



# FEDERAL MAGISTRATE JUDGES ASSOCIATION

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

**Re: Comments on Proposed Amendments to Federal Rules of**  
**Civil and Criminal Procedure (Class of 2007)**

**Dear Mr. McCabe:**

**The Federal Magistrate Judges Association (FMJA) submits the following comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA chaired by the Honorable Barry M. Kurren (District of Hawaii). The committee members are:**

**Honorable S. Allan Alexander, Northern District Mississippi**  
**Honorable Tim A. Baker, Southern District of Indiana**  
**Honorable Hugh W. Brennenman Jr., Western District Michigan**  
**Honorable Joe B. Brown, Middle District Tennessee**  
**Honorable William E. Callahan, Jr., Eastern District Wisconsin**  
**Honorable B. Waugh Crigler, Western District Virginia**  
**Honorable Morton Denlow, Northern District Illinois**  
**Honorable Paul Komives, Eastern District Michigan**  
**Honorable Malachy E. Mannion, Middle District Pennsylvania**  
**Honorable Nita L. Stormes, Southern District of California**  
**Honorable Mary Pat Thyng, District of Delaware**  
**Honorable Andrew Wistrich, Central District California**

**Based on the variety of their respective districts and duties, the committee is representative of magistrate judges as a whole. Many of the committee members consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and, unanimously approved by the Officers and Directors of the FMJA.**

**The comments reflect the considered position of the membership of the FMJA. We have also encouraged individual magistrate judges to forward comments to you. We are pleased to have this opportunity to present written comments, and we welcome the opportunity to testify.**

**Sincerely yours,**

**Karen K. Klein**  
**President, Federal Magistrate Judges Association**

**COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION  
RULES COMMITTEE ON PROPOSED CHANGES TO  
THE FEDERAL RULES OF CIVIL PROCEDURE  
AND CRIMINAL PROCEDURE (Class of 2007)**

**I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE**

**A. PROPOSED RULE 5.2**

**COMMENT:** The Federal Magistrate Judges Association (“FMJA”) supports the proposed addition of Rule 5.2 which provides privacy protection for filings made with the court. The FMJA suggests, however, that the Rule make clear that compliance with the privacy requirements rests with counsel and the parties and not with the court.

**DISCUSSION:** New Rule 5.2 is proposed to comply with the requirements of section 205(c)(3) of the E-Government Act of 2002. That section of the E-Government Act requires that “rules be adopted to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of document filed electronically.” Rule 5.2, however, is not limited to electronic filing of documents and to the public availability of documents which are filed electronically. It also applies to paper filings.

The FMJA unanimously recommends the adoption of this new proposed rule with one slight modification. Although the *Advisory Committee Notes* mention that counsel and the parties are responsible to assure that filings are redacted, the proposed rule does not specifically advise or warn counsel and litigants of this obligation. Past experience suggests that unless such notice is provided in the rule itself, rather than buried in the

*Advisory Committee Notes*, an expectation may arise that the court, through the clerk, will review documents for compliance with this rule. To eliminate any misconceptions regarding who is responsible for compliance with this rule, the FMJA proposes that language be added which clearly states that responsibility for compliance rests with counsel and the parties and not with the clerk of court. The following language from the *Advisory Committee Notes* could be incorporated into the proposed rule: “The responsibility to redact filings rests with counsel and the parties. The clerk is not required to review each filing for compliance with this rule.” Should a jurisdiction want its clerk to review such filings, a general order, standing court or local rule so noting could be issued.

## **B. PROPOSED STYLE REVISIONS**

**COMMENT:** The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability.

## **II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE**

### **A. PROPOSED AMENDMENTS TO FED. R. CRIM. P. 11 (PLEAS)**

**COMMENT:** The FMJA supports the proposed changes to Rule 11(b)(1)(M) which removes language requiring the court to apply the Federal Sentencing guidelines when imposing sentence.

**DISCUSSION:** The proposed amendment of Rule 11(b)(1)(M) conforms the rule to the Supreme Court’s decision

in U.S. v. Booker 125 S.Ct. 783 (2005). The eliminated language relates to the previous requirement that the court apply the guidelines when imposing sentence. The new language specifies that the court should “...calculate the applicable sentencing guideline range...and to consider that range...and other sentencing factors under 18 U.S.C. § 3553(a)...” (emphasis added). This amendment clarifies that the Federal Sentencing guidelines are now advisory in nature, not mandatory.

**B. PROPOSED AMENDMENT TO FED. R. CRIM. P. 32  
(SENTENCING AND JUDGMENT)**

**COMMENT:** The FMJA supports the proposed changes to Rule 32(d)(2)(F) - (Presentence Report); 32(h) - (Notice of Intent to Consider Other Sentencing Factors); and 32(k)(1) - (Judgment) which conform the Rules to the Supreme Court’s decision in U.S. v. Booker 125 S. Ct. 783 (2005).

**DISCUSSION:** The proposed amendment of Rule 32(d)(2)(F) makes clear the court can request the probation officer to gather and include information other than what may have been called for under the sentencing guidelines, including, but not limited to any information relevant to the sentencing factors set forth in 18 U.S.C. § 3553(a).

The proposed amendment of Rule 32(h) is designed to ensure that no party is caught by surprise if the court considers factors not contained in the presentence report or the submissions of the parties, which could lead to a sentence outside the guideline range or based upon the factors set forth in § 3553(a). This rule

requires the court to give reasonable notice of any  
not otherwise identified

factors it is considering which may lead to a departure or non guidelines sentence.

The amendment of Rule 32(k)(1) is designed to ensure that all courts use the judgment forms prescribed by the Judicial Conference of the United States and include the statement of reasons required pursuant to § 3553(c).

**C. PROPOSED AMENDMENT TO FED. R. CRIM. P. 35  
(CORRECTING OR REDUCING A SENTENCE)**

**COMMENT:** The FMJA supports the proposed changes to Rule 35(b)(1) which removes language requiring the court to apply the federal sentencing guidelines when considering a reduction of sentence for post conviction substantial assistance.

**DISCUSSION:** The proposed amendment of Rule 35(b)(1) conforms the rule to the Supreme Court's decision in U.S. v. Booker 125 S.Ct. 738 (2005). The eliminated language relates to the previous requirement that the court apply the sentencing guidelines and policies statements when reducing a sentence for post conviction substantial assistance. The changes merely reflect that the guidelines provisions are no longer mandatory.

**D. PROPOSED RULE 45(c) (COMPUTING AND EXTENDING  
TIME)**

**COMMENT:** The FMJA supports the proposed amendment of Rule 45(c). The proposed amendment clarifies the computation of an additional three days when service is made by mail, leaving with the clerk of court, or by electronic means. Since the proposed amendment is intended to parallel the change in

Federal Rule of Civil Procedure 6(e), the FMJA suggests that the language of both rules be the same in the interest of consistency.

**DISCUSSION:** The FMJA notes that, in comparing the proposed amendment to Criminal Rule 45(c) with the current Civil Rule 6(e) (effective December 1, 2005), Criminal Rule 45(c) reads slightly differently from the current Civil Rule 6(e). More particularly, proposed Criminal Rule 45(c) uses the term “specified period” and current Civil Rule 6(e) uses the term “prescribed period.” (emphasis added). Also, proposed Criminal Rule 45(c) reads, in part, “3 days are added after the period . . .” Current Civil Rule 6(e) reads, in part, “3 days are added after the prescribed period . . .” (emphasis added). The Committee believes that both rules should use the same terms and words in the interest of consistency.

Furthermore, the FMJA notes that, in comparing the proposed amendment of Criminal Rule 45(c) with the proposed style revisions of Civil Rule 6(e) (which will, under the proposed style amendment, become Civil Rule 6(d)), Criminal Rule 45(c) reads slightly differently from the proposed stylistically revised Civil Rule 6(d). More particularly, the proposed stylistically revised Civil Rule 6(d) reads, in part, “When a party must or may act within a specified time after service . . .” (emphasis added). The proposed amendment to Criminal Rule 45(c) reads, in part, “Whenever a party must or may act within a specified period after service . . .” (emphasis added). The Committee believes that both rules should use either the word “time” or the word “period” in the interest of consistency.





Furthermore, if Civil Rule 6 is stylistically amended to read as proposed stylistically revised Civil Rule 6(d), then the FMJA believes that Criminal Rule 45(c) should be changed to reflect that service under Civil Rule 5(b)(2)(C), (D), (E), and (F) triggers the addition of 3 days, as opposed to the 3 days being added if service is made under Civil Rule 5(b)(2)(B), (C), or (D).

Finally, proposed Criminal Rule 45(c) uses the phrase “added after the period” (emphasis added) when referencing the 3 days. The stylistically amended Civil Rule 6(d) uses the phrase “added to the period” (emphasis added) when referencing the 3 days. The FMJA believes that both rules should use either the word “after” or the word “to” in the interest of consistency.

**E. PROPOSED RULE 49.1**

**COMMENT:** New Criminal Rule 49.1 is a mirror of proposed Civil Rule 5.2. Thus, the concerns expressed above regarding Civil Rule 5.2 are equally applicable and are incorporated herein. The FMJA unanimously recommends the adoption of Criminal Rule 49.1 with a similar modification as suggested to Civil Rule 5.2.