abolishing writs in Civil Rule 60, he asked whether it might make sense to ask the Federal Judicial Center or some other group to conduct a similar empirical study.

Judge Wolf moved that the committee not forward the Rule 37 proposal to the Standing Committee. Additional data substantiating the need for an amendment was required, and the proposal should be studied to determine whether it is proper under the Rules Enabling Act. Mr. McNamara noted that it was hard to tell, based solely on the Department's report that there were 284 coram nobis cases in 2005, what had happened in these cases and whether there truly were problems. Professor King said that she had been studying collateral review in the district courts for two years and that her impression is that courts are overwhelmed by them.

One judge expressed frustration with the many coram nobis petitions that he receives and urged support for the Rule 37 proposal, which he said would make it easier to find the one meritorious case in a hundred. Concern was expressed that the proposal would clearly represent a substantive amendment of the All Writs Act (28 U.S.C. § 1651) and therefore violate the Rules Enabling Act. The Department acknowledged that, in regularizing the process, this proposal would, at least in some circuits, reduce the remedies available, prompting one member to comment that the proposal therefore sounded substantive.

Following further discussion and a lunch break, the committee reconvened and voted on the motion not to forward the Rule 37 proposal to the Standing Committee.

The committee voted 7-4 not to forward the Rule 37 proposal to the Standing Committee.

There was a discussion about additional steps that could be taken with respect to the proposed amendment. Mr. Wroblewski asked whether the Federal Judicial Center or some other entity would be asked to collect data for presentation to the committee. Judge Bucklew asked whether there was support for avoiding the Rules Enabling Act problem by drafting a proposal for Congress to consider enacting directly. Mr. Wroblewski said that the Department would need some time to consider the matter and could inform the committee by letter at a later time.

E. Forfeiture Rules

Professor Bucklew acknowledged the hard work of the Forfeiture Subcommittee, chaired by Judge Wolf. She noted that two forfeiture experts had been invited to attend, Mr. Cassella from the Department and Mr. Smith from the defense side. Judge Wolf explained that, soon after the subcommittee began examining the Department's rule amendment proposal about a year ago, it became clear that this was a complicated, esoteric area of the law, that the subcommittee would benefit from the input of experts, and that it might be important to make the

expert presentations symmetrical. Early on, Professor Beale consulted with both sides in an effort to identify common ground and reach consensus around the key rule amendments needed.

The subcommittee recommended amending Rule 32.2(a) to generate a uniform practice by clarifying that: (1) notice of forfeiture is not a count or element of the offense and (2) the exact amount of money or precise property subject to forfeiture need not be specified in the indictment or information. It was noted that the potential use of a bill of particulars to elicit more information about the identity of the property is addressed in the committee note. Professor Beale noted that additional suggestions were expected from the style consultants.

The subcommittee recommended amending Rule 32.2(b)(1) to make clear that the rules of evidence are inapplicable to forfeiture procedures even if a jury decides. The Department had at one point recommended allowing "any relevant evidence," but the subcommittee had ultimately decided instead to adopt the phrase "any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." It was noted that the subcommittee had bracketed the final sentence of the note to encourage public comment on the question of live testimony during forfeiture proceedings.

The Department advised that it would submit further suggestions during the public comment period, such as adding the phrase "unless the court determines that neither live testimony nor oral argument would aid the court in its determination" after the word "must" in the following sentence of the Rule 32.2(b)(1)(B) amendment proposal: "If the forfeiture is contested, on the request of either party the court must conduct a hearing after the verdict or finding of guilt."

With respect to Rule 32.2(b)(2), the Forfeiture Subcommittee recommended requiring the court, unless impractical, to enter a preliminary forfeiture order sufficiently before sentencing to allow the parties to make suggestions before it becomes final.

Following further discussion, the committee's attention was directed to the proposed Rule 32.2(b)(2)(C) amendment:

> If the court is not able to identify all of the specific property subject to forfeiture or to calculate the total amount of the money judgment prior to sentencing, the court must [may] enter an order describing the property to be forfeited in generic terms, listing any identified forfeitable property, and stating that the order will be amended pursuant to subdivision (e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

The Forfeiture Subcommittee had placed the word "may" in brackets to reflect disagreement about whether "must" or "may" was preferable in subparagraph (C). Mr. Cassella said that the Department considered secondary whether "must" or "may" is used, as long as the court's authority to issue a generic forfeiture order is clear. In the absence of such express authority, courts too often have postponed forfeiture questions for months or even years after the

sentencing, which has proven problematic, he said, because defendants have challenged a forfeiture order on the ground that it does not comply with the rule's requirement that it be made part of the sentence. Mr. Smith said that the defense community felt strongly that the term "may" should be used rather than "must," reflecting the sparing use of generic forfeiture orders. In light of the positions taken, Judge Wolf suggested deleting the term "must" altogether and simply using the term "may." There was no objection. Another member noted that footnote 2 could therefore be deleted. Professor Beale noted that the style consultants would likely be making additional changes to the proposed language of the amendments or the subheadings.

With respect to the proposed amendments to Rule 32.2(b)(3) and (4), Professor Beale said that she was aware of no controversy or significant policy issues raised by them. Rather, these proposed amendments were an attempt to make the process clear to those who may not be regularly involved in these types of proceedings.

The committee discussed the proposed Rule 32.2(b)(5) amendment, which would clarify the procedure for requesting a jury determination of forfeiture. One member noted that his practice was not to inform the jury that it might have to return to decide forfeiture matters if it found the defendant guilty, because doing so could improperly affect the verdict. Mr. Burck said that the Department had concerns about the possibility of reversible error if all the proposed procedures were not followed.

There was a discussion of the proposed amendments to Rules 32.2(b)(6) and (7) and Rule 32(d)(2)(G). Professor Beale noted that the style consultants had further suggestions on wording. One member suggested deleting the word "and" in Rule 32.2(d)(2)(E). The Department suggested that the following obsolete reference in Rule 7(c)(2) also be deleted as part of the same forfeiture rules amendment package:

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

Judge Wolf agreed that it had been superseded by Rule 32.2(a) and that this should be corrected as part of the package. He moved to forward the proposed forfeiture rule amendments to the Standing Committee for publication, along with a proposal to abrogate Rule 7(c)(2).

The committee without objection decided to forward the forfeiture rule amendments to the Standing Committee for publication.

IV. OTHER PROPOSED AMENDMENTS

A. Pre-Trial Deadline for Challenges for Failure to State an Offense

Professor Beale noted that the Department had proposed amending Rules 12(b) and 34 to require the defense to raise before trial any claim that the indictment or information fails to state

an offense. The proposal had been initially discussed at the committee's April 2006 meeting, but had been tabled to the October 2006 meeting for further information and then deferred again pending the Supreme Court's decision in a potentially related case. Professor Beale noted that the Court had since decided *United States v. Resendiz-Ponce*, 549 U.S. ___, 127. S. Ct. 782 (2007), clearing the way for a resumed consideration of the rule amendment proposal.

It was suggested that the proposal should be referred to a subcommittee for further discussion. Judge Tallman, who had already left the meeting, had reportedly indicated particular interest earlier in the legal issues raised by the proposal. Mr. Wroblewski said that the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), had clarified that indictment defects are not jurisdictional. He added that he saw no need for subcommittee work on this amendment, because the proposal simply required indictment challenges to be raised at a time when something could be done about it, namely, before trial. One member said that he would like to have more time to think through the issue. After a few other comments were offered, Judge Bucklew suggested continuing the discussion of these proposed amendments at the committee's October 2007 meeting. There was no objection.

B. Update on Previously Proposed Amendments to Rules 15, 32(h), 32.1, and 46

Judge Bucklew drew the members' attention to a memorandum by Professor Beale summarizing the status of previously proposed amendments to Rules 15, 32(h), 32.1, and 46. She noted that the Department had withdrawn its proposal to amend Rule 15, which would have permitted deposing a prospective witness outside the defendant's physical presence if the court made certain specific findings. Meanwhile, the Rule 32(h) amendment proposal, originally published with the other *Booker*-related rule amendments, had been deferred pending resolution of two relevant cases by the Supreme Court. Also deferred, for the committee's consideration in October 2007, were proposed amendments to Rules 32.1 and 46, which would provide a procedure for issuing warrants when a defendant violates the conditions of pretrial release.

C. Proposed Amendment to Rule 32(i)(1)(A)

Judge Bucklew noted that Judge Ernest Torres of the District of Rhode Island had suggested amending Rule 32(i)(1)(A) to prevent an impasse at the sentencing stage if a defendant declines to read the presentence report. She said that she thought the issue was not an urgent matter and could probably wait to be discussed in October 2007.

D. Indicative Rulings

Judge Bucklew suggested also deferring discussion of the "indicative rulings" project, being led by the Civil Rules Committee, until the October 2007 meeting.

The meeting was adjourned.