

**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

**Washington, DC
April 28, 2017**

TABLE OF CONTENTS

MEETING AGENDA5

TAB 1 PRELIMINARY MATTERS

A. ACTION ITEM: Approval of Minutes

Draft Minutes of the September 19, 2016 Meeting of the
 Advisory Committee on Criminal Rules.....19

B. Information Item: Draft Minutes of the January 3, 2017
 Meeting of the Committee on Rules of Practice and
 Procedure.....37

C. Information Item: March 2017 Report of the Committee on
 Rules of Practice and Procedure to the Judicial Conference
 of the United States65

D. Information Item: Pending Legislation87

TAB 2 ACTION ITEM: PROPOSED AMENDMENTS PUBLISHED FOR PUBLIC
COMMENT (AUGUST 2016)

A. Rules 45 and 49

Reporters’ Memorandum (April 12, 2017).....95

Proposed Amendment to Rule 49101

Proposed Conforming Amendment to Rule 45115

B. Rule 12.4

Reporters’ Memorandum (April 11, 2017).....119

Proposed Amendment to Rule 12.4123

TAB 3 ACTION ITEM: RULES 5 OF THE RULES GOVERNING PROCEEDINGS
UNDER SECTION 2254 & 2255

A. Reporters’ Memorandum (April 11, 2017).....131

B. Proposed Amendments.....135

C. Supporting Materials

Reporters’ Memorandum (September 1, 2016)141

Suggestion 15-CR-F (Hon. Richard C. Wesley)159

TAB 4	ACTION ITEM: NEW RULE 16.1	
	A. Reporters’ Memorandum (April 12, 2017).....	167
	B. Proposed New Rule 16.1	173
	C. Suggestion 16-CR-B (New York Council of Defense Lawyers and National Association of Criminal Defense Lawyers).....	179
TAB 5	INFORMATION ITEM: COOPERATOR SUBCOMMITTEE REPORT	
	A. Reporters’ Memorandum (April 11, 2017).....	191
	B. Memorandum from Judge Lewis A. Kaplan to the Cooperator Subcommittee Regarding Initial Drafts of Possible Rules Amendments (March 10, 2017)	195
	C. Reporters’ Memorandum to the Cooperator Subcommittee (March 10, 2017) (revised)	199
	Appendix A: Side-By-Side Example Rules Amendments (April 11, 2017).....	219
	Appendix B: Possible Amendment to Rule 49.1(c) (April 11, 2017).....	229
	D. CACM Interim Guidance for Cooperator Information (June 30, 2016).....	233
TAB 6	INFORMATION ITEM: MANUAL ON COMPLEX CRIMINAL LITIGATION	
	Reporters’ Memorandum (April 1, 2017).....	245
TAB 7	INFORMATION ITEM: DEPARTMENT OF JUSTICE GRAND JURY TRACKING SYSTEM	
	Memorandum from Judge Wm. Terrell Hodges, Chair of CACM, Regarding the Department of Justice’s Grand Jury Tracking System (March 30, 2017)	249

AGENDA

Meeting of the Advisory Committee on Criminal Rules April 28, 2017 Washington, D.C.

I. PRELIMINARY MATTERS

- A. Chair's remarks and administrative announcements
- B. Review and approval of minutes of September meeting in Missoula, MT
- C. Report of the Administrative Office
 - 1. Report on the January 3, 2017 meeting of the Committee on Rules of Practice and Procedure
 - 2. Report on the March 2017 session of the Judicial Conference of the United States
 - 3. Legislative update

II. CRIMINAL RULES PUBLISHED FOR PUBLIC COMMENT

- A. Rules 49 and 45
 - 1. Reporters' memo
 - 2. Proposed amendment to Rule 49
 - 3. Proposed conforming amendment to Rule 45
- B. Rule 12.4
 - 1. Reporters' memo
 - 2. Proposed amendment

III. RULE 5 SUBCOMMITTEE REPORT

- A. Reporters' memo
- B. Proposed amendments
- C. Supporting materials
 - 1. Reporters' memo (September 2016)
 - 2. Suggestion 15-CR-F

IV. RULE 16 SUBCOMMITTEE REPORT

- A. Reporters' memo
- B. Proposed new Rule 16.1
- C. Suggestion 15-CR-B

V. COOPERATOR SUBCOMMITTEE REPORT

- A. Reporters' memo
- B. Memo from Judge Kaplan
- C. Reporters' memo (March 10, 2017) (revised)
 - 1. Draft amendments for discussion
- D. CACM interim guidance for cooperator information (June 30, 2016)

VI. MANUAL ON COMPLEX CRIMINAL LITIGATION

A. Reporters' memo

VII. DEPARTMENT OF JUSTICE GRAND JURY TRACKING SYSTEM

A. CACM memo

VIII. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Fall meeting: October 24, 2017, Chicago, IL

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair, Advisory Committee on Criminal Rules	Honorable Donald W. Molloy United States District Court Russell E. Smith Federal Building 201 East Broadway Street, Room 360 Missoula, MT 59802
Reporter, Advisory Committee on Criminal Rules	Professor Sara Sun Beale Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360
Associate Reporter, Advisory Committee on Criminal Rules	Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
Members, Advisory Committee on Criminal Rules	Honorable Kenneth A. Blanco Acting Assistant Attorney General (ex officio) Criminal Division United States Department of Justice 950 Pennsylvania Avenue, N.W., Room 2107 Washington, DC 20530-0001 Carol A. Brook, Esq. Executive Director Federal Defender Program for the Northern District of Illinois 55 East Monroe Street, Suite 2800 Chicago, IL 60603 Honorable James C. Dever III United States District Court Terry Sanford Federal Building 310 New Bern Avenue, Room 716 Raleigh, NC 27601-1418 Honorable Gary Feinerman United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 2156 Chicago, IL 60604 Mark Filip, Esq. Kirkland & Ellis LLP 300 North LaSalle Chicago, IL 60654

<p>Members, Advisory Committee on Criminal Rules (cont'd)</p>	<p>Honorable Denise Page Hood United States District Court Theodore Levin United States Courthouse 231 West Lafayette Boulevard, Room 251 Detroit, MI 48226</p> <p>Honorable Lewis A. Kaplan United States District Court Daniel Patrick Moynihan United States Courthouse 500 Pearl Street, Room 2240 New York, NY 10007-1312</p> <p>Honorable Terence Peter Kemp United States District Court Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard, Room 172 Columbus, OH 43215-2835</p> <p>Professor Orin S. Kerr The George Washington University Law School 2000 H Street, N.W. Washington, DC 20052</p> <p>Honorable Raymond M. Kethledge United States Court of Appeals Federal Building 200 East Liberty Street, Suite 224 Ann Arbor, MI 48104</p> <p>Honorable Joan L. Larsen Michigan Supreme Court Hall of Justice, 6th Floor 925 W. Ottawa Street Lansing, MI 48915</p> <p>John S. Siffert, Esq. Lankler, Siffert & Wohl LLP 500 Fifth Avenue, 33rd Floor New York, NY 10110</p>
<p>Liaison Member, Advisory Committee on Criminal Rules</p>	<p>Honorable Amy J. St. Eve (<i>Standing</i>) United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1260 Chicago, IL 60604</p>

<p>Clerk of Court Representative, Advisory Committee on Criminal Rules</p>	<p>James N. Hatten Clerk United States District Court Richard B. Russell Federal Building and United States Courthouse 75 Spring Street, S. W., Room 2217 Atlanta, GA 30303-3309</p>
<p>Secretary, Standing Committee and Rules Committee Officer</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
Donald W. Molloy Chair	D	Montana	2015	2018
Kenneth A. Blanco*	DOJ	Washington, DC	----	Open
Carol A. Brook	FPD	Illinois (Northern)	2011	2017
James C. Dever III**	D	North Carolina (Eastern)	2014	2017
Gary Scott Feinerman	D	Illinois (Northern)	2014	2017
Mark Filip	ESQ	Illinois	2013	2018
Denise Paige Hood	D	Michigan (Eastern)	2015	2018
Lewis A. Kaplan	D	New York (Southern)	2015	2018
Terence Peter Kemp	M	Ohio (Southern)	2015	2018
Orin S. Kerr	ACAD	Washington, DC	2013	2019
Raymond M. Kethledge	C	Sixth Circuit	2013	2019
Joan L. Larsen	JUST	Michigan	2016	2019
John S. Siffert	ESQ	New York	2012	2018
Amy J. Eve***	D	Illininois		2019
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

Principal Staff: Rebecca Womeldorf 202-502-1820

* Ex-officio - Acting Assistant Attorney General, Criminal Division

** Ex-officio - Liaison from Criminal Rules

***Ex-officio - Liaison from Standing Rules

LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Gregory G. Garre, Esq. <i>(Standing)</i> Judge Pamela Pepper <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Judge Susan P. Graber <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i> Peter D. Keisler, Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge James C. Dever III <i>(Criminal)</i> Judge Solomon Oliver, Jr. <i>(Civil)</i> Judge Richard C. Wesley <i>(Standing)</i>

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>
<p>Julie Wilson Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-3678 Fax 202-502-1755 Julie_Wilson@ao.uscourts.gov</p>
<p>Scott Myers Attorney Advisor (Bankruptcy) Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1913 Fax 202-502-1755 Scott_Myers@ao.uscourts.gov</p>
<p>Bridget M. Healy Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-240 Washington, DC 20544 Phone 202-502-1313 Fax 202-502-1755 Bridget_Healy@ao.uscourts.gov</p>
<p>Shelly Cox Administrative Specialist Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-4487 Fax 202-502-1755 Shelly_Cox@ao.uscourts.gov</p>
<p>Frances F. Skillman Paralegal Specialist Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-3945 Fax 202-502-1755 Frances_Skillman@ao.uscourts.gov</p>

FEDERAL JUDICIAL CENTER

<p>Tim Reagan <i>(Rules of Practice & Procedure)</i> Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199</p>	<p>Marie Leary <i>(Appellate Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov</p>
<p>Molly T. Johnson <i>(Bankruptcy Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohanson@fjc.gov</p>	<p>Emery G. Lee <i>(Civil Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov</p>
<p>Laural L. Hooper <i>(Criminal Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov</p>	<p>Timothy T. Lau <i>(Evidence Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov</p>

THIS PAGE INTENTIONALLY BLANK

TAB 1

THIS PAGE INTENTIONALLY BLANK

TAB 1A

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
September 19, 2016, Missoula, Montana

I. Attendance

The Criminal Rules Advisory Committee (“Committee”) met at the University of Montana in Missoula, Montana, on September 19, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Gary Feinerman
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge David G. Campbell, Incoming Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Rules Committee Officer, Secretary, Standing Committee
Laural L. Hooper, Esq., Federal Judicial Center
Shelly Cox, Rules Support Office

II. CHAIR’S REMARKS AND OPENING BUSINESS

A. Chair’s Remarks

Judge Molloy welcomed the Committee, made introductions, and invited Standing Committee Chair Judge Jeffrey Sutton to speak. Judge Sutton thanked Judge Molloy for hosting the Committee in Missoula. He congratulated Judge Molloy on his long service and for the honor of having a courtroom named after him there in Missoula.

B. Review and Approval of Minutes of April 2016 Meeting

Judge Molloy directed the Committee's attention to the draft minutes of the April 2016 meeting. A motion to approve the minutes having been moved and seconded:

The Committee unanimously approved the April 2016 meeting minutes by voice vote.

C. Status of Pending Amendments.

At the invitation of Judge Molloy, Professor Beale asked if any members had comments or questions about the draft minutes of the last Standing Committee meeting. Hearing none, Judge Molloy asked Ms. Womeldorf to report on the status of pending Rules amendments.

The proposed amendments to Rules 4, 41, and 45 were approved by the Supreme Court and transmitted to Congress; if Congress takes no action before December 1 the proposed amendments will become law. She reported that legislation has been introduced to block the amendment to Rule 41, but a hearing before the Judiciary Committee has not been announced. Members confirmed this understanding. Judge Molloy noted there was an identical bill in the House. A member added his belief that nothing would happen this fall, but there may be some activity in the next session. Professor Beale noted that if there is a hearing it might be helpful to respond directly to claims that the Rules process was not transparent. Responding to a question about whether more outreach to legislators is needed, Judge Sutton noted that many contacts have been made to attempt to counter the misleading claims about the process, and additional efforts are probably not needed right away. Another member indicated his impression that critics of the amendment are opposed to the substantive and policy issues, not what the Committee has done concerning venue.

The proposed amendments to Rules 12.4, 45, and 49 have been approved by the Standing Committee for publication. Professor Beale noted these proposed amendments were published August 1, and so far no comments have been filed. But most comments tend to come in at the last minute before the deadline, February 15. It is helpful to get comments earlier, particularly from groups that are likely to comment. Ms. Womeldorf noted that dates for two public hearings have been scheduled, but hearings go forward only if there is sufficient demand. Ms. Womeldorf also noted that in addition to being published in the Federal Register, proposed amendments are sent to every federal judge, as well as a listserve of thousands of people. She added that the rules process worked well with Rule 41, as some of the current critics chose to testify, the Committee held hearings and considered those comments. Professor Beale said that because Rule 49 is linked to similar changes in the other rules, there will likely be issues raised that will require coordination with other committees. The Rule 49 Subcommittee will provide its recommendations on any changes to the Committee at the April meeting.

III. Criminal Rules Actions

A. Rule 5 of the Rules Governing Section 2255 Proceedings (15-CR-F)

Judge Molloy asked Judge Kemp, Chair of the Rule 5 Subcommittee, to report on the Subcommittee's work on Rule 5 of the Rules Governing Section 2255 Proceedings. Judge Kemp agreed with Judge Molloy that this issue turned out to be more nuanced than it first appeared. He praised the Reporters' memorandum, and presented a summary. He began with the history of the 2004 amendment that added the provisions regarding the reply: "A moving party may submit a reply to the respondent's answer or other pleading, within a time fixed by the judge." The intent of that amendment was to make it clear that this was a matter of entitlement, and the judge does not have the discretion, through an order or a local rule of court, to deny the right to file a reply. But this has not been the consistent interpretation of the rule, and some judges have denied the opportunity to file a reply. Judge Wesley of the Second Circuit Court of Appeal raised this with the Committee, noting there are a number of district court decisions stating the rule continues to give judges the discretion to deny a reply.

Judge Kemp reported that the Rule 5 Subcommittee met by telephone in August to discuss whether there is a problem with the language of the rule requiring clarification by amendment, or just a misinterpretation by some judges of an unambiguous rule. Discussion also included whether there is any alternative, other than amending the rule, that would address the problem. The Subcommittee at that point was not enthusiastic about amending the rule, and asked the Reporters to investigate further potential alternatives. Judge Kemp noted that the Reporters' memo in the agenda book goes through why these various alternatives are not appropriate ways to address this. He agreed none of these alternatives are viable.

Judge Kemp asked for a sense of the Committee on the core issue. Is this a situation where the rule is clear, and it would be best just to wait for judges to correct their interpretations? Or is the language of the rule contributing to this problem? If so, should the rule be amended? He stated that he was in favor of an amendment. There was no consensus at the Subcommittee level about the need to amend the rule or the language and it had not yet had a chance to consider the most recent Reporter's memorandum in the agenda book. He noted that research had revealed that the rationale of some decisions did point to the language in the current rule, which is not as clear as it would be if it simply said the moving party may submit a reply, period. He noted that a number of potential alternative phrasings for an amendment are in the memo.

Judge Kemp added that the Subcommittee also looked at a secondary issue: whether there should be a presumptive time limit for filing a reply added to the rule. Helpful research from the Rules office revealed that the time limit for filing replies is not consistent from district to district or judge to judge, and that time limits initially set are often extended. He noted there was no strong feeling by the Subcommittee that there ought to be a time limit added to the rule.

Finally, Judge Kemp explained his own view that an amendment to clarify the entitlement to file a reply is warranted. Often the petition is relatively bare bones. The government's response goes into more detail, and frequently includes issues the petition does not address. The arguments of the petitioner or movant on these new issues and substantive arguments come first in the reply. So not only is denying the opportunity to file a reply

inconsistent with Rule 5, Judge Kemp explained, it also has the potential to have a substantive impact on these proceedings.

Judge Molloy asked if one of the problems with this particular interpretation of the rule is that it is almost impervious to appellate review. Judge Kemp agreed, and explained that no appellate decision addressing this division could be found, even though the problem has been around for twelve years. He noted that appellate decisions reviewing these cases tend to focus on aspects of the cases other than this procedural issue.

Subcommittee members then commented. One member reported her initial view that a rule amendment was not necessary because judges rarely denied the right to reply. It felt like using a sledge hammer to hit a flea. There was also a concern that an amendment that made the filing period more specific would cause problems since districts manage this so differently. But she had changed her mind based on others' comments, the explanation in the Reporters' memo that alternatives to a rule amendment to address this would not work, and the examples of potential amendments that would not require adding more rigid or specific language to the rule about timing. Compared to the clarity of Rule 11, which is also on the agenda and needs no clarification, the lack of clarity in Rule 5 suggests an amendment may be warranted.

Another member agreed, stating he favored options in the memo for amending the rule that would break out the two parts of the provision. He agreed that indicating a time period would be inappropriate given the variation in local practice and mostly pro se litigants filing these cases. He was persuaded that some of these decisions denying the opportunity to reply are relying on the current language of the rule.

Professor Beale pointed out that the suggested alternatives to avoid triggering the concerns of the style consultants are just illustrative and that the style consultants have not reviewed them.

One member thought it would be better if we could change the Note without amending the rule because the rule is clear. Unfortunately, that is not possible. Another member indicated that restricting the opportunity to reply was not a problem in his district.

Ms. Morales stated that the Department believes Rule 5 is clear. This problem is arising in just a handful of the thousands of Section 2255 cases filed every year, she said, and it is not enough of a problem to warrant a rule change. DOJ's appellate chiefs are comfortable that you won't see this again, and she didn't think a brief similar to the one discussed in the memo would be filed again. But Morales conceded she does not know what might happen years from now, and she observed that Section 2255 cases typically do not go to the most experienced attorneys. She added that because the rule is clear, it doesn't seem viable for the Department to instruct all of its attorneys on this specific issue, and she agreed with Professor Beale that it would be somewhat odd for the DOJ to be responsible for something the judge is supposed to do.

Professor Beale said she'd come around to thinking that the harm in clarifying the rule and running it through the amendment process was negligible, and that the amendment may have a significant benefit to the courts and moving parties and petitioners who have a point to make and deserve to be heard.

Professor King explained that the count of decisions found on Westlaw discussed in the memorandum is not a reliable measure of how often courts deny the right to reply. Most of these decisions and orders do not necessarily end up on Westlaw. Denial of the opportunity to file a reply has occurred in at least this many cases, but we cannot know the actual proportion of cases in which an opportunity to file a reply is being denied. Judge Kemp added that if replies are being denied consistently by all the judges in the districts that include a decision denying a reply, it is affecting about ten percent of cases. Others noted that it is not known if the practice is consistently applied in those districts currently or whether it is the practice of every judge in those districts.

One member indicated he supported an amendment and that it is unacceptable to deny the opportunity to file a reply. First, the reply is the first time to get into the nitty gritty of the substantive issues. Second, the reply is the first time to respond to the various procedural issues raised in the answer, including the issue of procedural default. Rule 5 is being misinterpreted in a non-trivial number of instances, and although it seems clear, some fault may lie with the language of the rule. The language could be improved to make it perfectly clear that the petitioner or movant gets to file a reply; this member favored the first proposal on p. 138 of the agenda book.

Another member agreed the Subcommittee had hoped to find some other way to cure the problem, but the Reporters' memo has shown these alternatives will not work. There is no harm in amending, this member agreed. The word "may" is what caused the problem, so this member stated a preference for getting rid of the word "may" and substituting "entitled." On the time for filing, this member preferred that the Rule include a default period for filing in case the time period for filing is not specified by local rule or by the judge.

Other members agreed there should be an amendment to clarify the Rule. One noted he always had thought the Rule was clear, but thought it meant exactly the opposite of what it actually does. An amendment would be helpful. Another member suggested that the Rule is there to make sure that litigants are properly treated. Because it appears that they are not being protected by this Rule, the Committee ought to clarify it. And a third member said he'd always been confused by the word "may," and that a change that would clarify the meaning of the Rule would be helpful.

Judge Sutton pointed out that one of the things the Rules Committees do is address circuit splits and here, for the reasons in the memo, it appears this issue does not reach the appellate courts. Attempting to address the non-trivial number of district court cases that have misinterpreted the Rule makes some sense. On the "may" point, he stated, it is important to be

disciplined about using the same, consistent language across all of the Rules. The Committee should avoid creating negative implications for other rules by getting rid of the word “may” here; this supports an amendment that doesn’t change the meaning of the word “may.”

Judge Campbell stated this was a real problem with a simple fix, and that in his view the language is not clear now. He recommended simply splitting the current sentence in two by adding a period, and stating in the Committee Note that the movant gets a reply in every case.

Another member agreed and said that the style consultants’ concern about negative implication from any amendment was misplaced here because of the second clause. It was the style consultants’ suggested rephrasing that creates problems because it adds new concepts with its new clause “although the judge.” This member recommended simply separating the two concepts so that the entitlement is not blended with judge’s control of timing.

Another member agreed this should be an easy fix and wondered if the second sentence is even needed. Another member responded that the Rule needs to refer to “fixed by local rule or by the judge,” because otherwise it may create an unnecessary burden for district judge to set a scheduling order in every case.

Judge Kemp interpreted the comments of Committee members as suggesting that the Subcommittee should go forward with drafting an amendment, and that it should talk further about whether there needs to be some presumptive time limit. Professor Beale noted again that the style consultants will have to address the language of any proposal carefully. Professor King stated that the Committee members’ comments suggest that, even if the Subcommittee decides that no specific time period for filing a reply should be added to the Rule, it should consider the separate issue of whether the Rule should specify that some time period for filing must be fixed by judge or local rule. Some members might not want the Rule to require that, but in reading these cases the failure to fix a time sometimes raised problems. Requiring a time to be fixed by a judge or local rule may eliminate those problems. She hoped that members with any additional feedback on these issues will provide it to the Subcommittee.

Judge Molloy indicated that the sense of the Committee was that the Subcommittee would work on proposed language for an amendment, a simple fix preferably, with a recommendation about the time period for filing, and bring it to the Committee for consideration in April.

B. Rule 16.1 (15-CR-B)

Judge Kethledge, Chair of the Rule 16 Subcommittee, stated that at the last meeting the Committee considered a proposal by NYCDL and NACDL to amend Rule 16 to govern judicial management of discovery in complex cases. The proposal was extremely prescriptive, and there was widespread opposition to it at the meeting. The Committee set the specific proposal aside and discussed cases that involve extremely complex financial transactions or massive quantities

of data, including a case with hundreds of thousands of audio tapes. The Committee recognized that if the judge fails to recognize and address the difficulties that this overwhelming discovery can pose for defense counsel, counsel's ability to prepare for trial can be impaired; cases that perhaps should be litigated and go to trial may be settled for reasons unrelated to the merits. Judge Molloy appointed a subcommittee and asked it to look at the issue.

At the Subcommittee's first call, Judge Kethledge reported, members decided that the bar proposal was a non-starter, because you can't prescribe wisdom. But the Subcommittee thought it was worth considering a more modest proposal, and the consensus was that it would be useful to create a process that would allow counsel to direct the court's attention to the problems that the defense faces in these kinds of cases. Judge Kethledge stated that this problem is not going to arise in the courtroom of an experienced judge, highly engaged, who will craft case management orders to accommodate these situations. The concern is that if the judge is inexperienced or not as engaged as he should be, Rule 16 procedures become the default and as a result counsel will have great difficulty preparing for trial. The Subcommittee tried to come up with a mechanism to allow defense counsel to engage the court with the problems these cases pose and discussed a number of factors the court could use to consider whether a case is "complex" (a term that is probably too broad).

Several alternatives were drafted after the call, he stated. One was longer, intended to assist judges dealing with this sort of thing for the first time. The first section listed a number of factors to get the court thinking about the difficulties counsel is facing dealing with the volume of data. The second section provided measures that the court could consider if the court determines that a case is complex. The third section provided actions the court could take if the court has implemented measures and one of the parties does not comply. A second version was much shorter and did not lay out all the factors and measures, leaving these to the accompanying Committee Note. Subcommittee members' feedback before the second telephone conference suggested that something in between would be better. A third alternative was drafted that simply says the party can move to have the court determine if a case is complex; if it is complex the court can consider measures that would facilitate preparation for trial; and finally non-compliance could be met with any measure that would advance the interest of justice.

During the Subcommittee's second call, Judge Kethledge said, DOJ expressed the concern that the term "complex" is broader than the problem at hand. If the problem is overwhelming discovery, the term complex captures more than that, such as cases in which expert testimony is particularly difficult. Judge Kethledge reported that the Subcommittee has asked the Department to suggest more narrowly tailored language that would not raise these concerns. He suggested that the Committee's process might parallel its development of the amendments to Rule 41: the Department came to the Committee with some general language, and the Committee revised the proposal to be more narrowly tailored to address the particular problem the Department had raised.

Ms. Morales agreed that the Department believes using the term “complex” will invite a host of problems. DOJ could support an amendment that would be narrowly targeted to specific sorts of cases, that invites the court to stop and consider whether these cases require some adjustments. But the language of the Subcommittee drafts opened Pandora’s box and raised a lot of issues. The Department has drafted two versions which have yet to be approved for submission to the Committee, but she was optimistic that a compromise can be reached.

Another member suggested that the proposed amendment might use “may” instead of “must,” and he spoke against narrowing the potential rule. He said that some members had suggested that the rule would make sense in electronic discovery cases, but he is not sure what “an electronic discovery case” is. For example, he described a case in the SDNY, with 18 defendants and 24,000 calls with wiretap materials, and another case with 500,000 audio tapes. “Complexity” does cover more than digital issues, he asserted. He recognized that there may be a need to triage and deal with electronic issues specifically, but the Criminal Rules should be able to accommodate another avenue. This is needed to ensure that judges cannot force trials without allowing proper discovery and without the defense having the opportunity to understand what the charges are and the proof will be. He said he was not sure what the Pandora’s box would be other than fairness to the defense.

One member noted there is a lot of scar tissue in this area, as generations of proposals to amend Rule 16 have come and gone, making it more difficult to address. He hoped that compromise language can be reached, and that it will result in a small positive step forward. But the reality, he said, is that you have to trust the common sense, pragmatism, and practicality of district judges, and you can’t legislate through Rule or otherwise how to handle pretrial proceedings or access. For every litigant operating in good faith, he commented, there is another trying to figure out reasons to delay a trial or put 400 associates on a case to generate a gajillion gigabytes of data. Sometimes judges get frustrated. Sometimes the tribunal doesn’t give as much access as it should. But that would be hard to deal with by rule or otherwise. Appellate courts, knowing how successful trial judges have been in the past, are not going to be keen about trying to manage, outside the bounds of abuse of discretion, how trial judges handle this.

Another member said it may be more helpful to have something in the rules about electronically stored information than it would be to attempt to regulate the discretion of district judges in designating particular complex cases. He said it may be helpful to have hearings or engage in fact-finding efforts to find out exactly what the problem is and what would solve it, to obtain a better understanding of the facts from the defense bar and the government regarding which cases need the most attention.

One member said he was pleased the NYCDL/NACDL proposal was a non-starter with the Subcommittee. He also saw real downsides to the drafts. One draft was so general it didn’t say anything at all. Another would transform whatever litigation now takes place concerning claims that the trial judge in a big criminal case has not adequately accommodated the interests of the defendant in a fair trial, whether by aggressive scheduling or insufficient discovery. He

said the draft would turn the current claim--that the judge's abuse of discretion resulted in a fundamentally unfair trial that didn't conform to due process—into an argument that nitpicks every term in the Rule. He warned that litigation would question whether the judge adequately considered the complexity of the charged conduct, what quantity of documents is too many, what is the meaning of “likely to be disclosed,” etc. Any rule carries unforeseen complications beyond the due process we have now. The problem of inexperienced judges encountering one of these cases also occurs on the civil side, and the solution is very different than what is being proposed here. There is a manual for complex litigation and conferences to educate judges with multi-district litigation. That has worked well without any rule amendments. This approach should be pursued instead of a Rule, if the problem is inexperienced judges.

Another member agreed that these training opportunities could be a supplement to a Rule, but also noted that the Civil Rules—unlike the Criminal Rules—provide for discovery, requiring that the defense be provided with the evidence and witnesses. Normally you can figure out the charge, he said, but when you have hundreds of thousands of tapes and gigabytes of data with no index, and you do not know what evidence the government is going to use to prove its case, it is impossible for the defendant to figure out the defense. It is essential for the defense to know where to find the evidence that is relevant is and what the government is relying on. Unless judges are required to consider how to give the defense access to that information, there cannot be a fair trial. This member also disagreed that the defense would ever want to pour through hundreds of thousands of tapes; the defense wants to know which tapes are relevant and might rebut the government's interpretation of the evidence. He noted that even sophisticated judges sometimes do not feel the need to allow access needed for a fair trial. If the defense were given the index and the government were forced to identify what its exhibits were, the likelihood is that there would be more dispositions sooner. Professor Beale asked if these issues are heightened in the criminal context because of the bare-bones pleading requirements. The member replied that it was both the pleadings and the discovery rules. He added that in criminal cases—unlike civil cases—there are no special masters, magistrate judges closely handling discovery, or interrogatories for the witnesses that will be called.

Another member stated that if the defense could get the civil discovery rules and the time to conduct discovery, she would give up this proposed rule in a minute. The differences between civil and criminal discovery are overwhelming. In 85- 90% of cases defenders in federal cases represent poor people, and in those cases they must go to the judge if they want an expert. That complicates the situation enormously because the judges rightfully have discretion as to how much to spend, who you can hire, at what point you can hire them. Most defense counsel who get huge electronic discovery cases and huge multi defendant cases need someone to give their time and expertise to work on those cases. Although the protocol for sharing electronically stored information exists, and many people worked really hard on it, it isn't followed, though not because the Department of Justice is deliberately failing to follow it. But the Department of Justice is huge. And its lawyers change. They got the protocol, and they understood it, and then they left. So Federal Defenders are constantly trying to work to get just a table of contents for these huge cases, and they don't always get even that. This is a real problem, she concluded, it

impacts all criminal defendants, and it would be worth this Committee's time to do something to make the situation better, even a small first step.

Ms. Morales responded that this may be more of a resource and training issue, rather than a rules issue. She expressed concern that the language of the drafts under consideration by the Subcommittee would invite litigation and confuse Rule 16 further, and hope that the Departments' proposed language will address the issues raised. The ESI protocol includes a pocket guide for judges, which is the result of years of work of collaboration between the Department and Federal Defenders. She said the Department's drafts will reference it. Technology moves quickly, raises many different issues, and requires very careful consideration. The protocol and pocket guide address these issues, and the draft could point directly to the pocket guide or summarize some of those measures.

A judge member stated this is an issue that needs to be addressed, noting he has had several cases in which just before trial defense counsel said "We just had dumped on us this many audio tapes and this many documents." The member's initial reaction was wishing this had been brought to his attention earlier so he could have done something about it, or that the parties could have worked this out. A judge has the authority to regulate these matters and facilitate discovery in this way if the parties cannot work it out themselves. As to how best to bring these issues to the attention of the bench and bar, although the non-rules mechanisms are great ideas, this member said but the best way would be by a rule. If there is a rule, everybody knows about it. Any rule, he said, should put the onus on defense counsel to bring this issue to the court's attention. It is the defendant who is being burdened, and judges should not have to guess when a problem might arise or raise something that might be a can of worms that otherwise wouldn't have been opened. The member favored brevity in a rule as opposed to some sort of detailed code, and thought that electronic discovery is an acceptable way to define the types of cases, but only if that term encompasses voluminous audio tapes.

A member noted that managing criminal discovery is different than civil discovery where lawyers have to do more work. This judge said she took the lead from the defense counsel in criminal cases as to what they need and that in her experience at least one of the defense counsel will take the lead and ask for what they need. Any rule should tell judges what kinds of things make a case complex. Sometimes a case is not complex in a general sense, but there are thousands of wiretapped conversations, and it is the quantity of discovery and how time consuming they are that causes problems. A new judge would want to know what are the things that make the case complex, so if it is the volume of discovery, the rule should say that so that a judge new to criminal cases will know. The judge may not see this until somewhere later down the road, and if the judge needs the reins a little bit early on, it would be good to have a laundry list of factors.

Another member agreed with the comments of the last two speakers and added that like Rule 17.1 (which states the court may hold pretrial conferences) a new rule could highlight the judge's options. The note could probably explain hypothetical cases that might need attention.

Just like 17.1, a short rule could let judges know you can do this on your own, without a defense motion (though it will be the defense lawyer making the motion in the vast majority of cases). And an amendment could help with the case budgeting process, knowing the defense will be going over the CJA limit because they anticipate this sort of discovery, which will be more involved than the ordinary case. A rule would bring it to everyone's attention. Manuals and conferences are also avenues, but this member favored something brief like Rule 17.1 that leaves the discretion to the judge.

One member observed that the proposal was asking for more active judicial management in handling discovery in criminal cases, and also strongly supported the idea of having the Federal Judicial center provide complex criminal case training.

A member responded to an earlier comment about the impact of a rule on appellate litigation, saying he didn't know what would be so bad about the courts of appeals having to articulate guidelines for what constitutes a fair trial. He asked why is it a problem to tell trial judges that defense lawyers need to know what the evidence will be, and that they need an index so that they can find it.

Judge Campbell observed that what is proposed in this rule is something judges already have the authority to do. Judges already can hold status conferences, set schedules, and at least in one circuit, require witness lists from the government and exhibit lists in advance of trial. The question is what do you do with the weakest of judges in order to get them to focus on it and think about it. He noted that the Civil Rules Committee has wrestled with this on the civil side. You write rules for the worst case managers recognizing that the good judges don't need the rules at all, he said.

He said he was surprised that there are complex cases in other districts that are not already coming to the attention of the judges early in the case. Complex cases come to his attention regularly by motions, filed primarily by defense attorneys, asking him to designate a case as complex for purposes of the Speedy Trial Act. The motion is invariably accompanied by a request for a case management conference. He orders the parties to work this out, they provide their agreement, and he tweaks it a bit. If a complex case does not come to his attention under the Speedy Trial Act, he said, they come in under the Criminal Justice Act because the defense lawyers want to get that budget early on, anticipating that it is going to exceed the prescriptive amount.

On fact finding, Judge Campbell reported that the Civil Rules Committee found it useful to hold a focus group meeting, called a mini-conference, with about 25 lawyers, judges and some academics representing a broad spectrum of views, who meet for a day with the subcommittee that is addressing an issue. He said that a month or two ahead of the meeting attendees were sent a list of things being considered, including proposed language changes. They were asked to come prepared to address those issues. The Committee tried to invite people who were involved in bar groups, who would canvas the position of those groups. The day-long session with these very

well informed people helped the Civil Rules Committee get a much better sense of what is happening on the ground and how the rules may make a difference.

Judge Sutton expressed support for the criminal equivalent of the manual for complex civil litigation. He agreed with the suggestion that the Committee should study how the ubiquity of email and new technology has changed discovery in criminal cases, whether that leads to rulemaking or not. He expressed some skepticism about a rule. He reported that about 10 years ago the Appellate Rules Committee met at Emory to ask Professor Freer to critique the Rules process. Freer's basic thesis was that the Rules Committees do way too much "small ball," enacting one technical amendment after the other to correct whatever silly problem, on the assumption that such amendments do no harm. But 10% of the time there is harm from amendments because of unintended consequences. And the broader harm is that the Rules have become too complex, increasingly inaccessible to someone who just graduated from law school. Judge Sutton recommended being more careful with the small-ball amendments and not assuming they are cost-free. Professor Freer was very frustrated that we rarely took on big bold projects or stepped back and asked what we are doing here. What concerns me about the proposals before the Committee, Judge Sutton said, is that they seem to be the epitome of small ball. What is added by the language in the shortest version of the rule, which seems so obviously true? On the other hand, he was very skeptical that we could get bolder versions of the amendments done. They would be similar to the Rule 16 Brady amendments. Rule 16 has a big graveyard of proposals, he noted, and DOJ will oppose any bold proposal. So it looks like the options are an amendment that accomplishes very little or facing difficulties in getting approval for a bolder proposal. He suggested further study, including a conference to bring in experts and people who know what is going on. Finally, he said, he was skeptical of importing anything from the civil rules on discovery into the criminal rules.

A member followed up, stating that a substantial body of precedent with the Jencks Act and bills of particulars will make it hard to do anything really bold. He also observed that this discussion about post-indictment discovery is primarily about prosecutions of individuals, because corporations tend not to get to this point.

Judge Kethledge stated that he heard that more clarity about the problem we are addressing is needed, and that the suggestion of more fact finding at a mini conference is a good one. Judge Molloy stated the Subcommittee with its current chair should consult with Judge Campbell about past conferences. He said the proposal makes a legitimate point, but we can use the conference to explore whether this is a judge problem or a rule problem.

C. Cooperators

Judge Molloy asked Judge Kaplan, Chair of the Cooperators Subcommittee, to give a report of the Subcommittee. Judge Kaplan reported that up until June the Subcommittee had been gathering information and looking into questions it had about the survey that underlies the CACM report. It had received a memo from the reporters on First Amendment issues and made

other efforts summarized in the agenda book. The Subcommittee had two lengthy conference calls. At about that time, CACM published to all of the district courts what it called “interim guidance.”

After talking to Judges Molloy and Hodges, Judge Sutton proposed a different way of attacking this problem: the creation of a task force with balanced representation from CACM and the Subcommittee of the Criminal Rules Advisory Committee. Judge Kaplan would chair the task force, and Judge Martinez and Judge St. Eve would also play leadership roles. The rest of the membership had not been determined, he said. He suggested that the task force broaden the focus to include non-rules solutions—which would obviously involve a major buy-in from the DOJ and from the BOP—to seek new ideas from the Criminal Rules Advisory Committee, from CACM, and from DOJ. Judge Kaplan said that Judge Sutton had indicated that he personally intended to make it a priority to get constructive participation in the task force from the Bureau of Prisons and from the Justice Department. Judge Sutton, Judge Kaplan continued, asked that the Criminal Rules Advisory Committee, at a minimum, draft a proposed rule and provide an analysis or an exposition of views as to the extent with which the Committee agreed or disagreed with the draft and why. From that point forward, the task force would try to see if common ground can be found on a proposal.

Procedurally, Judge Kaplan continued, the Cooperators Subcommittee will draft a rule and develop a position for consideration by the full Committee in April; the full Committee will come to some conclusion, which will then be brought back to the task force. In the meantime, the task force may focus on the DOJ and BOP side of things.

Beyond that the plan was not yet fully developed. Judges St. Eve and Martinez would be meeting with Judge Kaplan in New York on September 27. Once the Rules Committee and CACM finish their work, the task force will attempt to bring order to the situation. Judge Kaplan said he understood from Judge Molloy that Judge Hodges is thinking about a somewhat altered proposal from CACM, and we look forward to seeing what develops and working cooperatively with CACM in an effort to produce a consensus on what is a very, very difficult problem.

Judge Sutton expressed concern that the issue of protecting cooperators has been around since about 2007. CACM said they thought it was a problem and gave it to Criminal Rules, Criminal Rules said we’re not sure there is a problem, was concerned about the First Amendment and not sure there was a rules solution. CACM agreed to do a study, and the FJC study found 571 assaults or threatened assaults, and 31 murders. CACM concluded there is a serious problem. CACM and the Rules Committee have two very different approaches to this problem and two very different senses of how severe it is. He was afraid that we were about to repeat history and end up in the same place, so it made sense to have a task force—which has no power—to bring together the stake holders, including the clerks’ offices whose representatives are likely to know what will or will not work. He said he’d been working to identify two or three public defenders with different positions on this issue and see if the three of them could come up with something they could agree on. We have about eight months for each of these stake holders

to come forward with ideas that they think might work. In the case of Criminal Rules, he said, he thought it would be helpful to have some proposed language on the table, and it wouldn't necessarily have to be a single rule. There is more than one way to do this. He added that it is likely that to have a national solution you'll need a rule amendment, but a much narrower one than what's been contemplated. Probably we will also have something from CACM saying these are the ways we'll process these cases. The idea is to get open-minded thinking and try to achieve a consensus. This is a priority of the judiciary. The Executive Committee of the Judicial Conference recently met with the Attorney General, and this is the first thing they raised with her. At the recent Judicial Conference meeting, a discussion of the CACM guidance became a discussion about the task force and potential solutions. There was no criticism of this approach, and there were comments that this was a cross committee issue. CACM is doing more research on the constitutional issues, Judge Sutton reported. He said he was not inclined to think the First Amendment issues stand in the way of any rule amendment. This is a complicated issue, which is entirely technology driven. Twenty or thirty years ago an enterprising gang leader could go to the court files to identify the cooperators, but they were lazy and didn't do it. Now PACER, CM/ECF, and technology have made it very easy to identify cooperators. It's hard to say it is just a BOP/DOJ problem because the courts' files are part of this. Judge Sutton stated that there is no doubt that the main problem is with the DOJ and BOP. But it is hard to take the position that it is for them to fix, and we can just do what we do in each district court across the country.

Judge Molloy said that Judge Hodges had a strong feeling that unless there was a uniform national policy, it was all for naught. Judge Molloy asked Ms. Hooper if there was any correlation between the most recent data provided by the BOP and the FJC study. She responded she would be happy to look into that if the BOP data were forwarded to her.

Ms. Morales stated the Department does view this as a priority and looks forward to working on the task force. DOJ doesn't work in a vacuum, and can't solve the problems alone. DOJ has heard from AUSAs seeking to protect cooperators that judges had sometimes denied requests for sealing. We do have to work together, she said, and DOJ thinks the task force will be very productive.

At Judge Sutton's request Ms. Morales agreed the Department would come forward with three or four recommendations for the Task Force regarding how this problem should be addressed as a team. She said that the BOP has already adopted the recommendations of CACM, and the AUSAs office are already adopting some as well. She repeated that the Department is not sure that the Rules are the place to go for this. It is a serious problem, she said, but there are 10,000 people who get credit for cooperation every year. So it is really a small subset of cases, and of those, we don't know how many got that information from court documents. We are very willing to work on it and a task force with different stake holders where we can brainstorm about measures we can take that may or may not be in the form of rules could be very productive.

Judge Sutton responded that the premise is not just to brainstorm, but that each set of stake holders will come forward with three or four concrete ideas about how we can improve

things. Everyone agrees we can't eliminate all murders, all threats, and all assaults. But we can do a better job, he said, particularly if each stakeholder comes forward with something concrete.

Judge St. Eve stated that the task force will be guided in part by CACM's tracking of what jurisdictions are doing with the guidance, and if there is any success to the extent they can measure that. Also the general counsel to the BOP stressed that they are looking for a national rule or national guidance, because it won't help or work to do it district by district.

Judge Molloy asked Judge Kaplan if the Subcommittee composition should stay the same. Judge Kaplan said that it should, but that not all of the members of the subcommittee can be on the task force, which would become too large. Judge Sutton suggested that two or three members of the Subcommittee should be selected to serve on the task force and that CACM would also have two or three members.

A member reported the view of a former experienced prosecutor from the SDNY that threats and harm to cooperators result from the way the Marshals implement the witness protection program, not affording protection until after a cooperating witness has been sentenced. But cooperation becomes obvious much earlier from the movements of cooperators when they are in jail, not through court records. Further, cooperators are not separated from the general population until they are sentenced, and sentencing does not occur until after cooperation is complete. Ms. Morales noted that some districts do have measures to address this in place, and that she anticipated bringing in the Marshals Service. Judge Sutton agreed that would be beneficial.

D. Rule 11(a)(2) (16-CR-C)

Judge Molloy asked the Reporters to present the proposal to consider an amendment to Rule 11(a), which governs conditional pleas. He observed that the question seems to be the same as Rule 5. Do we need to change the rule? Or is the language already clear?

Professor Beale reported that Judge Graber, a member of the Standing Committee, invited the Committee to look at Rule 11(a). If a defendant is successful on appeal and the case is remanded, judges appear to disagree about what the Rule means in particular circumstances. She noted that the reporters had not researched district court opinions, but there is some disagreement among appellate opinions. Unlike Rule 5, the question of the proper interpretation of the rule is being debated in accessible court of appeals opinions. The question at this point is whether the Committee wishes to pursue this suggestion of an amendment, with the appointment of a subcommittee and additional research by the reporters.

Judge Molloy said he'd had a number of conditional pleas, and could not envision defense counsel advising a client that if you win on appeal you can withdraw your plea unless a court says it was harmless error. He thought the language was clear. He invited comments from the other members.

One member stated that unlike Rule 5 which is not clear, the language of Rule 11 is not susceptible of being misinterpreted. For example, the only reason to recommend a conditional plea to a client who has lost a suppression motion is the defense lawyer thinks if that evidence were not admissible the defendant could go to trial. Otherwise no client would plead guilty conditionally. And, this member added, she would have no idea what she would say to a client. “It is pretty likely we might be able to go to trial if we win on appeal”? The member reiterated that she was opposed to trying to change a rule she thought was already clear.

Other members agreed that the Rule is clear and need not be amended, and that no subcommittee was needed to examine it further. A member also expressed the view that the disputes about the effect of Rule 11(a) were unlikely to affect the disposition of cases because of the deferential application of the harmless error standard.

Judge Molloy suggested, with no opposition, that the Committee should place the issue on its study agenda and monitor it.

V. Next meeting; departing members.

Judge Molloy noted that the Committee’s spring meeting will be in DC, and that the location places for the fall 2017 meeting is not final. Ms. Womeldorf stated that the tentative plan is to hold the 2017 meeting in Chicago and the 2018 meeting in New York.

Judge Molloy invited Justice Gilbertson and Judge Sutton to make comments. Justice Gilbertson said it had been a great six years, he’d met wonderful people, and will take away good memories. Judge Sutton, completing his term as Standing Committee Chair, thanked everyone on the Committee for all the hard work they’d done, and praised the Reporters Professors Beale and King in particular. He commended Judge Molloy for his leadership. Judge Sutton mentioned that in particular he appreciated the effort members had made to find common ground, particularly with Rule 12, and that we all benefited from the consistent consensus-seeking attitude of the Committee.

After brief logistic instructions about the Committee Dinner, the meeting was adjourned.

TAB 1B

THIS PAGE INTENTIONALLY BLANK

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2017 | Phoenix, Arizona

TABLE OF CONTENTS	
Attendance	1
Opening Business	2
Approval of the Minutes of the Previous Meeting	3
Inter-Committee Work	4
Report of the Advisory Committee on Civil Rules	7
Report of the Advisory Committee on Appellate Rules	13
Report of the Advisory Committee on Bankruptcy Rules	17
Report of the Advisory Committee on Evidence Rules	21
Report of the Advisory Committee on Criminal Rules	23
Report of the Administrative Office	25
Concluding Remarks	26

ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) held its spring meeting at the Sandra Day O’Connor United States Courthouse in Phoenix, Arizona, on January 3, 2017. The following members participated in the meeting:

- | | |
|--|---|
| <p>Judge David G. Campbell, Chair
 Judge Jesse M. Furman
 Gregory G. Garre, Esq.
 Daniel C. Girard, Esq.
 Judge Susan P. Graber
 Judge Frank Mays Hull
 Peter D. Keisler, Esq.</p> | <p>Professor William K. Kelley
 Judge Amy St. Eve
 Professor Larry D. Thompson
 Judge Richard C. Wesley (by telephone)
 Chief Justice Robert P. Young
 Judge Jack Zouhary</p> |
|--|---|

The following attended on behalf of the advisory committees:

- | | |
|--|--|
| <p>Advisory Committee on Appellate Rules –
 Judge Neil M. Gorsuch, Chair
 Professor Gregory E. Maggs, Reporter</p> <p>Advisory Committee on Bankruptcy Rules –
 Judge Sandra Segal Ikuta, Chair
 Professor S. Elizabeth Gibson, Reporter
 Professor Michelle M. Harner,
 Associate Reporter</p> <p>Advisory Committee on Civil Rules –
 Judge John D. Bates, Chair
 Professor Edward H. Cooper, Reporter
 Professor Richard L. Marcus,
 Associate Reporter</p> | <p>Advisory Committee on Criminal Rules –
 Judge Donald W. Molloy, Chair
 Professor Sara Sun Beale, Reporter
 (by telephone)
 Professor Nancy J. King, Associate Reporter
 (by telephone)</p> <p>Advisory Committee on Evidence Rules –
 Judge William K. Sessions III, Chair
 Professor Daniel J. Capra, Reporter</p> |
|--|--|

Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Sally Q. Yates, Deputy Attorney General.

Other meeting attendees included: Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules and Chair of the Pilot Projects Working Group; Judge Robert Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Zachary Porianda, Attorney Advisor to the Court Administration and Case Management (CACM) Committee; Professor Bryan A. Garner, Style Consultant; and Professor R. Joseph Kimble, Style Consultant.

Providing support to the Standing Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget Healy (by telephone)	Attorney Advisor, RCSO
Hon. Jeremy D. Fogel	Director, Federal Judicial Center (FJC)
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

OPENING BUSINESS

Welcome and Opening Remarks

Judge Campbell called the meeting to order. He introduced the Standing Committee’s new members, Judge Furman of the Southern District of New York, Judge Hull of the U.S. Court of Appeals for the Eleventh Circuit, attorney Peter Keisler of Sidley Austin, and Justice Young of the Michigan Supreme Court.

Judge Campbell discussed the timing and location of meetings. The Standing Committee holds a meeting in June, after the advisory committees’ spring meetings have been concluded, and in time to approve matters to be published in August. The Standing Committee’s winter meeting is held during the first week of January, after the advisory committees’ fall meetings (which run from September through November) and the holidays, but before the reporters’ spring semesters begin. Although it has been a tradition for the past few years to hold the winter meeting in Phoenix, Judge Campbell welcomed the members to suggest alternative locations.

In his previous role as Chair of the Advisory Committee on Civil Rules, Judge Campbell found the January meeting to be an invaluable opportunity to share proposals with the Standing Committee and solicit feedback from its members. Judge Campbell encouraged all to share their thoughts.

Report on Rules and Forms Effective December 1, 2016

The following Rules and Forms went into effect on December 1, 2016: Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, new Form 7, and the new Appendix; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, new Rule 1012, and Official Forms 410S2, 420A, and 420B; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45 (*see* Agenda Book Tab 1B).

Judge Molloy reported that Congress is considering possible legislative action that would undo the recent amendment to Criminal Rule 41. Judge Campbell added that the Department of Justice (DOJ) had been helpful in advising Congress of the intent behind the rule change. Discussion followed.

*Report on September 2016 Judicial Conference Session,
Proposed Amendments Transmitted to the Supreme Court, and
Rules and Forms Published for Public Comment*

Rebecca Womeldorf reported on the September 2016 session of the Judicial Conference. In its semiannual report to the Judicial Conference, the Standing Committee submitted several rules amendments for final approval and requested approval for publication of a number of other proposed rule amendments.

The Judicial Conference approved the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and Evidence Rules 803(16) and 902. These amendments were submitted to the Supreme Court on September 28, 2016. The Court will review the package and, barring any objection, adopt it and transmit it to Congress by May 1, 2017. If Congress takes no action, the amendments will go into effect on December 1, 2017.

The Judicial Conference also approved the Mandatory Initial Discovery Pilot Project and the Expedited Procedures Pilot Project.

The Standing Committee previously approved for public comment proposed amendments to the following Rules: Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, and 8023, Part VIII Appendix (New), and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; Civil Rules 5, 23, 62, and 65.1; and Criminal Rules 12.4, 45, and 49. These rules and forms were published for public comment in July and August 2016. Many of these changes are non-controversial. The proposal to amend Civil Rule 23 has generated the most interest at public hearings; other hearing testimony has pertained to electronic filing changes affecting all rule sets.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 6, 2016 meeting.**

INTER-COMMITTEE WORK

Coordination Efforts

Scott Myers of the RCSO delivered a report on coordination efforts regarding proposed rules amendments that affect more than one advisory committee. He described rules amendments currently out for public comment that have implications for more than one set of federal rules. The first example related to electronic filing, service, and signatures (proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49). Mr. Myers noted that the advisory committees coordinated language prior to publication; any changes the advisory committees recommend when the rules are submitted to the Standing Committee for final approval will also go through the coordination process.

Mr. Myers explained that proposed amendments to Civil Rules 62 and 65.1 that would eliminate the term “supersedeas bond” also have inter-committee implications. The Appellate Rules Committee published proposed amendments to Appellate Rules 8, 11, and 39 that would eliminate the term, and that the Bankruptcy Rules Committee planned to do the same by recommending technical conforming amendments to Bankruptcy Rules 8007, 8010, and 8021. The advisory committees will need to coordinate any additional changes made as a result of comments received.

Proposed amendments published for comment to the criminal disclosure rule could impact the appellate, bankruptcy, and civil disclosure rules. As published, the criminal disclosure rule would change the timing for initial and supplemental corporate disclosure statements, and that parallel amendments to the appellate, bankruptcy, and civil disclosure rules would need to be made for consistency across the rules. A reporter to the Criminal Rules Committee said that this may be a case where factors specific to criminal procedure warrant a change that need not be adopted by the other advisory committees. Mr. Myers added that if parallel amendments are pursued by the Appellate, Bankruptcy, and Civil Rules Committees, the effective date of any changes to rules in those areas would trail the proposed criminal rule change by a year.

Finally, Mr. Myers noted that the Bankruptcy Rules Committee planned to address at its next meeting an amendment to its privacy rule to address redaction of personal identifying information from filed documents. The proposal responded to a suggestion from the CACM Committee after a national creditor sought assistance from the Administrative Office in efficiently removing personal identifying information from thousands of proof of claims it had filed across the country. The Civil and Criminal Rules Committees considered recommending similar amendments to their privacy rules, but both committees determined that courts have the tools needed to handle the relatively small number of documents filed on their dockets containing protected personal identifying information. Accordingly, the Civil and Criminal Rules Committees did not plan to follow the lead of the Bankruptcy Rules Committee in amending their privacy rules unless the Standing Committee believed amendments should be made to all the privacy rules in the interests of uniformity.

Judge Campbell solicited additional issues that will require or benefit from inter-committee coordination.

Five-Year Review of Committee Jurisdiction

Ms. Rebecca Womeldorf introduced discussion of the five-year review of committee jurisdiction required by the Judicial Conference. In 1987, the Judicial Conference established a requirement that “every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.” In 2017, therefore, each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

As the Bankruptcy Rules Committee had completed a version of the Five-Year review, Judge Ikuta was invited to summarize its recommendations. Judge Ikuta discussed the Bankruptcy Rules Committee’s responses, focusing on three issues: (1) inter-committee coordination, (2) voting rights for non-member participants such as the representative from the DOJ and the bankruptcy clerk participant, and (3) background knowledge requirements for judge members.

With respect to the first issue of coordination, Judge Ikuta said she supported the addition of the coordination report to the Standing Committee’s agenda, but urged more coordination once overlap is identified, so that there is a clear process transparent to all, with perhaps one advisory committee leading the effort.

Judge Campbell asked Judge Ikuta what additional steps should be added to the Standing Committee’s current coordination efforts. Judge Ikuta suggested that the existing charts of overlapping rules could provide a starting point from which to identify overlap among rules. Once points of overlap are identified, the question becomes how best to proceed. Should one advisory committee take the lead? Should all of the committees discuss the issue first? Should the procedure vary, depending on the particular situation? Judge Ikuta took the position that a specific procedure for handling overlapping provisions should be adopted.

The stated goal of coordination is generally parallel language among identical rules provisions across rules sets, adopted during the same rules cycle. A reporter stated that a coordination procedure *is* currently in place—proposed changes with inter-committee implications are to be referred to a subcommittee of the Standing Committee—and that process was followed when the time counting amendments were made to all the rule sets. This procedure was not followed precisely with respect to the current round of amendments concerning electronic filing, service, and signatures, but the basic procedure of using a Standing Committee subcommittee to coordinate when necessary is available when needed.

Another reporter agreed and added that the structure of committee hierarchy can complicate coordination. Although the Standing Committee is charged with coordinating the work of the advisory committees, and suggesting proposals for them to study, it does not simply direct advisory committees to amend particular rules. Rather, proposed rule changes flow up from the advisory committees to the Standing Committee, and it is not always clear until an advisory committee presents a fully developed recommendation that coordination with other advisory committees is needed. Even so, the Standing Committee may—and has—set up subcommittees

for the purpose of persuading the advisory committees to cooperate regarding related rules changes.

A staff member asked what role the Standing Committee liaisons, as part of the coordination machinery, could be expected to play in the coordination process. A Standing Committee member agreed that, while liaison members do not have voting privileges, they could be helpful to the coordination efforts by alerting the Standing Committee to possible overlapping changes under consideration.

A third reporter said advisory committees need more information about the other advisory committees' agenda items. Specifically, beyond the general subject matter under discussion, what exact amendments are under consideration for a parallel rule? Armed with this information, the advisory committees could better consider parallel amendments in the same meeting cycle. A suggestion was made that the most effective way to disseminate this information is to ensure that each advisory committee's agenda book is shared with the chairs and reporters of all of the other advisory committees. There was agreement that sharing agenda books would benefit coordination. A reporter reiterated that more proactive use of subcommittees can go a long way toward solving coordination issues.

A reporter observed that the Bankruptcy Rules are more frequently affected by coordination issues because many of the rules either incorporate or are modeled on the Civil and Appellate Rules. A staff member added that often changes to Bankruptcy Rules have lagged by a year or more parallel Civil or Appellate Rules changes, without issue. It may sometimes be necessary to ask the other advisory committees to delay a change for a year if the Standing Committee wants parallel changes to go into effect at the same time, but the fact that a bankruptcy version of a change sometimes goes into effect a year later than a parallel appellate or civil rule change has not been a historical source of problems for courts or attorneys, if it has been noticed at all. A reporter pointed to the recent proposal dealing with payments to class-action objectors as one that required substantial coordination between the Civil and Appellate Rules Committees and the current system worked well. A Standing Committee member cited Civil Rules 62 and 65 as another example of a successful coordination effort.

Judge Campbell identified four actions to be taken to further the Standing Committee's coordination efforts: (1) the RCSO will continue to identify, track, and report on proposed rules amendments affecting multiple advisory committees; (2) agenda books will be shared by each advisory committee with the chairs and reporters of all of the other advisory committees; (3) the RCSO will assist in establishing coordination subcommittees when that seems appropriate; and (4) the Standing Committee will look for opportunities for coordination and future process improvements. A Standing Committee member added that advisory committees affected by a proposed rule change could send a member to participate in the proposing advisory committee's meeting. Judge Campbell agreed that this would be a good idea in appropriate circumstances.

Judge Ikuta's second bankruptcy-specific issue in the Five-Year review concerned whether the Bankruptcy Rules Committee's substantive experts – such as a recent Chapter 13 trustee invitee, the bankruptcy clerk advisor, and the representatives from the DOJ and the Office of the United States Trustees – should be made voting members, and whether Article III judges being

considered for membership on the Bankruptcy Rules Committee should be required to have some knowledge of the bankruptcy process. Judge Campbell asked why the Bankruptcy Rules Committee's expert members do not currently vote. One possible answer is that the Bankruptcy Rules Committee does not consider them full voting members because they were not appointed by the Chief Justice. Several Standing Committee members noted that the DOJ representative on other rules committees have always voted, though clerk representatives have not. It was observed that because the United States Trustee is an arm of the DOJ, the government would have two votes if voting rights were extended to both representatives on the Bankruptcy Rules Committee.

Providing additional historical perspective, a reporter explained that the DOJ is unique among the committees' membership because it represents the Executive Branch in addition to the interests of the justice system generally. To give all bankruptcy expert invitees a vote could set a problematic precedent as many interest groups would seek to join the rules committees to advance their views. The DOJ is deserving of an exception from advocacy, however, because it is an Executive Branch agency, and the other two branches of government are represented in the rulemaking process.

A Standing Committee member supported making the bankruptcy DOJ representative a voting member, as was the case on the other rules committees, but added that the United States Trustee and DOJ representatives should have only one vote between them because they are the same office. After further discussion, Judge Campbell suggested the Bankruptcy Rules Committee should be consistent with the other advisory committees in its treatment of its expert members; the DOJ member should vote, and any other expert advisors should be treated like the clerk members of the other committees, who play an informational role but do not vote. No member objected to this approach.

Judge Ikuta's third bankruptcy-specific item from the Five-Year review concerned whether Article III judges being considered for membership on the Bankruptcy Rules Committee should be required to have bankruptcy experience. Judge Campbell agreed that bankruptcy experience should be considered in recommending potential members to the Chief Justice.

After further discussion of the Five-Year review, it was agreed that the Standing Committee should submit a single report for the rules committees.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Civil Rules Committee, which met on November 3, 2016, in Washington, D.C. The Civil Rules Committee's single action item involved recommending to the Judicial Conference for approval a technical amendment to Rule 4(m).

Action Item

Technical Amendment to Rule 4(m) – Rule 4(m) establishes a time limit for serving the summons and complaint. The proposed rule text revises the final sentence of Rule 4(m), which was

amended on December 1, 2015, and again on December 1, 2016. The 2015 amendment shortened the time for service from 120 days to 90 days, and added to the list of exemptions to that time limit Rule 71.1(d)(3)(A), notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. At the time the 2016 proposal was prepared, the advisory committee was working from Rule 4(m) as it was in 2014, because the 2015 amendment exempting service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. For this reason, the part of the 2015 amendment adding Rule 71.1(d)(3)(A) was inadvertently omitted from the 2016 proposal. Therefore, that proposal, as published, recommended, and adopted, read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The Standing Committee explored with Congress's Office of the Law Revision Counsel (OLRC) the possibility of correcting the rule text as a scrivener's error. The OLRC declined to do so, but did place in an explanatory footnote the official print for the House of Representatives Committee on the Judiciary.

Because the OLRC declined to correct the omission of Rule 71.1(d)(3)(A), it must be corrected through the Rules Enabling Act process. Given that the provision has already been published, reviewed, and adopted, and because its omission was inadvertent, further publication is not required. The final sentence of Rule 4(m) should read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The Civil Rules Committee voted to recommend approval of this rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court in the spring of 2017, for an effective date of December 1, 2017.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously voted to recommend the technical amendment to Rule 4(m) to the Judicial Conference for approval.**

Pilot Projects Working Group

Judge Bates, Judge Grimm, Judge Fogel, and Emery Lee of the FJC led the discussion of two pilot projects approved by the Judicial Conference in September 2016, both of which are intended to improve pre-trial case management and reduce the cost and delay of civil litigation: (1) the Expedited Procedures Pilot, which will utilize existing rules, practices, and procedures and is intended to confirm the merits of active case management under these existing rules and practices; and (2) the Mandatory Initial Discovery Pilot, which is intended to measure whether court-ordered, robust, mandatory discovery produced before traditional discovery will reduce cost, burden, and delay in civil litigation. It was noted that Chief Justice Roberts mentioned the pilot projects in his 2016 Year End Report.

Judge Bates advised that these projects are expected to be implemented beginning in the spring of 2017, likely with their starts staggered for administrative-convenience purposes. One key to the projects' success will be getting enough districts to participate.

To discuss these projects in more detail, Judge Bates called upon Judge Grimm, a former member of the Civil Rules Committee and Chair of the Pilot Projects Working Group. Judge Grimm noted that during the public comment period and in public hearings held on the 2015 Civil Rules Package, some practitioners questioned whether rule changes should be implemented absent empirical support. Other practitioners noted that active case management is essential to reducing the cost and delay of civil litigation. Both pilot projects are responsive to these concerns. The Mandatory Initial Discovery Pilot will provide empirical data regarding whether the procedures implemented in the pilot project are effective and warrant future rules amendments. The goal of the Expedited Procedures Pilot is to promote a culture change by confirming the benefits of active case management using existing procedural rules. The Pilot Projects Working Group is coordinating with the FJC to design the pilot projects to produce measurable markers that yield good data.

Judge Grimm reviewed the history of the Mandatory Initial Discovery Pilot. The concept of mandatory initial discovery was first introduced in the 1993 rules amendments. The idea was to create an obligation that parties exchange information relevant to claims and defenses underlying the litigation without a formal discovery request. "It was an idea whose time had perhaps not yet come." The 1993 amendments included opt-out provisions, and most opted out. As a result, mandatory initial discovery has been little-used, and there has been no opportunity to verify empirically whether such procedures would help to reduce the cost and length of litigation. Interestingly, approximately ten states have since adopted mandatory initial discovery, to great success.

The Mandatory Initial Discovery Pilot will be implemented through a standing order (*see* Agenda Book Tab 3B, Attachment 5). Participating courts will also have access to resources developed by the Pilot Projects Working Group, including a reference manual, model forms and orders, and additional educational materials.

Judge Grimm then turned to the Expedited Procedures Pilot, the goals of which include ensuring courts' compliance with the requirements of: a prompt Rule 16 conference; issuance of a scheduling order setting a definite period of discovery of no more than 180 days and allowing no more than one extension, and then only for good cause; the informal resolution of discovery disputes; a commitment on the part of judges to resolve dispositive motions within 60 days from the filing of a reply brief and a firm trial date. The trial date would be set either at the initial scheduling conference, after the filing of dispositive motions, or upon the resolution of those motions.

The Pilot Projects Working Group is continuing to develop and finalize the procedures and supporting materials for the pilot projects. Judge Grimm confirmed that the pilot projects will be staggered, with the Mandatory Initial Discovery Pilot beginning first. Once the pilot projects have begun, administrative support will be provided by RCSO and CACM. The pilots will last for three years, but data collection and analysis will continue for longer than three years.

Judge Grimm noted the need for additional recruitment of courts to participate. The original goal was to have at least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court. Recruitment efforts in the Northern District of Illinois resulted in a participation rate of approximately 75 percent, which will permit intra-district comparisons between participating and non-participating judges.

The District of Arizona will participate in the Mandatory Initial Discovery Pilot. Judge Campbell reported that because Arizona's state rules of civil procedure already include provisions similar to those the pilot projects are intended to test, the District of Arizona's judges have found the experiences of their state counterparts in handling these rules to be reassuring. Twenty years after the adoption of mandatory initial discovery in Arizona state court, a survey revealed that 74 percent of Arizona practitioners "prefer to be in state court" over federal court, as opposed to 41 percent nationally. When surveyed, lawyers in Arizona responded that they prefer state court because "[they] spend less money, and . . . cases [are] resolved more quickly." Judge St. Eve, whose Northern District of Illinois is confirmed to participate as well, suggested this information might be useful in helping judges to convince their colleagues to participate.

The District of Montana is also considering taking part. However, Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar's negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.

The Eastern District of Kentucky is confirmed to participate in the Expedited Procedures Pilot. Thanks to the efforts of Judges Diamond and Pratter in the Eastern District of Pennsylvania, that district remains a possibility, as do the Southern District of Texas, the District of Utah, and the District of New Mexico.

Judge Grimm shared several lessons learned as it has tried to recruit participating courts: the process takes time, success requires buy-in from multiple judges on a given court, and persuasion can be a challenge. Asked what percentage of a court's judges would constitute sufficient participation, Judge Grimm responded that 50 to 60 percent would provide a "center of gravity." A judge member requested clarification as to the term, "firm trial date," which Judge Grimm acknowledged had been an "area of concern" for some. He further acknowledged that the goal of disposing of 90 percent of cases within 14 months of either 90 days from service or 60 days from the entry of an appearance was "ambitious" by design.

Judge Fogel argued that "a culture change" is "quite difficult," but is necessary to drive up recruitment. Although the FJC has engaged in education methods such as webinars, receptivity to pilot project participation has largely been confined to so-called "baby judges," while "longer-tenured judges" seem "more comfortable with the status quo." Judge Fogel anticipated this topic would be discussed at the upcoming Chief District Judges meeting in March 2017. The FJC hopes to use adult education principles (specifically, by focusing training on certain areas of knowledge, skills, and abilities) to encourage judges to adopt active case management practices (*see* Agenda Book Tab 3B, Attachment 6). A judge member suggested the FJC consider

including a chambers staff member in the training, along with his or her judge. Judge Campbell also suggested including in the training process state judges who have experience with similar rules provisions.

Emery Lee then addressed the topic of data collection. He reviewed his November 29, 2016 memorandum to the Standing Committee, which addressed potential problems (*see* Agenda Book Tab 3B, Attachment 7). The first issue is whether and when to set the firm trial date. Available data from eight districts and 3,000 civil cases previously addressing this topic shows significant variance among district courts. In approximately forty-nine percent of cases, no trial date could be found. Second, the two pilot projects are very different from one another in terms of measures. The Expedited Procedures Pilot, which will require the tracking of motion practice and discovery disputes, is the easier of the two, although the lack of a definitive and consistent starting point for the “fourteen-month clock” is problematic.

Dr. Lee expressed interest in obtaining feedback through attorney surveys, which could be automated via the district’s CM/ECF system. When a “case-closing event” occurs in CM/ECF, it can trigger another “CM/ECF case event” directing attorneys to be noticed to a survey conducted by an outside vendor. Automation of the surveys in this manner will save significant time, but will require assistance from clerks’ offices.

A judge member asked whether, in addition to comparison among districts, the data collected would allow for a “before-and-after” comparison within a single district. The answer is yes by district and for individual judges, but the usefulness of the data can hinge on many factors over the next four to five years. Another judge member wondered whether “within-court data [was] *more* helpful” than data from a number of diverse districts, in that the former controls for more variables. Two other judges responded that the “self-selection bias” becomes an issue in that situation, as the judges opting in might already be using expedited procedures. In closing, another judge member pointed out the need to define the metrics: “What are we comparing?”

Information Items

Rules Published for Public Comment – Proposed amendments to Rules 5, 23, 62, and 65.1 were published for public comment in August 2016, and will be the subject of three hearings. The changes to Rule 23, which largely concern class-action settlements, have generated the most interest. Eleven witnesses testified at the November 3, 2016 hearing held in conjunction with the advisory committee’s fall 2016 meeting, and eleven more were scheduled to testify at the January 4, 2017 hearing. More than a dozen were already scheduled to testify at the February 16, 2017 hearing, which will be held by telephone.

Rule 30(b)(6) Subcommittee – The Civil Rules Committee has decided to explore whether it is feasible and useful to address some of the problems that bar groups have regularly identified with depositions of entities under Rule 30(b)(6). The Civil Rules Committee studied this issue ten years ago, but concluded that any problems were attributable to behavior that could not be effectively addressed by rule. When the question was reassessed a few years later, the advisory committee reached the same conclusion. Recently, certain members of the American Bar Association Section of Litigation submitted a suggestion reviving these concerns.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Joan Ericksen, to consider possible amendments to Rule 30(b)(6). The Rule 30(b)(6) Subcommittee has begun to develop a tentative initial draft of a potential amendment to help to make the challenges of the process concrete, but it has not yet decided whether to recommend any amendments to the rule.

Redacting Improper Filings: Rule 5.2 – Court filings frequently include personal information that should have been redacted. Rule 5.2 (Privacy Protections for Filings Made with the Court) was designed to protect litigants’ privacy by permitting court filings to “include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial-account number.” The rule resulted from a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

The Bankruptcy Rules Committee intends to publish proposed new Bankruptcy Rule 9037(h), which would establish a procedure for replacing an improper filing with a properly-redacted filing, for public comment.

The Civil Rules Committee considered a parallel amendment to the Civil Rules that would have added a specific provision to Rule 5.2 for correcting papers that are filed without redacting personal identifying information in the manner that the rule requires. During its consideration of the proposed amendment at its fall 2016 meeting, the Civil Rules Committee determined that the district courts seem to be managing the problem well when it arises and, therefore, determined that there is no independent need for a national rule to correct improperly-redacted filings. The advisory committee decided to remove this item from its agenda.

Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A) – Rule 81(c)(3) sets forth the procedure for demanding a jury trial in actions removed from state court. Specifically, Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law does not need to renew the demand after removal. Before the 2007 Style Project amendments, the rule provided that the party need not make a demand if state law “does not” require a demand (emphasis added). Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as pointed out in a suggestion submitted in 2015 by Mark Wray, Esq. (Suggestion 15-CV-A), replacing “does” with “did” inadvertently created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Discussion of this issue at the Standing Committee’s June 2016 meeting led Judges Gorsuch and Graber to suggest that the demand requirement in civil cases be reconsidered altogether (Suggestion 16-CV-F). Specifically, the suggestion would adopt the procedure currently used in criminal cases: a jury trial should be the default; a case would be tried without a jury only if all parties waive a jury trial, and the court must approve any waiver. The Civil Rules Committee has begun follow-up work on this suggestion. Preliminarily, the advisory committee surveyed local and state court rules and case law to determine how often parties who want a jury trial do not get one due to the failure to make a timely demand.

Service of Subpoenas: Rule 45(b)(1) – Under Rule 45(b)(1), a subpoena is served by “delivering a copy to the named person.” The majority of courts interpret this provision to require personal service, while some courts have recognized other means of delivery, most often by mail. The advisory committee will discuss at future meetings whether Rule 45 should expressly recognize other means of delivery.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Gorsuch and Professor Maggs provided the report on behalf of the Appellate Rules Committee, which met on October 18, 2016, in Washington, D.C. Judge Gorsuch succeeded Judge Steven M. Colloton as chair of the Appellate Rules Committee at the beginning of October 2016.

Judge Gorsuch reported that the Appellate Rules Committee had one action item, a proposed technical amendment, for which it sought the approval of the Standing Committee. The agenda also included five information items.

Action Item

Technical Amendment to Rule 4(a)(4)(B)(iii) – On December 14, 2016, OLRC informed the Appellate Rules Committee through RCSO that the published version of Appellate Rule 4 should not include subdivision (a)(4)(B)(iii), as that subsection had been inadvertently deleted in 2009. In 2009, Rules 4(a)(4)(B)(ii) and 4(a)(5) were amended as part of the Time Computation Project, but subsection (iii) was not amended. The redlined version of the proposed amendments, used during committee deliberations and published for public comment, included asterisks between subdivisions 4(a)(4)(B)(ii) and 4(a)(5) to show that the material between them—subdivision 4(a)(4)(B)(iii)—was not to be changed. However, the “clean version” combining the changes inadvertently omitted those asterisks, making it appear that subdivision 4(a)(4)(B)(iii) had been deleted. The Supreme Court’s order adopting the amendments to Rule 4(a) incorporated this version.

Accordingly, the OLRC deleted subdivision (iii) from its official document in 2009, but nonetheless the version from which the rules are printed did not include that change. For that reason, Rule 4(a)(4)(B)(iii) has continued to appear in the published version of the Appellate Rules. It was only recently that a publisher noticed the omission of subdivision (iii) from the 2009 Supreme Court order and inquired with the OLRC as to whether it was actually part of the Rule. The OLRC intends to publish Rule 4(a)(4)(B) without subdivision (iii), but include a footnote stating that the deletion was inadvertent.

Judge Gorsuch consulted with the members of the Appellate Rules Committee, who decided that the error was best remedied by a technical amendment restoring subdivision (a)(4)(B)(iii) to Rule 4. Because the change is non-substantive, publication is unnecessary. No member expressed objection or concern.

Judge Campbell added that if the Standing Committee approved the amendment, it could be approved by the Judicial Conference in March and transmitted to the Supreme Court, and

submitted to Congress by the first of May. It would then go into effect on December 1, 2017, assuming no action by Congress. There will be one year in which subdivision (a)(4)(B)(iii) will not be printed as part of Rule 4, but OLRC’s explanatory footnote will appear during that period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the technical amendment to restore Rule 4(a)(4)(B)(iii).**

Information Items

Judge Gorsuch presented the Appellate Rules Committee’s information items: (1) Appellate Rule 3(d)’s references to “mailing” in the context of electronic filing; (2) the references to security instruments in Appellate Rule 8(b); (3) possible conforming amendments to Rule 26.1’s corporate disclosure requirements; (4) possible conforming amendments in light of the Civil Rules amendments regarding class action objectors, and (5) possible amendments to Rule 25 regarding electronic filing and pro se litigants.

Rule 3(d) – Rule 3(d) governs service of the notice of appeal. After proposed amendments to Rule 25 were published in August 2016, the Appellate Rules Committee realized that Rule 3 still contained references to “mail,” and that the term “mail” appears throughout the Appellate Rules. The Appellate Rules Committee has discussed using the term “send” in place of “mail,” but those discussions are preliminary. Judge Gorsuch noted that the term “mail” is used in other federal rules as well, particularly the Civil and Bankruptcy Rules. As such, any terminology change may require coordination with the other committees, and he solicited input on these points.

One member cautioned that the effort could be a big undertaking, particularly for the Civil Rules. A reporter agreed the project would be substantial in scope, as there are words used in addition to “mailing” (e.g., “sending” and “delivering”) that would need to be examined as well. These instances might require a case-by-case determination as to whether electronic service is acceptable under the circumstances. To date, the Civil Rules Committee has not determined to replace these types of phrases throughout the Civil Rules. This issue had been explored by the Subcommittee on Electronic Filing two years ago, and the Subcommittee had decided not to take action due to the complexity of the problem and the potential for unintended consequences. Judge Gorsuch concluded that the Appellate Rules Committee will continue to pursue how to avoid confusion in the Appellate Rules between the references to electronic filing and references to mail.

Rule 8(b) – The Appellate Rules Committee is considering an amendment to clarify the recently-published draft of Rule 8(b) regarding security instruments. The proposed amendments initially came to the attention of the advisory committee as a result of the proposed amendment to Civil Rule 62, which clarifies that an appellant may post a security other than a bond in order to obtain a stay of proceedings to enforce a judgment. In June 2016, the Standing Committee approved for publication amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Civil Rule 62 by replacing the term “supersedeas bond.”

After the publication of these proposed amendments in August 2016, the Appellate Rules Committee became aware of an internal inconsistency in the language of the published draft of Rule 8(b). While the first clause of the first sentence of the proposed text includes four forms of security—“a bond, other security, a stipulation, or other undertaking”—the second clause mentions only two: “a bond or undertaking.” At the October 2016 meeting, the advisory committee tentatively decided to replace the first clause in Rule 8(b) with “a bond, a stipulation, an undertaking, or other security,” and the second clause in the rule with the term “security,” to encompass all prior iterations, explanations, or alternatives without repetition.

The Appellate Rules Committee also discussed the possibility of eliminating the reference to “stipulation,” which appears in the Appellate Rules but not in the Civil Rules. Although no published case touches upon the subject, the Appellate Rules Committee determined to retain the reference, and have consulted with the reporter for the Civil Rules Committee. The Appellate Rules Committee will wait to receive all public comments on the published version of Rule 8(b) before taking further action.

A reporter asked whether the suggested parallel amendments to Rule 8(b)’s language create an obligation on the part of the other committees to similarly conform. For example, the word “stipulation” is in the Appellate Rule but not in the corresponding Civil or Bankruptcy Rule. A member proposed that “stipulators” be treated as “other security providers,” as stipulations to the form and amount of security are routinely approved at the district court level, but expressly declined to suggest that the term be removed from Appellate Rule 8(b).

Judge Campbell noted that Appellate Rule 8 describes the person who provides the security in two different ways: once as “sureties or other security provider,” and twice as a “security provider,” and suggested a stylistic change from “surety” to “security provider.” Another member noticed that this would require amending the subsection’s title (“Proceeding Against a Surety”) as well. Professor Maggs explained that the Appellate Rules Committee had retained the term surety because the amendments to Civil Rule 62 retained the term “bond or other security,” and the “surety” referred to the security provider for the bond.

Judge Gorsuch thanked the other members for their comments, and reported that the Appellate Rules Committee expects to finalize the new text of Rule 8(b) before its next meeting.

Rule 26.1 and Corporate Disclosure Statements – Appellate Rule 26.1(a) currently provides that corporate parties must disclose their subsidiaries and affiliates so that judges can make assessments of their recusal obligations. For several years, the Appellate Rules Committee has discussed the possibility of expanding disclosure obligations to publicly-held non-corporate entities, and to require the disclosure, in addition to the information currently required by Rule 26.1(a), of the entity’s involvement in related federal, state, and administrative proceedings.

A careful study, including a memorandum by Professor Capra, revealed substantial variation among the circuits’ disclosure requirements. Despite the significant costs on counsel who must understand the different sets of rules in different jurisdictions, the Appellate Rules Committee concluded that it was not inclined to act because it was unable to devise a satisfying solution. Two major problems led to this decision: (1) the amount of information that is necessary and

helpful in evaluating recusal decisions varies significantly among judges, and (2) efforts to delineate which entities would be subject to the disclosure requirements were unsuccessful. Given these complicated issues, the Appellate Rules Committee decided to not go forward with a rule amendment.

The Appellate Rules Committee did, however, tentatively decide to recommend conforming amendments to Appellate Rule 26.1 in light of the proposed amendments to Criminal Rule 12.4, which requires the disclosure of nongovernmental corporate parties and organizational victims. These proposed changes to subdivisions (b) and (d) are more limited in scope. Rule 26.1(b) would be modified to replace the references to “supplemental” filings to “later” filings. This term is more precise and would include a party that was unaware of the need to make a disclosure at the time it filed its principal brief. Subdivision (d) would also be added to mirror the proposed revision of Criminal Rule 12.4(a)(2), which requires the government to “file a statement identifying any organizational victim of the alleged criminal activity” absent a showing of good cause.

The Appellate Rules Committee also tentatively approved a proposal to add a new subdivision (f) to Rule 26.1, which would impose a disclosure requirement on intervenors. Although it is rare to see a party intervene on appeal, most circuits have local rules similar to the proposed change. Judge Campbell pointed out that if the Appellate Rules Committee moves forward with the proposal to impose disclosure requirements upon intervenors, it should also consider amending Rule 15(d), which sets forth the requirements for a motion for leave to intervene. He suggested that Rule 15(d) could be amended to add procedures for making disclosures. Judge Gorsuch agreed to take this good point under consideration.

A more complicated issue is whether to expand the disclosure requirements in bankruptcy appeals. Bankruptcy cases tend to involve a much higher number of corporate entities because of the creditor entities. An ethics opinion indicates that, ideally, more detailed disclosure obligations would be required. The Appellate Rules Committee decided to consult with the Bankruptcy Rules Committee before proceeding further. Judge Ikuta confirmed that the Bankruptcy Rules do not contain a disclosure requirement, and that the Bankruptcy Rules Committee has referred the matter of corporate disclosures in bankruptcy cases to a subcommittee.

Class Action Settlement Objectors – In August 2016, a proposed amendment to Civil Rule 23 was published that intended to address perceived problems with objections to class action settlements. Specifically, revised Civil Rule 23(e)(5) would require objectors to state to whom the objection applies, require court approval for any payment for withdrawing an objection or dismissing an appeal, and require the indicative ruling procedure to be used in the event that an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. At its October 2016 meeting, the Appellate Rules Committee considered whether conforming amendments to the Appellate Rules are necessary in light of the proposed changes to Civil Rule 23. The Appellate Rules Committee concluded that the Civil Rules amendments currently out for publication adequately address the objector problem, and complementary Appellate Rules are unnecessary.

Electronic Filing by Pro Se Litigants – In August 2016, a proposed amendment to Rule 25 was published that addressed the prevalent use of electronic service and filing. Proposed subdivision (a)(2)(B)(ii) leaves in place the current requirement that *pro se* parties may file papers electronically only if allowed by court order or local rule. In response to several suggestions submitted by members of the public, at its October 2016 meeting the Appellate Rules Committee considered whether to reconsider the current rule on electronic filing by *pro se* parties. After discussion, the Appellate Rules Committee determined that it would not recommend any additional changes; however, no action will be taken as to the published revised version of Rule 25 until all public comments have been received.

Additional Issues – Judge Gorsuch also raised the topic of efficiency in the appellate process, an issue that has garnered increased attention in recent years. The 2016 amendments reducing Rule 32(a)(7)(B)'s presumptive word-count limit from 14,000 to 13,000 has led some to question whether all of the brief sections required under Rule 28(a), such as the summary of the argument and the components of the statement of the case, should continue to be mandatory. In addition, the Appellate Rules Committee is considering the issue of the publication of *en banc* appeals. It will continue to explore these issues in addition to the other information items discussed above.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professors Gibson and Harner presented the report on behalf of the Bankruptcy Rules Committee, which met on November 14, 2016, in Washington, D.C. The Bankruptcy Rules Committee had three action items for which it sought approval, including technical amendments and the new Chapter 13 package. There were also two information items.

Action Items

Chapter 13 Official Plan Form and Related Rules Amendments – The Bankruptcy Rules Committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

The Bankruptcy Rules Committee first discussed the possibility of a national form for Chapter 13 plans at its spring 2011 meeting in response to two suggestions which criticized the variance among districts' plans and argued that a uniform plan structure would streamline the process for both creditors and judges. A working group was formed to draft an official form for Chapter 13 plans and any related rule amendments.

In August 2013, the proposed Chapter 13 plan form and proposed amendments to nine related rules were published for public comment. The Bankruptcy Rules Committee made significant changes to the rules and the form in response to the comments and republished the full package in August 2014. Because many of these comments from the second publication period strongly opposed a mandatory national form for Chapter 13 plans, the Bankruptcy Rules Committee explored the possibility of adding provisions that would allow districts to opt out under certain conditions. At its fall 2015 meeting, the advisory committee approved the proposed Chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003,

5009, 7001, and 9009, but deferred further action in order to continue to develop the opt-out “compromise proposal.”

At its spring 2016 meeting, the Bankruptcy Rules Committee decided to recommend publication of two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. It also recommended a shortened comment period of three rather than six months, due to the two prior publications and the narrow focus of the revised rules. The Standing Committee approved this recommendation, and Rules 3015 and 3015.1 were published for public comment in July 2016. Despite some comments arguing that the form should be mandatory or, at the opposite end of the spectrum, opposing the requirement of any mandatory form, whether national or local, the advisory committee unanimously approved with minor changes Rules 3015 and 3015.1 at its fall 2016 meeting.

The Bankruptcy Rules Committee submitted Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113 to the Standing Committee for approval. The Bankruptcy Rules Committee recommended that the entire package of rules and the Chapter 13 Official Plan Form be submitted to the Judicial Conference at its March 2017 session and, if approved, be sent to the Supreme Court immediately thereafter. The Court is expecting the early submission, and if it approves and sends the package to Congress by May 1, it would take effect on December 1, 2017 absent Congressional action.

A judge member proposed a minor change to the first sentence of amended Rule 3002(a), which states, “A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim” The judge member suggested that indefinite articles be used consistently throughout that clause, either by deleting the word “an” before “equity security holder,” or inserting “an” before “unsecured creditor.” The Standing Committee agreed to remove “an.”

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the following for submission to the Judicial Conference for approval: Rules 2002, 3002 (subject to the removal of “an” from subdivision (a)), 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113.**

Technical and Conforming Amendments to Rule 7004(a)(1) and Official Form 101 – Judge Ikuta introduced two technical and conforming amendments not requiring publication: (1) updating Rule 7004’s cross-reference to a subsection of Civil Rule 4(d), and (2) correcting an error in Question 11 of Official Form 101.

Rule 7004(a) was amended in 1996 to incorporate by reference then-Civil Rule 4(d)(1), which provided, “A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.” In 2007, a number of amendments to Civil Rule 4(d) changed the former Rule 4(d)(1), renumbering it as subsection (d)(5) and altering its language to read, “**Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.”

The cross-reference to Civil Rule 4(d)(1) in Bankruptcy Rule 7004(a) was not changed at that time. Accordingly, the Bankruptcy Rules Committee recommended to the Standing Committee an amendment to Rule 7004(a) to correct the cross-reference to Civil Rule 4(d)(5). Because the amendment is technical and conforming, the Bankruptcy Rules Committee recommended submitting it to the Judicial Conference for approval without prior publication.

The second proposed amendment involved a correction to Question 11 of Official Form 101, the form for voluntary petitions for individuals filing for bankruptcy. Under § 362(b)(22) of the Bankruptcy Code, the automatic stay will generally not halt an eviction where a landlord obtained a judgment of possession against a tenant before the tenant filed a bankruptcy petition. However, that exception is subject to § 362(l), which permits the automatic stay if a debtor meets certain procedural requirements. Under § 362(l)(5)(A), the debtor must indicate whether a landlord has obtained a judgment for possession and provide that landlord's name and address. Section 362(l)(1) also requires the debtor to file a certification requesting the bankruptcy court to stay the judgment.

As currently written, Official Form 101 requires only *debtors who wish to remain in their residences* to provide information about an eviction judgment. As such, it is inconsistent with the Code, which requires *all* debtors who have an eviction judgment against them to indicate that fact on the petition and to provide the landlord's name and address. To address this inconsistency, the Bankruptcy Rules Committee recommended changing Question 11 on the form to clarify that, whether or not a debtor wants to stay in the residence, he or she must provide the required information if the landlord obtained an eviction judgment before the petition was filed.

A judge member asked whether, even though the question whether the tenant wishes to stay in the residence is being removed from Question 11, that information would still be apparent from the certification, Official Form 101A (Initial Statement About an Eviction Judgment Against You), that the tenant would also file. Judge Ikuta responded that it would. No other questions or comments were offered.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed technical and conforming amendments to Rule 7004(a)(1) and Official Form 101 for submission to the Judicial Conference for final approval.**

Judge Campbell said the Supreme Court had been alerted that the Chapter 13 package will be transmitted after the Judicial Conference in March, as the Court will have “only a short time”—until May 1—to approve it if it is to stay on track to become effective on December 1, 2017. The Court has agreed to this expedited timeline. The March 2017 submission to the Court will not include the technical amendments to Rules 7004(a)(1) and Official Form 101, which are unrelated to the Chapter 13 materials. Those technical amendments will be submitted in September 2017, which will minimize the amount of material the Court would be asked to consider on an expedited basis. No member expressed disagreement.

Information Items

Conforming Amendments to Rule 8011 – As part of the coordinated inter-committee effort to account for electronic filing, signatures, service, and proof of service, the Bankruptcy Rules Committee intends to recommend an amendment to Rule 8011. Rule 8011 is the bankruptcy appellate rule that tracks Rule 25 of the Federal Rules of Appellate Procedure. Amendments to Appellate Rule 25 published for comment in August 2016 would address electronic filing (FRAP 25(a)), electronic signatures, (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). The proposed amendment to Bankruptcy Rule 8011 would add provisions to mirror the new electronic procedures proposed for Appellate Rule 25.

The Bankruptcy Rules Committee recommends that this amendment be considered without publication for a number of reasons. First, publication would delay approval, resulting in a one-year “gap period” between the effective dates of the parallel amendments to Appellate Rule 25 and Bankruptcy Rule 8011. This would result in inconsistent treatment of electronic filing, service, and proof of service in the bankruptcy and appellate arenas. Second, the proposed amendments to Rule 8011 are materially identical to the proposed amendments to Appellate Rule 25 and do not raise bankruptcy-specific issues. The comments on the amendments to Appellate Rule 25 are therefore sufficient to identify any concerns as to the amendments to Rule 8011. Judge Gorsuch noted that the Appellate Rules Committee had received no comments so far on the amendment to Appellate Rule 25. A judge member asked whether the bankruptcy community would have an adequate opportunity to consider the impact of these proposed changes to electronic procedures if there was no publication. Professor Gibson responded that a related proposed amendment to Bankruptcy Rule 5005(a) regarding electronic procedures for filing is out for public comment at this time; so the basic issue is currently before the bankruptcy community. She added that the proposed changes to Rule 5005(a) had so far not received any comments.

Judge Ikuta said that Bankruptcy Rules Committee will review the proposed amendments to Rule 8011 at its April 2017 meeting in light of any public comments to Appellate Rule 25 and any feedback from the Appellate Rules Committee. Because the Standing Committee is authorized to eliminate the comment period for technical amendments, she said that the Bankruptcy Rules Committee will request approval of Rule 8011 without publication at the Standing Committee’s June 2017 meeting. No member objected to this proposal.

Noticing project and electronic noticing issues – The Bankruptcy Rules Committee has been asked on a number of occasions spanning many years to review noticing issues in bankruptcy cases, i.e., how noticing and service (other than service of process) are effectuated, and which of the numerous parties often involved in bankruptcy cases are entitled to receive notices or service. Approximately 145 Bankruptcy Rules address noticing or service.

In the fall of 2015, the Bankruptcy Rules Committee approved a work plan to study these issues, but an extensive overhaul of the Bankruptcy Rules’ noticing provisions was deferred pending further study of specific suggestions. The advisory committee decided to focus on a specific suggestion aimed at businesses, financial institutions, and other non-individual parties holding claims or other rights against the debtor. Because these parties, such as credit reporting agencies

and utilities, are likely to receive numerous notices and papers in multiple bankruptcy cases, permitting them to be electronically noticed and served has the potential to avoid significant expenditures. These funds would then be more likely to be available for distribution to creditors. The advisory committee is currently exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered CM/ECF users to opt into electronic noticing and service. The Standing Committee had no questions or comments regarding the noticing project.

Coordination – The subject of coordination arose with respect to Bankruptcy Rule 9037(h), which governs the redaction of private information. Judge Bates reported that the Civil Rules Committee has decided not to propose an amendment to the Civil Rules that would impose privacy-redaction requirements similar to those of Rule 9037(h).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra delivered the report on behalf of the Evidence Rules Committee, which last met on October 21, 2016, at Pepperdine University School of Law. A symposium was held in conjunction with the meeting. Professor Capra presented several information items.

Information Items

Fall Symposium – The fall 2016 symposium focused the Evidence Rules Committee’s working drafts of possible amendments to Rules 801(d)(1)(A) and 807, and the developing case law regarding Rule 404(b). In addition to the members of the Evidence Rules Committee, attendees included prominent judges, practitioners, and professors. A transcript of the symposium will be included in the Fordham Law Review.

The Third and Seventh Circuits have issued several opinions interpreting Rule 404(b) in a non-traditional way. Among the symposium participants was Judge David Hamilton of the U.S. Court of Appeals for the Seventh Circuit, which in recent years has decided a number of important Rule 404(b) cases. After the symposium, the Evidence Rules Committee discussed several proposals for amendments to Rule 404(b). The potential changes to the rule include that: (1) courts find the probative value of evidence of uncharged misconduct to be independent of any propensity inference, (2) notice be provided earlier in the proceedings to give the court an opportunity to focus on whether the purpose is permissible and whether the path of inferences linking the purpose and the act is independent of any propensity for misconduct, (3) the government’s description of the evidence to be more specific than the “general nature,” and (4) the government to state in the notice the permissible purpose and also to state how—without relying on a propensity inference—the evidence is probative of that purpose. The application of Rule 404(b) is a controversial topic, and the DOJ has an interest in how the rule is applied as several of the suggestions would require a change in noticing practices by the government. Professor Capra stressed that any proposed amendments to Rule 404(b) are in very early stages of consideration, and will be considered further at the spring 2017 meeting.

One member asked about the application of Rule 404(b) to civil cases, and whether Rule 609 was implicated. Professor Capra responded that most of the recent case law developments have

been in criminal cases, but the impact on civil cases is under consideration as well. Another member asked whether some of the issues under consideration might be part of case management. The group also discussed the first of the proposed changes and the standard of “independent of any propensity inference” and the noticing requirements.

Rule 807 (“Residual Exception”) – A comprehensive review of Rule 807 case law over past decade shows that reliable hearsay has been excluded, leading the Evidence Rules Committee to consider possible amendments to expand Rule 807’s “residual exception” to the rule against hearsay. Discussion of this issue began with the symposium held in 2015. At that time, the practitioners in attendance opposed the idea of eliminating the categorical hearsay exceptions (e.g., excited utterances, dying declarations, etc.) in favor of expanding the residual hearsay exception. The Evidence Rules Committee agreed that the exceptions should not be eliminated. Instead, it has developed a working draft of amendments intended to refine and expand Rule 807 to admit reliable hearsay even absent “exceptional circumstances,” as well as streamline the court’s task of assessing trustworthiness.

In developing the draft amendments, the Evidence Rules Committee is studying the equivalence standard; i.e., that the court find trustworthiness “equivalent” to the circumstantial guarantees of the Rule 803 and 804 exceptions. This “equivalence standard” is problematic because it requires the court to make a comparison of other exceptions that share no common indicator of trustworthiness, and it does not seem to be working as it should. The idea would be to permit the court to use a totality of circumstances standard in place of the equivalence standard. Also, the Evidence Rules Committee suggests deleting the language referring to materiality and the interests of justice because both terms are repetitive of other rules. Finally, the Evidence Rules Committee determined that the requirement that the hearsay be “more probative” than any other evidence that the proponent can obtain should be retained in order to prevent overuse of the residual exception. Discussion of the working draft will continue.

A Standing Committee member asked whether a “presumption of trustworthiness” could be associated with statements admissible under Rule 807. Professor Capra responded that the Evidence Rules Committee considered this idea, but considered it unworkable because of the shifting of the burden of proof for trustworthiness. He compared Rule 807 and Rules 803 and 804 as an example of this issue.

Rule 801(d)(1)(A) (Testifying Witness’s Prior Inconsistent Statement) – The Evidence Rules Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows: prior inconsistent statements made under oath during a formal proceeding. The expansion under consideration would permit the substantive use of video-recorded prior inconsistent statements. This proposal was received favorably at the symposium.

A member asked whether, under this potential amended version of Rule 801(d)(1)(A), the videotaped statement would need to have been made under oath in order to be admissible, and Professor Capra explained that it would not, and added that the advisory committee is considering a suggestion that the rule would include statements that the witness concedes were made in addition to videotaped statements. A reporter asked whether these statements should properly fall under Rule 803 rather than Rule 801. Professor Capra responded that such a

reclassification would not be appropriate because, unlike the Rule 803 exceptions, these prior inconsistent statements were not made under circumstances more likely to make them reliable. Judge Campbell noted that what constitutes a videotaped statement was discussed at the symposium, and advised that this question will need to be resolved in developing any rule amendments.

Professor Capra next presented updates on several ongoing projects, including a possible exception for “e-hearsay.” Professor Capra, Judge Grimm, and Gregory Joseph have authored an article that courts and litigants could reference in negotiating the difficulties of authenticating electronic evidence. The pamphlet, entitled “Best Practices for Authenticating Digital Evidence,” was published by West Academic, and will be included as an appendix to its yearly publication.

Rule 702 (Testimony by Expert Witness) – There have been suggestions to revisit Rule 702 based on developments in case law. The issue of whether weight or credibility should be examined is one of the things that the Evidence Rules Committee will consider. There are several other issues that have been raised, particularly regarding forensic science and language in the committee note. A symposium will be held regarding Rule 702 in connection with its fall 2017 meeting, bringing together judges, practitioners, and experts in the sciences. One member noted the fact that Rule 702 is very broad, sometimes making application of the rule difficult, particularly in cases involving analysis under *Daubert*. Another member raised the issue of the impact of disputed facts on the analysis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Criminal Rules Committee, which met on September 19, 2016, in Missoula, Montana. Judge Molloy reviewed three pending items under consideration.

Information Items

Section 2255 Rule 5 Subcommittee – The Criminal Rules Committee has formed a subcommittee to consider a suggestion made by a member to amend Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “may submit a reply . . . within a time fixed by the judge.” While the committee note and history of the amendment demonstrate that this language was intended to give the inmate a right to file a reply, and courts have recognized this right, other courts have interpreted the rule as allowing a reply only if permitted by the court. The subcommittee presented its report to the Criminal Rules Committee at its fall 2016 meeting. The phrase “within a time fixed by the judge” was identified as the source of the ambiguity; several members read it to imply judicial discretion.

One factor weighing in favor of a rules-based solution is the limited reviewability of rulings denying reply briefs. Judge Molloy identified this scenario as an example of one “capable of repetition, but evading review.” Because appellate review is unlikely to address the issue—

most habeas petitioners are unrepresented and do not advance the argument, and a number of decisions denying the right to file a reply are several years old—the Criminal Rules Committee decided to consider an amendment. To assuage concerns that new language might add to rather than resolve the confusion, the reporters suggested language clarifying the rule’s intent that breaks the current text into two sentences.

The Criminal Rules Committee also discussed whether to add a time for filing. A RCSO survey of local rules and orders addressing this issue revealed significant variance among districts. No consensus has been reached as to whether to set a presumptive time limit or require judges or local rules to fix a time period. The subcommittee will discuss the issue further. The subcommittee will collaborate with the style consultants to draft an amendment, and aims to deliver the proposed text to the Criminal Rules Committee for consideration at the April 2017 meeting.

Rule 16 Subcommittee – The Criminal Rules Committee has also formed a subcommittee chaired by Judge Raymond Kethledge to consider two bar groups’ suggested amendments to Criminal Rule 16 (Discovery and Inspection), which would impose additional disclosure obligations upon the government in complex criminal cases. Although the subcommittee concluded that the groups’ proposed standard for defining a “complex case” and steps for creating reciprocal discovery were too broad, it decided to move forward with discussion of the problem and formulation of a possible solution. The subcommittee’s initial impression, however, was that the problems associated with complex discovery in criminal cases “were attributable to inexperience or indifference” that could not be addressed appropriately by rule.

The DOJ and members of the defense bar have developed a protocol for dealing with the discovery of electronically stored information, but practitioners still report problems, particularly when the judge has little experience handling discovery in complex criminal cases. The members of the Criminal Rules Committee agreed that judicial education and training materials would help to supplement an amendment, but would be insufficient on their own.

The subcommittee will hold a mini-conference on February 7, 2016 in Washington, D.C. to discuss whether an amendment to Rule 16 is warranted. Invited participants include criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

Cooperator Subcommittee – The Criminal Rules Committee’s Cooperator Subcommittee, chaired by Judge Lewis Kaplan, continues to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is currently studying several proposals, including the CACM proposal, and work is ongoing.

More recently, the Director of the Administrative Office has formed a Task Force on Protecting Cooperators to consider the CACM and Rules Committees’ conclusion that any rules amendments would be just one part of any solution to the cooperator problem. The Task Force is comprised of seven district judge members—including Judge Kaplan, who is serving as Chair of the Task Force, and Judge St. Eve of the Standing Committee—and will also

include key stakeholders from the DOJ, Bureau of Prisons (BOP), Sentencing Commission, Federal Public Defender, clerks of court, and U.S. Marshals Service. The Task Force is charged with taking a broad look at the issue of protecting cooperators and possible solutions, including possible rules amendments. It has held initial teleconferences and is developing working groups and a schedule. Judge St. Eve added that four working groups have been formed to address specific issues.

Judge Molloy emphasized his view that a problem exists. Because the BOP does not track the specific causes of harm to cooperators, further investigation is necessary to determine precisely what aspects of the system must be fixed and why. The Task Force's role is to determine *how* to address the issue. A national solution, uniformly applied in all districts and combining both rules and non-rules approaches, will be required.

The Criminal Rules Committee will complement the Task Force's work by drafting a proposed rule or rules to protect the privacy of cooperator information.

REPORT OF THE ADMINISTRATIVE OFFICE

Task Force on Protecting Cooperators

Julie Wilson of the RCSO provided additional information about the administrative status of the Task Force. The Task Force will report to the Director of the Administrative Office, and its charter is being drafted.

A judge member volunteered that his district court has already implemented its own local policy to protect cooperator information and is awaiting a uniform national policy. Judge St. Eve replied that local courts will play an important role in the Task Force's work; the Task Force is interested in learning more about local courts' practices with respect to cooperator information, and receiving feedback as to their experiences implementing the guidelines the Task Force develops.

A reporter raised two related issues with the potential to complicate the Task Force's efforts: "technological issues" and "First Amendment issues." The reporter explained that technology truly *is* the issue, as the availability of criminal docket documents online has given rise to both the cooperator problem and First Amendment implications regarding access to those documents. The reporter wondered whether, assuming the media would be affected by limitations on access to cooperator information, the Task Force might consider involving the media in the process of formulating the guidance. Judge Molloy noted that the reporters' analysis of the applicable First Amendment principles and the constitutional right to access by the media is already before the Task Force.

Another reporter suggested that data related to the cooperator problem be made available in the aggregate, as an objective showing of the extent of cooperator harm might mitigate the concerns of members of the criminal defense bar who oppose restrictions on access to cooperation information. Judge Molloy acknowledged that the bar's tendency to wear "two hats" as to this issue complicates matters: keeping the information away from those who would use it to harm a

cooperating defendant but having access for the purpose of evaluating the fairness of a given plea deal.

The Task Force will continue to work toward the development of a uniform, national approach to protecting cooperator information.

Legislative Report

Ms. Womeldorf reported that approximately twenty pieces of legislation introduced during the two years of the 114th Congress were very pertinent to the work of the rules committees in that they would have directly amended various rules. Discussion of specific legislation followed, including legislation introduced in the fall of 2016 that would have delayed the implementation of the 2016 amendments to Criminal Rule 41.

Judge Campbell discussed that direct channels of communication between the RCSO and Capitol Hill staff sometimes allow for opportunities to explain how legislation could have unintended consequences for the operation of the rules. Judge Campbell welcomed suggestions to preserve informed decision-making pursuant to the Rules Enabling Act process designated by Congress.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the members and other attendees for their participation. The Standing Committee will next meet on June 13, 2017 in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1C

THIS PAGE INTENTIONALLY BLANK

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the lawpp. 2–3

2.
 - a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

 - b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.....pp. 4–8

3. Approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 8–9

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

- Federal Rules of Appellate Procedurep. 3
- Federal Rules of Civil Procedure..... pp. 8-13
- Federal Rules of Criminal Procedure.....pp. 13–15
- Federal Rules of Evidencepp. 15–16
- Other Matterspp. 16–17

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
--

THIS PAGE INTENTIONALLY BLANK

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

NOTICE

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: “No additional fee is required to file an amended notice.” The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Appellate Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

Information Items

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that “[c]urrently, every district’s plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district.” The States’ Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court’s then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms

subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that “[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained.” *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee’s recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a “form chapter 13 plan,” whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
- b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee’s report.

Information Items

Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a “user’s manual” to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a “user’s manual” and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

Other Projects

Among the other projects on the advisory committee’s agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand “[i]f the state law *did* not require an express demand” (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand.

Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing “does” with “did” created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee’s agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a “complex case” and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both

large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “*may* submit a reply . . . within a time period fixed by the judge” (emphasis added). The conflict involves the use of the word “*may*.” Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee’s suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee's working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the "California rule," under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

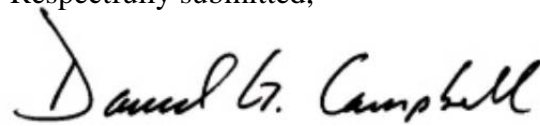
OTHER MATTERS

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Susan P. Graber	Sally Q. Yates
Frank M. Hull	Robert P. Young, Jr.
Peter D. Keisler	Jack Zouhary
William K. Kelley	

Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure

Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms

Appendix C – Proposed Amendment to the Federal Rules of Civil Procedure

THIS PAGE INTENTIONALLY BLANK

TAB 1D

THIS PAGE INTENTIONALLY BLANK

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA) <i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)	CV 23	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House

Updated April 5, 2017

Page 1

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p> <p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees • 1/30/17: Introduced in the House
	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p>	<ul style="list-style-type: none"> • 2/1/17: Letter submitted by Rules Committees • 1/30/17: Introduced in the Senate

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Stopping Mass Hacking Act	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 10 2016."</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate

TAB 2

THIS PAGE INTENTIONALLY BLANK

TAB 2A

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 49

DATE: April 12, 2017

This memorandum summarizes the public comments on Rule 49 (and the parallel rules published by other Advisory Committees) and the Subcommittee's response. As discussed below, the Subcommittee recommends two revisions in the text of Rule 49 as published, and one change in the Committee Note. The Subcommittee recommends that with these revisions the amendment be approved and transmitted to the Standing Committee.¹

The proposed amendment to Rule 49 is part of a comprehensive effort to integrate e-filing and service fully into all of the rules, and it incorporated the language of Civil Rule 5 whenever possible. As noted below, the Subcommittee's proposed revisions parallel those being considered by the Civil Rules Committee at its meeting on April 25-26. If changes are made in the revisions to Rule 5 at that meeting, it may be necessary to change the revisions to Rule 49 recommended here to maintain consistency.

I. Summaries of Public Comments on Rule 49

Six public comments discussing Rule 49 were posted during the public comment period. Brief summaries of each comment are provided below.

CR-2016-0005-0004. Oscar Amos Stilley. Describes experience as a disbarred former attorney who relies on the prison mailbox rule to "certify that service has been accomplished by CM/ECF"; urges that Rule 49 "should not limit the right of an inmate to certify service on opposing counsel via CM/ECF."

CR-2016-0005-0006. Pennsylvania Bar Association. Supports the amendment but recommends one revision: the "default rule of non-electric filing should be eliminated for

¹In the Subcommittee's view these changes merely clarify the proposed amendment in response to public comments, and accordingly they do not require republication.

nonparties, who should instead be permitted to elect between electronic and non-electronic service and filing.”

CR-2016-0005-0007. Heather Dixon. Expresses concern that the proposed Rule 49(b)(2)(A) regarding the signature requirement for electronic filing is “very confusing and seems to request that a filer include his/her user name and password on the signature block in the document being filed”; proposes alternative language.

CR-2016-005-0008. New York City Bar Association. Supports the “substantive changes” in the proposed amendment, but expresses concern that the provision regarding electronic signatures “could be read to mean that the attorney’s user name and password should be included on any paper that is electronically filed”; proposes clarifying language.

CR-2016-005-0009. Sai. Advocates (1) replacing presumptive prohibition of *pro se* use of CM/ECF filing with presumptive access, (2) treating *pro se* status as “rebuttably presumed good cause for nonelectronic filing”; (3) making this presumption irrebuttable in the case of *pro se* prisoners; (4) requiring courts to “allow *pro se* CM/ECF access on a par with attorney filers”; (5) permitting “*individualized* prohibitions on CM/ECF usage for good cause”; and (6) clarifying and relocating the provisions regarding electronic signatures.

CR-2016-005-0010. National Association of Criminal Defense Lawyers. Expresses support for the elimination of a requirement for separate certificate of service, and satisfaction with the treatment of “filing by unrepresented parties and non-parties.”

II. Discussion

The comments on Rule 49 focused on two issues: comments seeking clearer language in the provision on electronic signatures, and comments opposing limitations on the right of various individuals or groups to file or serve using CM/ECF. Additionally, the Civil Rules Committee received comments on other provisions that parallel Criminal Rule 49; those comments also require this Subcommittee’s attention and are discussed below.

A. The electronic signature provision

Three comments focused on the wording of the provision regarding electronic signatures (our proposed Rule 49(b)(2)(A)), and expressed concern that as published the rule could be read to suggest that a filer must include her user name and password in each filed document – which would make this information public. The language that these commenters found unclear is common to all of the proposed revisions to the rules on filing and service, and the other committees received similar public comments.

The Subcommittee agreed that the multiple expressions of concern are sufficient to warrant a revision in the language. The Subcommittee also agreed that to maintain the

consistency of the various rules, a common approach is required. Accordingly, it gave general approval of the language being considered by the reporters for all of the Advisory Committees, and authorized Judge Feinerman and the reporters to continue the discussion with the other committees to try to come to agreement on common language.

After further discussion among the reporters, the following language has been agreed upon, and will be presented to Civil Rules Committee at its meeting April 25-26:

An authorized filing [made] through a person's electronic-filing account, together with the person's name on a signature block, serves as the person's signature.

The Subcommittee recommends that the same language be adopted as an amendment to Rule 49(b)(2)(A).

B. Access to electronic filing

Three comments seek broader access to electronic filing, focusing on different groups.

One comment, **CR-2016-0005-0004**, focuses on inmates. Describing the severely limited resources available to inmates, it urges that the proposed rule permit inmates to “certify service on opposing counsel via CM/ECF.” The commenter states that “[i]n drafting the certificate of service, I always rely on the ‘prison mailbox rule’ and certify that service has been accomplished by CM/ECF.”

The decision not to permit unrepresented defendants and inmates to file electronically was made after careful consideration, and the Subcommittee concluded that this comment did not warrant a change in this fundamental policy decision. Moreover, it is not clear whether the proposed amendment would affect this individual. As discussed in prior committee meetings, inmates do not generally have direct access to CM/ECF. The commenter's reference to the prison mailbox rule suggests that he currently deposits his pleadings with prison personnel, rather than entering them himself in the CM/ECF system. Since he refers specifically to CM/ECF, he may be in an institution where prison officials convert inmate pleadings to PDFs and file those electronically. Programs of this nature would not be affected by the proposed amendment.

In contrast, **CR-2016-0005-0006** (from the Pennsylvania Bar Association) focuses on filing by nonparties. The Bar Association supports a revision allowing nonparties to be “permitted to elect between electronic and non-electronic service and filing.” It argues that barring nonparties from filing electronically “may unfairly burden nonparties and may effectively truncate their time to respond to filings.” It notes that counsel for a nonparty intervenor may be located a substantial distance from the courthouse, and even in-district counsel may have to travel a substantial distance to the courthouse if the district is geographically large. In such cases, the nonparty may have fewer days to file if it must use overnight delivery or regular mail. Further, the Bar Association questions the rationale for the default rule requiring nonparties to

file nonelectronically. The comment does not focus on any particular nonparties, such as media representatives or victims. It suggests that nonparties are in the best position to judge for themselves whether they wish to file electronically, and it finds unpersuasive the suggestion that some materials should not be provided to nonparties.

The Subcommittee was not persuaded that these arguments warranted a change in the default rule of nonelectronic filing for nonparties. Members noted that the Bar Association’s comment does not discuss the architecture of the current CM/ECF system, which treats only the prosecution and defense as parties in criminal cases, and makes no general provision for nonparties to file electronically. Moreover, the Bar’s comment seems to assume that nonparties frequently confront short filing deadlines, and it uses terminology (“nonparty intervenors”) that is common in civil cases but not generally employed in criminal cases. The comment offered no examples of filing deadlines in criminal cases that subject nonparties to serious hardships. Further, the comment seems to assume that nonparties should be given the opportunity to weigh for themselves the pros and cons of electronic filing (apparently having the option to file by whichever method it deems preferable). It is not clear, however, why the rule would provide nonparties the option of filing by whichever means they considered most appropriate. As published, the amendment sets a default of nonelectronic filing, but allows a party to seek permission on a case-by-case basis to file electronically. That seems sufficient to allow nonparties who face special difficulties to obtain permission to e-file if they can show that they have the capacity to do so and the filing system would support it.

In **CR-2016-005-0009**, Sai argues that all *pro se* filers (other than inmates) should have equal presumptive access to CM/ECF filing, with individualized prohibitions for good cause. The *pro se* filers affected by Sai’s proposal might be either defendants who are not in custody or nonparties. Sai’s detailed comments explain the importance to *pro se* filers of access to electronic filing, and provide amendments that would adopt his recommendation of presumptive access.

The Committee deliberated carefully about the question whether *pro se* filers should be permitted to use the CM/ECF system in criminal cases, and the Subcommittee concluded that Sai’s arguments did not warrant reconsideration of the question whether *pro se* filers—even those who are not incarcerated—should be able file electronically.

III. Other Issues Raised by Public Comments to Civil and Appellate Rules

A. Rule 49(a) (3)(A)

The Civil Rules Committee is considering amending its Committee Note in responses to comments regarding its counterpart to the statement in proposed Criminal Rule 49(a) (3)(A) that “Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.” The Civil Rules comments expressed concern that as published the amendment might be read to suggest that the clerk’s office would have some responsibility

for taking action when electronic service is not effective. Although the relevant portions of the Civil and Criminal notes are not identical, the Subcommittee concluded that the same solution could be adapted to both.

As published, the relevant portion of the Committee Note accompanying Criminal Rule 49 provides:

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system.

At its April meeting, the Civil Rules Committee will consider an addition (underlined below) to the published Committee Note to address this possible misreading of Rule 5:

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

The same statement could be added to the Committee Note to Rule 49, as follows:

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic filing system that an attempted transmission by the court's system failed.

The Subcommittee agreed that this language, if added to the Committee Note accompanying Civil Rule 5, should also be added to the Committee Note accompanying Rule 49.

B. No certificate for court-system service

A comment to Civil Rule 5 raised the question whether the rule should “dispense with any certificate of service for matters filed with the court’s e-filing system,” as proposed Appellate Rule 25(d)(1)(B) does. As published for comment, Rule 49(b)—like Rule 5—implies, but does not expressly state, that no certificate of service is required when a document is filed using CM/ECF. As published, Rule 49(b) states:

(b) Filing.

(1) *When Required; Certificate of Service.* Any paper that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. A notice of electronic filing constitutes a certificate of service on any person served by the court’s electronic-filing system.

The reporters for the various Advisory Committees agreed that it would be desirable for the proposed amendments to state explicitly that no certificate of service is required when service is made by filing with the CM/ECF system. To achieve that goal, Professor Cooper drafted the following language for presentation at the April meeting of the Civil Rules Committee:

(B) *Certificate of service.* No certificate of service is required when a paper is served by filing it with the court’s electronic-filing system. When a paper is served by other means, a certificate of service must be filed within a reasonable time after service or filing, whichever is later.

Because Rule 49 states the requirements for filing as well as the certificate of service, the Civil proposal would be modified as follows:

(b) Filing.

(1) *When Required; Certificate of Service.* Any paper that is required to be served must be filed within a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court’s electronic-filing system. When a paper is served by other means, a certificate of service must be filed within a reasonable time after service or filing, whichever is later.

The Subcommittee agreed that Rule 49 should also be revised to be explicit, and to use language that as nearly as possible parallels Rule 5. However, after the Subcommittee’s call issues have arisen about the last sentence quoted above. Discussions involving the reporters, subcommittee chairs, and style consultants are continuing, and revised language for the final sentence may be proposed at the April meeting.

1 **Rule 49. Serving and Filing Papers**

2 (a) **Service on a Party.**

3 **(1) What is ~~When~~ Required.** ~~A party must serve on~~
4 ~~every other party.~~ **Each of the following must be**
5 **served on every party:** any written motion (other
6 than one to be heard ex parte), written notice,
7 designation of the record on appeal, or similar
8 paper.

9 ~~(b) **How Made.** Service must be made in the manner~~
10 ~~provided for a civil action.~~

11 **(2) Serving a Party's Attorney.** **Unless the court**
12 **orders otherwise,** ~~W~~when these rules or a court
13 order requires or permits service on a party
14 represented by an attorney, service must be made
15 on the attorney instead of the party, ~~unless the~~
16 ~~court orders otherwise.~~

17 **(3) Service by Electronic Means.**

18 **(A) Using the Court's Electronic Filing System.**

19 A party represented by an attorney may
20 serve a paper on a registered user by filing
21 it with the court's electronic-filing system.

22 A party not represented by an attorney may
23 do so only if allowed by court order or local
24 rule. Service is complete upon filing, but is
25 not effective if the serving party learns that
26 it did not reach the person to be served.

27 **(B) Using Other Electronic Means. A paper**

28 may be served by any other electronic
29 means that the person consented to in
30 writing. Service is complete upon
31 transmission, but is not effective if the
32 serving party learns that it did not reach the
33 person to be served.

34 (4) Service by Nonelectronic Means. A paper may
35 be served by:
36 (A) handing it to the person;
37 (B) leaving it:
38 (i) at the person’s office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or
42 (ii) if the person has no office or the office
43 is closed, at the person’s dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;
47 (C) mailing it to the person’s last known
48 address—in which event service is
49 complete upon mailing;
50 (D) leaving it with the court clerk if the person
51 has no known address; or

52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.

57 **(b) Filing.**

58 (1) When Required; Certificate of Service. Any
59 paper that is required to be served must be filed
60 within a reasonable time after service. No
61 certificate of service is required when a paper is
62 served by filing it with the court’s electronic-
63 filing system. When a paper is served by other
64 means, a certificate of service must be filed
65 within a reasonable time after service or filing,
66 whichever is later.

67 **(2) Means of Filing.**

68 (A) Electronically. A paper is filed
69 electronically by filing it with the court’s

70 electronic-filing system. An authorized
71 filing [made] through a person's electronic-
72 filing account, together with the person's
73 name on a signature block, serves as the
74 person's signature. A paper filed
75 electronically is written or in writing under
76 these rules.

77 (B) Nonelectronically. A paper not filed
78 electronically is filed by delivering it:

79 (i) to the clerk; or

80 (ii) to a judge who agrees to accept it for
81 filing, and who must then note the
82 filing date on the paper and promptly
83 send it to the clerk.

84 **(3) Means Used by Represented and Unrepresented**
85 **Parties.**

86 (A) Represented Party. A party represented by
87 an attorney must file electronically, unless

88 nonelectronic filing is allowed by the court
89 for good cause or is allowed or required by
90 local rule.

91 (B) *Unrepresented Party.* A party not
92 represented by an attorney must file
93 nonelectronically, unless allowed to file
94 electronically by court order or local rule.

95 (4) *Signature.* Every written motion and other
96 paper must be signed by at least one attorney of
97 record in the attorney's name—or by a person
98 filing a paper if the person is not represented by
99 an attorney. The paper must state the signer's
100 address, e-mail address, and telephone number.
101 Unless a rule or statute specifically states
102 otherwise, a pleading need not be verified or
103 accompanied by an affidavit. The court must
104 strike an unsigned paper unless the omission is

105 promptly corrected after being called to the
106 attorney's or person's attention.

107 (5) Acceptance by the Clerk. The clerk must not
108 refuse to file a paper solely because it is not in
109 the form prescribed by these rules or by a local
110 rule or practice.

111 (c) Service and Filing by Nonparties. A nonparty may
112 serve and file a paper only if doing so is required or
113 permitted by law. A nonparty must serve every party
114 as required by Rule 49(a), but may use the court's
115 electronic-filing system only if allowed by court order
116 or local rule.

117 (d) Notice of a Court Order. When the court issues an
118 order on any post-arraignment motion, the clerk must
119 ~~provide notice in a manner provided for in a civil~~
120 ~~action~~ serve notice of the entry on each party as
121 required by Rule 49(a). A party also may serve notice
122 of the entry by the same means. Except as Federal

123 Rule of Appellate Procedure 4(b) provides otherwise,
124 the clerk’s failure to give notice does not affect the
125 time to appeal, or relieve—or authorize the court to
126 relieve—a party’s failure to appeal within the allowed
127 time.

128 ~~(d) **Filing.** A party must file with the court a copy of any~~
129 ~~paper the party is required to serve. A paper must be~~
130 ~~filed in a manner provided for in a civil action.~~

131 ~~(e) **Electronic Service and Filing.** A court may, by local~~
132 ~~rule, allow papers to be filed, signed, or verified by~~
133 ~~electronic means that are consistent with any technical~~
134 ~~standards established by the Judicial Conference of~~
135 ~~the United States. A local rule may require electronic~~
136 ~~filing only if reasonable exceptions are allowed. A~~
137 ~~paper filed electronically in compliance with a local~~
138 ~~rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to

Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, “Each of the following must be served on every party” restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is

retained here, with the “unless” clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court’s electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by “other electronic means,” such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil

Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court’s electronic filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing “in a manner provided for in a civil action” has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state “Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.” A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

The last sentence of subsection (b)(1), which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court's electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that

of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word “party” changed to “person” in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court’s electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided “in a manner provided for in a civil action” has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(d).

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service.

Whenever a party must or may act within a specified time after being served and service is made under Federal Rule of ~~Civil~~Criminal Procedure 49(a)(4)(C), (D), and (E)~~5(b)(2)(C) (mailing), (D) (leaving with the clerk), or (F) (other means consented to)~~, 3 days are added after the period would otherwise expire under subdivision (a).¹

Committee Note

Rule 49 previously required service and filing “in a manner provided” in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

¹ This rule text reflects amendments adopted by the Supreme Court and transmitted to Congress on April 28, 2016, which have an anticipated effective date of December 1, 2016.

THIS PAGE INTENTIONALLY BLANK

TAB 2B

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 12.4

DATE: April 11, 2017

The Criminal Rules Committee’s proposed amendment to Rule 12.4 was published for public comment in August 2016. This memorandum (1) reviews the comments and (2) summarizes the Rule 12.4 Subcommittee’s conclusion that the proposed amendment should be approved for transmittal to the Standing Committee with one change in the language of subdivision (b)(2).

Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Canon 3(C)(1)(c) of the Judicial Code was amended in 2009 to narrow the scope of required recusal to cases in which the judge has “an interest that could be substantially affected by the outcome of the proceeding.”

The Criminal Rules Committee concluded that the court should have the authority to relieve the government from its disclosure obligation in cases where burden of disclosure would be outweighed by any benefit it could provide, for example in cases involving a large number of corporations that had each suffered de minimis injuries. As published, the amendment to subdivision (a) allows the court to relieve the government of its obligation to provide disclosure upon a showing of good cause. The amendment to subdivision (b) specified the time for filing the initial disclosure statement and clarified that a “later” statement must be filed promptly if there is additional information or information changes. These changes were seen as relatively minor matters that would not have warranted an amendment in their own right, but were appropriate additions to the amendment to subsection (a).

After reviewing the public comments, as well as comments from other Advisory Committees, the Subcommittee recommends a modification in the language of subdivision (b)(2) that would bring it closer to the language of the parallel Rule of Civil Procedure. Adding additional language to clarify the duty to file a supplemental or later statement might suggest that the Criminal Rule has a different scope than the Civil Rule, or that the Civil Rule itself is unclear. To avoid these concerns, the Subcommittee recommends that the language of subdivision (b)(2) be revised to conform to the language of Civil Rule 7.1(b)(2).

We begin with a brief discussion of the public comments, and then turn to the issue raised by the other Advisory Committees.

I. The Public Comments

Only two public comments addressed the proposed amendment to Rule 12.4. Both were supportive, but one proposed a change in the language of subdivision (a).

In **CR-2016-0005-0010**, the National Association of Criminal Defense Lawyers expressed confidence that judges will not misapply the good cause standard, noted the value of flexibility and concluded that the amendment is “unobjectionable.”

But in **CR-2016-0005-0006**, the Pennsylvania Bar Association stated that it supported the amendment with one change. It expressed concern that the “good cause” exception from disclosure might “unintentionally broaden the grounds for relief from disclosure beyond facilitating recusal decisions.” Accordingly, it recommended that the proposed amendment be revised to say:

“Unless the government shows good cause bearing on judicial recusal, it must file a statement identifying any organizational victim of the alleged criminal activity.”

The Subcommittee was not persuaded that the good cause standard in (a) required clarification. This Pennsylvania Bar’s concern fails to appreciate that the only reason for disclosure under Rule 12.4 is to provide the information judges need to determine whether to recuse themselves. As the Committee Note explains: “Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct.” Thus for good cause to excuse disclosure, it must be relevant to judicial disqualification.

II. Comments from Other Advisory Committees

Other Advisory Committees and their reporters expressed concern about the proposed amendment to Rule 12.4(b)(2). Although (b)(2) was not a central part of the proposal, the Committee was persuaded that it would be useful for the rule to explicitly state that disclosure was required not only if there were “changes” in the required information, but also if new or “additional” information came to light.

At the Standing Committee meeting a second change was made in (b). The word “later” was substituted for “supplemental” in both the caption and text of (b). As a member of the Standing Committee noted, there may be cases in which no organizational victims have been identified within the time specified for the first filing required by (b)(1). If information that requires disclosure in such a case is subsequently discovered, the disclosure under (b)(2) would not be supplemental to any earlier filing. This issue does not arise under Civil Rule 7.1 because every party must file an initial statement under (a) either making the required disclosure or stating that there is no corporation that meets the disclosure requirements. Thus all disclosures under (b) are properly called “supplemental.”

The concerns from other committees focused exclusively on the Criminal Rules Committee’s effort in (b)(2) to state explicitly that later/supplemental disclosure is required not

only if there are “changes” in the required information, but also if “additional” information has come to light. The new language diverges from the current language of Civil Rule 7.1 (which also governs in bankruptcy cases).

Civil Rule 7.1(b) (2) requires a supplemental statement “if any required information changes.” From the perspective of the Civil Rules Committee, the Criminal Rules Committee’s rationale for the clarifying change in 12.4(b)(2) is problematic for two reasons. First, it may suggest that the Civil Rule is not clear and should be amended. Alternatively, it might suggest that disclosure is not required under the Civil Rule if new or additional information becomes available. The reporter for the Civil Rules Committee believes that Rule 7.1 is clear and does not warrant an amendment. He is concerned, however, that if our proposal is adopted it might lead to arguments that the Civil Rule is narrower than revised Criminal Rule 12.4(b)(2).

As became clear most recently in the efforts to revise the rules on e-filing and service, a strong justification is required for variations in the language of parallel rules. In light of the Civil Rules Committee’s concerns, the Subcommittee concluded that the proposed clarifying language in (b)(2) should be withdrawn.

The Subcommittee also concluded that the language of (b)(2) should be revised to more closely parallel Rule 7.2(b)(2) (though retaining the term “later” rather than “supplemental”). Even without any amendment, current 12.4(b)(2) is wordy. It provides that a party must:

(2) promptly file a later supplemental statement upon any change in the information that the statement requires.

The language of Civil Rule 7.2(b)(2) is shorter and more direct. It provides that a party must:

(2) promptly file a supplemental statement if any required information changes.

The Subcommittee recommends that (b)(2) be revised to incorporate this shorter and more direct wording, substituting the word “later” for “supplemental.” (As noted above, all subsequent statements filed under Civil Rule 7.1(b)(2) do supplement an initial statement, which is required in all cases.)

III. Recommendation

With the change in (b)(2) noted above, the Rule 12.4 Subcommittee recommends that the Advisory Committee approve the transmittal of the amendment to Rule 12.4 to the Standing Committee.

THIS PAGE INTENTIONALLY BLANK

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3 (1) *Nongovernmental Corporate Party.* Any
4 nongovernmental corporate party to a proceeding
5 in a district court must file a statement that
6 identifies any parent corporation and any
7 publicly held corporation that owns 10% or more
8 of its stock or states that there is no such
9 corporation.

10 (2) *Organizational Victim.* Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity. ~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~
15 ~~government must file a statement identifying the~~
16 ~~victim.~~ If the organizational victim is a
17 corporation, the statement must also disclose the

18 information required by Rule 12.4(a)(1) to the
19 extent it can be obtained through due diligence.

20 **(b) Time ~~for~~to Filing; Supplemental~~Later~~ Filing.** A
21 party must:

22 (1) file the Rule 12.4(a) statement within 28 days
23 ~~after~~~~upon~~ the defendant's initial appearance; and

24 (2) promptly file a later ~~supplemental~~ statement if
25 any required information changes ~~upon any~~
26 ~~change in the information that the statement~~
27 ~~requires.~~

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has “an interest that could be substantially affected by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “substantially affected by the outcome of the proceedings.”

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance.

Because a filing made after the 28-day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have been revised to refer to a later, rather than a supplemental, filing. The text was also revised to be more concise and to parallel Civil Rule 7.1(b)(2).

Changes after Publication

The language of (b)(2) was simplified to parallel Civil Rule 7.1(b)(2). Additional language that had been proposed was omitted as unnecessary.

THIS PAGE INTENTIONALLY BLANK

TAB 3

THIS PAGE INTENTIONALLY BLANK

TAB 3A

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Advisory Committee
FROM: Professors Sara Sun Beale and Nancy King, Reporters
RE: Rules 5 of the Rules Governing Section 2254 and 2255 Proceedings
DATE: April 11, 2017

At the Committee’s April 2016 meeting, a Subcommittee, chaired by Judge Terry Kemp, was appointed to consider a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that “The moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the committee note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

The Subcommittee presented its report at the September 2016 meeting, where there was support for the view that the text is, at least in part, creating the problem. The reference to filing “within a time fixed by the judge” can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing. Indeed, some members acknowledged that they had previously been uncertain whether the rule granted a right to reply. Given little prospect that appellate review will correct the interpretation, members agreed an amendment may be warranted. Members also discussed language that would clarify the intent of the rule without raising concerns about the meaning of “may”—a term used throughout the rules. Members also discussed briefly the question whether any amendment should include a time for filing, but there was no consensus on this issue. The Subcommittee was asked to draft an amendment, working closely with the style consultants.

The Subcommittee met again by phone conference in January, and approved language, already reviewed by the style consultants, that would clearly signal that the moving party (or petitioner in 2254 cases) has a right to file a reply:

The moving party may file a reply to the respondent’s answer or other pleading.
The judge must set the time to file, unless the time is already set by local rule.

Subcommittee members remained concerned that retaining “may” (rather than “has a right to” or “is entitled to”) in the first sentence might not solve the problem, although they recognized the potential problem that replacing “may” could cause for other rules where “may” appears. To address this, the Subcommittee agreed to add a sentence to the committee note, which the style

consultants accepted: “We retain the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’ ”

The proposed language does not set a presumptive time for filing, as there was considerable concern that the rule retain the discretion individual courts and judges use to accommodate local circumstances and practices. It also recognizes that the time for filing is sometimes set by local rule, as research revealed. Declining to impose a new, presumptive filing period avoids disrupting the widely varying practices among the districts. But when there is no local rule, requiring the judge to set a time for filing will help avoid uncertainty that might trip up unwary prisoners and create unnecessary litigation.

For the reasons set out in the memo for the September meeting (included *infra*), the Subcommittee is recommending a parallel amendment for Rule 5(e) of the Rules Governing § 2254 Proceedings.

TAB 3B

THIS PAGE INTENTIONALLY BLANK

RULES GOVERNING SECTION 2255 PROCEEDINGS
FOR THE UNITED STATES DISTRICT COURTS

Rule 5. The Answer and the Reply.

* * * * *

1 **(d) Reply.** The moving party may ~~submit~~file a reply to the
2 respondent's answer or other pleading. ~~within a time fixed~~
3 ~~by the judge.~~ The judge must set the time to file unless the
4 time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the

RULES GOVERNING SECTION 2255 PROCEEDINGS
FOR THE UNITED STATES DISTRICT COURTS

respondent's answer or pleading. It retains the word “may,” which is used through the federal rules to mean “is permitted to” or “has a right to.” No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to set the time for filing a reply. To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

RULES GOVERNING SECTION 2254 PROCEEDINGS
FOR THE UNITED STATES DISTRICT COURTS

Rule 5. The Answer and the Reply.

* * * * *

1 **(e) Reply.** The petitioner may ~~submit~~file a reply to the
2 respondent's answer or other pleading. ~~within a time fixed~~
3 ~~by the judge.~~ The judge must set the time to file unless the
4 time is already set by local rule.

Committee Note

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under §2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the

RULES GOVERNING SECTION 2254 PROCEEDINGS
FOR THE UNITED STATES DISTRICT COURTS

respondent's answer or pleading. It retains the word “may,” which is used through the federal rules to mean “is permitted to” or “has a right to.” No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to set the time for filing a reply. To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule.

TAB 3C

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Committee
FROM: Professors Sara Sun Beale and Nancy King, Reporters
RE: Report from 2255 Rule 5 Subcommittee
DATE: September 1, 2016

At its April 2016 meeting, the Committee discussed a letter from Judge Richard Wesley expressing concern about inconsistent district court interpretations of Rule 5(d) of the Rules Governing Section 2255 Proceedings. Rule 5(d) presently provides: “The moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” This subsection was added by amendment in 2004, and its legislative history suggests that it was intended to give all inmates who file an application for relief under Section 2255 the opportunity to file a reply to the government’s responsive pleading. The opportunity to reply may be essential to applicants, particularly as some issues are first raised in the government’s response. Several district courts, however, have read Rule 5 differently, as leaving the opportunity to file a reply up to the court’s discretion.

Committee Members discussed whether Rule 5(d) should be amended to make it even clearer that inmates are entitled to file a reply, whether to add to the Rule a presumptive deadline for filing a reply, and whether similar changes are needed in Rule 5(e) of the Rules Governing Section 2254 Proceedings, a provision added in 2004 contemporaneously with the addition of Rule 5(d) to the 2255 Rules. Judge Molloy appointed a Subcommittee with Judge Kemp as Chair to consider these matters further. The Subcommittee met by telephone on August 18, after receiving a Reporter’s memorandum and research from the Rules Office. Members expressed doubt about whether an amendment was warranted, and the Subcommittee agreed that the reporters should explore steps other than amendment that might be available for addressing case law that has misinterpreted the rule. The Subcommittee also wanted to get input from the Committee at the September meeting. This memorandum summarizes the information provided to the Subcommittee, the Subcommittee’s deliberations, and new information obtained following the telephone conference.

In light of the information in this memorandum and its attachments, the Subcommittee seeks feedback from the Committee regarding the following options: (1) proposing an amendment to Rule 5(d); (2) taking one or more steps other than amendment to address the decisions denying a right to reply; (3) placing the issue on the Committee’s study agenda to evaluate again at a later time; or (4) taking no action.

Section I provides the essential background regarding both Rule 5 of the 2255 Rules and Rule 5 of the 2254 Rules, and the present application of these provisions. Section I A. discusses

their text and legislative history. Section 1B. reviews commentary and case law construing the relevant provisions. Section I C. summarizes research into the local rules and standing orders governing replies in 2255 and 2254 proceedings and the practices in various districts.

The remainder of the memorandum considers possible Committee action. Section II reviews the considerations for and against an amendment to Rule 5(d) that would clarify the right to reply. We also discuss several potential avenues to address inconsistent interpretation in the district courts that would not involve amending the Rule. Section III considers the features of a possible amendment that would clarify the right to reply, should the Committee decide to pursue an amendment. Finally, Section IV addresses whether the same treatment is warranted for Rule 5(e) of the Rules Governing Section 2254 Proceedings.

This memorandum does not address whether to include a new presumptive deadline for filing a reply as part of an amendment to Rule 5 or what that deadline might be. The Subcommittee chose not to discuss these issues, concluding that they were not relevant to the choice of action required to clarify the right to reply; they could be addressed later if the Committee chose to pursue an amendment.

I. Background on Rule 5 and the Division over its meaning.

A. The text, legislative history, committee note, and cases construing Rule 5(d)

The Subcommittee agreed that that the text, legislative history, and committee note all support the view that the current rule gives prisoners the right to file a reply.

1. The text

Rule 5(d) presently provides (emphasis added): “The moving party *may submit* a reply to the respondent’s answer or other pleading within a time fixed by the judge.” The Federal Rules generally use the term “may” to indicate that the court or party has the authority to take some action. In the view of the style consultants, the text is now clear: it gives the prisoner a right to file a reply, and any effort to clarify the language would be problematic. In an email to the reporters, Professor Kimble explained:

The style consultants agree that the rule should not be changed. The word “may” means that the party is permitted to do it. That’s what “may” means. Lower courts that require the court’s permission are acting contrary to what the rule says. What’s more, changing this “may” has implications for other uses of “may.” Now do we have to worry that all those other uses of “may” without some kind of intensifier don’t really grant permission?

2. The legislative history of the 2254 and 2255 Rules

The legislative history of the rules provides strong support for the view that the Criminal Rules Committee and the Standing Committee intended the amendment to give prisoners the right to file a reply. These provisions were first proposed as amendments to the 2254 and 2255 Rules in 2002, by a Subcommittee of the Criminal Rules Committee chaired by Judge David Trager. Prior to the amendment, the 2254 and 2255 Rules made no mention of a reply (or traverse). The 2004 amendment added the provision addressing the reply, and changed the title of the rule from “Answer; contents” to “The Answer and the Reply.”

When the 2004 amendments to 2254 Rule 5 and 2255 Rule 5 were originally proposed, committee members were divided on the question whether allowing prisoners to file a reply was a substantive change, but unanimous in concluding that prisoners “should be provided with that opportunity.”¹ After discussion, the Committee voted unanimously to include the new provision in the amendment proposed for publication.²

At the Standing Committee meeting when the revisions to the habeas rules were proposed for publication, Judge Trager explained that “Rule 5 of both sets of rules would be amended to *give the petitioner or moving party a right* to reply to the government’s answer or other pleading,” which he said most judges already allowed (emphasis added).³ The Standing Committee unanimously approved these provisions (along with all of the other changes to the habeas rules proposed at the same time).⁴

At the conclusion of the public comment period, the Committee revisited the parallel provisions in the 2254 and 2255 Rules, and the minutes explicitly recognize that the revised rules would give prisoners in both 2254 and 2255 cases a “right” to file a reply. The Committee first took up Rule 5(e) in the 2254 Rules. The minutes state (emphasis added):

The Committee discussed proposed Rule 5(e) that would *provide the petitioner with the right to file a response* to the respondent’s answer. Judge Miller moved, and Judge Trager seconded, a motion that *the rule remain as published, that is, petitioners would have the right to reply in all cases*. The motion carried by a vote of 5 to 3.⁵

The Committee then turned its attention to the 2255 Rules. The minutes state (emphasis added):

The Committee had previously discussed the proposed amendment to *proposed Rule 5(e), of the § 2254 rules that would provide the petitioner with the right to file a response* to the respondent’s answer. That proposal had been approved by a vote of 5 to 3, *supra*. *The Committee agreed that the approach should be applied to Rule 5(d) of the § 2255 rules*.⁶

The Committee’s view was informed by its comprehensive revision of the habeas rules, which also included the requirement that the government’s answer raise procedural bars and the statute of limitations.⁷ It is understandable that the Committee would want to guarantee the

¹ In his report describing the work of the Habeas Corpus Subcommittee, Judge Trager stated that the subcommittee draft “provided that the petitioner or moving party may file a reply within a time fixed by the judge.” Agenda Book, Criminal Rules Meeting, April 2002, at 164. He observed that he did not view this as a substantive change because most judges already provided this opportunity. But he also recognized that “some may feel otherwise.” *Id.* The minutes of the Committee meeting report that Judge Bucklew did view this as a substantive change, but she stated that “the petitioner and moving party should be provided with that opportunity.” Minutes of Advisory Committee on Criminal Rules, April 10-11, 2002, at 7.

² *Id.*

³ Comm. on Rules of Practice and Procedure, Minutes, June 10-1, 2002, at 26-27.

⁴ *Id.*

⁵ Minutes of Advisory Committee on Criminal Rules, April 28-29, 2003, at 4.

⁶ *Id.* at 6.

⁷ In “Changes Made After Publication and Comments,” the Committee observed that another revision to Rule 5 for the first time required an answer to address procedural bars and the statute of limitations:

opportunity to reply to new issues such as these that would be raised by the government’s responsive pleading.

At no time during the process was there any suggestion made that these amendments did not grant a right to reply. The Rules’ final progress through Conference, the Court, and Congress was uneventful.

3. The Committee Note

The Committee Note does not use the term “right.” It refers, instead, to the movant’s “opportunity to file a reply,” stating:

[R]evised Rule 5(d) adopts the practice in some jurisdictions *giving the movant an opportunity to file a reply* to the respondent’s answer. Rather than using terms such as “traverse,” *see* 28 U.S.C. Sec. 2248, to identify the movant’s response to the answer, the rule uses the more general term “reply.” The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Judge Wesley’s letter notes that in *Anderson v. United States*, 612 F. App’x 45 (2d Cir. 2015), the government in its brief maintained that Rule 5 does not give prisoners a right to file a reply brief, a claim the government argued was supported by case law as well as the Committee Note. The Subcommittee concluded that the portions of the Committee Note cited by the government in *Anderson*⁸ do not support the government’s interpretation. The quoted language fails as support for the government’s interpretation of Rule 5 both because it appears in the Note accompanying the initial 1976 adoption of the Rule, not the 2004 provision, and also because it speaks only to whether the movant must file a reply in order to avoid dismissal,⁹ not whether the court must permit a filing. In other words, the rule was intended to clarify

“The Note was also changed to reflect that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law.”

⁸ The government quoted two passages: (1) “[t]here is nothing in 2255 which corresponds to the . . . requirement of a traverse to the answer. . . .” and (2) “As under rule 5 of the 2254 rules, there is no intention here that such a traverse be required, except under special circumstances.” Br. for Gov’t at 14–15, *Anderson v. United States*, 612 F. App’x 45 (2d Cir. 2015) (No. 13-934) (emphasis in government’s brief) (quoting Advisory Committee Notes to Rule 5, Rules Governing Section 2255 Proceedings).

⁹ Apparently, the issue that prompted the initial note language in the 2255 context was a statute that applied in 2254 cases at the time. Until the 2004 amendment to Rule 5, the 2254 rules “omitted any reference to a traverse or reply.” RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 17.1 (7th ed. 2015). The 1976 Committee Note indicates that Rule 5 was intended to address the “difficulty” that had been caused by 28 U.S.C. §2248, which provided that “the allegations of a return [answer] . . . if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.” (emphasis added). Liebman and Hertz explain: “Although the Habeas Rules dispensed with the *requirement* of a traverse (except in successive petition situations), they did not forbid such a pleading, and the Advisory Committee Notes endorsed a traverse or amendment where ‘it [would] serve a truly useful purpose’ or was ‘called for by the contents of the answer’ filed by respondent.” *See also* Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 242 (1978) (explaining that under Rule 5 “No traverse to the answer is required, and the former statutory rule that the allegations of the return are assumed to be true until impeached has been abandoned.”).

that an inmate was *not required* to file a traverse or reply; it said nothing about whether a court *must allow* a traverse or reply to be filed.

The Committee Note accompanying the 2004 addition of subsection (d) in 2255 Rule 5 is consistent with the intent of the Criminal Rules Committee, repeated several times during the drafting and adoption process, that the amendment was to confer the right to file a reply. The language of the Note even highlights that the amendment codified a practice not followed in every jurisdiction: “revised Rule 5(d) adopts the practice in some jurisdictions giving the movant an opportunity to file a reply to the respondent’s answer.”

B. Commentary and Cases Interpreting the Rule

1. Cases holding there is no right to reply in a 2255 case.

Several district court opinions holding that prisoners have no right to file a reply to the government’s answer or responsive pleading in a 2255 case are collected in the government’s brief filed in *Anderson v. United States*, 612 F. App’x 45 (2d Cir. 2015). That brief states:

Numerous courts across the country have confirmed that Rule 5(d) does not require a judge to allow a Section 2255 movant to file a reply. *See, e.g., Simmons v. United States*, 2014 WL 4628700, at *1 (E.D. N.Y. Sept. 15, 2014) (stating that the Rule’s “plain language does not mandate a reply”); *Terrell v. United States*, 2014 WL 1203286, at *1 (W.D. N.C. Mar. 24, 2014) (stating that while a petitioner “may” file a reply, there is “no [such] absolute right . . . in an action brought under § 2255”). Instead, “[w]hether to allow the moving party to file a reply brief is within the Court’s discretion.” *United States v. Martinez*, 2013 WL 3995385, at *2 (D. Minn. Aug. 5, 2013). “When a court does not request, permit, or require the additional argument that would be contained in a reply brief, § 2255 petitioners are not prejudiced by denial of an opportunity to file such a brief.” *United States v. Crittenton*, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008). This principle holds even when a petitioner does not receive the Government’s opposition. *United States v. King*, 184 F.R.D. 567, 568 (E.D. Va. 1999) (holding that though “neither [the petitioner] nor his attorneys were ever served with the government’s response,” no “mistake or excusable neglect occurred” because “a § 2255 petitioner has no right to file a reply to the government’s response”).

Our research identified fifteen additional post-2004, district court decisions that state or hold that there is no right to file a reply under Rule 5(d).¹⁰

¹⁰ Note that many of these decisions cite cases included in the government’s brief in *Anderson*, quoted above in the text, especially *Crittenden* and *Martinez*. *United States v. Griffin*, 2015 WL 1925821, at *1 (D. Minn. Apr. 28, 2015) (following *Martinez* and *Crittendon*); *Harris v. United States*, 2015 WL 5714552 at *2 (W.D. N.C. Sept. 29, 2015) (stating that whether to allow reply is within court’s discretion, finding “a Reply would not aid the decision-making process”); *Nix v. United States*, No. 1:15CV79-LG, 2015 WL 2137296, at *1 (S.D. Miss. May 7, 2015) (stating “while Rule 5(d) of the Rules Governing Section 2255 Cases states that a Petitioner *may* submit a reply, it does not require the Court to wait on a reply before ruling”); *Sifford v. United States*, 2014 WL 114671, at *1 n.1 (W.D.N.C. Jan. 10, 2014) (concluding that whether to allow reply is within court’s discretion, denying Rule 59 motion); *United States v. Benson*, No. CIV. 13-1935 DSD, 2014 WL 1478438, at *1 n.1 (D. Minn. Apr. 16, 2014) (refusing to consider reply, citing *McElrath*); *Argaves v. United States*, No. 3:11CV1421 SRU, 2013 WL 1856527, at *2 (D. Conn. May 2, 2013) (noting reply briefs are not

There appear to be three principal rationales that judges have referenced when finding no right to file a reply in 2255 Rule 5(d) or 2254 Rule 5(e).

First, although most of these cases were decided after the 2004 amendment, some appear to have been influenced by pre-amendment law and policy.¹¹ It is possible that unrepresented inmates and boilerplate orders mean that some judges take longer to notice changes in 2254 and 2255 Rules, and continue to rely on outdated authority.

Second, several decisions relied on a local rule governing motions generally—rather than 2255 cases—that require a movant to obtain leave of court to file a reply.¹²

Finally, the phrasing of the rule also appears to be contributing to the confusion. By stating that applicant or petitioner “*may* submit a reply to the respondent’s answer or other pleading *within a time fixed by the judge*,” the rule could suggest that the judge has the discretion to determine whether to set any time for a reply, or to determine none is needed.¹³ For example, after quoting Rule 5(e) adding emphasis to the word “*may*,” one judge explained:

required under general local rule); *United States v. Dixon*, No. CIV. 12-1914 JNE, 2013 WL 1408577, at *4 n.4 (D. Minn. Apr. 8, 2013) (quoting *Moreno and Crittendon*, concluding that a reply is not necessary and denying extension of time to file a reply); *United States v. Sturgis*, No. CIV. 13-945 JNE, 2013 WL 3799848, at *6 (D. Minn. July 22, 2013) (relying on *Crittendon*); *United States v. Moreno*, No. CIV. 12-2968 ADM, 2013 WL 1104766, at *1 (D. Minn. Mar. 18, 2013) (stating the Government’s Response does not give the Defendant an automatic right to reply, relying on *McElrath*); *Rosario v. Akpore*, 967 F. Supp. 2d 1238, 1242 n.2 (N.D. Ill. 2013); *United States v. Cleve-Allan George*, No. CR 2003-020, 2011 WL 5110409, at *1 n.1 (D.V.I. Oct. 26, 2011) (considering untimely reply, but noting with approval the *Crittendon* court’s statement “[w]hen a court does not request, permit, or require the additional argument that would be contained in a reply brief, § 2255 petitioners are not prejudiced by denial of an opportunity to file such a brief”); *Coleman v. United States*, No. CIV 09-6330, 2011 WL 149863, at *2 (D.N.J. Jan. 18, 2011) (“We join those courts in concluding that a petitioner does not have a right to submit a reply”); *United States v. McElrath*, Crim. No. 03–235(JNE), Civ. No. 08–5291(JNE), 2009 WL 1657453, at *2 (D. Minn. June 11, 2009) (denying opportunity to file reply brief, relying on *Crittendon* and pre-2004 authority); *Arias v. United States*, No. 06-381, 2007 WL 2119050, at *1 (M.D. FL July 20, 2007) (relying on general local rule that allows a reply by a movant with leave of court); *Shi Arias v. United States*, No. 06-381, 2007 WL 2119050, at *1 (M.D. FL July 20, 2007) (relying on general local rule that allows a reply by a movant with leave of court); *Shipley v. United States*, No. CIV 07-2051, 2007 WL 4372996, at *1 (W.D. Ark. Dec. 12, 2007) (§ 2255 petitioners are not prejudiced by denial of an opportunity to file replies when courts do not solicit such replies, grant leave to file such replies or find additional argument necessary to dispose § 2255 motions).

For similar statements in a dozen additional 2254 cases, see notes 36 & 37, *infra*.

¹¹ *E.g.*, *United States v. McElrath*, Crim. No. 03–235(JNE), Civ. No. 08–5291(JNE), 2009 WL 1657453, at *2 (D. Minn. June 11, 2009); and the three cases relying on *McElrath*: *Benson*, *Martinez*, and *Sifford*.

¹² Examples include *United States v. Crittenton*, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008); *Shipley v. United States*, No. 07-2051, 2007 WL 4372996, at *1 (W.D. Ark. Dec.12, 2007); *Arias v. United States*, No. 06-381, 2007 WL 2119050, at *1 (M.D. Fla. July 20, 2007). *Arias*, relying on a local rule in M.D. Fla., was cited as authority in *Shipley* and *Crittendon*. *Crittendon* was cited as authority for finding no right to reply in a total of six cases: *McElrath*, *Martinez*, *Griffin*, *Sturgis*, *Dixon*, and *United States v. Cleve-Allan George*, No. CR 2003-020, 2011 WL 5110409, at *1 n.1 (D.V.I. Oct. 26, 2011) (considering untimely reply, but noting with approval the *Crittendon* court’s statement “[w]hen a court does not request, permit, or require the additional argument that would be contained in a reply brief, § 2255 petitioners are not prejudiced by denial of an opportunity to file such a brief.”)

¹³ Examples of decisions emphasizing the word “*may*” when finding the rule grants discretion include *Nix v. United States*, No. 1:15CV79-LG, 2015 WL 2137296, at *1 (S.D. Miss. May 7, 2015) and *Sifford v. United States*, 2014 WL 114671, at *1 n.1 (W.D.N.C. Jan. 10, 2014) (whether to allow reply is within court’s discretion, denying Rule 59 motion). *See also* *United States v. Andrews*, No. 12 C 6208, 2012 WL 6692159, at *2 (N.D. Ill.

It has never been clear whether that means a habeas petitioner has the right to submit a reply or whether it means that the judge may order such a reply as needed. In an abundance of caution this Court has most often proceeded with the former reading, but as the text reflects that does not appear to be called for here.

Rosario v. Akpore, 967 F. Supp. 2d 1238, 1242 n.2 (N.D. Ill. 2013).

2. Commentary

Treatises and commentary that discuss the amendment to 2255 Rule 5 and 2254 Rule 5 generally state or assume that the amended rules provide a right to reply.¹⁴ The clearest statement is in WRIGHT, LEIPOLD, HENNING & WELLING, 3 FED. PRAC. & PROC. CRIM. § 633 (4th ed.): “A traverse or reply to the answer is not required, but Rule 5(d) was added in 2004 to require the court to accept such a reply if the applicant chooses to file one.” The treatises do not generally highlight the division of authority in the district courts or critique decisions not permitting a reply. Indeed only one source we found indicated there was any potential dispute on this point.¹⁵ We noticed, moreover, that one treatise continues to cite to some pre-2004 case law,¹⁶ which might cause confusion.

II. Local Rules, Standing Orders, and Practices

At Judge Kemp’s request, Julie Wilson and Bridget Healy from the Administrative Office of U.S. Courts examined local rules, standing orders, and docket entries in eight small, eight medium, and eight large districts, and they also surveyed pro se clerks and magistrate judges to learn more about their practices. Their results are provided in Tabs C.1, C.2, and C.3.

In a memo summarizing their review of local rules, standing orders, and docket entries, Wilson and Healy concluded:

“the majority of courts included in the sample permit petitioners to file reply briefs. Most courts permit reply briefs and set the time period with an order, although a minority of courts has a local rule permitting reply briefs. A review of the dockets of the sample courts shows that the order requiring the respondent to answer is the most common method of setting the time period for

Dec. 19, 2012) (acknowledging it may have been error to rule on § 2555 motion without considering reply but citing authority permitting such a ruling when the government’s answer is conclusive and a reply would be of no assistance).

¹⁴ Several treatises state that the prisoner “may” file a reply. RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 17.1 (7th ed. 2015) (“n 2004, the Rules Governing Section 2254 Cases in the United States District Courts were amended to state explicitly that “[t]he petitioner may submit a reply” then quoting the rule and the Committee Note); BRIAN MEANS, POSTCONVICTION REMEDIES § 17:1 (“State prisoners proceeding under 28 U.S.C.A. § 2254 and federal prisoners proceeding under 28 U.S.C.A. § 2255 may file a reply to the respondent’s answer”); BRIAN MEANS, FEDERAL HABEAS MANUAL § 8:35 (stating that Rule 5(e) and Rule 5(d) “authorize the petitioner’s or movant’s filing of a reply to the respondent’s answer within a time fixed by the district court.”); WEST’S FED. ADMIN. PRAC. § 6940 (“Amendments to Rule 5 ... provide the petitioner with the chance to reply to respondent’s answer.”)

¹⁵ 16A FED. PROC., L. ED. § 41:375 (noting a contrary decision with the signal “Caution”).

¹⁶ BRIAN MEANS, POSTCONVICTION REMEDIES § 17:1 n.2 (“Springs Industries, Inc. v. American Motorists Ins. Co., 137 F.R.D. 238, 240 (N.D. Tex. 1991) (“There will be instances, of course, when a movant should not be permitted to cure by way of reply what is in fact a defective motion or when an injustice will otherwise result to a nonmovant if a reply brief is augmented with new evidence”).

a petitioner’s reply, and that reply briefs are sometimes filed regardless of whether they are specifically permitted in an order.”

Of these 24 districts, most appeared to recognize or assume that replies were permitted, although many districts’ rules said nothing about replies in these cases. But at least one district’s local rule continues to contemplate no entitlement to file a reply to a response to any motion without leave of court; 2255 cases are still termed motions, even though they are docketed as separate cases.¹⁷

In addition, Wilson and Healy also emailed the Pro Se Law Clerks’ list and the Magistrate Judges Advisory Group asking for responses to the following questions:

- (1) In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?
- (2) What time period is given for filing a reply?
- (3) Are extensions of that time period granted?

A chart recording the responses is provided at Tab C.3.¹⁸ Respondents in the majority of districts stated that petitioners are automatically permitted to reply. But respondents in two districts stated that petitioners are not automatically given a right to reply,¹⁹ and in seven additional districts, the response to this question was coded as “maybe” or judge specific.²⁰

III. Amendment, Other Action, or Study Agenda?

The Subcommittee agreed that 2255 Rule 5(d) and 2254 Rule (e) give prisoners a right to file a reply, that district courts that have concluded otherwise are in error, and that the denial of a right to file a reply affects the liberty interests of persons who are incarcerated. Given the nature of this interest, it is particularly important that prisoners be permitted to present their replies, if any, to the government’s pleading before the district court rules.²¹

¹⁷ This district is Massachusetts, where Local Rule 7.1, which governs motion practice, provides that a reply brief may be permitted only with leave of the court. Wilson and Healy note, however, that although the general scheduling orders in the case documents they surveyed did not reference a petitioner’s reply brief, petitioners in some cases did file reply briefs or supplemental memoranda.

¹⁸ The period of time for filing a reply varied, and is not addressed in this memo.

¹⁹ These districts are Hawaii and the Eastern District of Wisconsin.

²⁰ In both 2255 and habeas cases, the Administrative Office study coded the Eastern District of New York, the Middle District of Florida, and the District of Massachusetts as judge specific or maybe. It coded the Eastern District of Virginia and the District of Maryland as judge specific or maybe in 2255 cases, and the Eastern District of Louisiana and the Northern District of New York as judge specific or maybe in state habeas cases.

²¹ The Eleventh Circuit, in a decision addressing a different issue (the need to serve on a petitioner not only the state’s responsive pleading but also the exhibits referenced in that pleading), aptly explained the importance of the petitioner’s reply (emphasis added):

And in any event, *a habeas petitioner whose claims are thrown out on a procedural or jurisdictional ground deserves just as much of an opportunity to respond to the State’s answer as the petitioner whose claims are dismissed on the merits. See Rules Governing § 2254 Cases, Rules 5, 6 (establishing rules governing the filing and contents of pleadings as well as discovery without drawing any distinction based on the grounds on which a claim is likely to be decided).* . . .

Although the Subcommittee agreed that both Rules 5 guaranteed a right to reply, members questioned whether an amendment was the best response to the present inconsistency in district court decisions. The Subcommittee briefly discussed several alternative responses, and it requested that the Reporters collect more information about these and other potential alternatives. This section presents the information collected and identifies factors that might, in this context, weigh for and against a clarifying amendment.

A. The Case for Amendment

As a preliminary matter, the Committee should consider whether the rule is clear and contrary decisions are simply wrong, or the text of the rule is not clear and its phrasing and/or structure is contributing to the inconsistency in interpretation. When the text of the rule itself creates ambiguity or inconsistency, an amendment may be an appropriate response. But erroneous interpretations of clearly stated rules are typically corrected over time by appellate review.

1. Textual Ambiguity

At least some judges who have denied the right to reply appear to find support for that reading in the phrasing of Rule 5. The text is susceptible to an interpretation that the court has discretion not only to set the time for a reply, but to determine whether a reply will be permitted. If the text is not entirely clear, that strengthens the case for an amendment.

It appears that the phrasing of the rule is at least partially responsible for some, but not all, of the decisions interpreting Rule 5 to authorize a judge to deny an opportunity to reply. Rather than emphasize the text, some of the decisions relied on outdated pre-amendment sources or on local rules governing motions that give the court discretion to determine when a litigant can file a reply. These reasons are consistent with the view that the text of the Rule is

This distinction ignores the very real possibility—indeed, the probability—that the District Court would base even a jurisdictional or procedural ruling on documents filed alongside the State's answer (for example, trial transcripts showing that a claim is procedurally defaulted due to lack of a contemporaneous objection). If the State points to a document that purports to show that the petitioner did not exhaust his claim, or that it is procedurally defaulted, why should that petitioner not have a meaningful opportunity to review the document and explain to the District Court why the State's position is wrong? If we were to deny petitioners this opportunity, we would do so in the face of our experience that has repeatedly demonstrated that a petitioner must have a meaningful opportunity to challenge the propriety of rulings on procedural grounds. These cases often present close calls which are subject to debate. . . .

. . . Federal habeas corpus proceedings are the last chance a petitioner has to present arguable constitutional violations and errors to a court capable of correcting them. Therefore much rides on having an adversarial process structured in a way that best equips the District Court to get it right. See Lonchar v. Thomas, 517 U.S. 314, 324, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1996) (“Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.”).

Rodriguez v. Florida Dep't of Corr., 748 F.3d 1073, 1080 (11th Cir. 2014) (emphasis added). Consider also Fitzpatrick v. Bradshaw, No. 1:06-CV-356, 2006 WL 3591955, at *2 (S.D. Ohio Dec. 11, 2006) (“Because a respondent may be expected to raise new matters such as affirmative defenses in the answer, the petitioner may have new matter to plead in response, e.g., equitable tolling as a response to a statute of limitations defense or cause and prejudice or actual innocence as a response to a procedural bar claim.”).

clear and these courts are simply mistaken. But a number of decisions denying the right to reply mention the text of Rule 5(b) as support. This reliance on the text adds support to the view that it is the language of the Rule, and not only mistaken reliance on outdated or inapplicable authority, that is causing the problem.

2. Appellate Correction

Even if the text is clear, some Subcommittee members have expressed concern that erroneous interpretations of 2255 Rule 5(d) and 2254 Rule 5(e) are significantly less likely to be corrected by appellate litigation than are erroneous decisions concerning other federal rules of procedure. If so, this may also weigh in favor of amending the rule or taking other corrective action rather than deferring to appellate review. Indeed, in the twelve years since the 2004 amendments added 2254 Rule 5(d) and 2255 Rule 5(e), there has been no appellate discussion of this issue in any case available through searches of Westlaw.²²

Several factors could be contributing to the absence of appellate discussion. First, most prisoners seeking relief in these cases will be proceeding pro se,²³ with limited capacity to research, brief, and argue the issue. The vast majority of published and unpublished district court decisions available on Westlaw that rejected a right to reply after 2004 involved a 2255 applicant or 2254 petitioner without counsel.

Second, most inmates who lose in the district court do not seek appellate review, and those who do seek appellate review face an extra hurdle: a losing applicant or petitioner must secure a certificate of appealability.²⁴

²² Only a handful of appellate cases even mention Rule 5(d). The Eleventh Circuit's opinion in *Rodriguez*, quoted in footnote 20, assumes there is a right to reply. See also *White v. United States*, 175 F. App'x 292, 293, 2006 WL 887743, at *1 (11th Cir. 2006) (stating in passing, citing Rule 5, that "After the government has responded, the movant has the opportunity to reply.") But two decisions note that the prisoner claimed he was denied the opportunity to reply, and each was resolved on a different ground without further discussion of Rule 5(d). The *Anderson* case discussed in the text accompanying notes 8 and 25. And in *Cleaver v. Maye*, 773 F.3d 230, 233 (10th Cir. 2014), the court refused to allow a prisoner who claimed district denied Rule 60(b) motion before he received the Government's response and could reply to invoke 2255(d)'s "savings clause" and Section 2241. In an earlier ruling, *United States v. Cleaver*, 319 F. App'x 728, 730–31, 2009 WL 903408, at *2 (10th Cir. 2009), the court held that because Cleaver could have, but did not, assert his Rule 5(d) objection in his Rule 59(e) motion to alter or amend the district court's judgment or in his direct appeal, he could not later argue that he was entitled to relief from the district court's judgment under Rule 60(b)(6)).

²³ An estimated 95% of non-capital 2254 cases are resolved in the district court without counsel for the petitioner. N. KING, F. CHEESMAN, & B. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS at 23 (2007) (reporting results of study of nearly 2400 non-capital 2254 cases filed in 2003 and 2004). Statistics on representation in 2255 cases are not readily available, but it is fair to assume that a significant proportion are resolved without representation for the applicant.

²⁴ See 28 U.S.C. § 2253; Fed. R. App. P. 22(b). See also Nancy King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 FED. SENT. R. 308, 315 (2012) (following cases from study cited in note 23 through the courts of appeals, finding that in less than 40% was an appeal sought). The rate of appeal in 2255 cases is not available but caseload statistics suggest the appeal rate is similar. Between March 2014 and March 2015, there were about 7,000 Section 2255 applications terminated in the district courts, U.S. District Courts - Civil Cases Terminated, by Nature of Suit and Action Taken, compared to 2900 appeals from Section 2255 rulings filed in courts of appeals during the same period. U.S. Courts of Appeals - Civil and Criminal Cases Filed, by Circuit and Nature of Suit or Offense.

Third, when a prisoner’s no-right-to-reply claim actually reaches an appellate court, it may be less likely to be addressed in the appellate court’s decision than is a Criminal Rules claim raised on direct appeal. There are generally many alternative grounds on which to affirm a district court’s decision to deny or dismiss a 2255 application or 2254 petition for relief. Post-conviction cases involve numerous procedural barriers to review such as the statute of limitations, exhaustion requirement, procedural default, and the successive petition bar. Indeed, a procedural barrier precluded the court from reaching the issue in the *Anderson* case, which was brought to the attention of the Committee by Judge Wesley. Although the issue of the right to file a reply was briefed in *Anderson*, the court of appeals did not address it, affirming the judgment below because the 2255 application was filed too late.²⁵

A final factor regarding the capacity of further litigation to correct erroneous applications of 2254 Rule 5(e) and 2255 Rule 5(d) involves the potential skewing of the decisions that are available through legal research. One Subcommittee member suggested that decisions allowing a reply may be less likely to result in a written opinion than decisions denying or upholding the denial of a reply, and further that the opinions denying the right to reply are not flagged in Westlaw in a way that would suggest that holding is contested. Our Westlaw searches identified dozens of district court opinions since 2004 that noted in passing that there *is* a right to reply under Rule 5,²⁶ and hundreds more that set deadlines for the reply. But these opinions did not involve disputes over whether there was a right to reply, and most appeared to be boilerplate language repeated in all orders in such cases from that district or by that judge. If available legal research methods do disguise the balance of opinion on this issue, that too may delay the eventual correction of what the Subcommittee believes are erroneous interpretations of these rules.

B. The Case Against Amendment

1. Negative implications for other rules.

The style consultants believe the language of Rule 5 is quite clear, and they fear that efforts to clarify would set a dangerous precedent, suggesting that other rules that use “may”

²⁵ It stated:

Anderson maintains that Rule 5(d) afforded him an absolute right to respond to the government's answer to his § 2255 petition before the district court ruled. We need not conclusively decide this issue because, given that Anderson’s petition was untimely, any error the district court may have committed was harmless. Anderson has conceded the untimeliness of his petition on this appeal, and he has failed to show that he was prejudiced by any error the district court may have made in ruling on his § 2255 petition before he could respond to the government's answer to it.

Anderson v. United States, 612 F. App'x 45, 46, 2015 WL 5233406 (2d Cir. 2015).

²⁶ E.g., Blake v. United States, No. 213CV02663JPMCGC, 2016 WL 4153618, at *3 (W.D. Tenn. Aug. 4, 2016) (“The movant is entitled to reply to the Government's response. Rule 5(d)"); United States v. Obaei, 2015 WL 1545019, at *1 (N.D. Ill. April 1, 2015) (“Rule 5(d) . . . gives Obaei the right to submit a reply to that response”); Poulsen v. United States, No. 2:06-CR-129, 2014 WL 7272228, at *7 (S.D. Ohio Dec. 18, 2014) (“Rule 5(d) permits the moving party to reply to the respondent's answer”); Baerga-Suarez v. United States, 30 F. Supp. 3d 91, 99 (D.P.R. 2014) (“the Court recognizes petitioner's right to submit an answer under Rule 5(d)”).

are somehow deficient. Similar phrasing is used elsewhere in the rules to convey a right to take some action.²⁷

But the phrasing in Rules 5 is not identical to that in the other Criminal Rules, and the extra clause regarding judicial discretion to set the time for reply that may be contributing to the disputed interpretation.

If the Committee pursues an amendment, some revisions would be less likely to raise concerns that the term “may” does not, by itself, clearly state an entitlement to act. We discuss some alternatives *infra* in Section III.

2. Scope of the problem.

Several Subcommittee members suggested that the problematic decisions were not sufficiently frequent or widespread to warrant any action on the part of the Committee. We cannot answer the question exactly how many cases are affected because many (perhaps most) district court rulings in 2254 and 2255 cases do not make it into the searchable legal research databases. Thus, even if research identifies a particular number of decisions stating that a reply could be disallowed at the judge’s discretion, that research is not a reliable gauge of either the number or percentage of cases in which a reply is not permitted.

We do have information gathered by the Administrative Office about local rules and policies in a sample of districts. The Wilson and Healy survey of 24 districts indicates that the practice in the clear majority of those districts is to give all prisoners the right to reply. Even in the handful of districts where that is not the case, most courts permit prisoners to file a reply, a practice confirmed by respondents from those districts. Assuming that the sample of districts examined in the survey fairly represents the practices of remaining districts, the survey suggests that the percentage of judges denying an opportunity to reply is quite small.

It is notable, however, that the post-2004 opinions we did find that contest the right to reply in either 2255 or 2254 cases were not limited to those with particularly small prisoner caseloads and include decisions by judges from the Middle District of Florida, the Eastern District of New York, the District of New Jersey, the Northern District of Illinois, and the Eastern District of Pennsylvania.²⁸

3. Availability of Options Besides Amendment

²⁷ See Fed. R. Crim. P. 30(a) (“[a]ny party may request in writing that the court instruct the jury on the law as specified in the request.”); Fed. R. Crim. P. 32(f)(3) (“the probation officer may meet with the parties to discuss objections”); Fed. R. App. P. 28(c) (“[t]he appellant may file a brief in reply to the appellee’s brief”).

²⁸ Approximately 6,500 Section 2255 cases and 16,300 state prisoner habeas petitions were filed in district courts nationwide in the twelve months preceding March 31, 2015. U.S. DISTRICT COURTS, CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS, TABLE NO. C-3, CIVIL CASES FILED, BY JURISDICTION, NATURE OF SUIT, AND DISTRICT (2015), available at <http://www.uscourts.gov/statistics/table/c-3/judicial-business/2015/09/30>. The number of 2255 and state habeas cases in these districts was as follows:

Court	2255	2254
M.D. FL	285	285
E.D.N.Y.	75	133
D.NJ	108	306
N.D.IL	116	199
E.D.PA	155	466

The Subcommittee was interested in what other options are available to address this division in the case law, other than amending the rule. Four options are examined below.

a. Letters to Chief Judges from Committee Chair or Rules Office

The Subcommittee requested information on possibilities for bringing inconsistent case law or local rules to the attention of some or all chief judges by means of a letter from either the Rules Office or the Chair of the Committee. The recent examples of such letters we found, however, occurred under circumstances somewhat different than those facing the Committee with Rule 5.

The first example involved letters from the Chair of the Standing Committee, Judge David Levi, to Chief Judges of various districts around the country. These letters were the final step in the Standing Committee’s nationwide review of local rules for compliance with Fed.R.Civ.P. 83 and 28 U.S.C. § 2071, which prohibit local rules inconsistent with national law. The Standing Committee issued a report that put local rules it identified as “problematic” into four categories: (1) rules that directly conflicted with national law, (2) rules that arguably conflicted with national law, (3) rules that were outmoded because they regulate a practice that no longer arises in federal courts, and (4) rules that duplicate national law in a manner that may lead to inconsistency. Letters were sent to the Chief Judge of every district that had a local rule in any of these categories, providing the report, noting the problematic rules, and drawing “attention to these matters for whatever action you consider appropriate.” Because these letters were the product of a national project by the Standing Committee, they do not seem apposite to the current situation.

The second and third examples involved issues the Appellate Rules Committee decided to handle without amendment. In 2012, as Chair of the Committee, Judge Sutton wrote a letter to the chief judges of three circuits regarding the Appellate Rules Committee’s consideration of a proposal to treat federally recognized Native American tribes the same as states for purposes of Appellate Rule 29’s amicus-filing provisions.²⁹ Judge Sutton proposed this as an interim approach, explaining to these Circuits that the Committee thought the issue warranted serious consideration but that it was not sure that it was the time to adopt a national rule change on this issue, and that the Committee planned to revisit the issue in five years.³⁰ The Appellate Rules Committee also used a letter to deal with a suggestion that sealing and redaction practices in some circuits were causing difficulties for litigants. The Committee investigated the varied approaches to sealing and redaction on appeal, and debated their pros and cons. It then agreed unanimously not to pursue an amendment, but to have Judge Sutton write to the chief judge of each circuit, with copies to the circuit clerks, to advise them of the suggestion, the reasons for it, the Committee’s findings concerning the circuits’ varying approaches, and the rationale for the approach of the Seventh Circuit, which presumed materials would be unsealed absent specified action.³¹ Members expressed the hope that this informational approach would generate dialogue and perhaps produce greater uniformity without rulemaking.³²

²⁹ The letter itself is in the Fall 2012 Appellate Agenda Book at Tab 2, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-appellate-procedure-september-2012> .

³⁰ Minutes of Spring 2012 Meeting of Advisory Committee on Appellate Rules, April 12, 2012, at 10-12.

³¹ In the course of this discussion, the Reporter noted, according to the minutes, two other instances of this “letter” approach. “The Reporter observed that after the Committee had circulated to the Chief Judges of each circuit Ms. Leary’s 2011 report on the taxation of appellate costs under Rule 39, at least one circuit had changed its practices

Each of these situations was quite different from this one, and none involved an attempt by the Committee, its Chair, or the Rules Office to suggest to district judges that they were interpreting a rule incorrectly. An informational letter could focus on the variation in local rules and standing orders, providing the information gathered by the Administrative Office. The action of the Appellate Rules Committee provides some precedent for such a letter. But that approach would not squarely focus on the problem in the decisional law.

b. Federal Judicial Center Action - Mention in Benchbook or Training Materials

On more than one occasion in the past, the Committee has concluded that the more appropriate response to an issue was not to amend a rule, but instead to recommend to the Federal Judicial Center that it add language to the Benchbook addressing a particular subject to guide district judges. In 2011 the Committee followed this approach in lieu of proposing (1) an amendment to Rule 16 requiring pretrial disclosure of exculpatory evidence and (2) inclusion in Rule 11's plea colloquy of advice about the possibility of civil commitment for sex offenders.³³ Both subjects—pretrial disclosure and the plea colloquy—already appeared in the Benchbook, so that adding material would have been an incremental change. By contrast, the Benchbook does not say anything at all about Section 2254 or 2255 proceedings, other than a cross reference in the appendix to a pocket guide to capital habeas cases. It is doubtful that the right-to-reply issue will warrant its own mention in isolation, or justify the addition of an entirely new section. Thus this avenue does not appear promising.

The FJC also convenes meetings of the chief judges of all districts, and it carries on an extension program of education for all district judges. The Committee could prepare written materials for distribution at the chief judges' meeting or in general educational sessions for district judges. But any materials that argued Rule 5 is intended to give a right to file a reply would raise concerns about the role of the Advisory Committee. There is a strong norm that the Advisory Committees (and their chairs and reporters) do not provide advisory opinions on the meaning of the rules. The Committee can, of course, use the Committee Note to explain the purpose of an amendment and its intended effect. But once a rule is adopted, the Committee does not normally seek to advocate for a particular interpretation. That function passes to the courts (or to other groups, such as the Benchbook Committee). The Committee writing to explain or argue in favor of a particular interpretation of Rule 5 seems to be inconsistent with this norm.

concerning costs.” Minutes of Fall 2012 Meeting of Advisory Committee on Appellate Rules, Sept. 27, 2012, at 9. Later, the Reporter stated “that in fall 2006 Judge Stewart, as the Chair of the Committee, had written to the Chief Judge of each circuit to urge the circuits to consider whether their local briefing requirements were truly necessary and to stress the need to make those requirements accessible to lawyers.” *Id.* Professor Coquillette also observed that in some instances, “committees have identified specific areas where local rule variation may be justified, and have merely circulated information about such local variations.” *Id.* at 10.

³² *Id.* at 9.

³³ See Minutes of Advisory Committee Meeting, April 11-12, 2011, at 4-5 (discussion and approval of language in letter from Committee Chair, Judge Richard Tallman, to the Federal Judicial Center requesting changes in the Benchbook concerning advice concerning collateral consequences of pleading guilty); *id.* at 15-17 (after vote not to proceed with amending Rule 16, Committee decided to pursue amendments to Benchbook to state best practices). See also Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 146-47 (2016) (noting that Advisory Committee's consideration of amendments to Rule 16 influenced a new section in the 2013 edition of the FJC's Bench Book covering *Brady* and *Giglio* obligations, which provides a wealth of relevant information for judges).

c. Department of Justice Action

As a stopgap or alternative to amending 2255 Rule 5(d), the Department of Justice could be requested to use its supervisory and educational authority to ensure that the government does not advance the argument that Rule 5 does not give prisoners a right to file a reply. For example, the Department might bar its attorneys from arguing on appeal that the Rule allows judges to deny the opportunity to reply (though that would not preclude an argument that denial was harmless error). It might ask its trial attorneys to request that district judges and magistrate judges provide each 2255 applicant with an opportunity to reply to the government's responsive pleading whenever that opportunity appears to have been forbidden or placed in doubt. If the Department were to undertake actions of this nature, it might reduce the problem in 2255 cases. But it would not address cases in which judges are denying the right to reply in cases seeking relief under Section 2254.

d. Clarifying Commentary

If there were a treatise that most judges consulted as guidance in these cases, it might be used to highlight this problem and clarify what the 2004 amendment was intended to achieve. There are indeed several habeas resources, but none so ubiquitous that it would reach the intended audience. Moreover, although several treatises already note Rule 5 creates a right to reply,³⁴ they have not prevented some courts from concluding to the contrary.

Another possibility might be an article in *Judicature*, a publication received by all federal judges. Although at first blush this option might seem appealing, there are several problems. The first is who could appropriately write such an article. The Committee Chair (and perhaps the reporters) are seen as authoritative, but they would be precluded from writing to advocate a certain view of the proper interpretation of Rule 5 by the norm noted above against advisory opinions on the meaning of the rules. It is also unclear how effective a *Judicature* article would be. It may not reach and persuade judges who now deny the opportunity to reply because they are using boilerplate language based on earlier cases in these orders, or are simply applying a local rule governing replies for motions generally.

IV. Options for an Amendment

If the Subcommittee concludes that an amendment is needed, it will then consider how to clarify the text of the rule. (And, as noted, it will then turn to the questions whether to specify a default time period for replies, and whether to propose a parallel amendment to Rule 5 of the 2254 Rules.)

The style consultants, when pressed to suggest some language to clarify the rule, offered the following:

(d) Reply. The moving party may submit a reply to the respondent's answer or other pleading ~~within a time fixed by the judge.~~ Although the judge's permission is not required, the judge may fix a time for the reply.

But they reiterated their position that (1) no clarification is needed, and (2) such a clarification sets a dangerous precedent by suggesting that "may" does not mean that the court or party is permitted to take the action specified.

³⁴ See § I(B)(2), *supra*.

If the Committee decides to pursue an amendment, there are alternative formulations that may be less likely to be seen as setting a problematic precedent by qualifying the meaning of “may.” Because the Subcommittee has not considered these alternatives—and the drafting issues are not now before the Committee— we offer these merely as illustrations of the possibilities:

- The petitioner may submit a reply to respondent’s answer or other pleading. The reply must be submitted within the time fixed by the judge or by local rule.³⁵
- The petitioner is entitled to submit a reply to the respondent’s answer or other pleading. The reply must be submitted within the time fixed by the judge or by local rule.
- The petitioner is entitled to submit a reply to the respondent’s answer or other pleading, but must submit that reply within the time fixed by the judge or by local rule.

Any amendment would, of course, be accompanied by a committee note that clearly stated the purpose of the revision.

V. Parallel Treatment for 2254 Rule 5(e)

The Subcommittee agreed that if an amendment to Rule 5(d) is proposed, a parallel change to the 2254 Rules should be proposed as well. The Committees that reviewed the 2004 amendments saw no reason to treat them differently on this issue. We found a division of authority in the 2254 cases similar to that in the 2255 cases, with some district courts recognizing an entitlement to file a reply within the time set by the judge,³⁶ and others stating that the right to file a reply is conditioned upon a judge’s order.³⁷

³⁵ A variant of this version emphasizes that no permission is required:

The petitioner may submit a reply to respondent’s answer or other pleading, and need not obtain permission from the judge. The reply must be submitted within the time fixed by the judge or by local rule.

³⁶ Decisions interpreting 2254 Rule 5(e) as allowing a petitioner to file a reply brief as a matter of right include the following: *McCauley v. Bowersox*, No. 4:13-CV-872 NAB, 2015 WL 6955361, at *3 (E.D. Mo. Nov. 10, 2015) (stating “right to file” a reply is waived by failure to comply with timing requirement); *U.S. ex rel. Gilzene v. Pfister*, 45 F.Supp. 3d 854, 855, 2014 WL 4568133 (N.D. Ill. 2014) (“this Court followed its consistent practice of treating a Section 2254 petitioner as entitled to file a reply as a matter of right (see Rule 5(e)”); *Miles v. Bradshaw*, No. 5:13 CV 1078, 2014 WL 977702, at *13 (N.D. Ohio Mar. 12, 2014) (stating “a habeas petitioner may file a reply to the government’s answer provided it is within a time frame ordered by the court”); *Fischer v. Ozaukee Cty. Cir. Ct.*, 741 F. Supp. 2d 944, 961, 2010 WL 3835089 at *15 (E.D. Wis. 2010) (“The opportunity to reply to an answer to a petition is another distinguishing factor between the pleadings in a habeas petition and the ordinary civil case,” denying state’s motion to amend order granting writ, which state complained was issued too quickly after petitioner’s reply received.”); *U.S. ex rel. Bell v. Mathy*, No. 08 C 5622, 2009 WL 90078, at *1 n.2 (N.D. Ill. Jan. 14, 2009) (noting that though court had not also set a time for any filing, “Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts now permits petitioners to submit replies to respondents’ answer”); *Querendongo v. Tennis*, No. CIV A 06-2925, 2007 WL 2142387, at *1 n.1 (E.D. Pa. July 23, 2007) (stating “petitioner requested permission from the court to file a response,” but [s]uch permission is not required under the Rules Governing Section 2254 Cases in the United States District Court, Rule 5(e)”); *Garner v. Morales*, 237 F.R.D. 399, 400 n.1 (S.D. Tex. 2006) (distinguishing the general rule for civil cases, which allows a

Also, the reasoning in these Section 2254 cases mirrors the reasoning in the 2255 cases, with references to outdated authority,³⁸ local rules,³⁹ and emphasis on the word “may” in the text of the rule.⁴⁰

reply in some circumstances only when the court so orders with “the rule for state inmates seeking habeas relief, which allows a reply by a petitioner).

³⁷ Decisions interpreting 2254 Rule 5(e) as giving the court discretion to determine whether a reply may be filed include the following: *Gilreath v. Bartkowski*, No. CIV.A. 11-5228 MAS, 2015 WL 2365125, at *2 (D.N.J. May 15, 2015) (“Petitioner does not have an absolute right to file a reply in a habeas petition,” citing pre-2004 Committee note; also stating the court allowed petitioner to file a reply but petitioner “simply did not”); *Moore v. Coleman*, No. CIV. 13-7031, 2015 WL 1073142 (E.D. Pa. Mar. 11, 2015) (no entitlement to file a reply in § 2254 cases); *Stultz v. Giroux*, No. CV 14-4570, 2015 WL 9273429, at *2 (E.D. Pa. Dec. 21, 2015) (finding that even if magistrate judge erred in not allowing petitioner time to respond, error was not prejudicial); *United States ex rel. Taylor v. Williams*, 2015 WL 6955495 at *1 (N.D. Ill. Nov. 10, 2015) (court denied petition finding “no need to bring Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts into play by calling for a reply”); *Harris v. Wenerowicz*, No. CIV.A. 11-7750, 2014 WL 4056953, at *2 (E.D. Pa. Aug. 14, 2014) (“a petitioner’s reply is not a required element of the *habeas corpus* process in federal courts. Rule 5(e). . . provides that the ‘petitioner *may* submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.’ (Emphasis added)); *Jackson v. Fortner*, 2014 WL 3015265 at *3 (M.D. Tenn. July 2, 2014) (“counsel has not made any showing under Rule 5(e) that the reply would have served a ‘truly useful purpose’”); *Baker v. Cate*, No. CV 09-7600 DDP FMO, 2012 WL 1940607, at *1 (C.D. Cal. May 29, 2012) (noting petitioner failed to show that any reply he could have filed would have raised a meritorious issue or substantively altered the court’s decision); *U.S. ex rel. Linton v. Battaglia*, 416 F.Supp. 2d 619, 623 (N.D. Ill. 2006) (stating that because the exhibits provided a conclusive legal response to the petition, “no purpose would be served by calling for a reply as Section 2254 Rule 5(e) might otherwise permit”). *See also* *Martinez v. Kansas*, No. CIV.A. 05-3415-MLB, 2006 WL 3350653, at *2 (D. Kan. Nov. 17, 2006) (noting the 2254 Rules “suggest that there will ordinarily be no need for a reply (historically referred to as a traverse), but that one may be authorized by the court. Rule 5(e) & advisory committee’s note (“Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances.”)).

³⁸ For example, several decisions appear to rely on the pre-2004 Committee Note. *E.g.*, *Jackson v. Fortner*, 2014 WL 3015265 at *3 (M.D. Tenn. July 2, 2014) (finding no authority entitling petitioner to traverse or reply, citing 2254 Rule 5 and Advisory Committee Notes); *Williams v. Cline*, No. CIV.A.07-3036-MLB, 2007 WL 2174729, at *2 (D. Kan. July 27, 2007) (allowing reply, but stating “The rules suggest that there will ordinarily be no need for a reply (historically referred to as a traverse), but that one may be authorized by the court. *Id.*, Rule 5(e) & advisory committee’s note (“Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances.”). The Court ordered such a traverse from petitioner here.”); *Housley v. Tennis*, No. CIV.A. 04-658, 2004 WL 1737646, at *2 (E.D. Pa. July 30, 2004) (finding no authority entitling petitioner to file reply or traverse to answer, finding no prejudice, citing 2254 Rule 5 and cmt). Some more recent cases cite earlier authority that relies, in turn, on pre 2004 sources. *E.g.*, *Armstrong v. Coleman*, No. CIV.A. 11-4354, 2012 WL 1252570, at *3, *3 n.8 (E.D. Pa. Feb. 10, 2012) (rejecting claim as not challenging custody, rejecting right to reply in dicta, quoting *Housley*, and stating “Petitioner’s alleged inability to file a reply did not prejudice his habeas rights”); *Mills v. Poole*, No. 06-CV-842A, 2008 WL 141729, at *5 n.1 (W.D.N.Y. Jan. 14, 2008) (stating that “the Section 2254 Rules suggest that, ordinarily, there will be no need for a Reply, which historically has been referred to as a Traverse, but that one may be authorized by the court,” and citing *Martinez v. Kansas*, Civ. No. 05-3415-MLB, 2006 WL 3350653, at *2 (D. Kan. Nov.16, 2006), which in turn cited Rule 5(e) of the Section 2254 Rules & Advisory Committee’s Note to Rule 5 of the Section 2254 Rules (“Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances.”). *See also* *Moore v. Coleman*, No. CIV. 13-7031, 2015 WL 1073142, *1 n.1 (E.D. Pa. Mar. 11, 2015) (“There is no entitlement to file a reply in § 2254 cases”).

³⁹ It is possible there is some confusion about when local rules on civil case deadlines and pleadings apply in these cases. For example, in *Garner v. Morales*, 237 F.R.D. 399, 400, 2006 WL 2529609 at *1, (S.D. Tex. 2006), the court stated:

Rule 7(a) establishes that plaintiffs may not file a reply to an answer except in specific circumstances . . . [footnote: This general rule for civil litigation is contrasted with the rule for state inmates seeking habeas relief, which allows a reply by a petitioner.]” (citing 2254 Rule 5(e)) *with* Davidson v. Morrow, No. 2:07-0047, 2008 WL 4065919, at *1–2 (M.D. Tenn. Aug. 27, 2008) (Petitioner stated the reason he failed to respond was “the absence of a directive pursuant to [2254] rule 5(e) by the court’ . . . However, a Motion to Dismiss is not a responsive pleading within the meaning of the Federal Rules of Civil Procedure, . . . and, in any event, Rule 5(a) which requires an Answer only upon order of a court ‘does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition.’ Rule 5, Rule Governing Section 2254 Cases, Adv. Comm. Notes, 2004 Amendments. In this case, Respondent did not file an Answer, but instead chose to file a Motion to Dismiss. Under this Court’s Local Rule 7.01(b), any response to the Motion to Dismiss was due within ten days after service.”

⁴⁰ Baker v. Cate, No. CV 09-7600 DDP FMO, 2012 WL 1940607, at *1 (C.D. Cal. May 29, 2012) (rejecting objection to decision before reply submitted to answer and stating “a reply is not required and the failure to file a reply does not disqualify a deserving petitioner from obtaining habeas corpus relief”); Harris v. Wenerowicz, No. CIV.A. 11-7750, 2014 WL 4056953, at *2 (E.D. Pa. Aug. 14, 2014) (“The petitioner *may* submit a reply to the respondent’s answer”) (emphasis added by district court); Whitepipe v. Weber, 536 F.Supp.2d 1070, 1093 n. 2 (D.S.D. 2007) (stating that “Rule 5(e) of the § 2254 Rules contemplates that permission be granted and a time period be set by the reviewing court before a petitioner may file a reply to the respondent’s answer”).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

15-CR-F

RICHARD C. WESLEY
UNITED STATES CIRCUIT JUDGE

585-243-7910
FAX 585-243-7915

October 26, 2015

Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I recently had a case that called into question the interpretation of Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Under this rule, it is unclear whether a 2255 petitioner has an absolute right to file a reply to a respondent's answer.

The full text of Rule 5 reads as follows (emphasis added):

RULE 5. THE ANSWER AND THE REPLY

- (a) When Required. The respondent is not required to answer the motion unless a judge so orders.
- (b) Contents. The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
- (c) Records of Prior Proceedings. If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.
- (d) Reply. The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.**

One plausible reading of subsection (d) is that a petitioner may submit a reply, provided that he or she wishes to do so. Another plausible reading is that a petitioner may submit a

reply, provided that the judge allows the petitioner to do so. The ambiguity appears rooted in differing interpretations of the word “may.” “May” could mean that a petitioner is permitted—but not required—to file a reply. Alternatively, “may” could mean that a petitioner is allowed—if granted permission by the court—to file a reply.

The federal district courts that have encountered this ambiguity are presently divided on its resolution. Several courts have concluded that Rule 5(d) affords a 2255 petitioner the absolute right to file a reply. *See, e.g., United States v. Hosseini*, 2013 U.S. Dist. LEXIS 89148, at *2 (N.D. Ill. June 25, 2013) (“In accordance with Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts, [the petitioner] is entitled to file a reply to the government’s detailed response if he desires to do so.”); *United States v. Andrews*, 2012 U.S. Dist. LEXIS 179244, at *6 (N.D. Ill. Dec. 19, 2012) (“It is reasonable to read [Rule 5(d)] as requiring the district court to provide the petitioner with the opportunity to reply. If that is the correct reading, we may have erred in ruling on the § 2255 motion without considering a reply”).

Other courts have concluded that a reply is not required under Rule 5(d). *See, e.g., Simmons v. United States*, No. 12 Civ. 04693 (ILG), 2014 WL 4628700, at *1 (E.D.N.Y. Sept. 15, 2014) (“[Rule 5(d)]’s plain language does not mandate a reply.”); *Terrell v. United States*, No. 3:12-cv-233-FDW, No. 3:09-cr-172-FDW-1, 2014 WL 1203286, at *1 (E.D.N.C. Mar. 24, 2014) (“There is . . . no absolute right for a Petitioner to file a Reply to the Government’s Response in an action brought under § 2255.”). At least some of these courts hold that whether a 2255 petitioner may file a reply depends on the circumstances or is a matter of discretion for the judge. *See, e.g., United States v. Crittenton*, Crim. Act. No. 03-349-2, Civ. Act. No. 07-3770, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008) (“No court has held that Rule 5(d) entitles a petitioner to submit a reply under all circumstances.”); *United States v. Martinez*, Crim. No. 11-131(2) (SRN/AJB), 2013 WL 3995385, at *2 (D. Minn. Aug. 5, 2013) (“[W]hether to allow the moving party to file a reply brief is within the Court’s discretion.”).

It is my view that Rule 5(d) entitles a petitioner to submit a reply regardless of a court’s express permission. The confusion appears to be fueled at least in part by the portion of Rule 5(d) providing that the court will set a time limit for submission of the reply. The Advisory Committee Notes to the 2004 Amendment, however, help clarify that the court’s discretion to set time limits does not grant the court discretion to deny entirely a 2255 petitioner’s right to reply:

[R]evised Rule 5(d) adopts the practice in some jurisdictions *giving the movant an opportunity to file a reply* to the respondent's answer. Rather than using terms such as "traverse," *see* 28 U.S.C. Sec. 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

These Notes support a reading of Rule 5(d) that permits (but does not require) a petitioner to reply. Furthermore, the language of Rule 5(d) is strikingly similar to that of Federal Rule of Appellate Procedure 28(c), which provides that "[t]he appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed." Fed. R. App. P. 28(c). The language "appellant may file a brief in reply," which certainly entitles an appellant to reply, is parallel to "[t]he moving party may submit a reply" in Rule 5(d).

The broader jurisprudential question underlying this issue is whether parties to a 2255 proceeding are entitled to a full round of briefing. By denying a 2255 petitioner the right to reply, a court essentially assumes that nothing the petitioner might raise in reply could possibly change the outcome of the 2255 proceeding. This does not strike me as the Committee's intended result.

I raise this matter with you for the Committee's consideration.

Sincerely,

Richard C. Wesley
United States Circuit Judge

Cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules
Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules

THIS PAGE INTENTIONALLY BLANK

TAB 4

THIS PAGE INTENTIONALLY BLANK

TAB 4A

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Proposed Rule 16.1

DATE: April 12, 2017

The New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers proposed an amendment to Rule 16 to address disclosure and discovery in complex cases, including cases involving voluminous information and electronically stored information. The Committee first discussed the proposal at its April 2016 meeting. Judge Molloy appointed a Subcommittee, chaired by Judge Raymond Kethledge, to consider the issues. The Subcommittee presented several options for an amendment to the Committee for discussion at its September meeting. After discussion, the Committee agreed that it would be useful to hold a mini-conference to collect additional information from attendees about the problem such an amendment would address and potential responses to that problem, as well as focused critique of specific proposals selected by the Subcommittee.

The mini-conference took place in Washington, D.C., on February 7, 2017. Invitees, listed at the end of this memo, received materials reviewed by the Subcommittee in advance, asking them to consider whether there is a need for an amendment, the categories of cases that should be subject to an amendment, if any, and what an amendment should include. At the mini-conference, experienced private practitioners and public defenders working with these issues expressed strong support for a rule change. One question was whether the ESI Protocol worked out by the Justice Department and defense representatives was sufficient to solve most problems. The defense attorneys reported that some prosecutors and judges do not know about the ESI Protocol, nor do they understand the problems some disclosures pose for the defense. The prosecutors who attended were not convinced a rule was needed. They did agree that not all judges or AUSA's are aware of the ESI Protocol and that more training would be useful. They also emphasized that any rule had to be flexible in order to address variation between cases. Prosecutors agreed that a rule that says essentially, "Follow the protocol" would be helpful.

All attendees agreed that ESI discovery problems can arise in both small and large cases, that these issues are handled very differently between districts, and that most criminal cases now include ESI. Problems can arise, for example, with social media, cell site data, storage devices to image or search, or evidence an incarcerated defendant would have trouble reviewing. As the day went on, a surprising degree of consensus developed about what sort of rule was needed. First, it should be something simple, putting the principal responsibility on the lawyers, and

encouraging the use the ESI Protocol, which saves time and is cost-effective for the courts. Some participants reported that once the parties get together and actually consult the ESI Protocol, discovery goes very smoothly. Participants did not support a rule that would attempt to specify narrowly the type of case in which this attention was required, or list the individual options that should be considered, such as providing an index. After this very helpful meeting, the Subcommittee collected several examples of local rules and orders addressing this issue.

After two telephone conferences to discuss the mini-conference and review local rules, the Subcommittee unanimously approved the draft proposal appended to this memo, with the recommendation that the Committee approve it for publication.

The proposed amendment is not included in Rule 16 itself but would instead be a new Rule 16.1. The Subcommittee agreed that because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, it warrants a separate position in the rules. Also, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

The new rule has two sections, one section that requires the attorneys to confer and agree on the timing and procedures for disclosure in every case, and a second section that emphasizes the parties may seek a determination or modification from the court to facilitate preparation for trial.

We have included both the version approved by the Subcommittee and a suggested revision that was provided by the style consultants just as the agenda book was being completed. There are several suggested styling changes of potential concern. For example, the restyled version of section (b) substitutes “the parties” for “one or both parties.” It eliminates the reference to “manner” of disclosure, and omits the phrase “to facilitate preparation for trial.” It conditions determination by the court on the failure to agree, and suggests that modification would be to agreed-upon timing and procedures, excluding modification to default rules for disclosure contained in local rules or standing orders, for example. Prior to the April meeting, the reporters and Judge Kethledge will continue to work with the style consultants.

List of Participants in Rule 16 Mini-Conference February 7, 2017

In person:

Hon. Donald Molloy, Chair, Criminal Rules

Rule 16 Subcommittee:

Hon. Raymond M. Kethledge, Chair

Hon. Gary Feinerman,

Prof. Orin Kerr

Michelle Morales, Esq. DOJ

John Siffert, Esq.

Jonathan Wroblewski, Esq., DOJ

David Adler, Esq. Bellaire, TX

Russell Aoki, Esq. Aoki Law PLLC, Seattle, WA

Sean Broderick AO Defender Services Office, Oakland, CA

Amy Harman Burkart, Esq. Assistant U.S. Attorney, District of MA, Boston, MA

Donna Lee Elm, Esq. MDFL Federal Public Defender, Tampa, FL

Hon. Jonathan W. Feldman U.S. District Court, Rochester, NY

Emma Greenwood, Esq. Emma Greenwood Law Office, New York, NY

Andrew Goldsmith, Esq., DOJ

John Haried, Esq., Assistant U.S. Attorney, District of CO, Denver, CO

David Markus, Esq., Markus Moss PLLC, Miami, FL

David Patton, Esq., Federal Defenders of NY, Brooklyn, NY

Catherine Recker, Esq., Welsh & Recker, Philadelphia, PA

Roland Riopelle, Esq., Sercarz & Riopelle, LLP, New York, NY

Alexandra Shapiro, Esq., Shapiro Arato, New York, NY

Prof. Sara Sun Beale, Reporter

Prof. Nancy King, Reporter

By telephone:

Hon. David Campbell (Standing Committee Chair)

Hon. Amy St. Eve (Standing Committee Member and Liaison to Criminal Rules)

Mark Filip, Esq. (Rule 16 Subcommittee Member)

Prof. Daniel Coquillette (Reporter to the Standing Committee)

THIS PAGE INTENTIONALLY BLANK

TAB 4B

THIS PAGE INTENTIONALLY BLANK

APPROVED BY SUBCOMMITTEE:

1 **Rule 16.1. Pretrial Discovery Conference and**
2 **Modification.**

3 **(a) Discovery Conference.** Within [14] days after the
4 arraignment the attorney for the government and the
5 defendant's attorney shall confer in person or by
6 telephone, and attempt to agree on a timetable and
7 procedures for pretrial disclosure under Rule 16.

8 **(b) Modification of Discovery.** After the discovery
9 conference, one or both parties may request that the
10 court determine or modify the timing, manner, or
11 other aspects of disclosure to facilitate preparation
12 for trial.

RESTYLED:

1 **Rule 16.1. Pretrial Discovery Conference; Request to**
2 **the Court.**

3 **(a) Discovery Conference.** Within [14] days after the
4 arraignment, the attorneys for the government and
5 the defendant must confer in person or by
6 telephone, and try to agree on a timetable and
7 procedures for pretrial disclosure under Rule 16.

8 **(b) Request to Modify or Determine Disclosure.**

9 After the discovery conference, the parties may ask
10 the court to modify the agreed-on timetable and
11 procedures for disclosure, or to determine them if
12 the parties have not agreed.

Committee Note

1 This new rule requires the attorney for the
2 government and counsel for the defendant to confer in
3 person or by telephone shortly after arraignment about the
4 timetable and procedures for pretrial disclosure. The new
5 requirement is particularly important in cases involving
6 electronically stored information (ESI) or other voluminous
7 or complex discovery.

8 The rule states a general standard that the parties
9 can adapt to the circumstances. Simple cases may require
10 only a brief informal conversation to settle the timing and
11 procedures for discovery. Agreement may take more effort
12 as case complexity and technological challenge increases.
13 Moreover, the rule does not displace local rules or standing
14 orders that supplement its requirements.

15 Because technology changes rapidly, the rule does
16 not attempt to state specific requirements for the manner or
17 timing of disclosure in cases involving ESI. However,
18 counsel should be familiar with best practices. For
19 example, the Department of Justice, the Administrative
20 Office of the U.S. Courts, and the Joint Working Group on
21 Electronic Technology in the Criminal Justice System
22 (JETWG) have published “Recommendations for
23 Electronically Stored Information (ESI) Discovery
24 Production in Federal Criminal Cases” (2012).

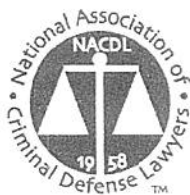
25 Subsection (b) allows one or more parties to request
26 that the court modify the timing, manner, or other aspects
27 of the disclosure to facilitate trial preparation.

28 This rule focuses exclusively on the process,
29 manner and timing of pretrial disclosures, and does not
30 address modification of the trial date. The Speedy Trial
31 Act, 18 U.S.C. §§ 3161-3174, governs whether extended
32 time for discovery may be excluded from the time within
33 which trial must commence.

THIS PAGE INTENTIONALLY BLANK

TAB 4C

THIS PAGE INTENTIONALLY BLANK



NEW YORK COUNCIL OF DEFENSE LAWYERS

Peter Goldberger, Esq.
William Genego, Esq.
 Federal Rules Committee Chairs

Roland G. Riopelle
 President

March 1, 2016

Hon. Donald W. Molloy
 United States District Judge
 Russell E. Smith Federal Building
 201 East Broadway Street
 Missoula, MT 59802

Re: Enclosed Proposed Amendments to Rule 16

Dear Judge Molloy:

This letter is submitted to you on behalf of the New York Council of Defense Lawyers (the “NYCDL”) and the National Association of Criminal Defense Lawyers (“NACDL”). We write to you in your capacity as Chair of the Advisory Committee on the Federal Rules of Criminal Procedure. We respectfully request that the Advisory Committee consider proposing to the Judicial Conference amendments to Federal Rule of Criminal Procedure 16. The NYCDL and NACDL support the proposed amendments for the reasons stated below.

The NYCDL is an organization comprised of more than 250 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal court and before New York courts and regulatory tribunals. Our membership includes numerous former state and federal prosecutors, and we regularly submit *amicus curiae* briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York’s federal courts, and in virtually any complex criminal case in New York City, a member of the NYCDL will appear for one or more of the defendants. Many of our cases are document-intensive “white collar” cases of the sort that require extensive and detailed preparation, such as insider trading, securities fraud and mail and wire fraud. Indeed, I believe it is fair to say that, given the location of the financial markets here, the Southern and Eastern Districts of New York are two of the principal venues where a large number of complex federal criminal cases are brought and tried.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Our members represent persons and entities in federal criminal cases throughout the country, and they frequently confront the difficulties of complex criminal cases with enormous amounts of discovery. NACDL is a longstanding participant in the Judicial Conference's rules promulgation process, sending a representative to attend meetings and regularly submitting comments on proposed changes of interest to the criminal defense bar.

The amendments we propose are enclosed with this letter. These amendments are meant to address a growing problem in the defense of complex federal criminal cases nationwide. It is now routine in many jurisdictions for defense counsel to receive enormous amounts of information at the outset of the discovery process, with relatively little guidance as to what might be relevant to the prosecution or defense of the charges contained in the indictment. In the 21st Century, defense counsel are often handed a computer hard drive at the first appearance in court, and told that it contains the government's first production of discovery, consisting of millions of pages of documentation and thousands of emails culled from the server of a client's employer. Thousands more pages of documentation and emails typically follow that first production, and, occasionally, more gigabytes of documentation will be dropped into defense counsel's laps on the eve of trial.

In such cases, the indictment itself is often a fairly "bare bones" document, not revealing much about the government's theory of the case or the evidence the government intends to rely on. Because the decisional law permits indictments to be pleaded sparsely, with relatively little factual description (indeed, many conspiracy statutes do not even require the pleading of "overt acts" committed in furtherance of the conspiracy), and because the decisional and statutory law also does not typically require the government to provide bills of particulars, defense counsel is left with little guidance as to the specific facts the government intends to prove or the documents the government intends to rely on at trial. Absent indices of the government's production, a listing of the exhibits the government intends to use at trial, or other guidance to defense counsel, it is virtually impossible for defense counsel to wade through the mountains of material produced by the government and identify the critical documents important to the defense of the case.

The experience of the federal courts in New York under district judges' pretrial orders shows that a rule-based solution for this nationwide problem is feasible. The enclosed proposals are based on the real experiences of our membership in complex cases. District Judges in the Southern and Eastern Districts of New York typically enter orders requiring procedures like those set forth in the enclosed proposals, because they recognize that without these procedures, the trial of a complex case cannot proceed smoothly and will not be fair to the defendants. If rules like those in our proposal are followed, the jobs of both the prosecution and the defense are made easier, because the defense gets an early glimpse at the government's proof, and knows where to focus in order to assess the strength of the government's case and mount a defense. These procedures also provide a significant benefit to the prosecution, because the defense's

identification of the evidence it will use gleaned from the government's own proof gives the government advance notice of the facts that will be disputed at trial, signals to the prosecution where the weaknesses in its proof may be and what the factual defenses are likely to be, and better enables the government to prepare its response. And with this pre-trial exchange of information, evidentiary issues and potential in limine motions are identified, and made easier for the Court to address before trial. We also observe that the procedures recommended in the enclosed proposals often encourage the early disposition of complex criminal cases, because it is easier for defense counsel to identify the relevant evidence, and defense counsel are therefore better able to counsel their clients' on the strength of the government's case and the clients' defenses.

Finally, the Advisory Committee should know that even though procedures like those described in our proposed amendments are commonly adopted in the New York federal courts, we are unaware of any case in which these procedures have resulted in witness tampering or threats from the defendants. We have yet to see a case in which early disclosure of the sort advocated in the enclosed proposals resulted in obstruction of justice or other improper conduct. And if there were a complex case in which such issues were a valid concern, the Court would always be free to modify the procedures described in the enclosed proposals by way of protective order.

We appreciate the opportunity to submit the NYCDL's and NACDL's proposal to you, and are available to provide any additional information the Committee may require.

Very truly yours,



Roland G. Riopelle
President, NYCDL



Peter Goldberger, Esq.
Chair, NACDL Federal Rules Committee



William Genego, Esq.
Chair, NACDL Federal Rules Committee

Cc: John Siffert, Esq.
Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice & Procedure
Prof. Sara Sun Beale, Reporter, Advisory Committee on Criminal Rules

PROPOSED MODIFICATIONS TO RULE 16

RULE 16. Discovery and Inspection

(b) Government's Additional Disclosure in a Complex Case.

(1) Applicability. This subsection of the rule shall apply in any case in which the court finds that the case is complex for the purposes of discovery production and review. The time periods for production and scheduling set forth in this subsection are subject to the requirements of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, and scheduling orders pursuant to a finding of complexity under this rule must also include the requisite findings under that statute.

(2) Application for Finding of Complexity. The government or the defendant may make an application to the court for a finding that a case is complex for the purposes of discovery production and review, within 30 days of arraignment or at such other time as the court may require. The court may also make such a finding *sua sponte*.

(3) Complexity

A. Considerations.

i. In determining whether a case is appropriate for treatment as a complex case under this Rule, the trial court shall consider the degree of difficulty of the case and the time needed for the government and defense to prepare adequately for trial and to ensure a fair trial for the defendant. Among other factors, the court should take into account the complexity of the subject matter, the technical difficulty to understand and analyze the evidence, the existence of scientific, economic or similarly technical evidence, the number of documents, the number of defendants, the number of witnesses and such other factors as may make it necessary to provide additional time for the parties to be prepared adequately for trial.

B. Presumption of Complexity. There shall be a presumption that a case is complex for the purposes of discovery, production and review:

i. if the government's obligation to disclose materials pursuant to this rule would require it to disclose or permit inspection of:

(1) more than 50,000 physical pages of material consisting of books, papers, documents, photographs or copies of those items;

(2) more than one gigabyte of data;

(3) more than 100 audio and visual recordings; or

ii. if more than 10 defendants are joined in a single indictment.

(4) Extended Period for Discovery. If the court finds that a case is complex for the purposes of discovery production and review:

A. the government shall be permitted to produce the materials required to be produced pursuant to section (a) of this rule over a period of up to six months following the arraignment of the defendant; and

B. the court shall not set any trial date until the certification described in sub-paragraph (5) below has been made.

(5) Certification of Substantial Disclosure. In a complex case, the government shall certify that it has produced substantially all the materials or data it is required to produce pursuant to section (a) of this rule, no later than six months after the arraignment of the defendant. The government may continue to produce additional materials or data to the defendant after this date, upon a showing that the materials were only discovered or accessible to the government after the date of its certification that it has produced substantially all the materials or data it is required to produce pursuant to this rule.

(6) Trial Date. The court may not set a trial date that is earlier than 12 months from the date of the government's certification required by sub-paragraph (5) above, unless the defendant consents to such earlier date.

(7) Index. Simultaneously with the certification required by subparagraph (5), the government shall provide the defendant with an index of materials produced pursuant to section (a) of this rule. Such index shall include a

description of the following: (A) any books, papers, documents, photographs or copies of those items produced by the government; (B) the source from which the materials were obtained; (C) the location at which the items were acquired during the execution of a search warrant; (D) the date and time of any recordings; and (E) the names of the persons whose voices and/or images the government contends were recorded.

(8) Tentative Exhibit List, and Copies of Exhibits. At least six months before the trial date set pursuant to sub-paragraph (6) above, the government shall produce all exhibits the government intends to offer in evidence, together with a tentative exhibit list that cross-references the exhibits to the index described in sub-paragraph (7) above.

(9) Corrective Measures. In the event that the tentative exhibit list produced pursuant to sub-paragraph (8) above is materially incomplete, or misleading, or fails to provide sufficient notice as to which materials produced pursuant to section (a) of this rule the government intends to offer at trial, the court may take such corrective action as it deems just, including an adjournment of the previously scheduled trial date; preclusion of exhibits not included on the tentative exhibit list; a directive to provide adequate notice of the evidence the government will offer at trial; or such other remedy as may be required.

(10) The Government's Right to Amend the Tentative Exhibit List and Index. The government shall have the right to amend the index and tentative exhibit list described in sub-paragraphs (7) and (8) above for any reason at any time until 90 days before the trial date set by the court pursuant to sub-paragraph (6) above. Thereafter, the government shall have the right to further amend the index and tentative exhibit list, upon a showing that the amendment to the index and tentative exhibit list relates to materials that were only discovered or accessible to the government after the date on which the index and tentative exhibit list were produced, or for other good cause shown. In the event the government amends the index and tentative exhibit list within 90 days of the previously set trial date, the court shall entertain an application by the defendant for an adjournment of the trial date. Such an adjournment shall be sufficient to allow the defendant to prepare for the newly identified items, but shall in no event be less than 30 days, unless the defendant so consents.

(11) Reciprocal Disclosure. In a complex case, the defendant shall produce to the government copies of those items from the government's index

produced pursuant to sub-paragraph (7) that the defendant intends to offer in evidence at trial, either through government or defense witnesses. The defendant shall also produce a tentative exhibit list of such materials. The defendant's production under this sub-paragraph shall be made the sooner of: (A) 30 days before the defendant's case in chief begins, or (B) the date the parties make their opening statements. The production of the defendant's tentative exhibit list and the copies of the defendant's exhibits does not require the defendant to call any witness or offer any exhibit during the trial, and the defendant is not required to produce any document or other material which the defendant only intends to use to impeach a government witness, and which the defendant does not intend to offer in evidence. The defendant's tentative exhibit list may be amended at any time upon a showing that newly designated materials were only discovered or accessible to the defendant after the date on which the defendant's tentative exhibit list was produced, or for other good cause shown. In the event that the tentative exhibit list produced by the defendant fails to provide sufficient notice as to what materials from the government's index the defendant intends to offer in evidence, the court may grant a continuance of the trial sufficient to allow the government to prepare for the newly identified items. The defendant shall not be required to include in its tentative exhibit list any item that is not contained in the government's production under Section (a) of this rule.

THIS PAGE INTENTIONALLY BLANK

TAB 5

THIS PAGE INTENTIONALLY BLANK

TAB 5A

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Cooperators Subcommittee

DATE: April 11, 2017

The Cooperators Subcommittee has been meeting by teleconference to consider the question how the Rules of Criminal Procedure might be amended to reduce the potential that the courts' records may be used to identify cooperators. Three general approaches are described in the Subcommittee materials included in this Agenda Book, and illustrative amendments are included for each approach.

Judge Kaplan will provide an update on the work of both the Subcommittee and the Task Force, and will seek input from the Committee.

THIS PAGE INTENTIONALLY BLANK

TAB 5B

THIS PAGE INTENTIONALLY BLANK

**United States District Court
Southern District of New York**

March 10, 2017

TO: Cooperator Subcommittee

FROM: Judge Lewis A. Kaplan

RE: Protection of Cooperators – Initial Drafts of Possible Rules Amendments

As you know, the Committee on Court Administration and Management (CACM) has recommended procedural changes to prevent the use of court documents to identify cooperators, who then may become targets of retaliation and intimidation.¹ The Standing Committee referred CACM's proposal to the Criminal Rules Advisory Committee. Judge Molloy then appointed this subcommittee to consider the CACM proposal, a task that we began last year.

This summer, at the suggestion of Judge Sutton, the Task Force on the Protection of Cooperators (Task Force) was created to explore the subject of protection of cooperators more broadly and to recommend actions by all entities concerned, including the Bureau of Prisons, the Criminal Division of the Department of Justice, the U.S. Marshals Service, and United States Attorneys.

The Task Force is working in parallel with this Subcommittee, and it will consider a variety of rules-based and non-rules changes. (To mention just one example, the Task Force is considering the possibility of changes in the CM/ECF system that might reveal less information about cooperation.) This Subcommittee has undertaken to draft proposed amendments to the Federal Rules of Criminal Procedure that would be necessary to implement the CACM proposal and to consider other rule-based alternatives. It ultimately will make recommendations to the full committee with respect to the desirability of the CACM proposal as well as any other rules-based solutions it thinks appropriate.

Our reporters have prepared for initial discussion by the Subcommittee drafts of possible rules amendments that embody three approaches:

- The CACM “sealing approach” would implement the specific recommendations of the Committee on Court Administration and Management (CACM).

¹ The CACM proposal will be distributed with this memorandum.

- A “PSR approach,” which would channel many materials concerning cooperation into the presentence report, which typically is not filed as part of the court record and is not available to the public.
- A “limited remote access” approach, which would permit remote access to the record only to counsel of record while retaining public and press access in person at courthouses.

Of course, we ultimately may decide to recommend adoption of one, none or some combination of these or other possibilities. (Copies of the draft rules amendments as well as a memorandum by the reporters are enclosed.)

At present, the anticipated time table for the parallel efforts of the Subcommittee, the full committee and the Task Force is as follows. The Subcommittee will have preliminary discussions, based on the enclosed material, beginning with our March 28 conference call, with a view to reporting its progress to the full committee at the April meeting. The Subcommittee will continue its work thereafter in anticipation of reporting its ultimate view for consideration by the full committee at its September 2017 meeting. It is anticipated that both the full committee and the Task Force will make their final reports by December 2017 or January 2018.

In concluding, it is appropriate to acknowledge that the problems that occur when cooperators are identified cannot be eliminated entirely by any rules-based or administrative solution. The right to public trials and press access to judicial proceedings mean that those cooperators who testify inevitably are identified, although the extent to which that information gains broader currency doubtless varies from case to case. Moreover, even non-testifying cooperators often are identified by means independent of court records and public testimony. Nevertheless, I am confident that we all share a commitment to recommend such steps as are feasible, consistent with our values, to reduce these problems to the extent that solutions are available to the courts.

A handwritten signature in black ink, appearing to be the initials 'GAK' or similar, written in a cursive style.

TAB 5C

THIS PAGE INTENTIONALLY BLANK

To: Cooperators Subcommittee
From: Professors Sara Beale and Nancy King
Date: March 10, 2017 (revised)

This memorandum describes three approaches to amending the Rules of Criminal Procedure to reduce the potential that the courts' records may be used to identify cooperators who may then be targeted for threats or harm:

- the “CACM/sealing” approach seeks to implement the specific recommendations of the Committee on Court Administration and Management (CACM);
- the “PSR approach” channels materials concerning cooperation into the presentence report, which need not be filed as part of the court’s record and is not available to the public; and
- the “no remote access” approach permits remote access to the record for parties only, retaining public and press access in person at the courthouse.

Although we present these as different options, the Subcommittee could combine elements from each.

For each approach, we present a brief description, draft amendments that would implement the approach, and discuss the advantages and disadvantages of that approach. We close with a discussion of issues that may impact any approach.

Because many of the draft amendments to implement the CACM/sealing and PSR approaches affect multiple parts of the same rules, we present those amendments in a side-by-side chart to facilitate comparison, which is Appendix A. Appendix B provides an amendment to implement the no remote access approach.

I. The CACM/sealing approach¹

A. Introduction

CACM has proposed to protect cooperators by limiting access to court records and judicial proceedings in the following ways:

- Requiring all plea agreements to have a public portion and a sealed supplement that contains a description of the defendant's cooperation or states there was no cooperation;
- Requiring any sentencing memoranda to have a public portion and a sealed supplement that contains any references to the defendant's cooperation or states that there was no cooperation;
- Requiring all plea and sentencing hearings to include a conference at the bench, at which the government will disclose the defendant's cooperation or lack of cooperation;
- Requiring all plea and sentencing transcripts to have a sealed portion containing a conference at the bench that contains any discussion of the defendant's cooperation or states that there was no cooperation;
- Requiring all Rule 35 motions based on cooperation to be sealed; and
- Providing all documents or portions sealed pursuant to this policy to remain under seal indefinitely unless otherwise ordered by the court on a case-by-case basis.

The CACM proposal contains a detailed explanation for these recommendations, which we will not repeat here.

B. Amendments to implement

We have addressed the CACM/sealing proposal with the following draft amendments.

An amendment to Rule 11(c)(2) ("Disclosing a Plea Agreement") (1) excludes terms concerning cooperation from the general requirement that plea agreements be disclosed in open court, and (2) provides that in every case the disclosure of a plea agreement must include a conference at the bench where information regarding cooperation or the lack of cooperation is

¹ The CACM proposal will be distributed with this memorandum. We do not discuss other important aspects of CACM's recommendation, such as those addressed to the Bureau of Prisons.

disclosed. The amendment specifically prohibits any reference to cooperation or lack of cooperation in open court.²

An amendment to Rule 11(c)(3) (“Judicial Consideration of a Plea Agreement”) would require that any written submission regarding the plea agreement include both a public portion and a sealed portion that addresses cooperation or lack thereof.³

An amendment to Rule 11(g) (“Recording the Proceedings”) would mandate that the transcript of the bench or in camera conference held in every case be filed under seal.

Several potential amendments to Rule 32 are summarized here in the order in which they appear in the rule. First, Rule 32(i)(4)(C) would be amended to provide that a bench or in camera conference occur in every case, and that the transcript of that discussion must be filed under seal. Furthermore, although not part of CACM’s proposal, in keeping with the sealing approach, we offer an example amendment to Rule 32(i) that would require that any PSR filed must be filed under seal. In addition, a new provision, Rule 32(l) would require, in every case, that the parties file a sealed supplement for any written submissions regarding sentencing. This could include sentencing briefs as well as any evidence supporting objections to the PSR that the parties may submit under Rule 32(i)(2).⁴

An amendment to Rule 35 addresses the cases in which the motion for a reduction based on cooperation is made after the defendant has been convicted and sentenced. The Sentencing Commission reports that 1,645 defendants received Rule 35 reductions in 2014.⁵ The use of

² The amendment takes no position on the question whether the present rule generally requires the terms of plea agreements to be discussed in open court, as is the case in some districts, or instead may be satisfied by providing the judge with a written copy of the agreement, either in chambers or on the bench. Neither the text nor the Committee Notes squarely address this issue. Although some courts and commentators have expressed the view that all terms must be stated on the record, we have found no precedent squarely on point. The checklist in the Benchbook for U.S. District Court Judges 64 (6th ed. 2013) provides:

B. If it has not previously been established, [the court should] determine whether the plea is being made pursuant to a plea agreement of any kind. If so, [the court should] require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(c)(2).

³ The CACM proposal did not specifically address written submissions by the parties concerning pleas, perhaps because such submissions are not common. Nevertheless, we added this to the set of example rule amendments as an option for addressing this if the Subcommittee believes written submissions concerning the plea might reference cooperation information.

⁴ Although not specifically included in the CACM proposal, it is possible that notice provided to the parties by the court under Rule 32(h), as well as written summaries of information excluded from the PSR under Rule 32(i)(1)(B), might touch on cooperation or lack of cooperation. In the event the Subcommittee decides that protection is needed for these items as well, we offer an example of a new subsection (l)(2), in brackets, that would provide that whenever these items are filed and appear on the docket, a sealed supplement to each is required. We considered whether to also include rulings on disputed matters under Rule 32(i)(3) as potentially including references to cooperation but decided that the prohibition on oral references to cooperation in open court took care of this. We may have to revisit this if these determinations are sometimes filed in the record.

⁵ U.S. SENTENCING COMM’N, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(b) 8 (Jan. 2016).

Rule 35(b) varies greatly by district, and reductions are concentrated in certain districts.⁶ As recommended by CACM, the amendment provides that the motion be made under seal.⁷

An amendment to Rule 47 modifies the rules governing motions in order to protect cooperators. At present, both the Guidelines and 18 U.S.C. § 3553(e)⁸ require the government to file a “motion” seeking a sentencing reduction for a defendant who has cooperated. U.S.S.G. § 5K1.1 provides that the court may depart from the Guidelines “[u]pon motion of the government stating that the defendant has provided substantial assistance....”⁹ The amendment to Rule 47 requires that both motions for a reduction under § 3553(e) or § 5K1.1 and supporting affidavits be filed under seal. Although this requirement was not specifically requested by CACM, it parallels the requirement that Rule 35 motions be filed under seal.

Additionally, we provide an amendment to Rule 12.1, concerning disclosures in cases where the defendant will raise an alibi defense; though not requested by CACM, this proposal

⁶ *Id.* at 9 (noting that district courts within the Fourth and Eleventh Circuits account for 49.3 percent of Rule 35(b) reductions).

⁷ We drafted but did not include an amendment requiring the government to file a shell document containing the Rule 35 motion or stating there was no Rule 35 motion in every case within one year of the date of sentencing. Such a shell document—which would parallel to the approach CACM has recommended for the plea agreement—would make it impossible to identify cooperators from the docket sheet, since every case would show a sealed entry. Two concerns led us not to include this proposal. First, the concentration of Rule 35 motions in just a handful of districts may not justify imposing a burden on U.S. Attorneys’ Offices and clerks in the majority of districts where Rule 35 motions are rare. Second, it would be difficult to enforce such a provision.

⁸ Section 3553(e) provides:

(e) Limited authority to impose a sentence below a statutory minimum-- Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

⁹ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2004) provides:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

In Fiscal Year 2015, 8,470 defendants benefitted from 5K motions. U.S. SENTENCING COMM’N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *Table 30: Substantial Assistance Departure Cases: Degree of Decrease for Offenders in Each Primary Offense Category* n,1 (2016). As noted above, in the same year 1,645 defendants received Rule 35 reductions.

seems consistent with CACM's goals and recommendations. It explicitly identifies the need to prevent the disclosure of the identity of a cooperating witness as one form of good cause for the court to limit disclosure.

C. Discussion

All members of the Criminal Rules Committee have agreed that there is strong interest in preventing threats or harm to cooperators who could be identified by the courts' records. CACM's proposal was crafted to make it difficult (or impossible) to determine from the courts' records which defendants may have cooperated. CACM has concluded that rules adopted in individual districts cannot be fully effective, and implementation of these procedures on a national level is essential.

To achieve this goal, the CACM procedures remove a significant amount of information from the public record by directing it to sealed filings. The approach restricts access to that information by the press, counsel in other cases, researchers, and members of the public, introducing an unprecedented level of secrecy into the federal criminal justice process. In every federal criminal case, a portion—possibly a significant portion—of the sentencing proceedings would be conducted at a bench conference, and the transcript sealed. Portions of sentencing submissions by the parties would be sealed. And in every criminal case involving a plea, each plea agreement (and, possibly, written submission) would be filed with a sealed attachment. All Rule 35 motions would be sealed.

We have addressed the First and Sixth Amendment concerns raised by CACM's proposals in an earlier memorandum, and will not repeat that analysis here.¹⁰ We emphasize only one central point. Heightened scrutiny under First Amendment analysis generally requires narrow tailoring and a case-by-case justification for restricting access of the press and the public. A blanket permanent closure requires the greatest justification, and accordingly more narrowly tailored alternatives warrant serious consideration.

The CACM/sealing proposal could also significantly impair the ability of defense counsel to defend clients. In cases in which there was (or arguably was) cooperation, the CACM/sealing procedures would force counsel to segment any references to cooperation into a separate sealed written submission, and would restrict counsel's oral references to cooperation to the bench conference. But the most effective defense advocacy may often make cooperation a major theme that is woven throughout the written memoranda and counsel's oral presentations. The CACM/sealing proposal would also have a negative effect on defense advocacy in general, by limiting the information available to counsel about other cases that counsel would otherwise rely on as precedent or distinguish from the present case at sentencing. This would severely limit counsel's ability to address "the need to avoid unwarranted sentence disparities among

¹⁰ Our Reporters' First Amendment Memorandum will be distributed with this memorandum.

defendants with similar records who have been found guilty of similar conduct,” as required by 18 U.S.C. § 3553(a)(6). Other impairments mentioned during Committee discussions include making counseling clients much more difficult; hampering the ability to challenge racial disparities; and limiting access to exculpatory material, even when prosecutors try in good faith to comply with *Brady*.

Moreover, it is unclear how individual defendants would participate if the mandatory bench/in camera conference were implemented at plea and sentencing. Defendants have a vital interest in being present to hear the presentation of information, arguments by counsel, and comments by the court concerning cooperation/lack of cooperation.

Other concerns raised by the CACM/sealing approach include how to handle written briefs supporting oral motions made at sentencing under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e).

Finally, the approach raises the question how long these documents must be kept under seal. Several districts that now seal such documents provide for unsealing, or consideration of unsealing after a set number of years.¹¹ In contrast, CACM recommends indefinite sealing unless the court orders disclosure on a case-by-case basis.

II. The PSR Alternative

A. Introduction

Another way to disguise which cases involve cooperation is to direct references to cooperation or lack of cooperation into the presentence report (PSR) instead of filing them under seal. This proposal may alleviate the constitutional concerns raised by the CACM/sealing proposal because PSRs are not available to the public and have been traditionally exempt from disclosure under First and Sixth Amendments.¹² Under this alternative, references to cooperation or lack thereof would not be included in specified materials filed with the court. Instead, these materials would be submitted to the probation officer for inclusion in or attachment to the PSR.

We note at the outset that although most districts appear to keep the PSR confidential and do not file it in the record to begin with, in ten or so districts the PSR is filed under seal.¹³ The

¹¹ See, e.g., Chart of Local Rules re Sealing, District of NH Local Rule 83.12(c) (“sealed for five (5) years or until the completion of any term of imprisonment, whichever occurs later.”) (in Agenda Book, Sept. 19, 2016 Meeting, tab 6F, at 285), available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-criminal-procedure-september-2016> [hereinafter “Agenda Book”].

¹² See Reporters’ First Amendment memo at 13-15.

¹³ See Chart of Local Rules re Sealing (in Agenda Book, supra n.11, tab 6F, at 280-340) quoting local rules from CO, LAW, MOE, NCM, NCW, NE, OHN, TXS, VAW, and WVN as noting PSRs are filed under seal. Note that this chart suggests in its summary column that several additional jurisdictions file PSRs under seal though the local rule instead requires PSRs to remain confidential documents of the court not filed at all. Also, the CACM Guidance

example amendments for the PSR approach include an amendment to Rule 32(i) that would require that any PSR filed with the court must be filed under seal, if that is something the Subcommittee favors.

B. Amendments to implement

Under this approach, instead of filing cooperator material under seal as CACM recommends, material mentioning cooperation would not be filed; instead, it would be shown to the judge and then included or appended to the PSR. An amendment to Rule 11(c) would require written plea agreement terms and written submissions at the plea that referencing cooperation or lack of cooperation to be shown to the judge when the plea is offered, for example, but not made part of the record. As with the CACM sealing proposal, an amendment to Rule 11(c) would require a bench or in camera conference in every Rule 11 proceeding, at which the government discloses any agreement to cooperate or states that there is not agreement for cooperation. The transcript of the conference could be submitted to the probation officer for inclusion in the PSR, not filed under seal.¹⁴

Similar amendments are provided for Rule 32. Comments about cooperation or lack of cooperation must be made at the bench or in camera. A new subsection Rule 32(1), is proposed providing that written submissions that are filed by the parties must omit any reference to cooperation or lack of cooperation, and instead be shown to the judge and then provided to the probation officer.¹⁵

An amendment to Rule 47 would require that motions made as part of the sentencing process under Section 5K1.1 of the Guidelines and Section 3553(e) must be made orally; this parallels the proposed Rule 47 amendment that would implement the CACM/sealing approach. However, unlike the CACM/sealing approach, the PSR approach amendment to Rule 47 provides that any written submissions in support of these motions be preserved as part of the PSR.

C. Discussion

Because there is no traditional public right of access to PSRs, placing all materials regarding cooperation in the PSR could withstand First and Sixth Amendment challenges better

itself appears to assume that PSRs are filed under seal. See CACM Guidance, at B.6., referring to “presentence reports and any other sealed documents.”

¹⁴ Because the Subcommittee might prefer that material submitted for the plea stage simply not be filed, brackets are provided around this language in the accompanying draft amendments.

¹⁵ Again, this material is bracketed in the accompanying draft because the Subcommittee might prefer that sentencing transcripts and other material submitted after the PSR was complete simply not be filed, or filed under seal rather than included in the PSR. We have also included bracketed language that would channel to the PSR notices under Rule 32(h) and summaries from the court under Rule 32(i)(1)(B), which might be included if the Subcommittee believes they might refer to cooperation.

than the CACM/sealing approach.¹⁶ The new procedure could be seen as a proper effort to protect the privacy and security of defendants by placing this information in the PSR with other sentencing-related personal information that is not appropriate for public disclosure. On the other hand, the press and advocates of public access might characterize this as an attempt to do an “end run” around the purposes served by the First and Sixth Amendments. Thus some First and Sixth Amendment concerns remain. We know of no direct precedents.

There are several disadvantages to the PSR proposal to consider. It shares some of the downsides of the CACM/sealing approach. Like the CACM/sealing approach, the PSR approach requires the artificial and potentially detrimental separation of cooperation information from all other information in written and oral advocacy by the defense. Because PSRs, like sealed documents, cannot be disclosed to defense counsel in other cases, both approaches severely limit the ability of counsel to carry out their responsibility to research similar cases. And the difficulty of managing a defendant’s presence at the mandatory bench or in camera conferences at both plea and sentencing hearings arises under both approaches.

The PSR approach also raises two distinctive concerns. First, the approach would not reach cases in which the court did not order a PSR.¹⁷ No PSR was ordered in about 8 percent of felony and class A misdemeanor cases in FY 2015,¹⁸ but most of these cases came from only three districts and the offenses in question do not generally involve cooperation.¹⁹ In the future, if the PSR procedure is adopted courts can order a PSR in any case involving cooperation. A second concern might arise, depending upon the scope of documents included in or appended to the PSR. When deciding whether it is appropriate to add an item to the PSR, the Subcommittee may wish to take into account the item’s length, timing, and function in order to avoid what might be considered a departure from the essential nature of the PSR.

III. Additional Issues Raised by Both the CACM/Sealing and PSR Approaches

¹⁶ See Reporters’ First Amendment memo at 13-15.

¹⁷ Rule 32(c)(1)(A)(ii) allows the court to determine that the information on the record is sufficient and no PSR is required.

¹⁸ In FY 2015, 71,003 individual defendants were sentenced in the federal district courts for felonies and Class A misdemeanors. In 65,350 of those cases, a presentence report was prepared, and in 5,653 cases the PSR was “waived.” U.S. SENTENCING COMM’N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *Table 1 Document Submission by Each Circuit and District* (2016).

¹⁹ The District of Arizona accounts for over a third of all cases with a waived PSR, and it is quite likely that most of these cases involve the simple possession of drugs. West Texas accounts for the next large group of missing PSRs. Given the large immigration caseload in WDTX, it appears that most of cases with no PSRs from WDTX involve immigration. Finally, EDVA ranks third in the number of cases with missing PSRs, and it is likely that most of these cases are Class A misdemeanor cases. Judicial districts (like EDVA) with military bases, national parks, or other federal lands (such as the George Washington Parkway that runs along the Virginia side of the Potomac River) usually have a high number of Class A misdemeanor cases. See email from Glenn R. Schmitt, Director, Office of Research and Data, U.S.S.G., to the Reporters (Feb. 22, 2017).

A. An alternative approach for 5K motions

An amendment to U.S.S.G. § 5K1.1 could allow the government to provide its recommendation for a below-Guideline sentence in a submission to the Probation Office for inclusion in the PSR instead of filing a motion with the court. The Criminal Rules Committee could recommend that the Sentencing Commission amend the Guidelines to substitute a submission to the probation officer for the requirement of a 5K motion filed with the court. A Guideline amendment would eliminate the presence of this motion on the docket. If the motion requirement were removed from the Guidelines, the government would still have the power to recommend or withhold the substantial assistance departure, and the court would remain unable to depart for this reason without the government's request.

In contrast, in order to address motions under 18 U.S.C. § 3553(e), which allow the court to impose a sentence below the statutory minimum, Congressional action would be required to amend the statutory requirement for a government "motion."

B. Bench or in camera conference

For either the CACM/sealing or the PSR approach, the parties must confer with the judge without the public at both plea and sentence stages. This raises two questions.

The first is whether to require that this meeting be at the bench, or instead allow it to take place in camera outside of open court. Because an in camera meeting is not visible to those present in the courtroom, it has the advantage of eliminating some visual clues about whether a defendant has cooperated. But it may take more time and seems to move even further towards secret proceedings with no public oversight.

The second related question is whether the rule should address the defendant's own participation or presence during these discussions. A defendant has a constitutional right to be present at sentencing,²⁰ and may have a constitutional or statutory right to be present at a bench or in camera conference if evidence is received or his presence would contribute to the reliability of determinations or his ability to defend.²¹ Generally, a defendant's failure to object to exclusion from a bench or in camera conference waives the right to be present.²² It would be

²⁰ LaFave, et al., 6 CRIM. PROC. § 24.2(a) (4th ed. 2016) (collecting authority).

²¹ Few cases address defendant's presence at bench or in camera conferences during sentencing as opposed to trial. See *Morales v. United States*, 651 F. App'x 1, 3 (2d Cir. 2016) (right to be present violated when defendant not present at in camera conference where judge offered sentence of "25 today only"). See also *United States v. Reyeros*, 537 F.3d 270, 289 n.26 (3d Cir. 2008) (emphasizing in case involving judicial discussion with counsel off the record as part of sentencing "that district courts should avoid off-the-record discussions with either counsel or witnesses. As this case demonstrates, such a procedure may tempt a disappointed party to adopt dubious tactics to overturn a decision."). Compare *State v. Bacon*, 337 N.C. 66, 85-86 (1994) (unrecorded bench conferences conducted with the defendant in the courtroom with counsel for both parties, as part of capital sentencing hearing, did not violate the defendant's constitutional right to be present when court received no evidence and "most of the discussions concerned mechanical aspects of the proceedings").

²² *United States v. Gagnon*, 470 U.S. 522, 529 (1985).

helpful for the Subcommittee to discuss the question whether the rule should address this issue. Presumably, each defendant would either accompany his or her defense attorney to the bench or waive presence.

C. What items to bifurcate

We have attempted to canvas all aspects of plea and sentencing that might contain references to cooperation, and have provided that the portion of each that is filed in the record must be cleansed of any such references, while a separate portion containing any of these references is filed separately under seal in every case (under the CACM/sealing approach) or else forwarded for inclusion with the PSR (under the PSR approach).

This bifurcation is not limited to oral and written submissions from the parties. It also includes a number of items prepared by the court: notice to the parties about departures contemplated by the court that have not been raised by the PSR or the parties, and the court's summaries of information excluded from the report on which the court will rely. It may be that one or more of these categories presents such a low likelihood of including any mention of cooperation that the Subcommittee concludes that it is not worth the trouble – and added secrecy – of including it on the list of regulated items. The Subcommittee, however, may disagree with our tentative assessment that bifurcation is not warranted for determinations by the court under 32(i)(3)(B), which we concluded are unlikely to touch upon cooperation issues.

D. Advice about mandatory minimum sentences under Rule 11(b)(1)(I)

We considered, but did not include, an amendment addressing Rule 11(b)(1)(I), which requires the court to advise the defendant of any mandatory minimum penalty. We are not certain whether this provision is applicable when a defendant who would otherwise be subject to a mandatory minimum is cooperating, and the government has made or agreed to make a motion under 18 U.S.C. § 3553(e) (or Rule 35) for a sentence below the mandatory minimum. One might say that such a defendant is not actually subject to the mandatory minimum sentence, and the plea colloquy should include no reference to it. But there is a danger that the omission of any reference to an otherwise applicable mandatory minimum statute could be read as a signal identifying this defendant as a cooperator. Because the applicability of Rule 11(b)(1)(I) in such cases is not clear²³ and it is not likely that a reference to the mandatory minimum in the colloquy in such a case would confuse the defendant, we concluded an amendment is not needed.

²³ Rule 11(b)(1)(I) requires the court to inform the defendant of “any mandatory penalty,” but 11(b)(1)(J) requires the court to notify the defendant of “any applicable forfeiture.” The omission of the word “applicable” from 11(b)(1)(I) might provide some support for the argument that when advising the defendant under Rule 11(b)(1) the court need not resolve the question whether a motion under Rule 3553(e) will render the mandatory penalty inapplicable.

Moreover, it is not clear what change could be made that would not draw undesirable attention to cooperation.

E. Filing or “public disclosure”

It was suggested to us that rules implementing the CACM/sealing or PSR approaches should forbid both filing and “public disclosure” of information. We have rejected this suggestion because a rule barring public disclosure could be interpreted as a gag on the free speech rights of the parties and victims, a limitation well beyond our charge. If members of the Subcommittee believe that language barring “public disclosure” should be added, perhaps limited to disclosure of documents filed with the court, this should be discussed.

F. Judicially ordered exceptions

Some of the suggested phrasings for amendments that we received included exceptions for court-ordered disclosure. The CACM Guidance itself added, “unless ordered by the court” to all of its suggested rules barring disclosure and public access. For any of these amendments, the Subcommittee may wish to consider whether to recognize that the requirement of sealing, non-disclosure, etc. could be overridden by court order. This might be accomplished by adding language about a court order to each rule, or adding one new rule recognizing that the option for disclosure by court order applies to a listed set of rules.

G. Enforcement

Both the CACM/sealing and PSR approach require the parties to cull all cooperation references from their submissions and place them in separate documents. It is not clear whether there will be any oversight on that culling process by court staff, or what the consequences would be if material that should not have been filed in the public record appears there.

IV. No Remote Electronic Access

A. Introduction

This proposal takes a fundamentally different approach than the CACM/sealing and PSR approaches, which seek to prevent all public access to information about cooperation. This proposal, in contrast, limits only remote (online) access. Instead of seeking to preclude public access, it seeks to turn back the clock, allowing traditional forms of access at the courthouse, but not remote access. It also includes procedures for courthouse access designed to deter and identify those who might seek to access cooperator information in order to retaliate, threaten, harm, or intimidate.

This proposal is premised on two ideas.

First, the incidence of threats and harm to cooperators seems to have increased significantly at least in part because of ubiquitous remote access to the court records that disclose cooperation.²⁴ Concerns about threats and harm to cooperators were managed without blanket secrecy rules before remote electronic access. Thus limitations on remote access seek to turn the clock back, providing no less—but admittedly no more—protection than was traditionally afforded to cooperators. Giving the press and public access to the full record of criminal cases at the courthouse could provide information about cooperators to persons who might seek to threaten or harm them. But that potential harm would be no greater than it was before internet access. Eliminating remote access to docket sheets and underlying filings could provide some significant improvement in protection for cooperators over the status quo, though less protection than would be provided by the across-the-board sealing recommended by CACM (or the PSR proposal). If the no-remote-access option were chosen, courts could also take additional protective measures in individual cases, such as sealing certain portions of the record (though the presence of sealed filings would be visible on a docket sheet).

Second, the proposal reflects the view that there is substantial value in allowing at least the traditional level of public access to federal judicial proceedings and records. Accordingly, the value of the additional protection to cooperators must be weighed against the cost of introducing an unprecedented level of secrecy into the federal criminal justice process. The potential for harm to cooperators did not prompt this sort of blanket secrecy in the past, and may not warrant such drastic steps if former conditions could be replicated (or largely replicated) today. Because of the open and adversarial nature of the federal criminal justice system, it will never be possible to prevent all disclosure of cooperators. For example, the courtroom is not routinely closed when cooperators testify; and even if the courtroom is closed they must testify in the presence of the defendant, where they are subject to cross examination. Information about cooperators must often be disclosed to the defense as *Brady* material. Even public information about a cooperator's sentence (or change in sentence) may signal cooperation when it is below the statutory minimum.

The proposal thus seeks to accommodate and balance the need to protect cooperators as well as the need for the press, other litigants, and the public to have access to information about the criminal cases in the federal courts. It is modeled on Civil Rule 5.2(c), which presently prohibits remote access to immigration and social security cases, as well as Rule 49.1(c) (which incorporates Civil Rule 5.2(c) to prohibit remote access to any filing that relates to the petitioner's immigration rights in an action under 28 U.S.C. § 2241).

²⁴ We recognize that the blame for any increase in threats and harm to cooperators since the 1960s or so does not rest entirely with the advent of PACER access to court records. Since the 1970s, the number of federal criminal cases involving cooperators has probably increased because of the adoption of mandatory minimum sentences that, once charged, can only be avoided with cooperation, as well as the adoption of the sentencing guidelines. Also, gang activity in prisons may have increased and with it the efforts to identify and retaliate against cooperators.

B. Amendment to implement

We provide an option for amending Rule 49.1 that differs from Civil Rule 5.2(c) in two ways.

First, it allows only the parties' counsel to have remote electronic access to any part of the case file. Civil Rule 5.2(c) allows both the parties and their counsel to have remote electronic access. The proposed distinction between the defendant (who is not allowed remote access) and counsel was premised on the concern that providing defendants access would invite others to force defendants to produce such documents. (This aspect of the proposed amendment is readily severable. Either option could be revised to allow defendants, as well as their counsel, to have online access.)

Second, we suggest a new limitation on courthouse access to criminal case files, either by requiring those who wish to access case files to show identification and, in addition or as an alternative, by requiring them to sign up for an account (which would be analogous to a PACER account). There is presently no analogous national requirement in civil or criminal cases, and there appears to be no district that collects and maintains records of the identity of persons who access court records using the public terminals at the courthouse.²⁵ In order to provide more protection to cooperators, the new requirement would admittedly impose a burden on everyone who wishes to view files at the courthouse. Requiring persons who view case files to provide identification or sign up for and log into an account would provide a mechanism allowing authorities to track access to criminal case files. The knowledge that access to this information could be tracked might deter threats and harm to cooperators based on information in the court's files. This information could also be used after the fact to investigate cases in which cooperators were threatened or injured, which may also provide a deterrent. This requirement could, of course, be severed from the limitation on remote access.

Our amendment allows anyone who provides the requisite identification (or creates an account) full access at the courthouse, as well as limited remote access. Tracking the language of Civil Rule 5.2(c)(2)(B), the draft amendment provides the public with remote access to “an opinion, order, judgment, or other disposition of the court, but not any other part of the case file.” Access to judicial decisions could be useful to the press and to counsel in other cases, as well as members of the public. In general, such decisions and orders would not contain information about cooperation. In exceptional cases in which they might do so, it would be up to the parties to inform the court that access should be restricted.

²⁵ James Hatten, our clerk of court liaison, informed the reporters on March 2 that clerks from 75 districts responded to a CACM survey, and none reported collecting information about the identity of the persons who used court terminals.

C. Discussion

Although the effort to turn the clock back is intended to reduce secrecy and provide defense attorneys, the press, and members of the public with greater access to information about federal criminal cases, it nonetheless significantly restricts access to a large volume of information that is now readily available online. Accordingly, the proposal would impose significant costs on the press, the defense, and interested members of the public. It does so, however, in order to provide a degree of protection to cooperators (and their friends and families). Moreover, as compared with the CACM/sealing or PSR approaches, this approach provides full access at the courthouse to all criminal case materials not sealed in individual cases. It restricts only the means of access, but not the content of information available to the press, the public, and counsel in other cases.

The first question is whether this approach raises constitutional issues. We know of no precedent that is directly on point. Because the proposal turns the clock back, allowing access to all criminal case materials at the courthouse, it gives the press and the public the same access they had from the time of the founding until the beginning of the 21st Century. For that reason, we think there is a strong argument that the proposal would not violate the First and Sixth Amendments, though it might generate challenges.

There might be separate challenges to any requirement that individuals who wish to view case files at the courthouse present identification or sign up for a login account. Courts have denied Sixth Amendment public trial challenges in cases where courts required those who wished to enter the courtroom to provide identification or sign in, but some of those cases noted a case-specific finding before such a limitation was imposed.²⁶

The second question is whether the restrictions would be consistent with Section 205(c) of the E-Government Act, which imposes a general requirement that courts “make any document that is filed electronically publicly available online.”²⁷ Almost all documents in a criminal case are (and must be) filed electronically and are subject to this requirement. Section 205(c) provides, however, that “[d]ocuments that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online,”²⁸ and that rules may be enacted under the Rules Enabling Act procedures “to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of

²⁶ *Foti v. McHugh*, 247 Fed.Appx. 899, 901 (9th Cir. 2007) (noting that government's identification policy did not violate appellants' constitutional rights because “[a]ppellants do not have a constitutional right to enter the federal building anonymously”); *United States v. Smith*, 426 F.3d 567, 575-6 (2d Cir. 2005) (concluding that defendant's constitutional rights were not violated by imposition of photo identification requirement); *United States v. DeLuca*, 137 F.3d 24, 36 (1st Cir. 1998); *Haas v. Monier*, No. NH CA 08-169 MML, 2009 WL 1277740, at *7 (D.N.H. Apr. 24, 2009) (collecting authority); *United States v. Cruz*, 407 F.Supp. 2d 451, 452 (W.D.N.Y. 2006) (upholding United States Marshal Service's practice of requiring photographic identification of all visitors to federal courthouse).

²⁷ E-Government Act of 2002, § 205, 116 Stat. 2988, 2913 (2002).

²⁸ *Id.*, § 205(c)(2).

documents filed electronically.”²⁹ Any rules promulgated under this authority must “take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.”³⁰

The no-remote-access rule is fundamentally at odds with the general goal of providing the public with remote access to all federal court files, but it is premised on the critical need to protect cooperating defendants and their families from threats and serious harm. Under the E-Government Act, the Rules Enabling Act process is the mechanism for harmonizing the Congressional goal of making court documents available online with the need to protect “privacy and security concerns.”³¹ Thus the Civil Rules Committee (and later the Standing Committee) will have to consider whether the need to protect the “privacy and security” of cooperators justifies such a significant exception to the Congressional goal of providing online access to court files.

We note that in promulgating the current rules governing the availability of court records online (including Rule 49.1), the Rules Committees gave substantial weight to CACM’s recommendations. Similarly, in this case, we expect that the views of CACM and the Task Force would be relevant to the Rules Committee’s determination whether the no remote access approach is needed—and is sufficient—to protect the privacy and physical security of cooperators.

On one prior occasion referenced in its 2016 guidance, CACM concluded that denying remote access to plea agreements was not sufficient to protect cooperators.³² In 2008 the Department of Justice proposed “a uniform policy of removing all plea agreements from remote electronic public access through PACER.”³³ In response to a federal register notice CACM received 68 comments, which ran 4 to 1 against the DOJ proposal.³⁴ In a report to the Judicial Conference, CACM stated that “[m]ost of the comments favored retaining public access to plea agreements.”³⁵ CACM declined to adopt DOJ’s recommendation, citing as one of its reasons “that the Department’s proposal was inadequate in that it would prohibit public internet access to all plea agreements, including those that did not disclose cooperation, yet would simultaneously leave all plea agreements available to the public in the courthouses.”³⁶ Since the public comments favored “retaining public access to plea agreements,” they would presumably not support sealing, which eliminates all access, both remote and at the courthouse, in all cases. On

²⁹ *Id.*, § 205(c)(3)(A)(i).

³⁰ *Id.*, § 205(c)(3)(A)(iii).

³¹ See *id.*, § 205(c)(3)(A)(i).

³² COURT ADMINISTRATION AND CASES MANAGEMENT (CACM), SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 9 (Mar. 2008).

³³ *Id.* at 8.

³⁴ *Id.* at 9.

³⁵ *Id.*

³⁶ *Id.*

the other hand, at least at that time CACM concluded that denying remote access was not sufficient to protect cooperators.

If this option is pursued, there will also be questions about terminology. Although the language of these amendments mirrors that of Rule 5.2, it is not obvious exactly what is included in the terms “case file” or “full record.” What about the docket sheet? Does the full record include sealed documents? Is the case file different from the full record? Would adopting different terminology for criminal cases create unwanted negative inferences for cases under Rule 5.2?

One important question for the Subcommittee to consider concerns the tradeoffs, and the best balance of competing interests. Cutting off remote access in criminal cases will restrict the practical access to a wide range of information in criminal cases, affecting researchers, litigants in other cases, the press, and members of the public. It will also impose some burdens on the clerks' offices if the amended rule requires staff to attend to persons who want access at the courthouse, to check [or photocopy] the identifications presented, and to assist those who wish to create a login account. Moreover, it will not provide the degree of protection to cooperators that could be accomplished by sealing. But it could provide full public access—though not convenient online access—to all records in criminal cases.

The draft is intended to provide some greater degree of public access without a major sacrifice in the protection of cooperators. It employs the phrase “opinion, order, judgment or other decision,” which is used in Civil Rule 5.2(c)(2)(B). It would be useful for the Subcommittee to discuss whether that phrase would capture an important category of information that would be of interest to the public et al., and could be defined without undue difficulty in most criminal cases.

If the Subcommittee wishes to pursue this alternative, it may have questions about how clerks' offices handle various issues, such as whether individuals may request that copies of documents be mailed to those requesting copies, or whether in person delivery is the only option, whether someone wishing access will be able to print the document or request that it be printed out at the clerk's office, and what other restrictions (e.g. per page charge) might be acceptable.

V. Concluding remarks

We have presented three approaches, but they are not the only options. As noted in the introduction, the Subcommittee may wish to combine elements from these approaches. For example, it might recommend adopting most of the CACM/sealing approach, but channeling all plea agreements, including any cooperation agreements, to the PSR. This would avoid the rather cumbersome requirement that every plea agreement accompanied by a sealed document detailing any cooperation or stating that there had been no cooperation. Moreover, in addition to—or instead of—recommending amendments to the Rules of Criminal Procedure, the Subcommittee may wish to recommend procedures that have been adopted by local rule or informal practice in

some districts. For example, many districts do not file plea agreements; they are shown to the judge and then returned to the U.S. Attorney's Office, which retains them.

If the Subcommittee is leaning toward a sealing approach, it might be useful to discuss what it views as the best treatment of sealed documents:

- requiring a sealed addendum for every filed item that might contain cooperator information,
- funneling all sealed addendums and transcripts from a particular case into a single "sealed" docket entry (even perhaps, an entry labeled "presentence report," combining the PSR approach with a decision to file and seal it and all of its appendices), or
- an in-between approach, such as creating one docket entry for "sealed plea documents" another for "sealed sentencing documents" and another for "sealed post-sentencing documents."

In considering this, the Subcommittee might keep in mind the many appropriate ways information on a docket sheet is used by different groups, including other defendants' counsel, researchers, the Sentencing Commission, the BOP, successive counsel for the defendant in civil cases, or appointed counsel in § 2255 cases.

Whatever approach or approaches are selected for presentation to the full Committee by the Subcommittee, we encourage the Subcommittee to consider whether that approach should also apply to § 2255 case files (which might require amendment of § 2255 Rules), and/or probation revocation hearings and submissions under Rule 32.1.

Research provided to the Subcommittee revealed that various combinations of these measures are already tried in some districts,³⁷ so it may be prudent to pursue implementation questions to the relevant districts. For example, DOJ's memo to the Subcommittee dated May 31, 2016 noted one district in which the terms of a cooperation agreement are not contained in

³⁷ We have requested updated information on district-by-district responses to the CACM guidance, which will be shared with the Subcommittee. Memoranda from Margaret S. Williams to Members of Cooperators Subcommittee of the Advisory Committee on Criminal Rules (May 18, 2016) (in Agenda Book, supra n. 11, tab 6D at 7) (noting the number of responses indicating their court used, inter alia "Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement); Restricting remote access of documents containing cooperation information; Requiring the entry of documents containing cooperation to be private entries in CM/ECF; Ordering parties to redact cooperation information from documents; Removing documents containing cooperation information from public files; and Allowing public access of documents containing cooperation information only in the courthouse or clerk's office"). Note that the FJC researchers concluded that "Because all districts responding to that section of the survey reported taking some steps to protect cooperators, and no two districts are using the same steps, it is empirically impossible to identify the effect of any policy (individually or in combination with other policies) on the amount of reported harm to cooperators."). Memorandum to Cooperator Subcommittee from Sara Sun Beale and Nancy King dated July 21, 2016 (in Agenda Book, supra n.11, tab 6B at 237).

the publicly filed plea agreement but in a “side letter” that the judge reviews and then provides—without filing it—to the Probation Office for its use in preparing the presentence report.³⁸

³⁸ Memorandum from Michelle Morales, Acting Director, DOJ, to Hon. Lewis A. Kaplan, Chair, Rules Subcommittee on Cooperators 3 (May 31 2016) (in Agenda Book, supra n.11, tab 6H at 301).

APPENDIX A

THIS PAGE INTENTIONALLY BLANK

Appendix A: Side by Side example rule amendments 4-11-2017

CACM Sealing Approach	PSR Approach
Rule 11	Rule 11
(c) Plea Agreement Procedure.	(c) Plea Agreement Procedure.
<p data-bbox="196 369 631 405">(2) <i>Disclosing a Plea Agreement.</i></p> <p data-bbox="196 443 753 730">(i) <u>In general.</u> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. <u>But the parties must not disclose in open court any terms in the agreement involving cooperation or lack of cooperation with the government.</u></p> <p data-bbox="196 768 781 1129">(ii) <u>Bench Conference.</u> In every case, the disclosure of a plea agreement must include a conference at the bench [or in camera] at which the government must disclose any agreement by the defendant to cooperate or state that there is no agreement for cooperation. Any reference to the defendant’s cooperation or lack of cooperation with the government in open court is prohibited.</p>	<p data-bbox="829 369 1265 405">(2) <i>Disclosing a Plea Agreement.</i></p> <p data-bbox="829 443 1422 730">(i) <u>In general.</u> The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. <u>But the parties must not disclose in open court any terms in the agreement involving cooperation or lack of cooperation with the government.</u></p> <p data-bbox="829 768 1422 1094">(ii) <u>Bench Conference.</u> In every case, the disclosure of a plea agreement must include a conference at the bench [or in camera] at which the government must disclose any agreement by the defendant to cooperate or state that there is no agreement for cooperation. Any reference to the defendant’s cooperation or lack of cooperation with the government in open court is prohibited.</p>
<p data-bbox="175 1213 647 1281">(3) <i>Judicial Consideration of a Plea Agreement</i></p> <p data-bbox="175 1285 240 1306">* * *</p> <p data-bbox="175 1323 768 1608">(C) <u>Written Submissions.</u> Any written submission to the court regarding the plea agreement that is filed [with the court/ in the record], including the plea agreement itself, must include a public portion and a sealed supplement that contains any references to the defendant’s cooperation with the government or states that there was no cooperation.</p>	<p data-bbox="808 1213 1281 1281">(3) <i>Judicial Consideration of a Plea Agreement</i></p> <p data-bbox="808 1285 873 1306">* * *</p> <p data-bbox="808 1323 1422 1864">(C) <u>Written Submissions.</u> Any written submission to the court regarding the plea agreement that is filed [with the court/ in the record], including the plea agreement itself, must not contain any reference to the defendant’s cooperation or lack of cooperation with the government. Any written reference to the defendant’s cooperation or lack of cooperation must be submitted separately, by <u>[(i)] showing [or reading] it to the judge at the bench [or in camera] conference required by Rule 11(c)(2)(ii) when the plea is offered, [and</u> <u>(ii) providing a copy to the probation officer for inclusion in the presentence report.]</u></p>

Appendix A: Side by Side example rule amendments 4-11-2017

CACM Sealing Approach	PSR Approach
Rule 11	Rule 11
(g) Recording the Proceedings.	(g) Recording the Proceedings.
<p><u>(i) In general.</u> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><u>(ii) Inquiries and advice.</u> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><u>(iii) Bench [or in camera] conference.</u> The [recording or] transcript of the bench conference required by Rule 11(c)(2) must be filed under seal.</p>	<p><u>(i) In general.</u> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><u>(ii) Inquiries and advice.</u> If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).</p> <p><u>(iii) Bench [or in camera] conference.</u> The [recording or] transcript of the bench conference required by Rule 11(c)(2) must not be filed [with the court/ in the record] [, but must be submitted to the probation office for inclusion in the presentence report].</p>

Appendix A: Side by Side example rule amendments 4-11-2017

CACM Sealing Approach	PSR Approach
Rule 12.1	Rule 12.1
(d) Exceptions. For good cause, <u>including the need to prevent the disclosure of the identity of a witness who is cooperating with the government</u> , the court may grant an exception to any requirement of Rule 12.1(a)–(c).	(d) Exceptions. For good cause, <u>including the need to prevent the disclosure of the identity of a witness who is cooperating with the government</u> , the court may grant an exception to any requirement of Rule 12.1(a)–(c).

Appendix A: Side by Side example rule amendments 4-11-2017

CACM/Sealing Approach	PSR Approach
<p>Rule 32</p> <p>(i) Sentencing</p> <p style="text-align: center;">...</p> <p>(4) Opportunity to Speak</p> <p style="text-align: center;">...</p> <p><i>(C) In Camera Proceedings.</i></p> <p>(i) Generally. Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p>(ii) Cooperation. <u>References to the defendant’s cooperation or lack of cooperation with the government in open court are prohibited. In every case, sentencing must include a conference [in camera or] at the bench at which the parties may discuss the defendant’s cooperation or lack of cooperation. The [recording or] transcript of this conference must be filed as a sealed addendum to the sentencing transcript.</u></p> <p>(5) Filing Presentence Report. <u>If filed, the presentence report and appended documents must be filed under seal.</u></p>	<p>Rule 32</p> <p>(i) Sentencing</p> <p style="text-align: center;">...</p> <p>(4) Opportunity to Speak</p> <p style="text-align: center;">...</p> <p><i>(C) In Camera Proceedings.</i></p> <p>(i) Generally. Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p>(ii) Cooperation. <u>References to the defendant’s cooperation or lack of cooperation with the government in open court are prohibited. In every case, sentencing must include a conference [in camera or] at the bench at which the parties may discuss the defendant’s cooperation or lack of cooperation. The [recording or] transcript of this conference must not be filed [with the court/ in the record] [, but must be submitted to the probation office to append to the presentence report].</u></p> <p>(5) Filing Presentence Report. <u>If filed, the presentence report and appended documents must be filed under seal.</u></p> <p style="text-align: center;">...</p>

Appendix A: Side by Side example rule amendments 4-11-2017

CACM/Sealing Approach	PSR Approach
<p>Rule 32</p>	<p>Rule 32</p>
<p><u>(1) Written References to Cooperation.</u> <u>[(1) By a Party or Victim.] Any written submission regarding sentencing that is filed [with the court/ in the record], including sentencing memoranda, objections under Rule 32(f), and evidence submitted under Rule 32(i)(2), must include a public portion and a sealed supplement that contains any references to the defendant’s cooperation with the government or states that there was no cooperation.</u></p> <p><u>[(2) By the Judge. Any written notice under Rule 32(h), or summary under Rule 32(i)(1)(B) that is filed [with the court/ in the record] must include a public portion and a sealed supplement that contains any references to the defendant’s cooperation with the government or states that there was no cooperation.]</u></p>	<p><u>(1) Written References to Cooperation.</u> <u>[(1) By a Party or Victim.] Any written submission regarding sentencing that is filed [with the court/ in the record], including sentencing memoranda, objections under Rule 32(f), and evidence submitted under Rule 32(i)(2), must not contain any reference to the defendant’s cooperation or lack of cooperation with the government. Any written references to the defendant’s cooperation or lack of cooperation must be submitted separately, by</u> <u>(A) showing or reading it to the judge at the in camera or bench conference under Rule 32(i)(4)(C), and</u> <u>(B) providing a copy to the probation officer to append to the presentence report.</u></p> <p><u>[(2) By the Judge. Any written notice under Rule 32(h), or summary under Rule 32(i)(B) that is filed [with the court/ in the record] must not contain any reference to the defendant’s cooperation or lack of cooperation with the government. Written references to the defendant’s cooperation or lack of cooperation must be provided separately to the parties, and a copy provided to the probation officer to append to the presentence report.]</u></p>

Appendix A: Side by Side example rule amendments 4-11-2017

CACM/Sealing Approach	PSR Approach
Rule 35. Correcting or Reducing a Sentence.	Rule 35. Correcting or Reducing a Sentence.
<p>(b) Reducing a Sentence for Substantial Assistance.</p> <p style="text-align: center;">* * * * *</p> <p>(3) <u>Sealing.</u> All motions under Rule 35 must be filed under seal.</p> <p>(3) (4) <u>Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p>(4) (5) <u>Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>	<p>(b) Reducing a Sentence for Substantial Assistance.</p> <p style="text-align: center;">* * * * *</p> <p>(3) <u>Sealing.</u> All motions under Rule 35 must be filed under seal.</p> <p>(3) (4) <u>Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p>(4) (5) <u>Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p>

Appendix A: Side by Side example rule amendments 4-11-2017

CACM/Sealing Approach	PSR Approach
Rule 47	Rule 47
<p>(b) Form and Content of a Motion.</p> <p><u>(1) In writing.</u> A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. <u>Any motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must filed under seal.</u></p> <p><u>(2) Contents and support.</u> A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit. <u>Any affidavit supporting a motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must filed under seal.</u></p>	<p>(b) Form and Content of a Motion.</p> <p><u>(1) In writing.</u> A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. <u>Any motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must not be in writing, but must be made orally during the bench [or in camera] conference required by Rule 32(i)(4)(C).</u></p> <p><u>(2) Contents and support.</u> A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit. <u>Any affidavit or written submission supporting a motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must be submitted to the court by</u></p> <ul style="list-style-type: none"> <u>(A) showing it to the judge at the bench [or in camera] conference required by Rule 32(i)(4)(C), and</u> <u>(B) providing a copy to the probation officer for inclusion in the presentence report.</u>

THIS PAGE INTENTIONALLY BLANK

APPENDIX B

THIS PAGE INTENTIONALLY BLANK

APPENDIX B

Rule 49.1. Privacy Protections for Filings Made with the Court.

* * * * *

1 (c) ~~Immigration Cases~~ Limitations on Remote Access to
2 Electronic Files.

3
4 (1) Unless the court orders otherwise, in a criminal case
5 access to an electronic file is authorized as follows:

6
7 (A) the parties' attorneys¹ may have remote electronic
8 access to any part of the case file; and

9 -
10 (B) any other person [who has presented identification
11 at the courthouse] [set up an electronic account with
12 the court] may have:

13 (i) electronic access to the full record at the
14 courthouse; and

15 (ii) but may have remote electronic access
16 only to an opinion, order, judgment, or other
17 disposition of the court, but not any other part
18 of the case file.

19
20 (2) A filing in an action brought under 28 U.S.C. § 2241 that
21 relates to the petitioner's immigration rights is governed by
22 Federal Rule of Civil Procedure 5.2.²

23 * * * * *

¹Note that Civil Rule 5.2(c) provides that the parties as well as their attorneys may have remote electronic access. The proposed amendment limits remote access to the parties' attorneys.

²This provision is not made applicable to criminal cases because proposed (c)(1) does not precisely track Civil Rule 5.2(c).

THIS PAGE INTENTIONALLY BLANK

TAB 5D

THIS PAGE INTENTIONALLY BLANK



COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

Wm. Terrell Hodges, Chair

Anna J. Brown
Charles S. Coody
Audrey G. Fleissig
Kim R. Gibson
Joseph N. Laplante
Robert E. Littlefield, Jr.

Philip R. Martinez
Norman A. Mordue
Michael R. Murphy
Rebecca J. Pallmeyer
Roger W. Titus
Reggie Walton


Mark S. Miskovsky, Staff

June 30, 2016

MEMORANDUM

To: Chief Judges, United States District Courts
District Judges, United States District Courts
District Court Executives
Clerks, United States District Courts

From: Judge Wm. Terrell Hodges, Chair 
Committee on Court Administration and Case Management

Judge Roger W. Titus, Chair, Privacy Subcommittee 
Committee on Court Administration and Case Management

RE: INTERIM GUIDANCE FOR COOPERATOR INFORMATION

On behalf of the Committee on Court Administration and Case Management (CACM), we would like to share interim guidance that the Committee developed concerning the treatment of cooperator information in criminal cases. This guidance is “interim” because the issue has been referred to the Committee on Rules of Practice and Procedure for formal consideration. As discussed below, however, the Committee believes this is an issue of such importance that it requests each court to consider adopting the provisions of the guidance, in a manner consistent with local practice, applicable case law, and the court’s rule-making authority, pending consideration through the Rules Enabling Act process.

Background

The CACM Committee has responsibility for issues relating to court operations, including the task of helping courts maintain their records in a way that protects both the public right of access to case filings and the legitimate privacy interests of litigants. Perhaps the most challenging example of this responsibility is balancing public access to criminal cases against the potential exposure of government cooperators. Remote electronic access dramatically increased

the potential for illicit use of case information regarding cooperators, and it is largely for this reason that the Judicial Conference initially delayed public electronic access to criminal case files. This concern also prompted the Committee in 2008 to endorse practices aimed at minimizing the use of case documents to identify cooperators, and encourage all courts to consider their implementation. March 2008 Report of the CACM Committee to the Judicial Conference, pp.8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350.

Since then, the CACM Committee has continued to track the use of criminal case information to identify cooperators. Despite courts' individual efforts, the problem continues to grow. Based on increasing concerns expressed by judges about harm to cooperators, this Committee, in August 2014, asked the Federal Judicial Center (FJC) to survey judges, U.S. attorneys, federal defenders, Criminal Justice Act panel representatives, and probation and pretrial services chiefs to measure the scope and severity of the problem.

The FJC analyzed the responses to these surveys and collected its findings in a report entitled "Survey of Harm to Cooperators," which is now available on the FJC website at [http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/\\$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf) ("FJC Report"). The FJC Report fully substantiates the concern that harm to cooperators persists as a severe problem. For example, district judge respondents reported 571 instances of harms or threats – physical or economic – to defendants and witnesses between the spring of 2012 and the spring of 2015, including 31 murders of defendant cooperators.

The Committee believes these threats and harms should be viewed in the context of a systemic problem of court records being used in the mistreatment of cooperators. The FJC Report presents 363 instances in which court records were known by judges to be used in the identification of cooperators. This is a particular problem in our prisons, where new inmates are routinely required by other inmates to produce dockets or case documents in order to prove whether or not they cooperated. If the new inmates refuse to produce the documents, they are punished. The FJC Report confirms the existence and widespread nature of this problem,¹ which is aggravated by prison culture and the prevalence of organized gangs.

The conditions cooperators face in prison also impact the sentences imposed by the judiciary. Multiple respondents in the FJC Report noted that cooperators' fear of harm is so great that some forgo the potential benefits of U.S. Sentencing Guidelines Manual § 5K1.1 out of fear that the related case documents will identify them as cooperators. If they are identified as cooperators after arriving in prison, in many cases the only effective protection available is to move the threatened inmate into a segregated housing unit or solitary confinement, with an attendant loss of the privileges that would otherwise be available to that inmate – an ironic and more onerous form of punishment not typically contemplated by the sentencing judge.

Chief Judge Ron Clark of the Eastern District of Texas recently held a hearing regarding a motion to unseal plea agreements that involved extensive factfinding on these issues.² The hearing involved the participation of the local United States Attorney's Office, the Office of the

¹ See FJC Report, Appendix I: Open-Ended Comments (discussing practices in BOP facilities).

² *United States v. McCraney*, 99 F. Supp. 3d 651 (E.D. Tex. 2015).

Public Defender, counsel for five defendants, and counsel for the newspaper who had requested the unsealing, as well as an amicus filing by another newspaper. At the hearing, the court heard testimony from two Bureau of Prisons (BOP) representatives and a federal prosecutor concerning the experiences of cooperators in prison. Based on its factfinding, the court concluded that the disclosure of information in plea agreements that identifies cooperating defendants “puts those defendants at risk of extortion, injury, and death.” It therefore found “an overriding interest in preventing disclosure of information that states or even hints that a defendant has agreed to be an informant or cooperating witness.” The court’s local rules regarding criminal case management were updated as a result, so that all plea agreements from that point forward include a sealed supplement containing any discussion of cooperation. *See* E.D. Tex. L. R. CR-49(c)-(d). The court found that this new procedure – which it applied to the case at hand – “balances the public’s right of access against the higher need to protect the lives and safety of defendants” and other individuals, as well as “the need to encourage accused individuals to provide the truthful information that is crucial to the successful prosecution of serious offenses.”

Certainly, U.S. attorneys and the BOP must continually strive to protect cooperators and ensure the safety of prisoners. The Committee believes, however, that the judiciary also has a role in finding solutions to these problems. Of particular concern for judges, apart from the need to protect the well-being of those we sentence, is the fact that our own court documents are being used to identify the cooperators who then become targets. In many instances these documents are publicly available online through PACER. Because criminal case dockets are being compared in order to identify cooperators, every criminal case is implicated.

Guidance

The CACM Committee believes a nationwide, uniform solution providing for greater control over access to cooperator information is required to address this systemic national problem. It has therefore asked the Committee on Rules of Practice and Procedure to consider the issues described in the FJC Report and determine whether changes to the criminal rules are warranted as a long-term remedy. In the interim, the CACM Committee is also asking courts to consider taking more immediate steps at the district level to address this problem. **The Committee has developed the attached guidance for protecting cooperator information found in criminal case documents and recommends that each district adopt it via local rule or standing order.** The guidance is based on practices for protecting cooperators already used in a number of courts.³

The guidance recommends that, in all criminal cases, courts restructure their practices so that documents or transcripts that typically contain cooperation information – if any – would include a sealed supplement. Any discussion of defendants’ cooperation – or lack thereof – would then be limited to these sealed supplements. For example, any plea agreement docketed in a criminal case would be accompanied by a separate, sealed supplement containing either discussion of cooperation or a simple statement that there was no cooperation. As a result, any member of the public who reviews the docket would be unable to determine, based on the plea agreement, whether a given defendant has cooperated. By adding standardized sealed material that will appear in every case, whether or not there is a cooperator, and placing all discussion of

³ Thirty-three district courts, or over one-third, have already adopted local rules or standing orders to make all criminal defendants appear identical in the record to obscure cooperation information. FJC Report at 26.

cooperation under seal, adoption of these practices would inhibit identification of cooperators through dockets and case documents. The public, however, would continue to have access to key criminal case files – albeit without sensitive information regarding cooperation.⁴

Importantly, the government’s disclosure obligations to opposing counsel would not be affected by implementation of this guidance, and the public would still have access to much of the plea and sentencing material that is now available.

Discussion

The CACM Committee would like to emphasize that, in recommending this guidance, its members understand and embrace our duty as judges to vigilantly safeguard the public’s right to access court documents and proceedings pursuant to the First Amendment and under common law. Nonetheless, the Committee finds that the harms to individuals and the administration of criminal justice in this instance are so significant and ubiquitous that immediate and effective action should be taken to halt the malevolent use of court documents in perpetuating these harms, consistent with each court’s duty to exercise “supervisory power over its own records and files.”⁵

The Committee is also mindful of the high burden that must be met before shielding particular case information from the public’s eye,⁶ but notes that this should not be seen as an absolute bar to exercising authority over court records and proceedings. Indeed, there are many well-established restrictions on access to criminal case information that address compelling government interests.⁷ The CACM Committee believes that the need in this instance is as great as, if not greater than, the needs that supported adoption of restrictions in the past.

⁴ The guidance contains other provisions, including procedures for prisoners to access sealed case materials in a secure environment, consistent with local BOP policy and court rules. The Committee is in communication with the Executive Office for U.S. Attorneys and the BOP regarding the provisions and local implementation.

⁵ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (“[A]ccess has been denied where court files might have become a vehicle for improper purposes.”).

⁶ *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-13 (1984) (recognizing that, where right of public access applies, a court may close court proceedings or deny access to transcripts, but must articulate reasons for doing so in specific and reviewable findings demonstrating “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest”). Several circuits also have issued decisions that may impact court efforts to implement this guidance. *See, e.g., United States v. DeJournett*, 817 F.3d 479 (6th Cir. 2016) (vacating policy-based order that sealed the entirety of a plea agreement without case-specific findings); *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008) (finding a public right of access to the cooperation addendum of a plea agreement, albeit with limited analysis of whether the right should apply); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (acknowledging that potential threats to criminal investigations or individuals “may well be sufficient to justify sealing a plea agreement,” but vacating sealing of cooperator information as unwarranted where fact of cooperation was publicly known).

⁷ *See, e.g.*, 18 U.S.C. § 3153(c) (making pretrial services reports confidential); Fed. R. Crim. P. 32 & 18 U.S.C. § 3552(d) (limiting distribution of presentence investigation reports); Fed. R. Crim. P. 49.1 (requiring redaction of personally identifiable information and minors’ names); Fed. R. Crim. P. 49.1, 2007 Advisory Comm. Notes & Guide to Judiciary Policy, Vol. 10, Ch. 3, § 340 (categorizing as non-public a number of criminal case documents, including juvenile records); 18 U.S.C. § 5038 (making names and pictures of juveniles in delinquency proceedings non-public; safeguarding records from “unauthorized persons”); JCUS-MAR 01, p. 17 (dictating that statements of reasons are not to be disclosed to the public); 18 U.S.C. § 3662(c) (mandating that conviction records maintained by the Attorney General “not be public records”).

It is important to emphasize that, to the extent possible, broad adoption of the CACM guidance is key to its effectiveness at addressing the problems discussed above. If districts continue to take different approaches toward addressing this problem, there is a real risk that well-intentioned measures to protect cooperators in one court might result in criminal dockets that indicate cooperation, rightly or wrongly, when compared to those of another court. The inadequacy of a patchwork approach to sealing cooperator-related material is highlighted in Chief Judge Clark's opinion and referenced by a number of responses in the FJC Report. It is for this reason that the Committee has requested the Committee on Rules of Practice and Procedure to consider this issue for national application.

Finally, in drafting and recommending this guidance, the CACM Committee emphasizes that it has acted to the best of its ability to narrow the scope of the proposed measures. The Committee also thoroughly considered other potential options for addressing this issue in each district, such as those it recommended for potential adoption in 2008.⁸ These options, however, suffer from either failing to move the judiciary toward a uniform approach or by making a greater volume of case information unavailable to the public. For example, some courts presently seal the entirety of all plea agreements in an attempt to prevent identification of and harm to cooperators. By implementing the attached guidance and sealing only cooperator information, as the CACM Committee recommends, these courts may actually increase the amount of criminal case information available to the public.⁹

The CACM Committee believes that the misuse of court documents to identify, threaten, and harm cooperators is a systemic problem, and can only be addressed through a more uniform approach toward public access to cooperator information. To that end, the Committee believes uniform implementation of the attached guidance at the local level -- pending consideration of a national rule -- would be an important, measured step toward that goal, and one which is appropriately tailored to address the significant interests involved.

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

⁸ See March 2008 Rep. of the CACM Committee to the Judicial Conf., pp. 8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350 (listing as potential measures (1) shifting cooperation information into non-case file documents, (2) sealing plea agreements, (3) restricting access to plea agreements, (4) redacting all cooperation information, (5) restructuring case records so that all criminal cases appear identical, and (6) delaying publication of plea agreements referencing cooperation).

⁹ The CACM Committee recognizes that there is no complete or perfect solution. If a cooperator testifies during a trial, for example, or is sentenced below a statutory mandatory minimum where the "safety valve" does not apply (18 U.S.C. § 3553(f)), his cooperation is apparent. This obviously does not mean, however, that solutions should not be adopted for those cases in which they are available and can be effectively applied.

If you have any questions or concerns, please feel free to contact either of us, Judge Terry Hodges (Chair, CACM Committee) or Judge Roger Titus (Chair, CACM Committee's Privacy Subcommittee). You can also contact Sean Marlaire, Administrative Office Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean.Marlaire@ao.uscourts.gov.

Attachment

cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Chief Probation Officers
Federal Public and Community Defenders
CJA Panel Attorney District Representatives

Guidance on Access to Plea Agreements and Other Documents That May Reveal Cooperation

- A. On the basis of the following findings of the Court Administration and Case Management Committee, arrived at in consultation with the Criminal Law Committee and Defender Services Committee (which takes no position on the proposed guidance), the Committee recommends prompt local adoption of the guidance set forth in subsection (b) by each district court via local rule or standing order.
1. As indicated by the Survey of Harm to Cooperators: Final Report prepared by the Federal Judicial Center in June 2015, and the findings contained in the memorandum order of Chief Judge Clark of the Eastern District of Texas dated April 13, 2015 (Case No. 14-CR-80), there is a pervasive, nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families.
 2. The problem has been exacerbated by widespread use of PACER and other systems that provide ready public access to case information, including documents containing cooperation information and criminal dockets indicating whether cooperation did or did not occur in a case.
 3. The problem threatens public safety. It also interferes with the gathering of evidence, the presentation of witnesses, and the sentencing and incarceration of cooperating defendants, and therefore poses a substantial threat to the underpinnings of the criminal justice system as a whole. The Court Administration and Case Management Committee agreed that there is a compelling government interest in addressing these issues.
 4. Other possible less-restrictive alternatives have been considered before selecting this guidance and, to the greatest extent possible, the guidance has been narrowly tailored. To be effective, any action intended to address these issues must be implemented universally across all criminal cases; any rules, standing orders, or policies that provide for case-to-case variation in the treatment of criminal documents for cooperators and non-cooperators are ineffective and may compound the problem.
 5. Uniform nationwide measures regarding access to particular criminal court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term. As a result, the Committee will continue to work with other committees of the Judicial Conference, and in particular the Committee on Rules of Practice and Procedure, along with the Department of Justice and the Bureau of Prisons, in

order to investigate and establish nationwide measures that are most effective at protecting cooperators while avoiding unnecessary restrictions on legitimate public access.

B. Recommended Document Standards to Protect Cooperation Information

1. In every case, all plea agreements shall have a public portion and a sealed supplement, and the sealed supplement shall either be a document containing any discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement. There shall be no public access to the sealed supplement unless ordered by the court.
2. In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.
3. All transcripts of guilty pleas shall contain a sealed portion containing a conference at the bench that will either contain any discussion of or references to the defendant's cooperation, or simply state that there is no agreement for cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.
4. All sentencing transcripts shall include a sealed portion containing a conference at the bench, which reflects either (a) any discussion of or references to the defendant's cooperation, including the court's ruling on any sentencing motion relating to the defendant's cooperation; or (b) a statement that there has been no cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.
5. All motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court.
6. Copies of presentence reports and any other sealed documents, if requested by an inmate, shall be forwarded by the Chief Probation Officer or the Clerk of the Court to the warden of the appropriate institution for review by the inmate in an area designated by the warden and may neither be retained by the inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies of the Bureau of Prisons. Federal court officers or employees (including probation officers and federal public defender staff), community defender staff, retained counsel, appointed CJA panel attorneys, and any other

- person in an attorney-client relationship with the inmate may, consistent with any applicable local rules or standing orders, review with him or her any sealed portion of the file in his or her case, but may not leave a copy of a document sealed pursuant to this guidance with an inmate.
7. Clerks of the United States district courts, when requested to provide a copy of docket entries in criminal matters to an inmate or any other requesting party, shall include in a letter transmitting the docket entries, a statement that, pursuant to this guidance, all plea agreements and sentencing memoranda contain a sealed supplement which is either a statement that there is cooperation, including the terms thereof, or a statement that there is no cooperation, and, as a result, it is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government.
 8. All documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis.
 9. Nothing contained herein shall be construed to relieve the government in any case of its disclosure obligations, such as those under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Jencks v. United States*, 353 U.S. 657 (1957) (as codified at 18 U.S.C. § 3500).
 10. Judicial opinions involving defendants or witnesses that have agreed to cooperate with the government, where reasonably practicable, should avoid discussing or making any reference to the fact of a defendant's or witness's cooperation.

THIS PAGE INTENTIONALLY BLANK

TAB 6

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Manual on Complex Criminal Litigation

DATE: April 1, 2017

At its September meeting in Missoula, the Committee discussed the need for a Manual on Complex Criminal Litigation that would parallel the very successful Manual on Complex Civil Litigation. Following the meeting, Judge Molloy and Ms. Womeldorf presented the idea of such a manual to the Director of the Federal Judicial Center, Judge Jeremy Fogel.

After discussions with his senior staff, Judge Fogel advised Judge Molloy that he supports the idea of a manual. Judge Fogel observed that the Benchbook covers the major stages of criminal cases generally, but doesn't include the special problems that arise in "mega-cases."

In preparation for work on the manual, Judge Fogel requested more input from the Criminal Rules Committee about the specific topics that it would like the manual to address (e.g., voluminous/complex discovery, scientific evidence/technical subject matter, motion practice, case and trial management in cases with numerous defendants). Since it may not be possible to cover everything, he asked if the Committee could identify its top five or ten list of topics it wished to have included.

This issue is on the agenda as a discussion item for the April meeting.

THIS PAGE INTENTIONALLY BLANK

TAB 7

THIS PAGE INTENTIONALLY BLANK



COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

Wm. Terrell Hodges, Chair

Anna J. Brown
Charles S. Coody
Audrey G. Fleissig
Kim R. Gibson
Joseph N. Laplante
Robert E. Littlefield, Jr.

Philip R. Martinez
Norman A. Mordue
Michael R. Murphy
Rebecca J. Pallmeyer
Roger W. Titus
Reggie Walton

Mark S. Miskovsky, Staff

March 30, 2017

MEMORANDUM

To: Chief Judges, United States District Courts
District Court Executives
Clerks, United States District Courts

From: Judge Wm. Terrell Hodges 
Chair, Committee on Court Administration and Case Management

RE: DEPARTMENT OF JUSTICE'S GRAND JURY TRACKING SYSTEM (**INFORMATION**)

The Department of Justice is actively promoting use of a software application known as the Grand Jury Tracking System (GJTS). The GJTS software allows a U.S. Attorney's Office to streamline the grand jury subpoena process by shifting away from the use of paper forms toward the use of electronic forms. In order to use the software to generate grand jury subpoenas, U.S. Attorneys' Offices have asked district courts to provide them with PDF versions of the courts' grand jury subpoena forms (Form AO 110), with the court seal and clerk's signature electronically affixed. For those districts in which the GJTS software is being used, the subpoena form with the affixed seal and signature is transferred to the U.S. Attorney's Office and loaded into the software, after which prosecutors can fill in the necessary case-specific information and produce whatever subpoenas are needed for grand jury proceedings. This is a change from the more customary procedure whereby the clerk provides the U.S. Attorney's Office with copies of the grand jury subpoena form in paper, with the seal and signature physically affixed. As of March 2017, U.S. Attorneys' Offices in 35 districts are using the GJTS software to generate grand jury subpoenas, with the seal and signature already electronically affixed in coordination with the court.

At the request of the Administrative Office, and in light of inquiries received from courts regarding GJTS, the Court Administration and Case Management Committee reviewed the GJTS software and considered its potential impact on court operations. The Committee took no

position on the GJTS, but offered two suggestions for district courts that are or are considering providing electronic versions of their grand jury subpoena form to U.S. Attorney's Offices for use with the GJTS software. In making these suggestions the Committee emphasized, however, that issues relating to grand jury practice are best left to each court to consider under its discretion, and in light of local rule and practice.

First, courts should be aware although Rule 17(a)¹ requires that a clerk issue blank grand jury subpoenas bearing the court's seal and the clerk's signature upon request,² and does not contemplate a clerk's issuance of subpoena forms in the manner required by use of the GJTS software, the plain language of the rule does not prohibit it.

Second, courts may wish to consider entering into a memorandum of understanding or otherwise memorializing terms with the U.S. Attorney's Office regarding the use of the affixed seal and signature. For example, a memorandum could define how the GJTS will be used to support the grand jury process, establish guidelines on the use of the seal and signature being provided, or ask that periodic updates on the use of the subpoenas be provided to the court.

If you have any questions or concerns, please feel free to contact either Joe Gergits, Office of the General Counsel, at 202-502-1104 or Joe_Gergits@ao.uscourts.gov, or Sean Marlaire, Court Services Office, at 202-502-3522 or Sean_Marlaire@ao.uscourts.gov.

cc: Members, Committee on Court Administration and Case Management

¹ Fed. R. Crim. P. 17(a) reads: "A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served."

² The rule does not specifically mention grand jury subpoenas, but the prescription concerning subpoenas in criminal cases governs the issuance of subpoenas in every aspect of a criminal case, including grand jury practice. See 2 Charles Alan Wright et al., *Federal Practice & Procedure* §272 (4th ed.) ("Rule 17 is not limited to subpoenas for the trial" and "a subpoena may be issued for a preliminary examination, a grand jury investigation, a deposition, a determination of a factual issue raised by a pre-trial motion, or a post-trial motion in a criminal case.")