ADVISORY COMMITTEE
ON
CRIMINAL RULES

Nashville, TN
October 10, 2018

AGENDA

Meeting of the Advisory Committee on Criminal Rules
October 10, 2018
Nashville, TN

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TAB 1

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TAB 1A-B

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Item 1A: Chair's Remarks and Administrative Announcements
Item 1B: Introduction of New Members

Items 1A and 1B will be oral presentations.

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TAB 1C

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 24, 2018, Washington, D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Washington, D.C., on April 24, 2018. The following persons were in attendance:

Judge Donald W. Molloy, Chair
John P. Cronan, Esq.
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
James N. Hatten, Esq.
Judge Denise Page Hood
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Joan L. Larsen
Judge Bruce McGivern
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Professor Cathie Struve, Standing Committee Associate Reporter (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Rules Committee Staff
Patrick Tighe, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order. After congratulating several members on career developments, Judge Molloy recognized Professor Daniel Coquillette, who is leaving his position as Reporter to the Standing Committee, and the outgoing members of the Criminal Rules Committee, and invited them to make remarks.

Mr. Siffert recalled hearing outgoing members praise the Committee's integrity and state how meaningful they found its work. He agreed that being able to watch and participate in this

process had been one of his most valuable professional experiences. He stressed his affection for the other members and the reporters, and his hope to stay in touch.

Judge Larsen said it had been a real pleasure to serve on the Committee, noting that her tenure was short because as a federal judge she could not continue to serve as the state court representative. She wished the members well and looked forward to seeing them again.

Professor Coquillette thanked the Committee, and said that his 34 years as a reporter had been an extraordinary privilege. He expressed his gratitude for so many dear friends among the reporters, commended Ms. Womeldorf in the Rules Office for her fantastic work, and praised Professor Struve who will be taking over as a terrific Reporter for the Standing Committee.

Judge Molloy thanked the outgoing members and Professor Coquillette for their many, many years of great service, and then introduced John Cronin, Acting Head of the Criminal Division at the Department of Justice. Mr. Cronin said it was an honor to attend and hoped that a permanent Assistant Attorney General would be available soon to work with the Committee.

Judge Molloy turned to the approval of the Minutes from the Fall 2017 Criminal Rules Committee Meeting.

Professor Beale noted receipt of several typographical corrections, indicated those corrections will be made, and invited members to let the reporters know of any other typographical corrections.

The minutes were approved unanimously on voice vote.

Judge Molloy asked Ms. Womeldorf to report on the Rules Office.

Ms. Womeldorf first drew attention to the minutes of the January meeting of the Standing Committee in the agenda book. At that meeting, the report from the Criminal Rules Committee consisted primarily of this Committee's long and thorough consideration of the cooperators issue, and the various rules provisions dealing with that issue. She noted that Judge Campbell had thanked the Reporters and members for their thorough and careful work on that issue. The Standing Committee was asked if it agreed with the Committee's recommendation not to go forward with any of those Rules amendments. Although there was no formal vote, the sense of the Standing Committee was agreement with this Committee's recommendation.

Ms. Womeldorf noted that the Report to the Judicial Conference in the agenda book included only information items, namely the complex criminal litigation manual, the cooperation material, and possible changes to Rule 32(e)(2).

Ms. Wilson drew the Committee's attention to the chart in the agenda book compiling relevant legislative activity and reviewed the legislation listed there. She informed the Committee of a communication from Senator Wyden's office, which had been active on the Rule 41 issues. They were contemplating suggesting an amendment to Rule 41 to require delayed notice to the target when the government obtains emails from an internet service provider. The

Rules Office provided the Senator's office with information on how to propose a rules change to the Committee, and we will have to see if anything develops.

Judge Molloy then asked Judge Kethledge, chair of the Rule 16 Subcommittee, to lead the discussion of the proposed amendment to Rule 16.1. Judge Kethledge noted that publication produced six comments, some suggesting changes. The Subcommittee met to discuss the comments and agreed on several changes to the proposed rule and note.

Two comments were concerned about districts where local rules have a shorter period of time for discovery than the rule provides for counsel's meeting. The Subcommittee had already included language in the Committee Note to address that concern: "The Rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure." Districts are able to tighten those timelines.

Judge Kethledge said the Department of Justice submitted a lengthy letter. The Department was concerned about a slight variation between the language in proposed subsection (b) and the language in Rule 16(d)(2)(A), because courts might read something into that variation. Seeing no substantive difference, the Subcommittee recommends that the language in proposed Rule 16.1 be modified to track the language in Rule 16.

The Department also suggested that the rule should say that the court must comply with Rule 16 and other applicable laws. The Subcommittee thought it was unnecessary to say that the court had to comply with some other law. If the premise of that change were correct, Judge Kethledge explained, it would be necessary to list all of the existing laws in every rule. The Department also wanted to revise the Committee Note adding fairly broad language to the effect that the rule does not change substantive discovery rules, the requirements of Jencks Act, or other acts. The Subcommittee modified the note in a more limited manner, stating that the rule "does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act." That seemed to assuage the Department's concerns.

Judge Kethledge noted that the Department was also concerned that the rule published for comment did not make it clear that the government's lawyer would not need to meet with a pro se defendant for these initial conferences. The style consultants proposed a very helpful clarification: "the attorney for the government and the defendant's attorney must confer."

Although the new rule would not require the government to meet with pro se defendants, the Subcommittee recognized the importance of the courts' obligation to ensure that pro se defendants get the discovery they are entitled to and the courts' power to regulate the process in cases with pro se defendants. To address this concern, the Subcommittee added the following language to the committee note: "However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure that such defendants have full access to discovery."

Other comments addressed issues the Subcommittee had already considered very carefully before the rule went out for comment. One suggested renumbering the rule, another adding that the parties have to confer in "good faith." The Subcommittee decided not to revisit those decisions.

Judge Kethledge concluded that the changes made by the Subcommittee after publication were basically modest tweaks.

Mr. Cronin asked if the section titled "Changes After Publication" was published along with the rule. Professor Beale responded that publication of this section is required.

Professor Beale commented that the style consultants had been very helpful on this rule, especially in clearing up the ambiguity in the published rule, which stated "the attorneys for the government and the defendant must confer." As the public comments noted, this could be read (though the Committee had not intended this) to require the government to confer with the defendant. Both the Department and the National Association of Criminal Defense Lawyers (NACDL) thought it was unclear. The government thought it should be clarified that there is no duty. NACDL thought it should be clarified, and that there should be an obligation to meet with pro se defendants. The Subcommittee discussed whether the government should meet with pro se defendants about discovery, and the consensus on the Subcommittee was that it would not be practical. Accordingly, the committee note says "For practical reasons," the rule does not require this. We would not want anyone to think that pro se defendants are not as important as any other defendants or do not need as much assistance and preparation before trial and discovery. But the Subcommittee did not think the two-week window for these discussions was going to be practical as an across-the-board rule.

One member suggested that the Committee should feel good about this rule. If he could change anything about the federal process he would enhance discovery. The proposed rule first came to the Committee with a highly prescriptive draft, which met with very strong opposition. Judge Kethledge found a solution to this complex problem that all could accept. It is a small step but important.

Professor Beale and Judge Kethledge noted that Judge Campbell had suggested that we hold a mini-conference, and that is where the solution emerged. When the Committee started we didn't have any idea that we would have a rule ready to be published in 2017, requiring only these minor tweaks after publication. The process worked really well. Thanks to the NACDL and New York Council of Defense Lawyers for getting this started.

Judge Molloy agreed that a great deal of this was based on an epiphany that arose from some very robust discussion at the mini-conference. It reflects how these Rules Committees work.

A motion to approve the Subcommittee's amended Rule and Committee Note for transmittal to the Standing Committee passed unanimously on voice vote.

Judge Molloy asked Judge Dever, Chair of the Rule 5 Subcommittee, to address the Committee on the pending proposals to Rules 5 of the 2254 and 2255 Rules.

Judge Dever summarized the status of the proposed amendments, which are a response to decisions of several district courts that Rule 5 allowed a judge to deny the opportunity to file some kind of reply. The proposed amendments were intended to make clear that, assuming the court did not dismiss the petition, once the government files a response, the inmate has a right to file a reply. After publication, the Committee received a few comments, including one that argued that the word "may" caused the problem. The proposed amendment persists in its use of "may," he said. The Subcommittee thought the proposed change makes clear the inmate has a right to file a reply. A number of courts have local rules that set deadlines for replies. Like the Rule 16.1 proposal, the amendment recognizes these existing local rules and seeks to avoid conflicts. It provides that the judge has to set the time to file, unless it is already set by local rule. The Subcommittee made one change in the committee note in response to a suggestion from NACDL. The new language states that if the court is setting a time for a reply, it can also provide notice of any other deadlines associated with that piece of the litigation. The Subcommittee unanimously supported this change to help clarify this very important issue. There are many pro se petitions under 2254 and 2255, and this takes into account the reality that many courts have local rules or standing orders that address these timing issues.

Professor Beale reminded the Committee that the proposal came from Judge Richard Wesley on the Standing Committee, who praised the Committee's proposed amendments at the last Standing Committee meeting. He said when a law clerk came to him, they were outraged that the petitioner or moving party had not been allowed to file a reply. So he sent the issue to us. It was not possible to demonstrate how many cases there were, because many of them are not recorded. Although many (including the style consultants) said "the rule is clear," demonstrably, it wasn't, not to the people who needed to know, including the district courts. So we will see if the amendments solve the problem. If the Rule was clear and the courts weren't reading it, perhaps this will provide more notice. She noted the style consultants had prohibited the use of "has a right to" or "is entitled to," because (in their view) "may" is clear.

Judge Molloy asked whether the change of "submit" to "file" had been approved.

Professor Beale answered yes, that there is no change to the text as published. The only change to what was published was the last sentence added to the committee note. This was responsive to NADCL's suggestion that there should be a change to Rule 4 adding that the court ought to give notice, and do it at a certain time. NACDL's suggestion fell outside of what had been published, and the Subcommittee thought it was not necessary. The Subcommittee thought, however, it would make sense to nod in the direction of a reminder that there should be notice. There may be some concern about who knows about the deadlines in some places, such as courts that handle timing with a standing order. Without republication we could not amend Rule 4, as NACDL had suggested. Nor, she said, should we be saying what judges have to tell these pro se parties in writing, when there are lots of things they ought to also be telling. It is a slippery slope.

Judge Molloy confirmed that the changes to Rule 5(d) and Rule 5(e) are identical.

A member raised a question about the additional sentence for the note. He agreed an addition to the note, rather than a change in the rule, was the right approach. But the proposed sentence, he said, seemed to imply that the court's order giving the time to file the reply will necessarily come when the court orders the response. Perhaps it should. But in some cases, the court might set the time to reply after the government files a motion to dismiss the petition or answers the petition.

Professor King stated that the Subcommittee did recognize that there might be instances where the time to file the reply to the answer or response would need to be decided after that response or answer was received. The Subcommittee's proposal can accommodate such cases. In such a case, if the time to reply had been set earlier, it could be modified. Moreover, the new sentence was not a command that judges must add a reference to the time to file a reply in the order requiring the government to file an answer or other pleading. It states only that if the court does so, it provides notice. The original suggestion included the contingent language "would" provide notice, which the Subcommittee deleted. The sentence was not intended to require the judge to do that. Rather, it is just a statement that when the judge does so, it gives notice.

The member asked if the sentence implies that the court's order would have to be simply at that one time, but not other times. Professor Beale responded that the Subcommittee didn't think so, but asked if the member had a suggestion for different language.

The member responded that the sentence could just refer to any order, any order providing a time to file a reply provides notice to all the parties.

Professor King noted that that formulation does not really respond to the concern that motivated the addition of the sentence. The concern was the one raised by NACDL that the petitioner or movant receive notice early on. So substituting "any order" doesn't do much more than the text of the rule that says to "set." It does suggest that the "set" take the form of an order, which is perhaps the member's intent, but it doesn't reflect what the Subcommittee was doing. The Committee could amend the language to do that, but it would have a different meaning.

The member indicated that answered his concern.

Motions to transmit the proposed Rules 5(d) and 5(e), with the amended Committee Notes, to the Standing Committee passed unanimously on voice vote.

Judge Molloy then turned to Rule 32(e), and asked the Reporters to introduce that issue.

Professor Beale stated that Judge Kaplan, the Chair of the Cooperator Subcommittee was not able to attend the meeting. In his absence, she would put a few things on the table for discussion. This proposal came from Judge Molloy. Probation officers in his district expressed concern that the rule at present directed them to give a copy of the presentence report (PSR) not only to defense counsel but also to the defendant. The concern was that this was closely related to the issues being considered by the Cooperators Subcommittee. Having possession of the PSR

can enhance the potential for coercion to show one's "papers," leading to the inference that those who won't show their "papers" have cooperated. Possession of the PSR is part of this mix of threats and harm to cooperators. The issue was discussed briefly at the Criminal Rules Committee Meeting in the fall and then sent to the Cooperators Subcommittee, which held a call to discuss these issues.

Rule 32(e)(2) is quite unusual in that copies of the PSR must go to the attorney for the government, to the defendant, and to defense counsel. It is the only place in the rules that Professor Beale could think of that says you have to give something to the defendant. And as the materials in the agenda book demonstrate, that was very deliberate. The 1983 Committee Note has italics – "*both* defendant *and* his counsel." The Committee thought this was the best way to correct errors in the PSR. Defendants know a lot more about some of the information in their PSRs than defense attorneys, and they really need time to look this over. So on the one hand there is an accuracy concern, and the Bureau of Prisons (BOP) recognizes that when the defendant is preparing for sentencing, he needs to have the PSR, and it is not contraband. The Task Force on Protecting Cooperators is not suggesting any changes to that BOP policy. But there is a concern that possession of the PSR may create a situation where threats and harms can be exacerbated, and we have a general system where material for represented defendants is served on counsel.

The Subcommittee did not reach agreement on whether it would be a good idea to move ahead with an amendment to the rule. Members debated whether an amendment is warranted, whether it would it solve the problem, and whether it would be a good idea to try to restrict the availability of PSR to a defendant in this period before a technological fix may come along. Eventually, kiosks could be available and defendants could have as much time as they want to review their own materials. Professor Beale noted that the defenders commented on how feasible it is to spend as much time as they would like going over the PSR face to face with their clients, and that practices seems to differ in various parts of the country.

The question before the Committee was whether a Subcommittee should be appointed to discuss whether and how to draft such an amendment.

Professor King added that those opposed to an amendment were convinced either that changing Rule 32 wouldn't make that much different in the defendant's access to the PSR, or that it was very important to ensure access by the defendant to the PSR and it didn't make sense to impede all defendants' ability to check the accuracy of their PSRs for the sake of a small segment that might be cooperating. The conversation also emphasized the relationship between counsel and client. Defense attorneys indicated that they would have to give the PSR to a client if the client asked. Given ethical rules, an amendment wouldn't move the ball in terms of protecting against the possession of the PSR as it might be intended to do. On the other side, judges did not want to have to deal with requests from prisoners for their PSRs, or have their clerk's staff deal with these requests. If the rule was clear, prisoners would know they could not write to the court or the clerk's office demanding copies of their PSRs. There really was no consensus.

Judge Molloy noted that in working on the Task Force with Judge St. Eve and the BOP, he learned what prisoners are actually doing in demanding that new prisoners post their papers. Coincident with that work, a defendant in Judge Molloy's district demanded his copy of his PSR, and the Probation Officer brought this to Judge Molloy's attention. He said that for years he had been overlooking that the rule said the Probation Officer was required to give a copy of the report to the defendant. He noted that requirement is honored in the breach. He didn't think many districts give a copy of the PSR to the defendant. If the defendant has a right under the rule to have that PSR, he wondered, can the BOP make it contraband? His suggestion was to amend the rule to remove the requirement of giving the PSR directly to the defendant. After a good conversation, the Subcommittee rejected the idea. Professor Beale noted that the Subcommittee was split 50-50. If a consensus was needed, that wasn't enough.

Judge Molloy asked members to give their thoughts.

One member said she believed that defense attorneys have to be able to give the PSR to clients. One reason is that the client needs to be able to review it and think about it. If it is a long PSR and the member does not have four hours to sit down and go through it in person, she may give it to the defendant, have him look it over, and arrange for a phone call in a few days, or make a car trip back to see him. Ethics rules also affect this. Every jurisdiction in the country except Florida says that attorney files belong to the client, and the client has the right to see his file. Defense counsel have the PSR, she said, and we have to put it into our files, which belong to the client. There are many situations in which defense counsel needs to provide the PSR to the client. She has had clients who don't speak English, and has had to send an interpreter. Maybe she can't go because she is in trial. Certainly by the time you are doing pro se litigation in habeas, or 2255, you may want the PSR. All of these things make it really problematic if the client is not allowed to have the PSR. She liked the idea of a kiosk, a really smart idea for a lot of documentation. But a very small minority of her defendants are in federal detention centers. Most of them are in state jails. The ability of clients to access electronic evidence at a kiosk would be easy in federal detention centers but not in jails.

Judge St. Eve said she had been unable to join the Subcommittee's conference call as she was in trial. She said the Task Force's work with cooperators found that the threats to cooperators began once they were designated and sent to a designated facility, not during presentence detention. There may be some issues there, but what the Task Force found was that these threats occurred when cooperators were at the higher security facilities. She suggested that Rule 32(e)(2) is really just for the presentencing stage. BOP makes a PSR contraband once an inmate is designated, not at this prior presentencing stage. She urged the Committee to see what happens with the BOP recommendations before looking into this further. One of the BOP recommendations coming out of the Task Force is to make sure that once a defendant leaves a pretrial facility and is designated and sent to where he is going to serve his time, BOP staff will go through whatever that defendant will take with him, to make sure that he is not taking the PSR or other documents. Once he arrives, they will check whatever the inmate brings with him to make sure he is not bringing the PSR or other documents. The PSR will be considered

contraband at that point. The Task Force did not hear about problems at these pretrial facilities with cooperator status, or pressure on inmates to show the papers. She recommended tabling this until we know which of the Task Force recommendations go through, and then wait a little to see if there is any improvement. If there is still a problem maybe we can go back and look at this.

A member made a motion to table, following Judge St. Eve's suggestion.

Judge Molloy said his only concern is that the language in the rule is mandatory and we are not following that rule. He saw something that said 61% of the probation officers give PSRs to the defense lawyer, who in turn provide them to their clients. If the rule is honored only in the breach by most districts, then the Committee should address that issue.

Judge St. Eve stated she thought that was a separate concern from the cooperator issue. Whether defendants are getting their PSRs in the first instance is separate from whether they should, or should not, be getting them.

A member asked if the rule gives a time frame during which the defendant is entitled to keep the PSR. Professor Beale said the Rule states when he must receive it, but it does not specify how long he can keep it. He must receive it within 35 days.

A member asked if there is an implication in the rule that the defendant must be allowed to keep a copy of the report on his or her person. Professor King noted that years ago the rule said that the defense had to return the physical copy of the PSR. That was later deleted.

Professor Beale added that the rule does not prohibit BOP from having rules about what you can bring into prison after you have been designated. The focus of Rule 32 is to help people prepare for sentencing. There is no inconsistency with separate rules by the BOP specifying what you are allowed to bring with you after you have been designated.

The member said he could imagine the PSR being helpful to the defendant if the case was on appeal. Professor Beale agreed and mentioned that there is some discussion of that in the memo. Also, 2255 movants may also need PSRs, and they may make FOIA requests to get them. Courts have been asked to allow them when they are trying to do some kind of motion or on appeal. But Rule 32 doesn't really speak to those situations one way or the other. Courts are dealing with those issues, as the memo reports. However, you might conclude there would not be much point to limiting possession up front if courts say you have to be able to have it later.

Professor King stated that the rule is really about notice before sentencing.

The member asked if this issue about whether BOP would make this contraband remained on the Task Force agenda.

Judge St. Eve stated that PSRs are already contraband, after sentencing once a defendant has been designated. A defendant can still get *access* to his PSR at the BOP facility. It is just kept in the defendant's file. What he cannot do is take it back to his cell with him, or have copies. So defendants still have access to the PSR, for court purposes, though it is contraband in the cell. And that has been in place since the mid-1990s.

Judge Campbell noted that in his district, what typically happens is the probation officer sends the report to the defense attorney and the attorney sends it to the defendant. If we change this rule, the defendant could still get the PSR from the defense attorney. So it does not seem like a very efficient way to try to solve the problem of a defendant having the PSR in a facility. In addition, in his district (and he suspected in others), the PSR does not say anything about cooperation. It is deliberately left out of the PSR, and dealt with in a separate document. So you are not really tipping anybody off to cooperation by anything that is in the PSR. He is not sure amending Rule 32 is an efficient way to address the problem the Task Force is trying to solve.

Professor Beale stated that there is quite a bit of variation nationwide on how PSRs are provided to prisoners. There are district to district differences, and in some cases differences judge to judge. When the Task Force met with defense lawyers in January, she asked some of them what happens with this in their districts. Each had a different way of doing this. One said probation officers just ask us: "Do you want it sent directly to the defendant or do you want it to come to you?," so they ask the client. This person also said the sex offenders do not want it to come to them, but a lot of others want it to come directly to them. It certainly is not being done exactly as written in all jurisdictions. But as Judge St. Eve said, that was not the question that prompted this initial review by the Subcommittee.

A member said that the motivation for this proposal was safety of cooperators, which is being looked at by the Task Force. He renewed the motion to table to see what the Task Force does.

Judge Molloy asked if there are other places in the rule where it says "must," the Probation Officer "must" give, not may give, or should give.

Professor Beale said if the question was whether there are other places where the rules say must give to the defendant, it is the only one she knew of, and it was deliberate. There were italics on that in the Committee Note. The information in the PSR is something defendants know a lot about: their life and what they have done.

Professor Coquillette also said he could not think of any other situation where a rule said something must be provided to the defendant as well as the lawyer.

Professor King noted Rule 11 does provide the court must address the defendant personally, not just the lawyer, but that does not involve a document.

A member asked if the Task Force thinks that the current rule would preclude a procedure that would provide, for example, that the defendant must be given a copy of the PSR but that the defendant need not be allowed to retain a copy.

Judge St. Eve answered that the way the rule is written now, the defendant can retain that copy in detention in the pretrial facility. Once the defendant is designated after sentencing, the BOP rules kick in when he arrives at his designated facility, and the PSR becomes contraband. So the defendant cannot retain a copy of the PSR in his cell. But there is a file on the defendant,

and if he needs to see the PSR, he can go to the special room where his file is and look at the PSR.

Professor Beale asked Judge St. Eve if it was correct that under the BOP's rule, in the period before he is designated, he may have his paper copy in his own cell, and that the Task Force does not suggest that that should change.

Judge St. Eve answered that was correct, the harm to cooperators, based on what we investigated, is coming once the defendant is designated and arrives at the designated facility.

Professor Beale said this reflected that they have more need to have the PSR in that predesignation period, and there is less danger. Judge St. Eve agreed.

The member renewed his motion to table once more, and it was seconded.

The motion to table any change to Rule 32(e)(2) until the Committee learns how BOP responds to the recommendations of the Task Force on Protecting Cooperators passed unanimously by voice vote.

After a short break, the Committee turned to a report on the Task Force by Judge St. Eve. She reported that the Task Force is completing its work, and has divided its report into two parts: recommendations for the BOP and everything else. She said they wanted to get going on the BOP recommendations because it would take some time for them to work their way through the BOP. That report is complete and on Jim Duff's desk to go to the Director of the BOP. There are 18 separate recommendations for the BOP to put in place to help protect cooperators. The second part, the rest of the report, is still being completed. Judge St. Eve hoped that the report would be completed before the Committee's next meeting. It will likely come back to a Committee, possibly the Committee on Court Administration and Case Management (CACM), possibly Criminal Rules, for some implementation work. She thought changes to CM/ECF were among the recommendations likely to be approved, and that would have to go through some committee. She believed that part of the report would be finished before the Committee's next meeting.

Judge Molloy asked if anyone had any questions.

Professor Beale asked if the Task Force has accepted the idea that there will be no slate of rules proposed for the CACM guidance. Judge St. Eve answered that was correct.

Professor King asked if it was possible that the second part of the report will include something for this Committee to work on. Judge St. Eve said she was not sure, because she was not sure how things are divided jurisdictionally. One aspect that the Task Force is going to recommend is that the Federal Judicial Center (FJC) conduct education for judges on these issues. She was not sure whether that would come back through the Criminal Rules Committee, or go directly to the FJC, or to the Criminal Law Committee, or to the Standing Committee. But she did not expect it to come back for proposed rules.

Professor Beale asked if she was able to say whether there are going to be any proposed limitations on remote electronic access via CM/ECF. Judge St. Eve said that there is a proposal in this CM/ECF part that is not final. There is a proposal to put certain limitations on CM/ECF. The PSF (plea and sentence folder) approach has been rejected.

Judge Molloy then turned to the next item on the agenda. He noted the Committee received suggestions from both Judge Jed Rakoff and Judge Paul Grimm regarding the disclosure of expert opinions and how detailed it might be. He commented that it was very interesting to read the history of the discovery rules, and to learn that in 1992 or 93 when the both the Civil Rules and Criminal Rule 16 were amended the Committee originally planned to require the same kind of disclosure for experts in criminal cases and civil cases. But late in the process DOJ objected, and Rule 16 was scaled back after Judge Hodges, the chair of the Criminal Rules Committee, broke a tie vote. Judge Molloy asked Judge Kethledge to lead the discussion.

Judge Kethledge reported that the Rule 16 Subcommittee had a call, and there was a consensus in favor of having the Subcommittee consider the idea of making the expert disclosures under the criminal rules more like those under Civil Rule 26.

But there was a difference of opinion about timing of when to move forward. On the one hand, there was the sense that some innocent people might be convicted because of the inadequate disclosure the government makes particularly regarding forensic testimony. A forthcoming article by Professor McDiarmid details some of those cases, and some members felt that is an urgent problem on which we should move as quickly as we can. On the other hand, the Department has adopted a new policy recommended by the national forensic commission, which Judge Rakoff chaired, that more or less provides the information required by the civil rules, in cases involving forensic experts. Judge Kethledge understood from the call that the policy is rolling out right now, the AUSAs have been trained, and they are supposed to be making those disclosures in cases that involve experts in federal court. His sense was that the policy makes the situation less urgent. He thought the issue probably would require a mini-conference, because it is so fact intensive, and we need practitioners to tell us what the problems and needs are, and how best to address those. He thought that a mini-conference would probably be a lot more fruitful if it took place after the DOJ policy has been in place for some significant period of time, at the end of the year or the beginning of next year. Professor McDiarmid's article proposed something quite different from what was proposed by Judges Rakoff and Grimm. It is not just mirroring Rule 26, but instead calls for information more specific to criminal cases, such as chains of custody, bench memos, and more. He thought the Committee would only get one shot at a mini-conference, and would get the most out of it if members could see if the policy mimicking Rule 26 is working well, or is it pointed in the wrong direction.

A member of the Subcommittee stated that he had been in direct contact with the Innocence Project, and had spoken to the lead scientist and Peter Neufeld, one of the Project's founders. He had also had some conversations with Mr. Wroblewski. In his view, waiting to see whether the DOJ's protocols are properly used is not acceptable. It will result in innocent people

being convicted, bad science being tendered into evidence, and the admission of testimony that is not supported by scientific practices. He read that in at least one area of forensic evidence, something like 10% of science is mistaken, and none of it is discovered until after the defendant is convicted. That's not acceptable. It is complacent to say, "the DOJ is taking care of it." We may not be able to formulate a working rule until after we see the effect of DOJ policies, but there are other things we should do now. We should have a mini-conference to learn what defense lawyers say they need.

The member observed that many of the scientists who are giving the opinions are not federal scientists, they are not from the FBI, they are not from accredited labs, and there are no reports. These experts are from state labs, and from independent places. The result is that defendants do not know what the expert will testify to at trial. And defendants do not know what the basis of those reports are, notwithstanding Rule 16. He did not understand why there is that gap, because Rule 16 does say that on request, the government should give a written report. But he was told the gap is real, and indeed based on the McDiarmid article it is an unacceptable margin of error. He said the Subcommittee ought to canvas the legal aid, federal defender, and private practice lawyers who deal with expert testimony and get that done quickly. It ought to canvas the scientists to get an understanding of just what the labs do, whether they are federal, state, or private. We need to know whether a rule can solve the problem. The McDiarmid article identifies some issues that have to do with fraud. If a scientist is purposely lying about the evidence or conclusion reached, no rule is going to solve that problem. But in Peter Neufeld's view, the problem is primarily that scientists get on the witness stand and exaggerate what the science says in their testimony, and they make mistakes. Because there is no prior written statement of what the scientist will say, which would bind the scientist to that testimony, there is no cross examination available. Exaggerations lead the jury to conclude there is evidence when there isn't.

The member said that one of the issues the Committee will have to confront is when the rule kicks in. He said he understood from Jonathan Wroblewski that the current federal labs issue reports. The government does not want those labs to have to write a second report. Maybe the existing report is sufficient for *Brady* purposes and other purposes, prior to a plea if you get whatever there is in the open file. But maybe more is required before trial. But the member doesn't deal with this type of issue himself, and he wanted to know what the people who do deal with it need and when they need it. Another thing that has to be addressed in the mini-conferences and in drafting a rule is the form of discovery. And obviously we are going to have to get input from the DOJ before drafting any rule.

But it is only after we do all that work that we will see whether or not what is being done by the DOJ is sufficient. Otherwise it will be, "we're doing this and it's OK." But there has already been a change of the administration which has resulted in a change of policy affecting scientific evidence on a related issue concerning uniform language testimony and reports about what the scientist can say. That is not a discovery issue; it has to do more with can a scientist evaluate and say this is a match or can he only say this is a 95% chance that this fingerprint

might be similar to the one that is left at the scene. The need for uniform language arises from learning that for decades, the FBI was testifying that the hair sample identified the defendant. And for decades, the FBI was testifying that a bullet could be traced to a particular source, and it turns out that is not true. Hair follicles do not correspond adequately, and bullets cannot be traced properly to their sources. And these examples showed the need for some agreement on how far scientists could testify to things like fingerprints. Apparently, the way that process had been going under the prior administration is very different from the way that is going now. Peter Neufeld told him there had been a transparent process, and the scientific community had access to what the Department of Justice was doing in formulating these rules. But Neufeld said it no longer does. There does appear to have been a change in policy about how to formulate those rules. Any change in administration means that a policy of training prosecutors to do something that does not have the force of law. It can be changed. He did not think any of the judges in the room want to tolerate a situation where DOJ decides what the discovery rule will be. It ought to be the court, and you need a rule for that. We should not wait a substantial amount of time (whether it be one year or eighteen months) to get started on a problem this urgent, where there innocent people being convicted, where there is documented testimony that is incorrect being admitted at trial and being used.

Judge Kethledge noted that he was not advocating that the Committee limit its enquiry to whether the DOJ protocol by itself will be an adequate solution, but he did think the Committee ought to get the benefit of that policy empirically in crafting a rules based solution. He noted that the scandals that are described in the McDiarmid article are basically state scandals. The real five alarm fire problems that she is describing are happening in state courts, such as the Detroit and West Virginia labs. He was not aware of anything like that in federal court. The Committee's jurisdiction is federal. DOJ has told us that in cases involving forensic experts, they are going to mimic disclosure under Civil Rule 26 now going forward. That is a meaningful stop gap while potentially we get information about how that approach works.

The member responded that the problem is that state labs frequently offer evidence in federal court. And private labs frequently offer evidence in federal court. This requires some oversight.

Another member agreed, saying this really does need to be addressed. She applauded what DOJ is doing, and she was glad to hear the Subcommittee is looking at moving forward. The problem in relying on DOJ's proposed fix, is that it is subject to the DOJ's administration, and the effectiveness of implementation. She gave two examples. After Senator Ted Stevens' prosecution, all the DOJ lawyers were trained about giving *Brady*, but the prosecution was still withholding *Brady* in the Pulse nightclub shooting case. We saw this with the ESI protocol, too. Everyone was trained and taught to use it, but we are still hearing "What protocol?" So it's the effectiveness of implementing that concerned her. She liked the idea of having smaller meetings where we can get more information. In addition to tracking what is going on in DOJ and how effective it is, we should also consider a number of things that are not in the DOJ's policy. She applauded the idea of having another mini-conference or maybe two, and the idea of bringing in

the scientific community as well as the defense. It would be a good idea to bring in people from the labs to ask them whether they can you provide these reports, and how much trouble that would be. So it is important, and she hoped the Committee would go forward with it actively and promptly.

Professor Coquillette added that the Evidence Rules Committee sponsored a President's Council of Advisors on Science and Technology (PCAST) conference at Boston College involving the scientific community. If the Criminal Rules Committee goes ahead with a mini-conference, it would find that some of the fundamental work has already been done by the Evidence Rules Committee.

Mr. Cronin said the DOJ agrees this is an important issue that needs to be addressed. The guidance – which DOJ put out about a year ago, and trained prosecutors on through 2017 – will go a long way whether as a stop gap or permanent solution. The guidance on forensics covers DNA testing, chemists, and ballistics testing, and goes much farther than Rule 16. It provides very clear and explicit guidance to the AUSAs. Other sorts of guidance may have ambiguity that could confuse individual prosecutors, but there is really no ambiguity here. It is very explicit as to what prosecutors should disclose. The forensic expert's laboratory report explains the scope of the assignment, the evidence tested, the means and methodology, and conclusions drawn. It requires a written summary of what the testimony will be, and provides for an open case file for the expert and also disclosure of the expert's qualifications. In terms of clear and explicit guidance, and ensuring that the prosecutors are aware of that guidance, DOJ has moved considerably.

Mr. Cronin could not say how many state or private labs are involved in federal cases. As a prosecutor in New York for a decade he dealt only with federal labs, which were accredited. There may have been a different practice in other districts, but his sense was that the majority if not the overwhelming majority of labs you are dealing with here would be federal, accredited labs.

Mr. Cronin said DOJ welcomes anything it can do to ensure that we are putting defendants in a fair position to be able to address the expert testimony coming in. It is the most important testimony in many of these cases, which is why DOJ adopted the guidance.

Judge Molloy asked if there was any auditing of individual prosecutors to find out if they are following the guidance. It is one thing to say this is what you should do, it is another thing to find out if they are doing it. Mr. Cronin said he was not aware of any specific auditing, but could check. He thought the way it probably works out in practice is if a prosecutor is not providing what the guidance requires, that is going to be made known to the supervisor very quickly, and resolved very quickly. He was not aware of any nationwide audit. The guidance is now accessible on line, as part of the United States Attorney's Manual (USAM).

Professor Beale noted that the McDiarmid article has been updated, so when it comes out in the *Indiana Law Review* it will state that the Guidance is in the USAM.

Mr. Wroblewski acknowledged that members had made many very good points. He stressed that it is very important to distinguish between two related issues, one of which is very controversial. There is tremendous controversy about what only government experts can say. The PCAST report, which Professor Coquillette mentioned, suggests there should be no expert testimony unless a particular discipline has "validated" the statistical information that can clearly identify the likelihood of a match between a particular piece of evidence and a known piece of evidence. DOJ disagrees with that very, very strongly. There has been a lot of give and take about that at multiple conferences, and precisely what language our experts should be able to use when that statistical evidence is not available is very controversial. DOJ is undertaking an exercise called the "Uniform Language for Testimony and Reports" to try to address that controversy and ensure that that information is, first of all, peer reviewed, and that our experts testify only as far as the science permits. But there's controversy about that. For example should there be any expert testimony in a case involving a shoe print. The PCAST report suggests there should be no expert testimony in such a case. The Department disagrees. Even though you cannot identify precisely how many Nike size nines are available in a particular area and therefore the likelihood that a particular shoe was associated with the print, we still think the experts can add something. The question is how far can they go, and that's a controversial subject.

Mr. Wroblewski emphasized that is not what this Committee is dealing with, and it is not what Judge Grimm and Judge Rakoff are asking the Committee to address. They are asking the Committee about discovery. On that, the government can't give you more than it has. The DOJ policy is open file, giving the defense everything that we have, and a summary of what the witnesses are going to say. And of course part of accreditation is to ensure that they have reports and that the reports indicate what they will say. Again what the language they can use in any particular discipline is very much up for debate. But in terms of discovery, there is no risk in delaying consideration for a year or two. And there is tremendous benefit. When we bring people in, we ask, "Is this the kind of discovery process that should be codified within the rules?" There is no way they're going to be able to know yet. Government experts testify 100 or 200 times a year nationwide. Remember there are less than two thousand trials in any year, and experts are not testifying in most of them. So to get a read on how the DOJ policy is working is going to require some time. It is not going to be particularly useful to bring people in the few couple of months and ask them how this is going, because no one is going to have experience. On discovery in particular, it would benefit the Committee to delay a little bit.

This whole issue is going to be quite complicated, Mr. Wroblewski said, because there are forensic experts, for which one set of rules will apply, and then there are other kinds of experts, for which he believes a different set of rules should apply. For example, when an expert is brought in to testify to the amount of loss in a fraud on the market case, would you want the kind of report that is suggested and required by the Civil Rules? In that context, DOJ does not think that would be appropriate. There are other experts, such as doctors who treat victims of sexual assault, where there are different concerns, such as privacy. This will be a complicated

exercise. But in terms of discovery in forensic cases, he thought the Committee would benefit from just a little bit of time to see how the new guidance plays out

Another member noted he had a 2255 where the defendant disclosed the expert and the government asked for a Rule 26(a)(2)(B) report from the defendant. It is actually up in the air under 2255, because Rule 12 says both the civil and criminal rules apply unless the rules say otherwise. So sometimes the shoe will be on the other foot in terms of whether the defendant or the government wants more disclosure. He agreed with the comments from the government representatives. The Committee needs to distinguish between the Evidence Rule 702 issues with junk science and Criminal Rule 16 disclosure issues. He would be interested in hearing about how can we craft the criminal rules to allow the defendant or the government to make the case to the judge that whatever information is being disclosed does not satisfy the requirements of Evidence Rules 702, 703, or 704. He asked whether the defense has been challenging government disclosures under Rule 16(a)(1)(g) on the ground that the disclosure does not sufficiently provide the basis or reasons for the opinion. Maybe it would be sufficient if the government discloses an expert and does not provide sufficient information for the defendant to move to strike the expert under 16(a)(1)(g) on the ground that the government didn't provide sufficient explanation of bases and reasons for the opinion. Or maybe more is required, something along the lines of Civil Rule 26. A mini-conference would be in order, he said, and he was leaning in the direction of allowing the current DOJ policy to play out for several months or a year or so, because that will give us data points where the disclosure is more like Civil Rule 26, because right now our data will be primarily under Rule 16. So it would give us some data that would probably be helpful in deciding which disclosure regime would be more helpful to allow for challenge.

Another member also agreed a mini-conference is needed, but was also concerned about the timing. He thought probably be something less than a year, depending upon what information DOJ has about how frequently the policy has been used. Maybe a little more assurance about people using it and how that is monitored.

Judge St. Eve noted that the DOJ guideline covers forensic evidence only, and there are many more types of experts that come in these cases. She thought a mini-conference was a great idea, but it should not be limited to just forensic evidence, it should cover the gamut. She'd had a lot of issues with late disclosure. If the parties want to come in on a late *Daubert* challenge, it fouls up the trial date. Accordingly, she recommended putting the timing of disclosure on the agenda for the mini-conference.

Another member agreed with the need to distinguish between the discovery issue, including the timing, and the separate issue of how judges are applying Evidence Rules 702 to 704. Based on his experience in many trials, there is an important issue of the adequacy of discovery to provide sufficient notice for a *Daubert* motion that we can deal with before trial. This is critical to the defense, and also when the government seeks to exclude defense experts. It would be helpful to put off a mini-conference until the end of the year, if DOJ could gather information about how many cases are getting forensic testimony admitted, and how many other

experts are testifying, like an agent who interprets wiretaps and says this is drug code language and gets qualified. It would provide much better sense about crafting a discovery related rule and seeing how that is being implemented. And then there is a whole separate issue under the evidence rule. There are some egregious errors, a lot of them on 2254s where the state court judge lets somebody testify to 100% certainty this bite mark matches, and the science is just doesn't support that at all. Discovery rules will help attorneys bring a timely *Daubert* motions, saying this is junk science, don't let it in. Even if they don't keep it out, it would be more akin to civil cases where *Daubert* is where the bulk of time is spent, and then a lot of trials go away because of that. But again gathering that information over some period of time would help us.

Another member noted that the question is fundamentally a discovery question. State labs are a problem, but that does not seem that that is the issue on the table. A mini-conference is a good idea but having the DOJ's experience, even though it is just the forensic evidence, would be helpful.

Another member agreed it is an important issue, which is not going away, and stated that he supported one or more mini-conferences. If there is any disagreement, he thought it was about when rather than what we should be looking at. There are a lot of pieces to this large and complicated puzzle. He would like to start as soon as possible and do what can be done now, realizing that important ingredients may be informed by the DOJ guidance. Are there some discrete issues, or some ground work that an initial mini-conference could identify, that we could get started on? The Justice Department guidance is limited to forensics, but that is only part of the universe. Can we get started on the other part of the universe?

Another member indicated his preference to try a mini-conference sooner rather than later. This has the feel of a complicated problem, and after mini-conferences in the past we have usually emerged with a much better sense of the scope of the problem and what the options are.

A member noted the general agreement on the desirability of having a mini-conference, and suggested there might also be other sources of information, such as an FJC judicial survey to help define the issue to address, allowing the Committee to learn what judges who are hearing these cases consider to be the scope of the problem. A survey might also provide some information about the timing of mini-conference. It would also give a point of reference of where things are versus where they might be under the new policies. It might show that there is real progress or that there is no progress, that AUSAs are not getting the information.

Judge Molloy asked about the interaction between the Speedy Trial Act (STA) and any change in the Rule 16 that would require disclosure like the Civil Rules. He noted a study that revealed every continuance causes the cost of paying out CJA lawyer to go up. When you get four continuances, you almost double the cost of the defense. It seems like you have the obligation to disclose, but then the defense is put in the position where it needs to get an expert. He wanted to know if the government had given any thought to the interplay between the STA and what might come down in terms of the change in discovery rule.

Mr. Cronin answered that DOJ had not thought much about the implication of the STA in this context. He noted the application of the Act varies considerably from district to district. It is now very important from the prosecution side that the obligation be reciprocal. It may have the impact of moving a lot of this much farther up. It would probably depend on the district how much impact it would have under the STA.

Mr. Cronin thought DOJ would be able to get statistics as to number of times forensic expert testimony has been received since its guidance came out. They have been keeping track of that. A complication will be there is no one size fits all for experts. The government and the defense offer a large number and variety of experts, everything from a drug agent testifying about the movement of cocaine from Colombia, to experts in organized crime gangs talking about their operations, to interpreters providing translations. So being asked to deal with the different varieties of expert testimony will be an added complication.

In response to the earlier question about motions challenging disclosure under Rule 16, in his last job before coming to Main Justice Mr. Cronin supervised a terrorism case in SDNY and saw a lot of motions saying the discovery had not provided enough information to allow the defense to cross examine the expert. If the motion was made well enough in advance of trial, the judges generally granted the motion and ordered more disclosure or denied the motion. But on the eve of trial, if more discovery would delay the trial, the judge would not allow the expert to testify because the disclosure was not enough and would prejudice the relevant party.

Judge Campbell followed up on the idea about a survey and asked if there a way to survey the federal public defenders in advance of the mini-conference, and maybe go to U.S. Attorneys' offices around the country to try to collect some information about what kind of experiences people are having with disclosures.

A member responded that a survey of defenders is possible, they are all on listservs and might be good to try to do that to get some information. It would also be helpful to survey panel lawyers in every district.

Judge Campbell emphasized it is important to keep in mind the different kinds of expert disclosures that are in Rule 26 of the Civil Rules. Under Rule 26(a) there are three kinds of expert disclosures. Rule 26(a)(2)(A) just requires disclosure of the expert's identity. Two different regimes govern what the party has to disclose about what the party's expert will say. For specially retained experts, there is 26(a)(2)(B) report; he thought that was what Judges Grimm and Rakoff are talking about. But if experts are not specially retained to testify, Rule 26(a)(2)(C) requires only what Criminal Rule 16 requires: disclosure of the subjects and the substance of the testimony. And that's what applies to in-house people testifying, treating physicians, or police officers, people who weren't retained but have some expertise to bring to the case. That's nothing like the report requirement that is being spoken of. If the Committee is going to pursue a Rule 26(a)(2)(B) type report, it is important to recognize how extensive it is in the civil rules. In the 1993 amendments when that was adopted, the Committee made clear in the note what exactly was required. The expert must prepare a detailed and complete written report

stating the testimony the witness is expected to present during direct examination together with the reasons therefore. It is supposed to be almost a recitation of the expert's testimony. The note goes on to say, if the experts do this you don't even need to depose them. Because you know everything they will say at trial. There are a lot of trial judges who will have the report with them during the testimony, and if there is an objection they will ask the lawyer to show them where that is in the report. If it is not in the report, the expert will not be permitted to testify to it. You even have to disclose the exhibits the expert will use ahead of time. He didn't know if Judge Grimm and Judge Rakoff are suggesting that level of detail be adopted for experts in criminal cases, or whether they are just asking for a more robust report. That is a distinction to keep in mind. And Civil Rule 37 says if you don't disclose what you are required to disclose under Rule 26(a), you can't use it at trial. So the consequence of failing to put a subtopic in the report is the expert cannot testify about that subtopic at trial. It is not clear if we are talking about getting to that level of detail for retained and non-retained experts in criminal cases, or whether we are just talking about something more robust.

Mr. Wroblewski said that was precisely what was discussed when the National Commission on Forensic Science issued its recommendation. DOJ's guidance based on the Commission's recommendations does not track Civil Rule 26 precisely because of the federal forensic lab administrators' fear that it would not be good enough to have the forensic report required by any accredited lab, and not good enough to open the file. Writing a report that is the equivalent of a deposition would be immensely burdensome. It is not 100% clear whether our forensic experts would fall into that category or the other category with the summary. So if you look at DOJ's guidance, it does not precisely track Civil Rule 26. It goes beyond it in allowing an examination of everything in the file. And it cuts a little bit short by requiring the summary that is in Criminal Rule 16, rather than the kind of very, very detailed report that is required in at least one category of Civil Rule 26. This is precisely the concern that DOJ has about a rule that would tremendously burden an already overwhelmed forensic lab system.

Professor Coquillette said that when the scientists saw this recommendation in Civil Rule 26, they commented that the word "complete," looked like an unnecessary word we should omit. They did not understand the whole thrust of the committee note, that the complete report is supposed to be almost a verbatim statement of testimony. He also noted that because of these detailed expert reports, the civil rules adopted a revised work product approach to what a party has to disclose in terms of the lawyers' communications with the experts and draft reports. They were trying to eliminate a lot of unnecessary discovery. The amendment is now in Rule 26(b)(4). This was an outgrowth of the complete disclosure requirement of Rule 26(a). He urged the Committee to keep in mind some of the details in Rule 26 and consider whether we should incorporate that level of detail into the criminal rules.

Professor Beale added that when the parallel amendments were originally proposed in the 1990s, there were some negative comments from the defense bar focusing on the reciprocal nature of the obligations, saying the defense could not afford to and did not want to have to make these disclosures. The further you go, the more it is going to cut both ways. On a potential

survey, she asked Ms. Hooper if FJC could help write the questions and Ms. Hooper said absolutely.

Another member suggested reaching out to NACDL as well.

Judge Kethledge expressed the view that there should only be one mini-conference rather than several, to avoid compartmentalizing different experts and to allow the Committee to talk to people on both sides.

Judge Molloy expressed support for a mini-conference and said he would work with Judge Kethledge and reporters and lay out a plan of attack. Timing is a question. Some members felt this was an important issue the Committee should begin work on immediately, but others wanted to know how the DOJ memo is being implemented and if there are any problems. He also noted the concern that Rule 26 is not just a blanket rule, there are different types of experts.

Judge Molloy then asked Professor Beale to present the new rules suggestions.

Professor Beale drew the Committee's attention to the brief descriptions in the agenda book and the email submissions. Ms. Albanese wants a uniform set of national procedural rules. Even if this was a good idea that is not within our Committee's authority. Mr. Ahern also is asking for some things that we cannot really provide. He wants a procedure that would allow small businesses to collect restitution. That does not appear to fall within the jurisdiction of our Committee. We were consulted by the Rules Committee Staff on whether to list these as suggestions. And we did because it is respectful to do that, whether or not on their face they appeared to fall within our jurisdiction.

Judge Molloy asked if anyone on the Committee was interested in pursuing either of these suggestions, and no one was. He asked Professor Beale to turn to the next proposal on work product.

Professor Beale stated that Mr. Blasie wrote to suggest that the relationship between *Hickman v. Taylor* and rules is very unclear, and he suggested that the rules should clearly codify all aspects of work product production. The civil and criminal rules should be reconsidered together, he argued, and a very comprehensive review undertaken. He set out his views at some length in a law review article. Because he is seeking a comprehensive review, Professor Beale reached out to the reporters for the Civil and Evidence Rules Committees. They were not enthusiastic, and did not favor gearing up for a major cross-committee project on this topic. Professors Beale and King agreed.

No member responded to Judge Molloy's invitation to discuss or pursue this further.

A motion was made to remove all three suggestions from the Committee's agenda. It was seconded and passed unanimously by voice vote.

Judge Molloy then turned to the report from the Rules Committee Staff.

Ms. Womeldorf noted that Rules 12.4, 45, and 49 are pending before the Supreme Court. If they are sent to Congress and Congress takes no action, they will become law as of December 1 of this year.

Judge Molloy reminded the Committee that the October 2018 Committee meeting will be held in Nashville, at Vanderbilt. He thanked the departing members and Reporter Daniel Coquillette for their service.

The meeting was adjourned.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12, 2018 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee" or "Committee") held its spring meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12, 2018. The following members participated:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Elizabeth J. Shapiro, Esq.*
Judge Amy St. Eve
Judge Srikanth Srinivasan
Judge Jack Zouhary

The advisory committees were represented by their chairs and reporters:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Incoming Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Bridget M. Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Frances F. Skillman	Paralegal Specialist, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He apologized to any Washington Capitals fans who would miss the Stanley Cup victory parade in D.C. because of the meeting.

He welcomed Judge Dennis Dow of the U.S. Bankruptcy Court for the Western District of Missouri, who will be the Chair of the Advisory Committee on Bankruptcy Rules beginning October 1, 2018. Because the current Chair, Judge Sandra Segal Ikuta, could not attend the meeting, Judge Dow is attending in her place. Judge Campbell also welcomed Professor Ed Hartnett who was recently appointed as Reporter to the Advisory Committee on Appellate Rules. He also noted that Chief Justice Roberts reappointed Judges Bates and Molloy as Chairs of their respective Advisory Committees for another year. Judge St. Eve was recently appointed to the U.S. Court of Appeals for the Seventh Circuit, and although Director Duff appointed Judge St. Eve to the Judicial Conference Committee on the Budget, Judge St. Eve graciously agreed to serve her remaining term on the Standing Committee.

Judge Campbell remarked that Judge Zouhary's tenure on the Standing Committee ends on September 30, 2018. Judge Zouhary will continue to help with the pilot projects going forward. He thanked Judge Zouhary for his service, noting that he is an innovator in district court case management.

In addition, Judge Campbell lamented the passing of Professor Geoffrey C. Hazard, Jr., a longtime member of and consultant to the Standing Committee. Professor Hazard passed shortly after the Committee's meeting in January 2018, and Judge Campbell said that he will be greatly missed.

Lastly, Judge Campbell discussed Professor Dan Coquillette's upcoming retirement from his role as Reporter to the Standing Committee in December 2018 but noted that Professor Coquillette will remain as a consultant thereafter. Chief Justice Roberts appointed Professor Catherine Struve as Associate Reporter, and we will ask the Chief Justice to appoint Professor Struve as Reporter while Dan transitions to a consulting role. Judge Campbell thanked Professor Coquillette for his service and looks forward to the celebration later this evening.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process, which is included in the Agenda Book. Also included are the proposed rules approved by the Judicial Conference in September 2017, adopted by the Supreme Court, and transmitted to Congress in April 2018. If Congress takes no action, the rule package pending before Congress will become effective December 1, 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 4, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met on April 6, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of five action items and presented a few information items.

Action Items

Appellate Rules 3 and 13 – Electronic Service. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 3 and 13, both of which concern notices of appeal. The proposed amendments were published for public comment in August 2017 and received no comments.

The proposed amendments to Rules 3 and 13 reflect the increased reliance on electronic service in serving notice of filing notices of appeal. Rule 3 currently requires the district court clerk to serve notice of filing the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Similarly, Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

One Committee member remarked that use of "sends" and "sending" in Rule 3 seemed vague and inquired why more specific language was not used. Judge Chagares responded that a more general term was used to cover a variety of ways to serve notices of appeal, reflecting the various approaches courts use as they transition to electronic service.

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 proposed amendments to Rules 3 and 13.**

Appellate Rules 26.1, 28, and 32 – Disclosure Statements. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 26.1, 28, and 32. The proposed amendment to Rule 26.1 changes the disclosure requirements in several respects designed to help judges decide whether they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term "corporate disclosure statement" to "disclosure statement." These proposed amendments were published in August 2017. The proposed amendments to Rules 28 and 32 received no public comments whereas Rule 26.1 received a few.

The National Association of Criminal Defense Lawyers ("NACDL") suggested that the Committee Note include additional language to help deter overuse of the government exception in 26.1(b) concerning organizational victims in criminal cases. In response, the Advisory Committee revised the Rule 26.1 Committee Note to more closely follow the Committee Note for Criminal Rule 12.4 and account for the NACDL comment. In addition, Charles Ivey suggested that Rule 26.1(c) include additional language referencing involuntary bankruptcy proceedings and requiring that petitioning creditors be identified in disclosure statements. The Advisory Committee consulted Professor Gibson, Reporter to the Bankruptcy Rules Committee, and accepted Professor Gibson's suggestion that no change was needed. Finally, two commentators argued that the meaning of 26.1(d) regarding intervenors was ambiguous. In response, the Appellate Rules Committee folded language from 26.1(d) regarding intervenors into a new last sentence in 26.1(a) and changed the title of subsection (a) to reflect that intervenors are subject to the disclosure requirement.

One member asked what constitutes a "nongovernment corporation" and whether this term includes entities such as Fannie Mae and Freddie Mac, which are government-sponsored publicly traded companies. This member also questioned why Rule 26.1 was limited to corporations, noting that limited partnerships can raise similar issues as corporations. One Committee member stated that disclosures should be broader rather than narrower and did not see the harm in deleting "nongovernmental." Another member questioned whether it is onerous to list governmental corporations. A different member reiterated that other types of entities can present similar problems as corporations.

Professor Struve noted that the goal of the proposed amendments to Rule 26.1 is to track the other disclosure provisions in the Civil, Criminal, and Bankruptcy Rules. Professor Cooper relayed the history of these disclosure statement rules, stating that the Civil Rules Committee decided to limit the disclosure statement to "nongovernment corporations" given the significant variation among local disclosure rules. Judge Chagares reiterated Professor Struve's point that the purpose underlying the proposed change to Appellate Rule 26.1 is consistency with the other federal rules regarding disclosure statements. Professors Beale and King noted a memo by Neal Katyal exploring why the disclosure statement is limited to "nongovernmental corporations" and concluding that this limitation was not causing a practical problem.

A member noted the federal rules should be consistent with each other. However, a bigger problem is whether the newly consistent rules provide judges with adequate information for recusal. Judge Campbell said that there are two distinct issues: first, whether to approve Rule 26.1 to make it consistent with the other federal rules, and second, whether to change or revisit the current policy underlying the disclosure statement rules. He argued that the second question was not ripe for the Committee's consideration.

A member asked if 26.1(b)'s disclosure obligation is broader than 26.1(a). Judge Campbell responded that subsection (b) is parallel with Criminal Rule 12.4 whereas subsection (a) is parallel with Civil Rule 7.1. He reiterated that the scope of the disclosure obligation should perhaps be reconsidered at a later time.

A member suggested deleting "and intervenors" in Rule 26.1(a)'s title, and Judge Chagares concurred. For consistency with other subsection titles, another member recommended making "victim" and "criminal case" plural in Rule 26.1(b)'s title, as well as deleting the article "a" preceding "criminal case." The Committee's style consultants recommended making a few stylistic changes in subsection (c), including adding a semicolon after "and" as well as deleting "in the bankruptcy case" in item number (2).

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 proposed amendments to Rules 26.1, 28, and 32, subject to the revisions made to Rule 26.1 during the meeting.**

Appellate Rule 25(d) – Proof of Service. The Advisory Committee sought final approval for a proposed amendment to Appellate Rule 25(d), which is designed to eliminate unnecessary proofs of service in light of electronic filing. This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court. But after discussion at the January 2018 meeting, the previously submitted version was withdrawn for revision to address the possibility that a document might be filed electronically but still require service through means other than the court's electronic filing system on a party who does not participate in electronic filing. The Advisory Committee now seeks final approval of the revised language. Judge Campbell thanked Professor Struve for noting the potential issue. Judge Chagares also noted a few minor changes that should be made, including adding a hyphen between "electronic filing" in 25(d)(1) and deleting the words "filing and" in the Committee Note. Judge Chagares noted the Advisory Committee's view that the proposed revision to 25(d) was technical in nature, and did not require republication.

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 proposed amendments to Rule 25(d), subject to the revisions made during the meeting.**

Appellate Rules 5, 21, 26, 32, and 39 – Proof of Service. If the proposed amendment to Appellate Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee sought final approval without public comment of what it views as technical and conforming amendments to Rules 5, 21, 26, 32, and 39. Proposed

amendments to Rules 5, 21(a)(1), and 21(c) delete the phrase "proof of service" and add "and serve it," consistent with Rule 25(d)(1). Rule 26(c) eliminates the "proof of service" term and simplifies the current rule for when three days are added for certain kinds of service. Current Rule 32(f) lists the items that are excluded when computing length limits, including "the proof of service." Given the frequent occasions in which there would be no proof of service, the article "the" should be deleted. Given this change, the Advisory Committee agreed to delete all of the articles in the list of items. Rule 39(d) removes the phrase "with proof of service" and replaces it with "and serve." Judge Chagares explained that the Advisory Committee did not think public comment was necessary for these technical, conforming amendments.

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 proposed amendments to Rules 5, 21, 26, 32, and 39.**

Appellate Rule 35 – En Banc Determinations. The Advisory Committee sought approval for publication of proposed amendments to Appellate Rules 35 and 40, which would establish length limits applicable to responses to petitions for rehearing en banc. Also, Rule 40 uses the term "answer" whereas Rule 35 uses the term "response." The proposed amendment would change Rule 40 to use the term "response" for consistency.

Some members noted other inconsistencies between the two rules. For instance, one member stated that Rule 35(e) just concerns the length limit whereas Rule 40 imposes additional requirements. Professor Hartnett responded that although the Advisory Committee has formed a subcommittee to examine Rules 35 and 40 more comprehensively, the committee felt it appropriate to move forward with this amendment in the interim. Judge Campbell asked if the Advisory Committee has a time table for when this review will conclude, and Judge Chagares stated they hope to finish this review in the fall. One Committee member noted that clarifying the length limits in the appellate rules is generally helpful and important.

One Committee member commented that the Committee Note to Rule 35 states "a court," instead of "the court" like the text of rule. The Committee's style consultants concurred that "a" should be changed to "the."

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rules 35 and 40, subject to the revisions made during the meeting.**

Information Items

Judge Chagares announced the formation of three subcommittees to examine: (1) Rule 3(c)(1)(B) and the merger rule; (2) Rule 42(b) regarding voluntary dismissals, and; (3) whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S. Ct. 13 (2017). One member asked if the Rule 42(b) subcommittee will explore whether different rules regarding voluntary dismissals should exist for class actions, and Judge Chagares stated that the subcommittee is exploring why judicial discretion over voluntary dismissals may be necessary, including in the class action context.

In addition, Judge Chagares noted that the Advisory Committee examined the problem of appendices being too long and including too much irrelevant information, as well as how much the requirements vary by circuit. However, technology is changing quickly which may transform how appendices are done. Accordingly, the Advisory Committee decided to remove this matter from the agenda and to revisit it in three years. Judge Chagares stated that the Advisory Committee also removed from its agenda an item relating to Rule 29 and blanket consents to amicus briefs, and an item relating to whether "costs on appeal" in Rule 7 includes attorney's fees. The Committee discussed the Supreme Court's recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), but that discussion did not give rise to an agenda item.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Incoming Chair Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 3, 2018, in San Diego, California. The Advisory Committee sought approval of eight action items and presented three information items.

Action Items

Bankruptcy Rule 4001(c) – Obtaining Credit. The Advisory Committee sought final approval for a proposed amendment to Bankruptcy Rule 4001(c), which details the process for obtaining approval of post-petition credit in a bankruptcy case. The proposed amendment would make this rule inapplicable to chapter 13 cases. The Advisory Committee received no comments on this proposed change. Some post-publication changes were made, such as adding a title and a few other stylistic changes. No Standing Committee members had any comments or questions about this proposed amendment.

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 proposed amendments to Rule 4001(c).**

Bankruptcy Rule 6007(b) – Abandonment or Disposition of Property. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 6007(b). The proposed amendments are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with the procedures set forth in Rule 6007(a). The Advisory Committee received some comments on this rule, some of which they accepted but others they declined to adopt. The Committee's style consultants suggested changes to subpart (b) which would have improved the overall language. Because the purpose of the current amendment is simply to parallel the text of Rule 6007(a), the Advisory Committee declined to accept these suggestions, but will revisit the styling improvements if the restyling project goes forward.

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 proposed amendments to Rule 6007(b).**

Bankruptcy Rule 9036 – Notice and Service Generally; Deferral of Action on Rule 2002(g) and Official Form 410. These amendments are designed to expand the use of electronic noticing and service in bankruptcy courts. The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The published amendments to Rule 9036 allow not only clerks but also parties to provide notices or to serve documents through the court's electronic-filing system. The proposed amendments to Official Form 410 add a check box for opting into email service and noticing.

The Advisory Committee received four comments, each raising concerns about the technological feasibility of the proposed changes and how conflicting email addresses supplied by creditors should be prioritized given the different mechanisms for supplying email addresses for service. The AO and technology specialists with whom the Advisory Committee consulted confirmed these concerns. Consequently, the Advisory Committee unanimously recommended deferring action on amendments to Rule 2002(g) and Official Form 410. By holding these amendments in abeyance, the Advisory Committee will have additional time to sort out these technological issues.

Nevertheless, the Advisory Committee recommends approving the amendments to Rule 9036. In Rule 9036, the word "has" in the second sentence of the Committee Note should be changed to "have." One Committee member asked if the phrase "in either of these events" should be "in either of these cases," and the Committee's style consultants noted that they try not to use "case" unless referring to a lawsuit.

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 proposed amendments to Rule 9036, subject to the revision made during the meeting.**

Bankruptcy Rule 9037(h) – Motion to Redact a Previously Filed Document. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 9037, which adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Advisory Committee received comments on the proposed changes, including one seeking to expand the amendments to address how documents placed under seal by the bankruptcy court should be handled on appeal. The Advisory Committee rejected this concern as beyond the scope of the rule amendment.

Another comment suggested an explicit waiver of the filing fee if a party bringing the motion seeks to redact protected privacy information disclosed by a different party (i.e., a debtor motion to redact his or her social security number inappropriately revealed in an attachment to a creditor's proof of claim). The Advisory Committee agreed with this sentiment but did not think that changing the rule was necessary because Judicial Conference guidelines already permit the court to waive the filing fee in this situation. A third commenter noted that nothing in the rule required filing the redacted document. In response, the Advisory Committee added language making it clear that the redacted document must be filed.

A final comment argued that restrictions on accessing the originally filed document should not go into effect until the redacted document is filed. The current rule as written imposes restrictions on the document once the motion to redact is filed. The Advisory Committee rejected this comment, finding such restrictions necessary and appropriate because other people will be made aware of this sensitive information when the motion to redact is filed.

Judge Campbell asked if the language of "promptly restrict" is sufficient to guide clerks and whether clerks know to restrict access to these documents upon the filing of a motion to redact. Judge Dow responded affirmatively and noted that the clerk member of the Advisory Committee advised that clerks already impose restrictions as a matter of course. Judge Chagares asked about the scope of the rule and whether it applies to an opinion, which is also a "document filed." Judge Dow stated that it could, and Professor Bartell noted that the rule only applies to the protected privacy information listed in Rule 9037(a).

A member stated that he is generally supportive of the rule change and asked whether the rule should apply more broadly, including in the Civil and Criminal Rules. Professor Beale noted that the Advisory Committees on Civil and Criminal Rules, respectively, have considered this question and decided against a parallel rule change because outside the bankruptcy context, where the problem is more frequent, judges routinely and quickly handle these matters when they arise.

This same member also asked why the information is limited to the information listed in Rule 9037(a). Professors Gibson and Beale explained that Rule 9037(a) is the bankruptcy version of the privacy rules adopted by the advisory committees to limit certain information in court documents as required by the E-Government Act. Professor Capra noted that the E-Government Act does not prohibit going farther than the information listed and that the Committee could decide to prohibit disclosing additional information. He added that if the issue is taken up, it should apply across the federal rules and not just in bankruptcy.

A member questioned why the rule uses the term "entity." Judge Dow explained that the term "entity" is a defined term in the Bankruptcy Code, and the broadly defined term even encompasses governmental entities.

This member also asked if the Advisory Committee considered any changes to 9037(g) regarding waiver. Professor Bartell explained that the waiver rule is still intact and that the Advisory Committee decided no change was needed. A member inquired about local court rules that address this waiver problem, and Professor Bartell noted that bankruptcy courts have such rules.

Another Committee member suggested adding language in the Committee Note stating that 9037(g) does not abrogate the "waiver" provision. Professor Gibson was reluctant to make that change absent discussion with the Advisory Committee. Judge Campbell stated that, under the current rule, a problem already exists. Parties are currently filing motions to redact, and in certain situations it is possible such a motion could conflict with the waiver provision. This rule just creates a formal procedure for filing a motion to redact. It does not affect the current case law regarding waiver.

Professor Hartnett asked what happens when the motion is granted and whether the court, not the party, is required to docket the redacted document. Professor Gibson noted that the filing party must attach the redacted document to its motion to redact and that the court has the responsibility to docket the redacted document. The Advisory Committee explored requiring the moving party to file the redacted document as a separate document, but rejected this approach.

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 proposed amendments to Rule 9037.**

Official Forms 411A and 411B – Power of Attorney. Proposed Official Forms 411A and 411B are used to execute power of attorney. As part of the Advisory Committee's Forms Modernization Project, prior versions of these forms were changed from Official Forms to Director's Forms 4011A and 4011B. However, Judge Dow explained that this created a problem because Bankruptcy Rule 9010(c) requires execution of a power of attorney on an Official Form, and these forms are no longer Official Forms. To rectify this problem, the Advisory Committee sought approval to re-designate Director's Forms 4011A and 4011B as Official Forms 411A and 411B. Because there would be no substantive changes for which comment would be helpful, the Advisory Committee sought final approval of the forms without publication.

Judge Campbell asked if the Judicial Conference can designate these forms as Official Forms, or if Supreme Court approval is required. Professor Gibson and Mr. Myers said that under the Rules Enabling Act, the Judicial Conference makes the final decision in approving Official Bankruptcy Forms, and that if it acts this September, the changes will become effective on December 1, 2018.

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 designation of Director's Forms 4011A and 4011B as Official Forms 411A and 411B effective December 1, 2018.**

Bankruptcy Rule 2002(f), (h), and (k) – Notices. Bankruptcy Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee sought approval to publish amendments to three of the rule's subdivisions for public comment. These amendments would: 1) require giving notice of the entry of an order confirming a chapter 13 plan; 2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and 3) add a cross-reference reflecting the relocation of the provision specifying the deadline for an objection to confirmation of a chapter 13 plan. The Standing Committee had no questions or comments about these proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rule 2002(f), (h), and (k).**

Bankruptcy Rule 2004(c) – Examinations. Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. The Advisory Committee sought approval to publish an amendment to 2004(c) adding a reference to electronically stored information to the title and first sentence of the subdivision. The Standing Committee had no questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 2004(c).**

Bankruptcy Rule 8012 – Corporate Disclosure Statement. The Advisory Committee sought approval to publish an amendment to Rule 8012 concerning corporate disclosure statements in bankruptcy appeals. The amendment adds a new subdivision (b) to Rule 8012 to require disclosing the names of any debtors in an underlying bankruptcy case that are not revealed by the caption in an appeal and, for any corporate debtors in the underlying bankruptcy case, disclosing the information required of corporations under subdivision (a) of the rule. Other amendments track Appellate Rule 26.1 by adding a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal, and make stylistic changes to what would become subdivision (c) regarding supplemental disclosure statements.

Professor Gibson noted that the reference to subdivision (c) will be dropped from the Committee Note. A Committee member asked if the term "corporation appearing" already captures corporations seeking to intervene. Professor Gibson responded that it might be better to track the language used in FRAP 26.1. The first sentence should read: "Any nongovernmental corporation that is a party to a proceeding in the district court . . . ." She also noted that Rule 8012(b) will incorporate the language changes made to FRAP 26.1(c) at the meeting today, including adding a semicolon before "and" as well as deleting "in the bankruptcy case" in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 8012, subject to the revisions made during the meeting.**

Information Items

Judge Dow stated that a Restyling Subcommittee is exploring whether to recommend that the Advisory Committee restyle the Federal Rules of Bankruptcy Procedure. To inform this recommendation, the Committee's style consultants produced a draft of a restyled Rule 4001. In consultation with the FJC, the Subcommittee is conducting a survey of interested parties, including judges, clerks of courts, and other bankruptcy organizations, which will conclude on June 15, 2018. The survey uses a restyled example of 4001(a). The Subcommittee will analyze the survey responses and make a recommendation to the Advisory Committee at its September 2018 meeting. Although only preliminary results were available at the time of the meeting, Judge Dow said that responses from most bankruptcy judges and clerks were positive.

Professor Capra asked whether the Bankruptcy Rules could be restyled given that they track language in the Bankruptcy Code. Judge Dow noted that the parallels with the Code do not prohibit restyling; rather, they provide a reason for caution in undertaking that restyling effort. He emphasized that no decision on restyling has been made. Informed by the survey of interested parties, the Advisory Committee will consider the advantages and disadvantages of restyling and determine how, if at all, to move forward.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on April 24, 2018, in Washington, D.C. The Advisory Committee sought approval of two action items and shared two information items.

Action Items

New Criminal Rule 16.1 – Pretrial Discovery Conference. Judge Molloy reviewed the history of the proposal, which originated as a suggestion by members of the defense bar to amend Rule 16 to address disclosure and discovery in complex criminal cases, including those involving voluminous information and electronically stored information. At Judge Campbell's suggestion, a subcommittee held a mini-conference to gather information on the problem and potential solutions. Mini-conference participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. This conference significantly helped the Advisory Committee develop the proposed new Rule 16.1 by, among other things, building consensus on what sort of rule was needed and whether the rule should apply to all criminal cases. One member echoed that the mini-conference was fantastic and helped the Advisory Committee reach consensus on this rule. Judge Campbell applauded the Advisory Committee for finding consensus.

The new rule has two new sections. The first section, Rule 16.1(a), requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. The second section, Rule 16.1(b), states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial."

Publication of the rule produced six comments. One comment from the DOJ expressed concern that the new rule could be read to grant new discovery authorities that could undermine important legal protections. The Advisory Committee agreed and decided to conform the language of the proposed rule to the phrasing of Criminal Rule 16(d)(2)(A). Two comments addressed whether the rule required the government to confer with pro se litigants and the Advisory Committee, in turn, changed the rule's language to "the government and the defendant's attorney" reasoning that it would not be practical for the government to confer about discovery with each pro se defendant. Two commenters recommended relocating the rule, but the Advisory Committee rejected this suggestion. One commenter suggested adding "good faith" to the meet and confer requirement but the Advisory Committee had already explored and rejected this idea. Professor Beale noted that the words "try to agree" capture this idea of conferring in good faith.

Lastly, two comments concerned whether the new rule would displace local rules or orders imposing shorter times for discovery. As published, the Committee Note stated that the rule "does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure." The Advisory Committee determined that the Committee Note affirms the district courts retain authority to impose additional discovery requirements by local rule or court order, and that no further clarification was needed.

Many Committee members expressed concern that the Committee Note did not address adequately the concern about displacing local rules. One member reads the note to authorize local rules that are inconsistent with Rule 16.1. Judge Bates said that this issue has come up in his court and he shares the same concern. Professor Capra stated that whether a local rule that supplements the Federal Rules is inconsistent remains an open question. Professor Marcus discussed the history of Civil Rule 83 dealing with local rules.

Judge Campbell proposed addressing this concern by adding the language "and are consistent with." Professor Cooper suggested that it would be helpful to add a comment that the local rules must be consistent with the Federal Rules. He also proposed adding a citation to Rule 16 to ensure that Rule 16.1 is not interpreted as altering Rule 16's discovery obligations. Judge Livingston echoed Professor Cooper's concern that this last sentence is too freestanding and could benefit from a citation.

Professor Beale responded that this Committee Note language satisfied the interested parties and that she did not think that referencing other rules in the Committee Note is a good idea. Instead, she proposed adopting Judge Campbell's proposal. A Committee member expressed similar sentiments asking why the Committee Note does not use the phrase "consistent with." Judge Campbell reminded the Committee that the proposed language reflected an accord that had been carefully worked out among the interested parties.

After much discussion, consensus emerged to revise the last sentence in the third paragraph of the Committee Note as follows: "Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure."

Other Committee members raised stylistic concerns with Rule 16.1. In an email sent prior to the meeting, a Committee member raised some grammatical and stylistic comments about Rule 16.1, which Judge Molloy and the Reporters agree require revisions. First, the word "shortly" in the first sentence in the Committee Note should be replaced with "early in the process, no later than 14 days after arraignment," to better track the language of the rule. Second, an errant underline between "it" and "displace" in the third paragraph of the Committee Note will be removed. Third, the phrase "determine or modify" will be added in the fifth paragraph of the Committee Note to more closely parallel the rule's language. Lastly, this member also noted that the commas in Rule 16.1(b) should not be bolded.

Another Committee member proposed using words like "process" or "procedure" instead of "standard" in the third paragraph of the Committee Note reasoning that such terms better reflect that Rule 16.1 is instituting a new procedure. The Committee's style consultants stated that the word "procedure" would be appropriate to use. Judge Molloy and the Reporters agreed with this change.

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 proposed new Rule 16.1, subject to the revisions made during the meeting.**

Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings – Right to File a Reply. Judge Richard Wesley, a former member of the Standing Committee, raised this issue with the Advisory Committee, noting a conflict in the cases construing Rule 5(d) of the Rules Governing Section 2255 Proceedings. This rule currently states that "[t]he 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 rule make clear an intent to give the inmate a right to file a reply, some courts have held that the inmate 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. After reviewing the case law, the Advisory Committee concluded that the text of the current rule contributes to a misreading of the rule by a significant number of district courts. A similar problem was found with regard to parallel language in Rule 5(e) of the Rules Governing Section 2254 Cases. The Advisory Committee agreed to correct this problem by placing the provision concerning the time for filing in a separate sentence, thereby making clear in the text of each rule that the moving party (or petitioner in § 2254 cases) has a right to file a reply.

Three comments were received during publication. The Advisory Committee determined that the issues raised by the comments were considered at length prior to publication and no changes were required. No Standing Committee members raised any questions or comments about this proposed amendment.

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 proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings.**

Information Items

Criminal Rule 16 – Pretrial Discovery Concerning Expert Witnesses. The Advisory Committee received two suggestions from district judges recommending that Rule 16's provisions concerning pretrial discovery of expert testimony should be amended to provide expanded discovery similar to that under Civil Rule 26. Judge Molloy noted that there are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil cases. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded discovery of forensic expert testimony. While there will not be a simple solution, there is

consensus among the Advisory Committee members that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Evidence Rules) and also plans to hold a mini-conference.

Task Force on Protecting Cooperators. Judge St. Eve updated the Committee on the efforts of the Task Force on Protecting Cooperators. In April 2018, Director Duff sent 18 recommendations identified by the Task Force for implementation by the Bureau of Prisons ("BOP"). A day before the Director's scheduled meeting with the BOP, the BOP Director resigned, and that meeting did not occur. Since then, meetings have taken place with the BOP's Acting Director, who had attended the Task Force meetings. He and his staff are preparing the BOP's response, which they anticipate sending to Director Duff and the Task Force later this month. Some of the BOP Recommendations must be approved by the BOP union. Ms. Womeldorf has drafted the Task Force's second and final report, which will be submitted sometime next month to Director Duff. Some of the Task Force's recommendations may have to be considered by the Standing Committee and the Committee on Court Administration and Case Management. That said, Judge St. Eve stated that the Task Force's work is coming to a close.

Judge Campbell noted that, last January, the Standing Committee reviewed the Advisory Committee's decision not to recommend any rules implementing the CACM Interim Guidance or similar approaches to protecting cooperator information in case files and dockets based on the Task Force's recommendations. The Advisory Committee on Criminal Rules will revisit this decision after the Task Force's second and final report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on April 10, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of one action item and presented four information items.

Action Item

Rule 30(b)(6) – Deposition of an Organization. The Advisory Committee sought approval for publication of proposed amendments to Rule 30(b)(6) which would impose a duty to confer. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to Rule 30(b)(6). In the summer of 2017, the subcommittee invited comment on a preliminary list of possible rule changes. Over 100 comments were received. Discussions eventually focused on imposing a duty on the noticing and responding parties to confer in good faith. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule.

As drafted, the duty to confer is iterative, and the proposed language requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each person who will testify. The first topic has not proved controversial; however, the second topic – the identity of the witnesses – has generated more discussion. Some fear the rule might be interpreted to require that organizations obtain the noticing party's approval of its

selection of witnesses. Nevertheless, the Advisory Committee decided to keep the identity of witnesses as a topic of conferring, at least for the public comment process, because the proposal carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf, and the Committee Note affirms that the choice of the designees is ultimately up to the organization.

Judge Bates noted that the Standing Committee received comments about the Advisory Committee's decision to include the identity of witnesses as a topic on which the parties must confer. Although these comments were addressed to the Standing Committee, he assured the Standing Committee that the Advisory Committee considered their substance when deciding to recommend publication. He noted that there is some force to the concerns stated in the comments, but that the Advisory Committee decided to include this topic because it is tied to the question of the matters for examination (the other question about which the parties must confer). Discussing what kind of person will have knowledge about a matter for examination may help avoid later disputes. Judge Bates also emphasized that the amendment only adds a requirement to confer; it does not require that the parties agree nor lessen the organization's ability to choose its witnesses.

Moreover, he cautioned that the comments to the Standing Committee are coming from only one segment of the bar, particularly from the defense bar and those who represent organizations who often must identify such witnesses. Interestingly, one letter from past, present, and upcoming Chairs of the ABA Section of Litigation did not raise concerns about the "identity" topic. That said, Judge Bates anticipates receiving many comments on this topic if the proposed amendment is approved for public comment, and he thinks comments from other groups will be informative. He guaranteed that these late submissions will be included as part of the Advisory Committee's broader assessment after public comment concludes.

Judge Campbell noted that the Standing Committee has received eight to ten last-minute comments about the proposed amendments to Rule 30(b)(6). This happens from time to time, but having received a number of them, he stated that the Standing Committee needs to clarify when it is appropriate to address comments directly to the Standing Committee. Clarification will help ensure that the public has fair notice of when to properly submit comments and that all commenters are treated equally. The Reporters discussed these questions at their lunch meeting today, and the Standing Committee will consider this procedural issue at its January 2019 meeting.

Many of these late comments noted by Judge Campbell expressed concern that the noticing party would have the ability to dictate the witnesses the organization must produce for deposition. In response, Judge Campbell stated that this is not the intent of the rule. Moreover, he noted that the rule also lists the matters for examination as a topic of conferring. Under the logic of the comments, it could be said that the organization now can dictate the matters for examination. Again, this is not the intent of the rule.

Lastly, Judge Bates reported that the Advisory Committee rejected adding a reference to Rule 30(b)(6)'s duty to confer in Rule 26(f) because Rule 26(f) conferences occur too early.

After this introduction, the Standing Committee engaged in a robust discussion about the Rule 30(b)(6) amendments. One member asked whether the conference must always occur and whether complex litigation concerns were driving this requirement. Professor Marcus responded that many complained about the inability to get the parties to productively engage on these matters and that the treatment here reflects repeat reports from the bar about issues with Rule 30(b)(6). This same member questioned whether the iterative nature of the confer requirement needs to be included in the rule. Judge Bates answered that it is important to signal in the rule the continuing obligation to confer because the topics of the conference may not be resolved in an initial meeting. For example, the identity of the organization's witnesses may have to be decided once the matters for examination are confirmed. The member stated this is a helpful change to a real problem and that it avoids the "gotcha" element of Rule 30(b)(6) depositions by requiring more particularity.

Another member asked whether it may be wise to require parties to identify and produce documents they will use at the deposition. By providing all such documents in advance of the deposition, parties can better focus on the issues. Moreover, Rule 30(b)(6) notices often list the matters to be discussed and providing the documents to be used will enable parties to get more specific. Another member agreed, asserting that documents ought to be identified prior to the deposition. Professor Marcus noted that such a practice could help focus the issues, but it also could lead to parties dumping a bunch of documents they may not use.

One member suggested that identifying documents is a best practice and should be highlighted in the Committee Note to Rule 30(b)(6). Professor Coquillette responded that committee notes should not be used to discuss best practices but to illustrate what the rule means. A member noted that nothing in the proposed rule would prohibit providing the document in advance; in fact, it would not change what many lawyers already do. One member recommended deleting "at least some of" from the first paragraph of the Committee Note, which discusses how it may be productive to discuss other matters at the meet and confer such as the documents that will be used at the deposition.

Other members questioned why the rule does not address timing. One member proposed adding a provision requiring the parties to make such disclosures within a certain number of days before the deposition. Another member seconded this concern. Judge Bates stated that this is a rule about conferring, not about timing, and the Advisory Committee learned that timing is often not the real issue facing the bar.

Echoing a point raised in the letter from present, past, and incoming Chairs of the ABA Section of Litigation, one Committee member expressed concern about previous committee notes – the 1993 Committee Note stating that a Rule 30(b)(6) deposition counts as a single deposition (for purposes of the presumptive limit on the number of depositions), and the 2000 Committee Note indicating that, if multiple witnesses are identified, each witness may be deposed for seven hours. The member thought this approach could carry unintended consequences. Professor Marcus discussed the history of the seven-hour rule and stated that the Advisory Committee has twice studied this issue carefully, most recently when Judge Campbell served as Chair. Getting more specific seemed to generate more problems, and although the Advisory Committee considered this, they do not think there is a cure because any solution

would lead to other problems. The Advisory Committee consequently concluded that a requirement to confer was a step in the right direction.

Committee members discussed at length the "identity" requirement. One member noted his agreement with the criticism that "identity" is unclear. He does not know if it is helpful to require conferencing about "identity." The member stated that he conducted an informal survey and said that this is not much of an issue, especially for good lawyers. Another member noted that she does not see Rule 30(b)(6) issues often unless they concern the scope of the deposition, which the "matters for examination" topic addresses. She shared her colleague's concern that "identity" is unclear.

Judge Bates noted that district court judges do not see many Rule 30(b)(6) issues, but the Advisory Committee heard from the practicing bar that problems do not always get to the judge. The proposal is responsive to the practicing bar's concerns. Judge Campbell explained that they write rules for the weakest of lawyers and that the "identity" topic responds to the concerns of practitioners who complain that they cannot get organizations to identify the witnesses. Judge Bates reminded everyone that the proposed language is not final, but rather is the proposed language for public comment. The comments received thus far are from one constituency – members of the bar that primarily represent organizations – and comments have yet to be received from the rest of the bar.

Another Committee member remarked that the "identity" topic is important because it will inform the serving party whether the organization has no responsive witness and must identify a third party to depose. This member also suggested adding something encouraging the parties to ask the court for help in resolving their Rule 30(b)(6) disputes and to remind them of this practice's efficacy. Judge Bates noted that committee notes typically do not remind parties to come to the court to resolve such disputes, and Professor Marcus noted that judicial members on the Advisory Committee objected to inclusion of this concept in an earlier draft.

Despite this conversation, a Committee member stated that he was still uncomfortable with the "identity" language. He proposed stating "and when reasonably available the identity of each person who will testify." Another Committee member noted that such language would reinforce the iterative nature of the rule because organizations could identify witnesses shortly after conferring on the matters for examination.

Professor Cooper expressed skepticism about this Committee member's proposal. After conferring with Judge Bates and Professor Marcus, Professor Cooper recommended adding "the organization will designate to" so that the topic for conferral will be "the identity of each person the organization will designate to testify." The additional language – "the organization will designate to" – will reinforce that organizations maintain the right to choose who will testify and thus better respond to the concerns raised. If they make this change, they also recommended deleting the earlier use of "then."

Another Committee member noted that the Committee Note's use of the phrase "as necessary" was confusing and could be interpreted as requiring multiple conferences. He recommended instead: "The duty to confer continues if needed to fulfill the requirement of good

faith." Judge Bates liked this proposal, in part because it used fewer words and clarified the iterative nature of the rule.

After this discussion, Judge Campbell summarized the proposed modifications: (1) deleting "then" before the word "designate"; (2) deleting "who will" and adding "the organization will designate to"; (3) deleting "at least some of" from the first paragraph of the Committee Note; and (4) changing the wording of the penultimate sentence of the third paragraph of the Committee Note to read "The duty to confer continues if needed to fulfill the requirement of good faith."

Judge Bates noted that they may need to explain the deletion of "then" in the Committee Note, and Judge Campbell said that he and Professors Cooper and Marcus can explore this after the meeting. If such language is needed, a proposal can be circulated to the Standing Committee for consideration and approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 30(b)(6), subject to the revisions made during the meeting.**

Information Items

Rules for Multidistrict Litigation. The subcommittee formed to consider creating rules for multidistrict litigation is still in the information gathering phase. Proposed legislation in Congress known as the Class Action Fairness Bill would affect procedures in MDL proceedings. Judge Bates noted that consideration of this subject will be a long process, and that the subcommittee is attending various conferences on MDLs. The subcommittee has identified eleven topics for consideration, including the scope of any rules and whether they would apply just to mass torts MDLs or all types of MDLs, the use of fact sheets and *Lone Pine* orders, rules regarding third-party litigation financing, appellate review, etc. He encouraged Committee members to provide the subcommittee their perspective on any of these topics. Judge Bates noted that the subcommittee has not decided if rules are necessary or whether a manual and increased education would be better alternatives.

Social Security Disability Review Cases. A subcommittee is considering a suggestion from the Administrative Conference of the United States to create rules governing Social Security disability appeals in federal courts. The subcommittee has not concluded its work, and whatever rules it may recommend, if any, still need to be considered by the Advisory Committee. The most significant issues concerning these types of proceedings are administrative delay within the Social Security Administration and the variation among districts both in local court practices and in rates of remand to the administrative process. Whatever court rules may be proposed will not address the administrative delay.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 26-27, 2018, in Washington, D.C. The Advisory Committee presented two action items and seven information items.

Action Items

Evidence Rule 807 – Residual Exception. The Advisory Committee sought final approval for proposed amendments to Evidence Rule 807. Professor Capra reviewed the history of suggestions to amend the rule, noting that the Advisory Committee found that the rule was not working as well as it could. The proposal deletes the language requiring guarantees of trustworthiness "equivalent" to those in the Rule 803 and Rule 804 hearsay exceptions and instead directs courts to determine whether a statement is supported by "sufficient" guarantees of trustworthiness in light of the totality of the circumstances of the statement's making and any corroborating evidence. Subsections (a)(2) and (a)(4) are removed because they are at best redundant in light of other provisions in the Evidence Rules. The amendments also revise Rule 807(b)'s notice requirement, including by permitting the court, for good cause, to excuse a failure to provide notice prior to the trial or hearing.

One member asked if this proposal will increase the admissibility of hearsay evidence. Professor Capra noted that any increase will be marginal, perhaps in districts that adhere to a strict interpretation of the rule regarding "near miss" hearsay.

Ms. Shapiro noted the fantastic work Professor Capra did to help improve this rule and stated that the DOJ is incredibly grateful for his work.

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 proposed amendments to Rule 807.**

Evidence Rule 404(b) – "Bad Acts" Evidence. The Advisory Committee sought approval to publish proposed amendments to Evidence Rule 404(b). Professor Capra explained various Rule 404(b) amendments considered and rejected by the Advisory Committee. The Advisory Committee, however, accepted a proposed amendment from the DOJ requiring the prosecutor to provide notice of the non-propensity purpose of the evidence and the reasoning that supports that purpose. The Advisory Committee liked this suggestion because articulating the reasoning supporting the purpose for which the evidence is offered will give more notice to the defendant about the type of evidence the prosecutor will offer. The Advisory Committee also determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "*other* crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Professor Bartell asked whether the Advisory Committee considered designating a specific time period for the prosecutor to provide notice. Professor Capra said the Advisory Committee considered this idea but thought it was too rigid.

One member inquired about implementing a notice requirement for civil cases. Professor Capra responded that notice was not necessary in civil cases because this information

comes out during discovery. Judge Campbell also noted that lawyers in civil cases are not bashful about filing Rule 404 motions in limine.

Another member asked whether it would be better that subsection 404(b)(3) track the language of 404(b)(1) instead of stating "non-propensity purpose." Professor Capra said the Advisory Committee will consider this idea during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 404(b).**

Information Items

Judge Livingston provided a brief update of the Advisory Committee's other work. First, the Advisory Committee decided not to proceed with rule changes to Evidence Rules 606(b) and 801(d)(1)(A).

Second, the Advisory Committee considered at its April 2018 meeting the results of the Symposium held at Boston College School of Law in October 2017 regarding forensic expert testimony, Rule 702, and *Daubert*. The Symposium proceedings are published in the Fordham Law Review. No formal amendments to Rule 702 have been considered yet but the Advisory Committee is exploring two possible changes: 1) an amendment focusing on forensic and other experts overstating their results and 2) an amendment that would address the fact that a fair number of courts have treated the reliability requirements of sufficient basis and reliable application in Rule 702 as questions of weight and not admissibility.

Lastly, Judge Grimm proposed amending Rule 106 regarding the rule of completeness to provide that: 1) a completing statement is admissible over a hearsay objection, and 2) the rule covers oral as well as written or recorded statements. The courts are not uniform in their treatment of Rule 106 issues, and the Advisory Committee decided to consider this proposal in more depth at its next meeting.

THREE DECADES OF THE RULES ENABLING ACT

To honor Professor Coquillette's thirty-four years of service to the Standing Committee and his upcoming retirement as Reporter to the Standing Committee, Judge Sutton – a former Chair of the Standing Committee – led a question and answer session with Professor Coquillette. The discussion was wide-ranging and provided current Committee members with helpful history on challenges faced by the rules committees over time. Professor Coquillette noted that the Rules Enabling Act ("REA") has been so successful in part because the Department of Justice played an integral role in the REA process. He thanked the DOJ for recognizing the value of the REA and for helping preserve its integrity. Although the Standing Committee must be sensitive to the political dynamics Congress faces, Professor Coquillette cautioned that the REA process should not become partisan football. He stated that the Committee must "check its guns at the door" and do the fair and just thing. It is so important that the Committee be seen as fair,

Professor Coquillette explained, because the manner in which the Committee is perceived when reaching its decisions is vital to preserving the REA and faith in the rules process.

JUDICIARY STRATEGIC PLANNING

Brian Lynch, the Long-Range Planning Officer for the federal judiciary, discussed the strategic planning process and how the Standing Committee can provide feedback on the *Strategic Plan for the Federal Judiciary*. He emphasized that the Committee's reporting on long-term initiatives will help foster dialogue between the Executive Committee and other judicial committees.

Following Mr. Lynch's presentation, Judge Campbell directed the Committee to a letter dated July 5, 2017, in which the Standing Committee provided an update on the rules committees' progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*. Judge Campbell proposed updating this letter to reflect its ongoing initiatives that support the judiciary's strategic plan. In 2019, the Committee will be asked to update the Executive Committee on its progress regarding these identified initiatives.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved authorizing Judge Campbell to update and forward to Chief Judge Carl Stewart correspondence reflecting the Committee's long-term initiatives supporting the *Strategic Plan for the Federal Judiciary*.**

LEGISLATIVE REPORT

Julie Wilson of the Rules Committee Staff ("RCS") briefly delivered the legislative report. She noted that two new pieces of legislation have been proposed since January 2018 – namely, H.R. 4927 regarding nationwide injunctions, and the Litigation Funding Transparency Act of 2018 (S. 2815) regarding the disclosure of third-party litigation funding in class actions and MDLs. Neither bill has advanced through Congress. Ms. Wilson indicated that the RCS will continue to monitor these bills as well as others identified in the Agenda Book and will keep the Committee updated.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Standing Committee will next meet on January 3, 2019 in Phoenix, Arizona. He reminded the Committee that at this next meeting it will confer about its policy regarding comments on proposed rules addressed directly to the Standing Committee outside the typical public comment period.

Respectfully submitted,

Rebecca A. Womeldorf

Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
September 2018

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 amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A 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..... pp. 2-6

2. a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B 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 effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-15

3. Approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C 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..... pp. 20-24

4. Approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them 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. 25-26

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

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 or Committee) met on June 12, 2018. All members were present.

Representing the advisory committees were: Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, incoming Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, 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, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Rules of Evidence.

Also participating in the meeting were: Judge Jeffrey S. Sutton, former Chair of the Standing Committee; Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter; Professor Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff; Patrick Tighe, Law Clerk to the Standing Committee;

and Dr. Tim Reagan, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

Rule 5 (Appeal by Permission)

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." Instead, it provides that "a party must file a petition with the circuit clerk and serve it on all other parties."

Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase "with proof of service" in Rule 21(a) and (c) is deleted and replaced with the phrases "serve it" and "serving it."

Rule 26 (Computing and Extending Time)

The proposed amendment to Rule 26 deletes the term "proof of service" from Rule 26(c). A stylistic change was also made to simplify the rule's description for when three days are added to the time computation: "When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)."

Rule 39 (Costs)

The proposed amendment to Rule 39(d)(1) deletes the phrase "with proof of service" and replaces it with the phrase "and serve."

Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3)

currently require the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Rule 13(a)(2) currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail. There were no public comments on the proposed amendments to Rules 3 and 13.

Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; new subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases. In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the

Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) to require that certain parties "must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a)."

A third comment objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the committee note was required to understand it. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors into a new last sentence of 26.1(a). In addition, the phrase "wants to intervene" was changed to "seeks to intervene" in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but who may not truly "want" to intervene. Other stylistic changes were made as well.

Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rules 28 and 32 change the term "corporate disclosure statement" to "disclosure statement" to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such

item is "the proof of service." To account for the frequent occasions in which there would be no such proof of service, the article "the" should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A 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.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendments to Rules 35 and 40 create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but not for responses to those petitions. In addition, the Advisory Committee observed that Rule 35 (which deals with en banc determinations) uses the term "response," while Rule 40 (which deals with panel rehearing) uses the term "answer." The proposed amendment changes the term in Rule 40 to "response."

Information Items

The Advisory Committee's consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing

on the structure of Rule 21, and a subcommittee was formed to evaluate possible amendments. Another subcommittee will consider whether any amendments are appropriate following the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will also consider whether to align the rule with the statute, correcting for divergence that has occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because litigants lack certainty, and it may result in a court issuing an advisory opinion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 4001, 6007, 9036, 9037, and Official Forms 411A and 411B, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements)

The proposed amendment to Rule 4001(c), which applies to obtaining credit, makes that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The Advisory Committee proposed the amendment

after concluding that the rule's provisions are designed to address the complex postpetition financing issues particular to business debtor chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address the consumer financing issues common in chapter 13 cases, such as obtaining a loan to purchase an automobile for family use.

There were no public comments on the proposed amendment. In giving final approval to the amendment at its spring meeting, the Advisory Committee added a title to the new paragraph (4), "*Inapplicability in a Chapter 13 Case*," and made stylistic changes to address suggestions from the style consultants.

Rule 6007 (Abandonment or Disposition of Property)

The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b) of the Bankruptcy Code, and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five public comments were submitted on the proposed amendments. Two comments addressed the last sentence of the proposed amendment, which stated that a court order granting a motion to compel abandonment "effects abandonment without further action by the court." The comments stated that this would be inconsistent with § 554(b), which provides for abandonment of property by the bankruptcy trustee, not the court. In response, the Advisory Committee inserted the words "trustee's or debtor in possession's" immediately before the word "abandonment." Two comments criticized as too burdensome the amendment language that requires both service and notice of the motion on all creditors. The Advisory Committee determined that ensuring all parties receive the notice of a motion to abandon property outweighed the concern of burdensomeness, and therefore made no change.

One comment noted that the 14-day period for parties to respond after *service* of a motion to compel abandonment under proposed Rule 6007(b) could be up to three days longer than the 14-day response period after a trustee voluntarily files *notice* of an intent to abandon property under Rule 6007(a). This is because of the extra time allowed for service of motions by mail. The comment suggested possible changes to Rule 6007(a) or Rule 9006(a) that would make the response periods under both subparts of Rule 6007 the same. The Advisory Committee declined to make any change at this time.

Rule 9036 (Notice by Electronic Transmission); Deferral of Action on Rule 2002(g) and Official Form 410.

Proposed amendments to Rules 2002(g), 9036, and Official Form 410 were published in 2017 as part of the Advisory Committee's ongoing study of noticing issues and were intended to expand the use of electronic noticing and service in the bankruptcy courts. Proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and a corresponding amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. Current Rule 9036 provides for electronic service and notice of certain documents by permission of the receiving party and court order. As amended, the rule would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system, without the need of a court order. The proposed amendments to Rule 9036 also allowed service or noticing on any person by any electronic means consented to in writing by that person.

Four sets of comments were submitted addressing the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised implementation issues and therefore suggested a delayed

effective date of December 1, 2021 with respect to the proposed amendments to Rule 2002(g) and Official Form 410.

All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (BNC) would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to the BNC by clerk's office personnel.

Three comments expressed concerns that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed proof of claim email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions in the Bankruptcy Code and rules that allow a creditor to designate an address for notice and service. One comment suggested the following order of priorities: (a) CM/ECF email address for registered users; (b) BNC email address; and (c) proof of claim opt-in email address. This order of priorities was inconsistent, however, with the proposed committee note accompanying the amendments to Rule 2002(g), which stated that "[a] creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

The Advisory Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. The idea of approving the rule and form amendments now but delaying their effective date until 2021 provoked concern

that technological advances during that three-year period might result in better means of employing electronic service and noticing than is currently proposed.

Members were also persuaded that the comments about determining priorities among conflicting creditor email addresses show a need for further coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Therefore, the Advisory Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be deferred for now.

The comments supported immediate implementation of the proposed amendments to Rule 9036. Those amendments (a) allow both clerks and parties to serve and give notice through CM/ECF to registered users; (b) allow other means of electronic service and noticing to be used for parties that give written consent to such service and noticing; and (c) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus, the Advisory Committee recommended final approval of the amendments to Rule 9036, with minor non-substantive wording changes to clarify applicability and in response to suggestions from the Standing Committee's style consultants, and with the addition of the following sentences to the committee note:

> The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

Rule 9037 (Privacy Protection for Filings Made with the Court)

The proposed amendment to Rule 9037 adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in

compliance with Rule 9037(a). The Advisory Committee proposed the amendment in response to a suggestion submitted by the Committee on Court Administration and Case Management.

Three comments were submitted. The first suggested that the proposed amendment be expanded to allow parties to submit a redacted document as an alternative to the designation of sealed documents to be included in the record on appeal under Rule 8009(f). The Advisory Committee decided this suggestion was beyond the scope of the situation it was attempting to address with proposed Rule 9037(h), and therefore declined to make any change in response to this comment.

The second comment recommended that the amendment be revised to clarify that no fee need be collected, or replacement document filed, from a party seeking to redact his or her protected information unless it is the party who filed the previous (unredacted) document. In addition, the second comment pointed out two instances of the phrase "unless the court orders otherwise" that created ambiguity.

Judicial Conference policy already addresses the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. JCUS-SEP 14, pp. 9-10. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that "[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor." Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Advisory Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Advisory Committee agreed that the rule was ambiguous concerning when a bankruptcy court may "order otherwise," and revised the proposal to clarify that any part of the rule may be modified by court order.

The final comment suggested that proposed Rule 9037(h) contained an inadvertent gap because the rule did not require the filing of a redacted version of the original document as a condition of the restrictions upon public access. Under the rule as published, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view upon filing and before the court rules on the motion. The suggestion recommended that the motion to redact not be restricted from public view until the court rules on it.

When the Advisory Committee initially considered how best to provide for the redaction of already-filed documents, it strove to avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document. Accordingly, the proposed rule requires immediate restriction of public access to the motion and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although not expressly stated, the intent and implication of the rule was that if the motion is granted, the redacted document, which was filed with the motion, would be placed on the record as a substitute for the original document that remained protected from public view. As explained in the committee note: "If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted."

To eliminate any ambiguity, the Advisory Committee added language to the rule stating that "[i]f the court grants [the motion], the redacted document must be filed." The Advisory

Committee did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

Finally, stylistic changes were made in response to suggestions from the style consultants, and the committee note was revised to reflect the changes made to the rule.

Official Form 411A (General Power of Attorney) and Official Form 411B (Special Power of Attorney)

As part of the Forms Modernization Project, the power of attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director's Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. The Forms Modernization Project group recommended this change to allow greater flexibility in their use, in light of increased restrictions on making modifications to Official Forms under then pending amendments to Rule 9009 that became effective in 2017.

The Advisory Committee later realized, however, that using Director's Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). That rule provides that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). In revisiting this matter, the Advisory Committee concluded that its earlier decision to convert the forms to Director's Forms was unnecessary. Rule 9009 allows modifications of Official Forms "as provided in these rules." The relevant rule here – Rule 9010(c) – only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that "conforms substantially" to an Official Form have been interpreted to permit modifications of those forms and are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Advisory Committee's fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting

modifications of the power of attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii). Accordingly, to bring the rule and forms into conformity, the Advisory Committee recommended designating the power of attorney forms as Official Forms 411A and 411B, in keeping with the new numbering system for forms, with an effective date of December 1, 2018.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B 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.

b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2002, 2004, and 8012 with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee recommended publication for public comment of amendments to three of the rule's subdivisions. This package of amendments would (i) require

giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (ESI). The Advisory Committee discussed the suggestion at its fall 2017 and spring 2018 meetings. By a close vote, the Advisory Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to ESI and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 sets forth the disclosure requirements for a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel. It is modeled on Appellate Rule 26.1. The Advisory Committee on Appellate Rules has proposed amendments to Rule 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Advisory Committee on Bankruptcy Rules therefore proposed publication of conforming amendments to Rule 8012 this summer.

Information Item

The Advisory Committee has created a Restyling Subcommittee and charged it with recommending whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

To inform its recommendation, the subcommittee is seeking input from those who would be affected by such a restyling. The subcommittee worked with the Standing Committee's style consultants to produce a draft restyled version of Rule 4001 that illustrates changes that would likely occur should the restyling project proceed.

At its spring meeting, the Advisory Committee decided to seek comment on one section of the restyled rule, Rule 4001(a), and it approved a cover memo and a set of survey questions to be distributed to interested parties, such as all bankruptcy judges and clerks and various professional bankruptcy organizations. The cover memo explains that the exemplar is not being proposed for adoption, nor is the Advisory Committee seeking substantive comments on its revisions, but rather that input is sought on the threshold issue of whether restyling should be undertaken. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules. The deadline for making comments was set at June 15, 2018. The subcommittee will analyze the responses over the summer in preparation for making a recommendation to the Advisory Committee at its September meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an

organization, with a request that they be published for comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Rule 30(b)(6) are the result of over two years of work by the Advisory Committee. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to the rule. By way of background, this is the third time in twelve years that Rule 30(b)(6) has been on the Advisory Committee's agenda. In the past, the Advisory Committee ultimately concluded that the problems reported by both plaintiffs' and defendants' counsel involve behavior that could not be effectively addressed by a court rule.

The initial task of the subcommittee formed in 2016 was to reconsider whether it is feasible (and useful) to address by rule amendment problems identified by bar groups. The subcommittee worked on initial drafts of more than a dozen possible amendments that might address the problems reported by practitioners and, in the summer of 2017, invited comment on a narrowed down list of six potential amendment ideas. More than 100 comments were received. In addition, members of the subcommittee participated in conferences around the country to receive input from the bar. The focus eventually narrowed on imposing a duty to confer in good faith between the parties. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule. The proposed amendment requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.

As drafted, the duty to confer requirement is meant to be iterative and recognizes that a single interaction will often not suffice to satisfy the obligation to confer in good faith. The committee note also explicitly states that "[t]he duty to confer continues if needed to fulfill the requirement of good faith." The duty to confer is also bilateral – it applies to the responding organization as well as to the noticing party.

Information Items

The Advisory Committee met on April 10, 2018. Among the topics on the agenda were updates from two subcommittees tasked with long-term projects. As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules "for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." With input and insights from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee has developed draft rules. The three draft rules are for discussion purposes only and do not represent any decision by the subcommittee to recommend adoption of these or any other rules.

Another subcommittee has been formed to consider three suggestions that the Advisory Committee develop specific rules for multidistrict litigation proceedings. Among the many proposals are early procedures to address plainly meritless cases and broadened mandatory interlocutory appellate review for important issues. This subcommittee will also consider a suggestion that initial disclosures be expanded to include third party litigation financing agreements, which are used in multidistrict litigation proceedings as well as other contexts. With assistance from the Judicial Panel on Multidistrict Litigation, the subcommittee has begun gathering information and identifying issues on which rules changes might focus. The subcommittee's work is at a very early stage – the list of issues and topics for study is still being developed.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol.[1] Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

[1]The "ESI Protocol" is shorthand for the "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial." The phrase "determine or modify" contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to "determine" when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to "determine or modify" discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties' agreement or otherwise limit the court's discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel "should be aware of best practices" and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some

changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a

significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing "within a time fixed by the judge" as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner "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." The committee note states that the proposed amendment "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'" The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee's resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: "Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties." In the Advisory Committee's view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C 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.

Information Item

The Advisory Committee met on April 24, 2018. At that meeting, the Advisory Committee added to its agenda two suggestions from district judges recommending that pretrial disclosure of expert testimony in Rule 16 (Discovery and Inspection) be amended to parallel Civil Rule 26. While there is consensus among members of the Advisory Committee that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed, members also agree that there is no simple solution. There are many different types of experts, and criminal proceedings are of course not parallel in all respects to civil proceedings. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded disclosure of forensic expert testimony; it will take some time for the effects of those guidelines to be fully realized. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Rules of Evidence) and also plans to hold a mini-conference.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems addressed by the proposed amendment to Rule 807 are as follows:

1. The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.

2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.

3. The requirements in Rule 807 that the hearsay must be proof of a "material fact" and that admission of the hearsay be in "the interests of justice" and consistent with the "purpose

of the rules" have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the "particulars" of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and committee note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them 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.

Rule Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 404(b) (Crimes, Wrongs, or Other Acts) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The Advisory Committee has monitored significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several circuits have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1. Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.

2. Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.

3. Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Advisory Committee considered several textual changes to address these case law developments. At its April 2018 meeting the Advisory Committee decided against proposing extensive substantive amendments to Rule 404(b), based on its conclusion that such amendments would add complexity without rendering substantial improvement. The Advisory Committee did recognize that some protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted, given the prosecution's expanded notice obligations under the Department of Justice proposal. The Advisory Committee also unanimously agreed that the requirement that the defendant must request notice be deleted, as that requirement simply leads to boilerplate requests.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Information Items

At its April 26-27, 2018 meeting, the Advisory Committee discussed the results of the symposium held at Boston College School of Law in October 2017 regarding Rule 702. The symposium consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Advisory Committee with extremely helpful insight, background, and suggestions for change.

The Advisory Committee is considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Paul Grimm submitted a suggestion that Rule 106 should be amended in two respects: 1) to provide that a completing

statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Advisory Committee continues to consider the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) barring testimony of jurors on deliberations violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. When it first considered the issue in April 2017, the Advisory Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Advisory Committee revisited the question at its April 2018 meeting and came to the same conclusion but will continue to monitor the case law applying *Pena-Rodriguez.*

The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

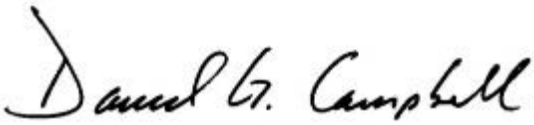
Finally, the Advisory Committee determined not to go forward with possible amendments to Rules 609(a), 611, and 801(d)(1)(A).

JUDICIARY STRATEGIC PLANNING

Chief Judge Carle E. Stewart, the judiciary's planning coordinator, asked Judicial Conference committees to provide an update on the initiatives they are pursuing to implement the strategies and goals of the *Strategic Plan for the Federal Judiciary*. The judiciary's long-range planning officer addressed the Committee on how its feedback on the *Strategic Plan* and reporting of its long-term initiatives helps foster communication between the Executive

Committee and Judicial Conference committees. The Committee will provide an update to Chief Judge Stewart on the rules committees' progress in implementing initiatives in support of the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
Appendix C – Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings for the United States District Courts (proposed amendments and supporting report excerpt)
Appendix D – Federal Rules of Evidence (proposed amendments and supporting report excerpt)

TAB D.3

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Effective December 1, 2017 REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2017); approved by the JCUS and transmitted to the Supreme Court (Sept 2016)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentifcation that would allow certain electronic evidence to be authenticated by a certifcation of a qualified person in lieu of that person's testimony at trial.	

Effective December 1, 2018 Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018) REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provison similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing) (Official Forms approved by Judicial Confirance as noted above, which is the final step in approval process for forms).	FRAP 4, 25
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limites, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). Approved by Standing Committee at June 2018 meeting; to be considered by Judicial Conferene at September 2018 meeting.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Effective December 1, 2018 Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018) REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to “supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019 Current Step in REA Process: approved by the Judicial Conference (Sept 2018) REA History: approved by the Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); unless otherwise noted, published for public comment Aug 2017-Feb 2018; approved for publication (June 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Effective (no earlier than) December 1, 2020 Current Step in REA Process: published for public comment (Aug 2018-Feb 2019) REA History: unless otherwise noted, approved for publication (June 2018)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendmens clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice be deleted; the proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

TAB D.4

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Pending Legislation That Would Directly or Effectively Amend the Federal Rules
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** *Sponsor:* Smith (R-TX) *Co-Sponsors:* Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	**Bill Text (as passed by the House without amendment, 3/10/17):** https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf **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. 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. Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf	• 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 (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
Lawsuit Abuse	**S. 237** *Sponsor:* Grassley (R-IA) *Co-Sponsor:* Rubio (R-FL)	CV 11	**Bill Text:** https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf **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. 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. Courts may impose additional sanctions, including striking the pleadings, dismissing	• 11/8/17: Senate Judiciary Committee Hearing held – "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators" • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Reduction Act of 2017, cont.			the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** None.	
Innocent Party Protection Act	**H.R. 725** *Sponsor:* Buck (R-CO) *Co-Sponsors:* Farenthold (R-TX) Franks (R-AZ) Goodlatte (R-VA) Sessions (R-TX) Smith (R-TX)		**Bill Text:** https://www.congress.gov/115/bills/hr725/BILLS-115hr725rfs.pdf **Summary (authored by CRS):** (Sec. 2) This bill amends procedures under which federal courts determine whether a case that was removed from a state court to a federal court on the basis of a diversity of citizenship among the parties may be remanded back to state court upon a motion opposed on fraudulent joinder grounds that: (1) one or more defendants are citizens of the same state as one or more plaintiffs, or (2) one or more defendants properly joined and served are citizens of the state in which the action was brought. Joinder of such a defendant is fraudulent if the court finds: actual fraud in the pleading of jurisdictional facts with respect to that defendant, state law would not plausibly impose liability on that defendant, state or federal law bars all claims in the complaint against that defendant, or no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant. In determining whether to grant or deny such a motion for remand, the court: (1) may permit pleadings to be amended; and (2) must consider the pleadings, affidavits, and other evidence submitted by the parties. A federal court finding that all such defendants have been fraudulently joined must: (1) dismiss without prejudice the claims against those defendants, and (2) deny the motion for remand. **Report:** https://www.congress.gov/115/crpt/hrpt17/CRPT-115hrpt17.pdf	• 3/13/17: Received in the Senate; referred to Judiciary Committee • 3/9/17: Passed House (224-194) • 2/24/17: Reported by the Judiciary Committee • 1/30/17: Introduced in the House; referred to Judiciary Committee;

Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	**H.R. 985** *Sponsor:* Goodlatte (R-VA) *Co-Sponsors:* Sessions (R-TX) Grothman (R-WI)	CV 23	**Bill Text (as amended and passed by the House, 3/9/17):** https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf **Summary (authored by CRS):** (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless: • 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. 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. 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. 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. 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. 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.	• 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 (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 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

H.R. 985, cont.			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. Appeals courts must permit appeals from an order granting or denying class certification. (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. 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. (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. **Report:** https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf	

Stopping Mass Hacking Act	**S. 406** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf **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, 2016." **Report:** None.	• 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 1110 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf (Sec. 2) "(a) In General.—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, 2016. (b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant." **Summary (authored by CRS):** This bill repeals an amendment to [R]ule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances. **Report:** None.	• 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

Back the Blue Act of 2017	**S. 1134** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 2437 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

To amend section 1332 of title 28, United States Code, to provide that the requirement for diversity of citizenship jurisdiction is met if any one party to the case is diverse in citizenship from any one adverse party in the case.	**H.R. 3487** *Sponsor:* King (R-IA) *Co-Sponsor:* Smith (R-TX)	CV	**Bill Text:** • **Substitute:** https://judiciary.house.gov/wpcontent/uploads/2018/09/HR-3487-ANS.pdf • **Original Bill Text:** https://www.congress.gov/115/bills/hr3487/BILLS-115hr3487ih.pdf **Summary (authored by CRS):** This bill amends the federal judicial code to specify that U.S. district courts have jurisdiction on the basis of diversity of citizenship if at least one adverse party does not share the same citizenship as another adverse party. [Bill would require a $700 filing fee for the defendant's removal of a civil action from a state court to a federal district court.] **Report:** None.	• 9/13/18: markup held; no final action taken • 9/11/18: "Amendment in the Nature of a Substitute" • 9/6/17: referred to Subcommittee on the Constitution and Civil Justice • 7/27/17: Introduced in the House; referred to Judiciary Committee
To amend title 28, United States Code, to limit the authority of district courts to provide injunctive relief, and for other purposes.	**H.R. 4927** *Sponsor:* Brat (R-VA)	CV	**Bill Text:** https://www.congress.gov/115/bills/hr4927/BILLS-115hr4927ih.pdf **Summary (authored by CRS):** This bill limits the authority of federal district courts to issue injunctions. Specifically, it prohibits a district court from issuing an injunction unless the injunction applies only: (1) to the parties to the case before that district court, or (2) in the federal district in which the injunction is issued. **Report:** None. *See infra* H.R. 6730.	• 2/5/18: Introduced in the House; referred to Judiciary Committee
Litigation Funding Transparency Act of 2018	**S. 2815** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Tillis (R-NC)	CV	**Bill Text:** https://www.congress.gov/115/bills/s2815/BILLS-115s2815is.pdf **Summary:** **Section 2: Transparency and Oversight of Third-Party Litigation Funding in Class Actions.** Amends chapter 114 of Title 28 (Class Actions) by adding a § 1716. Section 1716 would provide that in any class action, class counsel must disclose to the court and all named parties the identities of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the	• 5/10/2018: Introduced in the Senate; referred to Judiciary Committee

Litigation Funding Transparency Act of 2018, cont.			contingent right. Also includes timing provisions. **Section 3: Transparency and Oversight of Third-Party Litigation Funding in Multi-District Litigation.** Amends 28 U.S.C. § 1407 (Multidistrict Litigation) to include similar disclosure, production, and timing provisions as those that apply to class actions above. **Section 4: Applicability.** Provides that the amendments made by the Act would apply to any case pending on or commenced after the date of enactment. **Report:** None.	
Federal Courts Access Act of 2018	**S. 3249** *Sponsor:* Lee (R-UT)		**Bill Text:** https://www.congress.gov/115/bills/s3249/BILLS-115s3249is.pdf **Summary:** (1) raises the ordinary amount in controversy requirement to $125K but lowers the Class Action Fairness Act (CAFA) amount in controversy from $5M to $125K. (But retains the CAFA provision that allowing aggregation of class members' damages for amount in controversy purposes.); (2) eliminates the complete diversity requirement; (3) eliminates § 1332(d)(3) & (4)'s discretionary and mandatory carveouts for CAFA cases (i.e., the tests under which district courts either could or must decline to exercise CAFA jurisdiction); (4) deletes § 1332(d)(11) (concerning mass actions); (5) permits removal of § 1332(a) diversity cases featuring in-state defendants so long as at least one defendant is out-of-state; (6) removes the 1-year time limit on removing diversity cases that become removable later than the initial pleading; and (7) revises the criteria for class action diversity removal (including by eliminating the § 1453(b) proviso that removal is "without regard to whether any defendant is a citizen of the State in which the action is brought") **Report:** None.	• 7/19/2018: Introduced in the Senate; referred to Judiciary Committee
Anti-Corruption and Public Integrity Act	**S. 3357** *Sponsor:* Warren (D-MA)	CV 12	**Bill Text:** https://www.congress.gov/115/bills/s3357/BILLS-115s3357is.pdf **Summary:** Section 403: makes the Code of Conduct for United States Judges applicable to the Supreme Court; requires the JCUS to establish enforcement procedures; such	• 8/21/18: Introduced in the Senate; referred to Finance Committee

Anti-Corruption and Public Integrity Act, cont.			procedures must be submitted to Congress Section 404: amends disclosure requirements with respect to financial reports, recusal decisions, and speeches; requires livestreaming of appellate proceedings (subject to exceptions); provisions publicizing case assignments; making websites user-friendly Section 405: places ALJ positions in the competitive service Section 406: provision regarding reporting on judicial diversity Section 407: amends Civil Rule 12 to add a subdivision j: (j) Pleading Standards. A court shall not dismiss a complaint under Rule 12(b)(6), (c) or (e): (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief; or (2) on the basis of a determination by the court that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged. Section 408: amends the E-Government Act of 2002 regarding the public availability of judicial opinions **Report:** None.	
Injunctive Authority Clarification Act of 2018	**H.R. 6730** *Sponsor:* Goodlate (R-VA)		**Bill Text (Amendment):** https://www.congress.gov/115/bills/hr6730/BILLS-115hr6730ih.pdf **Summary:** Prohibits federal courts from issuing an order "that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority" unless the non-party is represented "by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure." **Report:** None. *See supra* H.R. 4927.	• 9/13/18: markup held; reported favorably out of Committee (14-6) • 9/11/18: "Amendment in the Nature of a Substitute" • 9/10/18: Introduced in the House; referred to Judiciary Committee

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TAB 2

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 43
Suggestion from Collins T. Fitzpatrick (18-CR-C)

DATE: September 11, 2018

Mr. Fitzpatrick, the Circuit Executive for the Seventh Circuit, wrote to draw the Committee's attention to the opinion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), in which the court suggested "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence.

Part I of this memo provides a brief description of the *Bethea* decision (which is also included with Mr. Fitzpatrick's suggestion), and Part II describes the Committee's recent treatment of Rule 43.

Part III discusses the Committee's options. Although the Committee has declined on two recent occasions to propose an amendment allowing video conferencing for pleas or sentencing in felony cases, this case presents a compelling scenario that the Committee has not previously considered. Accordingly, it may warrant reference to a new subcommittee to consider (1) whether a narrow exception to the requirement of physical presence is warranted for exceptional cases, especially those involving the defendant's physical illness or disability, and (2) whether such an amendment could be kept within appropriately narrow bounds. We suggest some language, drawn from Rule 15, that might provide a template.

I. The decision in *Bethea*

The district judge in *Bethea* conducted a combined plea and sentencing hearing, presiding from the courtroom with the prosecutor and one defense counsel while the defendant and another defense counsel appeared by video conference. This procedure was intended to benefit the defendant, who had very severe health and mobility issues. He required dialysis for 10 hours a day, five days per week, suffered pulmonary issues, recently had a heart stent implanted, was wheelchair bound, and suffered from a condition that made him "highly susceptible to fractures and dislocations from even minor physical contact." *Id*. at 865 n.1. Although the defendant did not object to the procedure, the record is not entirely clear on the question whether he or his counsel requested that he be permitted to appear by video conference.[1]

[1]The government's brief asserts that defense counsel suggested this procedure for the defendant's benefit and essentially invited the error now complained of. It notes that defense counsel withdrew after the judgment was docketed, noting that it would be inappropriate to appear in order to argue that the requested procedure was reversible error. Brief of United States, Plaintiff-Appellee, No. 17-3468, 2018 WL 1414305,

The court of appeals held that "Federal Rule of Criminal Procedure 43(a) required him to be physically present during his plea," *id*. at 865, and that the violation of Rule 43(a) constituted per se error, *id.* Accordingly, the court vacated the judgment and remanded the case. It began with a textual analysis. Rule 43(a) requires that the defendant "must be present at . . . the plea," and none of the exceptions to that requirement were applicable. Indeed, the Rules were amended in 2011 to permit misdemeanor—but not felony—pleas to be taken by video conference. *Id*. at 866. Accordingly, "the plain language of Rule 43 requires all parties to be present for a defendant's plea," and "a defendant cannot consent to a plea via video conference." *Id.* at 867. The court found this conclusion "supported by the unique benefits of physical presence." *Id.* It concluded:

> . . . while it might be convenient for a defendant or the judge to appear via video conference, we conclude the district court has no discretion to conduct a guilty plea hearing by video conference, even with the defendant's permission.

Id. Finally, the court agreed with a Tenth Circuit decision that a Rule 43(a) error constitutes per se error, and the presence or absence of prejudice was not relevant. *Id.* (quoting *United States v. Torres-Palma*, 290 F.3d 1244, 1248 (9th Cir. 2002)).

The court ended its opinion with a suggestion that it might be beneficial to revise Rule 43(a):

> We are sympathetic to the government's concerns that a defendant on appeal can complain of an accommodation that was for his benefit below. We also agree with various courts that have stated it would be sensible for Rule 43 to allow discretion in instances where a defendant faces significant health problems. *See, e.g.*, *United States v. Brunner*, No. 14–cr–189, 2016 WL 6110457, at *3 (E.D. Wis. Sept. 23, 2016). However, Rule 43(a) simply does not allow a defendant to enter a plea by video conference. *See Lawrence*, 248 F.3d at 305 ("[T]he rule should indeed provide some flexibility. But it does not. We cannot travel where the rule does not go.").

Id. at 868.

II. The Committee's prior consideration of Rule 43(a) and video conferencing for pleas or sentencing

On two relatively recent occasions, the Committee considered and rejected the use of video conferencing for pleas and/or sentencing.

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at *14 (March 9, 2018). In contrast, the defense reply brief cites another communication from defense counsel casting the matter in a different light, and it quotes an email from the prosecutor suggesting that the defense consider video conferencing. Reply Brief of Defendant-Appellant, Gregory Bethea, No. 173468, 2018 WL 1378427, at *2-4 (March 14, 2018).

As the *Bethea* court noted, in 2011, the Committee amended Rule 43(b)(2) to permit misdemeanor defendants upon written consent, to appear by video conference for arraignment, plea, trial, and sentencing. Although the Committee strongly endorsed the continued value of in-person proceedings, it recognized that misdemeanor cases were already being treated very differently than felony cases: in misdemeanor cases, the defendant could consent to proceedings (including trial) in absentia. For example, prior to 2011 the rule allowed a defendant charged with a misdemeanor that occurred during a vacation in a national park to decide not to make a long trip back for all or part of the proceedings. The Committee concluded that in this context, allowing the option of video conferencing would provide the defendant with an opportunity to participate from a remote location, and would not be a substitute for face-to-face proceedings in the courtroom. Members were strongly opposed, however, to extending video conferencing to felony pleas or sentencing.

Most recently, at its meeting in October 2017, the Committee decided not to move forward with a suggestion (17-CR-A) to allow video conferencing for sentencing at the judge's option (unless the defendant objected and showed good cause) when the defendant and counsel were in the courtroom, but the judge was at a remote location. Multiple judicial members opposed an extension of sentencing by video conference. They stressed the difference between proceedings conducted by video conferencing and those done in person, face-to-face. Being in the courtroom allows the judge to better gauge whether the defendant understands the proceedings, and whether there is any coercion. It is the most human thing judges do, and physical presence allows the judge to understand the defendant better. Also, given the grave consequences, it is appropriate for the judge to be in the courtroom with the defendant. Finally, members noted that the rule already provides some flexibility. For example, Rule 43(c)(1)(B) permits waiver by a defendant who was present for trial or the plea proceedings, and who then chooses to be voluntarily absent from sentencing.[2] The Committee concluded no change in the rule was warranted.

III. The Committee's options

Although the Committee's actions in 2011 and 2017 do not foreclose consideration of the current suggestion for an amendment, they counsel against in-depth treatment unless the current proposal is distinguishable from those recently considered and rejected.

The current proposal is distinctive in several respects. First, it reflects the concerns of the Seventh Circuit panel in *Bethea* (and other cases cited by that court). In contrast, 17-CR-A was a suggestion from a single senior judge who was away from his courthouse several months each year. In 2011, when the Committee did its comprehensive review of changes to accommodate new technology, there was no proposal for video conferencing in felony cases.

Second, the facts of *Bethea* demonstrate that there can be exceptional cases in which the public interest might be served by allowing the defendant to consent to video conferencing for his

[2]This provision was not applicable in *Bethea*, because there was no trial, and the defendant was absent from the *combined* guilty plea and sentencing.

sentencing, or both the plea and sentencing. *Bethea* is not a case in which the judge (or another party) simply found it more convenient to appear by video conferencing. The defendant's many health problems made it extremely difficult for him to come to the courtroom, and given his susceptibility to broken bones doing so might have been dangerous for him. Similarly, a district court concluded that the rules did not permit it to allow a defendant to appear at his change of plea hearing either telephonically or by video conference despite "severe health problems that limit his mobility," as well concerns about the cost of transporting him to court (for which counsel had received estimates of $3,000–$4,000). *United States v. Brunner*, No. 14-CR-189, 2016 WL 6110457, at *1 (E.D. Wis. Sept. 23, 2016).[3] Yet even in such exceptional cases, and even with the defendant's consent, Rule 43 does not permit video conferencing. This raises the question whether an exception could be drawn narrowly enough that the exception did not swallow the rule, or take a first stop down the proverbial slippery slope.

The appointment of a subcommittee would be appropriate if the Committee concludes that further consideration of a narrow exception to the requirement of physical presence is warranted. A subcommittee could examine, inter alia, the procedures necessary to ensure an knowing and intelligent waiver, as well as concerns about the right to counsel when the defendant and counsel are in different locations. State authorities may provide useful guidance. *See, e.g.*, *State v. Anderson*, 896 N.W.2d 364, 374 (2017) (holding that a valid waiver requires a colloquy that unambiguously informs the defendant he or she has a right to be physically present for the plea hearing in the same courtroom as the presiding judge, and that the court must specifically inquire, as often and in whatever manner necessary under the circumstances, whether the defendant is able to hear and understand the court and the other participants).

[3] *See also United States v. Klos*, No. CR-11-233-PHX-DGC (LOA), 2013 WL 2237543, at *1 (D. Ariz. May 20, 2013) (holding the court had no authority to permit a defendant to appear by video conference despite finding he had "valid reasons" for not wishing to travel from Florida to Arizona for a change of plea hearing: "he 'reside[d] in northern Florida and provides daily care for his elderly, sickly, disabled parents . . . he not only lack[ed] the funds to travel to/from Arizona for the change of plea hearing, but a prolonged absence from his parents would seriously risk their well-being.")

TAB 2B

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JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

18-CR-C

COLLINS T. FITZPATRICK
CIRCUIT EXECUTIVE

PHONE (312) 435-5803

May 3, 2018

District Judge Donald W. Molloy
United States District Court
Post Office Box 7309
Missoula, MT 59807-7309

Dear Judge Molloy:

I have enclosed the opinion of the United States Court of Appeals for the Seventh Circuit, in *U.S. v. Bethea*, No. 17-3468. It deals with the requirement of Federal Rule of Criminal Procedure 43(a) that the defendant be physically present for the judge to accept a plea. The defendant had consented to having the plea and sentence by videoconference but the Court of Appeals concluded that Rule 43(a) required his presence. Your committee may want to consider this issue.

Sincerely,

Collins T. Fitzpatrick

CTF/rma
Enclosure
cc w/encl.: Chief Judge Diane P. Wood
Circuit Judge Joel M. Flaum
District Judge Gary Feinerman
Sara Sun Beale, Reporter
Nancy J. King, Associate Reporter
Rebecca Womeldorf, Rules Committee Staff

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-3468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GREGORY BETHEA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 3:17-cr-008 — **James D. Peterson**, *Chief Judge.*

ARGUED MARCH 29, 2018 — DECIDED APRIL 26, 2018

Before BAUER, FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Defendant-appellant Gregory Bethea pleaded guilty to possessing a counterfeit access device in violation of 18 U.S.C. § 1029(a)(1). Due to serious health issues, Bethea appeared via videoconference at his combined guilty plea and sentencing hearing where he was sentenced to twenty-one months' imprisonment. He now argues his sentence should be vacated because Federal Rule of Criminal Procedure 43(a) required him to be physically present during

his plea. We agree, and thus reverse and remand for further proceedings.

I. Background

In 2014, Bethea used fraudulently obtained credit cards to purchase merchandise at retailers in Wisconsin. A grand jury subsequently indicted him for possessing a counterfeit access device in violation of 18 U.S.C. § 1029(a)(1). Bethea agreed to plead guilty in May 2017.

On December 1, 2017, the district judge conducted a combined guilty plea and sentencing hearing. The judge presided from his Madison, Wisconsin courtroom, while Bethea appeared via videoconference from Milwaukee because of his health issues and limited mobility.[1] After conducting a plea colloquy, the judge accepted Bethea's guilty plea and moved to sentencing. Although the judge acknowledged Bethea's health as a complicating factor in imposing a sentence, he remained bothered that Bethea's illegal conduct allegedly continued well after his health issues supposedly worsened. Ultimately, the judge sentenced Bethea to twenty-one months' imprisonment, which fell at the bottom of the Guidelines range of twenty-one to twenty-seven months. Bethea timely appealed, arguing that the district court was not permitted to accept Bethea's guilty plea via videoconference.

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[1] Specifically, Bethea requires dialysis for ten hours a day, five days a week; suffers from pulmonary issues; recently had a heart stent implemented; is wheelchair-bound; and suffers from Charcot joint syndrome, which makes him highly susceptible to fractures and dislocations from even minor physical contact.

II. Discussion

We review legal questions, such as whether the use of videoconferencing at a sentencing hearing violates the Federal Rules of Criminal Procedure, de novo. *See United States v. Thompson*, 599 F.3d 595, 597 (7th Cir. 2010). Bethea argues that his combined guilty plea and sentencing via videoconference violated Federal Rule of Criminal Procedure 43(a) because he was not physically present in the courtroom during his plea. He argues this was an unwaivable obligation, and the court's failure to adhere to the requirement constitutes per se reversible error. Thus, he maintains that even if he consented to the form of proceeding, we must still vacate his plea and sentence.

Rule 43 of the Federal Rules of Criminal Procedure governs the circumstances under which a criminal defendant must be present in the courtroom. The Rule states that "the defendant must be present at ... the initial appearance, the initial arraignment, *and the plea*." Fed. R. Crim. P. 43(a) (emphasis added). The presence requirement is couched in mandatory language—"the defendant *must* be present." *Id.* (emphasis added); *see also In re United States*, 784 F.2d 1062, 1062–63 (11th Cir. 1986) ("The rule's language is clear; the rule does not establish the right of a defendant to be present, but rather affirmatively *requires* presence." (emphasis added))[2].

True, the Rule's presence requirement does contain several exceptions and waiver provisions. *See* Fed. R. Crim. P. 43(b), (c). These exceptions include, for example, when a proceeding involves the correction or reduction of a sentence, *see* Fed. R.

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[2] Earlier cases quote a prior version of the Rule which used the language "shall be present." The Rule was amended in 2002 to read "must be present." That change is immaterial to our analysis.

Crim. P. 43(b)(4), or when the defendant is voluntarily absent during sentencing in a noncapital case after initially attending the trial or plea, *see* Fed. R. Crim. P. 43(c)(1)(B). But none of these exceptions apply to the situation before us and are generally limited to the sentencing context.[3] Moreover, Rule 43 was amended in 2011 to permit videoconference pleas for *misdemeanor* offenses. *See* Fed. R. Crim. P. 43(b)(2) (stating that when the offense "is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits ... plea ... to occur by video teleconferencing or in the defendant's absence"). That the drafters did not include that option in the felony plea situation is telling.[4]

No other circuit has addressed whether a defendant can affirmatively consent to a plea by videoconferencing.[5] However, four circuits have addressed whether a district court can

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[3] For instance, a defendant can waive his absence at sentencing, but he must have been initially present either at the plea or the start of trial. *See, e.g., United States v. Benabe*, 654 F.3d 753, 771 (7th Cir. 2011) ("[T]he language of Rule 43 does not provide for waiver of the right to be present unless a defendant is 'initially present at trial.'") (quoting Fed. R. Crim. P. 43(c)(1)).

[4] Likewise, Federal Rules of Criminal Procedure 5 and 10 were amended in 2002 to permit initial appearances and arraignments to be conducted by videoconference if the defendant consents. Rule 11, however, which governs the taking of guilty pleas, was not amended to permit a defendant to agree to enter a guilty plea by videoconference.

[5] Several district courts have addressed this precise issue and held that a defendant *cannot* consent to video conferencing during a plea, even for medical or financial hardship reasons. *See, e.g., United States v. Brunner*, No. 14-CR-189, 2016 WL 6110457 (E.D. Wis. Sept. 23, 2016); *United States v. Klos*, No. CR–11–233, 2013 WL 2237543 (D. Ariz. May 20, 2013); *United States v. Thomas*, No. CR 06–40079, 2007 WL 1521531 (D.S.D. May 21, 2007);

require it. All have held that Rule 43 obligates both the defendant and the judge to be physically present; the outcome is the same whether it is the judge or defendant who appeared via videoconference. *See United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) ("The text of Rule 43 does not allow video conferencing" and the "structure of the Rule does not support it"); *United States v. Torres-Palma*, 290 F.3d 1244, 1246–48 (10th Cir. 2002) ("[V]ideo conferencing for sentencing is not within the scope of a district court's discretion."); *United States v. Lawrence*, 248 F.3d 300, 303–05 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 238–39 (5th Cir. 1999). We agree with our sister circuits' reasoning and extend it one step further. We thus hold that the plain language of Rule 43 requires all parties to be present for a defendant's plea and that a defendant cannot consent to a plea via videoconference.[6]

Our decision is supported by the unique benefits of physical presence. As the Sixth Circuit explained, "[b]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference." *Williams*, 641 F.3d at 764–65. Likewise, the Fourth Circuit reasoned that "virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *Lawrence*, 248 F.3d at 304.

United States v. Jones, 410 F. Supp. 2d 1026 (D.N.M. 2005); *United States v. Melgoza*, 248 F. Supp. 2d 691 (S.D. Ohio 2003).

[6] Since we find Bethea's presence at a plea an unwaivable requirement, we need not address the government's contention that Bethea invited the error here or forfeited the claim.

This Court has also recognized the value of the defendant and judge both being physically present. In the context of revocation of supervised release via videoconferencing, we noted that "[t]he judge's absence from the courtroom materially changes the character of the proceeding." *Thompson*, 599 F.3d at 601. The same is true if the defendant is the person missing. "The important point is that the form and substantive quality of the hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of a cable or satellite link." *Id.* at 600. A "face-to-face meeting between the defendant and the judge permits the judge to experience 'those impressions gleaned through ... any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.'" *Id.* at 599 (alteration in original) (quoting *Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978)). "Without this personal interaction between the judge and the defendant—which videoconferencing cannot fully replicate—the force of the other rights guaranteed" by Rule 43 is diminished. *See id.* at 600. Thus, while it might be convenient for a defendant or the judge to appear via videoconference, we conclude the district court has no discretion to conduct a guilty plea hearing by videoconference, even with the defendant's permission.

In so holding, we agree with the Tenth Circuit that a Rule 43(a) violation constitutes *per se* error. *Torres-Palma*, 290 F.3d at 1248; *see also Lawrence*, 248 F.3d at 305 (automatically reversing for Rule 43 error); *Navarro*, 169 F.3d at 238–39 (same). "Rule 43 vindicates a central principle of the criminal justice system, violation of which is *per se* prejudicial. In that light, presence or absence of prejudice is not a factor in judging the violation." *Torres-Palma*, 290 F.3d at 1248.

The government's reliance on our statement in *United States v. Benabe*, that "[w]e see no reason to expand the limited list of structural rights whose violation constitutes per se error by adding the defendants' Rule 43 right to be present at the inception of trial," 654 F.3d 753, 774 (7th Cir. 2011), is misplaced. First, in *Benabe*, the district court dealt with Rule 43(c), which unlike Rule 43(a), *does* permit waiver of presence in limited circumstances. *See* Fed. R. Crim. P. 43(c). Second, in declining to require automatic reversal, we stressed "[i]t is important ... to remember the precise error in question." *Id.* at 773. In *Benabe*, the court's error "was only the precise timing of the exclusion order." *Id.* As such, we held "[t]he timing of the trial court's decision to remove the defendants from the courtroom, although a technical violation of Rule 43, was harmless." *Id.* at 774. Here, the precise error was more than the mere timing of an order; indeed, the defendant was *never* present. As such, *Benabe* is unhelpful.

We are sympathetic to the government's concerns that a defendant on appeal can complain of an accommodation that was for his benefit below. We also agree with various courts that have stated it would be sensible for Rule 43 to allow discretion in instances where a defendant faces significant health problems. *See, e.g., United States v. Brunner*, No. 14-cr-189, 2016 WL 6110457, at *3 (E.D. Wis. Sept. 23, 2016). However, Rule 43(a) simply does not allow a defendant to enter a plea by videoconference. *See Lawrence*, 248 F.3d at 305 ("[T]he rule should indeed provide some flexibility. But it does not. We cannot travel where the rule does not go."). Accordingly, we remand

to the district court for the plea and resentencing of Bethea in the physical presence of a judge.[7]

III. Conclusion

For the foregoing reasons, we VACATE the judgment of the district court and REMAND in accordance with this opinion.

[7] Given that result, we need not address Bethea's claim that the district court erred in addressing Bethea's health issues at the sentencing hearing.

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Time for Ruling on Habeas Motions
Suggestion from Gary E. Peel (18-CR-D)

DATE: September 18, 2018

Mr. Peel proposes "new federal civil and/or criminal court rules (or the mandating of local court rules)" that require "district court judges to issue decisions/opinions on pending motions within a specified number of days [he suggests 60 or 90 days] absent exigent circumstances." He states that the failure of judges to rule on motions in Section 2254 and 2255 cases, in particular, is a "systemic problem," and that it is not uncommon for Section 2254 and 2255 motions to remaining "pending" or "under consideration" for a year or more. He adds that efforts to remedy this situation have been ineffective.

The question before the Criminal Rules Advisory Committee is whether to consider a response to this proposal, by an amendment to the Criminal Rules, the Rules Governing Section 2254 Cases, the Rules Governing Section 2255 Proceedings, or some other response. The Civil Rules Advisory Committee has this proposal on its agenda as well. *See* Suggestion 18-CV-V. The Civil Rules may also apply to 2254 and 2255 cases. *See* Rule 12 of the Rules Governing Section 2254 Cases (Civil Rules may be applied to the extent that they are not inconsistent with statute or these rules); Rule 12 of the Rules Governing Section 2255 Proceedings (Civil and Criminal Rules may be applied to the extent that they are not inconsistent with statute or these rules).

We believe there will be little appetite for the sweeping rules amendment that Mr. Peel proposes: an amendment that would require all pending civil and criminal motions to be decided within a specific number of days. In criminal cases, the Speedy Trial Act already regulates delay. Moreover, presumptive time limits for the resolution of pending matters, even with exceptions for exigent circumstances, have been disfavored. We understand that the Reporter's Memorandum to the Civil Rules Committee will be recommending rejection of Mr. Peel's proposal for this reason.

Although the broad amendment Mr. Peel suggests is unlikely to gain traction, his specific complaint about delay in the timely processing of 2254 and 2255 cases has support in empirical research. Two studies, completed in 2007[1] and 2012,[2] documented the extent of delay in

[1] *See* Nancy J. King, Fred L. Cheeseman II, and Brian Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996 (Aug. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. This study examined a random sample of 2254 cases filed in 2003 and 2004, and calculated disposition times after correcting errors in AO filing and disposition dates using original documents from PACER.

[2] *See* Marc D. Falkoff, *The Hidden Costs of Habeas Delay*, 83 U. Colo. L. Rev. 339 (2012). This study traced the history of delay in these cases, efforts to address that delay including the statutory

resolving habeas matters in district courts. Both found great variation between districts in disposition times for non-capital habeas cases, with the slowest districts taking multiple years to close these cases. The 2007 study also used statistical analyses to evaluate factors correlated with variations in delay. After controlling for features including caseload, number of claims, claims and defenses raised, number of pro se clerks, use of magistrate judges, representation and more, it found that variations in processing time continued to be significantly associated with the district in which the petition had been filed.[3]

If the Committee is concerned about the timely processing of these cases, several options are available other than an amendment to the Criminal Rules. An alternative, more targeted option is an amendment to the Rules Governing 2254 Cases and the Rules Governing 2255 Proceedings that would regulate disposition times. Yet this too would face strong headwinds. Rule 4 of the Rules Governing Section 2254 Cases does not impose presumptive deadlines for summary dismissal, or the filing of an answer or response. Instead, it allows local variation and individual discretion:

> The clerk must *promptly* forward the petition to a judge under the court's assignment procedure, and the judge must *promptly* examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.[4]

Rule 4, the Committee Note explains, was intended to accord

> greater flexibility than under [28 U.S.C.] § 2243 in determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2),[[5]] for good

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priority assigned to these cases in 28 U.S.C. § 1657, and calculated disposition times for many years in all districts using AO data.

[3]King, et al., *supra* note 1, at 44, 68-77.

[4]Rule 4 of the Rules Governing Section 2254 Cases (emphasis added). Rule 4(b) of the Rules Governing Section 2255 Proceedings is similar:

> The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

[5]This provision now appears as Rule 81(a)(4) after the 2007 restyling. The time limits once included in Rule 81(a)(2) were deleted by amendment in 2002. *See* the 2002 Committee Note ("In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the

> cause. In view of the widespread case overloads in prosecutors' offices, additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Courts have recognized that Rule 4's discretion replaced the deadlines in Section 2243 and Civil Rule 81. *See, e.g., Wyant v. Edwards*, 952 F. Supp. 348, 350 (S.D.W. Va. 1997). Considering the relationship of Rule 4 to Section 2243, Judge Weinstein noted in *In re Habeas Corpus Cases*, 216 F.R.D. 52, 55 (E.D.N.Y. 2003):

> Even Rule 4, which arguably grants judges discretion to delay the proceedings, emphasizes that petitions shall be brought to the attention of the district court judge '*promptly*'—and repeats that the petition must be examined by the judge to whom it is assigned '*promptly*.' At the very least, such language must be understood as a directive to district court judges not to let habeas applications settle to the bottom of their to-do lists.

As Judge Cecchi observed last year in *Iremashvili v. Rodriguez*, Civil Action No. 15-6320 (CCC), 2017 WL 935441 (D.N.J. Mar. 9, 2017), Judge Weinstein's decision ultimately recognized "the impracticalities, and perhaps the impossibility" of complying with the rigid deadlines of Section 2243, "given modern judicial systems and norms." "[U]nderstand[ing] the frustration expressed by the *In re Habeas* court with regard to what is typically a lengthy process in adjudicating habeas petitions," Judge Cecchi also rejected the petitioner's argument that the specific deadlines set out in Section 2243 survived the adoption of Rule 4. *Id*. at n. 2.

The general issue of presumptive deadlines in these cases arose recently in the Committee's deliberations over the right to file a reply in 2254 and 2255 cases. After becoming familiar with the wide range of time periods individual jurisdictions and judges impose for the filing of a reply, the Committee declined to restrain that discretion with a presumptive deadline. Although the time for filing a response under Rule 4 or the time to file a reply under Rule 5 is not exactly the same as the time for rendering a decision on a petition after the parties' submissions are complete, the Committee's continued concern for retaining judicial discretion over the timing of the process is instructive.

Assuming that a new presumptive deadline for resolving matters in 2254 and 2255 cases is probably a non-starter, it remains possible that the Committee might be inclined to consider taking some alternative action on this issue. We therefore include additional brief information about three potential responses that do not involve an amendment to the Rules.

The first would be to suggest that the Judicial Conference Committee on Court Administration and Case Management (CACM) reconsider the exclusion of 2254 petitions and

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Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81.").

2255 motions from the list of pending dispositive motions that must be reported as pending for more than six months under Section 476 of the Civil Justice Reform Act.[6] Section 2254 and 2255 cases are already included in the three-year case disposition reports, but they are excluded from the six-month motion reports. This means that even though motions to dismiss and motions for summary judgment in other civil cases must be included in a report if pending for more than six months, a Section 2254 petition or Section 2255 application for relief that is ready for decision but has not been resolved for more than six months is not included. Apparently, 2255 "motions" were excluded because they were considered motions in a criminal case.[7] No reason was provided for excluding 2254 petitions from the motion reporting requirement. The memo simply says, "Although Social Security appeals and prisoner petitions (habeas corpus) are normally filed as "motions," "petitions," or "complaints," these cases should not be treated as reportable motions when they are initially docketed."[8] The 2012 study recommended that changing this policy would be an effective way to encourage judges to attend to these cases more promptly without amending the rules. At least one district court has endorsed that suggestion in a published opinion.[9]

CACM has previously recommended changes to the CJRA reporting requirements. In March of 1998, for example, the Judicial Conference accepted CACM's recommendation to require district courts to report pending bankruptcy appeals, "[i]n order to assist in directing judges' attention to bankruptcy appeals and avoid undue delays in providing finality to matters where delay can be financially detrimental to the parties." Later that year, social security appeals (initially excluded along with 2254 petitions from the motion reporting requirement) were added to reporting requirements as well. "Noting that including social security appeals in public reports may encourage courts to remain attentive to their prompt disposition, the Court Administration and Case Management Committee recommended, and the Judicial Conference agreed, that social security appeals be included in CJRA public reports in the same way as motions in civil cases, but that the pending date from which the six-month clock begins to run be set at 60 days after the filing of the transcript."[10] It is instructive that, at least in that context, the

[6] *See* Falkoff, *supra* note 2, at 393-407 (arguing that "by exempting habeas applications from the reporting requirement, the practical effect is to encourage judges to turn to aging motions in every other type of civil matter first, . . . a perverse result for a category of cases that by statute is supposed to receive expedited treatment").

[7] *See* Memorandum from Ralph Mechum, Reporting Required Under the Civil Justice Reform Act of 1990 (September 23, 1991) at 1 ("Even though these motions are counted for statistical purposes as civil cases, they are docketed on the criminal docket and should be excluded from the report.") (emphasis in original). *See infra* Tab C.

[8] *Id.* at 2.

[9] *Aldrich v. MacEachern*, 880 F. Supp. 2d 271, 273 (D. Mass. 2012) (characterizing as "imminently reasonable" Professor Falkoff's suggestion that the Judicial Conference reconsider its interpretation of the CJRA's reporting provision so that habeas petitioners in custody "do not bear a disproportionate share of the burden of delay caused by the courts' heavy civil caseload").

[10] E-mail from Rebecca Womeldorf, Secretary, Committee on Rules of Practice and Procedure, to authors (Sept. 12, 2018, 16:45 EST) (on file with authors); *see* Report of the Proceedings of the Judicial Conference of the United States (March 10, 1998), http://www.uscourts.gov/sites/default/files/1998-

Judicial Conference recognized that extending the reporting requirement would encourage prompt disposition. If the exclusion of 2254 petitions were eliminated, possibly a time other than the initial filing could be set at which the six-month clock would begin to run designating when the petition is ready for decision, just as it was for social security appeals.

A second idea is to recommend that the Federal Judicial Center consider educational programming to share best practices in managing these cases or staff that avoids unnecessary delay in disposition. The 2007 study, for example, noted, "[i]nformal discussions with court staff suggest that efficiencies may be created by allowing court staff to specialize in particular types of cases (prison discipline habeas cases, parole habeas cases, regular habeas), and to serve as support to all of the judges in the district on that specific type of case."

Finally—in addition to or instead of one of these two options—the Committee might recommend that the FJC study further the extent and causes of delay in these cases.

03_0.pdf; Report of the Proceedings of the Judicial Conference of the United States (Sept. 15, 1998), http://www.uscourts.gov/sites/default/files/1998-09_0.pdf.

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18-CV-V
18-CR-D

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, Il 62208

July 9, 2018

Sen. Chuck Grasley –	Chairman of the U.S. Senate Committee on the Judiciary 135 Hart Senate Building, Washington, D.C. 20510
Sen. Dianne Feinstein -	Ranking member of the U.S. Senate Committee on the Judiciary 331 Hart Senate Building, Washington, D.C. 20510
Rep. Bob Goodlatte -	Chairman of the House Committee on the Judiciary 2309 Rayburn HOB, Washington, D.C. 20515
Rep. Jerrold Nadler -	Ranking member of the House Committee on the Judiciary 2109 Rayburn HOB, Washington, D.C. 20515
Sen. Richard J. Durbin -	711 Hart Senate Building, Washington, D.C. 20510
Administrative Office of the U.S. Courts, Standing Advisory Committee on the Federal Rules of Criminal Procedure (F.R. Crim. P)	One Columbus Circle, NE, Washington, DC 20544
Hon. Michael J. Reagan,	Chief Judge of the U.S. District Court for the Southern District of Illinois 750 Missouri Ave., East. St. Louis, IL 62201 * * (for adoption of local rules only) * *

Re: Proposed Amendment to the Federal Rules of Civil and Criminal Procedure

To whom it may concern:

I am NOT seeking any intervention, by you, in my legal matter; however, by way of example ,I am enclosing a copy of my **Fifth** Motion for Court Ruling This motion highlights a systemic problem within the federal civil and criminal court systems that I believe warrants your attention by way of one or more rule changes.

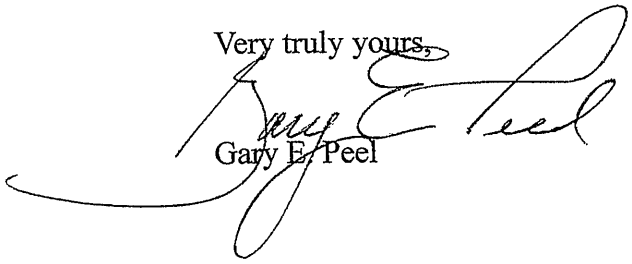
The issue is this: many criminal and civil court motions, particularly those filed by *pro se* litigants pursuant to 28 U.S.C. §§ 2254 and 2255, do not receive *prompt* rulings by U.S. District Court Judges. It is not uncommon for 28 U.S.C. §§ 2254 and 2255 motions to remain "pending" and "under consideration" for a year or more. Efforts to remedy the situation at the District Court level are usually met with orders suggesting that the matter is under advisement; yet, persistent efforts to obtain rulings are to no avail. Additionally, any Motion for Writ of Mandamus filed in the Appellate Court requires payment of filing fees which most criminal defendants do not have. A Mandamus action, to compel the issuance of a ruling, is seldom successful, leaving the defendant with less funds and no remedy. District and appellate court resources are wasted in addressing this recurring problem

I am suggesting new federal civil and/or criminal court rules (or the mandating of local court rules) that mandate district court judges issue decisions/opinions on pending motions within a specified number of days, absent exigent circumstances (such as the death or incapacity of the judge, a pending appellate or Supreme Court case that may control the pending decision, or a pending briefing schedule applicable to the parties).

Mandating decisions within "a reasonable time" or "in due course" will not solve the problem as district court judges routinely use these generic excuses to delay issuing substantive rulings. A specific number of days (60-90?) needs to be mandated (subject only to identifiable exigent circumstances).

Thank you for your attention and consideration.

Very truly yours,



Gary E. Peel

Encl: (1)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY E. PEEL	)	
	)	
Petitioner	)	
	)	
vs	)	Case No. 3:17-cv-01045-SMY
	)	
JOHN M. KOECHNER	)	
	)	
(Chief United States Probation Officer for the Southern District of Illinois)	)	Hon. Staci M. Yandle
	)	
Defendant	)	

FIFTH Motion for Court Ruling

Comes now the Petitioner, Gary E. Peel, *pro se*, and, for the **FIFTH time**, moves this Court to take action and render a ruling on Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE," and as grounds therefor states as follows:

1. ***Petitioner is not seeking a "status" regarding this matter.*** Clearly, the matter is "pending," or "under advisement." Instead, the Petitioner is seeking a *dispositive decision/order* on the pending motion for reconsideration.
2. The "Petition for Writ of habeas Corpus" (Doc. #1) was filed on 9-29-17, over nine (9) months ago. A Memorandum and Order (Doc #11) and a "Judgment in a Civil Case" (Doc. #12) were *promptly* entered by this Court on 11-16-17 (only 48 days later).
3. Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE" (Doc. #13) was then filed on 12-8-17, presenting two primary bases for reconsideration, i.e.
    a. This Court applied the wrong standard in determining what constitutes "newly discovered evidence," (regarding Count 1 of the Indictment), and
    b. This Court turned a blind eye to controlling Supreme Court and Seventh Circuit precedent (regarding Counts 3 & 4 of the Indictment).
4. On March 9, 2018 petitioner filed a "Motion for Court Ruling," (Doc. #14) informing this Court that the motion to reconsider (filed 12-8-17) had been pending for more than ninety

(**90**) days without a decision. This Court, on the same day of March 9, 2018, construed the motion as a request for status, terminated the motion, as moot, and indicated that the Court ***"will issue rulings in due course."*** (See Doc. #15.)

5. On April 9, 2018 petitioner filed a "Second Motion for Court Ruling," (Doc. #16) informing this Court that the motion to reconsider had been pending for more than one-hundred twenty (**120**) days without a decision. This Court merely denied the motion on 4-13-18 (Doc.#17) noting that the Court is aware of the pending motion [to reconsider] and ***"will issue a ruling in due course."***
6. ***However, the "standard" established by Rule 4 is NOT one of "due course." It is one of "promptness."*** Rule 4 specifically requires that the Court "**promptly examine**" the Petition. Whatever logic exists for requiring the *prompt* examination of an *initial* habeas filing surely applies as well to motions to reconsider same. As stated by British Prime Minister William E. Gladstone in 1868, "Justice delayed is justice denied."
7. On 5-9-18 petitioner filed a "**Third** Motion for Court Ruling," (Doc. #18) informing this Court that the motion to reconsider had been pending for more than one-hundred fifty (**150**) days (40% of a year) without a decision. This Court has not yet decided that "**Third** Motion for Court Ruling."
8. On 6-8-18 petitioner filed a "**Fourth** Motion for Court Ruling," (Doc. #19) informing this Court that more than one hundred eighty (182) days (half of a year) had then elapsed without a ruling on the motion to reconsider. Similarly, this Court has not decided that "**Fourth** Motion for Court Ruling."
9. An additional month has now elapsed without a ruling on the motion to reconsider. This makes a total of more than **two hundred ten (210)** days (approximating 57% of a year) without a ruling on the motion to reconsider.
10. Three (3) persons associated with Petitioner's bankruptcy and criminal cases have now died. These are Bankruptcy Judge Kenneth Myers, District Judge William Stiehl, and attorney Donald W. Urban (bankruptcy attorney for Petitioner's first wife, Deborah J. Peel). Hopefully, this Court's delay in rendering a decision is not indicative of any desire that the Petitioner join this list so as to render his habeas motion "moot."
11. Petitioner is constitutionally entitled to the following:

a. due process [guaranteed by the Fifth & Fourteenth Amendments], and

b. access to the courts [guaranteed by the First, Fifth & Fourteenth Amendments].

Both constitutional rights are denied when a District Court Judge refuses to render a timely substantive order/decision upon one or more pending motions.

12. An indefinite delay, as here, benefits only the prosecution. It is not this Court's responsibility to assume or promote the role of Petitioner's adversary. Likewise, this Court's delay in rendering a substantive decision should not be incentivized by any retaliatory motivation to deter Petitioner's insistence on securing a prompt decision.. Petitioner hopes that this Court's delayed ruling is neither

    a. indicative of a judicial bias favoring the petitioner's adversary, nor

    b. a punitive act to deter petitioner's efforts to secure a prompt ruling.

13. Petitioner is entitled to either a) an evidentiary hearing on his habeas petition or b) the right to appeal any adverse ruling denying him that evidentiary hearing. This Court's refusal to issue a ruling precludes both avenues of recourse, thereby denying the petitioner both due process and access to the courts.

14. Petitioner seeks a ruling on the merits, not one that is tainted by this Court's assumption of an adversarial role adverse to the Petitioner or this Court's retaliation for Petitioner's multiple efforts to secure a prompt decision.

Wherefore Petitioner moves this Court, for a **FIFTH** time, to act and render a *prompt* dispositive ruling/decision, on Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE."

July 9, 2018

Gary E. Peel, *pro se*
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208
Cell Phone: 618-304-6187

cc: While Petitioner seeks NO intervention in this matter from the following, a copy of this motion is nevertheless being provided to the following to encourage the adoption of a change in the federal rules of civil and/or criminal procedure for the following purposes; to wit,

a) to compel timely decisions on pending district court motions, and
b) to reduce the waste of judicial resources committed to addressing delayed district court rulings.

Sen. Chuck Grasley -	Chairman of the U.S. Senate Committee on the Judiciary 135 Hart Senate Building, Washington, D.C. 20510
Sen. Dianne Feinstein -	Ranking member of the U.S. Senate Committee on the Judiciary 331 Hart Senate Building, Washington, D.C. 20510
Rep. Bob Goodlatte -	Chairman of the House Committee on the Judiciary 2309 Rayburn HOB, Washington, D.C. 20515
Rep. Jerrold Nadler -	Ranking member of the House Committee on the Judiciary 2109 Rayburn HOB, Washington, D.C. 20515
Sen. Richard J. Durbin -	Illinois State Senator, 711 Hart Senate Building, Washington, D.C. 20510
Administrative Office of the U.S. Courts, Standing Advisory Committee on the Federal Rules of Criminal Procedure (F.R. Crim. P)-	One Columbus Circle, NE, Washington, DC 20544
Hon. Michael J. Reagan, Chief Judge of the U.S. District Court for the Southern District of Illinois-	750 Missouri Ave., East. St. Louis, IL 62201 *** (for purposes of adopting local rules only) ***

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L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

September 23, 1991

MEMORANDUM TO: JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES BANKRUPTCY COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES DISTRICT COURTS
CLERKS, UNITED STATES BANKRUPTCY COURTS

SUBJECT: Reporting Requirements Under the Civil Justice Reform Act of 1990 (CJRA)

Recently you received new reporting instructions, including Form JS 56 for use in complying with the CJRA reporting requirements. These instructions address the reporting of motions pending over six months and bench trials submitted over six months. Instructions concerning reporting requirements for cases pending over three years will be forwarded to you shortly. As a result of recent discussions with some of you and your staffs concerning CJRA issues, primarily related to the reporting of motions, the Statistics Division has identified a list of areas which require additional clarification.

With the exception of the circumstances listed below, the pending date for all types of motions, both dispositive and non-dispositive,

1) for district judges is 30 days after the date of filing; and

2) for magistrate judges is 30 days after the date of filing or on the referral date, whichever is later.

The reporting requirements for Bankruptcy Judges on matters under advisement over 60 days have not changed. Bankruptcy Judges should continue to report matters under advisement over 60 days on the AO 413 form to the circuit executives at the end of each quarter.

1. Motions to Vacate Sentence (28 USC Section 2255)

Even though these motions are counted for statistical purposes as civil cases, they are docketed on the criminal docket and should be excluded from the report.

2. Social Security Appeals/Prisoner Petitions--2254 (Habeas Corpus)

Although Social Security appeals and prisoner petitions (habeas corpus) are normally filed as "motions", "petitions" or "complaints", these cases should not be treated as reportable motions when they are initially docketed. If an additional or secondary motion is filed, i.e., if some decision is being required of the court, these should be included in the report. Examples of these types would be a "motion for summary judgment" or a "motion to dismiss". The pending date for these motions should be determined in the same manner as it is for all other motions.

3. Bankruptcy Appeals

Bankruptcy appeals are normally commenced when the clerk of the bankruptcy court transmits the notice of appeal and the record to the clerk of the district court for docketing. The parties are then required to brief the appeal in accordance with Bankruptcy Rule 8009 or applicable local rule. Occasionally, procedural motions will be filed in a bankruptcy appeal. See Bankruptcy Rule 8011. These motions should be treated as any other for reporting purposes. Do not report a bankruptcy appeal unless a motion has been filed; report it like any other motion.

4. Asbestos

Any district court cases which have been transferred to the Eastern District of Pennsylvania (Judge Charles R. Weiner) as a result of the Multi-District Litigation Order Number 875 should be excluded from the report.

5. Automated Reporting

Any court with the capability to prepare the motions/bench trials report by automated means may do so; however, these reports must include information which addresses each area of the Form JS 56.

Hopefully, the clarification of these issues will help to facilitate the reporting of pending motions and bench trials. Any questions you may have regarding the new CJRA requirements should be addressed to Maurice Galloway on FTS-633-6036.

L. Ralph Mecham

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Proposed New Rule 5.2 (Confidential Disclosure of Full Name and Date of Birth)
Suggestion from the National Association of Professional Background Screeners (18-CR-E)

DATE: September 13, 2018

Melissa Sorenson, the Executive Director of the National Association of Professional Background Screeners (NAPBS), has written to suggest the addition of a new Criminal Rule that would require all defendants who are natural persons to file a confidential statement with the clerk of court disclosing their full names and dates of birth. As discussed in greater detail below, NAPBS also recommends changes in the Civil Rules, and in the PACER system.

These changes are intended to assist professional background screeners in using the PACER system to do background checks for employers and landlords, and to help screeners meet the accuracy requirements imposed by the Fair Credit Reporting Act, 15 U.S.C. § 1681a, et seq. NAPBS asserts that background checks make an important contribution to public safety.

The question for discussion at the October meeting is whether the Committee has sufficient interest in this proposal to refer it to a Subcommittee for further study and discussion.

I. NAPBS's proposal

The core of NAPBS's proposal is new Criminal Rule 5.2, which would require that all natural defendants in federal criminal cases file with the clerk of court a confidential statement providing their full name and date of birth. The confidential statement itself would not be accessible to the general public on PACER, but as noted below, PACER users could use the defendant's full name and/or date of birth as search criteria.

NAPBS recommends three other related changes designed to facilitate the use of the courts' records to conduct background searches:

- a parallel amendment to the Rules of Civil Procedure requiring natural parties to civil cases to submit a confidential statement giving their full names and dates of birth to the clerk of court;

- a direction to the clerks of court to input the names and dates in PACER in the same manner as is done now in the PACER system for bankruptcy cases; and

- a reconfiguration of the PACER system to enable users to use full names and dates of birth as search criteria.

NAPBS's proposals for the Criminal and Civil Rules are modeled on Bankruptcy Rule 1007(f), which provides:

> (f) STATEMENT OF SOCIAL SECURITY NUMBER. An individual debtor shall submit a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 14 days after the entry of the order for relief.

The Committee Notes to the 2003 amendments to Bankruptcy Rule 1007 explain the purpose of this requirement (emphasis added):

> [*Subdivisions (c) and (f).*] The rule is amended to add a requirement that a debtor submit a statement setting out the debtor's social security number. The addition is necessary because of the corresponding amendment to Rule 1005 which now provides that the caption of the petition includes only the final four digits of the debtor's social security number. The debtor submits the statement, but it is not filed, nor is it included in the case file.[1] The statement provides the information necessary to include on the service copy of the notice required under Rule 2002(a)(1). It will also provide the information to facilitate the ability of creditors to search the court record by a search of a social security number already in the creditor's possession.

* * * * *

[1]The instructions to Official Form 121 explain (emphasis added):

> Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements. To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to your case.

> *Changes Made After Publication and Comments.* The rule amendment is made in response to the extensive commentary that urged the Advisory Committee to continue the obligation contained in current Rule 1005 that a debtor must include his or her social security number on the caption of the bankruptcy petition. Rule 1005 is amended to limit that disclosure to the final four digits of the social security number, and Rule 1007 is amended to reinstate the obligation in a manner that will provide more protection of the debtor's privacy while continuing access to the information to those persons with legitimate need for that data. The debtor must disclose the information, but the method of disclosure is by a verified statement that is submitted to the clerk. The statement is not filed in the case and does not become a part of the court record. Therefore, it enables the clerk to deliver that information to the creditors and the trustee in the case, but it does not become a part of the court record governed by §107 of the Bankruptcy Code and is not available to the public.

(emphasis added).

NAPBS contends that in criminal and civil cases–as in bankruptcy– requiring the provision of birthdate information in a fashion that facilitates PACER searches "poses no risk of harm" to criminal defendants or civil parties. NAPBS emphasizes that the new personal information required by its proposed rule would be available only as a search field. It argues that its proposal would allow persons (such as NAPBS members) who already possess an individual's full name or date of birth to conduct an accurate search. But because the confidential statements providing this information will not themselves be subject to disclosure, no private information will be disclosed to others who do not already possess it. NAPBS also contends that the changes it recommends would be consistent with the purposes of the E-Government Act of 2002, which include promoting access to Government information, consistent with the protection of privacy.

II. NAPBS's 2006 proposal

Although this point is not mentioned in their current submission, NAPBS made an earlier proposal in 2006, when Criminal Rule 49.1 and the other E-Government rules were under consideration. The earlier proposal is provided *infra* as Tab C. In 2006, NAPBS urged that Rule 49.1 did not strike the right balance between privacy and the need for accurate background screening, and accordingly the rule should not redact the day and month of the defendant's birth.

The Criminal Rules Advisory Committee did not agree with this recommendation, concluding, inter alia, that aiding background screeners was not one of the functions of the Rules of Criminal Procedure.

III. Discussion

In evaluating whether to refer this suggestion to a subcommittee for further development, the Committee may wish to discuss how much weight, if any, the rule-making process should give to NAPBS members' interest in conducting more efficient and effective background searches. Should the rules be amended in order to assist certain businesses in undertakings that are not part of the litigation process? Although the Criminal Rules do not, themselves, define their purpose, Rule 1 of the Federal Rules of Civil Procedure provides that the basic goal of the Civil Rules is "the just, speedy, and inexpensive determination of every action and proceeding." NAPBS's proposed rule is designed to serve a purpose extrinsic to litigation, not to make criminal (or civil) litigation more just or efficient.

On the other hand, NAPBS contends that its background reports are useful to ensure the safety of groups such as hospital patients and school children, and are also "essential to homeland security." It would be useful to know whether the Department of Justice supports the proposal on this ground.

The Committee may also wish to consider whether NAPBS's proposal might produce any negative consequences. Specifically, would these changes reveal private information that is presently protected? As part of the protection of individual privacy, Criminal Rule 49.1(a)(2) presently requires redaction of the date and month of an individual's birth, while allowing filings to contain the year of birth.

NAPBS contends that the changes it seeks would not reveal personal information now shielded by the rule. Rather, these changes would permit persons or entities that already possessed an individual's full name and/or date of birth to confirm whether that individual was involved in civil or criminal litigation. The proposed changes would not, NAPBS says, disclose the full names and date of birth to anyone who did not already possess that information. NAPBS analogizes to the current system under the Bankruptcy Rules. A party may search for bankruptcy cases of debtors with known social security numbers but cannot learn the social security numbers of other debtors.

By analogy, as we understand the proposed configuration of the PACER system, it would allow an individual to search the Criminal Rules for an individual whose full name and date of birth were known, e.g., determining whether any criminal case involved the particular "Michael Smith" or "John Jones" whose background was being searched. But, NAPBS says, if one did not know the full name or date of birth, one could not obtain that information.

We lack the information necessary to determine whether this assertion is correct. It may be possible, for example, to set up a program to run a series of searches quite rapidly to search for all of the possible dates (Jan. 1, Jan. 2, Jan. 3, etc.), until one got a hit. If that is the case, then the proposed changes would undermine the policy judgment reflected in Rule 49, and do so for purposes extrinsic to criminal litigation. We are not aware of any change in circumstances that would make the revelation of this information less problematic than it was at the time Rule 49.1 and the other E-Government rules were adopted.

Indeed, if anything, there is heightened concern for the misuse of PACER searches to identify and target cooperators.

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18-CV-W
18-CR-E

July 20, 2018

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Chief Counsel
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544

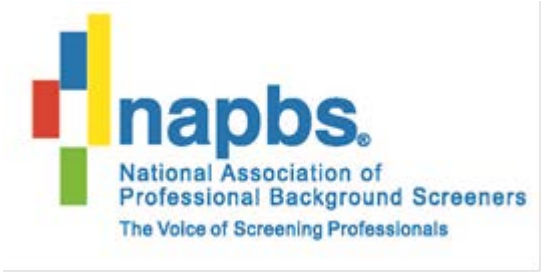
RE: **Proposed Change to PACER**

Dear Ms. Womeldorf:

Pursuant to 28 U.S.C. § 2072, the National Association of Professional Background Screeners ("NAPBS") respectfully submits this proposed change to the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Public Access to Court Electronic Records ("PACER") federal court record system. As discussed below, in order to ensure more speedy, accurate, and reliable background checks and related services, NAPBS recommends the Committee on Rules of Practice and Procedure propose two changes to Judicial Conference policy: first, to require natural persons who are parties to civil and criminal cases to file a disclosure statement in a manner similar to the disclosure statement required by Rule 1007(f) of the Federal Rules of Bankruptcy Procedure, except that instead of submitting one's social security number ("SSN"), the party would submit his or her full name and full date of birth; and second, to make this non-sensitive personally identifying information available as a search criteria for criminal and civil cases in the PACER system in the same manner that SSNs are available in the bankruptcy system as a search criteria.

The PACER system today does not offer an effective way to ensure that the name searched in the federal criminal records system can be verified with a personal identifier such as a date of birth or Social Security Number. Without an effective identifier present in most federal criminal record cases in PACER, professional background screeners must choose between including the record in a background check report – which may not belong to the individual and will therefore be disputed, slowing the employment placement down significantly for a job candidate, or not reporting it and potentially putting other employees and employers at risk if the record does belong to the applicant. The unavailability of a key identifier in this system impedes the ability of professional background screeners to accurately associate a federal criminal record with a specific individual.

The NAPBS is an international trade association of over 850 member companies. Its members provide employment and tenant background screening and related services to virtually every industry around the globe. NAPBS members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record data. NAPBS members also include court-record retrieval services and companies that provide access to public record data to background screeners.



The reports prepared by NAPBS's background screening members are used by employers and landlords every day to ensure that workplaces and residential communities are safe for all who work, reside or visit there. Background reports help ensure the safety of the elderly in nursing homes, patients in hospitals, children at school, and countless others in nearly every facet of daily life. Background reports are also essential to homeland security.

NAPBS's background screening members must comply with the federal Fair Credit Reporting Act ("FCRA") in furnishing background reports to employers and landlords. See, 15 U.S.C. §§ 1681a, et seq. The FCRA imposes accuracy requirements. Id. § 1681e(b). Personal identifiers are key to accuracy; without them, a background screener cannot determine whether a public court record relates to the individual about whom a report is being prepared. If key identifiers like full names and full dates of birth are unavailable, employers and landlords throughout the United States will receive background reports containing "false negatives." For example, a prospective employer will not know whether an applicant was convicted of a serious crime, and the individual may be hired and placed in a position of access to vulnerable third parties or entrusted with access to money and critical assets. The inability to provide accurate and complete background reports increases the risk of harm to American citizens. And federal courts have recognized that businesses have a legitimate public policy interest in managing the risk associated with hiring or leasing to ex-offenders. See, *El v. SEPTA*, 479 F.3d 232, 245 (3rd Cir. 2007) ("If someone with a violent conviction presents a materially higher risk than someone without one, no matter which other factors an employer considers, then [an employer] is justified in not considering people with those convictions."). Indeed, many federal agencies examine public court records maintained by PACER when conducting background checks of potential federal employees, leaving the U.S. government itself vulnerable to the impact of false negatives. (A number of NAPBS members partner with these federal agencies in conducting these background checks.)

By contrast, there is no risk of harm to parties to civil and criminal cases if they are required to file a confidential statement with the court clerk disclosing their full names and full dates of birth. NAPBS members are not asking the courts to disclose this information; we already have that information. Rather, we are asking for PACER to enable users of the system to conduct searches using the name and date of birth as a search criteria. Presently, the bankruptcy-side of PACER permits conducting this type of search with SSNs. And unlike SSNs, dates of birth are not a gateway to identity theft. For many people, dates of birth are already available in the public sphere. Notable public figures will have their dates of birth posted on Wikipedia. The vast majority of state court systems make dates of birth publicly available. And forty-nine out of fifty state data breach notification laws do not treat dates of birth as sensitive personal information subject to breach notification requirements.

If the bankruptcy court system is comfortable mandating that natural persons submit their SSNs to the court clerk, and if PACER has no concerns in permitting the public to run a search of the PACER bankruptcy court system using the SSN, then we would submit the Judicial Conference should have no concerns with requiring the collection of full dates of birth and enabling dates of birth to be a search field when conducting criminal and civil case searches on PACER.

Accordingly, NAPBS respectfully recommends the Committee on Rules of Practice and Procedure consider and implement the following specific rule changes:

- Add a Rule 5.2 to the Federal Rules of Criminal Procedure requiring all defendants who are natural persons to file a confidential disclosure statement to the clerk of court disclosing their full names and dates of birth;

- Add a Rule 7.2 to the Federal Rules of Civil Procedure requiring natural persons who are parties to cases to submit a confidential disclosure statement to the clerk of court disclosing their full names and dates of birth;

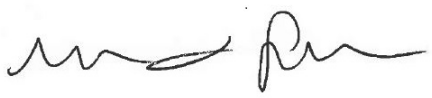
- Direct the clerks of the United States District Courts to input the full names and dates of birth into the PACER system in the same manner that bankruptcy court clerks input SSNs; and

- Direct the United States Administrative Office of Courts to enable full names and full dates of birth as search criteria when users of the PACER system conduct searches of criminal and civil case records.

When Congress enacted the E-Government Act of 2002, it articulated a number of policy purposes. One of them was "to promote access to high quality Government information…." See, 44 U.S.C. § 3601 Note. Another purpose was "to provide enhanced access to Government information and services in a manner consistent with laws regarding the protection of personal privacy…." Id. What NAPBS proposes advances both purposes.

Thank you for your consideration, and please feel free to reach out with any questions or concerns.

Sincerely,



Melissa Sorenson, Esq.
Executive Director

CC: The Honorable Wm. Terrell Hodges, Chair
Committee on Court Administration and Case Management

The Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure

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COLLINS
& Company, Inc.

Integrity and Competence in Government Relations

2111 Wilson Blvd., Suite 700
Arlington, Virginia 22201

phone 703.351.5057
fax 703.522.1738

05-CR- 008

December 8, 2005

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

Dear Mr. McCabe:

I understand the Judicial Conference Advisory Committee on Criminal Rules will hold a public hearing on the proposed amendments to the rules and forms on January 9, 2006 in Phoenix, Arizona. I am writing on behalf of the National Association of Professional Background Screeners, which represents almost 500 firms nationwide who rely on court records to conduct criminal background checks for employers. As such, NAPBS has a substantial interest in these proceedings. NAPBS is particularly interested in the implications of rule 49.1 of the Criminal Rules section. **Mike Sankey**, Associate Member Director of NAPBS, would like the opportunity to present the Association's perspective by providing testimony before the advisory committee at the Jan. 9, hearing. In accordance, with the requirements put forth by the committee, I am informing you of Mr. Sankey's intention to testify 30 days in advance of the hearing. A preliminary draft copy of his testimony and the Association's recommended language for Rule 49.1 are attached to this letter. On behalf of NAPBS, I thank you for your consideration. I know the entire Association looks forward to the opportunity to aid the Committee by providing our unique insight into the filing and records system.

Sincerely,

Shay D. Stautz
On behalf of NAPBS
Vice-President for Technology Programs
Collins & Company, Inc.
stautzs@collinsandcompany.com

cc Mike Sankey Associate Member, NAPBS
Jason Morris, Co-Chairman NAPBS
Tracey Seabrook, Executive Director, NAPBS

--------DRAFT--------DRAFT--------DRAFT--------

The Use of Date of Birth in Criminal Filings and Records
Testimony of the National Association of Professional Background Screeners
Provided by Mike Sankey, Associate Member Director of NAPBS
January 9, 2006

I appreciate the opportunity to provide testimony to you today on behalf of the National Association of Professional Background Screeners (NAPBS), an association of nearly 500 firms nationwide who provide essential background screening services for employers and landlords across the nation. On their behalf, I would like to address the provisions in the proposed rule changes that address the filing and display of key "identifiers" in court records – identifiers such as full names, social security numbers and dates of birth. NAPBS is completely aware of the sensitivity of this issue, and we applaud the Conference's initiatives to increase the privacy protections of the nation's citizens. However, some of these proposed changes will severely affect the ability of background screeners to conduct their essential services, and we believe a slight change to the proposed rules can maintain the increased privacy protection to citizens while maintaining background screeners' ability to perform their services, which are so important for safety in the workplace and in the renting industry.

First, let me provide a bit of context for our industry. Background screening companies are engaged by employers and landlords to do background checks on potential employees or tenants. As such, we serve employers, job applicants, landlords and potential tenants by providing the critical information employers and landlords need to make safe, intelligent hiring and leasing decisions. This information is essential because, in the case of employers, they are compelled to investigate the backgrounds of those they hire if the would-be employee is in a position to potentially harm a third party. This covers many categories of employees. Failure to conduct adequate background checks of employees can make an employer vulnerable to a lawsuit for negligent hiring practices. Aside from mitigating employer liability, background screening protects the public, other employees, and the employer. Ensuring a dangerous person does not have the opportunity to abuse his or her employment position is in the public interest. Industry statistics indicate that 10 percent of applicants who are screened have criminal records. That statistic is particularly unsettling when viewed in the light of another, that the cost to the American economy due to workplace violence is estimated at $55 billion each year in lost wages alone.

A key point must be made about these kinds of background searches – they are *always* conducted with the consumer's written consent, as required by the Federal Fair Credit Reporting Act and several state fair credit reporting acts.

A major component of such background checks is a criminal history search. This criminal history component of employment screening is dependant on access to court records, as provided for under law by the Freedom of Information Act. Screeners use information provided by a consumer to verify his or her criminal history through public

documents. However, because of concern over protecting citizens from identity theft, critical identifiers are being increasingly stripped from available public court records. The removal of these identifiers, specifically social security numbers and dates of birth, makes it hard or impossible for screeners to do their jobs adequately and efficiently. The proposed rule change of 49.1, which seeks to redact information from filings in criminal proceedings, is another example of this trend.

Citizens have a right to privacy, and they have a need for employment and security. The system we operate under requires a certain balance to see that they receive all of these. Rule 49.1, in stripping the day and month of birth for adults in criminal cases, fails to maintain this balance. Without a full date of birth, numerous "false positives" are generated when individuals are screened for employment purposes. Since many people having the same or similar names are born in the same year, their records cannot be distinguished without more complete information, leaving employers to guess about the criminal history of those they intend to hire. The absence of this information requires the individual to "prove" the record in question belongs to someone else, which delays the start of their employment, and results in additional work for court employees when assisting individuals to resolve potential issues related to criminal records. This delay can cost honest applicants jobs, or, if an employer decides not to wait, can allow dishonest applicants with criminal histories to obtain sensitive jobs. In the effort to protect consumers from criminals and identity theft, the removal of identifiers could unwittingly make the public more vulnerable to criminals.

The removal of key identifiers from federal criminal court records is particularly disconcerting for two reasons: 1.) Those convicted in federal courts are often the most serious offenders. 2.) State courts often look to federal courts as a model. If federal courts fail to include adequate identifier information, state court systems are likely to follow suit.

It is also important to note that if identifiers, like date of birth, are not available in a database, employers will be required to pull every relevant court file to try to establish identification, putting a strain upon the resources of clerks' offices. Given the number of background checks that are conducted, thousands each day, requests to access court files may be overwhelming. Employers and background screeners will need to see the public files. The courts may need to add staff to handle the requests for public records, which will have a financial impact on courts and taxpayers. In addition to adding to a significant burden to private enterprise, employers, and consumers, the stripping of necessary identifiers may create an extra burden for the courts themselves.

As the preeminent association for those who conduct employment screening, our members understand public concern for personal data security. We understand concerns about identity theft. Our screens are conducted for the expressed purpose of finding out if people are who they say they are. It is understandable for the federal courts to seek to protect the personal information of citizens. NAPBS agrees that social security numbers or financial account numbers may need to be redacted in court records to address these concerns. However, an individual's date of birth is not as useful or relevant to identity

theft as a social security number, where a criminal endeavors to fraudulently obtain credit using someone else's identity. NAPBS is not aware that the listing of the date of birth of those convicted of crimes in public records has ever resulted in a case of identity theft or misuse of personal data. We see no evidence to suggest a rule change stripping date of birth, while well-intentioned, will serve to protect either the individuals involved or the public at large.

However, for all the reasons I mentioned, failure to include full dates of birth in the filings and records for adults charged in criminal proceedings will almost certainly harm job seekers, employers and the public. In the face of this, the Committee must consider modifying Rule 49.1 to allow for full dates of birth.

On behalf of every member of NAPBS, I thank the Committee for the opportunity to present our industry's views and comments here today. I am happy to answer any questions members of the Committee wish to pose at this time.

NAPBS-RECOMMENDED AMENDMENT TO RULE 49.1

From the Criminal Procedure portion (Pg. 150):

Rule 49.1 Privacy Protection for Filings Made with the Court**

(a) **Redacted Filings.** Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number, or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, a financial account number or the home address of a person may include only:
(1) the last four digits of the social security number and tax identification number;
(2) the minor's initials;
(3) the year of birth **for minors; and the day, month, and year of birth for adults;**
(4) the last four digits of the financial account number; and
(5) the city and state of the home address.

05-CR-008-1
Testimony

The Use of Date of Birth in Criminal Filings and Records

Testimony of the National Association of Professional Background Screeners
Provided by Mike Sankey, Associate Member Director of NAPBS
Hermosa Inn, Scottsdale, AZ, January 6th, 2006

I appreciate the opportunity to testify before you today on behalf of the National Association of Professional Background Screeners (NAPBS), an association of nearly 500 firms that provide background screening services to over 500,000 employers and landlords across America. On behalf of our members and the people we serve, I would like to speak about the provisions in the proposed rule changes that address the filing and display of key "identifiers" in court records – identifiers such as full names, social security numbers, and dates of birth. NAPBS is completely aware of the sensitivity of this issue, and we applaud the Committee's initiatives to increase the privacy protections of the nation's citizens.

However, we would direct the Committee's attention to one aspect of the proposed changes that is problematic. Removing, or encouraging the removal of, the dates of birth for adults in criminal filings will impact the hiring procedures of nearly every employer in this country, and it will likely make citizens more vulnerable to crime. We believe a slight change to the proposed rules can maintain increased privacy protection to citizens without disrupting the employee or tenant screening procedures that are so important for safety in the workplace and in the renting industry. As I will elaborate on, NAPBS strongly urges the Committee to consider a slight modification of the proposed changes to Rule 49.1 to retain full dates of birth in criminal court record filings. To this end, we have submitted modifying language for your consideration with this written testimony.

First, let me provide a bit of context for our industry. Background screening companies are engaged by employers and landlords to do background checks on potential employees and tenants. As such, we serve employers, job applicants, landlords and potential tenants by providing the critical information employers and landlords need to make safe, intelligent hiring and leasing decisions. This information is essential because, in the case of employers, our customers are compelled to investigate the backgrounds of those they would hire if the would-be employee is in a position to potentially harm a third party. This covers many categories of employees. Failure to conduct adequate background checks of employees can make an employer vulnerable to a lawsuit for negligent hiring practices. Aside from mitigating employer liability, background screening protects the public, other employees, and the employer. Ensuring a dangerous person does not have the opportunity to abuse his or her employment position is in the public interest. Industry statistics indicate that 10 percent of all applicants fail to disclose their criminal histories when asked on applications. This statistic is particularly unsettling when viewed in the light of another -- that the cost to the American economy due to workplace violence is estimated at $55 billion each year in lost wages alone.

A key point must be made about the kinds of background searches we do – they are *always* conducted with the consumer's written consent, as required by the Federal Fair Credit Reporting Act and several state fair credit reporting acts.

A major component of background checks is a criminal history search. This criminal history component of employment screening is dependant on access to court records, as provided for under law by the Freedom of Information Act. Screeners use information provided by a consumer to verify his or her criminal history through public documents. However, because of concern over protecting citizens from identity theft, critical identifiers are increasingly being stripped from available public court records. The removal of these identifiers, specifically social security numbers and dates of birth, makes it hard or impossible for screeners to do their jobs adequately and efficiently. The proposed change to Rule 49.1, which seeks to redact information from filings in criminal proceedings, is another example of this trend.

Citizens have a right to privacy, and they have a need for employment and security. The system we operate under requires a certain balance to see that they receive all of these. The proposed Rule 49.1, in stripping the day and month of birth for adults in criminal cases, fails to maintain this balance. Without a *full* date of birth, numerous "false positives" are generated when individuals are screened for employment purposes. Since many people having the same or similar names are born in the same year, their records cannot be distinguished without more complete information, leaving employers to guess about the criminal history of those they intend to hire. The absence of this information requires the individual to "prove" the record in question belongs to someone else, which delays the start of their employment, and results in additional work for court employees when assisting individuals to resolve potential issues related to criminal records. This delay can cost honest applicants jobs, or, if an employer decides not to wait, can allow dishonest applicants with criminal histories to obtain sensitive jobs. In the effort to protect consumers from criminals and identity theft, the removal of identifiers could unintentionally make the public more vulnerable to criminals.

Six percent of criminal convictions are federal crimes. Some of these are arguably the most serious crimes - crimes like those that involve terrorism. Taking date of birth out of federal court records *blinds* screeners to that six percent. We would not feel comfortable if we failed to check the passports of six percent of foreign visitors. Our standards should not be more lax for those we take into our homes and businesses. Without access to identifiers in records, screeners lose the ability to keep applicants honest. If date of birth is not readily available in federal court records, how many applicants with federal criminal histories will lie to gain employment?

Significantly, the rule changes implemented by this Committee and the Judicial Conference will have consequences reaching beyond the *federal* courts. State courts look to federal courts as a model. If federal courts fail to include adequate identifier information, state court systems will likely follow suit. This will make criminal background checks on those who commit the remaining 94% of crimes (at the state and local level) also difficult or impossible to conduct.

Another potential impact of the rule change is a substantial increase on the burden of court clerks. If identifiers, like date of birth, are not available in a database, employers

will be required to pull every relevant court file to try to establish identification, putting a strain upon the resources of clerks' offices. Given the number of background checks that are conducted, thousands each day, requests to access court files may be overwhelming. Employers and background screeners will need to see the public files. The courts may need to add staff to handle the requests for public records, which will have a financial impact on courts and taxpayers. In addition to adding to a significant burden to private enterprise, employers, and consumers, the stripping of necessary identifiers may create an extra burden for the courts themselves.

As the preeminent association for those who conduct employment screening, our members understand public concern for personal data security. We understand concerns about identity theft. Our screens are conducted for the expressed purpose of finding out if people are who they say they are. It is understandable for the federal courts to seek to protect the personal information of citizens. NAPBS agrees that social security numbers or financial account numbers may need to be redacted in court records to address these concerns. However, an individual's date of birth is not as useful or relevant to identity theft as a social security number, where a criminal endeavors to fraudulently obtain credit using someone else's identity. NAPBS is not aware that the listing of the date of birth of those convicted of crimes in public records has ever resulted in a case of identity theft or misuse of personal data. while well-intentioned , we see no evidence to suggest that a rule change stripping date of birth will serve to protect either the individuals involved or the public at large.

While we cannot be sure of the benefits of removing dates of birth, we can be sure of the consequences. For all the reasons I have mentioned here, failure to include full dates of birth in the records for adults charged in criminal proceedings will almost certainly harm job seekers, employers, and the public. Every screen conducted by every employer or landlord on every applicant will be affected by a failure to include this information. The removal of identifiers will create increased strain on the resources of court clerks. It will make it hard or impossible for screeners to identify the six percent of criminals convicted of a federal crime. The sure result of this failure will be that average citizens will be less safe, at their workplaces and in their homes. In the face of all this, NAPBS strongly urges the Committee to consider a slight modification of the proposed changes to Rule 49.1 to retain full dates of birth in the criminal court record filings. To this end, we have submitted modifying language for your consideration with this written testimony.

On behalf of the nearly 500 member of NAPBS who serve the nation's employers and public, I thank the Committee for the opportunity to present our industry's views and comments here today. I am happy to answer any questions members of the Committee wish to pose at this time.

NAPBS-RECOMMENDED AMENDMENT TO RULE 49.1

From the Criminal Procedure portion (Pg. 150):

Rule 49.1 Privacy Protection for Filings Made with the Court**

(a) **Redacted Filings.** Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number, or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, a financial account number or the home address of a person may include only:

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

(2) the minor's initials;

(3) the year of birth **for minors; and the day, month, and year of birth for adults;**

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

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

TAB 5

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TAB 5A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 16
Suggestion from Carter B. Harrison IV (18-CR-F)

DATE: September 11, 2018

Mr. Harrison, a CJA attorney from New Mexico, writes to urge the Committee to amend Rule 16's expert disclosure provisions. He raises concerns about the insufficiency of the current pretrial disclosure rules that are similar to those brought to the Committee by Judges Jed Rakoff (17-CR-B) and Paul Grimm (17-CR-D). Their submissions have been referred to the Rule 16 Subcommittee, with the expectation that the subcommittee will convene a mini-conference on issues surrounding expert disclosure. Mr. Harrison's submission includes several points not addressed in the earlier submissions, including:

- adding a requirement that the witness (not the prosecutor) sign the summary;
- tailoring the reciprocity requirement; and
- adding an option for reciprocal depositions for retained experts.

We recommend that Mr. Harrison's suggestion be referred to the Rule 16 Subcommittee for consideration along with the two related submissions.

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August 30, 2018

VIA EMAIL ONLY: donna_elm@fd.org

Advisory Committee on Criminal Rules
Attn: Donna Lee Elm
400 North Tampa Street, Suite 2700
Tampa, FL 33602

Re: Proposal to Change the Expert-Disclosure Provisions of Fed. R. Crim. P. 16

Dear Ms. Elm and the Committee:

I am a CJA attorney in the District of New Mexico who also does a substantial amount of federal civil work. I am excited to hear that the Committee is considering adopting more civil-style expert disclosure rules, and I wanted to share my thoughts on the matter briefly.

I. Complaints About the Current System

In my opinion, the criminal system for handling expert witnesses – in which opponents of an expert get neither a detailed expert report nor a deposition – is inferior to its civil analogue in virtually every way. Even cost/efficiency, which I believe to be the real justification for many of the comparatively minimal discovery rights afforded in criminal cases, suffers here, because the Court often ends up in the position of having to sit and watch an expert deposition – which in criminal cases is called a "*Daubert* hearing" (not to be confused with the "*Daubert* hearings" in civil cases, in which the Court hears primarily legal arguments and whatever minimal testimony still needs to be developed after the successive issue refinement provided by the expert report and deposition) – unfold live in open court.

In my experience, the way the expert disclosure process often plays out in criminal cases in federal court is that the proponent of the expert will file a two-to-three-page (double-spaced) summary either of the opinions that the proponent *hopes* the expert will say or of the broad topics (barely narrower than the "subject matter") that the expert *can* testify on. Here, the simple requirement (which exists in Civil Rule 26(a)(2)(B) but not in Criminal Rule 16) that the report be "signed by the witness" is huge. Many summaries from the Government are (1) written by an AUSA and not even *seen* by the expert prior to the *Daubert* hearing; and (2) written before the

expert has formed his actual opinions. The experts that are particularly susceptible to this are those that repeatedly testify to more or less the same opinions in multiple cases, often by stating general principles of their field of expertise and leaving it to the jury to apply those principles to the case at hand.

For example, there might be an out-of-state child psychology expert who has testified for the Government in numerous Districts in sex trafficking cases, and this expert might have become one of the word-of-mouth go-to experts for AUSAs nationwide facing sex trafficking cases that appear to be headed to trial. An AUSA in a case set for trial in a month and a half might contact this expert and 'sign them up' with the understanding that the expert will not be expected to know much about the facts of the case, but rather will be called to testify, 'seminar-style,' about general principles of the child psychology of sex trafficking. The AUSA might then copy and paste the Rule 16(a)(1)(G) summary of the expert's testimony in his or her most recent case, perhaps modifying the summary to tie principles that *the AUSA* believes apply to the instant case to the facts (the AUSA is especially likely to do this if, in the prior case, the expert *did* tie principles to facts). At that point, defense counsel is handed a "summary" that is effectively a prior publication excerpt – *i.e.*, a statement by an expert not made in connection with the instant case – that lacks the reliability attendant to actual publication (both the carefulness of the author and the review of the expert's peers), and that is augmented by the (non-)expert opinion of the AUSA.

There is no built-in penalty for the AUSA for doing this, provided that he or she drafted an over-inclusive summary (*i.e.*, one containing opinions that the expert will not ultimately testify to) rather than an under-inclusive one, as the penalty of having extraneous opinions struck is no penalty at all if the expert was never going to testify to them anyway, and the defense cannot even impeach the expert with the summary because the expert did not write it.[1] The defense counsel might then file a *Daubert* motion that is directed to opinions that the expert does not even have, and the Court will then set a hearing. Cross-examination at criminal *Daubert* hearings, in my view, tends to try to serve the role of both deposition (with open questions for the purpose of discovery) and hearing (with leading questions for the purpose of persuasion), and does neither well.

II. Proposal for Reciprocal Expert-Report Discovery

At a minimum, I believe the Committee should require an *expert signed* disclosure for all retained experts (a term I will use to refer to those experts required to provide a report under Civil Rule 26(a)(2)(B)).[2] I also see little downside to requiring that this report fulfill all the detailedness requirements of a civil expert report.

---

[1] Judges seem to vary regarding whether an opponent technically *can* impeach an expert with the summary – *i.e.*, whether reading from the document to contradict the expert is allowed (I always say that the summary is attributable as a prior statement by the expert under FRE 801(d)(2)) – but it certainly is not *effective* impeachment when the expert can honestly explain that he or she neither wrote nor approved the summary.

[2] I will discuss this more below, *see* Park III, *infra*, but please do ensure, if your rule recognizes a (sensible) distinction in disclosure obligations between retained/'party-controlled' experts on the one hand and unretained/independent experts on the other, that case agents who testify in a dual role as both fact and expert

How to handle reciprocity is an interesting issue. My sense is that heightening the current Rule 16(a)(1)(G)/(b)(1)(C) requirements by adding an expert report obligation for retained experts will benefit defendants more than the Government, simply because the Government uses more experts. That said, the current paltry expert disclosure regime of the Criminal Rules incentivizes defendants in some cases – at their selection – to forego *any* reciprocal expert disclosure, and those cases, although somewhat rare, can when they arise put the defendant in a much better situation than the Government, given the ability to effectively circumvent the pretrial *Daubert* motion process. (This might occur if, for example, the defense anticipates that the Government will either not put on expert testimony or will only put on expert testimony in which disclosure will be minimally helpful to the defense – such as chemical identification of drugs testimony, which is obviously *Daubert*-satisfying and where the defense knows what is going to be said – and the defense intends to put on expert testimony either from a less than reputable expert or field of study, or that will be difficult for the Government to anticipate the contours of, such as battered spouse testimony in support of a self-defense claim.) In short, I think the increase from no disclosure to reciprocal "summary" disclosure benefits the Government more than the defense, while the increase from reciprocal "summary" disclosure to reciprocal "report" disclosure benefits the defense more than the Government.

Given that reality, I would retain the obligations imparted by Rule 16(a)(1)(G) and (b)(1)(C) as they currently exist and simply add an *additional* ground of reciprocal discovery that obligates the production of a signed expert report for retained expert witnesses (this would then excuse the obligation of providing a summary for those experts). Here is a proposed redline of the relevant portions of Rule 16, with additions underlined and deletions stricken; where text taken from Civil Rule 26(a)(2)(B) is modified, I have noted it in red:

> **(G) Expert ~~witnesses~~ Summaries.** At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the

witnesses fall on the party-controlled/higher disclosure side of the divide. This is one area where there is a major difference in context and expectations between the criminal and civil rules and practice. In civil cases, when a judge or attorney thinks of a "dual role" expert who has both facts and expert opinions to testify about, they are probably thinking of a 'treating physician,' and the judge's major concern is probably *encouraging* their use by not weighing down proponents with unrealistic obligations that the proponent then has to pass onto the physician, who may have no particular desire to participate in the case; in short, such witnesses are seen as desirable and trustworthy, and the rules are written and interpreted with that in mind. In criminal cases, dual role experts are usually law enforcement officers who want to explain why their factual observations point to the defendant's guilt by way of 'expert' testimony that (1) may have been developed during the instant case's investigation (*e.g.*, meanings of code words); (2) may be more suspicion, speculation, or intuition than real expertise; (3) may veer into 'profile' evidence of the defendant, which may be unreliable and may violate character-evidence rules; and (4) may invade on the decisionmaking province of the jury. These experts are widely viewed as suspect, and the courts have largely struggled in curtailing the dangers of their use. *See, e.g.*, *United States v. Rodriguez*, 125 F. Supp. 3d 1216, 1248-53 (D.N.M. 2015) (outlining six dangers of law-enforcement expert testimony).

government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(H) Expert Reports. At the defendant's request, the government must give to the defendant a written report – prepared and signed by the witness – for each witness from whom the government intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the government need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

. . . .

(C) Expert ~~witnesses~~ Summaries. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(D) Expert Reports. If a defendant requests disclosure under Rule 16(a)(1)(H) and the government complies, then the defendant must give to the government a written report – prepared and signed by the witness – for each witness from whom the defendant intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the defendant need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

I fully admit that the addition of an entirely separate subdivision for reports (versus summaries) is not the most elegant draftsmanship, but the Rule already breaks out "reports of examinations and tests" from "documents and objects" and "expert witnesses," and I think attempting to jam extensive new material into subdivision (a)(1)(G)/(b)(1)(C) will render those subdivisions difficult to read.

III. Proposal for Reciprocal Depositions of Retained Experts

This is probably asking for too much (and too big of a break from the longstanding federal criminal tradition opposing depositions), but I also genuinely believe that providing an additional option for the reciprocal deposition of retained experts would increase both the quality of the truth-seeking function of discovery and the efficiency of the proceedings. The benefits of expert depositions are obvious, and efficiency could be additionally improved by (1) time-limiting the depositions to less than the civil standard of seven hours (I have found that 4 hour depositions work well); (2) reversing or loosening the civil case norm that the deposition taker has primary authority for selecting the date and time of the deposition, and providing a late deadline by which the expert's proponent must make the expert available for deposition – I would think that 7-14 days before the *Daubert*-motions deadline would be sufficient – so that the number of depositions taken in cases that ultimately plead out is minimized; and (3) tying the taking of an expert deposition to a requirement (either explicit in the rule or recognized by convention, although I recommend the former given the strong inertia of convention among the criminal bar) that any *Daubert* motion contain citations to the transcript sufficient for the Court to rule on the motion without a hearing. My state's state court system gives criminal litigants a right to interview *all* of the other side's witnesses – not just experts – and the world has not come to an end; the procedure is widely popular among the bar and believed to produce superior results to a 'blind' system (and the pretrial interview system to which I am referring is, in many ways, *much* more onerous on the prosecution than the reciprocal-at-the-defense's-option system of expert depositions that I am proposing here).

If the Committee were interested, I think such a change could be made by simply adding a new subdivision to the bottom of Rule 16(a)(1), "Depositions of Retained Experts," and adding a couple words long disclaimer somewhere in Rule 15 effectively subjecting expert depositions to the procedural provisions of Rule 15, but not its availability provisions. I would recommend making a condition of the defendant's invocation of the reciprocal deposition option that he waives the right to appear personally at the depositions (either the government's depositions of his experts or his depositions of the government's); Rule 15(c) currently grants the defendant a right to be present at depositions.

Aside from the obvious benefits, an additional plus to implementing this idea is that it will provide some deterrent/drawback to designating fact witnesses aligned with a party (usually case agents) as dual-role expert witnesses, as doing so would expose them to a deposition that they would otherwise not have to go through. *See supra* note 2. I think that this result is entirely appropriate not just as a matter of 'rough justice,' but also because such expert testimony is among the most in need of close examination under Rules 702-705 (and probably really 701); if the Government wants to put on "expert" testimony in the venerable scientific field of "why my client is guilty," then it should at least have to demonstrate how that expertise was developed through *actual* experience *outside* of the instant case – a time-consuming vein of cross-examination that is among the least appropriate things to ask an expert about in front of a jury (which is the current method of handling the task).

Thank you for taking the time to review my concerns. I think this is an important topic where there is significant room for meaningful improvement in the Rules. Best of luck with your changes.

Very truly yours,

Carter B. Harrison IV

CBH/ml

cc: Rebecca A. Womeldorf
(RulesCommittee_Secretary@ao.uscourts.gov)

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TAB 6

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TAB 6A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Background Briefing on Pretrial Disclosure and Expert Witness Reports

DATE: September 17, 2018

The Committee has received three suggestions that it consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* 17-CR-B (Hon. Jed S. Rakoff); 17-CR-D (Hon. Paul Grimm); and 18-CR-F (Carter B. Harrison IV).

At its April meeting, the Committee agreed to study this issue, which was referred to the Rule 16 Subcommittee. Members recognized that one of the critical tasks would be gaining more information. There was support for a mini-conference, as well as a recognition that it would be necessary to delay such a conference until there was more experience under the new Department of Justice policies. Given the likely delay, members expressed the hope that information could be gathered before the mini-conference

Accordingly, to assist the Committee in its deliberations, a portion of the October meeting will be a background briefing on pretrial disclosure, with materials from both the Department of Justice and Donna Elm, who solicited the views of the Federal Defenders.

Tab B provides a list of speakers from the Department of Justice that will describe the Department's current practices and efforts to improve discovery, and to present typical examples of discovery materials.

In the attached memo, Tab C, Donna Elm describes the views of Federal Defenders and experienced CJA lawyers regarding the problems with expert discovery that currently arise under Rule 16, and the issues the Defenders believe the Committee should study.

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TAB 6B

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PRESENTATION BY THE DEPARTMENT OF JUSTICE
LIST OF SPEAKERS

1. Andrew Goldsmith, National Discovery Coordinator for the Criminal Division

2. Ted Hunt, Senior Advisor on Forensics

3. An FBI forensic scientist who will walk the Committee through a firearm and tool-mark evidence report

4. An AUSA who will walk the Committee through discovery of non-forensic expert testimony

5. An AUSA who will walk the Committee through a civil discovery forensic package

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To: Criminal Rules Committee Members
From: Donna Lee Elm
Date: September 17, 2018
Re: Expert Discovery – Defense Concerns

In preparation for the meeting, I sent an email survey to federal defenders as well as CJA Panel practitioners concerning problems that they had encountered with the existing federal expert discovery under Rule 16(a)(1)(G). As is common with email survey blasts, there was little response. However while a number of those responding summarily bemoaned the Rule as insufficient and "toothless," I was provided with quite a few instances where the Rule fell short of adequately apprising the Defense so that the government's expert testimony could be effectively challenged.[1] Furthermore, I asked about traditional experts, not the thorny problem of officers offering "expert" testimony as is common in interpreting drug trafficking language and behavior. I nonetheless had a groundswell of complaints about the latter – suggesting it may be something to consider going forward.

Criminal Defense Attorneys with Civil Experience

CJA A: A long-time CJA panel member from the southwest, who has an active civil practice, was pleased that the Committee was considering productive changes of the Rule. "The criminal system for handling expert witnesses – in which opponents of the expert get neither a detailed report nor a deposition – is inferior to its civil analogue in virtually every way." He noted that it is costly to use Court time for a *Daubert* hearing, which essentially allows the defense to discover the opinions and their bases, as opposed to the civil practice which would provide all that information without Court intervention and hearing.

Rule 16's disclosure requirement results in "a two-to-three page (double-spaced) summary either of the opinions the proponent of the expert *hopes* he will say or of the broad topics ... that the expert *can* testify on." The simple civil requirement that the expert sign the disclosure was "huge," especially because "Many of the summaries written by the Government are (1) written by an AUSA and not even *seen* by the expert prior to a *Daubert* hearing; and (2) written before the expert had formed his actual opinions." He offered as an example experts such as child psychology and human trafficking experts who testify "seminar style" about typical effects and behaviors in these cases. He noted that the criminal Rule offers no penalty for providing this type of disclosure, provided that the AUSA drafted "an over-inclusive disclosure." Another

[1] This serves only to alert us to some problem areas we may want to focus on for any testimony.

drawback of the unsigned notice is that the expert cannot be impeached with it when varying from the Government's notice.[2]

He recommended some changes to the criminal rule. At a minimum, the rule should require the expert to sign the disclosure, and "there is little downside to requiring that this report fulfill all the detailedness requirements of a civil expert report."

When so little is disclosed by the Government so late, he has seen current reciprocal discovery obligations "incentivize defendants in some cases ... to forego any reciprocal expert disclosure."[3] Noting that those are rare occurrences, the government's late/lax disclosure can place the defense at an advantage. Hence the Government could strategically use its Rule 16 obligations to obfuscate, and the Defense can do the same with its reciprocal obligation – gaming instead of principally deciding a controversy.

He went on to offer redlined changes to Rule 16. He followed with a thoughtful and fleshed-out proposal for reciprocal expert depositions. Acknowledging that it would be a significant departure from the current Rule, he believed that that would nonetheless "increase both the quality of the truth-seeking function of discovery and the efficiency of the proceedings."

AFPD B: A Midwest AFPD who had worked in civil practice for a number of years was deeply troubled by the difference between civil and criminal expert discovery rules. She had found that all expert disclosures by AUSAs were "pretty bare bones." She also noted that the government often claimed that they do not need to disclose non-forensic experts "such as the accountant from the victim company or the investigating agency, claiming that they are fact or lay witnesses," even though they testify about matters within their particular expertise.

She also saw a significant difference in disclosure of the substance of the expert's testimony. "The AUSA's summary is often a lot shorter and less detailed than what the expert is ultimately going to testify to. My experience was that a lot more detail was required in civil to pass muster."

Finally, local rules and procedures did not ensure adequate notice. Defense lawyers "have to push the government and court for a deadline for expert disclosures." She usually did not receive those disclosures early enough to sufficiently investigate, prepare for, and hold *Daubert* hearings. "Unlike motions in limine, expert disclosures should not be submitted just a couple weeks before trial because trial judges are often reluctant at that point to hold *Daubert* hearings when appropriate." The defense

[2] He conceded that he has sometimes been allowed to impeach an expert with the Government's Rule 16 notice, but that confrontation "certainly is not *effective* impeachment when the expert can honestly explain that he or she neither wrote nor approved the summary."

[3] This can occur when the Defense is not fully informed until a thorough *Daubert* hearing that sets out the expert position, hence the Defense must secure an expert at the eleventh hour at no fault of its own.

therefore sometimes faces "shoddy prosecution experts offering either junk science or untestable conclusions that are cloaked in expert mystery."

CJA C: A CJA and civil rights practitioner in the North Central part of the country acknowledged "how vital it is to get a full report in advance of trial."

CJA D: A recently retired west coast CJA Attorney (who had 25 years of civil litigation experience that was rife with experts) felt our existing criminal expert discovery rules failed to require important background information about expert opinions. He suggested that Rule 16 spell out more detailed disclosure requirements, including:

- All documents/data provided to the expert to review;
- A copy of the expert's CV (not just a summary of his experience);
- All raw testing data used to prepare reports;
- All graphics generated by the expert regarding reaching his opinion; and
- Identify computer applications used to test/analyze the data.

Unfair/Inadequate Expert Notice

Often inadequate disclosure coupled with inadequate court procedures result in expert testimony that was not anticipated, went untested, and could not be confronted on short notice.

AFPD E: A Southwest AFPD detailed her experience in a lengthy high stakes bomb-making trial where the Government's expert disclosure was inadequate. The notice "read something like we will call an electrical engineering expert who will testify about various items and why they were significant to him and then will opine that this was an IED cache." Upon the Defense objection, the AUSA conceded that the notice was insufficient,[4] but claimed that they had produced the opinions/conclusions of their experts in standard discovery. Per the Court's Order, the Government produced over 80 engineering reports by the FBI spanning 2,000 pages. A new judge took over the case and never ruled on the objection, initiating trial. During the expert's testimony, the Defense found out that this expert had only read 5-10 of those 80+ "expert reports" disclosed. "Worse, his testimony directly contradicted those reports on material points." His testimony was nevertheless allowed over objection.

CJA F: Another veteran CJA Panel member from the Southeast noted much the same problem with expert notices. He complained of common "data dumps" of discovery regarding expert information that hid rather than clarified the opinions, and their bases, that experts relied on. Given that, "It would be great to get some kind of rule requiring indexing."

[4] This was also on the eve of trial and well after the expert notification deadline imposed by the Court.

CJA G: A CJA Panel attorney from the central plains area complained that he regularly got late and inadequate notice. "After several discovery requests by letter and even a motion, you are still waiting for this to happen with trial approaching." He believes this is done to thwart Defense preparation to confront the Government expert, noting that sometimes the AUSA has offered an acceptable plea agreement instead of disclosing the expert or his report.

Police Agent as Expert Inadequate Disclosure

Although I was not asking about these types of experts, several concerned practitioners raised the issue. Moreover, the problems inherent with notice of traditional forensic experts also plague these witnesses, thus informing the discussion of forensic experts.

FPD H: A 2-decade Federal Defender from the Northeast felt that the problem of police witnesses serving as experts on drug quantities and packaging being consistent with distribution, or on gang structure and drug code words, was a bigger problem than abuses of standard forensic expert disclosures.

CJA A: The long-time CJA lawyer from the Southwest who was also engaged in a civil practice felt that the most abused aspect of the criminal expert practices was using a lay witness (like the case agent) as an expert. "This is one area where there is a major difference in the context and expectations between the criminal and civil rules and practice." Such experts are "among the ones most in need of close examination under Rules 702-705 (and probably really 701)." His discussion of these types of experts is quite worthy of our regard when we turn to that subject.

CJA I: A CJA attorney from a Southern state has been frustrated by the AUSA using "a DEA agent as an expert on 'drug interdiction' and Narcotics investigation." He continuously asked for clarifications of what testimony these experts would offer, and provided as an example serial responses filed by an AUSA. Those Rule 16 notices were overbroad and unspecific. The original Rule 16 disclosure is quoted in whole below. The Government would call the DEA agent:

> as an expert witness in the field of drug interdiction and drug trafficking investigations if the case proceeds to trial. A copy of his curriculum vitae is attached. [He] will testify to his knowledge of drug interdiction and drug trafficking investigations.

After being pressed for greater information, the prosecutor added more verbiage but hardly more content; he reported that his DEA agent "is expected to testify as an expert on drug trafficking, drug investigation techniques, drug-trafficking 'tools of the trade,' as well as the modus operandi used by drug traffickers." Additional "expected" testimony included that "drug-trafficking 'tools of the trade' were seized in this case and that defendants follow the drug-trafficking modus operandi to traffic cocaine." The agent would also be expected to opine as to "cocaine quantities and prices, and related

matters." Consistent to the belief expressed by CJA A, that response appears to confirm that no discussions to ascertain the scope of expert testimony had taken place even by the point that that second disclosure was made. When pressed, he provided some meaningful substance of the expert testimony relating to details that in fact pertained to the case – presumably after finally discussing anticipated testimony with the DEA agent. This Defense attorney went on to note the need for "a report requirement or a summary requirement provided by the expert not the attorney as to what the testimony is going to be. ... At a bare minimum the Rules of Criminal Procedure need to match the Civil Procedure Rules as a person's liberty interest is at stake in a criminal prosecution."

CJA C: The CJA and civil rights attorney mentioned in the first section also commented on the police expert dilemma: "So many cases involve opinions by law enforcement on anything from supposed drug code language to how cartels or canine alerts work. The methodology or generally accepted standards are often ambiguous in the summaries. So Rule 26 would be a great change."

CJA J: A CJA attorney from a west coast state reported that the Government hid the fact that they were going to solicit from their case agent expert testimony about child exploitation, referring to him merely as a percipient fact witness. This was done to prevent disclosure to the Defense. "His opinions became a moving target at trial, and continued to evolve even between trial and sentencing." Recognition in Rule 16 that there may be mixed fact/expert witnesses like this, and specifying necessary disclosures for these individuals, is recommended.

CJA K: A CJA Panel member from the Northwest reported on a trial (a single drug transaction) where the Government "sought to introduce expert testimony about methods and techniques of drug traffickers." The Defense successfully moved to preclude this testimony. (I have the motion and response.)