ADVISORY COMMITTEE
ON
CRIMINAL RULES

Phoenix, AZ
October 20-21, 2008

AGENDA
CRIMINAL RULES COMMITTEE MEETING
OCTOBER 20-21, 2008
PHOENIX, AZ

I. PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of April 2008 Meeting in Washington, D.C.

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

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court and Pending Before Congress (No Memo)

1. Rule 1. Scope; Definitions. Proposed amendment defining "victim."

2. Rule 12.1. Notice of Alibi Defense. Proposed amendment provides that victim's address and telephone number should not be automatically provided to the defense.

3. Rule 17. Subpoena. Proposed amendment requires judicial approval before service of a post indictment subpoena seeking personal or confidential information about a victim from a third party and provides a mechanism for providing notice to victims.

4. Rule 18. Place of Trial. Proposed amendment requires court to consider the convenience of victims in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. Proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when presentence report should include information about restitution, clarifies standard for inclusion of victim impact information in presentence report, and provides that victims have a right "to be reasonably heard" in judicial proceedings regarding sentencing.

6. Rule 41. Search and Seizure. Proposed amendment authorizing magistrate judge to issue warrants for property outside of the United States.

7. Rule 45. Computing and Extending Time. Technical Amendment Correcting Cross-Reference to Restyled Civil Rule 5.

8. Rule 60. Victim's Rights. Proposed new rule provides for notice to victims, attendance at proceedings, the victim's right to be heard, and limitations on relief.

9. Rule 61. Conforming Title.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court (No Memo)

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.

2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.

3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.

4. Rule 41. Search and Seizure. Proposed amendments specifying procedure for executing warrants to search for or seize electronically stored information.

5. Rule 11 of the Rules Governing § 2254 Cases. Proposed amendments clarifying requirements for certificates of appealability.

6. Rule 11 of the Rules Governing § 2255 Cases. Proposed amendments clarifying requirements for certificates of appealability.

C. Proposed Time Computation Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court (No Memo)

1. Rule 45. Computing and Extending Time. Proposed amendment simplifying time computation methods.

2. Related amendments proposed regarding the time periods in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and Rule 8 of § 2254/§ 2255 Rules.

D. Proposed Amendments Approved by the Standing Committee for Publication (No Memo)

1. Rule 5. Initial Appearance. Proposed amendment implementing the Crime Victims' Rights Act.

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

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

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

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

III. REPORTS OF SUBCOMMITTEES

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

B. Rule 32(h), Procedural Rules for Sentencing (Memo)

C. Use of Technology (Memo)

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Letter from Judge Carnes on Amending Rule 41 to Authorize Pretrial Service and Probation Officers to seek and Execute Search Warrants

B. Letter from Judge Weinstein on Amending Rule 11 to Authorize Discovery by Defendants

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

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

B. Update on Implementation of Crime Victims Rights Act and Issues Arising Under the Act

C. Use of Subcommittees

D. Revision of the Search and Seizure Warrant Forms

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Spring Meeting

B. Other

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:	**Reporter:**
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive and Towerview Road Box 90360 Durham, NC 27708-0360 ---------- Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
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Honorable Morrison C. England, Jr. United States District Court 15-220 Robert T. Matsui United States Courthouse 501 I Street Sacramento, CA 95814-7300	Honorable James P. Jones Chief Judge United States District Court 180 West Main Street - Room 146 Abingdon, VA 24210
Honorable James B. Zagel United States District Court 2588 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Donald W. Molloy Chief Judge United States District Court Russell E. Smith Federal Building 201 East Broadway Street Missoula, MT 59802
Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312	Honorable Anthony J. Battaglia United States Magistrate Judge United States District Court 1145 Edward J. Schwartz United States Courthouse 940 Front Street San Diego, CA 92101-8927
Honorable Robert H. Edmunds, Jr. Associate Justice of the Supreme Court of North Carolina Justice Building 2 East Morgan Street Raleigh, NC 27601	Professor Andrew D. Leipold Edwin M. Adams Professor of Law University of Illinois College of Law 504 E. Pennsylvania Avenue Champaign, IL 61820

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ADVISORY COMMITTEE ON CRIMINAL RULES

				Start Date	End Date
Richard C. Tallman	C	Ninth Circuit	Member:	2004	----
Chair			Chair:	2007	2010
Anthony J. Battaglia	M	California (Southern)		2003	2009
Rachel Brill	ESQ	Puerto Rico		2006	2009
Leo P. Cunningham	ESQ	California		2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina		2004	2010
Morrison C. England, Jr.	D	California (Eastern)		2008	2011
Matthew W. Friedrich*	DOJ	Washington, DC		----	Open
James P. Jones	D	Virginia (Western)		2003	2009
John F. Keenan	D	New York (Southern)		2007	2010
Andrew Leipold	ACAD	Illinois		2007	2010
Thomas P. McNamara	FPD	North Carolina (Eastern)		2005	2011
Donald W. Molloy	D	Montana		2007	2010
James B. Zagel	D	Illinois (Northern)		2007	2010
Sara Sun Beale	ACAD	North Carolina		2005	Open
Reporter					

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

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ADVISORY COMMITTEE ON CRIMINAL RULES SUBCOMMITTEES

Subcommittee on Sentencing Judge Donald W. Molloy, Chair Justice Robert H. Edmunds, Jr. Thomas P. McNamara Rachel Brill, Esquire DOJ Representative	**Subcommittee on Rule 16 (Brady)** Thomas P. McNamara DOJ Representative Professor Nancy J. King, Consultant
Subcommittee on CVRA Judge James P. Jones, Chair Judge Anthony J. Battaglia Justice Robert H. Edmunds, Jr. Thomas P. McNamara Leo P. Cunningham, Esquire DOJ Representative Professor Nancy J. King, Consultant	**Subcommittee on Writs** Thomas P. McNamara, Chair Judge John F. Keenan Judge Robert H. Edmunds, Jr. Rachel Brill, Esquire DOJ Representative Professor Nancy J. King, Consultant
Subcommittee on E-Government Judge James B. Zagel Thomas P. McNamara Rachel Brill, Esquire DOJ Representative	**Subcommittee on Time Computation** Leo P. Cunningham, Esquire, Chair Judge Anthony J. Battaglia DOJ Representative
Subcommittee on Electronically Stored Information Judge Anthony J. Battaglia, Chair Judge Robert H. Edmunds, Jr. Leo P. Cunningham, Esquire DOJ Representative Professor Nancy J. King, Consultant	**Subcommittee on Rule 6(f)** Judge Anthony J. Battaglia, Chair Judge Robert H. Edmunds, Jr. Professor Andrew D. Leipold Rachel Brill, Esquire DOJ Representative
Subcommittee on Forfeiture OPEN, Chair Judge James P. Jones Thomas P. McNamara Rachel Brill, Esquire DOJ Representative Professor Nancy J. King, Consultant	**Subcommittee on Rule 15** Judge John F. Keenan, Chair Professor Andrew D. Leipold Leo P. Cunningham, Esquire DOJ Representative

LIAISON MEMBERS

Appellate:

Judge Harris L Hartz (Standing Committee)

Bankruptcy:

Judge James A. Teilborg (Standing Committee)

Civil:

Judge Sidney A. Fitzwater (Standing Committee)

Judge Eugene R. Wedoff (Bankruptcy Rules Committee)

Criminal:

(Standing Committee)

Evidence:

Judge Thomas W. Thrash, Jr. (Standing Committee)

Judge Christopher M. Klein (Bankruptcy Rules Committee)

Judge Michael M. Baylson (Civil Rules Committee)

Judge David G. Trager (Criminal Rules Committee)

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TAB I

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 28-29, 2008
Washington, D.C.

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Washington, D.C., on April 28-29, 2008. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Assistant Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Also supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Two other officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Ruth E. Friedman, Director of the Federal Defenders' Capital Habeas Project, attended part of the meeting.

A. Chair's Remarks and Administrative Announcements

After welcoming everyone and making administrative announcements, Judge Tallman recognized Professor King for her years of distinguished service as a Committee member and thanked her for agreeing to serve further in the capacity of Assistant Reporter. Judge Tallman made a request that subcommittee chairs try to begin their work earlier in the period between meetings to ensure that it is completed in time for the next Committee meeting.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2007 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court

Mr. Rabiej reported that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Supreme Court and submitted last week to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2008.

Rule 1. Scope; Definitions. The proposed amendment defines a "victim."

Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of "victim" and "crime of violence or sexual abuse" to conform to other amendments, clarifies when a presentence report must include restitution-related information, clarifies the standard for including victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States, but still subject to administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa.

Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

Mr. Rabiej reported no action in Congress on the Crime Victims' Rights Rules Act bill introduced in this session of Congress by Senator Jon Kyl (R-AZ). Judge Tallman noted that the Judicial Conference had voiced strong opposition to this new measure, which would circumvent the federal rulemaking process by directly changing the Federal Rules of Criminal Procedure without affording anyone the opportunity for notice and comment and bypassing the deliberative process that Congress previously established for judicial rulemaking under the Rules Enabling Act. Mr. Rabiej also reported that no responses had yet been received from the 20 or so different groups from which the Committee had requested suggestions for further CVRA-related rule amendments. Judge Tallman noted that, on the recommendation of this Committee and the Standing Committee, Chief Justice John Roberts had recently approved Director Duff's letter to Lewis & Clark Law School Professor Doug Beloof declining his suggestion that a permanent crime victims' advocate position be added to the Advisory Committee on Criminal Rules.

Ms. Hooper provided an update on the Federal Judicial Center's efforts to educate the Judiciary about the CVRA. The Center has produced a DVD, featuring Judge Jones and Judge Zagel, that examines the Act's requirements, the related rules amendments, and the experiences of judges and prosecutors in applying the Act. The Center has updated its monograph, "The Crime Victims' Rights Act of 2004 and the Federal Courts" and will distribute it, along with related materials, at all national workshops for district court judges this year. A panel session on "the CVRA and Issues and Challenges for the Federal Judiciary" will be held at the Sentencing Institute in Long Beach, CA on June 25-27, 2008, to be co-chaired by former Judge Paul Cassell and Benji McMurray. Also, the Center is nearing completion of a report, prepared at the Committee's request, reviewing victims' rights laws in all 50 states, the District of Columbia, and the territories. To understand how victims' rights laws operate in practice, the Center has conducted interviews with state judges, victim coordinators, prosecution staff, and defense counsel in six states, and with professionals from victim assistance organizations.

Ms. Hooper reported a few preliminary findings from the study. First, expansion of criminal proceedings to include greater participation and input from victims does not appear to impede judges' ability to effectively manage their caseloads even when multiple victims wish to participate. Second, although many jurisdictions require only that victims be treated with "fairness and respect," the lack of more detailed legislative guidance has not resulted in a significant increase in litigation seeking to broaden victims' rights. Third, most states allow a victim to be heard orally regarding a plea agreement and at sentencing, and a few permit victims to speak at a bail or bond hearing or an initial appearance. In practice, though, few victims

choose to speak, a phenomenon that some attribute to untimely notice. Fourth, most jurisdictions allow the victim to confer with the prosecutor, but states vary with regard to the type of information that is authorized to be disclosed to the victim by the prosecutor. Only 10 jurisdictions, for instance, allow victims some access to the presentence report — five allow victims to review the report, two allow them to receive copies, and three allow discretionary disclosure by the prosecutor. Fifth, a few jurisdictions have formalized complaint procedures for victims who believe that their rights were violated. Typically, this is done by filing a writ of mandamus, but one jurisdiction allows a nominal monetary damages remedy where there was an intentional failure to afford a victim his rights.

Ms. Hooper reported that the Center is still committed to producing a judge's pocket guide on victims' rights, but wanted to ensure that it would not be duplicative of the materials that have already been prepared. She also noted that the GAO is expected to issue a full report on the effect and efficacy of CVRA implementation in the federal courts by October 2008. If, after reviewing the GAO report, the Committee believes that further research is necessary, the Center is ready to undertake it.

Judge Tallman asked representatives from the Department of Justice whether, in their meetings with crime victims groups, any additional feedback had been obtained. Mr. Wroblewski reported meeting about two months ago with 20-25 people from a dozen or more victims' organizations and explaining the Department's involvement with the rules committees. Although the Department had not yet received any suggestions or comments, Mr. Wroblewski said that these meetings would continue to be held on a regular basis. Judge Tallman mentioned that he had recently been asked about the Department's efforts at automating victim notification. Mr. Wroblewski reported that the Department sends out millions of notices to victims each year through the computerized Victim Notification System.

B. Additional CVRA-Related Proposed Amendments

Mr. Rabiej noted that the three additional CVRA-related rule amendments had been approved for public notice and comment and would be published on August 15, 2008. Public hearing dates on each coast would be tentatively scheduled for sometime in January 2009.

> Rule 5. Initial Appearance. The proposed amendment directs a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant.
>
> Rule 12.3. Notice of Public-Authority Defense. The proposed amendment provides that for security and privacy the victim's address and telephone number should not be automatically provided to the defense. Courts remain free to authorize disclosure for good cause shown.
>
> Rule 21. Transfer for Trial. The proposed amendment requires consideration of the convenience of victims in determining whether to transfer the proceedings to another district for trial.

Professor Beale pointed out that the Style Consultant had slightly modified the original wording of these proposed amendments. Also, the Standing Committee had agreed that the arguably unnecessary statement in proposed Rule 5(d)(3) should be retained to underscore that, in making the determination on bail and release, "the court must consider any statute or rule that protects a victim from the defendant."

C. Proposed Forfeiture Rule Amendments

The Committee discussed the following three proposed rule amendments governing forfeiture that had been published for public comment.

> Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.
>
> Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.
>
> Rule 32.2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Professor Beale reported that the proposals had elicited a single comment, from Judge Lawrence Piersol of the District of South Dakota, who voiced concern that the proposed Rule 32.2 amendment could cause sentencing delays. But, she said, Proposed Rule 32.2(b)(2)(B) specifies that courts must enter preliminary forfeiture orders before sentencing "[u]nless doing so is impractical." Proposed Beale added that two changes to the published version were recommended: standardizing the references to "assets" and "property," and eliminating the bracketed language. A member pointed out that the "and" at the end of proposed Rule 32(d)(2)(E) on page 43, line 6, of the agenda book requires deletion.

There was discussion about the phrase "either party's request" in proposed 32.2(b)(1)(B), on page 46, lines 30-31, and the phrase "the date when the order granting or denying the amendment becomes final" in proposed Rule 32.2 (b)(4)(C) on page 51, lines 101-102. Clarification was also requested regarding the phrase "the government must submit a proposed Special Verdict Form." Following Committee discussion, it was decided that these various phrases should be retained as drafted.

Judge Zagel moved to approve the forfeiture rule amendments as revised.

The Committee voted unanimously to send the proposed forfeiture rule amendments, as revised, to the Standing Committee.

D. Proposed Rule 41 Amendment on Seizure of Electronically Stored Information

The Committee discussed the proposed Rule 41 changes recently published. Judge Battaglia, chair of the Electronically Stored Information Subcommittee, reported that one public comment had been received. The Jordan Center for Criminal Justice and Penal Reform had suggested that, by authorizing the "seizure of electronic storage *media*" rather than "*information*," the proposed change would violate the Fourth Amendment's particularity requirement by allowing information to be seized without establishing probable cause. Another objection was the absence of controls to prevent the government from using copied information for "general intelligence or other unauthorized or illicit purposes." The Jordan Center also recommended that the rule require that the seized materials be returned within a set time period.

Judge Battaglia reported that the subcommittee had decided to address those concerns by adding a clarification to the Committee Note that the "amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving this and the application of other constitutional standards to ongoing case law development." The subcommittee also proposed adding "copying or" to the last line of Rule 41(e)(2)(B) to clarify that copying, not just review, may take place off-site. Professor King noted the typographical error, the third "the," on page 63, line 11, which would be fixed.

The Committee discussed the proposed elimination of all case citations, for style reasons, from the Rule 41 Committee Note. Mr. Rabiej noted that certain members of the Standing Committee had strong views on how detailed Committee Notes should be. Judge Tallman said that, because this area of the law was evolving, it would be wise where possible to omit citations to cases that might soon be out of date.

One member raised concern about government handling of seized electronic media and the delay in the return of the media. Judge Tallman suggested that these issues were best left to case law development. After further discussion, Judge Wolf moved that the Committee Note's reference on page 65 to "other constitutional standards to ongoing case law development" be changed to "other constitutional standards concerning both the seizure and the search to ongoing case law development."

The motion was unanimously approved.

In response to a member's inquiry, Judge Tallman confirmed that the Jordan Center's suggestion that controls be added to prevent the government from using copied information for "general intelligence or other unauthorized or illicit purposes" had been declined because it would be a substantive change of law that should instead be the subject of case law development or congressional action.

Judge Keenan moved that the Committee send the proposed Rule 41 amendment, as revised, to the Standing Committee.

The Committee voted, with one dissent, to send the proposed Rule 41 amendment, as revised, to the Standing Committee.

E. Proposed Time Computation Rule Amendments

Professor Beale reported that no public comments had been received in response to publication of the following proposed time computation rule amendments.

> Rule 45. Computing and Extending Time. The proposed amendment simplifies the method for computing time.
>
> Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Cases. Amendments to these rules are intended to adjust the deadlines in light of the new time computation principles.

Judge Rosenthal explained that the Criminal Rules Committee was the last of four advisory committees meeting to finalize this coordinated effort. She noted that the goal was to achieve seamless synchronization with Congress so that the rule amendments, statutory changes, and local rule changes all take effect on December 1, 2009. She said that congressional staff, many of whom were former law firm associates, had expressed general approval in recent meetings for simplifying time computation across the board. There was discussion whether the rule amendments should be made conditional on the proposed statutory changes or whether they should take effect even if Congress declined to enact the statutory changes. The consensus of the Committee seemed to be that every effort should be made to have the proposed time computation rule amendments take effect at the same time as the proposed statutory changes. Mr. Cunningham moved that the proposed rule amendments be approved.

The Committee voted unanimously to approve the proposed time computation rule amendments.

III. CONTINUING AGENDA ITEMS

A. Proposed Time Computation Statutory Amendments

The Committee discussed which statutes Congress should be asked to amend in light of the proposed time computation changes. Judge Tallman noted that unless statutes were changed, the rules committees' effort to simplify time computations would have the opposite effect, adding a new layer of complexity. Judge Rosenthal explained that there was a desire, first, not to have the rules be inconsistent with the statutes, and second, not to disadvantage practitioners by shortening their deadlines. One member pointed out that the rules expressly apply the new time computation approach to statutes unless a statute specifies a different approach. To increase the probability of passage in Congress, Judge Rosenthal noted that an effort was being made to keep all proposed statutory changes uncontroversial and outcome neutral.

The Committee discussed the report submitted by the Committee's Time Computation Subcommittee. The subcommittee was asked to explain why it was deviating from the "days are days" approach and recommending instead that Congress simply exclude Saturdays, Sundays, and legal holidays from the four-day periods set forth in 18 U.S.C. § 2339B(f)(5)(B)(iii)(I) and (III) and 18 U.S.C. App. 3 § 7(b)(1) and (3) within which appellate courts must hear arguments or render decisions in certain cases involving material support and the Classified Information Procedure Act. Judge Rosenthal explained that the Department of Justice had voiced significant concerns with converting these periods to seven calendar days and that keeping the proposed statutory changes uncontroversial was critical to the project's success. Assistant Attorney General Fisher said that these procedures had been used in the case of convicted terrorism conspirator Zacarias Moussaoui. Professor Beale noted that the subcommittee recommended a similar approach for the two-day deadline for dissolution of a temporary restraining order in 18 U.S.C. § 1514(a)(2)(E).

With respect to the current 10-day period in 18 U.S.C. App. 3 § 7(b) within which an interlocutory appeal in a CIPA case "shall be taken" after the trial court renders a decision, however, the Department supported recommending its extension to 14 calendar days. Ms. Fisher explained that this provision typically applied when a court is ordering the government to turn over classified information or sanctioning the government for not turning over classified information, in which case consulting with the applicable agencies sometimes took time.

Professor Beale reported subcommittee support for the following recommendations:

- extending to 14 calendar days the current 10-day period in 18 U.S.C. § 3771(d) within which a victim must file a motion for a writ of mandamus in the court of appeals to reopen a plea or sentence;
- extending to seven calendar days the current period of five days before trial in 18 U.S.C. § 3509(b)(1)(A) within which an order for a child's testimony to be taken via two-way closed circuit video must be sought; and
- extending to 14 calendar days the current 10-day period in 18 U.S.C. § 2252A(c) within which a defendant seeking to utilize certain affirmative defenses against child pornography charges must notify the court.

The Committee discussed the current three-day period in 18 U.S.C. § 3432: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial." Ms. Fisher said that the Department had no strong preference, but would recommend retaining the three days and only excluding Saturdays, Sundays, and legal holidays. One member noted that the three-day deadline in 18 U.S.C. § 3432 was important to prosecutors not in capital cases, but in non-capital cases, because it allows prosecutors to argue that if the deadline is three days in capital cases, it should be no greater in ordinary, non-capital cases. Judge Tallman suggested that the Department's compromise offer was probably advisable, given the witness security concerns.

It was noted that these proposed statutory changes were going to be published and, if problematic, might elicit public comment. Following further discussion, a motion was made to recommend retaining the current three-day period in 18 U.S.C. § 3432 within which a person charged with treason must be furnished with a copy of the indictment and a list of the jurors and witnesses, but to recommend excluding Saturdays, Sundays, and holidays from the three days.

The motion was approved, with minimal dissent.

A motion was made to recommend extending to 14 calendar days the current 10-day period in 18 U.S.C. App. 3 § 7(b) for interlocutory appeals of a trial court's ruling in a Classified Information Procedure Act case.

The motion was approved unanimously.

Judge Battaglia moved that the Committee recommend that the Standing Committee send to Congress the other proposed time computation statutory changes set forth on pages 123-125 of the agenda book.

The Committee voted unanimously to recommend that the Standing Committee send to Congress the other proposed time computation statutory changes.

B. Proposed Amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

The Committee discussed the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases to, among other things, require a judge to grant or deny the certificate of appealability at the time a final ruling is issued. Professor King noted that the proposal had been submitted by the Department originally after the Supreme Court decided *Gonzalez v. Crosby*, 545 U.S. 524 (2005). After considering the five public comments received on proposed Rule 11(a), all opposing the published proposal, the Writ Subcommittee, chaired by Mr. McNamara, concluded that the proposal required modification, but split 3-2 over how to modify it.

Two alternative drafts were included in the agenda book for the Committee's consideration. The majority retained the published proposed requirement that the certificate of appealability be ruled on "at the same time" as an adverse final order, but recommended adding the phrase, "unless the judge directs the parties to submit arguments on whether or not a certificate should issue." Also, the majority proposed adding the following sentence: "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order." The minority proposed requiring only that motions for certificate of appealability be filed 14 days following a final order adverse to the applicant, a time frame that the minority contended was necessary for counsel to consider the final order. Judge Tallman thanked the subcommittee for working so diligently over the course of several months on this challenging area, whose numerous minefields for unwary petitioners had sometimes resulted in meritorious claims being procedurally barred.

Mr. Wroblewski said that the Department preferred the published version of Rule 11(a), designed to codify existing practice as explained in *Gonzalez*. One member said that requiring simultaneous rulings would not codify the practice in his own circuit, but that he considered it nonetheless desirable because judges would have to deal with a case only once, ruling on the certificate of appealability at the same time as the final order rather than long afterward. Another member said he favored the simultaneous ruling requirement because it gave judges a way to inform the parties when issuing the final order that they had struggled in reaching certain decisions. A motion was made to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the judge enters a final order adverse to the applicant.

The Committee decided, with minimal dissent, to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the final order.

Judge Tallman recommended making clear in the rule that filing a motion for reconsideration of the denial of a certificate of appealability does not toll the statute of limitation for filing the appeal — a point that has proven to be a trap for the unwary. Another member expressed concern about including a reference in the habeas rule to a motion for reconsideration because it could also pose a trap for the unwary and it would likely mislead pro se litigants into thinking that they needed to file them in every case. After extensive discussion, Judge Molloy moved that Rule 11(a) begin as follows: "The judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the applicant. The judge may direct the parties to submit arguments on whether or not a certificate should issue prior to entry of the final order."

The Committee decided unanimously to approve the proposed language at the beginning of Rule 11(a).

Judge Jones moved to eliminate the second sentence of the majority Rule 11(a) proposal on page 143, lines 6-9 — "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order" — and to change "motion for reconsideration" in line 12 to "certificate of appealability." Several members voiced concern that, unless it was stated in the text of the rule that filing a motion for reconsideration did not toll the statute of limitation for filing the appeal, meritorious habeas claims would continue to be procedurally barred for lack of a timely appeal. After extensive discussion, Judge Tallman suggested taking a vote on Judge Jones' motion.

The Committee decided unanimously to eliminate the second sentence of the majority Rule 11(a) proposal and to change line 12 as proposed.

After additional discussion, Judge Tallman moved to add the following to the end of the majority Rule 11(a) proposal on page 143, line 15: "A motion for reconsideration of the denial of a certificate of appealability does not extend the time for filing a notice of appeal."

The Committee decided by a clear majority to add the proposed sentence to the end of the majority Rule 11(a) proposal.

Professor King described the changes to Rule 11(b) and (c) of the Rules Governing §§ 2254 and 2255 Cases recommended by a majority of the Writ Subcommittee. First, to prevent confusion in light of the previous subdivision's reference to an unrelated motion for reconsideration (i.e., of the denial of a certificate of appealability), it recommended changing the title of Rule 11(b) from "Motion for Reconsideration" to "Motion for Relief from Final Order." Second, the subcommittee suggested expanding the definition of permitted grounds for obtaining relief from a final order, beyond "a defect in the integrity of the § 2255 proceeding," to include "an error in a ruling in the § 2255 proceeding which precluded a determination of a claim on the merits." Third, it was thought that the proposed rule amendment should expressly supplant not only motions brought under Rule 60(b), but also those under Rule 52(b) and Rule 59. Fourth, the subcommittee sought to clarify that Rule 11(b) does not require a separate certificate of appealability. Finally, it recommended stating expressly that a timely notice of appeal is required even if a certificate of appealability is issued under Rule 11(a).

Professor King also summarized the objections raised by the Writ Subcommittee's minority: (1) the proposed change is unnecessary; (2) it unduly and unnecessarily shrinks the filing period to 30 days; (3) it bars certain grounds for relief still available post-*Gonzales*; (4) it bars other currently existing routes for relief, such as Rules 52 and 59, which were not addressed in *Gonzales*; and (5) it purports to make a significant policy change that the rules committees lack the authority to make under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

Ms. Ruth Friedman, director of the Federal Defenders Capital Habeas Project, said that by eliminating Rules 52 and 59 as avenues for relief, the proposed Rule 11(b) amendment would be going far beyond merely codifying *Gonzales*. She recommended against conflating Rules 52 and 60(b), two very different provisions. She suggested instead requiring that Rule 59 motions for correction of errors be filed within 10 days and that Rule 60(b) motions for addressing fairness issues be filed within a year. Asked whether the Department intended anything beyond codifying *Gonzales*, Mr. Wroblewski responded that the objective was simply to regularize the process and to lay out in the text of the Rules Governing §§ 2254 and 2255 Cases what was supposed to happen following entry of a final order. One member suggested that the proposal was premature and that additional time was needed for post-*Gonzales* case law to develop. The Department moved to approve for publication the Rule 11(b) amendment as drafted by the subcommittee majority.

The motion failed by a vote of 4 to 8.

One member explained that he had voted against the majority proposal for Rule 11(b) because eliminating Rules 52 and 59 as avenues for relief extinguished substantive rights. Professor King suggested that although *Gonzales* did not specifically deal with Rule 52 and 59, its rationale implied that other rules could not be used to circumvent the successive petition bar. Ms. Fisher moved to approve the proposed Rule 11(b) amendment for publication, omitting the references to Rules 52 and 59. After brief discussion, however, Ms. Fisher retracted her motion, explaining that the Department required additional time to consider the matter further.

The Committee turned its attention to the proposed Rule 11(c) amendment. It was noted that it would need to be redesignated as Rule 11(b). Judge Tallman expressed approval for Judge Molloy's earlier suggestion that "issues" in line 14 be changed to "issues or denies." A motion was made to approve proposed Rule 11(c) — now 11(b) — for publication as revised.

The Committee decided unanimously to approve proposed Rule 11(c), now 11(b), for publication as revised.

C. Proposed Amendment to Rule 15

The Committee discussed the Department's proposed amendment of Rule 15 to authorize depositions in a limited category of cases to take place outside the defendant's physical presence. Professor Beale noted that the current proposal included a few changes recommended by the Rule 15 Subcommittee, chaired by Judge Keenan. The scope of the proposed rule amendment is now restricted to situations where the witness is outside the United States. In subparagraph (c)(3)(A), the proposed authorization to hold depositions outside the defendant's presence under limited situations now applies to all witnesses, not just government witnesses. The existing case law standard for witness unavailability — "there is a substantial likelihood the witness's attendance at trial cannot be attained" — is reflected in proposed Rule (c)(3)(A)(ii). Proposed Rule (c)(3)(A)(iii) makes clear that a deposition outside the U.S. can only take place without the defendant present only when "it is not possible to obtain the witness's presence in the United States for a deposition." The Committee Note was revised to specify the applicable burden of proof and to clarify that the proposed rule amendment does not supersede statutes that independently authorize depositions outside the defendant's physical presence, such as certain cases involving child victims and witnesses identified in 18 U.S.C. § 3509.

Following extensive discussion regarding proposed Rule 15(c)(3)(B) and whether it should be placed in the Committee Note rather than in the rule, Judge Keenan moved to revise the proposed provision in the rule to read: "Nothing in this rule creates a right for the defendant to be present at a deposition of his/her witness that takes place outside the United States." After further discussion, though, Judge Keenan withdrew his motion.

Judge Zagel moved to approve in principle the proposed Rule 15(c)(3)(B) amendment. Ms. Fisher urged adoption of the proposed rule amendment as a way to correct a problem with Rule 15 depositions. She stressed that defendants must not be able to allege that they need to depose a critical witness in, say, Pakistan and to claim a right to be transported to Pakistan to attend the deposition. Judge Zagel requested a vote on his motion to publish the rule as drafted.

The motion failed by a vote of 5 to 6.

Judge Wolf moved to add "in the United States" on page 185 to proposed Rule 15(c)(1), line 7, and to (c)(2), line 20, to delete "Except as provided in paragraph (3)" from lines 4-5 and 18, and to delete (c)(3)(B).

The motion was approved, with one dissent.

To avoid the double use of the word "outside," Judge Molloy moved to change the title of proposed Rule 15(c)(3) to "Limited Authority to Hold Depositions Outside the United States Without the Defendant's Presence."

The motion was approved unanimously.

It was suggested that the situation covered by proposed Rule 15(c)(3)(B) could be addressed in the Committee Note. Professor Beale promised to circulate a draft by email after the meeting for Committee approval. Mr. Wroblewski noted that the bracketed language in the Note on page 188, lines 27-46, had been intended only for the benefit of the Committee and the Standing Committee and would not be part of the actual note. It was suggested and agreed that the Note not cite simply to cases decided before *Crawford v. Washington*, 541 U.S. 36 (2004). There was also consensus that the sentence on page 189, lines 8-13, should be deleted. Mr. Wroblewski moved to approve the proposed Rule 15 amendment, as revised, and forward it to the Standing Committee for publication.

The Committee voted unanimously to approve Rule 15, as revised, for publication.

D. Proposed Amendment to Rule 6(f)

The Committee discussed the proposed Rule 6(f) amendment, copies of which were distributed as a handout. The proposal would permit courts to receive the return of a grand jury indictment by video conference. Judge Battaglia, chair of the Rule 6(f) Subcommittee, noted that judges have sometimes had to travel up to 250 miles one-way to attend a 30-second proceeding. The subcommittee had two recommendations. The first was that the "open court" requirement be retained as a safeguard against the infamous Star Chambers proceedings. The second was that the "good cause" threshold be replaced with a showing that video conferencing is needed "to avoid unnecessary cost or delay." Professor Beale added that it was emphasized in the Committee Note that having the judge and grand jury in the same courtroom remained the preferred practice. She also noted that all "magistrate judge" references in the rules, such as in lines 4 and 10, include district judges by definition. There was agreement that line 5 should also refer to "magistrate judge" instead of "judge." It was also agreed that the characterization of a district as "unpopulated" in lines 26-27 of the Note was unnecessary and should be revised. The Committee also agreed to replace the phrase "in the court" in line 32 with "in a courtroom." Judge Battaglia moved to approve the proposed Rule 6(f) amendment for publication.

The Committee voted unanimously to send the proposed Rule 6(f) amendment to the Standing Committee for publication.

E. Proposed Amendment to Rule 12

Judge Wolf, appointed at the last meeting to chair the Rule 12 Subcommittee, reported that the group had conferred in several teleconferences, but that additional time was needed to formulate a recommendation. A report would be presented at the Committee's next meeting.

F. Proposed Amendments to Rules 32.1 and 46

Professor Beale said that the proposed amendments to Rules 32.1 and 46 had been deferred until the October 2008 meeting so that additional input could be obtained from the Criminal Law Committee and the Office of Probation and Pretrial Services.

G. Proposed Amendment to Rule 32.1(a)(6)

Professor Beale briefly reviewed the history of Magistrate Judge Robert Collings' suggestion that Rule 32.1(a)(6) be amended to clarify its reference to 18 U.S.C. § 3143(a) and to specify that the applicable burden of proof is clear and convincing evidence. Judge Battaglia emphasized that this was not a substantive change and that numerous courts have concluded, after extensive analysis, that only § 3143(a)(1) applies to the situation in the rule. Following a discussion of whether clear and convincing was indeed the appropriate burden of proof for alleged violations of the conditions of supervised release under Rule 32.1(a)(6), Judge Battaglia moved to send the proposed amendment to the Standing Committee for publication.

The Committee voted, with one dissent, to send the proposed Rule 32.1(a)(6) amendment to the Standing Committee for publication.

H. Rule 32(h)

Professor Beale explained that the proposed Rule 32(h) amendment had originally been part of the package of amendments proposed in the wake of *United States v. Booker*, 543 U.S. 220 (2005). But because the Supreme Court had granted certiorari and heard oral arguments in *Irizarry v. United States*, No. 06-7517, to resolve a circuit split, and because a decision was expected by June, the Rule 32(h) Subcommittee was deferring consideration of the proposed rule change. The Department noted that after *Booker*, the Constitution Project had proposed certain changes to Rule 32, which the American Bar Association was currently considering, to reform sentencing procedures and increase their transparency. Ms. Felton reported that, during oral argument in *Irizarry*, the Justices had asked counsel why the Supreme Court should not defer to the rulemaking process. Professor Beale promised to distribute copies of the *Irizarry* oral argument transcript and the *Irizarry* amicus brief filed by Catholic University of America Law Professor Peter B. Rutledge and Ohio State University Law Professor Douglas A. Berman.

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Proposal to Amend Rule 7

Judge Battaglia described his proposal to amend Rule 7(b) to permit a defendant to waive indictment by video conference. Several members voiced concern that recent rule amendment proposals authorizing court proceedings by video conference seemed to be on a slippery slope. Professor Coquillette suggested adding restrictive language similar to that used in the proposed Rule 6(f) amendment: "To avoid unnecessary cost or delay." He also noted that rule changes normally required empirical evidence of a problem. One member suggested perhaps examining

the Criminal Rules more comprehensively and assessing which proceedings should and should not be conducted by video conference. After significant discussion, Judge Battaglia moved to send the proposed Rule 7 amendment to the Standing Committee for publication.

The motion failed by a vote of 3-8.

It was suggested that Judge Battaglia's Rule 6(f) Subcommittee, perhaps under a new name, undertake a comprehensive look at how video conferencing is used in the courts and at which Criminal Rules should and should not permit its use. Judge Tallman agreed and requested the Federal Judicial Center's assistance in collecting relevant empirical data. Justice Edmunds asked if he could be replaced on the subcommittee, explaining that he would be unusually busy in coming months seeking re-election. Professor Leipold agreed to take his place.

B. Consent Calendar Suggestions:

Earlier in the meeting, Judge Tallman had drawn the Committee's attention to five suggested rule amendments included in the agenda book as consent calendar items:

03-CR-C: On April 1, 2003, attorney Carl Person suggested that each federal judge require, as a condition to approving plea agreements, that the prosecutor agree that one out of every 10 cases involving a plea bargain be selected at random to go to trial. Once the system is in place, he recommended adjusting the percentage of cases that must be randomly selected for trial based on the percentage of the defendants in randomly selected cases who are acquitted. Mr. Person reasoned that such a system would create an incentive for federal prosecutors to bring a smaller number of cases and prepare them more carefully. There were concerns that this proposal would burden the judicial system with trials in a way that might violate the substantive rights of criminal defendants.

03-CR-F: On November 5, 2003, attorney Steve Allen suggested that Rule 9(a) of the Rules Governing § 2254 Cases be amended to refer to a claim, not to a petition. He cited *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003), which construed the one-year statute of limitation in 28 U.S.C. § 2244(d)(1) as applicable to all claims in a habeas petition, thereby reviving claims that might have otherwise been time-barred. In 2004, subdivision (a), to which Mr. Allens's proposal relates, was deleted as unnecessary in light of the one-year statute of limitation for § 2254 actions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d).

05-CR-C: On December 14, 2004, Judge James F. McClure, Jr., suggested that the Committee revise Rule 10 to permit waiver of arraignment. This proposal was discussed briefly at the Committee's October 2005 meeting in Charleston, but was tabled after several Committee members noted that during the general restyling of the Criminal Rules in 2002, the Committee had declined to allow waiver of the arraignment itself because it serves as a triggering event for several other rules.

05-CR-F: On November 2, 2005, Judge Michael Baylson suggested that the Committee discuss the increase in petitioner litigation under *Gonzalez*. Judge Baylson's recommendation is closely related to the work of the Writ Subcommittee, including the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases.

07-CR-C: On October 2, 2007, Mr. Kelly D. Warfield suggested that "the one-year statute of limitation under 28 U.S.C. 2244 (d) should be rescind[ed]." The Rules Enabling Act, however, does not authorize the rules committees to rescind statutes.

It was moved that the Committee decline to take action on these suggestions.

The Committee decided unanimously not to take action on these suggestions.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, AND OTHER COMMITTEES

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

Judge Tallman summarized the legislation pending in Congress that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear. Some districts are forfeiting bonds if the defendant violates other conditions of release and is rearrested, a scenario that corporate bail bondsmen want to see eliminated. Mr. Rabiej noted that the proposed Bail Bond Fairness Act would amend Rule 46(f) directly, thereby bypassing the rulemaking process. The Judiciary has opposed this legislation for 15 years, and the Department of Justice had recently sent a letter to Congress also opposing the bill. Nonetheless, the House passed it, and some Senators, including Senate Majority Leader Harry Reid, are supporting it.

B. Other Matters

1. Limiting Disclosure of Information About Plea Agreements and Cooperating Defendants

Professor Beale reported that the Committee on Court Administration and Case Management (CACM) had declined to recommend adoption of a national policy at this time on internet access to plea agreements and other case docket information revealing defendant cooperation with the government. The 68 public comments received in response to CACM's September 2007 publication in the *Federal Register* of the proposed removal of all plea agreements from the internet were 4-to-1 against the proposal. Courts have been experimenting with various ways of addressing the problem posed by websites such as www.whosarat.com. Professor Coquillette mentioned that the Standing Committee had established a task force to study how cases under seal are, and should be, docketed. One member noted that sealing requirements vary from circuit to circuit. Another member added that there is not yet public consensus on the proper balance between government transparency and individual privacy.

2. Questions Involving Implementation of Rule 49.1

Mr. Rabiej noted that the Administrative Office had received a variety of queries from courts regarding the proper implementation of Rule 49.1. Most involved the nine Rule 49.1(b) exemptions from the redaction requirement, which were resulting in the public having internet access to unredacted personal identifiers contained in the exempted documents. What was gained by requiring painstaking redaction of the names of all minors who are crime victims from most filings in a case, courts asked, if Rule 49.1(b)(9) allows those names to appear unredacted in, say, the criminal complaint? Ms. Fisher said that, to her knowledge, the government is diligently redacting personal identifiers from all court filings unless, for instance, the personal identifier is the subject of a warrant or part of the caption. If mistakes are indeed being made, she said, it may simply represent a training issue. Judge Tallman noted that Rule 49.1(d) and (e) offer courts a way to address those situations, albeit it only on a case by case basis.

3. Draft Revisions of Civil and Criminal AO Forms

Mr. McCabe reported that the Forms Working Group of judges and clerks had revised several forms in light of the new federal rules on privacy and to restyle their language in simple, modern English. He drew the members' attention to the draft revisions of 33 civil and criminal forms prepared by the working group, included in the agenda book for member comment.

4. Chart of Rule Amendment Activity by Committee

Mr. Rabiej explained the significance of several distributed charts showing the number of rule amendments by each advisory rules committee over the past 25 years. Judge Tallman suggested that the committees should generally take a conservative approach to changing rules given the significant increase of late in the number of proposed rule changes.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

After noting that the next meeting would be held on October 20-21, 2008, at the Biltmore Hotel in Phoenix, Judge Tallman adjourned the meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2008
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, DC, on Monday and Tuesday, June 9 and 10, 2008. All the members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General Mark R. Filip attended part of the meeting as the representative of the Department of Justice. In addition, the Department was represented throughout the meeting by Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division.

Also participating in the meeting were committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that Professor Morris was completing his service as reporter to the Advisory Committee on Bankruptcy Rules, noting that he would be honored formally at the January 2009 committee meeting. She pointed out that Professor Morris had made extraordinary contributions to the rules process during the hectic periods preceding and following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The far-reaching legislation, she noted, had required him to devote an enormous amount of time and effort to researching, analyzing, and drafting a great many new rules and forms. She said that Professor Morris truly had accomplished the work of several people, and the committee would greatly miss him.

Judge Rosenthal presented a resolution signed by the Chief Justice to Judge Kravitz recognizing his service as a member of the committee from 2001 to 2007. She noted that he had been at the center of several important projects during that time, had coordinated development of the time-computation amendments now before the committee for final approval, and had served as the committee's liaison to the Advisory Committee on Criminal Rules. And she was delighted that Chief Justice Roberts had appointed him as the new chair of the civil rules committee.

Judge Kravitz, in turn, presented Judge Rosenthal with a resolution from the Chief Justice recognizing her service as chair of the civil advisory committee from 2003 to 2007. During her tenure, she had shepherded many landmark rules changes dealing with such important matters as class actions, electronic discovery, and restyling of the civil rules.

Judge Rosenthal asked the committee to recognize the many contributions of the late Judge Sam Pointer, who had served as chair of the Advisory Committee on Civil Rules from 1990 to 1993. Among other things, he had coordinated the major package of amendments to the civil rules needed to implement the Civil Justice Reform Act of 1990. She noted that Judge Pointer had also led the committee's initial efforts to restyle the Federal Rules of Civil Procedure. He consistently had set high standards in everything he did and had been a very influential leader of the federal judiciary.

Judge Rosenthal noted that Chief Judge Anthony Scirica, former chair of the standing committee, had just been elevated by the Chief Justice to the position of chair of the Executive Committee of the Judicial Conference. She said that the appointment would serve the rules process and the entire federal judiciary very well.

Judge Rosenthal reported that the March 2008 session of the Judicial Conference had been uneventful for the rules process, as no rules matters had been placed on the discussion calender. She noted that she and Professor Coquillette had had very productive meetings with both Chief Justice Roberts and Administrative Office Director

James Duff. Both are very appreciative of the work of the rules committees. The Chief Justice, she said, was supportive of the effort to restyle the evidence rules and was keenly aware of the need for the rules committees to address problems regarding cost and delay in civil cases, victims' rights in criminal cases, and privacy and security concerns in court records.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 14-15, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on two pieces of legislation affecting the rules process, both of which have been opposed consistently by the Judicial Conference. First, legislation had been introduced in the last several congresses, at the behest of the bail bond industry, to limit the authority of a judge to revoke a bond for any condition other than failure of the defendant to appear in court as directed. The legislation had not moved in the past, but had now passed the House of Representatives and been introduced in the Senate.

Second, protective-order legislation had been reintroduced by Senator Kohl. It would require a judge, before issuing a protective order under FED. R. CIV. P. 26(c), to make findings of fact that the discovery sought: (1) is not relevant to protect public health or safety; or (2) if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a substantial interest in keeping the information confidential, and the protective order is narrowly drawn to protect only the privacy interest asserted. Mr. Rabiej noted that the Senate Judiciary Committee had reported out the bill, but it had not been taken up by the full Senate. It has also been introduced in the House.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a detailed written report on the various activities of the Federal Judicial Center (Agenda Item 4). He also reported on the Center's extensive research on local summary judgment practices in the district courts as part of the committee's discussion of the proposed revision of FED. R. CIV. P. 56 (summary judgment).

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Amendments for Final Approval by the Judicial Conference

Judge Rosenthal and Judge Huff, chair of the time-computation subcommittee, explained that the committee was being asked to approve:

(1) a uniform method for computing time throughout the federal rules and statutes, as prescribed in the proposed revisions to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a);
(2) conforming amendments to the time provisions set forth in 95 individual rules identified by the respective advisory committees; and
(3) a proposed legislative package to amend 29 key statutes that prescribe time periods.

Judge Rosenthal explained that the time-computation project had proven to be more complicated than anticipated, and the subcommittee and advisory committees had worked very well together in resolving a number of difficult problems. In the end, she said, the package that the committees had produced is very practical and elegant.

Judge Huff stated that the purpose of the amendments is to simplify and make uniform throughout all rules and statutes the method of calculating deadlines and other time periods. She noted that the public comments had been generally positive and had helped the committees to refine the final product. She noted that the subcommittee and the advisory committees had identified the 29 most relevant and significant statutory deadlines that should be adjusted to conform to the proposed new rules. She pointed out, too, that local rules of court will also have to be amended to conform to the new national rules. The rules committees will work with the courts to accomplish this objective.

Professor Struve reported that there had not been a great deal of public reaction to the published amendments. The comments, she said, had been mixed but mostly positive and very useful. She noted that a few changes had been made following the comment period. For example, the definition of the term "state" had been deleted from proposed FED. R. APP. P. 26(a) and FED. R. CIV. P. 6(a) because it would be added elsewhere.

She reported that the principal issues discussed by the subcommittee following the public comment period concerned the interaction between the backward time-counting provision in the proposed rules and the definition of a "legal holiday," which includes all official state holidays. For example, in counting backwards to ascertain a filing deadline, the proposed rule specifies that when the last day falls on a weekend or holiday, one must continue to count backwards to the day before that weekend or holiday. The problem, as the public comments pointed out, is that the definition of a "legal holiday" may cause a trap for the unwary because some state holidays are obscure and not generally observed either by courts or law firms. A filer unaware of an obscure state holiday, for example, might file a paper on the holiday itself only to learn at that

time that the filing is untimely.

Professor Struve explained that the subcommittee had considered potential fixes for the problem. One would be to provide that a state holiday is a "legal holiday" for forward-counting purposes, but not for backward-counting purposes. She said, though, that the subcommittee had rejected the fix because a majority of members believed that it would make the rule too complex. On the other hand, the Advisory Committee on Bankruptcy Rules has complained that the rule will cause serious problems in bankruptcy practice and that state holidays must be excluded from the backwards-counting provision – either across-the-board for all the rules, or at least in the bankruptcy rules.

Professor Struve emphasized that the advisory committees were recommending changes in the specific deadlines contained in many individual rules to make the net result of time-computation changes essentially neutral as to the actual amount of time allotted for parties to take particular actions.

Professor Struve noted, for example, that the 10-day appeal deadline in FED. R. BANKR. P. 8002 would be revised to 14 days. In addition, she said, the civil and appellate advisory committees had worked together to address post-judgment tolling motions filed under FED. R. CIV. P. 50, 52, or 59. They decided to lengthen the deadline for filing such motions from 10 days to 28 days.

CIVIL RULES TIME COMPUTATION

Judge Kravitz stated that, as published, the Advisory Committee on Civil Rules had recommended extending the deadline to file a post-judgment motion under FED. R. CIV. P. 50 (judgment as a matter of law), 52 (amended or additional findings), or 59 (new trial) from 10 days to 30 days. But the Advisory Committee on Appellate Rules pointed out that extending the deadline to 30 days could cause problems because FED. R. APP. P. 4 (appeal as of right – when taken) imposes the same 30-day deadline to file an appeal in a civil case not involving the federal government. Accordingly, as the deadline to file a notice of appeal looms, an appellant may not know until the last minute whether a post-judgment tolling motion will be filed.

As a result, he said, the civil rules advisory committee considered scaling back the proposed deadline for filing a post-trial motion from 30 days to 21 days or 28 days. The committee concluded that 21 days was simply not a sufficient increase from 10 days, and that a substantial increase is in fact needed to help the bar. Therefore, the committee decided upon 28 days, even though that might seem like an odd time period. Yet it would give the appellant at least two days before a notice of appeal must be filed to learn whether any other party has filed a post-judgment motion tolling the time to file a notice of appeal. The appellate rules committee found this change acceptable.

Judge Kravitz reported that the Advisory Committee on Civil Rules had found only one statute that needs to be amended to conform with the proposed rule changes.

CRIMINAL RULES TIME COMPUTATION

Judge Tallman reported that the Advisory Committee on Criminal Rules was recommending several changes in individual rules to extend deadlines from 10 days to 14, a change that is essentially merits-neutral. He noted that Congress had deliberately established very tight deadlines in some statutes, some as short as 72 hours, and he suggested that it might be difficult to persuade Congress to change these statutes.

APPELLATE RULES TIME COMPUTATION

Professor Struve stated that some public comments had suggested eliminating or revising the "three-day rule," which gives a party additional time to file a paper after service. She said that the advisory committee thinks the suggestion is well worth considering and had placed it on its agenda. But it had decided not to recommend elimination as part of the current time-computation package.

BANKRUPTCY RULES TIME COMPUTATION

Judge Swain stated that the proposed amendments to the bankruptcy rules include a recommendation to extend from 10 days to 14 days the deadline in FED. R. BANKR. P. 8002 (time for filing notice of appeal) to file an appeal from a bankruptcy judgment. She noted that the proposal had been controversial because it would change a century-old tradition of a 10-day appeal period in bankruptcy. She noted that the advisory committee had made special efforts to reach out to the bar on the issue.

Judge Swain pointed out that the proposed rules pose special challenges for the bankruptcy system in dealing with backward-counting deadlines because the Federal Rules of Bankruptcy Procedure rely heavily on a notice and hearing process and use a good deal of backwards counting. Moreover, because of the national nature of bankruptcy practice, it is not expected that bankruptcy practitioners would be aware of all state legal holidays.

The advisory committee, she said, was strongly of the view that state holidays should not be included in backwards counting. She recognized the importance of having uniformity among all the rules, and urged that state holidays be excluded from backwards counting in all the rules. If this approach is not possible, an exception to uniformity should be made in this particular instance for the bankruptcy rules.

Professor Morris explained that the Bankruptcy Code specifies more than 80 statutory deadlines. Another 230 time limits are set forth in the Federal Rules of

Bankruptcy Procedure, including 18 that require counting backwards. Accordingly, he said, backward-counting deadlines are dramatically more common in bankruptcy than in the other rules. State holidays, he explained, pose no problem in counting forward because they give parties an extra day. But in counting backwards, a filing party is given less time to file a document if a deadline falls on any state holiday. Judges, he said, can usually deal with inadvertent mistakes made in backwards counting. But when a deadline is statutory, a court is less likely to be generous.

He suggested adopting the approach set forth in Judge Swain's memorandum of June 4, 2008, to the standing committee recommending that FED. R. BANKR. P. 9006(a)(6)(C) be added to define a state holiday as a "legal holiday" only in counting forward. The advisory committee would also state in the committee note to the rule that this limiting provision would apply only in the bankruptcy rules.

A member emphasized the importance of uniformity among all the rules and stated that he was concerned about having different standards in the different sets of rules. Nonetheless, he said, the bankruptcy advisory committee had made persuasive points. He wondered whether there might be another solution, such as to make distinctions among different types of state holidays. Some, he said, are important, with government offices, courts, and law firms closed throughout the state. Others, however, are hardly known at all. He suggested that the rule might be revised to provide that only those state holidays that are listed in local court rules be included in the definition of "legal holidays."

Another member agreed that the rule would clearly create a trap for the unwary. He argued that the proposal to exclude state holidays from backward counting is not too complicated, and it should be implemented across the board in all the rules, not just in the bankruptcy rules. Several other participants concurred.

A member argued, though, that the proposed rule is clear, and states do in fact announce all their official holidays. The main problem appears to be that state officials cannot act on days when their offices are closed. If they file a paper on the following day, it will be untimely under the rule. As a practical matter, they will have to file a day early.

A member noted that the committee simply cannot achieve national uniformity in this area and suggested that state holidays be dealt with by local rules. Another responded, though, that reliance on local rules would not address the concerns of the Advisory Committee on Bankruptcy Rules that many bankruptcy lawyers have a national practice and represent far-flung creditors. Lawyers and creditors are largely unaware of state holidays and state issues. Judge Swain added that many creditors in bankruptcy cases do not have counsel. Their involvement is often limited to filing a proof of claim.

It would be unreasonable to expect them to be aware of local court rules referring to state holidays.

Several participants recommended extending the bankruptcy committee's proposed exclusion of state holidays in backwards counting to all the rules. Judge Huff and Professor Struve pointed out that the agenda book contained the text of an alternate rule that would accomplish that objective by including state holidays only in counting forwards. They said that it would be an excellent starting point for revising the rule.

The committee without objection by voice vote approved the proposed amendments to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a) for approval by the Judicial Conference, using the alternate rule language set forth in the agenda book, together with a committee note incorporating language from the bankruptcy committee's memorandum of June 4, 2008, except for its last sentence, and some improved language by Professor Cooper regarding the inaccessibility of the clerk's office. Judge Rosenthal added that the text would be subject to final review by the style subcommittee and recirculation to the standing committee.

Following approval of the uniform time-computation rule, Judge Rosenthal turned the discussion to the specific time adjustments in individual rules proposed by the advisory committees to account for the changes in the time-computation method.

One member argued that the proposed amendments to FED. R. CIV. P. 50 (motion for judgment as a matter of law), 52 (motion for amended or additional findings), and 59 (motion for a new trial) go well beyond conforming the three rules to the new time-computation methodology. Rather, they would substantially expand the time for filing post-judgment motions and add cost and delay to civil litigation. She suggested that trial judges may not support extending the time because they want to resolve their cases promptly and have post-trial motions made without delay. In addition, if a lawyer does not have enough time to fully prepare a polished post-trial motion, the matter can be fixed later, and the parties will still enjoy their full appellate rights. Extending the time to file motions from 10 days to 28 days will slow down the whole litigation process.

Judge Kravitz pointed out, though, that trial judges often bend the rules to give lawyers more time to file post-trial motions, especially after a long trial when the lawyers are exhausted and a transcript is not yet available. Judges, for example, may hold up the entry of judgment. Or they may let lawyers file a skeletal post-judgment motion to meet the deadline and then have them supplement it later. The problem, he said, is that 10 or 14 days is simply not enough time in many cases for a lawyer to prepare an adequate motion. Under the rules, moreover, the court cannot extend the deadline, even though some judges routinely do so by procedural maneuvers. In addition, there is case law holding that issues not raised in the original filing cannot be raised later. All in all, Judge

Kravitz concluded, it is unreasonable to require lawyers to file quick post-trial motions, especially in large cases. Extending the deadline to 28 days may result in some delays, but on balance, the advisory committee believes that it is the right thing to do.

A member asked whether trial judges could impose a deadline shorter than the 28 days specified in the proposed rule. Professor Cooper responded that the matter had not been considered by the advisory committee. But it had considered amending FED. R. CIV. P. 6(b) (extending time) to allow judges to extend the time for filing post-trial motions. It was concerned, though, about the interplay between the civil and appellate rules and the jurisdictional nature of the deadline for filing a notice of appeal. Therefore, it declined to take any steps that might be applied ineptly in practice and lead to a loss of rights.

Judge Kravitz explained that scholars are concerned that permitting a judge to extend the time to file post-motion judgments would not fully protect the parties, given the jurisdictional and statutory nature of the time to appeal. A party might still lose its right to appeal if it fails to meet the jurisdictional deadline, even though the trial judge has extended the time to file a post-judgment motion.

A member suggested that 10 or 14 days to file a post-trial motion should be sufficient for lawyers in most cases. He asked how often the short deadline actually presents problems for lawyers. If not frequent, the procedural devices that trial judges now use to give lawyers more time may be sufficient to address the problems.

Judge Kravitz responded that the advisory committee had concluded that it was common for lawyers to need additional time, especially in circuits where the case law holds that claims are waived if not raised in the original motion. He said that he had presided over a number of cases in which the parties needed a transcript to file a motion. He pointed out that there had been no negative public comments on extending the deadline from 10 days to 28 days, either from judges or the bar. Professor Struve added that the E.D.N.Y. Committee on Civil Litigation had been critical of the time-computation project in general, but had come out strongly in favor of this particular extension.

A member added that lawyers are uncomfortable with the devices that trial judges now use, such as deferring entry of judgment or allowing a bare-bones post-judgment motion. The 10-day deadline, he said, is notoriously inadequate because many issues require careful briefing, even after a relatively short trial. Moreover, there may be a change in counsel after the trial, making the current deadline virtually impossible to meet. The proposed extension to 28 days, he said, is badly needed and will not cause unreasonable delays.

The lawyer members of the committee all agreed that the current 10-day deadline is much too short. They said that it is not safe for lawyers to rely on procedural maneuvering, such as delaying the entry of judgment. Lawyers, moreover, are bound by what they write in the original filing, and they may need a transcript to prepare a proper motion. One added that it is not uncommon for appellate counsel to be brought in after the trial and have to be brought up to speed by exhausted trial counsel.

A member pointed out that notices of appeal are normally filed only after disposition of a post-judgment motion, usually a Rule 59 motion for a new trial. Under the proposed extension, more parties may file prophylactic notices of appeal before any post-judgment motions are filed. This practice may impose some administrative burdens on the court of appeals, but Professor Struve suggested that it would likely arise only in multi-party cases. Judge Kravitz added that even 28 days may not be sufficient for lawyers to prepare post-judgment motions in some cases. Therefore, the proposed change may not altogether end the procedural devices that are now being used.

A member suggested that the committee consider the fundamental purpose of post-trial motions. As originally conceived, they were designed to allow a trial judge to promptly fix errors in the trial record. But they have evolved into full-blown motions to reconsider a whole host of issues raised at pretrial, by motion, and at trial and to relitigate all the decisions made by the trial judge in the case. In all, post-trial motions lead to a misuse of judicial time.

Judge Rosenthal stated that the advisory committees, and district judges generally, are troubled by the procedural subterfuges now used to circumvent the current rule. They are not worried about waiting a few more days if the result is better-prepared motions.

A motion was made to adopt all the proposed rule changes in the time-computation package.

Judge Tallman pointed out that FED. R. CRIM. P. 5.1 (preliminary hearing) and 18 U.S.C. § 3060(b) both specify that a preliminary hearing must be held within 10 days of the defendant's first appearance if the defendant is in custody. He explained that the proposed amendment to Rule 5.1 would extend the deadline to 14 days, but the statute will also have to be amended to keep the two consistent. If Congress does not extend the statutory deadline to 14 days, it would make no sense to amend the rule.

A member asked whether the committee should approve the rule contingent upon Congress amending the statute. Judge Rosenthal reported that representatives of the rules committees had already discussed a timetable with congressional staff to synchronize the effective date of the new rules with the needed statutory changes. She said that staff had been very sympathetic to the objective, and it did not appear that there would be

significant obstacles to accomplishing this objective. There is certainly no guarantee of success, but the committees are hopeful. Professor Coquillette added that the problem of synchronization could also be addressed by delaying the effective date of all the rules, or selected rules, to coincide with the statutory changes.

A member noted that under the Rules Enabling Act, rule changes supersede inconsistent statutes (except for changes to the bankruptcy rules). So even if Congress were not to act, the revised rules would override the inconsistent statutes. Judge Rosenthal responded that the committee, as a matter of comity with the legislative branch, tries to avoid reliance on the supersession clause of the Act. It also seeks to avoid the confusion that results when a rule and a statute are in conflict. The member agreed, but noted that if Congress simply does not act in time, as opposed to refuses to act, the extended deadlines in the new rules would govern in the interim until Congress acts.

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

The committee without objection by voice vote approved the advisory committees' recommendations that the Judicial Conference seek legislation to adjust the time periods in 29 statutes affecting court proceedings to conform them to the proposed changes in the time-computation rules.

Judge Rosenthal asked the committee to concur in her view that the changes made in the time-computation amendments following publication were not so extensive as to require republication of the proposals.

The committee without objection by voice vote agreed that there was no need to republish any of the proposed time-computation amendments.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 13, 2008 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 4(a)(4)(B)(ii)

Professor Struve reported that the proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would resolve an inadvertent ambiguity that resulted from the 1998 restyling of the Appellate Rules. The current rule might be read to require an appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. She reported that the public comments on the proposed amendment had raised some additional issues, which had been placed on the future agenda of the advisory committee.

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

FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the criminal rules to authorize indicative rulings explicitly. Accordingly, the appellate

advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

FED. R. APP. P. 22(b)(1)

Judge Stewart explained that the proposed amendment to FED. R. APP. P. 22(b)(1) (certificate of appealability) would conform the rule to changes being proposed by the Advisory Committee on Criminal Rules in Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings. The amendment would delete from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the matter is more appropriately

handled in Rule 11. Professor Struve added that approval of the amendment would be contingent on approving the tandem amendments proposed by the criminal rules committee.

A member questioned the language of the proposed amendment stating that "(t)he district clerk must send the certificate and the statement . . . to the court of appeals," suggesting that the district clerk should be required to send the certificate only when it has been issued by a district judge. The certificate may be also issued by the court of appeals or a circuit justice, but a district clerk should bear no noticing obligation in those situations. The limitation on the clerk's obligation may be implicit in the rule, but it would be preferable to substitute language such as, "If the district court issues the certificate, the district clerk must send . . . ."

Professor Struve explained that the principal concern of the advisory committee had been to make sure that the certificate is included in the case file. She noted, though, that under CM/ECF, the courts' comprehensive electronic records system, there should be few problems with filing and transmitting documents. Nevertheless, the district clerk should have no obligation to handle a certificate issued by a circuit judge.

Judge Rosenthal suggested that the committee defer further consideration of the proposed amendment to FED. R. APP. P. 22(b)(1) until after the committee considers the parallel rule amendments proposed by the Advisory Committee on Criminal Rules.

Later in the meeting, the committee approved the parallel rule amendments proposed by the Advisory Committee on Criminal Rules. At that time, it approved without objection by voice vote the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference. **(See page 46.)**

FED. R. APP. P. 26(c)

Judge Stewart explained that the proposed amendments to FED. R. APP. P. 26(c) (additional time allowed after mail and certain other service) would clarify the method of computing the additional three days that a party is given to respond after service. The amendment would make the language of the rule parallel to that of FED. R. CIV. P. 6(d). He also pointed out that the advisory committee had received a comment from Chief Judge Frank Easterbrook recommending that the "three-day rule" be eliminated entirely, and the committee would place the matter on its agenda for a full discussion.

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

Amendments for Publication

FED. R. APP. P. 1(b)

Professor Struve explained that proposed new FED. R. APP. P. 1 (definition) would define the term "state" throughout the Federal Rules of Appellate Procedure to include the District of Columbia and any U.S. commonwealth or territory. The definition, she explained, is consistent with a proposed amendment to FED. R. CIV. P. 81(d).

FED. R. APP. P. 29(a)

The proposed amendments to FED. R. APP. P. 29(a) (when an amicus curiae brief is permitted) would eliminate the current language referring to a state, territory, commonwealth, or the District of Columbia because new FED. R. APP. P. 1(b) would make it unnecessary.

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

FORM 4

Professor Struve reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) had already been updated informally to conform to the new privacy rules that took effect on December 1, 2007, and had been posted by the Administrative Office on the Judiciary's web-site. The proposed revisions to the form would delete the full names of minor children and the home address and full social security number of the applicant. She explained that the advisory committee had also concluded that the term "minor" could be ambiguous because the definition varies from state to state, and pro se petitioners who normally fill out Form 4 should not be placed in the position of worrying about who is a "minor." Instead, the committee decided to substitute the language "under 18."

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

Informational Item

Judge Stewart reported that the advisory committee was continuing to monitor case law developments following *Bowles v, Russell,* 551 U.S. ___ (2007), regarding the jurisdictional and statutory dimensions of the time limits to appeal.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professors Morris and Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of May 14, 2008 (Agenda Item 10).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Bankruptcy Procedure.

FED. R. BANKR. P. 1017.1

Judge Swain noted that proposed new FED. R. BANKR. P. 1017.1 (individual debtor's exemption from the pre-petition credit counseling requirement) would have revised the process for granting an extension of time for the debtor to complete the credit-counseling required by the 2005 amendments to the Bankruptcy Code. It had been published for public comment in August 2007, but the comments had shown that a rule is unnecessary because very few cases arise in which there is a request for an extension. Therefore, the advisory committee decided to withdraw it from further consideration.

FED. R. BANKR. P. 4008

Judge Swain noted that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would require that a new official form cover sheet be filed with a reaffirmation agreement. (See OFFICIAL FORM 27 below.)

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

Judge Swain explained that the new rule and the proposed rule amendments deal with clarifying the requirement that a judgment be set forth in a separate document. New FED. R. BANKR. P. 7058 (entry of judgment) would make FED. R. CIV. P. 58 (entering judgment) applicable in adversary proceedings. FED. R. BANKR. P. 7052 (findings by the court) and 9021 (entry of judgment) are conforming amendments to accompany new Rule 7058.

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

OFFICIAL FORMS 1, 8, and 27

Professor Morris reported that the amendments to Exhibit D of OFFICIAL FORM 1 (individual debtor's statement of compliance with the credit counseling requirement) and OFFICIAL FORM 8 (individual Chapter 7 debtor's statement of intention) would become effective on December 1, 2008. New OFFICIAL FORM 27 (reaffirmation agreement cover sheet) would take effect on December 1, 2009, to coordinate it with the proposed revision to Rule 4008 that would require the form to be filed with a reaffirmation agreement. The form will give the court basic information about what is contained in the agreement. He noted that the advisory committee had received comments on the form and had made minor changes after publication.

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

TECHNICAL CHANGES

FED. R. BANKR. P. 2016, 7052, 9006(f), 9015, and 9023

Professor Morris reported that the advisory committee recommended that the proposed amendments to the five rules be approved and sent to the Judicial Conference for final approval without publication because they involve only technical changes, such as correcting cross-references or implementing provisions in the other sets of rules.

He said that the proposed amendment to FED. R. BANKR. P. 2016 (compensation for services rendered and reimbursement of expenses) merely corrects a cross-reference to a subsection of the Bankruptcy Code changed by the 2005 omnibus bankruptcy legislation.

The amendment to FED. R. BANKR. P. 9006(f) (additional time allowed after service by mail or certain other means) would correct a cross-reference to subparagraphs in FED. R. CIV. P. 5 (service), which had been renumbered as part of the civil rules restyling project.

The other three amendments would implement the proposed new 14-day deadline to file a notice of appeal from a bankruptcy judgment. Professor Morris explained that the proposed 28-day time to file a post-judgment motion in civil cases would not work in bankruptcy cases because the deadline to file a notice of appeal, currently 10 days, will be 14 days once the time-computation amendments take effect.

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

OFFICIAL FORMS 9F, 10, and 23

Professor Morris reported that the proposed amendments to the forms were technical in nature and did not merit publication. He explained that the advisory committee inadvertently had retained a requirement in OFFICIAL FORM 9F (initial notice in a Chapter 11 corporation or partnership case) that debtors provide their telephone numbers. That item of personal information has been removed from the other forms.

The change in OFFICIAL FORM 10 (proof of claim) would remind persons filing claims based on health-care debts that they should limit the disclosure of personal information. Two changes in the definition section of the forms would tie the words "creditor" and "claims" more closely to the definitions set forth the Bankruptcy Code.

The proposed amendment to OFFICIAL FORM 23 (debtor's certification of completing the required post-petition financial-management course) would add a reference to § 1141(d)(5)(B) of the Bankruptcy Code.

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

Amendments for Publication

Professor Morris explained that the proposed amendments and new rule would implement new Chapter 15 of the Bankruptcy Code, added by the 2005 legislation.

FED. R. BANKR. P. 1004.2

Under proposed new FED. R. BANKR. P. 1004.2 (Petition in Chapter 15 cases), an entity must state on the face of the petition the country of the debtor's main interests.

FED. R. BANKR. P. 1014 and 1015

FED. R. BANKR. P. 1014 (dismissal and change of venue) and 1015 (consolidation or joint administration of cases) both deal with multiple cases involving the same debtor. A question had been raised as to whether these rules are applicable in Chapter 15 cases. The advisory committee would resolve the ambiguity by making the two rules specifically applicable.

FED. R. BANKR. P. 1018

The amendments to FED. R. BANKR. P. 1018 (contested involuntary and chapter 15 petitions, etc.) would clarify the scope of Rule 1018 to the extent it governs

proceedings contesting an involuntary petition or Chapter 15 petition for recognition. There is some confusion now as to the applicable procedures in injunctive actions. The amendments clarify that the rule applies to contests over the involuntary petition itself, and not to matters that arise in or are merely related to a Chapter 15 case or an involuntary petition. Such other matters are governed by other provisions of the Rules, as explained in the proposed committee note.

FED. R. BANKR. P. 5009

FED. R. BANKR. P. 5009 (case closing) would require a foreign representative to file and notice a final report in a Chapter 15 case describing the nature and results of the representative's activities in the United States court. In the absence of timely objection, a presumption will arise that the case has been fully administered and may be closed. Another amendment would require the clerk to send a notice to individual debtors in Chapter 7 and Chapter 13 cases that their case will be closed without a discharge if they have not timely filed the required statement that they have completed a financial-management course.

FED. R. BANKR. P. 5012

New FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in Chapter 15 cases) would establish a motion procedure in Chapter 15 cases for obtaining approval of an agreement or "protocol" under § 1527(4) of the Code for the coordination of Chapter 15 proceedings with foreign proceedings.

FED. R. BANKR. P. 9001

The amendment to FED. R. BANKR. P. 9001 (general definitions) would incorporate into the rule the definitions set forth in § 1502 of the Code, added by the 2005 bankruptcy legislation.

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 9, 2008 (Agenda Item 6).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G
FORMS 3, 4, and 60

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Civil Procedure, the Supplemental Rules, and the illustrative Civil Forms.

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee had published a proposed amendment to FED. R. CIV. P. 8(c) (affirmative defenses) that would remove a "discharge in bankruptcy" from the list of defenses that a party must affirmatively state in responding to a pleading. The Bankruptcy Code makes the exception unnecessary as a matter of law because a discharge voids a judgment to the extent that it determines the debtor's personal liability on the discharged debt. He said, though, that the Department of Justice had voiced opposition to the change. As a result, the advisory committee decided to postpone seeking final approval of the change in order to discuss the matter further with the Department.

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

Judge Kravitz reported that FED. R. CIV. P. 13(f) (omitted counterclaim) would be deleted from the rules as largely redundant and misleading. Instead, an amendment to a counterclaim would be governed exclusively by FED. R. CIV. P. 15 (amended and supplemental pleadings).

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

The amendments to FED. R. CIV. P. 15 (amended and supplemental pleadings) would revise the time when a party's right to amend its pleading once as a matter of course ends.

FED. R. CIV. P. 48(c)

Judge Kravitz said that new FED. R. CIV. P. 48(c) (polling the jury) is based on FED. R. CRIM. P. 31(d), but has minor revisions in wording to reflect that the parties in a civil case may stipulate to a non-unanimous verdict.

A member noted that the proposed amendment referred to "a lack of unanimity or assent" on the part of the jury and asked whether "unanimity" and "assent" are different requirements. Professor Cooper responded that they are, in fact, different concepts. If the parties in a civil case stipulate to accepting a less-than-unanimous verdict, only the "assent" of the jury is required, not "unanimity." Professor Cooper added that Professor Kimble had suggested restyling the language to read: "a lack of unanimity or a lack of assent."

FED. R. CIV. P. 62.1

Judge Kravitz reported that proposed new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal) was the most important rule in the package being forwarded to the Judicial Conference for approval. He noted that the language had been refined following the public comment period to emphasize that the remand from the court of appeals to the district court is for the limited purpose of deciding a motion.

A member suggested that the rule's language was awkward in referring to "relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." He suggested rephrasing the rule to read: "because an appeal has been docketed and is pending." Professor Cooper responded that there are several situations in which docketing of an appeal does not oust the district court's jurisdiction. The advisory committee, moreover, had tried to avoid getting into the morass over whether docketing an appeal is jurisdictional.

FED. R. CIV. P. 81(d)

Judge Kravitz pointed out that the proposed amendment to FED. R. CIV. P. 81(d) (law applicable) would define a "state" for purposes of the Federal Rules of Civil Procedure, where appropriate, as the District of Columbia and any U.S. commonwealth or territory.

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

Amendments for Publication

FED. R. CIV. P. 56

Judge Kravitz reported that the advisory committee had made additional refinements in the proposed amendments to FED. R. CIV. P. 56 (summary judgment) as a result of the comments made by standing committee members at the January 2008 meeting. In addition, the committee note had been shortened significantly.

Judge Kravitz explained that the project to revise FED. R. CIV. P. 56 had been challenging and, understandably, it had taken a great deal of time to complete. He extended special thanks to Judge Michael Baylson for his excellent leadership and insight in chairing the subcommittee that had developed the summary judgment proposal. He also thanked Professor Cooper, Andrea Kuperman, Joe Cecil, James Ishida, and Jeffrey Barr for their significant research efforts in support of the project.

Judge Kravitz explained that actual summary judgment practice has grown apart from the current text of Rule 56. The deficiencies of the current national rule have left space that has been filled by experimentation at the local level. Accordingly, he said, in fashioning a new national rule, the advisory committee had enjoyed the unique opportunity of drawing upon the best practices contained in local court rules.

Judge Kravitz reported that the bar is largely supportive of moving towards a more uniform national summary judgment practice under Rule 56. He noted that the advisory committee had conducted two mini-conferences on the proposed amendments with lawyers, law professors, and judges, and he had spoken personally to several bar groups. At the same time, however, he said that there may be resistance to the proposed rule from courts that do not presently use the three-step process embodied in the new rule.

He explained that the proposed rule would provide a uniform framework for handling summary judgment motions throughout the federal courts, but it would also give judges flexibility to prescribe different procedures in individual cases. The procedure that the new rule lays out will work well in most cases, he said, but trial judges will be free to depart from it when warranted in a particular case.

Judge Kravitz emphasized that there is nothing radical about the three-step, point-counterpoint procedure prescribed in the proposed rule. Clearly, a party should be required to give citations to the record to support its assertion that an issue is disputed or not. That, he said, is precisely what the amendments are designed to accomplish.

Judge Kravitz emphasized that the advisory committee had adhered to two basic principles in drafting the rule. First, it decided not to change the substantive standards governing summary judgment motions. Second, it decided that the revised rule must be neutral – not favoring either plaintiffs or defendants. He pointed out that the last time the advisory committee had proposed making changes to Rule 56, in the early 1990s, it had attempted to make substantive changes, and the effort had failed.

Judge Kravitz reported that the advisory committee had also worked with the Federal Judicial Center to verify empirically that the proposed rule would not run afoul of either of the two fundamental principles.

Mr. Cecil explained that 20 districts now require the point-counterpoint procedure in their local rules. The Center had compared summary judgment practice in those districts with practice in two other categories of districts: (1) the 34 districts that require movants to specify all the undisputed facts in a structured manner, but do not require any particular form of response from opponents; and (2) the remaining districts that have no local rule requiring either party to specify undisputed facts.

The Center's research, he said, had uncovered little meaningful difference among the three categories of districts, except in two respects. First, in districts having a point-counterpoint process, judges take somewhat longer to decide summary judgment motions. Those districts, however, generally have lengthier disposition times. Therefore, the longer times cannot be ascribed to the point-counterpoint procedure. Second, in districts that do require a structured procedure, motions for summary judgment are more likely to be decided. But there appears to be no difference as to the outcome of the motions – whether they are granted or denied. Mr. Cecil cautioned, however, that the current court data concerning termination by summary judgment may not be sufficiently reliable.

Judge Kravitz proceeded to highlight those provisions of the proposed rule that either have prompted comment from bench and bar or have been changed by the advisory committee since the January 2008 standing committee meeting.

RULE 56(a)

Judge Kravitz pointed out that proposed Rule 56(a) specifies that a court "should" grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. He said that the advisory committee had heard a great deal about whether the appropriate verb should be "should," "must," or "shall." He noted that the rule had used the term "shall" until it was changed to "should" as part of the 2007 general restyling of the civil rules.

He said that the advisory committee, after lengthy consideration, had decided that it would be best to retain the language of the rule currently in effect, *i.e.,* "should." Professor Cooper added that there continues to be some nostalgic support for returning to "shall," but that usage would violate fundamental rules of good style. Therefore, he said, the choice lies between "should" and "must." Earlier drafts of the committee note, he said, had undertaken to elaborate on the contours of "should," but the advisory committee decided that it would be improper to risk changing the meaning of a rule through a note. Thus, the 2007 committee note to the restyled Rule 56 remains the final word on the subject.

Professor Cooper added that the verb "should" is clearly appropriate when a motion for summary judgment addresses only part of a case. Under certain circumstances, he explained, it is wise as a practical matter for a judge to let the whole case proceed to trial, rather than grant partial summary judgment. He suggested that one possible approach might be to use "must" with regard to granting summary judgment on a whole case, but "should" for granting a partial summary judgment. That formulation, however, appears unnecessarily complicated.

Judge Kravitz noted a Seventh Circuit case suggesting that summary judgment must be granted when warranted on qualified immunity grounds, although the decision appears to have more to do with qualified immunity than summary judgment. He explained that the advisory committee tries to avoid providing legal advice in the committee notes. The committee, moreover, did not want to mention qualified immunity in the note as an example of a particular substantive area in which summary judgment may come to be indeed mandatory when the proper showing is made, for fear that it might miss other substantive areas.

Judge Kravitz noted that, at the January 2008 standing committee meeting, a member had pointed out a discrepancy between proposed Rule 56(a), which specifies that summary judgment "should" be granted in whole or in part, and Rule 56(g), specifying that partial summary judgment "may" be granted. He reported that the discrepancy had been fixed and the two provisions now work well together.

A member expressed concern that using the word "should" in Rule 56(a) would signal to the bar that the committee is retrenching from the substantive standard that had prevailed before the restyling of the civil rules, thereby making summary judgment less readily available. For decades, he said, Rule 56 had specified that a judge "shall" grant summary judgment if a party is entitled to it. In the restyling effort, though, the verb "shall" was changed to "should" as part of the policy of eliminating the use of "shall" throughout the rules. At the time, the committee specified that no substantive change had been intended.

He recommended that the committee signal to the bar once again that no substantive change had been intended by the change to "should." Accordingly, a judge

should have no discretion to deny summary judgment when a party is entitled to it as a matter of law.

Another member suggested that the relevant sentence in proposed Rule 56(a) is incoherent because it specifies that a court "should" grant summary judgment if a party is "entitled" to it. If a party is "entitled" to summary judgment, by definition the grant of summary judgment is mandatory. Other members endorsed this view.

A member argued that the appropriate verb to use in the rule is "must." In his state, for example, the state court trial judges are concerned that the intermediate appellate courts frequently reverse their grants of summary judgment. The consequence is that they are chilled from granting summary judgment, believing that it is safer to just let a case proceed to trial. Another member noted that some trial judges in his federal circuit grant summary judgment even when there is clearly a credibility dispute between the parties because they believe that they know how a case will turn out in the end.

Judge Kravitz explained that the advisory committee believes that the substance of the proposed rule is identical to the way it was before December 1, 2007, when "should" replaced "shall." There was no intention to make any substantive change. He pointed out that the committee note, for example, states that discretion should seldom be exercised. That point, he said, would continue to be emphasized in the materials that are published. A judge would exercise discretion to deny summary judgment only in a rare case.

He added that under prevailing summary judgment standards, a trial judge who decides a summary judgment motion must resolve all reasonable inferences in favor of the non-moving party. That, he said, leaves a good deal of latitude to the judge, even before deciding whether the moving party is "entitled" to summary judgment as a matter of law. He suggested that even if the rule were to specify that summary judgment "must" be granted if the moving party is "entitled" to it, the trial judge would have some flexibility in determining whether the moving party is "entitled."

A member complained that a number of trial judges avoid granting summary judgment, no matter how strong the moving party's entitlement to it. But there is no empirical evidence on the point because the cases go to trial, and there is no way to appeal the denial of summary judgment. To avoid the stark choice between "should" and "must," he suggested that the language might be revised to specify that "summary judgment is required if . . .," or "summary judgment is necessary if . . . ."

Judge Kravitz responded that the advisory committee had indeed considered an alternative formulation along these lines, but had abandoned the effort because it would change the substantive standard for granting summary judgment. He added that while the civil defense bar is nervous about the 2007 change from "shall" to "should," the

plaintiffs' bar is concerned about other aspects of the proposed rule and would be strongly opposed to changing "should" to "must."

A member suggested that the committee publish the rule for comment as currently drafted and solicit comments from the bar. She also observed that the proposed rule would explicitly authorize a court to grant partial summary judgment, and it would not make sense to specify that a judge "must" grant partial summary judgment.

Judge Kravitz pointed out that it was clear from the discussion that several committee members believe that a substantive change had been made inadvertently during the course of the restyling process. But he pointed out that the term "shall" had been interpreted in the pertinent Rule 56 case law as not requiring a judge to grant summary judgment in every case even though a party may be "entitled" to it.

He also noted that the committee would have to republish the rule for further public comment if it were to: (1) publish the proposal using "should"; (2) receive many negative public comments on the choice; and (3) then decide to revert to "must." He suggested that it might make more sense – although he did not specifically advocate the idea – to publish the rule using "should" and "must" as alternatives and specifically invite comment on the two.

A member observed that the bar had been informed that the change from "shall" to "should" during the restyling process was merely a style change. Therefore, the change from "should" back to "shall" would also be a mere style change.

Judge Kravitz noted that a change from "should" to "must" would clearly be more than a style change. He explained that the style subcommittee had made clear that "shall" is an inherently ambiguous word that should be changed wherever it appears. Therefore, in drafting the proposed revisions to Rule 56, the advisory committee had carefully researched how courts had interpreted the word "shall" in Rule 56. It concluded that "shall" had largely been read to mean "should" within the context of Rule 56.

Professor Kimble added that "shall" is so ambiguous that it can mean just about anything. It has been interpreted to mean "must," "should," and "may" in different circumstances. A cardinal principle of sound drafting, he said, is that ambiguous terms must be avoided. He said that "shall" should indeed normally mean "must," but in actual usage it often does not.

A member stated that she had always assumed that "shall" meant "must" and had been surprised to learn about the inherent ambiguity of "shall." She said that if the committee wants to solicit public comment on the choice between "should" and "must," it should make clear in the publication exactly what the committee intends for the rule to

mean as a matter of substance, describe the underlying issues, and ask for specific advice on those issues.

Judge Kravitz stated that the advisory committee will certainly highlight the issue for public comment. He reiterated that there are sound reasons for giving a trial judge discretion regarding partial summary judgment. One common problem, he noted, is that parties often move for summary judgment on the whole action, but may only be entitled to it on one count. In some cases, granting partial summary judgment may be warranted, but it may make more sense for the judge to go ahead and try the whole case.

A participant observed that these issues are critically important because few civil cases now go to trial. Summary judgment today lies at the very heart of civil litigation and is key as to how counsel perceive and evaluate a case. He recommended publishing the proposed rule using the alternative formulations of "should" and "must" and inviting specific comments on the alternatives. Judge Kravitz noted, by way of example, that the recent electronic discovery amendments had also been published with alternative formulations.

A member stated that, on initial reading, the change from "shall" to "should" did not appear to be substantive. But, on further reflection, the matter is not so clear. He pointed out that the 2007 change from "shall" to "should" is perceived by some as a substantive change, even though the committee is convinced that it is not. For that reason the proposal should be published with "should" and "must" in the alternative to solicit thoughtful comments. Several other members concurred.

A member suggested that some judges may refuse to grant summary judgment, even when warranted, because they are overworked. They can simply deny summary judgment with a one-line order and proceed to trial. But under the committee's proposal, the trial judge "should" give reasons for denying summary judgment. The requirement to give reasons may impact the willingness of some judges to grant summary judgment. Judge Kravitz added that the Federal Judicial Center's research shows that a disturbing number of summary judgment motions are still undecided when cases go to trial.

Judge Kravitz observed that it would be complicated to draft a provision specifying that a trial judge "must" grant complete summary judgment, but "should" grant partial summary judgment. It may be that some other formulation could avoid the drafting problems, but he suggested that it would be better just to tackle the issue head on and use either "should" or "must." He also noted that the choice of words could affect appellate review of summary judgment determinations because the word "must" conjures up the prospect of mandamus.

A member stated that if the committee were to change the verb to "must," it would clearly be a substantive change. Judge Kravitz responded that the committee

would have to conclude that "shall" had meant "must" all along, that it would not be a substantive change, and that the committee had made a mistake in the restyling process.

A member argued, however, that most lawyers and judges believed that "shall," formerly used in Rule 56, had meant "must." Therefore, the 2007 restyling change to "should" was substantive. Judge Kravitz responded, though, that research had revealed cases where courts of appeals had held that district courts had discretion not to grant summary judgment, even though the operative language of the rule was "shall."

A motion was made to publish the Rule 56(a) amendments for comment in a form that sets out and highlights "should" and "must" as alternatives and also solicits comment on the concept of treating complete summary judgment differently from partial judgment in this regard.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(a) for publication, subject to further refinement in language.

RULE 56(b) and (c)(1)-(2)

A member observed that the term "response" appears in several places in proposed Rule 56(b) and (c), but it is confusing because Rule 56(c) intends it to include only a factual statement, and not the response in full. He recommended that the language be modified to make it clear that a "response" does not include a brief.

A member noted that proposed Rule 56(c)(2)(A) specifies that a party must file a motion, response, and reply. Then Rule 56(c)(2)(B) refers to a response that includes a statement of facts. He suggested that the language state that the party must file a response and a separate statement of facts, rather than have the statement included in the response.

A participant noted that proposed Rule 56(b)(2) states that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." But the filing of the summary judgment motion means that an answer is not due. Thus, there will never be a responsive pleading "21 days after . . . a responsive pleading is due."

Professor Cooper explained that the impetus for the provision had come from the Department of Justice. The Department pointed out that a plaintiff may serve a summary judgment motion together with the complaint. This is common, for example, in collection actions. The Department has 60 days to answer a complaint. Under the proposed rule, however, it would have to respond to a plaintiff's summary judgment motion before its deadline for filing an answer to the complaint. For that reason, the

advisory committee added the language "or a responsive pleading is due, whichever is later." What the committee meant to say was something like: "or if the party opposing summary judgment has a longer time to file an answer to the complaint." Mr. Tenpas concurred, noting that the Department did not want to be required to respond to a motion for summary judgment before even being required to answer the complaint. He suggested that perhaps the provision could be fixed by saying, "or a responsive pleading is due from that party."

A participant pointed out that the problem is that the provision was intended to cover summary judgment motions filed by plaintiffs, but as written it covers all parties. Several participants suggested improvements in language, including breaking out the provision into parts to specify how it will operate in each situation. Judge Rosenthal recommended that Professor Cooper and Judge Kravitz consider the suggestions and return to the committee with substitute language.

Judge Kravitz explained that Rule 56(c) spells out the primary feature of the revised rule – its three-step, point-counterpoint procedure. He reported that the advisory committee had made a number of improvements since the last standing committee meeting, and he thanked Professor Steven Gensler, a member of the advisory committee, for devising a more logical, clearer format for the rule.

Judge Kravitz pointed out that one of the criticisms of the three-step process comes from lawyers who have had to defend complex cases where a moving party may list 500 or so facts in a summary judgment motion. It is just too difficult, he said, for the opposing party to go through them all and respond to each. Most local rules, moreover, do not give a party the right to admit a fact solely for purposes of the summary judgment motion. Accordingly, the proposed rule specifies that a party need not admit or deny every allegation of an undisputed fact, but may admit a fact solely for purposes of the motion. This, he said, was an important improvement.

He also noted that the words "without argument" had been deleted from proposed Rule 56(c)(5) because they were confusing and unnecessary. The committee note, moreover, explains that argument belongs in a party's brief, not in its response or reply to a statement of fact.

A member reported that, in his experience, the procedure contemplated in proposed Rule 56(c) is essentially standard practice in many districts already. He pointed out, though, that the proposed language of Rule 56(c)(2)(B) was confusing in part because it specifies that a party opposing a motion "must file a response that includes a statement." The "response" and the "statement" accepting or disputing specified facts are two separate things. Another member agreed and pointed out that the confusion results in part because the rule requires a moving party to file three documents and the opposing party to file two.

Another explained that a party opposing a motion must actually file four things: (1) a statement opposing the motion for summary judgment; (2) a "counterpoint" response, *i.e.,* a response to each of the undisputed facts enumerated by the moving party; (3) a statement pointing out any other facts that the opposing party contends are disputed; and (4) a brief. It is not intended, though, that the opposing party actually file four separate documents. But it would be useful for the rule to flag for opposing parties that the second and third items are separate concepts.

Another member agreed that the current formulation needs to be refined and suggested devising a new term that would denominate the whole package that the moving party must file and the whole package that the responding party must file. Lawyers should be given clear directions as to exactly what they are expected to provide.

A motion was made to approve proposed Rule 56(b) and 56(c)(1-2) for publication, subject to Judge Kravitz, Professor Cooper, and the Rule 56 Subcommittee making further improvements in the language consistent with the committee's discussion.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(b) and (c)(1-2) for publication, subject to further refinement in language.

RULE 56 (c)(3)-(6)

A member noted that proposed Rule 56(c)(3) specifies that "a party may accept or dispute a fact" for purposes of the motion only. It makes perfect sense for a party to accept a fact for purposes of the motion only, but for what purpose would a party ever dispute a fact for purposes of the motion only? Judge Kravitz responded that the advisory committee had focused only on "accepting" a fact for purposes of the motion, and had not considered "disputing" a fact for purposes of the motion.

A member noted that, under proposed Rule 56(c)(4), the court may consider other materials in the record to grant summary judgment "if it gives notice under Rule 56(f)." He suggested that the reference to Rule 56(f) is unnecessary because that rule itself covers the notice that the court must give.

In addition, he noted that proposed Rule 56(c)(6) states that an affidavit or declaration must "set out facts that would be admissible in evidence." The affidavit itself, though, would be admissible in evidence only if the affiant were testifying at trial. The language may cause some confusion because an affidavit submitted in support of or in opposition to summary judgment need not itself be admissible in evidence, but the facts do have to be admissible. Courts often receive affidavits that set out hearsay, but hearsay evidence is not enough to defeat summary judgment.

A participant noted that "facts" are not admissible in evidence and suggested that it would be better to say "facts that can be proven by admissible evidence." Another pointed out, though, that the language had been taken directly from the current Rule 56(e)(1), even though the terminology is not accurate. No court will be misled, and it does not appear to present a serious problem in practice that needs to be fixed. Another member recommended that no change be made because it might appear to signal a substantive change.

A member suggested that proposed Rule 56(c)(5), specifying that "a response or reply . . . may state without argument," should be revised to refer explicitly to a party's brief, where "argument" should be made. Another member suggested, though, that the rule should not go into detail as to how parties should combine their papers. It is an area where trial judges will want flexibility to prescribe procedures.

A motion was made to approve the rest of proposed Rule 56(c) for publication, with appropriate revisions in language to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(c)(3)-(6) for publication, subject to further refinement in language.

RULE 56(e)

Judge Kravitz explained that proposed Rule 56(e) enumerates the actions that a trial judge may take if the party opposing a summary judgment motion does not properly respond to the motion. He pointed out that if a party does not cite support to show that a particular fact is disputed, the court may deem the fact undisputed for purposes of the motion. But that by itself does not automatically entitle the moving party to summary judgment.

He noted that the advisory committee had decided not to spell out in detail what a judge should do with defective motions. There is a good deal of case law on the subject, and judges have experience in dealing with them. A member added that the committee note should explain that giving the opposing party notice and a further opportunity to respond will often be all that a court needs to do.

RULE 56(f)

A member asked whether the language of proposed Rule 56(f)(2), allowing a judge to "grant or deny the motion on grounds not raised by the motion or response," refers only to legal grounds not raised, or also to other facts not raised. Judge Kravitz responded that the language is intended to be broad and cover both.

RULE 56(g)

Judge Kravitz reported that proposed Rule 56(g) had been revised substantially since the last standing committee meeting. It would give a court substantial discretion when it does not grant all the relief requested by a motion for summary judgment.

A member pointed out that the committee note sets out several reasons why a trial court might not want to grant partial summary judgment. He suggested that the note would be more balanced if it also stated the reasons why a court should grant partial summary judgment, as set forth in Judge Kravitz's memorandum accompanying the proposed rule.

A member pointed out that the committee note refers to the trial of facts and issues at "little cost," and suggested that the words be deleted because there are always substantial costs to a trial.

Judge Kravitz observed that if the committee were to decide that there should be a revised section addressing partial summary judgment – in response to the suggestions that judges should have discretion to deny a worthy partial summary judgment motion but not a worthy summary judgment on the whole case – proposed Rule 56(g) would need to be folded into that section.

A participant suggested that the language of proposed Rule 56(g) that "any material fact – including an item of damages or other relief – that is not genuinely in dispute" is confusing. An item of damages is not a material fact. He suggested that the provision would be clearer if it referred to "any material fact, item of damages, or other relief." Judge Kravitz pointed out that the advisory committee had merely retained the language of the current rule, though it might be improved.

A member noted that proposed Rule 56(c)(3) permits a party to accept a fact for purposes of the motion only. But then proposed Rule 56(g) allows a court to treat the fact as established in the case. Would the party have to be given notice if the court is considering treating the fact as established in the case?

Judge Kravitz responded that this should not happen because the party has accepted the fact for purposes of the motion only. The judge should not be able to use the party's limited admission for any other purpose. The member speculated, though, that a party might try to prevent a trial judge from finding a fact established in the case under Rule 56(g) precisely by using the stratagem of admitting the fact for purposes of the motion only. Another member agreed, suggesting that the rule seemed to present a paradox. Judge Kravitz noted, though, that judges rarely enter a Rule 56(g) order anyway.

A member stated that it might be advisable to delete proposed Rule 56(g). Under the current proposal, if a party admits a fact for purposes of the motion only, some further procedure should be required before the judge may enter an order under Rule 56(g) finding the fact established in the case. Judge Kravitz noted that the proposed Rule 56(g) material is in the current rule, and he suggested that it remain in the rule for publication and that public comment might be solicited on whether it is still needed.

RULE 56(h)

Judge Kravitz reported that defense counsel had urged that the rule specify that sanctions be imposed when a summary judgment motion is made or opposed in bad faith. But, he said, the advisory committee had decided to avoid the inevitably controversial issue of sanctions.

A motion was made to approve for publication the remainder of proposed Rule 56, with drafting improvements to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to the remainder of FED. R. CIV. P. 56 for publication, subject to further refinement in language.

FED. R. CIV. P. 26

Judge Kravitz reported that both plaintiffs' and defendants' lawyers have voiced strong support for the proposed amendments to FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony) and FED. R. CIV. P. 26(b)(4)(A) (trial preparation protection for experts' draft reports, disclosures, and communications with attorneys). He pointed out that lawyers commonly opt out of the current rule by stipulation. The proposed amendments, he said, do not go as far as some may want in shielding all expert materials from discovery. For example, they do not place an expert's work papers totally out of bounds for discovery.

Under the current regime, he explained, lawyers engage in all kinds of devices to make sure that little or no preparatory material involving experts is created that could be discovered. Among other things, lawyers may hire two experts – one to analyze and one to testify. They may also direct experts to take no notes, prepare no drafts, or work through staff whenever possible.

Judge Kravitz noted that lawyers expend a great deal of time and expense in examining experts about their communications with lawyers and the extent to which lawyers may have contributed to their reports. But the outcome of cases rarely turns on these matters. Although some benefit may accrue to the truth-seeking function by having

more information available about lawyer-expert communications, the benefits are far outweighed by the high costs of the current system.

He emphasized that it is very important for the proposed amendments to Rule 26 to be clearly written. If the rule is vague, it will not succeed in reducing the high costs of the current rule because lawyers will not feel secure about the extent of the rule's protections. It would lead to unnecessary litigation over the meaning of the text, and lawyers will continue to engage in the kinds of artificial behavior regarding their experts that the advisory committee is trying to avoid.

RULE 26(a)(2)

Judge Kravitz explained that the proposed amendments to Rule 26(a)(2)(C) would require lawyers to provide a summary of a non-retained expert's testimony. The advisory committee, he said, had deliberately used the word "summary," rather than "report," to make it clear that a detailed description is not needed. The committee, he said, was concerned about placing additional burdens on attorneys.

A member asked whether the provision is intended to cover a lay witness described by FED. R. EVID. 701. Judge Kravitz responded that a witness under Rule 701 – one who is not an expert witness – is not covered by the amendments, and a lawyer would not be required to provide a summary of the testimony of a non-expert witness.

The member added that some witnesses do not testify as experts, but nonetheless have specialized knowledge. Judge Kravitz pointed out that proposed Rule 26(a)(2)(C) does in fact cover witnesses who are both fact-witnesses and expert-witnesses, and a summary must be provided of their expert testimony.

RULE 26(b)(4)(A)

Judge Kravitz said that under current Rule 26 anything told to or shown to an expert is discoverable. But under proposed Rule 26(b)(4)(A), work-product protection would be extended both to an expert's draft reports and to the communications between a party's attorney and the expert, with three exceptions: (1) compensation for the expert's study or testimony; (2) facts or data supplied by the attorney that the expert considered in forming the opinions to be expressed; and (3) assumptions supplied by the attorney that the expert relied upon in forming the opinions to be expressed. Under current Rule 26(b)(3), work-product protection is limited to "documents and tangible things." But the work-product protection proposed in the amendment would be broader, in the sense that it would cover all lawyer-expert communications not within any of the three exceptions, even if not "documents or tangible things."

A member stated that the proposed changes are excellent. He noted that lawyers now opt out of the current rule by stipulation or play games to avoid discovery of experts' draft reports and communications. He asked whether an attorney who deposes an expert and has a copy of the expert's report may ask the expert whether the attorney who has retained him or her had helped write the report or had made any changes in it. Judge Kravitz said that the question could not be asked under the proposed rule because inquiries about lawyer-expert communications would be out of bounds for discovery. The proposal, he said, is fair because it applies to drafts and communications on both sides.

A member suggested that the key question for the jury to decide is whether it can rely on an expert's opinion because it is based on the expert's own personal expertise. Therefore, the opposition should be permitted to pursue inquiries that could establish that the expert's opinion is not really an independent assessment reflecting the expert's own expertise, but the views of the attorney hiring the expert. Judge Kravitz pointed out, though, that the expert's report itself is not in evidence. The opposition can probe fully into the basis for the expert's opinions, but it just cannot ask whether the lawyer wrote the report. Who wrote the report is not important to the jury, and the jury does not even see the report. The key purpose of the report is really to apprise the opposition of the nature of the expert's testimony.

A member stated that he always enters into stipulations opting out of the current expert-witness provisions of Rule 26 because the current rule leads to a great deal of needless game-playing, discovery, and cross-examination. He explained that he always provides an outline for an expert to use at trial in order to help organize the testimony for the witness. The testimony, though, is that of the expert, not the lawyer. Requiring the outline to be turned over creates largely irrelevant disputes over authorship and distracts from the substance of the expert's testimony. The proposed rule, he concluded, is a major improvement over current practice and is consistent with what good lawyers on all sides are doing right now. And it does not favor one side or the other.

Professor Coquillette agreed and reported that he has often served as an expert witness in attorney-misconduct cases. Under the Massachusetts state rule, which is similar to the advisory committee's proposal, state trial judges do not allow inquiry into who wrote an expert's report. The cases go to trial, and the experts are cross-examined at the trial, but there are no long cross-examinations or interrogations. The jury bases its decision in the final analysis on what the expert says on substance. The state rule, he said, does not take away anything important from the truth-finding process.

On the other hand, in professional malpractice cases in the federal court in Massachusetts, it is routine for an expert to be deposed for an entire day. In the end, though, almost all the cases are settled without trial.

A member asked what the advisory committee had meant by using different language in the last two bulleted exceptions. One would allow discovery of facts and data that an expert "considered," while the other allows inquiry into assumptions that the expert "relied upon." Professor Cooper explained that it is legitimate for the opposition to ask whether an expert considered a particular fact provided by an attorney. But a more restrictive test is appropriate regarding "assumptions" provided by the attorney.

A participant argued that proposed Rule 26(a)(2)(B) explicitly requires an expert report to be "prepared and signed by the witness." Thus, the opposition should be able to ask whether the witness actually prepared the report and whether any part of it had been written by a lawyer. Judge Kravitz responded that the advisory committee had considered removing the word "prepared" from the rule and simply require that a report be signed by the witness. The committee note states clearly that a lawyer may provide assistance in writing the report, but the report should reflect the testimony to be given by the witness. The signature of the expert witness on the report means that he or she embraces it and offers it as his or her own testimony.

At trial, the opposing party may ask whether the expert agrees with the substance and language of the report, but it does not matter who actually drafted it. The current rule uses the word "prepared" and anticipates that a lawyer will provide assistance in drafting the report. But discovery should not be allowed into who wrote which parts of the report or who suggested which words to use. That is what has led to all the excessive costs and artificial gamesmanship that the proposed amendments are designed to eliminate.

A member stated that the proposed amendments are a great idea that will save the enormous time and expense now wasted on discovery into draft reports and lawyer-expert communications. He said that the litigation process should not be cluttered up with the extraneous and expensive issues of who "prepared" expert reports and opinions.

A member noted that under FED. R. EVID. 705 (disclosure of facts or data underlying expert opinion) and other provisions, experts routinely rely on other people, such as lab technicians. Much expert testimony is really the assimilation of much background information, rather than the work of one person. Perhaps a better word could be used than "prepared," but it should be understood that an expert's report will often involve collaboration. An expert could not function properly without speaking with others. If the expert signs the report, and by so doing stands by its substance, it really does not matter who supplied the actual words.

Another member observed that the rule deals with discovery, not trial. But the net effect of it will be to keep some evidence away from a jury, on the theory that it involves work product worthy of protection. Generally, expert witnesses have no direct knowledge of the facts of a case. They bring their own specialized knowledge to the

case, based on their professional expertise, not the lawyer's. A report is required in order for the expert to testify. It is different from a lawyer's communications with an expert. The opposition should be able to inquire into the circumstances of the production of a report that the court requires to be filed.

A member pointed out that most cases settle, and the proposed amendments will clearly reduce the costs of litigation by not allowing discovery of draft reports or inquiry into whether lawyers contributed to preparation. She noted that the three bulleted exceptions in Rule 26(b)(4)(A) draw a distinction between facts or data "considered" and assumptions "relied upon" that will likely lead to litigation over whether something was considered versus relied upon. She suggested that the distinction be eliminated and that in all cases the reference should be to matters "considered, reviewed, or relied upon."

A participant also questioned the validity of the distinction between "facts and data" and "assumptions," suggesting that the third bulleted exception be eliminated and the rule refer only to "facts and data."

The lawyer members of the committee were asked about the contents of the stipulations they use in opting out of the current rule. One responded that the stipulations he negotiates specify that neither party may ask for the drafts of experts, and no discovery will be allowed of lawyer-expert communications leading up to the expert's report. He added that his stipulations, though, allow the other party to ask whether the expert actually drafted the entire report.

Another member, however, said that his stipulations prohibit any inquiry into authorship. He emphasized that if questions of that nature were allowed, it would make more sense just to let the draft reports themselves be discovered because they will establish more reliably whether the expert wrote the whole report. The opposing party, he said, should only be allowed to ask whether the expert's opinion is his or her own, how the expert reached that opinion, and what supports the opinion. All the questions concerning the role of counsel in preparing the report, although not technically irrelevant, are largely pointless. There is no end to the inquiries, and they lead to endless, needless expense. Therefore, in the absence of a stipulation, lawyers and experts are forced to engage in artificialities, put nothing in writing, and avoid communications. As a result, it takes the expert much longer to draft a report, adding another large expense.

Judge Kravitz reiterated that it was important to keep in mind that the central purpose of the report is to provide the other side with notice of what the expert is going to testify about at the trial. It is not to find out who wrote each word.

A member emphasized that the real debate is over how much can be asked of the witness in cross-examination. There is a trade-off between what the other side may find out during cross-examination and the sheer cost of the exercise. Judge Rosenthal added

that the minimal benefits of the information that would be lost under the proposed amendments are simply not worth the expense of the current system.

A member stated that, under the current rule, if he cannot reach a stipulation with the other side to bar discovery of drafts and lawyer-expert communications, he will fight to obtain all the drafts. Unless an attorney knows what the other party can or cannot do, as set forth in a rule or stipulation, he or she will want all reports and communications. It would be best for the committee to cut off this kind of discovery entirely. The proposed amendments, he said, reflect the best of current practice. Without them, though, he will continue to negotiate stipulations.

A member stated that in testing an expert, the opposing party will probe for any inconsistencies between the expert's testimony and what is set forth in the report. The expert may explain an inconsistency by admitting that the particular point in the report had been written by the lawyer. The opposing party should not have to wait to learn about the inconsistency for the first time when the expert is on the witness stand. Inquiry into the inconsistency should be allowed during the discovery process.

In addition, a witness may be impeached by inquiry into the methodology used. It is important to know whether an attorney channeled the methodology for the expert. In other parts of the law, for example, it is common to have statements prepared by lawyers and signed by others, such as affidavits. Law-enforcement agents, for example, do not always write their affidavits in support of search warrants. Moreover, cross-examination is allowed in criminal cases. Issues of inconsistency may arise between a criminal defendant's testimony and a suppression report written by the lawyer. There should not be a different rule for civil and criminal cases.

A member asked why, in proposed Rule 26(b)(4)(A)(iii), the protections and restrictions apply only to a witness who is "required to provide a report." A treating physician, for example, who is not required to file a report under rule 26(a)(2)(B), should be entitled to the same work-product protection. Professor Cooper explained that if the treating physician is not retained by counsel, the work-product protection is really not needed. The relationship with the lawyer for a retained expert is not the same. Therefore, the protection applies only to retained witnesses.

Judge Kravitz suggested the example of an expert witness who is a state trooper, not retained by counsel. There is no need for the lawyer's communications with the trooper to receive work-product protection because there is no special relationship between the two. Troopers and family physicians testify essentially as fact witnesses, although they give some expert advice. The professional witness, on the other hand, is part of the litigation team.

A motion was made to approve the proposed amendments to Rule 26 for publication and to solicit specific public comment on the issues identified during the committee's discussions. Judge Kravitz added that the proposed amendments were still subject to style and format improvements.

The committee, with one member opposed, by voice vote approved the proposed amendments to Rule 26 for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2008 (Agenda Item 9).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59 and HABEAS CORPUS RULE 8

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Criminal Procedure and the Rules Governing §2254 Cases and § 2255 Proceedings.

FED. R. CRIM. P. 7, 32, and 32.2

CRIMINAL FORFEITURE

Judge Tallman reported that the proposed amendments to FED. R. CRIM. P. 7 (indictment and information), FED. R. CRIM. P. 32 (sentencing), and FED. R. CRIM. P. 32.2 (forfeiture), dealing with criminal forfeiture, had been initiated at the request of the Department of Justice. They were drafted by an ad hoc subcommittee that had enjoyed significant input from lawyers who specialize in forfeiture matters, both from the Department and the National Association of Criminal Defense Lawyers. The amendments essentially incorporate current practice as it has developed since the forfeiture rules were revised in 2000.

Judge Tallman explained that in some districts the government currently includes criminal forfeiture as a separate count in the indictment and specifies the property to be

forfeited. The proposed rule would specify that the government's notice of forfeiture should not be designated as a count of the indictment. The indictment would only have to provide general notice that forfeiture is being sought, without identifying the specific property to be forfeited. Forfeiture, instead, would be handled through the separate ancillary proceeding set forth in FED. R. CRIM. P. 32.2.

Professor Beale pointed out that the proposal was not controversial and represents a consensus between the Department of Justice and private forfeiture experts. She walked the committee through the details of the amendments and pointed out that they elaborate on existing practice and eliminate some uncertainties regarding the 2000 forfeiture amendments.

A member pointed to language in the committee note cautioning against general orders of forfeiture (where the property to be forfeited cannot be readily identified), except in "unusual circumstances," and asked what those circumstances might be. Judge Tallman suggested that a general order might be appropriate when the government demonstrates that funds derived from narcotics have been used to buy other property. The defendant, in essence, tries to hide assets and the government seeks to forfeit an equivalent amount of property.

Professor Beale pointed out that other examples are found in the cases cited in the note. She noted that the 2000 amendments allowed a forfeiture order to be amended after property has been recovered. Thus, some flexibility in forfeiting property is already accepted in the rules and in case law, although the outer boundary of forfeiture law is still somewhat ambiguous.

Judge Tallman added that the concept of forfeiture is driven by the "relation-back" doctrine, under which the sovereign acquires title to the property obtained by wrongdoing at the time of the wrong. The rule follows the money and perfects the sovereign's interest in an equivalent value of property. A participant recommended using the term "tracing" in the rule, and Judge Tallman suggested that the committee note might add the words "to identify and trace those assets."

A member pointed to an inconsistency in the proposed rule that needed to be corrected. Under proposed Rule 32.2(b)(6)(A) publication by the government is mandatory. But Rule 32.2(b)(6)(C) specifies that publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Professor Beale suggested changing the heading of Rule 32.2(b)(6)(C) to make it clear that there are exceptions to (A)'s mandatory publication requirement. She noted that the style consultant had advised against adding a cross-reference to subparagraph (C) in

Rule 32.2(b)(6)(A). A member suggested turning the proposed last sentence of (C) into a separate subparagraph (D), but Professor Kimble suggested that it would be better to pull the proposed last sentence of (C) back into (A). Professor Beale recommended that the committee approve the rule subject to further drafting improvements.

A participant noted that proposed Rule 32.2(b)(4)(C) specifies that "a party may file an appeal regarding that property under FED. R. APP. P. 4(b)" and asked whether it applies to an appeal by a third party. Professor Beale responded that the advisory committee had intended the language to refer only to the defendant or the government, not to third parties. It was suggested, therefore, that the rule might be amended to read: "the defendant or the government may file an appeal." A member noted that third parties are not atypical in forfeiture proceedings, and they need to be considered. The defendant takes an appeal from the judgment of conviction, but that obviously does not apply to a third party. So some guidance would be appropriate. Professor Struve added that third parties are not specifically mentioned in FED. R. APP. P. 4.

A member noted that the provision deals only with an appeal of the sentence and judgment. Forfeiture, on the other hand, is an ancillary proceeding governed by Supplemental Rule G. Therefore, no separate provision is needed in the criminal rules. A member added that proposed Rule 32.2(b)(4)(A) states that an order "remains preliminary as to third parties until the ancillary proceeding is concluded."

A member emphasized the need to have the rule make clear when third parties are included and when they are not. He moved to replace the term "a party" with "the defendant or the government" throughout Rule 32.2(b)(6)(A) and (B). Another member suggested that consideration be given to making a global change, such as by adding a new definition in FED. R. CRIM. P. 1 that would define the term "party" for the entire Federal Rules of Criminal Procedure. Judge Rosenthal agreed that the suggestion may have merit, but it would take considerable time to accomplish. She suggested, therefore, that the committee ask Judge Tallman, Professor Beale, the style subcommittee, and the forfeiture experts to refine the language of the amendments in light of the committee's discussion. Judge Tallman added that the advisory committee would favor changing the terminology in Rule 32(b)(6)(2)(C) from "a party" to "the defendant or the government."

Judge Rosenthal recommended that the committee approve the proposed forfeiture rules, subject to the advisory committee, working with others, further refining the exact language of the amendments.

The committee without objection by voice vote approved the proposed forfeiture amendments for approval by the Judicial Conference, subject to revisions by the advisory committee along the lines discussed at the meeting.

FED. R. CRIM. P. 41

Judge Tallman stated that the amendments to FED. R. CRIM. P. 41 (search and seizure) had been drafted to address challenges that courts are facing due to advances in technology. They would establish a two-step procedure for seizing electronically stored information. He noted that a huge volume of data is stored on computers and other electronic devices that law-enforcement agents often must search extensively after probable cause has been established.

Judge Tallman reported that the advisory committee had seen a demonstration of the latest technology at its April 2007 meeting. He noted, for example, that technology now on the market can prevent anyone from making a duplicate image of electronically stored information. Thus, agents in some cases must seize entire computers because they cannot duplicate the contents for off-site review. The Department of Justice, he said, reports that this process requires substantial additional time to execute warrants properly.

To address problems of this sort, the proposed rule sets out a two-step process. First, the data-storage device may be seized. Second, the device may be searched and the contents reviewed. The court may designate a magistrate judge or special master to oversee the search. Maximum discretion is given to judges to provide appropriate relief to aggrieved parties.

Professor Beale stated that the law on particularity under the Fourth Amendment is inconsistent and still evolving. The proposed rule, she said, is not intended to govern the developing case law on the specificity required for a warrant, but merely sets up a procedure. The warrant would authorize both seizure of the device and later review of the contents. The owner of the device may come into the court and seek return of the device or other appropriate relief.

A member stated that the rule makes a great deal of sense, but asked whether the advisory committee had considered how likely it is that a Fourth Amendment challenge will be brought to the proposed procedure. Professor Beale responded that the challenge would not be to the rule per se, but to particular orders or warrants issued under it. In other words, there will be the usual challenges to the breadth of the warrants, but the rule will not be invalidated.

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

HABEAS CORPUS RULES 11 and 12

Judge Tallman explained that the Rules Governing §§ 2254 Cases and 2255 Proceedings conform to the Anti-Terrorism and Effective Death Penalty Act. The statute aims to narrow the focus of issues that might justify issuance of a writ of habeas corpus. When the district court denies a petition for a writ of habeas corpus, it enters a judgment. Under the statute, a certificate of appealability must then be entered before an appeal may be taken by the petitioner, but it is unclear how and by whom it is issued. The Act, in fact, allows it to be issued by a district judge, the court of appeals, or a circuit justice.

Judge Tallman explained that the great majority of petitioners are pro se inmates, and the rules create a potential trap for them. District judges normally will first enter a judgment denying a habeas corpus petition and then later issue a certificate of appealability. But in waiting for the certificate to issue (and often seeking reconsideration of the denial of the certificate), inmates may fail to file a timely appeal. They are generally unaware that motions for a certificate of appealability do not toll the time for filing an appeal.

Judge Tallman said that the advisory committee had attempted to draft new Rule 11 in a way that spells out as clearly as possible, both in § 2254 cases and § 2255 proceedings what inmates have to do. The judges on the committee, he said, believe that district judges should normally issue or deny the certificate at the end of the case, when the facts and issues are still fresh in the judge's mind.

Professor Beale reported that the public comments had expressed some differences of opinion on this issue. Some had suggested that it would be better to bifurcate the two court decisions and allow a district judge to decide on the certificate later than ordering entry of the judgment. But, she said, the advisory committee had concluded that it is important for the court to make the two decisions together, both to promote trial court efficiency and to avoid misleading prison inmates. The committee, however, did revise the proposal after publication to give a trial judge the option of ordering briefing on the issues before deciding on the certificate of appealability. The court may also delay its ruling, if necessary, and include the two actions in a joint ruling. Judge Tallman added that the advisory committee had tried to make it clear in the last sentence of proposed Rule 11(a) that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to appeal.

A member agreed that the revisions to Rule 11 will provide better information to pro se litigants, but questioned the companion amendment to FED. R. APP. P. 22(b). The appellate rule, he suggested, assumes that the district court's decision on issuing the certificate of appealability will be made after the notice of appeal has been filed and sent to the court of appeals. But under the proposed revisions to Rule 11, the certificate of appealability will usually be issued before a notice of appeal is filed.

Judge Tallman responded that it was not necessarily true that the certificate will issue before the notice of appeal is filed. Under the governing statute, an appeal cannot be filed without a certificate of appealability. Thus, if the court of appeals receives a notice of appeal without a certificate of appealability, it must consider asking the district court to decide on issuing a certificate or granting one itself. Several participants suggested possible improvements in the language of the proposed amendment. One noted that if a habeas petitioner files a notice of appeal without a certificate of appealability, his circuit deems the notice of appeal to be a motion for a certificate of appealability.

A member pointed out that proposed Rule 11 specifies that the district court "must" issue or deny a certificate of appealability when it enters a final order. She suggested that the verb be changed to "should" in order to give district judges discretion in appropriate circumstances. Judge Tallman reported that the advisory committee had deliberately chosen the word "must," believing that a district judge could delay issuing the joint order and certificate to allow time for briefing, if necessary. He said that the advisory committee would be amenable to changing the language if the standing committee preferred to give trial judges greater discretion.

Current Rule 11 of the Rules Governing § 2254 Cases would be renumbered as Rule 12.

A motion was made to approve proposed Rule 11, retaining the verb "must."

The committee, with one objection, by voice vote approved the proposed amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings for approval by the Judicial Conference.

A motion was made to approve the proposed amendment to FED. R. APP. P. 22(b)(1), with a change in language to read, "If the district court issues a certificate, the district clerk must send the certificate . . . ."

The committee without objection by voice vote approved the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 6 (grand jury) had been brought to the advisory committee's attention by magistrate judges, who noted that in some districts no judge is present in the city where the grand jury sits. Therefore, a magistrate judge may have to travel hundreds of miles just to receive the return of an indictment. The proposed amendment would authorize a magistrate judge to take the return by video teleconference.

A participant questioned the language of the amendment that specifies that a judge may take the return "by video teleconference in the court where the grand jury sits." He suggested that the proper phrasing might be "from the court . . . ." Alternatively, the sentence might end after the word "teleconference." Professor Beale responded that the advisory committee wanted to have the return by the grand jury made in a courtroom in order to maintain the solemnity of the proceedings.

A member pointed out that the committee note states that the indictment may be transmitted to the judge in advance for the judge's review. She said that it is surprising that the matter is addressed in the note, rather than the rule itself, because it is essential that the indictment be sent to the judge in advance by reliable telegraphic means.

Judge Tallman agreed that the judge should have a copy of the indictment in hand. The judge would conduct the proceedings remotely by videoconference, and a deputy clerk would be physically present in the courtroom with the grand jury to receive and file the indictment.

A member pointed out that he had served as an assistant U.S. attorney in three different districts, and the practice of receiving grand jury returns varied in each. Nevertheless, there is always at least a deputy clerk present to receive and file the indictment. Judge Tallman emphasized that the thrust of the proposed rule is merely to authorize a judge's participation by video teleconference, not to regularize grand jury practices.

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

Judge Rosenthal stated that there may be some advantage to deferring publication of the proposed amendment to Rule 6 because it may be an unnecessary burden to couple it for publication with the potentially controversial proposed amendments to Rule 15. She suggested that it might be better to publish the amendments to Rule 15 in August 2008, review the public reaction to them, and then publish the amendment to Rule 6 at a later date. She emphasized that no decision had been made on the matter, but asked the committee's approval to delay publication if she deems it appropriate.

The committee without objection by voice vote agreed that the chair of the committee may decide on the timing of publication of the proposed amendment.

FED. R. CRIM. P. 15

Judge Tallman stated that the proposed amendments to FED. R. CRIM. P. 15 (depositions) would authorize, in very limited circumstances, the taking of depositions outside the United States and outside the presence of the criminal defendant, when the presence of a witness for trial cannot be obtained. The procedure, for example, would be permissible when the presence of the witness in the United States cannot be secured because the witness is beyond the district court's subpoena power and the foreign nation in which the witness is located will not permit the Marshals Service to bring the defendant to the deposition.

Judge Tallman noted a recent decision of the Fourth Circuit upholding the taking of depositions in Saudi Arabia in an al-Qaeda case. The Saudi Arabian government would not permit the witnesses to come to the United States. So the district court authorized a video conference where the defendant was in Virginia and the witnesses in Saudi Arabia. The witnesses could see the defendant, and the defendant could see the witnesses. The procedures contained in the proposed amendments, he said, mirror what the Fourth Circuit approved in that case.

Judge Tallman pointed out that the advisory committee was particularly sensitive in this area because the Supreme Court had reviewed earlier proposed amendments in 2002 and had declined to transmit a proposed amendment to FED. R. CRIM. P. 26 to Congress. At that time, Justice Scalia questioned the constitutionality of this kind of procedure, but said it might be permissible if there were case-specific findings that it is necessary to further an important public policy. Judge Tallman explained that the advisory committee had tried to meet Justice Scalia's concerns. Thus, proposed Rule 15(c)(3) lists in detail all the factors that the court must find in order for a deposition to be taken without the defendant's physical presence.

Professor Beale added that the proposed rule would require a court to determine, on a case-by-case basis, what technology is available and whether the technology permits reasonable participation by the defendant. The rule, she said, clearly establishes a preference for the witness to be brought to the United States and covers only those situations where the witness cannot come.

A member stated that certain nations would regard this procedure as a serious abuse of extraterritorial judicial authority by the United States and a violation of their sovereignty. Therefore, it might be helpful to state in the committee note that the

committee takes no position on whether the procedure might be legal in particular foreign nations.

A participant pointed out that the proposal was, in effect, a rule of evidence and suggested tying it to the language of FED. R. EVID. 807(b) (residual exception to the hearsay rule) and its comparative requirement. Under the proposed amendments to FED. R. CRIM. P. 15, for example, the government might have many similar witnesses available in the United States, but their presence is not a listed factor that the court must consider. FED. R. EVID. 807(b), he said, would provide a better, tougher standard. He also questioned the reference in proposed Rule 15(c)(3)(A) to "substantial proof of a material fact." Professor Beale responded that the phrase had been taken from the case law.

A member suggested that the standard in the rule need not be as narrow as FED. R. EVID. 807(b) because the testimony of the witness may not be hearsay evidence. In any event, though, she expressed doubts that the evidence produced by a deposition conducted under the proposed rule would be admissible.

Professor Beale agreed that the proposed rule does not address whether the information obtained from the witness will actually be admissible in evidence. But, she said, several circuits now have allowed district judges to craft specific arrangements in individual cases. The rule, she explained, had been drafted carefully to meet the constitutional standards and provide some structure that would make it possible in appropriate circumstances to have the evidence admitted. Of course, there is little point in conducting the deposition if it produces evidence that cannot be admitted.

A member pointed out that there are many procedural issues that the proposed rule does not address, such as the location of the prosecutor and defense lawyer during the deposition and the transmission of exhibits. She noted that the rule only addresses the initial approval and justification for conducting the deposition at all. Judge Tallman agreed that the advisory committee had intended to leave the logistical arrangements to the individual courts. Mr. Tenpas added that it is wise for the rule to avoid the technology issues because the technology is changing rapidly. It is appropriate that the rule simply focuses on when a court may allow a deposition to be taken. The Department of Justice, he said, supports the committee's best efforts on the matter and hopes that the Supreme Court will accept the rule.

A member suggested adding another circumstance to the list of case-specific findings that support taking a deposition – the physical inability of a criminal defendant to travel to another country. Mr. Tenpas responded that that circumstance may fall within proposed Rule 15(c)(3)(D)(ii), "secure transportation . . . cannot be assured," or proposed Rule 15(c)(3)(D)(iii), "no reasonable conditions will assure an appearance."

A member asked whether the committee planned to ask specifically for public comments on the constitutional issues, especially since the Supreme Court had rejected a similar proposal in the past. Judge Rosenthal responded that the committee would solicit comments on the constitutionality of the proposed procedure, and it must be up front in the publication regarding the history of the earlier amendments submitted to the Supreme Court.

A member pointed out that in some cases the criminal defendant may request a deposition. In that event, the defendant's confrontation-clause rights are not implicated by the deposition. She suggested that the proposed rule would be useful in that situation.

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

FED. R. CRIM. P. 32.1

Judge Tallman stated that the proposed amendment to FED. R. CRIM. P. 32.1(a)(6) (revoking or modifying probation or supervised release) had been brought to the committee's attention by magistrate judges. The current rule, he said, provides that a person accused of a violation of the conditions of probation or supervised release bears the burden of establishing that he or she will not flee or pose a danger, but it does not specify the standard of proof that must be met.

The Bail Reform Act specifies that a "clear and convincing evidence" standard applies at a defendant's initial appearance. Case law establishes that the same standard should be used in determining whether to revoke an order of probation or supervised release. The proposed amendment would explicitly state that the "clear and convincing evidence" standard of proof would apply in revocation proceedings.

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 12, 2008 (Agenda Item 8).

Amendments for Publication

RESTYLING THE FEDERAL RULES OF EVIDENCE

FED. R. EVID. 101-415

Judge Hinkle reported that the advisory committee was restyling the Federal Rules of Evidence in the same way that the appellate, criminal, and civil rules had been restyled to make them easier to read and more consistent, but without making any substantive changes. He pointed out that the committee was requesting approval at this meeting to publish the first third of the rules, FED. R. EVID. 101-415, but not to publish them immediately. The second third of the rules would be presented for approval at the January 2009 meeting, and the final third at the June 2009 meeting. All the restyled evidence rules would then be published as a single package in August 2009.

Judge Hinkle pointed out that additional changes may be needed in the first third of the rules because the advisory committee will have to go back later in the project to revisit all the rules for consistency. He also pointed to some global issues, such as whether the restyled rules should use the term "criminal defendant" or "defendant in a criminal case." Other issues that the advisory committee had been dealing with, he noted, have been set forth in footnotes to the proposed rules. He emphasized that the proposed restyling changes had been very thoroughly vetted at the advisory committee level.

A member noted that the proposed revision of FED. R. EVID. 201(d) (judicial notice) refers to the "nature" of a noticed fact, rather than the "tenor" of the fact, as in the current rule. Professor Capra responded that the advisory committee had examined the case law and could find no discussion of what "tenor" means. As a result, it decided to use "nature," rather than "tenor," because it is easier to understand and does not represent a substantive change.

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

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that FED. R. EVID. 804(b)(3) is the hearsay exception for a statement against interest by an unavailable witness. The proposed amendment, he said, would extend the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases. He emphasized that the Department of Justice does not oppose the change.

He noted that the current rule requires corroborating circumstances if the defendant offers a statement, but not if the government does. The anomaly results from the fact that Congress, in drafting the rule, believed that the government could never use

the provision because case law under the Confrontation Clause would preclude the government from submitting evidence under the rule.

The government, however, in fact can use the rule. Therefore, the provision does not impose parallel requirements on the government and the defendant. Nevertheless, some courts have held that the government must show corroborating circumstances, even though the current rule does not contain that requirement.

Judge Hinkle said that there was never any real rationale for the different treatment in the rule. It was just an historical accident because the drafters had assumed that the government could never use the provision.

He stated that the advisory committee had decided not to make any change in the rule regarding civil cases. The amendment, thus, would address only criminal cases. In addition, there are some other current misunderstandings about the rule that the committee decided not to address as part of the current proposal.

Professor Capra stated that the proposed amendments to Rule 804(b)(3) had not yet gone through style review. He pointed out that all the hearsay rules would be restyled together, which will require a great deal of work. Nevertheless, the advisory committee wanted to publish the substantive amendments to Rule 804(b)(3) now, with the understanding that the rule will be restyled in due course as part of the restyling process.

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

Informational Item

Judge Hinkle reported that the most important matter currently affecting the evidence rules is the pending effort to get Congress to enact new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work-product protection). The rule, he noted, had been approved unanimously by the Senate, but was still pending before the House Judiciary Committee.

Judge Hinkle noted that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). In that case, the Court held that admitting "testimonial" hearsay violates an accused's right to confrontation unless the accused has had an opportunity to cross-examine the declarant. He said that it is at least possible, in light of *Crawford* and the developing case law, that some hearsay exceptions may be subject to an

unconstitutional application in some circumstances. Case law developments to date suggest that rule amendments not be necessary.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the sealing subcommittee, reported that the subcommittee had decided to confine its inquiry to cases that have been totally sealed by a judge. The Federal Judicial Center, he noted, had been searching the courts' electronic databases to identify all cases filed in 2006 that have been sealed. It divided the civil cases into five categories: (1) False Claims Act cases; (2) cases related to grand jury proceedings; (3) cases involving juveniles; (4) cases involving seizures of property; and (5) all other cases. Criminal cases are being treated separately. In addition, the Center had contacted the clerks of the courts to obtain additional information about the cases. Its initial research to date had identified 74 sealed civil cases, 238 sealed criminal cases, and 3,631 cases sealed by magistrate judges. The Center reported that some of the sealed cases were later resolved by public opinions, including some published opinions.

Judge Hartz reported that the subcommittee planned to hold an additional meeting before the next meeting of the standing committee.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that the committee, with the invaluable assistance of Professor Capra, was continuing its work on reviewing the use of standing orders in the courts. She said that a survey had just been distributed to chief district judges and chief bankruptcy judges, and a good deal of helpful information had been received. Professor Capra, she added, was working on proposed guidelines to assist courts in determining which subjects should be set forth in local rules of court and which may appropriately be relegated to standing orders. In addition, the courts will be urged to post all standing orders on their court web-sites.

NEXT MEETING

The committee agreed to hold the next meeting in early to mid-January 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, January 12-13, in San Antonio, Texas.

Judge Kravitz reported that the civil rules committee was planning to hold three hearings on the proposed amendments to FED. R. CIV. P. 26 and 56 – one on the east coast, one on the west coast, and one in the middle of the country. Judge Rosenthal recommended scheduling the hearings to coincide with upcoming committee meetings. Thus, one hearing will be held on November 17, 2008, in conjunction with the fall meeting of the civil rules committee in Washington, and another will be held in San Antonio on January 14, 2009, the day after the next meeting of the standing committee. The third will be held on February 2, 2009, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB II-A

April 23, 2008

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61.

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

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2008, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

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

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope; Definitions

* * * * *

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

* * * * *

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

* * * * *

Rule 12.1. Notice of an Alibi Defense

* * * * *

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

(A) *In General.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the

government must disclose in writing to the defendant or the defendant's attorney:

(i) the name of each witness — and the address and telephone number of each witness other than a victim — that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

(ii) each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number*. If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant

establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness — and the address and telephone number of each additional witness other than a victim — if:

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

(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim Witness.*** The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1 (b)(1)(B).

* * * * *

Rule 17. Subpoena

* * * * *

(c) Producing Documents and Objects.

* * * * *

(3) ***Subpoena for Personal or Confidential Information About a Victim.*** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

* * * * *

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Rule 32. Sentencing and Judgment

(a) [Reserved.]

* * * * *

(c) Presentence Investigation.

(1) *Required Investigation.*

* * * * *

(B) *Restitution.* If the law permits restitution, the probation officer must conduct an

investigation and submit a report that contains sufficient information for the court to order restitution.

* * * * *

(d) Presentence Report.

* * * * *

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

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

* * * * *

(i) Sentencing.

* * * * *

(4) ***Opportunity to Speak.***

(A) *By a Party*. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim*. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

* * * * *

Rule 41. Search and Seizure

* * * * *

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of

Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises — no matter who owns them — of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

* * * * *

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 60. Victim's Rights

(a) In General.

(1) ***Notice of a Proceeding.*** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) ***Right to Be Heard on Release, a Plea, or Sentencing.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning

release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) ***Time for Deciding a Motion.*** The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) ***Who May Assert the Rights***. A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these

rights without unduly complicating or prolonging the proceedings.

(4) ***Where Rights May Be Asserted.*** A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

(5) ***Limitations on Relief.*** A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) ***No New Trial.*** A failure to afford a victim any right described in these rules is not grounds for a new trial.

Rule 61. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

TAB II-B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 7. The Indictment and the Information[2]

* * * * *

(c) Nature and Contents.

* * * * *

~~**(2) Criminal Forfeiture**. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.~~

~~**(3)**~~**(2) Citation Error.** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to

[1]New material is underlined; matter to be omitted is lined through.

[2]Additional proposed amendments to Rule 7(f) are on page 15.

dismiss the indictment or information or to reverse a conviction.

* * * * *

Committee Note

Subdivision (c). The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 7.

Rule 32. Sentencing and Judgment[3]

*** * * * ***

(d) Presentence Report.

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[3]Incorporates amendments approved by the Supreme Court that are scheduled to take effect on December 1, 2008, unless Congress acts otherwise.

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

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; ~~and~~

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

(G) specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law.

* * * * *

Committee Note

Subdivision (d)(2)(G). Rule 32.2 (a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 32.

* * * * *

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) ~~***In General.***~~ ***Forfeiture Phase of the Trial.***

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence

already in the record, including any written plea agreement, ~~or~~ and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If ~~if~~ the forfeiture is contested, on either party's request the court must conduct a hearing ~~on evidence or information presented by the parties at a hearing~~ after the verdict or finding of guilt.

(2) ***Preliminary Order.***

(A) *Contents of a Specific Order.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, ~~or~~ directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the

government has met the statutory criteria ~~without regard to any third party's interest in all or part of it~~. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) *Timing.* Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) *General Order.* If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total

amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence

proceedings that comply with any statutes governing third-party rights. ~~At sentencing — or at any time before sentencing if the defendant consents — the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) ***Sentence and Judgment.***

(A) *When Final.* At sentencing — or at any time before sentencing if the defendant consents — the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until

the ancillary proceeding is concluded under Rule 32.2 (c).

(B) *Notice and Inclusion in the Judgment.* The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal.* The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to

include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(~~4~~ 5) ***Jury Determination***.

(A) *Retaining the Jury.* ~~Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the

forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) ***Notice of the Forfeiture Order.***

(A) *Publishing and Sending Notice*. If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant

with standing to contest the forfeiture in the ancillary proceeding.

(B) *Content of the Notice.* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication; Exceptions to Publication Requirement.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) *Means of Sending the Notice.* The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) ***Interlocutory Sale.*** At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

* * * * *

Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

Although forfeitures are not charged as counts, the federal judiciary's Case Management and Electronic Case Files system

should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought if necessary to enable the defendant to prepare a defense or to avoid unfair surprise. *See, e.g.*, *United States v. Moffitt, Zwerdling, & Kemler, P.C.,* 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941, 944 (N.D. Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully). *See also United States v. Columbo*, 2006 WL 2012511 * 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subparagraph (B) makes it clear that in determining what

evidence or information should be accepted, the court should consider relevance and reliability. Finally, subparagraph (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. *Cf.* Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary forfeiture order once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated forfeiture order, within seven days after oral announcement of the sentence. During the seven-day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F. Supp. 2d 509, 512-13 (D.

S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the forfeiture order part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue a forfeiture order describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg*), 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue discovery necessary to identify and trace those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the forfeiture order becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with

new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the forfeiture order in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the forfeiture order in the judgment and commitment order, and the time to appeal.

New subparagraph (C) clarifies the time for appeals concerning forfeiture by the defendant or government from two kinds of orders: the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. This provision does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c).

Subdivision (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional

responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subdivision (b)(5)(B) explains that "the government must submit a proposed Special Verdict Form listing each property subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment to Rule 32.2 was modified to use the term "property" throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. The term "forfeiture order" was substituted, where possible, for the wordier "order of forfeiture." Other small stylistic changes (such as the insertion of "the" in subpart titles) were also made to conform to the style conventions.

In new subpart (b)(4)(C), dealing with the time for appeals, the words "the defendant or the government" were substituted for the phrase "a party." This portion of the rule addresses only appeals from the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. Only the defendant and the government are parties at this stage of the proceedings. This portion of the rule does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c). This point was also clarified in the Committee note.

Additionally, two other changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

Rule 41. Search and Seizure[4]

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) *Contents of the Warrant*.

* * * * *

[4]Additional proposed amendments to Rule 41(e) are on page 23.

(B) *Warrant Seeking Electronically Stored Information*. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(~~B~~C) *Warrant for a Tracking Device*. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be

returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

* * * * *

(f) Executing and Returning the Warrant.

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

* * * * *

(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or

from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

* * * * *

Committee Note

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or

copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. The same broad and flexible description is intended under Rule 41.

In addition to addressing the two-step process inherent in searches for electronically stored information, the Rule limits the 10 [14][5] day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or review of the media or electronically stored information would take place, the practical reality is that there is no basis for a "one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the court for additional time.

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[5]The 10 day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the "person aggrieved" requires access to the storage media or the electronically stored information earlier than anticipated by law enforcement or ordered by the court, the court on a case by case basis can fashion an appropriate remedy, taking into account the time needed to image and search the data and any prejudice to the aggrieved party.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the "paper world." In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e., the cabinets, on the

inventory, as opposed to making a document by document list of the contents.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The words "copying or" were added to the last line of Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol are presently working their way through the courts. *Compare United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999) (finding warrant authorizing search for "documentary evidence pertaining to the sale and distribution of controlled substances" to prohibit opening of files with a .jpg suffix) *and United States v. Fleet Management Ltd.*, 521 F. Supp. 2d 436 (E.D. Pa. 2007) (warrant invalid when it "did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity") *with United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085 (9th Cir. 2008) (the government had no reason to confine its search to key words; "computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files"); *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

Minor changes were also made to conform to style conventions.

PROPOSED AMENDMENTS TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA), identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning COAs more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Cases in the United States District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The new subdivision is designed to direct parties to the appropriate rule governing the timing of the notice of appeal and make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the

district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

Finally, a new subdivision (b) was added to mirror the information provided in subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings, directing petitioners to Rule 4 of the appellate rules and indicating that notice of appeal must be filed even if a COA is issued.

Minor changes were also made to conform to style conventions.

Rule ~~11~~ 12. Applicability of the Federal Rules of Civil Procedure

* * * * *

Committee Note

The amendment renumbers current Rule 11 to accommodate the new rule on certificates of appealability.

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the

district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a COA, identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings for the United States District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The amendment is designed to make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal. Finally, a sentence indicating that notice of appeal must be filed even if a COA is issued was added to subdivision (b).

Minor changes were also made to conform to style conventions.

* * * * *

TAB II-C

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 45. Computing and Extending Time[2]

~~**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:~~

~~**(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded,~~

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[1] New material is underlined; matter to be omitted is lined through.

[2] Incorporates amendments approved by the Supreme Court that are scheduled to take effect on December 1, 2008, unless Congress acts otherwise.

~~the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~**(4) *"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:~~

~~(A) the day set aside by statute for observing:~~

~~(i) New Year's Day;~~

~~(ii) Martin Luther King, Jr.'s Birthday;~~

~~(iii) Washington's Birthday;~~

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

~~(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.~~

(a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

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

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

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

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the

end of the next day that is not a Saturday, Sunday, or legal holiday.

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

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

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

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

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

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

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

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

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

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

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

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

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Criminal Procedure, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990)

(holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, the new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day

periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the

same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of

the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 56(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 35(a) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 14 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 7 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31,

then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods — *i.e.,* periods that are measured after an event — subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward

to the next accessible day that is not a Saturday, Sunday or legal holiday — no earlier than Tuesday, April 22.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Standing Committee changed Rule 45(a)(6) to exclude state holidays from the definition of "legal holiday" for purposes of computing backward-counted periods; conforming changes were made to the Committee Note to subdivision (a)(6).

Rule 5.1. Preliminary Hearing

* * * * *

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information[3]

* * * * *

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

* * * * *

[3]Additional proposed amendments to Rule 7(c) are on page 33.

(2) ***Defendant's Response.*** Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

* * * * *

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an

intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

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

* * * * *

(3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

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

(A) *Government's Request*. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.

(B) *Defendant's Response*. Within ~~7~~ 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name,

address, and telephone number of each witness.

(C) *Government's Reply*. Within ~~7~~ 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

* * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion***. A defendant may move for a judgment of acquittal, or renew such a motion, within ~~7~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) ***Other Grounds***. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within ~~7~~ 14 days after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within ~~7~~ 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within ~~7~~ 14 days after sentencing, the court may correct a sentence that

resulted from arithmetical, technical, or other clear error.

* * * * *

Committee Note

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Rule 41. Search and Seizure[4]

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) ***Contents of the Warrant***.

[4]Additional proposed amendments to Rule 41(e) and (f) are on pages 53-56.

(A) *Warrant to Search for and Seize a Person or Property*. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than ~~10~~ 14 days;

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 47. Motions and Supporting Affidavits

* * * * *

(c) Timing of a Motion. A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

* * * * *

Committee Note

The time set in the former rule at 5 days, which excluded intermediate Saturdays, Sundays, and legal holidays, has been expanded to 7 days. See the Committee Note to Rule 45(a).

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) Appeal.

* * * * *

(2) ***From a Magistrate Judge's Order or Judgment.***

(A) *Interlocutory Appeal*. Either party may appeal an order of a magistrate judge to a district judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence*. A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry.

To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may

serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must

promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

PROPOSED AMENDMENT TO RULES GOgoverning SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

TAB II-D

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

* * * * *

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant.

* * * * *

COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims' Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18

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

U.S.C. § 3142(g)(4), requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." In addition, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused."

Rule 12.3. Notice of a Public-Authority Defense

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

* * * * *

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

* * * * *

(C) *Government's Reply*. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~, address, and telephone number~~ of each witness—and the address and telephone number of each witness other than a victim — that the

government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number*. If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness — and the~~;~~ address, and telephone number of any additional witness other than a victim — if:

(~~1~~ A) the disclosing party learns of the witness before or during trial; and

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness

must not be disclosed except as provided in Rule 12.3(a)(4)(D).

* * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition in the United States and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition in the United States, subject to any conditions imposed by the court. If

the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all of the following:

(A) the witness's testimony could provide substantial proof of a material fact;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present for one of the following reasons:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court of significant need and public policy justification. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e.g.*, *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supercede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

It is not the intent of the Committee to create any new rights by enactment of this rule, which establishes procedures to procure testimony from foreign witnesses who may be located beyond the reach of federal subpoena power. The Committee recognizes that a request to admit testimony obtained under the new foreign deposition procedure may give rise to potential challenges. The Committee left the resolution of any such challenges to the development of case law.

Rule 21. Transfer for Trial

* * * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention*****.** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * * * *

Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g.*, *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

TAB III-A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Nancy J. King, Assistant Reporter

RE: Rules 12 and 34

DATE: September 17, 2008

In April 2006 the Department of Justice asked the Committee to consider amending Rule 12(b)(3)(B) so that motions claiming that the charge fails to state an offense would be required before trial. Rule 12 has exempted motions raising this defect from the general requirement that defects in the indictment be raised prior to trial, because the failure to state an offense was considered a "jurisdictional" defect. In 2002, however, the Court decided *United States v. Cotton*, 535 U.S. 625, and rejected this characterization. The Court held that the omission of an essential element from the defendant's indictment did not deprive the court of jurisdiction to review the conviction or sentence, and remanded the case to the court of appeals to consider the indictment error under Rule 52(b). *Id.* at 630-31.

The Department has maintained that *Cotton* removes any justification for continuing to allow this particular charging defect to be raised after trial begins. The exemption of this challenge from the timing requirements of Rule 12, it argues, reduces the incentive of defendants to raise the objection before trial, may lead to "strategic decisions by defendants to delay raising the defense," *United States v. Panarella,* 277 F.3d 678, 686-8 8 (3d Cir. 2002), wastes judicial resources, and undercuts the finality of criminal judgments.

Consideration of the proposal by the Committee was deferred when the Supreme Court agreed to consider during its October 2006 term whether the failure to state an offense could be considered harmless error. The Court never reached that question, however, see *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), and the Committee revisited the proposal at its October 2007 meeting. Committee members expressed concerns about how the proposal might change the way that trial judges respond to these claims, and Judge Tallman referred the proposal to a subcommittee. That subcommittee (Chief Judge Wolf, chair, with Mr. McNamara, Professor Leipold, and Mr. Wroblewski) has completed its deliberations and presents the proposal for Committee approval.

The subcommittee focused its deliberations upon four issues regarding the amendment to Rule 12. (The amendment to Rule 34 raised no separate concerns). The first issue was whether or not there was a need for the amendment at this time. The second issue concerned how the

proposal would affect the availability of relief on appeal for a claim that a charge failed to state an offense. The final two issues concerned how the proposal would affect relief in the trial court for this type of claim. The subcommittee's discussion of each issue is summarized below.

1) Justification for amendment.

Members of the subcommittee asked the Department for any information it could provide about the frequency of successful motions claiming that the charge failed to state an offense. The Department responded that there was no source that would answer this question, but that it believed that "a significant number of such motions" for relief on this basis are granted each year. It provided over a dozen case examples, and stated that "the omission of an element from an indictment may occur for a variety of reasons, including an intervening clarification of the law by an appellate court as well as a mistake by a prosecutor in drafting the indictment." Memo to Chief Judge Wolf from Jonathan Wroblewski, June 10, 2008. At least one court that has considered a delayed challenge on this ground has urged the Committee to amend the Rule. *See Panarella*, 277 F.3d at.686-88. The subcommittee concluded that further consideration of the proposal was warranted.

2) Appellate review of an untimely challenge that a charge fails to state an offense.

Under the existing rule, a reviewing court may consider a claim that the charge fails to state an offense, even if the claim was not raised before appeal.[1] Other defects in instituting the prosecution, as well as improper joinder of charges or defendants, the admission of illegally obtained evidence, and discovery violations are "waived" if not raised prior to trial under Rule 12(e). Rule 12(e) also provides that for "good cause," a "court may grant relief from the waiver."

The proposed amendment would presumably require appellate courts to review a delayed claim that the charge failed to state an offense using the same rules that they presently use to review other claims of error "waived" under Rule 12. The subcommittee's research, however, found that there is no consensus among appellate courts about what those rules are. Some courts have concluded that the failure to raise a claim in accordance with Rule 12(b) bars appellate review entirely absent a showing of "good cause" under Rule 12(e). *See United States v. Rose,* 538 F. 3d 175 (3d Cir. 2008) (collecting authority). Other courts have applied plain error review under Rule 52(b) to such claims, just as they do to any other claim that a defendant failed to raise on time in the trial court. *See United States v. Stevens*, 487 F.2d 232, 242 (5th Cir. 2007). Some

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[1] As part of the restyling in 2002, Rule 12(b) was amended. The former language in Rule 12(b)(2) provided that an objection that the charge fails to charge an offense "shall be noticed by the court at any time during the pendency of the proceedings." This provision was renumbered as (b)(3)(B) and amended to read "the court may hear a claim" that the charge fails "to state an offense." Despite this change from "shall" to "may," the Committee Note indicates that the amendments to Rule 12 were intended to be stylistic only. Following the 2002 amendments, at least one court has relied on the Committee Note in concluding that a defendant "must be permitted, in accordance with Rule 12(b)(3)(B), to challenge for the first time on appeal the sufficiency of [the] indictment." *United States v. Hedaithy*, 392 F.3d 580, 589 (2004). *See also United States v. Sinks*, 473 F.3d 1315, 1321 (10th Cir. 2007) (concluding that even after substitution of "may" for the former "mandatory language" in Rule 12, a "defendant may challenge an indictment for its failure to charge an offense for the first time on appeal").

decisions employ both "good cause" and "plain error" analysis. Several circuits have indicated that this remains an open question. See *United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008); *United States v. Caldwell*, 518 F.3d 426, 430 (6th Cir. 2008); *United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006). The subcommittee concluded that it was unnecessary to take a position on this question, but that some mention of it in the Committee Note may be appropriate.

3) Responding to a deficient charge raised during trial.

The remainder of the subcommittee's discussions addressed how the amendment would affect the handling of this particular objection in the district courts. Under the existing rule, even if a defendant waits until trial has begun to raise his claim that an indictment fails to state an offense, the trial judge must consider that claim and dismiss the charge if it indeed omits an essential element. (This dismissal does not bar subsequent prosecution for the same offense. *See United States v. Scott*, 437 U.S. 82, 98-99 (1978) (holding that a defendant who "deliberately choos[es] to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant."); *Lee v. United States,* 432 U.S. 23, 30-34 (1977) (retrial after dismissal of a defective information at defendant's request not a violation of the Double Jeopardy Clause)). The judge has no option other than dismissal because the defendant's Fifth Amendment right to grand jury review prevents the judge from either (1) allowing an amendment to the indictment to include the missing element, or (2) instructing the jury on an element not in the indictment (constructive amendment). The subcommittee was concerned about what effect, if any, the proposed amendment to Rule 12 would have on these options for trial judges.

The Department's position is that under the proposed amendment, when a defendant "waives" the claim that a charge fails to state an offense by delaying that objection until the trial has started, a trial judge could proceed with the trial and instruct the jury on every element of the offense. The defendant's failure to object to the missing element waives his right to claim that providing complete jury instructions is a constructive amendment of the indictment, the Department contends. Both the failure to include an element initially and the mid-trial addition of that element implicate the very same constitutional guarantee - review of every element by the grand jury.

Other members of the subcommittee expressed concern that even under the amended Rule, courts may interpret the Fifth Amendment to continue to bar a trial judge from constructively amending an incomplete indictment, and may instead require mid-trial dismissal. The argument here is that a waiver of the right to object to the defect itself may not necessarily waive the right to object to the trial court's choice of cure for that defect. If courts should adopt this approach, then the amended Rule would have no effect on the need for trial judges to dismiss incomplete indictments even when the objection is raised after trial begins.

The subcommittee decided to recommend that the Committee Note mention, but not resolve this uncertainty about the prospective operation of the amended rule in the trial courts. Although there is some uncertainty about the consequences of the proposed amendments for mid-trial objections, the subcommittee concluded that further consideration of the proposal was warranted by the potentially beneficial effects of the amendments in encouraging timely objections.

4) When "good cause" warrants relief from waiver prior to verdict.

The Subcommittee also considered how the "good cause" language in Rule 12(e) would apply to a delayed motion challenging the indictment for failure to state an offense. Of specific concern to some members of the subcommittee was the possibility that a defendant may be prejudiced by a trial judge's decision to proceed with an incomplete indictment after trial had commenced. For example, if defendant lacked notice of the charge he was facing before the elements of that charge were clarified mid-trial, would this constitute "good cause"?

The Department maintains that the proposal should not prevent defendants from raising a late-filed claim if there are serious concerns about due process, adequate notice of the offense charged, or the ability of the defendant to prepare a defense. It has advanced *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003), as an illustration. In that case a Rule 12 objection was raised in the district court following a jury verdict but before sentencing. The motion was made when the defendant learned he was being sentenced as though convicted of a felony assault on a federal employee. The indictment contained no language to suggest that a felony was charged. As a result, the motion was granted to the extent that it prevented the defendant from being sentenced as a felon. 318 F.3d at 1009-10.

The subcommittee drafted language attempting to capture this concern about prejudice to the defendant and added it to the Note in two places - in the bracketed sentence following the first mention of "good cause," and in the bracketed material discussing the effect of the amendment on the options of trial judges in responding to delayed motions. The subcommittee placed this language in brackets anticipating further discussion of this point by the Committee. Subsequent research determined that when considering whether to grant *appellate or collateral* relief for a claim that should have been raised prior to trial under Rule 12, courts have interpreted the "good cause" requirement to mandate both showing of prejudice from the error as well as cause for the failure to challenge it on time. *See Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963); *United States v. Crowley*, 236 F.3d 104 (2d Cir. 2004). There is very little authority addressing the meaning of "good cause" when a court is considering *prior to verdict* whether to overlook Rule 12 waiver of an untimely claim.[2] As with the prior open questions

[2]The Second and Sixth Circuits have both stated that under Rule 12, relief for a claim raised only after trial begins requires a showing of prejudice as well as cause for the failure to raise the claim prior to trial, but in each case the court ruled there was no cause shown. See *United States v. Howard*, 998 F.2d 42, 52 (2d Cir.1993) (holding that district court did not err in rejecting late raised suppression argument); *United States v. Fantroy*, 146 Fed. Appx. 808 (6th Cir. 2005) (unpublished) (affirming district court's rejection under Rule 12 of challenge to the venire). In some cases, trial courts have overlooked the Rule 12 waiver of a claim raised after trial began but prior to verdict, but these cases did not indicate whether or not a defendant must first show prejudice as well as a reason for failing to raise the claim prior to trial, and all rejected the underlying claim after reaching the merits. See *United States v.*

raised by the proposed amendments, the Committee may decide that it would be best to recommend that the Note not take a position on this issue, and instead leave it to future case development.

Chavez, 902 F.2d 259 (4th Cir. 1990) (holding that the trial court's denial of defendant's request to file for suppression hearing out of time was clear error where the request was made almost two weeks prior to trial and day after defense counsel received grand-jury transcript and the government had not turned over evidence directly relevant to the suppression issue until one day before the filing; rejecting fourth amendment claim on its merits and affirming conviction); *United States v. Cathey*, 591 F.2d 268 (11th Cir. 1979) (finding cause had been established for failure to file pretrial motion to dismiss due to knowing use of perjured testimony in grand jury when defendant did not receive a transcript of grand jury testimony until after the trial began, but "made his motion at the earliest possible time"; rejecting perjury claim on its merits, and reversing conviction on a different ground); *United States v. Campbell*, 999 F.2d 544 (9th Cir. 1993) (table case, unpublished) (approving of district court's decision to address (and deny) insufficient indictment claim on its merits although it had been waived under Rule 12 and raised only at the end of the government's case, finding that counsel's statement to the district judge at trial that he did not recognize a possible indictment insufficiency argument until researching jury instructions established "cause"); *United States v. Davis,* 598 F.Supp. 453 (S.D.N.Y. 1984) (holding sufficient cause to excuse late filing of motion to dismiss indictment was established when defense counsel had recently recovered from serious illness and had not become aware of death of one of two allegedly exculpatory witnesses until after deadline for filing motions; denying motion on merits).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURES

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(3) Motions That Must Be Made Before Trial.

The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including failure to state an offense--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction ~~or to state an offense~~;

* * * * *

Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and for this reason was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). For good cause the court may grant relief from the waiver. [Good cause may include injury to the substantial rights of the defendant.]

The amendment does not address the present division in the courts of appeals over whether untimely challenges "waived" under Rule 12(e) are considered forfeited and thus subject to plain-error review on appeal, or rather are considered waived so that appellate review is unavailable. [*Compare, e.g.*, *United States v Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) (conducting plain error review of an issue waived under Rule 12(e)), *with United States v. Ramirez*, 324 F.3d 1225 (11th Cir. 2003) (unlike the forfeiture of an objection or

defense, a waiver under Rule 12(e) precludes plain error review). *See also United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006) (declining to join debate).]

The amendment also leaves to case law development whether, under the amended rule, any option other than dismissal may be open to a trial judge should a defendant wait until after trial has started to object that an indictment fails to state an offense. [Under the former rule, which permitted a defendant to raise the failure to state an offense at any time, dismissal of a deficient charge was required, even if the error was not raised until after trial began. Instructing the trial jury on an essential element missing from an indictment has been considered an impermissible constructive amendment of the indictment by the court, depriving the defendant of his right under the Fifth Amendment to grand jury review of every element. *See Stirone v. United States*, 361 U.S. 212, 216-219 (1060) (stating, "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment."); *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (explaining that "a defect of a completely missing essential element cannot be cured by a later jury instruction because there is nothing for a petit jury to ratify . . . "); *United States v. Opsta*, 659 F.2d 848, 850 (7th Cir. 1981) (holding that a defective indictment cannot be cured by proper jury instructions). Under the amended rule, dismissal of an incomplete charge remains an appropriate mid-trial remedy if there is good cause for the failure to raise the error before trial, see Rule 12(e), or if a substantial right of the defendant would be prejudiced by proceeding upon the deficient charge. *E.g., United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (granting relief when indictment failed to include essential element of felony charge and failed to put defendant on notice he was facing felony; challenge raised after verdict but prior to sentencing).]

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if~~: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b), which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 now requires that such a defect be raised before trial.

TAB III-B

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32(h), Procedural Rules for Sentencing

DATE: September 24, 2008

The Advisory Committee's original package of Booker amendments included a proposed amendment to Rule 32(h) extending the notice requirement to variances as well as departures. After publication for notice and public comment, the rule was retained for further study. Consideration was further deferred pending the Supreme Court's decision in Irizarry v. United States, 128 S.Ct. 2198 (2008).

Judge Tallman assigned a subcommittee, chaired by Judge Molloy, to review the Supreme Court's decision in Irizarry and consider the merits of amending Rule 32(h). The subcommittee's assignment was subsequently expanded to include a full reassessment of Rule 32, including consideration of amendments to Rule 32 proposed by the American Bar Association. The other members serving on the subcommittee are Judge Wolf, Justice Edmunds, Mr. McNamara, Ms. Brill, and representatives of the Department of Justice. In addition, Judge Tallman solicited the participation of representatives of the Sentencing Commission.

The attached materials are Judge Molloy's subcommittee report, the opinion in Irizarry, and the ABA's proposal.

This item is on the agenda for discussion at the October meeting in Phoenix.

Rule 32(h) Subcommittee Report

From: **Hon. Donald W. Molloy**

Re: **Fed. R. Crim. P. 32(h) and Irizarry v. United States, decided June 12, 2008, and United States v. Evans-Martinez (Ninth Circuit), decided July 2, 2008**

Date: **September 23, 2008**

Irizarry v United States and United States v. Evans-Martinez, 530 F.3d 1164 (9th Circuit).

The United States Supreme Court decided Irizarry v. United States, 2008 WL 2369164, in which it held by a 5-4 vote that the Federal Rules of Criminal Procedure do not require separate notice to the defendant of all potential grounds for a sentence outside of the advisory Guideline range, commonly known as a "variance." The Supreme Court majority rejected the argument that Rule 32(h)'s advance notice requirement for departures within the Guidelines should extend to variances in the aftermath of United States v. Booker, 543 U.S. 220 (2005), Gall v. United States, 128 S.Ct. 586 (2007), and Rita v. United States, 127 S.Ct. 2456. It appears that the court acknowledged the conceptual distinction between downward departures from the advisory guidelines and application of 18 U.S.C. § 3553(a) factors. Justice Stevens wrote for the majority while Justice Breyer wrote for the four dissenting justices.

Federal Rule of Criminal Procedure 32(h) was added via the 2002 Amendments to the rules and provides:

> Before the court may **depart** from the **applicable sentencing range** on a ground **not identified for departure** either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a **departure**. The notice must specify any ground on which the court is contemplating a **departure**. (Emphasis added).

The principle enunciated in Rule 32(h) was established by the Supreme Court's decision in Burns v. United States, 501 U.S. 129, 138-39 (1991). Emphasizing the mandatory nature of the Guidelines, the Court in Burns concluded that the guarantee of an opportunity to comment on the appropriate sentence (now codified at Rule 32(i)(1)(C)) is rendered hollow unless the parties are aware of all potential grounds for departure. Now that Booker, Gall, and Rita, as well as many circuit opinions, deem the Guidelines advisory they are generally considered but one factor, the starting point, in determining "a sentence sufficient but not greater than necessary"[1]. The advisory

[1] 18 U.S.C. § 3553(a).

guideline calculation in the PSR is only a factor among many to be considered in sentencing under 18 U.S.C. § 3553(a). The majority in Irizarry sees no reason to require notice of all potential grounds for a sentence outside of the advisory Guideline scheme. Justice Stevens noted:

> The due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule set forth in Burns either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(C). . . . [T]here is no longer a limit comparable to the one at issue in Burns on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).

Irizarry, 2008 WL 2369164 at *4.

The majority in Irizarry concludes by noting the practical reasons for confining the reach of Rule 32(h) to Guideline departures. The Court quotes the First Circuit's observation in United States v. Vega-Santiago, 519 F.3d 1, 4 (1st Cir. 2008) (en banc), that sentencing is "a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds." Under these circumstances, the majority expresses concern that a notice requirement for variances would hinder the orderly progression of a prosecution by forcing the district court to continue a sentencing hearing in any instance in which a potential ground for variance crystalizes during the hearing. Rather than impose a categorical rule by extending Rule 32(h), the Irizarry Court defers to the discretion of the sentencing judge to determine whether an unanticipated factual basis for variance warrants a continuance. The essence of the Court's holding is expressed in the final sentence of the majority opinion: "We have confidence in the ability of district judges and counsel–especially in light of Rule 32's other procedural protections–to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." 2008 WL 2369164 at *6.

The dissent in Irizzary sees no principled distinction between a departure and a variance for purposes of Rule 32(h). Justice Breyer does not suggest that the majority's approach violates due process, choosing to focus instead on Rule 32's "overall purpose" of informing the parties of the issues bearing on the sentencing in order to facilitate thoughtful and thorough argument of the facts and law. According to the dissent, the failure to alert the parties to a potential basis for variance is at least as likely to undermine the value of the opportunity to comment on the appropriate sentence as the failure to give notice of a potential ground for departure within the Guidelines. The dissent also disagrees with the majority's view that the potential grounds for variance are limitless while the range of grounds for departure is finite and manageable. Moreover, even if the majority's view is accurate, the dissent argues that the expansion of the potential bases for a sentence outside of the Guideline range is all the more reason to require notice.

The dissent's final point is to take issue with the majority's view of the practical implications of a notice requirement for variances. In most instances, Justice Breyer reasons, the grounds for variance will be identified in the presentence report or the parties' sentencing memoranda. Justice Breyer states that only in exceptional cases would a truly unconsidered legal or factual issue surprise a party to the degree that a continuance is warranted, and that in those instances the principles of fairness outweigh the burden and delay associated with a continuance.

Inasmuch as there appears to be agreement between the majority and dissent that the issue of notice of a potential variance does not invoke considerations of constitutional due process, the only reason to consider amending Rule 32(h) in response to the Irizarry opinion is if the committee is persuaded by Justice Breyer's view of the importance of notice and the limited practical burdens associated with a special notice requirement. It is a question of whether the committee shares the majority's confidence in the ability of district courts to explore the full range of factors potentially affecting sentencing and to identify those instances in which a continuance is truly warranted, or whether instead the committee expects such instances to be so infrequent that the increased fairness resulting from mandatory notice is well worth the slight possibility of delay. Justice Breyer's dissenting opinion probably overlooks the mischief that may be made in the courts of appeals should Rule 32(h) extend to variances. It is easy to imagine a defendant parsing the transcript of his sentencing in hopes of identifying a word or phrase that can be construed as an unanticipated basis for the sentence imposed, giving rise to an appeal on procedural grounds regardless of the reasonableness of the sentence imposed.

In deciding whether an amendment is warranted, the committee may wish to keep in mind that both the majority and the dissent agree that except in rare instances the presentence report and the parties' filings will identify all viable factual bases for departure and variance, obviating the need for the district court to supply notice. In light of this practical consideration, as well as the apparent agreement that there are no constitutional issues in play, this appears to be an area in which no new rule making about Rule 32 (h) is warranted.

On the other hand, as a practical matter the "fluid nature" of sentencing would be undermined if a defendant, or counsel, is allowed to take a scalpel to the transcript after a judge has pronounced sentence. Frequently witnesses are called when a variance argument is made, and while the current rule provides the court "may permit the parties to introduce evidence on the *objections,*" Rule 32(i)(2), a broad view of this rule would ordinarily allow such testimony in support of a variance. What witnesses say is often a surprise to everyone including the lawyer calling the witness. But, occasionally they provide the evidence that justifies a variance, or denying a variance. As suggested above, if this kind of situation can be parsed by an appellate court on inadequate notice grounds, sentencing is going to become a series of continuances.

* * *

Following the Supreme Court's decision in Irizarry, the Ninth Circuit Court of Appeals decided United States v. Evans-Martinez, 530 F.3d 1164 (9th Cir. 2008) The defendant pled guilty to child pornography and witness tampering charges pursuant to a plea agreement. He had an offense level of 19 and a criminal history category of I, but faced a mandatory minimum of ten years on one count.[2] At sentencing the prosecution moved for a downward departure based on the defendant's assistance. The Court granted the motion, but stated that by doing so it merely freed itself from the obligation to impose a sentence of at least ten years, and that it retained the discretion to impose a sentence anywhere within the statutory range of zero to 20 years. The district court then sentenced the defendant to 15 years in prison and a period of supervised release. The court gave no prior notice of intent sentence above the guideline range.

The defendant argued on appeal that the sentencing court erred by failing to give notice of the ground for an upward departure as required by Rule 32(h). The Ninth Circuit panel determined that Rule 32(h) survives Booker, and relied on the Supreme Court's opinion in Burns to hold that the district court committed plain error by departing upward without proper notice. The panel deemed the outcome consistent with the Supreme Court's opinion in Irizarry because the sentence imposed in Evans-Martinez was an upward departure rather than a variance. As the Evans-Martinez court put it,

> Irizarry does not control the result in this case because the district court here did not sentence at variance from the recommended Guidelines range based on Section 3553(a) factors, but departed as the term was used when Rule 32(h) was promulgated. By its own terms, the Irizarry holding does not extend to sentencing departures under the Guidelines.

530 F3d at 1169

There is no support in the Evans-Martinez opinion for the panel's conclusion that the sentence imposed was an upward departure as opposed to a variance. The Guideline range calculated in the presentence report was ten years, due to the statutory mandatory minimum. The guideline range for the crime, absent the mandatory minimum, was 30-37 months. The panel described the district court's ruling as follows:

> The district court accepted the plea agreement, adopted the conclusions of the presentence report as amended and "granted" the Government's motion for a downward departure. The court determined, however, that the motion only

[2]Absent the mandatory minimum penalty, the corresponding Guideline range for an offense level of 19 and a criminal history category I is 30-37 months.

> "released" it from its obligation to impose a sentence at or above the mandatory minimum sentence of 10 years and that it was still able to sentence Evans-Martinez up to the statutory maximum of 20 years. The district court commented on the disturbing nature of the case and summarized the facts as they were related in the presentence report. Taking into account Evans-Martinez's cooperation, the court then sentenced him to a term of 15 years and a period of supervised release.

530 F.3d at 1166-67

The Evans-Martinez opinion contains no reference to any Guideline section authorizing an upward departure, nor does it cite any statement by the district court that the sentence imposed reflects a guideline upward departure rather than a variance. Although the panel claims to "understand the Supreme Court's distinction between a variance and a departure to be a meaningful one," 2008 WL 2599758 at *4, the opinion leaves the impression that the panel chose to characterize the sentence as a guideline upward departure, and therefore bring it within the purview of Rule 32(h), despite the absence of any reference to the record that the sentencing court meant for it to be anything but a variation. As the record is summarized in the opinion, it is an equally plausible inference that the district court meant to impose a variance. The panel's explanation for its choice to view the sentence as an upward departure is limited to its statement that the district court "departed as the term was used when Rule 32(h) was promulgated." Id. It is this kind of parsing of language, applying a plain error standard of review, that will make the sentencing task more difficult than it already is.

There are several possible interpretations of the Evans-Martinez opinion. It may be that the record shows that the district court meant to impose a guideline upward departure, and that the opinion on appeal neglects to cite or discuss that portion of the record directly. Another possibility is that the Ninth Circuit panel disagrees with the sentence imposed and took advantage of the ambiguity in the sentencing judge's record to characterize his action as an upward departure, thereby triggering the notice requirement under Rule 32(h) and creating a basis to vacate the sentence and remand. Or, if the Ninth Circuit is hostile to the Irizarry opinion, one could read Evans-Martinez as creating an exception that swallows the rule of Irizarry with respect to upward variances. The characterization of the sentence in Evans-Martinez as a "depart[ure] as the term was used when Rule 32(h) was promulgated" may be read to apply to any sentence that exceeds the Guideline range, regardless of whether it would today be called a departure or a variance, because any such sentence was a "departure" at the time Rule 32(h) was promulgated. Rule 32(h) came into effect in 2002, during the time when the guidelines were for all intents and purposes mandatory. Under a mandatory system, any sentence exceeding the Guideline range had to be the result of an upward departure. If the Ninth Circuit meant to refer to that reality when invoking the meaning of departure "at the time Rule 32(h) was promulgated," it suggests undermining the Irizarry decision by

extending the protections of Rule 32(h) to all sentences that exceed the high end of any calculated advisory Guideline range.

It is more likely that the panel saw findings in the record indicating that the sentence is an upward departure but did not refer to that part of the record in its opinion. The Evans-Martinez opinion muddies the waters to a degree but standing alone is not so problematic as to call for an amendment to Rule 32(h). While rulings by other panels in the 9th Circuit, or by other Circuits may be necessary to clarify the meaning of Evans-Martinez, the guidance offered by Irizarry is clear, and provides a workable system in which district courts will ensure on a case-by-case basis that criminal defendants receive fair notice of the grounds upon which any variance is based.

* * *

The subcommittee on Rule 32(h) held a telephone conference, and using the first part of this memo as a guide, discussed whether or not consideration of amending Rule 32(h) to include reference to variances was necessary. All members of the sub-committee were present and participated in the lively discussion.

The Justice Department encouraged the subcommittee to recommend to the committee as a whole to begin the amendment process. Justice presented its proposal for language to amend the rule to ensure that variances required the same notice that departures do under the current Rule 32(h). There was discussion that a significant percentage of variances are done without notice and the Justice Department, as well as committee members representing defender organizations and lawyers, asserted the problems in such sentencings are complex. The consensus of those participating in the conference call was that the Rule 32(h) should be amended., and the amendment should require notice of intent to "depart" as well as notice of intent to "vary" from the guidelines.

Judge Wolf suggested that it would be appropriate to wait ans see what the experience is following the Irizarry decision. He explained his practice is to generally give some advance notice if he is going to depart or make a variation in sentencing. Judge Wolf also suggested that the sentencing judge should be allowed the discretion to account for continuances in sentencing if the variation notion needs fleshing out by evidence, or by evidence to controvert an intent to upward or downward variation in imposing sentence. Judge Molloy agreed with Judge Wolf and Judge Molloy suggested the potential mischief caused by amending the rule outweighed the benefit of changing a rule so recently adopted.

The Sentencing Commission was represented at the conference. Requests were made for various empirical data to determine if the Rule 32(h) concerns represented a real problem or whether the expressed concerns identified a perceived problem. Professor Sara Beale followed up with the

Commission and determined that there was insufficient post Irizarry data to make the comparisons and data extractions requested by the subcommittee. They advised that they do not now have sufficient data to inform the Advisory Committee's discussion of Rule 32(h). Their most recent September "data cut" included only two weeks of post-Irizarry data .Professor Beale asked whether they could provide pre-Irizarry comparisons from the circuits that did and did not require notice, but the commission staff felt this would not be helpful because there are so many variances among the circuits other than differences in the interpretation of the notice requirement.

Eventually there will be sufficient post-Irizarry data to do a useful comparison, which would focus on the circuits that were requiring notice before Irizarry, looking at the data before and after that decision to see if the courts changed any of the relevant practices. The Committee will have to determine the importance of the data before deciding whether to go forward with consideration of amending Rule 32(h).

Westlaw.
128 S.Ct. 2198 FOR EDUCATIONAL USE ONLY Page 1
128 S.Ct. 2198, 171 L.Ed.2d 28, 76 USLW 4401, 08 Cal. Daily Op. Serv. 7130, 2008 Daily Journal D.A.R. 8671, 21 Fla. L. Weekly Fed. S 313

Irizarry v. U.S.
U.S.,2008.

Supreme Court of the United States
Richard IRIZARRY, Petitioner,
v.
UNITED STATES.
No. 06-7517.

Argued April 15, 2008.
Decided June 12, 2008.

Background: Defendant was convicted in the United States District Court for the Southern District of Alabama, No. 03-00236-CR-CG,Callie V.S. Granade, Chief Judge, of making a threatening interstate communication to his ex-wife, and he appealed. The Eleventh Circuit Court of Appeals, 458 F.3d 1208, affirmed. Defendant sought certiorari which was granted.

Holding: The Supreme Court, Justice Stevens, held that criminal procedure rule requiring notice that the court is contemplating a departure from the recommended guideline sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, is not applicable to a variance from the recommended range.

Affirmed.

Justice Thomas filed concurring opinion.

Justice Breyer filed dissenting opinion in which Justices Kennedy, Souter, and Ginsburg, joined.

West Headnotes

[1] Sentencing and Punishment 350H 651

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
A sentence outside the Sentencing Guidelines carries no presumption of unreasonableness. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[2] Sentencing and Punishment 350H 934

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)1 In General
350Hk932 Advice and Notice
350Hk934 k. Necessity. Most Cited Cases
Criminal procedure rule requiring notice that the court is contemplating a departure from the recommended guideline sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, is not applicable to a variance from the recommended guidelines range. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.; Fed.Rules Cr.Proc.Rule 32(h), 18 U.S.C.A.

***2198** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner pleaded guilty to making a threatening interstate communication to his ex-wife, in violation of federal law. Although the presentence report recommended a Federal Sentencing Guidelines range of 41-to-51 months in prison, the court imposed the statutory maximum sentence-60 months in prison and 3 years of supervised release-rejecting petitioner's objection that he was entitled to notice that the court was contemplating an upward depar-

ture. The Eleventh Circuit affirmed, reasoning that Federal Rule of Criminal Procedure 32(h), which states that "[b]efore the court may depart from the applicable sentencing range on a ***2199** ground not identified ... either in the presentence report or in a party's pre-hearing submission, the court must give the parties reasonable notice that it is contemplating such a departure," did not apply because the sentence was a variance, not a Guidelines departure.

Held: Rule 32(h) does not apply to a variance from a recommended Guidelines range. At the time that *Burns v. United States*, 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123, was decided, prompting Rule 32(h)'s promulgation, the Guidelines were mandatory; the Sentencing Reform Act of 1984 prohibited district courts from disregarding most of the Guidelines' "mechanical dictates," *id.,* at 133, 111 S.Ct. 2182. Confronted with the constitutional problems that might otherwise arise, the *Burns* Court held that the Rule 32 provision allowing parties to comment on the appropriate sentence-now Rule 32(i)(1)(C)-would be "render[ed] meaningless" unless the defendant were given notice of a contemplated departure. *Id*. at 135-136, 111 S.Ct. 2182. Any constitutionally protected expectation that a defendant will receive a sentence within the presumptively applicable Guidelines range did not, however, survive *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, which invalidated the Guidelines' mandatory features. Faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness. *Gall v. United States,* 552 U.S. ----, ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Thus, the due process concerns motivating the Court to require notice in a mandatory Guidelines world no longer provide a basis for extending the *Burns* rule either through an interpretation of Rule 32(h) itself or through Rule 32(i)(C)(1). Nor does the rule apply to 18 U.S.C. § 3553 variances by its terms. Although the Guidelines, as the "starting point and the initial benchmark," continue to play a role in the sentencing determination, see *Gall,* 552 U.S., at ----, 128 S.Ct. 586, there is no longer a limit comparable to the one in *Burns* on variances from Guidelines ranges that a district court may find justified. This Court is confident that district judges and counsel have the ability-especially in light of Rule 32's other procedural protections-to make sure that all relevant matters relating to a sentencing decision have been considered before a final determination is made. Pp. 2202 - 2204.

458 F.3d 1208, affirmed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined.

Arthur J. Madden, III, Mobile, AL, for petitioner.
Matthew D. Roberts, Washington, D.C., for respondent.
Peter B. Rutledge, Charlottesville, VA, as *amicus curiae*, appointed by this Court, in support of the judgment below.
Jonathan D. Hacker, Harvard Law School, Supreme Court and Appellate Advocacy Clinic, Cambridge, MA, Arthur J. Madden III, Counsel of Record, Madden & Soto, Mobile, AL, Walter Dellinger, Mark S. Davies, Ryan W. Scott, Admitted only in Illinois, Susan M. Moss, O'Melveny & Myers LLP, Washington, DC, for petitioner.
Paul D. Clement, Solicitor General, Counsel of Record, Alice S. Fisher, Assistant Attorney General, Michael R. Dreeben***2200** , Deputy Solicitor General, Matthew D. Roberts, Assistant to the Solicitor General, Sangita K. Rao, Attorney, Department of Justice, Washington, D.C., for United States.For U.S. Supreme Court Briefs, see:2009 WL 494940 (Pet.Brief)2008 WL 809102 (Resp.Brief)2008 WL 1721899 (Reply.Brief)

Justice STEVENS delivered the opinion of the

Court.
Rule 32(h) of the Federal Rules of Criminal Procedure, promulgated in response to our decision in *Burns v. United States,* 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991), states that "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." The question presented by this case is whether that Rule applies to every sentence that is a variance from the recommended Federal Sentencing Guidelines range even though not considered a "departure" as that term was used when Rule 32(h) was promulgated.

I

Petitioner, Richard Irizarry, pleaded guilty to one count of making a threatening interstate communication, in violation of 18 U.S.C. § 875(c). Petitioner made the following admissions in the factual resume accompanying his plea: (1) On November 5, 2003, he sent an e-mail threatening to kill his ex-wife and her new husband; (2) he had sent "dozens" of similar e-mails in violation of a restraining order; (3) he intended the e-mails to "convey true threats to kill or injure multiple persons"; and (4) at all times he acted knowingly and willfully. App. 273-275.

The presentence report (PSR), in addition to describing the threatening e-mails, reported that petitioner had asked another inmate to kill his ex-wife's new husband. Brief for United States 6. The PSR advised against an adjustment for acceptance of responsibility and recommended a Guidelines sentencing range of 41-to-51 months of imprisonment, based on enhancements for violating court protective orders, making multiple threats, and intending to carry out those threats. Brief for Petitioner 9. As possible grounds for a departure, the probation officer stated that petitioner's criminal history category might not adequately reflect his " 'past criminal conduct or the likelihood that [petitioner] will commit other crimes.' " *Ibid.*

The Government made no objection to the PSR, but advised the court that it intended to call petitioner's ex-wife as a witness at the sentencing hearing. App. 293. Petitioner objected to the PSR's application of the enhancement based on his intention to carry out the threats and its rejection of an adjustment for acceptance of responsibility. *Id.,* at 295-296.

Four witnesses testified at the sentencing hearing. *Id.,* at 299. Petitioner's ex-wife described incidents of domestic violence, the basis for the restraining order against petitioner, and the threats petitioner made against her and her family and friends. *Id.,* at 307, 309, 314. She emphasized at some length her genuine concern that petitioner fully intended to carry out his threats. *Id.,* at 320. A special agent of the Federal Bureau of Investigation was called to describe documents recovered from petitioner's vehicle when he was arrested; those documents indicated he intended to track down his ex-wife and their children. *Id.,* at 326-328. Petitioner's cellmate next testified that petitioner "was obsessed with the idea of getting rid of"***2201** his ex-wife's husband. *Id.,* at 336. Finally, petitioner testified at some length, stating that he accepted responsibility for the e-mails, but that he did not really intend to carry out his threats. *Id.,* at 361. Petitioner also denied speaking to his cellmate about killing his ex-wife's husband. *Id.,* at 356-357.

After hearing from counsel, the trial judge delivered a thoughtful oral decision, which included findings resolving certain disputed issues of fact. She found that petitioner had deliberately terrorized his ex-wife, that he intended to carry out one or more of his threats, "that he still intends to terrorize Ms. Smith by whatever means he can and that he does not accept responsibility for what he has done." *Id.,* at 372. After giving both petitioner and counsel an opportunity to make further comment, the judge concluded:

"I've considered all of the evidence presented

> today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.
>
> "The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him." *Id.,* at 374-375.

The court imposed a sentence of 60 months of imprisonment to be followed by a 3-year term of supervised release. *Id.,* at 375.

Defense counsel then raised the objection that presents the issue before us today. He stated, "We didn't have notice of [the court's] intent to upwardly depart. What the law is on that now with-," to which the Court responded, "I think the law on that is out the window .... You had notice that the guidelines were only advisory and the court could sentence anywhere within the statutory range." *Id.,* at 377.

The Court of Appeals for the Eleventh Circuit affirmed petitioner's sentence, reasoning that Rule 32(h) did not apply because "the above-guidelines sentence imposed by the district court in this case was a variance, not a guidelines departure." 458 F.3d 1208, 1211 (2006)*(per curiam)*. The Court of Appeals declined to extend the rule to variances. "After [*United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005),] parties are inherently on notice that the sentencing guidelines range is advisory.... Given *Booker,* parties cannot claim unfair surprise or inability to present informed comment." *Id.,* at 1212.

Because the Courts of Appeals are divided with respect to the applicability of Rule 32(h) to Guidelines variances,[FN1] we granted ***2202** certiorari. 552 U.S. ----, 128 S.Ct. 828, 169 L.Ed.2d 625 (2008). We now affirm.

> FN1. Compare *United States v. Vega-Santiago,* 519 F.3d 1 (C.A.1 2008) (en banc); *United States v. Vampire Nation,* 451 F.3d 189 (C.A.3 2006); *United States v. Mejia-Huerta,* 480 F.3d 713 (C.A.5 2007); *United States v. Long Soldier,* 431 F.3d 1120 (C.A.8 2005); and *United States v. Walker,* 447 F.3d 999, 1006 (C.A.7 2006), with *United States v. Anati,* 457 F.3d 233 (C.A.2 2006); *United States v. Davenport,* 445 F.3d 366 (C.A.4 2006); *United States v. Cousins,* 469 F.3d 572 (C.A.6 2006); *United States v. Evans-Martinez,* 448 F.3d 1163 (C.A.9 2006); and *United States v. Atencio,* 476 F.3d 1099 (C.A.10 2007).

II

At the time of our decision in *Burns,* the Guidelines were mandatory; the Sentencing Reform Act of 1984, § 211 *et seq.,* 98 Stat. 1987, prohibited district courts from disregarding "the mechanical dictates of the Guidelines" except in narrowly defined circumstances. 501 U.S., at 133, 111 S.Ct. 2182. Confronted with the constitutional problems that might otherwise arise, we held that the provision of Rule 32 that allowed parties an opportunity to comment on the appropriate sentence-now Rule 32(i)(1)(C)-would be "render [ed] meaningless" unless the defendant were given notice of any contemplated departure. *Id.,* at 135-136, 111 S.Ct. 2182. Justice SOUTER disagreed with our conclusion with respect to the text of Rule 32 and conducted a due process analysis. *Id.,* at 147, 111 S.Ct. 2182 (dissenting opinion).

[1] Any expectation subject to due process protection at the time we decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive our decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which invalidated the mandatory features of the Guidelines. Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in *Burns*. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness. *Gall v. United States,* 552 U.S. ----, ----, 128 S.Ct. 586, 596-97 (2007); see also *Rita v. United States,* 551 U.S. ----, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

[2] It is, therefore, no longer the case that "were we to read Rule 32 to dispense with notice [of a contemplated non-Guidelines sentence], we would then have to confront the serious question whether [such] notice in this setting is mandated by the Due Process Clause." *Burns,* 501 U.S., at 138, 111 S.Ct. 2182. The due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule set forth in *Burns* either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(C). And contrary to what the dissent argues, *post,* at 2204 - 2205 (opinion of BREYER, J.), the rule does not apply to § 3553 variances by its terms. "Departure" is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines.

The notice requirement set out in *Burns* applied to a narrow category of cases. The only relevant departures were those authorized by 18 U.S.C. § 3553(b) (1988 ed.), which required "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." That determination could only be made based on "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Ibid.* And the notice requirement only applied to the subcategory of those departures that were based on "a ground not identified as a ground for ... departure either in the presentence report or in a pre-hearing submission." *Burns,* 501 U.S., at 138-139, 111 S.Ct. 2182; see also Fed. Rule Crim. Proc. 32(h). Although the Guidelines, as the "starting point and the initial benchmark," continue to play a role in the sentencing determination, see *Gall,* ***2203** 552 U.S., at ----, 128 S.Ct. 586, 596-97, there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a) (2000 ed. and Supp. V).

Rule 32(i)(1)(C) requires the district court to allow the parties to comment on "matters relating to an appropriate sentence," and given the scope of the issues that may be considered at a sentencing hearing, a judge will normally be well-advised to withhold her final judgment until after the parties have had a full opportunity to present their evidence and their arguments. Sentencing is "a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds." *United States v. Vega-Santiago,* 519 F.3d 1, 4 (C.A.1 2008) (en banc). Adding a special notice requirement whenever a judge is contemplating a variance may create unnecessary delay; a judge who concludes during the sentencing hearing that a variance is appropriate may be forced to continue the hearing even where the content of the Rule 32(h) notice would not affect the parties' presentation of argument and evidence. In the case before us today, even if we assume that the judge had contemplated a variance before the sentencing hearing began, the record does not indicate that a statement announcing that possibility would have changed the parties' presentations in any material way; nor do we think it would in most cases. The Government admits as much in arguing that the er-

ror here was harmless. Brief for United States 37-38.

Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial. As Judge Boudin has noted,

> "In the normal case a competent lawyer ... will anticipate most of what might occur at the sentencing hearing-based on the trial, the presentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence. Garden variety considerations of culpability, criminal history, likelihood of reoffense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing." *Vega-Santiago,* 519 F.3d, at 5.

The fact that Rule 32(h) remains in effect today does not justify extending its protections to variances; the justification for our decision in *Burns* no longer exists and such an extension is apt to complicate rather than to simplify sentencing procedures. We have confidence in the ability of district judges and counsel-especially in light of Rule 32's other procedural protections [FN2]-to make sure that all relevant ***2204** matters relating to a sentencing decision have been considered before the final sentencing determination is made.

> FN2. Rule 32 requires that a defendant be given a copy of his PSR at least 35 days before sentencing, Fed. Rule Crim. Proc. 32(e)(2). Further, each party has 14 days to object to the PSR, Rule 32(f)(1), and at least 7 days before sentencing the probation officer must submit a final version of the PSR to the parties, stating any unresolved objections, Rule 32(g). Finally, at sentencing, the parties must be allowed to comment on "matters relating to an appropriate sentence,"Rule 32(i)(1)(C), and the defendant must be given an opportunity to speak and present mitigation testimony, Rule 32(i)(4)(A)(ii).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice THOMAS, concurring.

Earlier this Term, I explained that because "there is no principled way to apply the *Booker* remedy," it is "best to apply the statute as written, including 18 U.S.C. § 3553(b), which makes the [Federal Sentencing] Guidelines mandatory." *Kimbrough v. United States,* 552 U.S. ----, ----, 128 S.Ct. 558, 578, 169 L.Ed.2d 481 (2007) (dissenting opinion) (referencing *United States v. Booker,* 543 U.S. 220, 258-265, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)); see also *Gall v. United States,* 552 U.S. ----, 128 S.Ct. 586, 603 (2007) (THOMAS, J., dissenting) (applying the Guidelines as mandatory). Consistent with that view, I would hold that the District Court committed statutory error when it imposed a sentence at "variance" with the Guidelines in a manner not authorized by the text of the Guidelines, which permit sentences outside the Guidelines, or "departures," only when certain aggravating or mitigating circumstances are present. See United States Sentencing Commission, Guidelines Manual § 1B1.1 (Nov.2007). But the issue whether such post-*Booker* "variances" are permissible is not currently before us.

Rather, we are presented with the narrow question whether Federal Rule of Criminal Procedure 32(h) requires a judge to give notice before he imposes a sentence outside the Guidelines on a ground not identified in the presentence report or in a prehear-

ing submission by the Government. I agree with the Court that neither Rule 32(h) nor *Burns v. United States,* 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991), compels a judge to provide notice before imposing a sentence at "variance" with the post-*Booker* advisory Guidelines, *ante,* at 2203. Each addresses only "departures" under the mandatory Guidelines and does not contemplate the drastic changes to federal sentencing wrought by the *Booker* remedy. For this reason, I join the Court's opinion.

Justice BREYER, with whom Justice KENNEDY, Justice SOUTER, and Justice GINSBURG join, dissenting.
Federal Rule of Criminal Procedure 32(h) says:

> "Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."

The question before us is whether this Rule applies when a sentencing judge decides, pursuant to 18 U.S.C. § 3553(a) (2000 ed. and Supp. V), to impose a sentence that is a "variance" *from* the advisory Guidelines, but is not a "departure" *within* the Guidelines. The Court says that the Rule does not apply. I disagree.

The Court creates a legal distinction without much of a difference. The Rule speaks specifically of "departure[s]," but I see no reason why that term should not be read to encompass what the Court calls § 3553(a) "variances." The Guidelines define "departure" to mean "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise ***2205** different from the guideline sentence." United States Sentencing Commission, Guidelines Manual (USSG), § 1B1.1, comment., n. 1(E) (Nov.2007). So-called variances fall comfortably within this definition. Variances are also consistent with the ordinary meaning of the term "departure." See, *e.g.,* Webster's Third New International Dictionary 604 (1993) (defining "departure" to mean a "deviation or divergence esp. from a rule" (def. 5a)). And conceptually speaking, the substantive difference between a "variance" and a "departure" is nonexistent, as this Court's opinions themselves make clear. See, *e.g.,Gall v. United States,* 552 U.S. ----, ---- - ----, 128 S.Ct. 586, 594-95 (2007) (using the term "departure" to describe any non-Guideline sentence); *Rita v. United States,* 551 U.S. ----, ---- - ----, 127 S.Ct. 2456, 2464 (2007) (stating that courts "may depart (either pursuant to the Guidelines or, since *Booker,* by imposing a non-Guidelines sentence)").

Of course, when Rule 32(h) was written, its drafters had *only* Guidelines-authorized departures in mind: Rule 32(h) was written after the Guidelines took effect but before this Court decided *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Yet the language of a statute or a rule, read in light of its purpose, often applies to circumstances that its authors did not then foresee. See, *e.g.,Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 79-80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

And here, the purpose behind Rule 32(h) requires that the Rule be construed to apply to variances. That Rule was added to "reflect" our decision in *Burns v. United States,* 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991). See Advisory Committee's Notes on Fed. Rule Crim. Proc. 32, 18 U.S.C.App., p. 1141 (2000 ed., Supp. II). (2002 Amendments). In *Burns,* the Court focused upon "the extraordinary case in which the district court, on its own initiative and contrary to the expectations both the defendant and the Government, decides that the factual and legal predicates for a departure are satisfied." 501 U.S., at 135, 111 S.Ct. 2182. The Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government ... the district court [must] give the parties reasonable notice that it is contemplating

such a ruling." *Id.,* at 138, 111 S.Ct. 2182.

Our holding in *Burns* was motivated, in part, by a desire to avoid due process concerns. See 501 U.S., at 138, 111 S.Ct. 2182 ("[W]ere we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause"). That is perhaps why the majority today suggests that "[a]ny expectation subject to due process protection at the time we decided *Burns* " failed to survive *Booker*. *Ante,* at ----. But the due process concern was not the only reason for our holding in *Burns,* nor was it even the primary one. Rather, the Court principally based its decision upon Rule 32' s requirement that parties be given " 'an opportunity to comment upon ... matters relating to the appropriate sentence.' " 501 U.S., at 135, 111 S.Ct. 2182 (citing then-Rule 32(a)(1)). "Obviously," the Court said, whether a *sua sponte* departure was warranted was a "matter relating to the appropriate sentence." *Ibid*. (internal quotation marks omitted). To deprive the parties of notice of such a departure would thus "rende[r] meaningless" their right to comment on "matters relating to the appropriate sentence." *Id*., at 136, 111 S.Ct. 2182 (internal quotation marks omitted). Notice, the Court added, ***2206** was "essential to assuring procedural fairness." *Id.,* at 138, 111 S.Ct. 2182.

The Court's decision in *Burns* also relied on what the Court described as Rule 32's overall purpose of "provid[ing] for focused, adversarial development of the factual and legal issues" related to sentencing. *Id.,* at 134, 111 S.Ct. 2182. This could be gleaned, *inter alia,* from the requirement that parties be given an opportunity to file responses or objections to the presentence report and from the requirement that parties be given an opportunity to speak at the sentencing proceeding. *Ibid.* Construing Rule 32 not to require notice of *sua sponte* departures, the Court reasoned, would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution" of sentencing issues. *Id.,* at 137, 111 S.Ct. 2182.

The primary grounds for the Court's decision in *Burns* apply with equal force to the variances we consider here. Today, Rule 32(i)(1)(C) provides a virtually identical requirement that the district court "allow the parties' attorneys to comment on the probation officer's determinations *and other matters relating to an appropriate sentence.*" (Emphasis added.) To deprive the parties of notice of previously unidentified grounds for a variance would *today* "rende[r] meaningless" the parties' right to comment on "matters relating to [an] appropriate sentence." *Burns,* 501 U.S., at 136, 111 S.Ct. 2182 (internal quotation marks omitted). To deprive the parties of notice would *today* subvert Rule 32's purpose of "promoting focused, adversarial resolution" of sentencing issues. In a word, it is not fair. *Id*., at 137, 111 S.Ct. 2182.

Seeking to overcome the fact that text, purpose, and precedent are not on its side, the majority makes two practical arguments in its defense. First, it says that notice is unnecessary because "there is no longer a limit comparable to the one at issue in *Burns* " as to the number of reasons why a district court might *sua sponte* impose a sentence outside the applicable range. *Ante,* at ----. Is that so? Courts, while now free to impose sentences that vary from a Guideline-specified range, have *always* been free to depart from such a range. See USSG ch. 1, pt. A, § 4(b) (Nov.1987), reprinted in § 1A1.1 comment., editorial note (Nov.2007) (suggesting broad departure authority). Indeed, even *Burns* recognized that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U.S., at 136-137, 111 S.Ct. 2182 (citing USSG ch. 1, pt. A, § 4(b) (1990)). Regardless, if *Booker* expanded the number of grounds on which a district court may impose a non-Guideline sentence, that would seem to be an additional argument *in favor of,* not *against,* giving the parties notice of the district court's intention to impose a non-Guideline sentence for some previously unidentified reason. Notice, after all, would promote "focused, adversarial" litigation at sentencing. *Burns,supra,* at 134, 137,

111 S.Ct. 2182.

Second, the majority fears that a notice requirement would unnecessarily "delay" and "complicate" sentencing. *Ante,* at 2203, 2204. But this concern seems exaggerated. Rule 32(h) applies only where the court seeks to depart on a ground *not* previously identified by the presentence report or the parties' presentencing submissions. And the Solicitor General, after consulting with federal prosecutors, tells us that "in the vast majority of cases in which a district court imposes a sentence outside the Guidelines range, the grounds for the variance have previously been identified by the [presentence report] or the parties." Brief for United States 32.

In the remaining cases, notice does not necessarily mean delay. The parties may ***2207** well be prepared to address the point and a meaningful continuance of sentencing would likely be in order only where a party would adduce additional evidence or brief an unconsidered legal issue. Further, to the extent that district judges find a notice requirement to complicate sentencing, those judges could make use of Rule 32(d)(2)(F), which enables them to require that presentence reports address the sentence that would be appropriate in light of the § 3553(a) factors (including, presumably, whether there exist grounds for imposing a non-Guidelines sentence). If a presentence report includes a section on whether a variance would be appropriate under § 3553(a), that would likely eliminate the possibility that the district court would wind up imposing a non-Guidelines sentence for some reason *not previously identified*.

Finally, if notice *still* produced some burdens and delay, fairness justifies notice regardless. Indeed, the Government and the defendant here-the parties most directly affected by sentencing-both urge the Court to find a notice requirement. Clearly they recognize, as did the Court in *Burns,* that notice is "essential to assuring procedural fairness" at sentencing. 501 U.S., at 138, 111 S.Ct. 2182.

I believe that Rule 32(h) provides this procedural safeguard. And I would vacate and remand to the Court of Appeals so that it could determine whether the petitioner received the required notice and, if not, act accordingly.

I respectfully dissent.

U.S.,2008.
Irizarry v. U.S.
128 S.Ct. 2198, 171 L.Ed.2d 28, 76 USLW 4401, 08 Cal. Daily Op. Serv. 7130, 2008 Daily Journal D.A.R. 8671, 21 Fla. L. Weekly Fed. S 313

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AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that Rule 32 of the Federal Rules of Criminal Procedure be amended to require that:

(a) Any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer;

(b) a probation officer who receives oral information from a party other than through the interview of the defendant, unless excused by the Court for good cause shown, provide a written summary of the information to the parties.

(c) a probation officer who receives documentary information from a non-party in connection with a pre-sentence investigation, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties; and

(d) a probation officer who receives oral information from a non-party, unless excused by the Court for a good cause shown, provide a written summary of the information to the parties.

REPORT

The American Bar Association Criminal Justice Section supports the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. *See Recommendations for Federal Criminal Sentencing in a Post-*Booker *World*, available at **http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf**.

Specifically, the ABACJS endorses the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report. The proposed amendments to the Rule would ensure that both the government and the defense have an opportunity to review the information to be considered by the sentencing court in determining the appropriate punishment. *Cf. United States v. Hamad*, Case No. 05-4196 (6th Cir. July 19, 2007) (vacating sentence based on information not disclosed to defendant). As the Constitution Project Report noted:

> Prior to the Federal Sentencing Guidelines, district courts had discretion to sentence defendants anywhere between the statutory minimum (if any) and maximum sentences. Courts were not required to state any reasons for their sentences or make any particular factual findings to support their decisions. Under this discretionary regime, the courts utilized probation officers to conduct pre-sentence investigations regarding the defendant, but these reports were not used to make factual findings regarding disputed matters because no such factual findings were required in the sentencing process.
>
> Under the Guidelines, in contrast, narrow sentencing ranges are determined through very specific factual findings regarding the factors enumerated in the Guidelines. Given the number and importance of the factual determinations to be made under the Guidelines, the rules of procedure should ensure that the process of litigating these factual issues is balanced and designed to produce the most reliable results possible.
>
> The pre-existing practice of pre-sentence investigations conducted by probation officers is inconsistent with the principles underlying an adversarial system of justice and should be revised to account for the new importance of fact finding at sentencing. There are presently no rules governing the process by which such investigations are conducted. In practice, the parties and other interested persons submit factual information to the probation officer on an *ex parte* basis. The probation officers do not share the information submitted to them with the parties. Indeed, probation officers are authorized to promise confidentiality to sources of information and to present information without revealing its source. Even in the absence of a probation officer's grant of confidentiality to information sources, pre-sentence investigation reports do not typically cite or reference the sources of information upon which their proposed factual findings are based.

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Dueling *ex parte* submissions, followed by reports without citations, do not result in the level of reliability in the fact-finding process that would result though the ordinary adversarial process. There do not appear to be any countervailing considerations to suggest that an adversarial process would be unduly burdensome or unworkable in the litigation of sentencing facts, so long as provision is made for the protection of sensitive information upon good cause shown.

An adversarial process in litigating sentencing facts could be accomplished by amending Rule 32 of the Federal Rules of Criminal Procedure to require that any party wishing to provide information regarding sentencing to the probation officer writing the pre-sentence investigation report, must, absent good cause shown, provide that information to the other party.

Specifically, new subsections (c)(3) and (c)(4) should be added to Rule 32:

> **(3) Availability of Information Received from Parties**. Any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer.
>
> **(4) Availability of Information Received From Non-Parties.** Where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties.

This Rule would substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer. A "good cause" exception is made where information, if revealed to other parties, may compromise an ongoing investigation or result in physical or other harm to a confidential source, the defendant, or others. Existing rules limiting *ex parte* communications should suffice to limit submissions of information directly to the Court without serving opposing parties.

It may also be necessary to repeal or amend subsection (d)(3)(B), which directs probation officers to exclude from the pre-sentence investigation report "any sources of information obtained upon a promise of confidentiality." Probation officers should not be empowered to promise confidentiality to sources of information to be used to sentence

defendants in the absence of good cause.

As the Criminal Justice Section Council studied this issue, one matter of interest was whether any of the various federal district courts had enacted local rules addressing these issues. Accordingly, we reviewed the local rules for each of the ninety-four districts to determine how many districts address sentencing procedures by local rule and the manner in which they do so. The results of this survey were quite interesting. Seventy-five of the ninety-four districts have promulgated local rules regarding presentence investigation reports (PSRs) and sentencing procedures. The local rules vary widely from one district to another. A number of districts have local rules which are very similar to the proposed Recommendation.

1. The Northern District of California

The Northern District of California has enacted Criminal Local Rule 32-3, which provides in pertinent part:

> **Initiation of the Presentence Investigation.**
>
> * * *
>
> **(b) Sentencing Information in Government's Possession.** Within 7 days after receiving a written request from the Probation Officer for information (e.g., indictment, plea agreement, investigative report, etc.), the attorney for the government shall respond to the request and may supply other relevant information. The attorney for the government shall serve a copy of the material on defense counsel, except material already in the possession of defense counsel.
>
> **(c) Deadline for Submission of Material Regarding Sentence.** Any material a party wishes the Probation Officer to consider for purposes of the proposed presentence report shall be submitted to the Probation Officer at least 45 days before the date set for sentencing. The party shall serve a copy of the material on opposing counsel, except for material already in the possession of opposing counsel.

This Rule, like the proposed Recommendation, thus requires the parties to serve one another with the information submitted to the court through its probation officer for use in the preparation of the PSR.

2. The District of Connecticut

The District of Connecticut has enacted Local Rule of Criminal Procedure 32, which provides in pertinent part:

> **SENTENCING PROCEDURES**

104A

(**l) The Role of Defense Counsel**

* * *

2. Defense counsel may submit a "Defendant's Version of the Offense" to the Probation Officer and, in that event, shall serve a copy on the attorney for the government. Subject to the restrictions of Fed. R. Crim. P. 32 and D. Conn. L. Cr. R. 32(g), the attorney for the defendant shall promptly make available to the attorney for the government all documents provided to the Probation Officer that were not provided to the government in discovery, unless otherwise excused by the Court for good cause shown.

(m) The Role of the United States Attorney

* * *

3. The attorney for the government may submit a "Government's Version of the Offense" to the Probation Officer and, in that event, shall serve a copy on counsel for the defendant. Subject to the restrictions of Fed. R. Crim. P. 32 and D. Conn. L. Cr. R. 32(g), the attorney for the government shall promptly make available to the attorney for the defendant all documents provided to the Probation Officer that were not provided to the defense in discovery, unless otherwise excused by the Court for good cause shown.

This Rule, like the proposed Recommendation, thus requires the parties to serve one another with the information submitted to the court through its probation officer for use in the preparation of the PSR.

3. The District of Nebraska

The District of Nebraska has enacted Criminal Local Rule 32.1, which provides in pertinent part:

(a) Initiation of the Presentence Investigation.

(1) Government's Information. Within five (5) business days after receiving a written request from the probation officer for information (*e.g.*, indictment, plea agreement, investigative report), the government shall respond to the request and may supply other relevant information. The government shall serve defense counsel with a copy of any material provided to the probation officer that is not already in the possession of defense counsel.

This Rule is similar to the proposed Recommendation in that it would require the government to serve the defense with information submitted to the court through its probation officer. The Nebraska Rule differs from the proposed Recommendation in that it is one-sided and does not require the defense to serve the government with materials it provides to the probation officer. On the other hand, the Nebraska local rule further provides that after the PSR has been finalized, any party wishing to offer documentary evidence in support of or in opposition to an objection to the PSR must submit such evidence to the court and opposing parties in advance of the sentencing hearing. Neb. Cr. R. 32.1(b)(6)(C). Thus, under the Nebraska Rule the parties will at least obtain copies of opposing parties' evidence prior to the sentencing hearing itself.

4. The District of Hawaii

The District of Hawaii has enacted Criminal Local Rule 32.1, which provides in pertinent part:

> (g) Not less than eleven (11) calender days prior to the sentencing date, the completed presentence report shall be submitted to the court and to all parties. This report shall be accompanied by an addendum setting forth any objections raised by counsel that are unresolved, and any written materials provided by counsel in support of their respective positions. Any earlier proposed presentence reports furnished to counsel shall be returned to the probation officer.

Under this Rule, the parties submit their evidence to the probation officer on an *ex parte* basis, but the probation officer then discloses all evidence relating to disputed issues to both parties prior to the sentencing hearing.

5. The Northern and Southern Districts of Illinois and the District of Colorado

These three districts have adopted local rules requiring the government to submit a written "version of the offense" to the probation officer within a short period of time after a determination of guilt and to serve the defense with the document. The two Illinois districts require the defense to submit its own "version of the offense" and to serve the government with it. The Colorado Rule applies only to the government. *See* N.D. Il. LCrR32.1(e), S.D. Il Cr32.1(d), and D. Colo. General Order 2002-3. Under these rules, the parties will have access to at least the overall positions submitted to the probation officer, although perhaps not the documentary evidence later submitted to support these positions.

6. The Northern and Southern Districts of Iowa and the Northern District of Ohio

These three districts have adopted local rules requiring the parties to submit to the court and serve on opposing counsel five to seven days in advance of the sentencing hearing all information

and exhibits the parties intend to rely on at the hearing. *See* N.D. Ohio LCrR 32.2(c), Iowa LCrR32a4. Under these rules, the parties will not see each other's evidence until after the PSR has been completed, but they will at least obtain opposing parties' evidence in advance of the sentencing hearing.

7. The District of Rhode Island, the Eastern District of Tennessee, and the District of The Virgin Islands

These three districts have adopted local rules that highlight the disadvantages to the defense of probation officers preparing PSRs based on *ex parte* submissions by the government. In the District of Rhode Island, submissions to the probation officer are made ex parte, but the defense – and *only the defense* – must notify the court and the government at least seven days prior to the sentencing hearing regarding any witnesses the defense intends to call at the hearing. R.I. LR Cr 32(b). In the Eastern District of Tennessee there is no requirement that evidence submitted for use in the drafting of the PSR be either sworn or served on opposing parties, but any party wishing to object to a factual assertion made in the PSR must support the objection with a sworn affidavit. E. Tenn. LR83.9(c). The local rule enacted by the District of the Virgin Islands is similar in effect to the Eastern District of Tennessee. Under the Virgin Islands local rule, the parties need not serve each other with information submitted to the probation officer for use in the drafting of the PSR, but any party wishing to object to a factual assertion made in a PSR must file a memorandum in advance of the sentencing hearing stating "what evidence, including written submissions or witnesses, the aggrieved party wishes to present at the sentencing hearing." V.I. LRCrP 32.01d. There is no requirement under the Virgin Islands rule for the party defending the factual assertion in the PSR to reveal any information prior to the sentencing hearing.

The variety of local rules and the existence of a number which are very similar to the proposed recommendation supports the sense of the Criminal Justice Section that a uniform Rule is needed. Moreover, after considerable study and debate, the Section supports the rule changes outlined by the Sentencing Initiative of the Constitution Project, and believes these changes would provide a needed and valuable improvement in the procedural fairness of the federal sentencing process.

Respectfully Submitted,

Stephen A. Saltzburg
Chair, Criminal Justice Section
August 2008

TAB III-C

United States District Court
Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
Fax: (619) 702-9988

MEMORANDUM

TO: Hon. Richard Tallman

FROM: Judge Battaglia, Chair-Use of Technology Subcommittee

RE: Status Report

DATE: September 26, 2008

This subcommittee was created at the April 2008 meeting of the Advisory Committee on Criminal Rules. In addition to myself as chair, the subcommittee includes, Judge Tallman, Sara Beale , Andy Leipold, Leo Cunningham, and Nancy King. John Rabiej and Peter McCabe have also participated.

Two issues were initially assigned. The first was to generally review all the rules and to consider which rules might be appropriate for amendments embracing technological advances. The second issue was to consider the letter from Judge Gold suggesting that the rules be amended to allow judges to receive and grant applications for orders and warrants, including arrest warrants, pen registers and trap and trace orders, by telephone or other reliable electronic means.

After the subcommittee was underway, Judge Tallman also assigned the issue forwarded by Judge Rosenthal, Chair of the Standing Committee, to consider an amendment to Rule 41 to authorize probation and pretrial officers to apply for search warrants. This amendment was advanced by the Criminal Law Committee on recommendation of the Probation and Pretrial Services Chiefs Advisory Group and the Search and Seizure Working Group.

The Subcommittee had its first telephonic meeting on July 21, 2008. In advance of the meeting, the members reviewed all existing rules and created a list of 26 rules and/or subparts that might benefit by amendments incorporating technological advances. Starting with the first teleconference, each rule was discussed in turn, and a decision made to consider further for amendment, or not.

A second telephone conference was held on August 26, 2008. At that time, the general survey of rules was completed and a list of 16 rules and/or subparts were identified for further study. These items were divided among the Subcommittee members, who are now working on potential amendments.

For study purposes, the rules were grouped into generally related categories as set forth below:

Group 1

Rule 3 The Complaint

Rule 4 Arrest Warrant or Summons on Complaint
4(c)(3) Execution
4(c)(4)(A) Return

Rule 9 Arrest Warrant of Summons on Indictment or Information

Group 2

Rule 5 Initial Appearance
5(c)(1)(A) Place of Initial Appearance

Rule 32.1
(a)(5) Appearance in a district lacking jurisdiction

Rule 40 Arrest for Failing to Appear

Group 3

Rule 10 Arraignment

Rule 40 (b)(2) Revocation Hearing

Group 4

Rule 41 Search Warrant
(d)(3)
(e)(3)
(f)(1)(D)
(f)(2)(b)
(i)

Group 5

Rule 49 Serving and Filing Papers

Rule 58 Misdemeanors

The rules amendments advanced by Judge Gold and his colleagues, with regard to use of reliable electronic means for arrest warrants, are included in this review in Group 1.

The Subcommittee also considered proposed amendments Rule 41 with regard to the authorization of probation and pretrial services officers to apply for search warrants. At the August subcommittee meeting, Judge Tallman reported that the Criminal Law Committee had done some further work on the issue, and would be proposing newer language for our subcommittee's review. As a result, the Subcommittee stayed action on this issue pending that further communication. The updated proposals from the Criminal Law Committee have not been received to date.

The Subcommittee will continue its work, and will have a further report, and potentially proposed amendments, for consideration by the full Committee at the April 2009 meeting. These will include a disposition concerning Judge Gold's proposal, the general review that is underway, and the Rule 41 amendments that emanate from the Criminal Law Committee with regard to probation and pretrial services officers authority.

Respectfully submitted.

October 1, 2007

Hon. Richard C. Tallman
Circuit Judge
Ninth Circuit Court of Appeals
Chair, Advisory Committee on Criminal Rules
Park Place Building
1200 Sixth Avenue, 21st Floor
Seattle, WA 98101-3123

Re: Proposed Amendment to Federal Rules of Criminal Procedure

Dear Judge Tallman:

I am writing on behalf of myself and the other Magistrate Judges of the Eastern District of New York at the suggestion of Senior United States District Judge David G. Trager, a former member of the Advisory Committee on Criminal Rules. We are writing to suggest that the Federal Rules of Criminal Procedure be amended to permit judges to receive and grant applications for orders and warrants, including arrest warrants, pen registers and trap and trace orders, by telephone or other reliable electronic means.

Federal Rule of Criminal Procedure 41 was amended in 2006 to permit judges to issue warrants "based on information communicated by telephone or other reliable electronic means." 2006 Amendments, Advisory Committee Note to Subdivision (e). This amendment, recognizing the widespread use of facsimile transmissions and email messages, makes it far easier and more efficient for warrant applications to be made and considered when court is not in session. The Advisory Committee explicitly recognized that transmitting documents electronically can be a reliable means of promoting efficient use of judicial resources. Id.

We propose that the scope of the rule be clarified and expanded. More specifically, we propose that any application that could be made in writing may also be submitted and ruled upon by telephone or any reliable electronic means. We envision at least two practical applications of such a rule.

First, the amendment to Rule 41 discussed above apparently does not apply to arrest warrants sought pursuant to Rule 4. While late-night warrant requests are more frequently made for search and seizure warrants than arrest warrants, there are occasions when arrest warrants are sought on an emergency basis.[3]

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[3]Coincidentally, one of my fellow magistrate judges was recently called upon to consider an application for arrest warrants that had to be made late on a Friday night. The agents seeking the warrants were required to travel a substantial distance from where they were located to

Second, the proposed rule change would permit an application for a pen register or trap and trace device to be made by electronic means. Although emergency applications for pen registers or trap and trace devices are rare, at least in this district, they do occur, particularly when a law enforcement investigation involving undercover agents or active informants goes awry, and agents seek immediate information about calls being made to or from one or more telephones.

We do recognize that the requirement that an application for a pen register or trap and trace be made in writing is contained in a statute, 18 U.S.C. § 3122(a), rather than a rule. We believe that even a writing required by a statute may include, particularly if the rules so provide, a written document transmitted by electronic means. However, if the Committee believes it is inappropriate to adopt a rule arguably expanding upon the terms of a statutory provision, we propose in the alternative and at a minimum that Rule 4 be amended to state explicitly that an arrest warrant may be sought and issued pursuant to the procedures set forth in Rule 41. This might be accomplished simply by adding a sentence to Rule 4(a) providing that an arrest warrant may be obtained and issued pursuant to the procedures set forth in Rule 41(d) and (e).

Thank you for your attention to our proposal. We would of course be happy to answer any questions the committee may have.

Sincerely,

Steven M. Gold
U.S. Magistrate Judge

cc: John K. Rabiej
Chief, Rules Committee Support Office
OJP-RCSO
Administrative Office of the U.S. Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Hon. Anthony J. Battaglia
U.S. Magistrate Judge
Southern District of California
880 Front Street
San Diego, California 92101-8900

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present their application to the magistrate judge at her home. Had the agents been seeking search warrants, the magistrate judge could have received their application and ruled on it telephonically or electronically.

TAB IV

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
2167 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
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June 18, 2008

Honorable Lee H. Rosenthal
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Dear Judge Rosenthal:

I am writing to you in my capacity as Chair of the Judicial Conference Committee on Criminal Law (CLC) to ask that the Rules Committee consider an amendment to Rule 41 of the Federal Rules of Criminal Procedure to authorize probation and pretrial services officers to apply for search warrants. This request comes after careful consideration by the CLC of the recommendations of the Probation and Pretrial Services Chiefs Advisory Group (CAG) and the Search and Seizure Working Group. At present, Rule 41 does not permit probation officers to apply for a search warrant. As a result, in a post-conviction situation, probation officers are empowered to carry out searches of convicted offenders only when search conditions have been imposed as a condition of supervised release or probation or when the offender consents. As to pretrial supervision, it is unclear that pretrial services officers may properly conduct searches of pretrial defendants without first obtaining a search warrant, even when a search condition is made part of the defendant's pretrial release order. Accordingly, the inability to obtain a search warrant prevents pretrial officers from executing searches of those that they supervise, even in exigent circumstances.

Indeed, federal judges often set out search conditions in their criminal judgments. Where the judgment does not authorize a search as a condition of release or probation, however, the officer has no power to effect a search, absent the issuance of a search warrant or the consent of the offender. In exigent circumstances, where the suspected misconduct is serious, an officer's inability to effect a search could undermine public safety.

An amendment of Rule 41 to permit an officer to seek issuance of a search warrant would also permit searches by a pretrial services officer of a defendant who has not yet been convicted. Although courts have sometimes issued a search condition as a requirement of pretrial release, the enforceability of such conditions has been called into question as a result of the Ninth Circuit's decision in *United States v. Scott,* 450 F.3d 863 (9th Cir. 2006).

In *Scott,* the defendant had originally been arrested on state charges and his pretrial release was conditioned on his consent to random drug testing and to a warrantless search of his home for drugs, whenever requested by officers. State officers utilized this condition of release and entered the defendant's home for the purposes of administering a drug test. When the test revealed that the defendant had used drugs, officers arrested him, searched his home, and discovered a shotgun. Federal prosecutors then prosecuted the defendant for unlawfully possessing an unregistered shotgun. The Ninth Circuit upheld the district court's suppression of the shotgun, holding that a warrantless search, even when executed pursuant to a condition of pretrial release, requires a showing of probable cause, unless the Government can demonstrate the existence of "special needs" that make impracticable the enforcement of the otherwise applicable standard of suspicion. The court found no special need in the case before it.

Scott did not address federal pretrial search conditions. Indeed, the court explicitly noted that it expressed no view as to whether the result in the case would have been different had the court been examining the federal Bail Reform Act. *Id.* at n.8. Nonetheless, this Ninth Circuit decision, coupled with preexisting concerns about the enforceability of a warrantless search condition on a defendant who has not yet been convicted, has led to uncertainty about the propriety of any pretrial search undertaken without a warrant. Thus, while in FY 2005, district courts ordered 2,284 pretrial services search conditions, this

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discretionary condition of probation or supervised release imposed on certain sex offenders, a search based on reasonable suspicion. *See* 18 U.S.C. § 3563(b)(23) and § 3583(d).

number fell to 1,056 in FY 2006, the year after issuance of the original *Scott* opinion.[4]

Some districts have reportedly attempted to utilize the Rule 41 mechanism to obtain a search warrant when officers deem it necessary to search an offender. As noted, Rule 41(b) authorizes a magistrate judge or a state court of record in the district to issue warrants to "a federal law enforcement officer or an attorney for the government." Rule 41(a)(2)(C) defines the phrase "federal law enforcement officer" as "a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws *and is within any category of officers authorized by the Attorney General to request a search warrant.*" (Emphasis added.) The Attorney General, however, has not designated federal pretrial services or probation officers as "federal law enforcement officers" for the purpose of Rule 41. *See* 28 C.F.R. §§ 60.2 & 60.3. Accordingly, the issuance of a search warrant to a probation officer under the present iteration of Rule 41 is problematic.

Some districts have developed a procedure whereby officers petition the district court for a "search order" based on probable cause. The authority relied upon for this procedure is not Rule 41, but the All Writs Act, 28 U.S.C. § 1651 ("the Act"). The All Writs Act provides that courts "may issue all writs necessary or appropriate in aid of their . . . jurisdiction[] and agreeable to the usages and principles of law." Neither the plain language of the Act nor case law clearly authorizes its use to obtain a search warrant or order, however. While the Supreme Court has invoked the Act in the context of searches, it has not authorized its use as an alternative basis for the issuance of a search warrant or a means to bypass Rule 41's procedural requirements. In *United States v New York Tel. Co.,* 434 U.S. 159 (1977), the Supreme Court held that when a search is supported by probable cause and a search warrant has issued under Rule 41, a district court can order a third party to cooperate with law enforcement agents conducting the search to insure that the warrant is executed. The Court stated that the Act therefore authorized the district court to order a non-party telephone company to provide access to its facilities and to assist the agents in install–

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[4] *Scott* was originally decided on September 9, 2005. *United States v. Scott,* 424 F.3d 888 (9th Cir. 2005). In response to the Government's petition for rehearing *en banc*, the *Scott* majority superseded its original opinion on June 9, 2006, with an opinion amended to include *dicta* indicating that the court was not addressing the question whether the outcome would have been different if the drug testing condition that was the premise for the search had been imposed under the federal Bail Reform Act. *United States v. Scott,* 450 F.3d 863 (9th Cir. 2006).

ing pen registers as part of a criminal investigation. The Court noted that it had "repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Id.* at 172. A search warrant would not typically effectuate other previously-issued orders, however. In short, the All Writs Act appears to be an uncertain vehicle for use by probation officers who perceive the need to execute a search on an individual being supervised.

Judicial Conference's Current *Model Search and Seizure Guidelines*

Between 1981-83, the Advisory Committee on Criminal Rules considered a proposal, favored by the predecessor to the CLC (the Probation Committee), to amend Rule 41 to allow probation officers to apply for search warrants. The Advisory Committee did not approve this amendment, although it appears that no formal vote was ever taken. *See* Minutes of the Advisory Committee's June 1982 meeting, page 5, at http://www.uscourts.gov/rules/CR06-1982-min.pdf; July 1982 Advisory Committee Report at http://www.uscourts.gov/rules/Reports/CR07-1982.pdf.

As a result of the Supreme Court's decision in 1987 upholding the warrantless search of a probationer's home, based on a regulation that permitted such searches when "reasonable grounds" existed,[5] there was little impetus to revisit the need for probation officers to have authority to apply for a search warrant. Instead, the Judicial Conference determined that guidelines should be promulgated to govern probation officers' exercise of the search authority conferred by the Supreme Court's decision. In 1993, the Judicial Conference approved distribution of *Model Search and Seizure Guidelines* (Attachment 3) to be followed by officers in conducting searches and seizures of persons on probation or supervised release. JCUS-MAR 93, p.13. The Guidelines emphasized that searches are "disfavored" and "discouraged" and should be conducted only when alternatives to protect the public and assist the offender in complying with the conditions of supervision have been exhausted. The guidelines recognized three circumstances under which searches by officers could be conducted: (1) plain view searches, (2) searches conducted pursuant to a special condition of supervision, and (3) searches conducted with the consent of the offender.

Over the past two years, the Working Group and CAG have re-evaluated the guidelines in light of developments since the Conference initially approved them in 1993.

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[5] *Griffin v. Wisconsin,* 483 U.S. 868 (1987).

The groups have submitted a series of recommendations to the CLC, which we have begun to consider. A significant first step was taken when, during its March 2008 session, the Judicial Conference approved the CLC's recommendation to seek legislation that would provide to probation officers conducting searches the same powers available to traditional law enforcement officers to control and direct third parties when safety considerations require, and to permit probation officers to arrest, based on probable cause, persons who assault, resist, or impede the officer in the performance of official duties. The CLC will work with AO staff to ensure that this legislative proposal is transmitted to Congress and that appropriate policies, procedures, and training are developed.

The CLC understands that the development of revised guidelines to govern the search authority of probation officers is just as important as the legislative and criminal rule amendments that it has recommended. A working group of probation officers and staff of the Office of Probation and Pretrial Services (OPPS) are now conducting a thorough study of current search practices followed by the various districts. Ultimately, the CLC will attempt to draft a set of guidelines that will provide search authority for officers in appropriate situations and constrain use of that authority in inappropriate circumstances.

Thank you for considering our proposal and please contact me if you have any questions.

Sincerely,

Julie E. Carnes
Chair, Criminal Law Committee

jec

Enclosures

cc: Hon. Richard C. Tallman, Chair
Advisory Committee on Criminal Rules

John K. Rabiej, Chief
Rules Committee Support Office

John M. Hughes, Assistant Director
Office of Probation and Pretrial Services

Rule 41. Search and Seizure

[proposed revisions appear on page 1 (subsection (a)(2)(C)), page 2 (subsection (c)(5)), and page 6 (subsection (h))]

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information

(B) "Daytime" means the hours between 6.00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant, *and a U.S. pretrial services or probation officer.*

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the

district when the warrant is issued but might move or be moved outside the district before the warrant is executed,

(3) a magistrate judge--in an investigation of domestic terrorism or international terrorism--with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; ~~or~~

(4) a person to be arrested or a person who is unlawfully restrained*; or*

(5) evidence of a violation of a condition of pretrial release, probation, or supervised release if the warrant is applied for by federal law enforcement officers responsible for supervising defendants or offenders to ensure compliance with such conditions

(d) Obtaining a Warrant.

(1) In General. After receiving an affidavit or other information, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense

with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk

(D) Suppression Limited Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it

(2) Contents of the Warrant.

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date

and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant

(f) Executing and Returning the Warrant.

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

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) Service Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode

with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3)

(3) Delayed Notice. Upon the government's request, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--may delay any notice required by this rule if the delay is authorized by statute.

(g) Motion to Return Property A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings

(h) Motion to Suppress A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides. *A person on pretrial release, supervised release, or probation may not move to suppress evidence in a revocation proceeding except as otherwise authorized by law*

(i) Forwarding Papers to the Clerk The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: November 27, 2007

FROM: Joe Gergits, Assistant General Counsel

SUBJECT: Revocation Hearing Exception to Federal Rule of Criminal Procedure 41(h)

TO: District Judge Julie E. Carnes, Chair, Committee on Criminal Law

You requested that I explain the legal basis for one aspect of a proposed amendment to Rule 41 of the Federal Rules of Criminal Procedure that would authorize probation and pretrial services officers to apply for search warrants. Your concern was that the suggested amendment would diminish the right of probationers and supervised releasees to suppress illegally-obtained evidence at revocation hearings. The overall proposal (Attachment 6 to Agenda T) was appended to the agenda item as "[a]n example of revisions to Rule 41 that would extend the authority to apply for a search warrant to pretrial services and probation officers." The specific language in subsection (h) prompting your inquiry is indicated in italics on page 6 of attachment 6:

> (h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides. *A person on pretrial release, supervised release, or probation may not move to suppress evidence in a revocation proceeding except as otherwise authorized by law*

Agenda Item T, Attachment 6, p. 6.

The suggested amendment to subsection (h) reflects decades-old circuit court holdings refusing to extend the exclusionary rule to illegally-obtained evidence offered in a revocation proceeding,[1] as well as the Supreme Court's holding in *Pennsylvania Board*

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[1] *See, e g , United States v. Bazzano,* 712 F.2d 826, 832-34 (3d Cir. 1983) (per curiam) (Fourth Amendment exclusionary rule inapplicable to evidence illegally seized by police that was used at probation revocation proceeding; suppression would not deter

of Probation v Scott, 524 U.S. 357 (1998), that the exclusionary rule does not apply in state parole revocation proceedings. Prior to *Scott,* the Second and Fourth Circuits adopted a minority view that extended the exclusionary rule to revocation proceedings.[2] The Fourth circuit, however, retrenched and endorsed the majority view in light of the Supreme Court's decision in *Scott.*[3]

In *Scott,* the Supreme Court applied the traditional balancing test for extending the exclusionary rule to proceedings other than criminal trials. The test required the Court to weigh the costs to the fact-finding process of applying the exclusionary rule against the likelihood that it would deter future Fourth Amendment violations. *Id* at 363 (*citing INS v. Lopez Mendoza,* 468 U.S. 1032 (1984) (exclusionary rule does not apply in civil deportation proceedings); *United States v. Janis,* 428 U.S. 433, 448, 454 (1976) (exclusionary rule does not apply in civil tax proceedings); & *United States v Calandra,* 414 U.S. 338, 349-52 (1974) (exclusionary rule does not apply in grand jury proceedings)). The Court stated that the high costs of applying the exclusionary rule had compelled it to "repeatedly decline[] to extend the exclusionary rule to proceedings other than criminal trials." *Scott,* 524 U.S. at 363-64 & n.4.

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police misconduct, but it would exact great injury to determination of probationer's compliance with conditions of supervision), citing *United States v Calandra,* 414 U.S. 338, 349 (1974) (exclusionary rule inapplicable to grand jury proceedings);*United States v. Farmer,* 512 F.2d 160, 162 (6th Cir. 1975) (Fourth Amendment exclusionary rule does not apply in probation revocation proceedings); *United States v. Brown,* 488 F.2d 94, 95 (5th Cir 1973) (per curiam) (agreeing with offender's admission that the exclusionary rule is inapplicable to probation revocation proceedings); *United States v. Hill,* 447 F.2d 817, 818-19 (7th Cir. 1971) (same); *United States ex rel. Sperling v. Fitzpatrick,* 426 F.2d 1161, 1163-64 (2d Cir. 1970) (exclusionary rule does not apply to parole revocation proceedings).

[2]*See United States v Rea,* 678 F.2d 382, 390 (2d Cir. 1982) (exclusionary rule precludes admission of unconstitutionally seized evidence in probation revocation hearing; impact on administrative fact-finding process negligible because probation officers can easily apply for a warrant pursuant to Fed. R. Crim. P. 41 and officers should be deterred from constitutional violations); *United States v Workman,* 585 F.2d 1205, 1211 (4th Cir. 1978) (exclusionary rule applies in probation revocation proceedings), *overruled by United States v Armstrong,* 187 F.3d 392, 395 (4th Cir. 1999) (*citing Scott,* 524 U.S. 357).

[3]*Armstrong,* 187 F.3d at 395.

> although in some instances parole officers may act like police officers and seek to uncover evidence of illegal activity, they (like police officers) are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial. In this case, assuming that the search violated respondent's Fourth Amendment rights, the evidence could have been inadmissible at trial if respondent had been criminally prosecuted.

Id. at 368-69 (citations omitted).

The Supreme Court's holding in *Scott* prompted the Fourth Circuit to disavow its prior position extending the exclusionary rule to revocation proceedings. The Second Circuit, however, has not repudiated the minority view it had adopted in *Rea*. The Second Circuit therefore remains the only circuit court that extends the exclusionary rule to revocation proceedings. The suggested amendment to Rule 41(h) would appropriately alert the Rules Committee to the well-settled case law establishing that the exclusionary rule generally does not apply to revocation hearings. Circuit courts prior to *Scott,* and the Supreme Court in *Scott,* have held that the costs of extending the exclusionary rule to the revocation context substantially outweigh the marginal (or non-existent) deterrence benefits of extending the rule.

cc: John Hughes
James Oleson
John Fitzgerald

APPENDIX H: MODEL SEARCH AND SEIZURE GUIDELINES

(Approved for distribution by the Judicial Conference, March 1993)

Scope — Applies to probation officers in applying for and conducting searches and seizures of persons on probation or supervised release ("supervisees").

I. Search Policy

Searches by probation officers are disfavored. Other techniques should be relied upon to monitor compliance with conditions of supervision and, when information exists that indicates possession of contraband or evidence of a crime, consideration should be given to referring the matter to an appropriate law enforcement agency for investigation. When there are no other alternatives, searches should be conducted only (1) pursuant to conditions of release that specifically permit such searches or (2) pursuant to the consent of the client freely and voluntarily given.

Searches conducted pursuant to valid search conditions have been held to be permissible as administrative searches pursuant to the Supreme Court's decision in *Griffin v Wisconsin*, 483 U.S. 868 (1987). Search conditions are restrictions on the liberty of the supervisees and do not grant the probation officer the broader search powers of other law enforcement officers. The authority to conduct searches pursuant to conditions or to the consent of the supervisee does not extend the law enforcement authority of probation officers beyond those set out in 18 U.S C. § 3606 Accordingly, officers are not authorized to restrain third parties during a search. Officers should avoid searches where it is reasonably foreseeable that a third party or the releasee himself may present a danger Likewise, an attempted search should be abandoned if a third party or the releasee refuses to cooperate.

The fruits of any search conducted pursuant to these guidelines may, if relevant, be used in the regular course of management of non-compliant behavior by the supervisee. Seized items that are not contraband should be returned to the supervisee as soon as practicable.

Probation officers who may participate in searches are encouraged to receive, if available, appropriate training from Federal, state, or local law agencies prior to participating in such searches

II. Special Search Condition

A. Imposition of Search Condition

1 A probation officer should not routinely recommend that the court impose a special condition authorizing searches of persons under supervision. A probation officer should recommend such a special condition only in those cases in which the officer determines, based upon the offense of conviction and background of the offender, that resort to such a condition is necessary to enforce the conditions of release or to protect the public.

B. Composition of Search Condition

1. A special condition shall permit searches only of the supervisee's person, residence, office or vehicle.
2. A special condition shall permit searches only if the probation officer has a reasonable belief that contraband or evidence of a violation of the conditions of release may be found.
3. A special condition shall provide that any searches be conducted in a reasonable manner and at a reasonable time.
4. A special condition shall require the supervisee to notify any other residents of his home that areas of the home may be subject to search.
5 A special condition shall provide that failure to permit a search may be grounds for revocation.

C. Model Search Condition.

The court may utilize the following model special search condition:

The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

III. Consent Searches

A. A probation officer may conduct a search in the absence of a special condition if the supervisee gives written consent for the search. To ensure that consent is freely and voluntarily given, the probation officer shall advise the supervisee before the consent is given that the consent may be refused without adverse consequences, such as revocation of release. A search based upon consent may not exceed the scope of the consent.

B. A probation officer may use the following model consent:

I,_____, hereby consent to permit _____ a United States Probation Officer for the _____ District of _____ to search my_____. My consent is freely and voluntarily given. I understand that I am not required to consent to the search and that my refusal to consent may not be the basis of a revocation of my release or other adverse consequences, though the court may consider such refusal in connection with a modification of conditions of release

IV General Rules for Searches

A. A search of the person, residence, office or vehicle of a supervisee may be conducted by a probation officer only upon consent or pursuant to a special condition of release, as provided by these guidelines

B. No random, routine, or periodic searches, other than for the purpose of urinalyses as part of a drug treatment program, shall be conducted unless specifically authorized by a special condition of release.

C. A search shall not be conducted if the contemplated scope of the search will result in other than minor damage to the property to be searched.

D. A search shall not be conducted if there is reasonably reliable information that suggests that the conduct of the search would subject an officer or any other person to a danger of harm.

V. Approval of Searches

A. A search shall be conducted only upon the written approval of an application for such search. The application shall be in writing, shall be reviewed by the probation officer's supervisor, and shall be approved in writing by the chief probation officer of the district or his or her designee, which may not be the officer's supervisor. The application shall be approved prior to the officer's seeking consent or, in the case of a search pursuant to a search condition, prior to the search.

B. If exigent circumstances make it impracticable to present the application or to give approval in writing, the application or approval may be presented orally and reduced to writing at the earliest opportunity. Exigent circumstances exist if it is reasonably foreseeable that delay will result in danger to any individual or the public

C The application for the search shall contain the following information:

1 The name, address, type and term of supervision, offense of conviction, and relevant background of the person to be searched;

2. whether the search would be pursuant to a search condition or consent;

3 a description (address, license number, etc.) of the place to be searched;

4. a specific description of the grounds to believe that the search will yield contraband or evidence of a violation of the conditions of release;

5 a description of the general nature of the contraband or evidence sought;

6. a description of any potential dangers the search may present to the probation officer or others;

7 the assistance to be provided by other law enforcement agencies or the reasons why such assistance is unavailable, unnecessary, or impracticable;

8. a description of any contemplated minor damage to the property that may be caused by the search;

9 an explanation of why the matter should not be referred to an appropriate law enforcement agency for investigation; and

10. an explanation of why alternatives to conducting a search are inappropriate or impracticable

D. Approval of a search should, as specifically as is practicable, describe the place to be searched, the object of the search, the scope of the search approved, and the contemplated assistance from other law enforcement agencies.

E. The application, approval or rejection, and any consent form shall be filed in the probation office.

VI. Conduct of Searches

A. An officer conducting an approved search should take necessary safety precautions, including but not limited to, the following;

1. conducting the search with one or more fellow probation officers;

2 utilizing the assistance of other law enforcement officers for protection while conducting the search and taking possession of any dangerous contraband seized during the search;

3 carrying firearms, if authorized, during the search; and

4. conducting an initial security sweep of the premises to ascertain the presence of third parties or other hazards.

B. A probation officer is not authorized to detain or to restrain third parties If third parties are present who may present a risk to any person conducting the search or to the supervisee, or if the officer becomes aware of any other reasonably foreseeable danger of harm to any person, the officer should abandon the search.

C The search should be conducted in accordance with the approval and in a reasonable manner. The search should be no more intensive than is reasonably necessary to locate the objective of the search.

D. If a search is abandoned because of danger to the officer or another person, and there are reasonable grounds to believe that there exists a danger to the public, the officer shall notify the appropriate law enforcement authority as soon as possible.

VII. Plain View "Searches"

Contraband that falls within the plain view of a probation officer who is justified being in the place where the contraband is seen may properly be seized by the probation officer. It must be immediately apparent that the item is contraband with respect to the supervisee.

VIII. Seizures

A. An item that is located during an approved search or observed in plain view may be seized if the probation officer has reasonable grounds to believe that the item is contraband or constitutes evidence of a violation of a condition of release. If the item is not contraband, the supervisee should be given a receipt for the item and the item should be returned after it is no longer needed by the court.

B. A careful record must be kept regarding the chain of custody of any item seized.

C. Contraband should be delivered to an appropriate law enforcement agency as soon as practicable. Pending such delivery, the probation officer should take necessary measures to safeguard the contraband.

IX Reports of Search and Seizures

The probation officer shall prepare a narrative report of the circumstances and results of a search, including a search that is abandoned, file such report in the probation office, and provide copies to the chief probation officer and the Probation and Pretrial Services Division of the Administrative Office of the United States Courts.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

07-CR-E

JACK B WEINSTEIN
SENIOR JUDGE

May 15, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Center Building
Washington, D.C. 20544

Re: Suggested Amendment to Rule11 of the Federal Rules of Criminal Procedure

Dear Secretary McCabe:

While taking a guilty plea from a defendant today, I noticed that the current version of Rule 11 of the Federal Rules of Criminal Procedure does not require the court to inform the defendant of his or her right to compel the production of documents. *See* Fed. R. Crim. P. 11(b)(1)(E); *see also* Fed. R. Crim. P. 17 (c)(1) ("A subpoena may order the witnesses to produce books, papers, documents, data, or other objects the subpoena designates.")

I would suggest that Rule 11(b)(1)(E) be amended to include this right in addition to those already listed. Doing so would be simple: adding "and the production of documents" after "to compel the attendance of witnesses" would suffice.

Sincerely,

Jack B. Weinstein
U.S. Senior District Judge

cc: Raymond J. Dearie, Chief Judge
of the United States District Courts
for the Eastern District of New York

TAB V-VI

Items V-A and V-B will be oral reports.

DRAFT 6

To: **Hon. Anthony J. Scirica, Chair**
Executive Committee

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Use of Subcommittees**

Date: **September XX, 2008**

The current subcommittees for the Advisory Committee on Criminal Rules are:

Crime Victims Rights
E-Government Act/Sealing
Rule 12/Challenge to the Facial Validity of Indictments
Rule 15/International Depositions
Sentencing
Use of Technology

The composition, mission, and expected sunset date of each is described below.

Crime Victims' Rights:

This subcommittee was appointed in 2005 and it has been chaired since then by Judge James Jones. The current members of the subcommittee are Mr. Thomas McNamara (a Federal Public Defender), Judge Anthony Battaglia, Justice Robert Edmunds (North Carolina Supreme Court), Mr. Leo Cunningham (a private white-collar defense practioner), and a representative of the Department of Justice.

The subcommittee's original assignment was to conduct a comprehensive review of the Federal Rules of Criminal Procedure and to make recommendations concerning any conforming changes necessary to fully implement the Crime Victims' Rights Act. It presented recommendations to the Committee of the whole over several meetings, and, after careful consideration and lengthy discussion by the entire Committee, our first package of proposed amendments to Rules 1 (Scope; Definitions), 12.1 (Notice of Alibi Defense), 17 (Subpoena), 18 (Place of Trial), 32 (Sentence and Judgment), 60 (Victims' Rights), and 61 (Title), have been published for notice and comment, revised in light of those comments, approved by the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court. Unless the proposed amendments are disapproved by Congress, these amendments will go into effect December 1, 2008. The Committee's second package of proposed amendments to Rules 5 (Initial Appearance), 12.3 (Notice of Public-Authority Defense), and 21 (Transfer for Trial) has just been published for public notice and comment.

Now that the initial review of all of the rules has been completed, the subcommittee will be involved in evaluating the results of an ongoing GAO study of the implementation of the CVRA in the district courts. The subcommittee will also respond to any new issues that come to the Committee as a result of the regular meetings the Department of Justice holds with victims' representatives, as well as through outreach the Advisory Committee has done, inviting advocates for victims' rights to draw new issues and problems to the Committee's attention.

At this time, because of the continuing work to focus on improving recognition of the role of victims in the criminal justice system, no sunset date for this subcommittee has been established. As noted above, I envision that this subcommittee will continue to play an important role in initially evaluating the comments on the Rules changes now out for public notice and comment and the ongoing study by the GAO, as well as any new issues that arise in this rapidly developing area. Those recommendations will then be presented to the Committee for any necessary discussion and action.

E-Government Act/Sealing:

This subcommittee was formed in 2006 as part of the coordinated effort (involving all six Advisory Committees) to implement the E-Government Act. The subcommittee's initial chair was Judge Harvey Bartle, whose term on the Advisory Committee on Criminal Rules ended in 2007. The current chair is Ms. Rachel Brill (a private criminal defense attorney), and the current members of the subcommittee are Judge James Zagel, Mr. Thomas McNamara, and a representative of the Department of Justice.

The subcommittee's task was to consider the distinctive issues raised by the E-Government Act in the criminal law context, particularly relating to victim and witness security and privacy, and to propose adaptations mandated by criminal procedures as necessary to comply with the E-Government template prepared by the Kravitz Committee. It proposed an amendment to Rule 49.1 (Privacy Protection for Filings Made with the Court) incorporating the template, as well as corresponding amendments to the time periods in Rules 5.1 (Preliminary Hearing), 7 (The Indictment and the Information), 12.1 (Notice of an Alibi Defense), 12.3 (Notice of a Public-Authority Defense), 29 (Motion for a Judgment of Acquittal), 33 (New Trial), 34 (Arresting Judgment), 35 (Correcting or Reducing a Sentence), 41 (Search and Seizure), 47(Motions and Supporting Affidavits), 58 (Petty Offenses and other Misdemeanors), 59 (Matters Before Magistrate Judge), and Rule 8 of the Habeas Rules governing § 2254 and § 2255 proceedings. These amendments, with modifications following notice and publication by the full Committee, have now been approved by the Standing Committee on Rules and Procedure, and will be presented to the Judicial Conference for approval at its September 2008 meeting.

At this time, no sunset date for this subcommittee has been established. I have also appointed Judge James Zagel to serve as the Advisory Committee's representative to the Standing Committee's Subcommittee on Sealing, chaired by Judge Harris Hartz. It is my intention to refer to the E-Government subcommittee any issues that are raised by the work of the Hartz subcommittee, as well as any issues that arise from the implementation of the new E-Government rules.

Rule 12/Challenge to the Facial Validity of Indictments:

This subcommittee was formed in late 2007 to consider the Department of Justice's proposal to amend Rule 12 to require motions challenging the facial validity of an indictment to be brought or be deemed waived if not made before trial. The proposal is an outgrowth of the Supreme Court's decision in United States v. Cotton (2002), which established that defects in an indictment do not deprive the court of jurisdiction.

The subcommittee is chaired by Judge Mark Wolf, and its members are Mr. Thomas McNamara, Prof. Andrew Leipold, and a representative of the Department of Justice. The subcommittee has drafted a proposed amendment, which it will present to the Committee of the whole at the October meeting of the Advisory Committee.

No sunset date for the subcommittee has been established.

Rule 15/International Depositions:

This subcommittee was established in 2007 to consider a proposal by the Department of Justice to amend Rule 15 to permit depositions at which the defendant is not present if stringent criteria are met. After general discussion by the full Committee at several meetings, I established this subcommittee to give sustained attention to a number of drafting and policy issues. The subcommittee prepared a proposed amendment, which has been approved by the Advisory Committee and Standing Committee, and was published in August 2008 for public notice and comment.

The chair of the subcommittee is Judge John Keenan, and the members are Mr. Leo Cunningham, Prof. Andrew Leipold, and a representative of the Department of Justice. I anticipate that it will receive and evaluate any comments received during the period for notice and comment. Recommendations will then be discussed and necessary action by the full Committee will follow with proposed changes.

No sunset date for the subcommittee has been established.

Sentencing:

This subcommittee was established in 2005 to study the change in federal sentencing following the Supreme Court's decision in Booker (2005) and to recommend any necessary amendments to the Federal Criminal Rules. The subcommittee's original chair was Judge Paul Friedman, whose term on the Advisory Committee has concluded. It is now chaired by Judge Donald Molloy. The current members of the subcommittee are Judge Mark Wolf, Mr. Thomas McNamara, Justice Robert Edmunds, Ms. Rachel Brill, and a representative of the Department of Justice.

The original package of Booker rules included amendments to Rules 11 (Pleas), 32 (Sentencing), and 35 (Sentence Reductions) that have now gone into effect. The subcommittee's original proposals also included an amendment to Rule 32(h) (Sentencing and Judgment; Notice of Possible Departure from Sentencing Guidelines), which the Standing Committee returned to the Advisory Committee for further study. An amendment to Rule 32(h) remains under active consideration by our Committee, and the subcommittee has been studying several additional rulings by the Supreme Court (particularly Irizarry v. United States (2008)), as well as developments in the lower courts. In addition, I have asked the subcommittee to consider other aspects of Rule 32, including two proposals for changes offered by the House of Delegates of the American Bar Association. Recommendations for proposed changes will be considered and acted upon by the Committee of the whole.

No sunset date has been set for this subcommittee.

Use of Technology:

This subcommittee was established in 2007. Its original charge was to consider a proposal to amend Rule 6(f) (The Grand Jury; Indictment and Return) to allow the return of indictments by video conference where no judicial officer was present at the location where the grand jury sits, but the subcommittee's mandate has now been expanded to review all of the Federal Criminal Rules to determine which, if any, should be revised to encourage greater use of different forms of technology (such as video conferencing and presentation or transmittal of case-related documents or other materials by reliable electronic means).

The chair of the subcommittee is Judge Anthony Battaglia, and its members are Ms. Rachel Brill, Prof. Andrew Leipold, Justice Robert Edmunds, and a representative of the Department of Justice. The subcommittee recently compiled a table of potential candidates for change and it will further study the Rules identified and propose possible amendments for consideration by the full Committee at several of our future meetings.

No sunset date has been set for this subcommittee.

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

ANTHONY J. SCIRICA
CHAIRMAN, EXECUTIVE COMMITTEE

(215) 597-2399
(215) 597-7373 FAX
ascirica@ca3.uscourts.gov

August 26, 2008

MEMORANDUM TO ALL COMMITTEE CHAIRS

SUBJECT: USE OF SUBCOMMITTEES

As you know, it has been the policy of the Judicial Conference, as reflected in *The Judicial Conference and Its Committees*, that the work of its committees be done by each committee as a whole as much as possible. To assure that this policy is advanced to the greatest degree possible consistent with efficient operation of the committees, the Executive Committee has been looking at the extent to which subcommittees are being used. The attached draft best practices guide has been developed, using input from committee staff, to assist committees in the management of subcommittees. The Executive Committee requests that you review it with your committee and provide any comments to the Judicial Conference Executive Secretariat. In addition, the Executive Committee asks that no further subcommittees be created until it has completed its review of this subject.

To further assist in this effort, the Executive Committee would like each committee, no later than January 16, 2009, to report on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date.

We look forward to your comments and hope that this process will assure that policy formulation is both as broad-based and as efficient as possible.

Anthony J. Scirica

Attachment

cc: Committee Staff

DRAFT

BEST PRACTICES GUIDE TO USING SUBCOMMITTEES OF JUDICIAL CONFERENCE COMMITTEES

INTRODUCTION

In recent years, it has become apparent that subcommittees can be an important tool in the accomplishment of the business of the Judicial Conference committees. Chairs have established subcommittees for a variety of reasons, such as to address complex or technical issues, to increase oversight of a particular program, to address emergencies, or to prepare to implement a specific statute. However each subcommittee created can cause additional bureaucratic complications, call on staff resources and expense. Approximately 81 subcommittees have been created, sometimes without careful consideration of the benefits and burdens.

The Judicial Conference policy quoted below seeks to accommodate these practical realities while assuring that subcommittees are used in a focused manner to support the collegial decision making of, and not as a surrogate for, the full committee.

This guide is designed to help in maximizing the effectiveness of subcommittees, while maintaining appropriate accountability and resource constraints. It is not comprehensive. We welcome any and all suggestions for improving it and for keeping it relevant as the work of committees evolves.

CURRENT CONFERENCE POLICY ON SUBCOMMITTEES

> It is the Conference's preference that work be performed by full committees, and *standing* subcommittees are discouraged. Chairs may appoint subcommittees composed of committee members to consider specific topics as necessary, but the number of subcommittees and meetings should be held to the minimum needed to accomplish the work of the committee. The approval of the Chief Justice, through the Conference Secretary, is required to appoint non-members [*i.e.*, persons who are not already members of any Judicial Conference committee] to subcommittees, ... The Conference Secretary maintains a list of all existing subcommittees, and chairs should notify the Secretary when one is established.

The Judicial Conference of the United States and Its Committees, p. 4 (Sep. 2007) (parenthetical and emphasis added).

ROLE OF COMMITTEE CHAIR

The chair of the full committee may establish a subcommittee and designate its members and chair. At the time the chair of a subcommittee is designated, the committee chair should discuss with the chair of the subcommittee such subjects as subcommittee procedures, the relationship of the subcommittee with the full committee, and how best to coordinate with the committee chair. The chair of the full committee should consider the impact on committee staffing resources when creating and assigning tasks to subcommittees.

MEMBERSHIP

It is preferable that the chair of a subcommittee have at least one year of service on the full committee before being designated. The chair might consider committee members' special interests, experience, or expertise when selecting subcommittee members. Membership should be balanced in terms of points of view, experience, etc. The size of the subcommittee should be as small as is consistent with the requirements imposed by workload, deadlines, and need for expertise. Experience has shown that it is beneficial for the chair of the full committee to participate in as many teleconferences and meetings of the subcommittee as possible.

DURATION OF SUBCOMMITTEE

All subcommittees (unless institutionally permanent, such as the Budget Committee's Economy Subcommittee and the Judicial Resources Committee's Judicial Statistics Subcommittee) should have a sunset date, subject to renewal, and be reviewed periodically to see if disbanding is appropriate; the chair of the full committee may dissolve a subcommittee whenever deemed appropriate. Some committees establish subcommittees to enable quick responses to emergencies and to maintain focus on recurring matters, such as long-range planning, and these may have a longer existence. Appointment of a new committee chair and the five-year committee jurisdictional review are also good times to review the need for each subcommittee.

MISSION AND AUTHORITY

The mission of each subcommittee should be clearly defined in the records of the committee. Subcommittees are creatures of the full committee and generally do not have independent authority, unless it is granted by the Conference or the Executive Committee. Use of AO staff and expenditures by subcommittees must be approved in advance by the chair. [Alternative: Communication with AO staff should be through the chair.]

MEETINGS

Telephonic meetings are encouraged, as is use of other technologies, such as collaborative electronic workplaces, and the like. It is occasionally appropriate for more than one subcommittee, either of the same or different full committees, to meet jointly on matters of common interest. In-person subcommittee meetings should normally be held in conjunction with meetings of the full committee. Out-of-cycle, in-person subcommittee meetings in venues other than Washington, D.C. must be approved by the chair of the Executive Committee of the Judicial Conference. *The Judicial Conference of the United States and Its Committees*, p. 4 (Sep. 2007).

SUBCOMMITTEE RECORDS AND CORRESPONDENCE

The chair of the full committee should sign any committee-related communication to recipients who are not members of the committee. In those rare instances when it is appropriate for the chair of a subcommittee to communicate with recipients who are not members of the committee, the communication must be expressly approved by the chair of the full committee.

Information considered by the subcommittee should be available to interested members of the full committee.

Subcommittees often complete the majority of their work between meetings of the full committee using telephonic meetings, e-mail, and other means to generate a report to the full committee. This enables the subcommittee report to be prepared in the same way as, and included in, other agenda materials for the full committee, giving the committee sufficient time to consider the issues. When the subcommittee chooses to hold an in-person meeting contiguous to the full committee meeting, this preparatory technique minimizes last-minute demands on the subcommittee and staff and enables the subcommittee to focus on final deliberations and fine tuning of its recommendations.

Advisory Committee on Criminal Rules
Agenda Tab V.
October 2008
Action Item

REVISION OF THE SEARCH AND SEIZURE WARRANT FORMS

At its July 2008 meeting, the Forms Working Group, an AO advisory group of six judges and six clerks of court, recommended a number of revisions to the standard AO forms used in civil and criminal cases. For the most part, the changes involve restyling the forms to reflect the recent restyling of the federal rules. But the group is also considering one substantive change to the search and seizure warrant forms that should be of interest to the Advisory Committee on Criminal Rules.

The two search warrant forms (AO 93 and AO 93A) and the seizure warrant form (AO 109) currently include a block on the "Return" page for the law enforcement officer executing the warrant to "swear that this inventory is a true and detailed account of the person or property taken by me on the warrant." The three forms also have a line for the judge's signature and the date of signing under the legend: "Subscribed, sworn to, and returned before me this date." (The three forms are attached.)

At the July meeting, the working group questioned the need for the inventory to be subscribed and sworn to before a judge. The requirement is not included in Federal Rule of Criminal Procedure 41. In addition, at the July 2008 Federal Judicial Center workshop for magistrate judges in Seattle, several judges complained that a good deal of unnecessary expense is being incurred in requiring officers to travel and appear personally before them merely to swear personally to the accuracy of an inventory.

Rule 41(f)(1)(B) sets out the procedure to be followed when law enforcement officers prepare the required inventory of property or persons seized pursuant to a warrant.

> **(B) Inventory**. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

Rule 41(f)(1)(D) prescribes the procedure for returning the warrant after execution:

> **(D) Return**. The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

Beyond requiring that the inventory be "verified" by an officer present during the

execution of the warrant and be returned to "the magistrate judge designated on the warrant," nothing in Rule 41 requires that the return of the warrant and the inventory be subscribed and sworn to before a judge. Moreover, Rule 41's requirements for inventories and returns have not changed substantively since the original rule took effect in 1946. The relevant portion of Rule 41(d) in 1946 stated that –

> **(d) Execution and Return with Inventory.** ... The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Nevertheless, the requirement that the inventory be sworn to before a judge has appeared on the AO forms for as long as records have been kept. The AO's forms records go back only to the 1970s, but it is highly likely that the provision for swearing to a return and inventory before a judge has been included on the warrant forms since 1946, and earlier. It seems to have been derived from the statute that had governed search warrant procedures before the Federal Rules of Criminal Procedure took effect in 1946.

A 1917 statute[1] governed the issuance of search warrants between 1917 and 1946. The former 11 U.S.C. § 623 stated that –

> **Return; contents.** The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect: "I, R.S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

On its face, former § 623 required the law enforcement officer preparing the inventory to swear before the judge or commissioner at the time of the return that it constituted a "true and detailed account of all the property taken" pursuant to the warrant.

The statute was officially repealed by Congress in 1948 and replaced with Rule 41. Although the Committee Note on Subdivision (d) of Rule 41 stated that, "[t]his rule is a restatement of existing law" and cited 18 U.S.C. former §§ 621-624, the language of Rule 41(d) that went into effect in 1946 in fact omitted the former statutory requirement that the law enforcement officer returning the warrant specifically swear before the judge or commissioner to

[1] 18 U.S.C. former §§ 611-633 (June 15, 1917, c. 30, Title XI, 40 Stat. 228).

the truth of the contents of the inventory.

It therefore appears that the language requiring that the inventory be "[s]ubscribed, sworn to, and returned before me," still found on the current search and seizure warrant forms, has not been legally required either by statute or rule for more than 60 years.

Courts interpreting Rule 41 and 18 U.S.C. former §§ 611-633 have universally held that the return and inventory provisions are essentially ministerial in nature and that a failure to comply with them does not invalidate an otherwise constitutional search on a warrant or justify suppression of seized evidence absent a showing of prejudice to the rights of the defendant. *See, e.g. United States. v. Charles*, 138 F.3d 257 (6th Cir. 1998)*; United States v. Dudek,* 530 F.2d 684 (6th Cir. 1976)*; United States v. Harrington*, 504 F.2d 130 (7th Cir. 1974)*; Evans v. United States*, 242 F.2d 534 (6th Cir. 1957)*; Rose v. United States*, 274 F. 245 (6th Cir. 1921)*; see also* 3A CHARLES ALAN WRIGHT, NANCY J. KING, SUSAN R. KLEIN & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE FEDERAL RULES OF CRIMINAL PROCEDURE § 672 "RETURN AND INVENTORY"(3d ed. 2008). Indeed, the Fifth Circuit held in 1923 in *Reisgo v. United States,*285 F. 740 (5th Cir. 1923) that "[t]he admissibility of the warrant was not dependent on the return being sworn to."

Accordingly, on the advice of the forms working group and many magistrate judges, the Administrative Office is considering revising AO Forms 93, 93A, and 109 to conform to the language of Rule 41 by eliminating the requirement that the return and inventory be sworn to before a judge. Before doing so, however, it will ask the forms working group for a specific recommendation at its October 15, 2008 meeting and would like to have the views of the Advisory Committee on Criminal Rules.

Accordingly, the committee is asked to advise the Administrative Office on whether it should proceed to eliminate the requirement on its forms that a return and inventory be sworn to before a judge.

Attachments

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)	Case No.

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____
(identify the person or describe the property to be searched and give its location):

The person or property to be searched, described above, is believed to conceal *(identify the person or describe the property to be seized)*:

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before _____
(not to exceed 10 days)

❒ in the daytime 6:00 a.m. to 10 p.m. ❒ at any time in the day or night as I find reasonable cause has been established.

You must also give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to U.S. Magistrate Judge _____ .

Date and time issued: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

Return

Case No.:	Date and time warrant executed:	Copy of warrant and inventory left with:

Inventory made in the presence of :

Inventory of the property taken and name of any person(s) seized:

Certification

I declare under penalty of perjury that this inventory is correct.

_____
Signature of officer executing warrant

_____
Printed name and title

Sworn to and signed before me on this date.

Date: _____

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)	Case No.

SEARCH AND SEIZURE WARRANT ON ORAL TESTIMONY

To: Any authorized law enforcement officer

I have received, and recorded electronically or by handwriting, sworn testimony communicated to me by *(name the officer)* _____, who has reason to believe that a certain person or specified personal property is concealed in the _____ District of _____ at this location:

The person or property to be searched, described above, is believed to conceal *(identify the person or describe the property to be seized)*:

I am satisfied that circumstances make it reasonable to dispense with a written affidavit and that the oral testimony establishes probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before _____
(not to exceed 10 days)

❒ in the daytime 6:00 a.m. to 10 p.m. ❒ at any time in the day or night as I find reasonable cause has been established.

You must also give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to U.S. Magistrate Judge

_____

Date and time issued: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

I certify that the Judge named above authorized me to sign his or her name.

_____ _____
Applicant's printed name *Applicant's signature*

Return

Case No.:	Date and time warrant executed:	Copy of warrant and inventory left with:

Inventory made in the presence of :

Inventory of the property taken and name of person(s) seized:

Certification

I declare under penalty of perjury that this inventory is correct.

_____
Signature of officer executing warrant.

_____
Printed name and title

Sworn to and signed before me on this date.

Date _____

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Seizure of *(Briefly describe the property to be seized)*	))))))	Case No.

WARRANT TO SEIZE PROPERTY SUBJECT TO CIVIL FORFEITURE
(Under Seal)

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests that certain property located in the _____ District of _____ be seized as being subject to forfeiture to the United States of America. The property is described as follows:

I find that the affidavit(s) and any recorded testimony establish probable cause to seize the property.

YOU ARE COMMANDED to execute this warrant and seize the property on or before _____
(Not to exceed 10 days)

❒ in the daytime – 6:00 a.m. to 10:00 p.m.

❒ at any time in the day or night, as I find reasonable cause has been established.

You must also give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

An officer present during the execution of the warrant must prepare, as required by law, an inventory of any property seized and the officer executing the warrant must promptly return this warrant and a copy of the inventory to United States Magistrate Judge *(name)* _____.

Date and time issued: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

Return

Case No.:	Date and time warrant executed:	Copy of warrant and inventory left with:

Inventory made in the presence of:

Inventory of the property taken:

Certification

I declare under penalty of perjury that this inventory is correct.

_____
Signature of officer executing warrant.

_____
Printed name and title

Sworn to and signed before me on this date.

Date: _____

_____
Judge's signature

_____
Printed name and title

Calendar for March–May 2009 (United States)

March

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

April

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

May

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

Holidays and Observances:

Mar 9 Prophet's Birthday (Islamic)
Apr 9 First day of Passover (Jewish)
Apr 10 Good Friday (Christian)
Apr 12 Easter Sunday (Christian)
Apr 13 Easter Monday (Christian)
Apr 15 Tax Day
Apr 16 Last day of Passover (Jewish)
May 1 Law Day
May 1 National Day of Prayer
May 1 Loyalty Day
May 10 Mother's Day
May 15 Peace Officers Memorial Day
May 15 National Defense Transportation Day
May 22 National Maritime Day
May 25 Memorial Day