ADVISORY COMMITTEE
ON
CRIMINAL RULES

Seattle, WA
October 13-14, 2009

AGENDA
CRIMINAL RULES COMMITTEE MEETING
OCTOBER 13-14, 2009
SEATTLE, WASHINGTON

I. PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of April 2009 meeting in Washington, D.C.

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

D. Minutes of June 2009 Standing Rules Committee meeting

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Time Computation Amendments Approved by the Supreme Court and submitted to Congress (No Memo)

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

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

B. Other Proposed Amendments Approved by the Supreme Court and submitted to Congress (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 warrants to search for or seize electronically stored information.

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

6. Rule 12 of the Rules Governing § 2254 Proceedings. Proposed amendment renumbering provision regarding applicability of Civil Rules.

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

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

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

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

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

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

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

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment authorizing defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrant and inventory by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross referencing to Rule 32.1 provision for participation in revocation proceedings by video teleconference and authorizing defendant to participate in misdemeanor proceedings by video teleconference.

10. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Memo)

- App. 1 - Judge Emmett Sullivan's April 28, 2009 letter to Judge Tallman
- App. 2 - Excerpt Criminal Rules May 2007 Report to Standing Committee
- App. 3 - Text of Rule 16 proposal as submitted to Standing Committee May 2007
- App. 4 - June 5, 2007 letter from DAG Paul McNulty to Judge Levi
- App. 5 - Beale/King Rule 16 Memo Aug. 31, 2009
- App. 6 - Wigglesworth memo Rule 16 Aug. 31, 2009
- App. 7 - DOJ memo Sept. 25, 2009

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

C. Rule 5 and Crime Victims Rights (Memo)

D. Rule 32(h) and Procedural Rules for Sentencing (Memo)

E. Indicative Rulings (Memo)

IV. NEW PROPOSALS

A. Rule 11. Advice on Immigration Consequences of Conviction (Memo)

B. Rule 12. Advice on Right to Appeal (Memo)

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 Work of Sealing Committee.

C. Update on Work of Privacy Subcommittee

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Spring Meeting

B. Other

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Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
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ADVISORY COMMITTEE ON CRIMINAL RULES

Members	Position	District/Circuit	Start Date	End Date
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David M. Lawson	D	Michigan (Eastern)	2010	2013
Rachel Brill	ESQ	Puerto Rico	2006	2013
Leo P. Cunningham	ESQ	California	2006	2013
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2010
Morrison C. England, Jr.	D	California (Eastern)	2008	2011
Lanny A. Breuer	DOJ	Washington, DC	—	Open
Timothy R. Rice	M	Michigan (Eastern)	2010	2013
John F. Keenan	D	New York (Southern)	2007	2010
Andrew Leipold	ACAD	Illinois	2007	2010
Thomas P. McNamara	FED	North Carolina	2005	20
Donald W. Molloy	D	Montana	2007	2010
James B. Zagel	D	Illinois (Northern)	2007	2010
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
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I. A-C

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 6-7, 2009
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 6-7, 2009. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morris C. England, Jr.
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
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
Rita M. Glavin, Acting Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy 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. 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
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court.

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

Judge Tallman welcomed Bruce Rifkin and Rita Glavin, Acting Acting Assistant Attorney General, Criminal Division, Department of Justice.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2008 meeting.

The Committee unanimously approved the minutes.

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

Mr. Rabiej reported that the following proposed rule amendments designed to simplify the computation of time had been approved by the Supreme Court and transmitted to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2009.

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

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

Judge Rosenthal added that corresponding statutory amendments had been introduced in Congress, with bipartisan support. Mr. Rabiej stated that in anticipation of changes to the rules and statutes governing time computation, the Administrative Office was preparing a memorandum that would be circulated to all courts reminding them to check their local rules to conform them to the new changes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed amendment to Rule 15 (Depositions)

The Committee discussed the proposed Rule 15 amendment that had been published for public comment. Judge Keenan, Chair of the Subcommittee on Rule 15, reported that the Subcommittee anticipated that the amendment would be challenged on the basis of *Crawford v. Washington*, 541 U.S. 36 (2004), but remained convinced that the amendment was needed in limited circumstances. The Subcommittee had reviewed the comments made during the public

comment period and agreed with the suggestion made by the Federal Defenders and supported by the Department of Justice that the Attorney General ("AG") or his designee certify or authorize that the deposition is necessary to a prosecution that advances an important public policy interest. The Subcommittee revised the proposed amendment to include this requirement.

There was discussion about which word – "certify" or "authorize" – was appropriate to describe the AG's required action. Adopting any language that *requires* action by the AG raised a separation of powers issue. Debate ensued with some members pointing out that the Department did not object to the requirement and that the requirement served a valuable purpose in limiting the scope of the Rule, while others agreed that requiring specific action by the AG raised concerns.

As an initial matter, it was moved that Rule 15(c)(3)(A) (page 148 of agenda book) be amended to exclude misdemeanor prosecutions from the rule's application by adding "in a felony prosecution" after "material fact."

The motion was approved unanimously.

To avoid directing the AG to act and sidestep the separation of powers issue, Judge Molloy moved to amend the proposed language of Rule (15)(c)(3)(F) (page 149 of agenda book) to read, in its entirety, "for the deposition of a government witness, that the prosecution advances an important public interest."

The motion passed by a vote of 8 to 4.

To impose accountability on federal prosecutors who might invoke the rule, Rachel Brill moved to amend Rule (15)(c)(3)(F) (page 149 of agenda book) to add "the attorney for the government has established" before "that the prosecution."

The motion passed by a vote of 10 to 2.

With these changes, it was moved that the Rule 15 amendment be approved, as revised, and sent to the Standing Committee.

The Committee voted, with three dissents, to approve the proposed Rule 15 amendment, as revised, and send it to the Standing Committee.

The Committee then discussed amendments to the Committee Note following Rule 15. Professor Coquillette reminded the Committee of the general principle that cases should not be cited in a Note because of the danger that they could later be overruled. He also stated that a Note should be neutral and not bear the burden of justifying the accompanying Rule. A member suggested that the cases cited in the first full paragraph of the Note on page 150 of the agenda book were outdated.

It was moved that the Note be amended by striking the case citations on page 150.

The motion was approved unanimously.

To state more broadly the purposes underlying the rule, Judge Molloy moved to amend the first sentence of the first full paragraph on page 150 by substituting "other public interests" for "public safety interests."

The motion was approved unanimously.

To make the Note more concise, Judge Battaglia moved to amend the first sentence of the first full paragraph on page 150 by striking "public policy." Judge Raggi offered a further amendment to end the sentence after the words "trial court." It was so moved.

The motion was approved, with one dissent.

Professor Leipold moved to amend the last paragraph in the Note on page 151 by striking the first sentence in its entirety. The sentence was defensive in tone and was unnecessary.

The motion was approved unanimously.

To make it more readable, Judge Zagel offered a complete substitute for the last paragraph on page 151. Following brief discussion, it was moved that the Committee amend the Note by deleting the final paragraph and substituting the following paragraph in its place:

> The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility are left to the development of the law.

With these changes, it was moved that the Committee Note be approved, as revised, and forwarded to the Standing Committee.

The Committee voted, with one dissent, to approve the proposed Committee Note, as revised, and send it to the Standing Committee.

Judge Rosenthal pointed out that because the amendment to Rule 15 implicated the Rules of Evidence, it might be prudent to refer the amended Rule and accompanying Note to the Advisory Committee on Evidence Rules for review. The Committee agreed.

B. Proposed Amendment to Rule 5 (Initial Appearance)

The Committee discussed the proposed Rule 5 amendment that had been recently published for public comment (page 130 of agenda book). Judge Jones, Chair of the Subcommittee on the Crime Victims' Rights Act ("CVRA"), observed that passage of the CVRA sent a message that victims' interests should be given greater weight. Notwithstanding this observation, several members expressed concern about amending Rule 5 to require a judge to specifically consider the right of a victim to be protected when making a decision on whether to release or detain a defendant. One member stated that the amendment seems redundant and perhaps unconstitutional. Another expressed reservations about whether pressure from Congress should influence the Committee's work in general. A member commented that if the purpose of the amendment is purely to highlight a victim's right to be protected – a right that is already covered through the Rule's incorporation of the Bail Reform Act (18 U.S.C. § 3143) – that such a purpose does not justify changing the Rule.

To incorporate into the rule the principles of the CVRA, Judge Jones moved that Rule 5(d)(3) be amended by adding at the end the following new sentence: "In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant and the requirements of the Bail Reform Act."

The motion to amend Rule 5 failed by a vote of 3 to 9.

The Committee thus decided to leave Rule 5 unchanged and not to send it to the Standing Committee for amendment.

C. Proposed Amendment to Rule 12.3 (Notice of Public-Authority Defense)

The Committee discussed the proposed Rule 12.3 amendment recently published (page 132 of agenda book). The amendment exempts a victim's name and address from the general disclosure requirements of the Rule. Judge Tallman noted that this amendment mirrors a provision that has already become part of Rule 12.1 (Notice of an Alibi Defense). Recalling the witness Michael Nachmanoff's comment that he could not imagine a scenario in which the amendment would be necessary, Judge Zagel described an actual case of his in which the amendment could have been used. After a brief discussion, Judge Jones moved that the Committee send the proposed Rule 12.3 amendment to the Standing Committee.

The Committee voted unanimously to send the proposed Rule 12.3 Amendment to the Standing Committee.

D. Proposed Amendment to Rule 21 (Transfer for Trial)

The Committee discussed the proposed Rule 21 amendment recently published (page 137 of agenda book). The amendment requires a judge to consider the convenience of victims in

deciding whether to transfer a trial to another location. Members observed that although the CVRA established a victim's right not to be excluded from a trial, the law did not create a substantive right to attend a trial. In response, other members underscored the discretionary nature of the amendment, which only requires a judge to consider, as one factor, the convenience of the victims. After further discussion, it was moved that the Committee send the proposed Rule 21 amendment to the Standing Committee.

The Committee voted, with two dissents, to send the proposed Rule 21 Amendment to the Standing Committee.

E. Proposed Amendment to Rule 32.1 (Revoking or Modifying Probation or Supervised Release)

The Committee discussed the proposed Rule 32.1 amendment recently published (page 158 of agenda book). The proposed amendment specifies that a Magistrate Judge must apply the provisions of 18 U.S.C. § 3143(a)(1) in deciding whether to release or detain an alleged violator of probation or supervised release conditions. The amendment also clarifies the burden of proof the alleged violator must meet in order to be released. After discussing the amendment, Rachel Brill moved to revise the proposed amendment by adding the "burden-shifting" language suggested by the Federal Public Defenders (page 166 of agenda book). The proposal places the burden of proof on the government in certain cases when imprisonment is an unlikely result of revocation.

The motion failed by a vote of 4 to 7.

It was then moved that the Committee send the proposed Rule 32.1 amendment as published for comment to the Standing Committee.

The Committee voted, with one dissent, to send the proposed Rule 32.1 Amendment to the Standing Committee.

III. REPORTS OF SUBCOMMITTEES

A. Subcommittee on Rule 12 – Proposed Amendment to Rule 12(b)

Judge England, Chair of the Subcommittee on Rule 12, provided some background to the amendment under consideration. Rule 12 currently sets forth a general requirement that defects in an indictment must be raised before trial. However, the Rule exempts from this requirement motions based upon an indictment's failure to state an offense. *See* Rule 12(b)(3)(B). In 2002, the Supreme Court held in *United States v. Cotton*, 535 U.S. 625 (2002), that defects in an indictment are not jurisdictional and, accordingly, if a defendant fails to raise such a claim at trial, the claim is not necessarily waived and will be subject to only plain error review. In 2006, the Department of Justice asked the Committee to consider amending Rule 12 to eliminate the

exemption for claims of failure to state an offense, thereby requiring such a claim to be raised *before* trial and purportedly bringing it into conformity with *Cotton*. The Department submitted a proposed amendment to this effect. The Federal Defenders oppose the Department's amendment, which they contend imperils rights of defendants, and urge the Committee to let Rule 12 stand.

Since the October 2008 meeting, the Subcommittee on Rule 12 has revised the Department's original proposal and has crafted a compromise that seeks to encourage defendants to raise this issue before trial while preserving a limited option to raise it later, upon a showing that the government's failure to state an offense in the indictment "has prejudiced a substantial right of the defendant."

The Committee discussed the amendment as revised. One member expressed concern that the amendment was unnecessary because the government had not shown that the present Rule was causing problems. The member further expressed concern that the amendment implicated the Fifth and Sixth Amendments. Another member was troubled by the vagueness of the words "prejudice" and "substantial right." However, other members thought that the meaning of these words could be developed through case law and that the amendment was needed to clarify how courts should handle such motions after *Cotton*.

After further discussion, Judge England moved that Rule 12 be amended to require that an indictment's failure to state an offense be raised before trial (as shown on pages 250-251 of the agenda book).

The Committee voted, with four dissents, to send the proposed Rule 12 Amendment to the Standing Committee for publication.

The Committee briefly discussed the proposed amendment to Rule 34 (Arresting Judgment), which conforms the Rule to the amendment approved above to Rule 12(b). It was moved that Rule 34 be amended as shown on page 253.

The Committee voted, with two dissents, to send the proposed Rule 34 Amendment to the Standing Committee for publication.

B. Subcommittee on Technology – Proposed Amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43, 47, and 49.

Judge Battaglia, Chair of the Subcommittee on Technology, reported on the Subcommittee's efforts to incorporate technological advances into the rules. He said that the Subcommittee employed a two-step process: (1) identify those rules which could benefit from advances in technology; and (2) determine whether changing a rule to accommodate new technology would undermine any rights of the parties. Judge Battaglia cited eight rules that the

Subcommittee had identified as amenable to technological amendments: Rules 3, 4, 9, 32.1, 40, 43, 47, and 49.

The Committee discussed the Subcommittee's proposed amendments to Rule 3 (The Complaint) and Rule 4 (Arrest Warrant or Summons on a Complaint). The amendments under consideration would allow a magistrate judge to consider a complaint or issue an arrest warrant "based on information communicated by telephone or other reliable electronic means." Judge Battaglia pointed out that in districts such as his (S.D. Cal.), the distance between a law enforcement agent in the field and a magistrate judge can be vast and these amendments would save considerable time and resources. Another member observed that by making it easier to apply for an arrest warrant from a remote location, the amendments would minimize the number of warrantless searches and provide more judicial oversight of the arrest process.

A member asked whether e-mail would qualify under the rule as a "reliable electronic means." The consensus was that e-mail would qualify but several members pointed out that e-mail alone would not be sufficient under the proposed Rule to obtain an arrest warrant or to have a complaint considered. A live conversation between a judge and an agent would also always be necessary, at a minimum, to place the agent seeking the warrant or consideration of a complaint under oath. Judge Battaglia added that the process would always result in a written document that reflected how the warrant was obtained.

Discussion ensued about whether the Rules should continue to permit a state or local judicial officer to issue a warrant or consider a complaint if a federal judge is unavailable. Given that some districts encompass huge geographic areas and have few federal judges assigned to them, the Committee agreed that keeping state and local judges as a backup if federal judges were not available was a good idea. The Committee recognized that even though the amendment would make it easier to reach a federal judge, occasions would arise when no federal judge would be available. To preserve this option, Judge Zagel moved to retain the language in Rule 3 (lines 20-21 on page 255 of agenda book) that permits a state or local judge to consider a complaint in person.

The motion was approved unanimously.

It was further moved that the "electronic means" option under Rules 3 and 4 be restricted to federal judges.

The motion was approved unanimously.

To facilitate the return of an executed warrant, it was further moved that the proposed amendment to Rule 4(c)(4) providing that an officer may return an arrest warrant to a judge by electronic means (page 258, lines 8-9) be approved.

The motion was approved unanimously.

To allow for the use of a "duplicate original" document, it was further moved that the proposed amendment to Rule 4(c)(3)(A) (page 257, lines 18 and 21), providing that an officer executing an arrest warrant may show a defendant either an original or a "duplicate original," be approved. Judge Battaglia explained how obtaining a warrant by electronic means creates two different documents that both function as originals, leading to the phrase "duplicate original."

The motion was approved unanimously.

The Committee turned to the procedures for obtaining a warrant or considering a complaint. The amendment proposed by the Subcommittee incorporated by cross reference the procedures set forth in Rule 41(d)(3) and 41(e)(3). A member pointed out the danger of relying upon a cross-reference, *i.e.,* that if the procedures contained in Rule 41 were later amended or repealed, the same changes would be incorporated into Rule 4. Instead of using a cross reference, the Committee considered the alternative of repeating the Rule 41 procedures in Rule 4. Several members suggested a third alternative: to consolidate the procedures for all electronic applications into one Rule.

Acting on this suggestion, Judges Battaglia and Tallman, with the assistance of Professors Beale and Leipold, drafted a consolidated rule, entitled "Rule X.X" as a placeholder, which was circulated to members of the Committee. Rule X.X consolidates the procedures for using electronic means to obtain search and arrest warrants or to obtain a complaint. In addition, the draft included new versions of Rules 3 and 4, newly-revised to contain a cross reference to Rule X.X.

It was moved that the Committee approve the amended Rule 3, as revised by the group, and send it to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 3 to the Standing Committee for publication.

The Committee briefly discussed the new Rule 4(d), as revised by the group. It was moved that the Rule be approved with two minor changes to make the subdivision more readable: substitution of "A magistrate judge" for "The court," at the beginning of the sentence, and deletion of "a" before "telephone." So revised, it was moved that the amended Rule be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 4 to the Standing Committee for publication.

The Committee proceeded to discuss the new, consolidated Rule X.X. After brief discussion, it was moved that to concisely state the purpose of the rule, subdivision (a) of the proposed rule be amended to read as follows:

(a) *In General.* Where a magistrate judge deems it appropriate, he or she may consider information communicated by telephone or other reliable electronic means when deciding whether to approve a complaint or to issue an arrest warrant, a summons, or a search warrant.

The motion was approved unanimously.

Turning to subdivision (b) of the proposed Rule X.X, the Committee discussed the procedures that would apply to the approval of a complaint or the issuance of a warrant or summons under the Rule. A member asked whether the requirement that a judge place an applicant under oath could be fulfilled by e-mail or a means other than by telephone. Another member suggested that the Rule should not limit itself to a specific technological method in this regard. Judge Raggi suggested that this subdivision should be drafted to present judges with a clear checklist that they could easily follow. To that end, it was suggested that the subsequent subdivisions (c) through (f) be redesignated as paragraphs (4) through (7) of subdivision (b). A member observed that amending the rules to embrace technological advances raised the question of whether the rules should actively encourage the use of technology or merely make it available as an option.

After further discussion, it was moved that the Committee approve proposed paragraph (1) of Rule X.X(b), which requires a judge proceeding under the rule to place the applicant for a warrant under oath.

The motion was approved by a vote of 9 to2.

It was then moved, by individual motions, that the Committee approve proposed paragraphs (2) through (7) of Rule X.X(b). The paragraphs list the procedures applicable to the issuance of warrants under the rule.

The motions were each approved unanimously.

The Committee discussed subdivision (c) of Rule X.X, which limits the suppression of evidence obtained pursuant to an arrest or search warrant to cases when law enforcement officers have acted in bad faith. A member noted that the subdivision is based upon the Supreme Court decision in *United States v. Leon*, 468 U.S. 897 (1984), which was recently extended to evidence seized based upon a defective arrest warrant. *See Herring v. United States*, __ U.S.__, 129 S. Ct. 695 (2009). It was moved that subdivision (c) be approved.

The motion was approved by a vote of 10 to 1.

A member noted that through its promotion of the use of technology, Rule X.X might indirectly discourage face-to-face encounters between judges and applicants for warrants. To

counterbalance that effect, a member suggested that a new paragraph be added to subdivision (b) that would read as follows:

> The magistrate judge may examine the applicant or affiant and any witness that the applicant or affiant produces.

It was moved that the new subdivision be approved and added to Rule X.X(b).

The motion was approved by a vote of 10 to 1.

It was moved that the Committee send the new Rule X.X, as revised, to the Standing Committee for publication. (The placement and number of the rule will be decided at a later time.)

The Committee voted unanimously to send the proposed Rule X.X to the Standing Committee for publication.

The Committee then considered the final part of the group's draft, which amended Rule 9 (Arrest Warrant or Summons on an Indictment or Information) by adding at the end a new subdivision to permit a judge to consider information communicated electronically. With the deletion of "a" before "telephone," it was moved that the new subdivision be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 9 to the Standing Committee for publication.

Professors Beale and King pointed out that in light of the creation of Rule X.X, Rule 41 (Search and Seizure) needed to be amended to contain a cross reference to the new rule. Accordingly, it was moved that Rule 41(d)(3) and (e)(3) be amended to read as follows:

> **Requesting and Issuing a Warrant by Telephone and Other Reliable Electronic Means.** A magistrate judge may issue a search warrant based on information communicated by telephone or other reliable electronic means. The procedures in Rule X.X govern the application for and the issuance of such a warrant.

The motion was approved unanimously.

It was further moved that Rule 41, as amended, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 41 to the Standing Committee for publication.

The Committee then considered two l amendments to Rule 47 and 49 (pages 269-70 of agenda book). The proposed amendments clarified that motions can be filed electronically (Rule 47) and that if so filed, the motion will be considered a "written paper" for purposes of the rules (Rule 49). It was moved that the proposed amendment to Rule 47 be approved, and, so revised, the proposed amendment be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 47 to the Standing Committee for publication.[1]

The proposed amendment to Rule 49 was revised to correct a typographical error by replacing "or" before "the United States" with "of," after which it was moved that it be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 49 to the Standing Committee for publication.

The Committee turned to the proposed amendment to Rule 1 (page 272 of agenda book). The amendment adds a definition of "telephone" to the list of definitions that apply to the rules. After revising the Note following the proposed amendment by striking as unnecessary the word "new" on line 9, it was moved that the amendment be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 1 to the Standing Committee for publication.

The Committee discussed the proposed amendment to Rule 32.1 (Revoking or Modifying Probation or Supervised Release) (page 261 of agenda book). The amendment adds a new subdivision (f) at the end of Rule 32.1 to permit a defendant on request to participate in proceedings under the Rule through video teleconferencing. A member noted that this amendment would be very useful in situations when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence. Rather than require the defendant to return to the original district, causing delay and inconvenience for the defendant, the proposed amendment allows the individual to remain where the alleged violation occurred. Another member voiced a concern that although useful, the amendment could become a "slippery slope" towards sentencing by video. Another raised a concern that defendants might be pressured into appearing by video, to save the government transportation costs if the defendant was indigent. Professor King pointed out that the use of video teleconferencing could be triggered only by the defendant's request, which ensures that it is the defendant's choice whether to proceed by video or in person.

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[1] The Committee subsequently voted, by email, to withdraw this amendment after it was deemed unnecessary.

It was moved that the proposed amendment to Rule 32.1 permitting teleconferencing be approved and sent to the Standing Committee for publication.

The Committee voted with four dissents to send the amended Rule 32.1 to the Standing Committee for publication.

The Committee considered the Note accompanying Rule 32.1 (page 261 of agenda book). Judge Raggi suggested that the language on lines 10-12 be amended to give a judge greater flexibility in choosing how to preserve the defendant's rights. Judge Tallman offered an amendment that substituted the following sentence for the sentence beginning on line 10: "If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel." It was moved that the Note be approved as revised and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Note to Rule 32.1 to the Standing Committee for publication.

Finally, the Committee considered two conforming amendments that reflect the proposed amendment to Rule 32.1(f), permitting video teleconferencing. First, it was moved that Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) (page 261 in agenda book) be amended by adding at the end a new subdivision, permitting video teleconferencing to be used, and, so revised, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 40 to the Standing Committee for publication.

Next, it was moved that Rule 43 (Defendant's Presence) (page 268 in agenda book) be amended to include a cross reference to Rule 32.1 and to add video teleconferencing as an option for a defendant who does not wish to appear in person for a misdemeanor offense, and, so revised, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 43 to the Standing Committee for publication.

With that, the Committee concluded its consideration of the amendments proposed by the Technology Subcommittee. Judge Tallman thanked Judge Battaglia for his diligent efforts and leadership of that subcommittee.

C. Subcommittee on Sentencing – Proposed Amendment to Rule 32(h) and Procedural Rules for Sentencing

Judge Molloy, Chair of the Subcommittee on Sentencing, reported on the two amendments under consideration to Rule 32 (Sentence and Judgment). Under Rule 32(c)(1)(A), a probation officer prepares a presentence report (PSR) for the court's consideration in sentencing. Under Rule 32(h), the court must give the parties reasonable notice if it is contemplating a departure from the applicable sentencing range and the ground for the possible departure is not mentioned in the PSR or in submissions filed by the parties. The first amendment under consideration, which originated in a proposal from the American Bar Association (ABA), would ensure that parties receive the same information as the probation officer preparing the PSR. The second amendment would require a court to give notice not just of a possible departure but also of a possible "variance" from a sentence under the guidelines.

1. Procedural Rules for Sentencing

To assist the Committee in its deliberations of the first amendment under consideration, two members of the Pretrial and Probation Division of the Administrative Office presented their views. Jim Olsen, Chief of Criminal Law Policy, spoke first and briefly discussed how the proposed amendment would increase the workload of probation officers and might alter a probation officer's neutral role in the sentencing process. Next, John Fitzgerald, Probation Administrator, expanded on these points. Referring to the ABA's proposed amendment on page 286, Mr. Fitzgerald described in more detail how the amendment would greatly increase a probation officer's workload by requiring the officer to distribute to the parties written summaries of interviews conducted by the officer in preparing the PSR. An officer might have 15-20 such interviews to summarize under the ABA amendment. This new duty has the potential to increase a probation officer's workload tremendously.

Mr. Fitzgerald also cited other concerns with the proposed amendment. The amendment could place probation officers in the middle of disputes between the parties. In addition, the proposed duty to disclose information could conflict with confidentiality restrictions imposed by law. Mr. Fitzgerald suggested that the goal of the proposed amendment – to increase transparency in the preparation of the PSR – could be achieved in other ways, such as revising portions of the manual used by probation officers or making an officer's sentencing recommendation more available to the parties.

The Committee briefly questioned Mr. Olsen and Mr. Fitzgerald. Mr. Wroblewski pointed out that the Department had prepared an alternative to the ABA proposal that sought to increase the flow of information but with a more modest change to the probation officer's duties. A member observed that the Federal Defenders had concerns about the Department's proposal.

Professor Beale noted that at this point, there was no consensus on how to best proceed to make the preparation of PSRs a more transparent process. She suggested that perhaps an academic conference could be arranged to bring together interested parties to further examine the issue. Another member said that many defense attorneys are not able to challenge important information underlying PSRs and the issue needs attention.

Judge Tallman said that although he felt some pressure to address the issue, the sense of the Committee appeared to be to collect more information and become more fully informed before acting. He noted that a study by the Federal Judicial Center on the views of probation officers was being prepared and that the Sentencing Commission was holding regional meetings. Accordingly, he recommitted to the Sentencing Subcommittee consideration of the Rule 32(c) issue, with a request that it prepare a draft amendment for presentation to the Committee at the meeting in October.

2. Rule 32(h)

The Committee turned to the proposed amendment to Rule 32(h), which would require a court to give notice to parties of a possible "variance" from a sentence under the guidelines, in addition to notice of a "departure" from the guidelines. Several members expressed concern about the difficulty of giving such notice, because the information upon which a judge relies may be continually supplemented right up to the time that sentence is pronounced. Therefore, it is hard to predict whether a variance from the guidelines may be imposed. Judge Raggi suggested that perhaps the issue is premature and the Committee might consider waiting until the Supreme Court had provided more clarification on post-*Booker* guidelines sentencing.

Noting that there was no consensus among the members at this point to change Rule 32(h), Judge Tallman said that further consideration of the amendment would be deferred.

D. Subcommittee on Victims' Rights – Proposed Amendment to Rule 12.4

Judge Jones reported on the Subcommittee's consideration of a possible amendment to Rule 12.4 (Disclosure Statement). Rule 12.4(a)(2) requires the government to disclose the identity of any organization that is a victim of a crime and, if the organization is a corporation, to make further financial disclosures. The Committee on Codes of Conduct had asked the Committee to look at whether the disclosure requirements should be expanded so that judges would be able to decide more easily whether recusal is advisable. The Subcommittee had considered whether Rule 12.4 should be expanded to include disclosure of individuals' identity, and also to require organizational victims themselves – as opposed to the government – to make financial disclosures.

Judge Jones reported that after due consideration, the Subcommittee had concluded that no amendment to Rule 12.4 is necessary. Judge Jones stated that the privacy concerns raised by disclosure of an individual's identity would outweigh any marginal assistance the information would provide to a judge. Therefore, the Subcommittee recommended that no action be taken. It was so moved.

The motion was approved unanimously.

Judge Tallman stated that he would write a letter to Judge Margaret McKeown, Chair of the Committee on Codes of Conduct, informing her of this result.

Mr. Wroblewski reported on efforts by the Department of Justice to communicate with the victims' rights community. As described more fully in his letter dated March 2, 2009 (page 332), Department representatives have held biannual discussions with victims' groups. During these discussions, the Department has informed the groups of relevant work being done by the Committee and solicited their concerns, if any, about the Federal Rules of Criminal Procedure. The Department also plans to continue meeting periodically with other victims' groups to seek their views.

IV. 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

Mr. Rabiej reported that bipartisan bills amending 28 statutes that contain time provisions affecting court proceedings had been introduced in the House and Senate. The bills use the exact language proposed by the rules committees. Judge Rosenthal has met with members of Congress as well as staff and prospects for quick passage of the bill seem good.

B. Update on Work of Sealing Subcommittee

Judge Zagel reported that he had no updates on the work of the Sealing Subcommittee, whose next meeting is scheduled for June 2, 2009.

C. Criminal Forms

Mr. Wroblewski reported that the AO's Forms Working Group had requested the Department of Justice to review many of the criminal forms that the Group has been revising. He said that the Group had accepted many of the Department's suggestions but that one disagreement remained regarding AO Form #102, used to apply for a tracking warrant (page 382 in agenda book). The Department is concerned with language in the form that refers to a request to "use the tracking capabilities of" a device such as cell phone. Mr. Wroblewski stated that courts were in disagreement over whether this type of request required probable cause and that the AO form implicitly endorsed a position that probable cause was required. (The full details of DOJ's concerns are contained in the letter from Assistant Attorney General Elisebeth Cook on page 380 of the agenda book).

Mr. McCabe stated that the form in question had been created in response to a request from magistrate judges for a generic form for all tracking devices. He said that Judge Russell Eliason, a member of the Forms Working Group, had addressed Ms. Cook's concerns in a letter to Judge Harvey Schlesinger (page 367 of agenda book). Summarizing Judge Eliason's views,

Mr. McCabe said that the form takes no position with regard to whether probable cause is required. He added that the AO decided to post the form on its website, notwithstanding the controversy, due to the requests from magistrate judges. Professor Beale added that the website also had a caveat regarding the legal issue. Judge Battaglia said he thought the form was a good starting point that could be adapted and revised by a local court as the law develops. Mr. Wroblewski concluded the discussion by saying that the Department was not requesting any action by the Committee and that discussion of the form at today's meeting was merely for informational purposes.

Mr. McCabe further reported that the Forms Working Group had removed personal identifiers from forms, consistent with the privacy protections set forth in Rule 49.1 (Privacy Protection for Filings Made with the Court).

D. Memorandum from Judge Rosenthal regarding Privacy Subcommittee

Judge Rosenthal reported that the Executive Committee of the Judicial Conference had revived the Subcommittee that had been formed after passage of the E-Government Act of 2002, and its new name is the Privacy Subcommittee. It will be chaired by Judge Raggi and its first meeting will be in June 2009. The Privacy Subcommittee will examine many issues related to the difficult task of providing public access to court documents while simultaneously protecting the privacy rights of those involved with the judicial process.

Judge Raggi offered two observations: (1) that advances in technology make it increasingly hard to shield sensitive information; and (2) new challenges will likely arise with the advent of computers in prisons. Several members confirmed that prisons in their districts already had computers accessible to prisoners.

Judge Tallman remarked that alien registration numbers are often indispensable to the judicial process. For example, he cited immigration cases that he had worked on that involved individuals with identical names. Without the "A number" assigned to each individual and their respective administrative file, he would not have been able to tell which file pertained to which individual.

Mr. Wroblewski commented that people frequently assume that "publicly available" means "available on the internet." However, competing values, such as privacy, challenge that assumption and weigh in favor of a distinction between the two. He offered as an example financial disclosure forms, which he said could be available for public inspection, but not posted on line.

Judge Rosenthal asked all judges to keep Judge Raggi informed of any effective measures that they had taken to address these concerns.

E. Criminal Law Committee's Proposal Regarding Probation/Pretrial Officers

Judge Tallman reported that he had communicated with Judge Julie E. Carnes regarding the Criminal Law Committee's proposal to authorize Probation and Pretrial Services officers to obtain search warrants. He said that according to Judge Carnes, further consideration of the matter was awaiting completion of a study by the AO.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman advised the Committee that the next meeting was scheduled for October 13-14, 2009, at the newly-renovated William K. Nakamura Courthouse in Seattle, Washington. Judge Tallman thanked Judge Jones and Judge Battaglia, who were leaving the Committee after finishing their terms, for their exemplary contributions. The meeting was adjourned.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 1-2, 2009
Washington, D.C.
Draft Minutes

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure met in Washington, D.C., on Monday and Tuesday, June 1 and 2, 2009. The following members were present:

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

Deputy Attorney General David Ogden attended part of the meeting for the Department of Justice. The Department was also represented throughout the meeting by Karyn Temple Claggett, Elizabeth Shapiro, and Ted Hirt.

Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble. Professor Nancy J. King, associate reporter to the Advisory Committee on Criminal Rules, participated in part of the meeting by telephone.

Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee, participated in portions of the meeting.

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
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	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 S. Elizabeth Gibson, 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

Changes in Committee Membership

Judge Rosenthal noted that several membership changes had taken place since the last meeting. She pointed out that Professor Daniel Meltzer had resigned from the committee to accept an important position in the White House. She emphasized that he had been a superb member and would be sorely missed at committee meetings. She noted, though, that Professor Meltzer had stayed in touch with the committee and would attend its group dinner.

She reported that this was the last official meeting for Judge Hartz and Mr. Beck, whose terms will expire on October 1, 2009. She pointed out that both would be honored at the January 2010 meeting.

In addition, she noted that this was Judge Stewart's last meeting as chair of the Advisory Committee on Appellate Rules. She pointed out that Judge Stewart was truly irreplaceable as a judge, friend, and colleague. She noted that he had been a remarkable chair, and the Chief Justice had extended his term for a year. The new chair, Judge Jeffrey S. Sutton, will represent the advisory committee at the next Standing Committee meeting.

Judge Rosenthal reported, sadly, the recent death of Mark I. Levy, a distinguished attorney member of the Advisory Committee on Appellate Rules. A resolution honoring him had been prepared and would be sent to his widow by Judge Stewart. Judge Rosenthal extended the committee's sympathies and gratitude to his family for his many contributions.

Recent Actions Affecting the Rules

Judge Rosenthal reported that little action at the March 2009 session of the Judicial Conference had directly affected the rules committees, although several items on the Conference's consent calendar indirectly affected the rules. She noted, for example, that the Court Administration and Case Management Committee had recommended that courts provide notice on their dockets of the existence of sealed cases. Also, she said, the Court Administration and Case Management Committee had proposed guidelines for filing and posting transcripts that are designed to safeguard privacy interests, including matters arising during jury voir dire proceedings. She noted that the Standing Committee's privacy subcommittee, chaired by Judge Raggi, would meet to discuss a wide range of privacy and security matters immediately following the committee meeting.

Judge Rosenthal reported that the Supreme Court had approved all the rules recommended by the committee and had sent them to Congress on an expedited basis. She noted that the committee had successfully pursued legislative changes to 28 statutes that specify time limits and would be affected by the time-computation rules. The legislation had just passed both houses of Congress and been enacted into law. The statutory changes will take effect on December 1, 2009, the same time that the new time-computation rules take effect. She added that coordinated efforts were also underway to have all the courts update their local rules by December 1 to harmonize them with the new national time-computation rules.

Judge Rosenthal thanked Judge Thomas W. Thrash, Jr., former committee member, for his assistance in promoting the recent legislation, and Congressman Hank Johnson, who introduced it and was very helpful in shepherding it through Congress. On behalf of the committee, Professor Coquillette expressed special thanks to Judge Rosenthal for leading the concerted and challenging efforts to get the legislation enacted.

On behalf of the Executive Committee, Judge Scirica extended his appreciation to the committee for its excellent work. He noted that the Chief Justice continues to praise Judge Rosenthal for her work, including her impressive legislative accomplishments.

Legislative Report

Judge Rosenthal reported that Judge Kravitz would testify again in Congress on behalf of the Judicial Conference in opposition to the proposed Sunshine in Litigation Act. The legislation, she explained, would impose daunting requirements before a judge could issue a protective order under FED. R. CIV. P. 26(c). The judge would have to first find that the proposed protective order would not affect public health or safety – or if it would, that the protection is needed despite the impact on public health and safety. All of this would occur even before discovery begins.

Judge Kravitz noted that the American Bar Association opposed the legislation, and other bar associations were likely to follow. In addition, he said, the hope is that the Department of Justice would formally oppose the legislation. He pointed out that the bill was well-intentioned in trying to protect public health and safety, but the mechanism it uses to do so was not at all practical. He noted that he was the only witness to be invited by the sponsors to testify against the bill.

Judge Rosenthal explained that the Judicial Conference opposes the legislation it would amend the federal rules outside the Rules Enabling Act process. She noted that empirical evidence demonstrates clearly that judges are doing a good job in dealing with protective orders and in balancing private and public interests. The Sunshine in Litigation Act, though, would impose significant burdens on judges, requiring them to make findings when they have little information on which to base those findings.

Judge Kravitz added that if there is a problem in some cases with protective orders, it arises largely at the state level, not in the federal courts. He noted that there is also little understanding by the legislation's sponsors of how the civil litigation process actually works. The thought, he said, that a federal judge would be able to read through all the documents that could be discovered in order to find a smoking gun is truly misguided.

Mr. Rabiej reported that the Judiciary's implementation of the new privacy rules had been questioned by a special-interest group seeking to make all government information available to the public on the Internet without restrictions and without cost. He noted that the group had discovered that some documents filed by parties and posted on the courts' electronic PACER system contained unredacted social security numbers. He added that the privacy subcommittee would consider the matter and address a number of other privacy issues at its upcoming meeting immediately following the Standing Committee meeting.

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 12-13, 2009.

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 8, 2009 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 1

Judge Stewart reported that the proposed amendment to Rule 1 (scope of the rules, definition, and title) was straightforward. It would define "state" for purposes of the appellate rules to include the District of Columbia and any U.S. commonwealth or territory.

Professor Struve added that, after the public comment period had ended, the advisory committee received a letter from an attorney in New Mexico asking it to expand the rule's definition of a "state" to include Native American tribes. She noted that the committee had discussed the request at length at its April 2009 meeting and had decided that the matter merited more time to develop because it implicates a number of different

rules and issues. Accordingly, the matter had been added to the advisory committee's study agenda. At the same time, though, the committee urged immediate approval of the proposed amendment to Rule 1.

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

FED. R. APP. P. 29

Judge Stewart reported that the proposed amendments to Rule 29(a) and (c) (amicus curiae brief) would add a new disclosure requirement on authorship and funding support received by an amicus in preparing its brief. The amendments had been modeled after the Supreme Court's recently revised Rule 37.6, although the advisory committee had to make a few adjustments because of differences in practice between the Supreme Court and the courts of appeals. Professor Struve added that the proposed amendment to Rule 29(a) would simply conform the rule to the proposed new definition of a "state" in Rule 1(b).

She noted that the advisory committee had received seven sets of public comments on the proposed amendments and had also considered the comments that had been submitted when the proposed revision to Supreme Court Rule 37.6 was published for comment. The comments, she said, had been very helpful, and the advisory committee had made two changes in the rule following publication. First, it reordered the subdivisions to place the authorship and disclosure provision in a new paragraph 29(c)(5).

Second, it revised subparagraph 29(c)(5)(C) to remove a possible ambiguity in the published language. The revised language would require an amicus to include in its brief a statement that "indicates whether . . . a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person." The revised language makes it clear that, if no such person has provided financial support for the brief, the amicus must state that fact expressly, rather than simply say nothing about funding. Professor Struve also pointed out that some public comments had suggested imposing a complete ban on funding amicus briefs, rather than merely requiring disclosure. But, she said, other commentators suggested that a ban would raise constitutional issues.

Professor Struve added that a suggestion had been received to delete the words "intended to fund." But, she explained, the advisory committee did not adopt it because the proposed alternative language — "contributed money toward the cost of the brief" — was too broad. Similar breadth in the version of Supreme Court Rule 37.6 published for comment had attracted vigorous opposition. It was later revised by the Court to use "intended to fund." She explained that without the "intended to fund" language, the disclosure requirement could require disclosure of membership dues and other indirect

financial support. Therefore, both the Supreme Court rule and the proposed appellate rule use the words "intended to fund" to make clear that the rule does not cover mere membership dues in an organization. Rather, the funding disclosure applies only when a party or counsel has contributed money with the intention of funding preparation or submission of the brief.

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

FED. R. APP. P. 40

Judge Stewart reported that the proposed amendments to Rule 40 (petition for a panel rehearing) had been presented to the Standing Committee before. They would clarify the time limit for filing a petition for rehearing in a case where an officer or employee of the United States is sued in his or her individual capacity for an act or omission occurring in connection with official duties. Originally, he explained, the Department of Justice had also sought a companion change in Rule 4 (appeal) to clarify the time limit for filing an appeal in a case where an officer or employee is sued individually for acts occurring in connection with official duties.

But, he said, the Supreme Court's decision in *Bowles v. Russell,* 551 U.S. 205 (2007), had seriously complicated any attempts to amend Rule 4. In essence, *Bowles* held that appeal time periods established by statute are jurisdictional in nature. Since the 60-day time limit for filing an appeal under Rule 4(a)(1)(B) is also established by statute, 28 § U.S.C. § 2107, there was a question whether the time period should be changed by rulemaking rather than legislation. Therefore, the Department decided to abandon the effort to amend Rule 4.

Rule 40, however, is not covered by statute. So the Department continued to seek the proposed amendments to that rule. Nevertheless, the advisory committee asked the Department to consider whether it preferred to pursue a legislative solution to deal with both situations.

Judge Stewart pointed out that a case currently pending before the Supreme Court raises the question of the application of the Rule 4 deadline in a qui tam action. *United States ex. rel. Eisenstein v. City of New York,* 129 S.Ct. 988 (2009). In view of the pendency of the case, the Department had asked that the Rule 40 proposal be held in abeyance (along with the Rule 4 proposal) to give it time to consider whether a single statutory fix might be a better approach. In addition, the Department was concerned that there could be a trap for the unwary if Rule 40 were to be amended before Rule 4 catches up. Therefore, even though the advisory committee had voted unanimously to proceed with amending Rule 40, it had decided to defer seeking final approval until the Supreme Court has acted in *Eisenstein.*

The committee without objection by voice vote approved remanding the proposed amendment back to the advisory committee.

FORM 4

Judge Stewart reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) would be amended to conform to the new privacy rules that took effect on December 1, 2007, by removing the request for full social security numbers and other personal identifier information. He noted that the Administrative Office had already made interim changes to the version of Form 4 that it posts on the Judiciary's website. Nevertheless, the official form needs to be changed to ratify those interim changes.

A member asked why a court needs all the information now required on Form 4, such as the street address, city, or state of the applicant's legal residence. Some of that information, for example, may be available from other documents, such as the pre-sentence investigation report. Other information, such as the applicant's years of schooling, may be of little use to the court.

Professor Struve explained that the advisory committee at this time was merely attempting to conform the form to the new privacy rules. It had not yet considered matters of substance. In fact, she said, the advisory committee planned to take up these issues later, and it may decide to draft two separate versions of the form to address the requests of judges for both a short version and long version of the form. Judge Stewart added that the advisory committee had a number of questions about the form and had asked its circuit-clerk liaison, Fritz Fulbruge, to survey his clerk colleagues on how the form is used in the courts.

A participant cautioned that the advisory committees should be careful not to let the privacy rules reach too far. At some point, he said, a court needs to have full information about certain matters. Another participant stated that the other parties in a case are entitled to review the petitioner's in forma pauperis application. But the applications are generally not placed in the official case file or posted on the Internet for public viewing.

The committee without objection by voice vote approved the proposed changes in the form for approval by the Judicial Conference.

Informational Items

Judge Stewart reported that the appellate and civil advisory committees had created a joint subcommittee to study a number of issues that intersect or overlap both

sets of rules, including "manufactured finality," the impact of tolling motions, and the impact of the Supreme Court's ruling in *Bowles v. Russell.*

Judge Stewart emphasized the advisory committee's shock and sadness at learning of the death of Mark Levy. He noted that Mark had participated actively in the advisory committee's April 2009 Kansas City meeting and had been responsible for a number of important proposals. He said that the advisory committee will present a resolution of remembrance and gratitude to Mrs. Levy. In addition, he had sent her some photographs that he had taken of Mark at recent advisory committee meetings in Charleston and Kansas City. She, in turn, had sent him a very nice note of appreciation.

Judge Stewart thanked the Standing Committee for its support of him personally and the advisory committee during his four years as chair. He also extended his special thanks to Professor Struve for her tireless, thorough, and uniformly excellent work.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in further detail in Judge Swain's memorandum and attachments of May 11, 2009 (Agenda Item 7).

Amendments for Final Approval

FED. R. BANKR. P. 1007, 1014, 1015, 1018, 1019, 4004, 5009, 5012, 7001, 9001

Professor Gibson reported that the advisory committee was seeking final approval of all but one of the proposed changes it had published for comment in August 2008. The committee, she said, would republish proposed new Rule 1004.2 for further comment because it had made a significant change in response to the first round of comments.

The amendments and proposed new rules, she explained, fall into several categories. Six of the provisions principally implement new chapter 15 of the Bankruptcy Code, governing cross-border insolvencies: FED. R. BANKR. P. 1014 (dismissal and change of venue), FED. R. BANKR. P. 1015 (consolidation or joint administration of cases), FED. R. BANKR. P. 1018 (contested petitions), FED. R. BANKR. P. 5009(c) (closing cases), new FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in chapter 15 cases), and FED. R. BANKR. P. 9001 (general definitions).

Professor Gibson said that amendments to two rules would change the procedure for seeking denial of a discharge on the grounds that the debtor has received a discharge

within the prohibited time period to get a second discharge. She explained that all objections to discharge are currently classified as adversary proceedings and must be initiated by complaint. But, as revised, FED. R. BANKR. P. 4004 (grant or denial of discharge) and FED. R. BANKR. P. 7001 (scope of the Part VII adversary proceeding rules) would allow certain objections to discharge to be initiated by motion, rather than complaint. The advisory committee, she added, had received some helpful technical comments on the amendments and had decided as a result to make changes in the placement of the provisions. Originally, the proposal would have set forth the principal change in Rule 7001. But a former member pointed out that since Rule 7001 introduces the Part VII adversary proceeding rules, it should not begin by referring to a contested matter. Therefore, the advisory committee had moved the key provision to Rule 4004(d). The change, she said, would not require republishing.

Three of the rules, she said, deal with the statutory obligation of individual debtors to file a statement that they have completed a personal financial management course. Amended FED. R. BANKR. P. 1007(c) (lists, schedules, statements, and time limits) would extend the deadline for filing the statement from 45 to 60 days after the date set for the meeting of creditors. This would allow the clerk of court, under proposed new FED. R. BANKR. P. 5009(b) (notice of failure to file the statement), to send a notice within 45 days to anyone who has not filed the required statement that they must do so before the 60-day period expires. Rule 4004(c)(4) (grant of discharge) would be amended to direct the court to withhold the discharge until the statement is filed.

Professor Gibson stated that the advisory committee had received one comment from a bankruptcy judge that the noticing obligation would place an undue burden on the clerks of court. But a survey taken of the clerks by the committee's bankruptcy-clerk liaison, James Waldron, had shown that many send out the notice now, and it would not impose a major burden to require it.

Professor Gibson said that FED. R. BANKR. P. 1019 (conversion of a case to chapter 7) would provide a new period to object to exemptions when a case is converted from chapter 11, 12, or 13 to chapter 7. The amendment would give creditors a new period to object – unless the case had previously been in chapter 7 and the objection period had expired, or it has been pending more than a year after plan confirmation. The advisory committee had received one comment on the rule from the National Association of Bankruptcy Trustees supporting the rule but not supporting the one-year provision.

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

FED. R. BANKR. P. 4001

Professor Gibson reported that the advisory committee recommended approval of two changes to Rule 4001 (relief from the automatic stay and other matters) without

publication because they are simply conforming amendments. Rule 4001 contains two time-period adjustments that had been overlooked and not included in the package of time-computation rules that will take effect on December 1, 2009.

OFFICIAL FORM 23

The advisory committee would also make a change in Official Form 23 (debtor's certification of completing a financial management course) without publication to conform to the change being made in Rule 1007. It would revise the instructions regarding the time for consumer debtors to file their certificate of having completed a personal financial management course. The proposed change in the form would become effective on December 1, 2010, at the same time that the proposed amendment to Rule 1007 takes effect.

The committee without objection by voice vote approved the proposed amendments to Rule 4001 and Official Form 23 without publication for approval by the Judicial Conference.

Amendments for Publication

FED. R. BANKR. P. 1004.2

Professor Gibson explained that the advisory committee would republish proposed new Rule 1004.2 (petition in a chapter 15 case) because it had made a substantive change in subdivision 1004.2(b) in response to public comments following the August 2008 publication.

An entity filing a chapter 15 petition to recognize a foreign proceeding must state in the petition the country where the debtor has the "center of its main interests." A party may challenge that designation. A commentator argued, persuasively, that the proposed 60-day time period allowed in the August 2008 version of the rule for a party to challenge the designation was simply too long. Therefore, the advisory committee would now set the deadline to file a challenge at 7 days before the hearing on the petition unless the court orders otherwise.

The committee without objection by voice vote approved the proposed new rule for republication.

FED. R. BANKR. P. 2003, 2019, 3001, 3002.1, 4004

Professor Gibson highlighted some of the other proposed changes to be published, focusing on two that she said were likely to attract a good deal of attention.

Rule 2019 (representation of creditors and equity security holders in Chapter 9 and 11 cases), she explained, is a long-standing rule that requires disclosure of interests by representatives of creditors and equity security holders. She noted that the advisory committee had received suggestions from trade associations that the rule be deleted on the grounds that it is unnecessary and over-inclusive.

On the other hand, the advisory committee had received comments from the National Bankruptcy Conference, the American Bar Association's Business Bankruptcy Committee, and two bankruptcy judges in the Southern District of New York that the rule should not be eliminated. Rather, it should be rewritten and expanded in scope, both as to whom it applies and what information they must disclose. In response, the advisory committee added a broader definition to the rule to require disclosures from all committees and groups that consist of more than one creditor or equity security holder, as well as entities or committees that represent more than one creditor or equity security holder. The court would also have discretion to require an individual party to disclose.

In addition, the amended rule would expand the type of financial disclosure that must be made beyond just having a financial interest in the debtor. As revised, a party in interest would have to disclose all "disclosable economic interests," defined in the rule as all economic rights and interests that establish an economic interest in a party that could be affected by the value, acquisition, or disposition of a claim or interest.

The purpose of the expanded rule, she said, was to provide better information on the motive of all parties who assert interests in a case to help the court ascertain whom they represent and what they are trying to do. In addition, the advisory committee had reorganized the rule to clarify the requirements and specify the consequences of noncompliance.

Professor Gibson explained that the proposed amendments to Rule 3001(c) (proof of claim based on a writing) and new Rule 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would govern home mortgages and other claims in consumer cases. Rule 3001(c) specifies the supporting information that must be attached to a proof of claim. She pointed out that claims today are often filed by financial entities that the debtor has never heard of because they are bought and sold in bulk freely on the market. Amended Rule 3001(c) would tighten up the documentation requirements to allow the debtor to see what claims are legitimate, what fees are being charged, and what defaults are alleged. Proposed subdivision 3001(c)(2)(D) specifies the consequences for a claim holder of not complying with the rule.

Professor Gibson explained that new Rule 3002.1 would work in tandem with the Rule 3001(c) changes and would govern mortgage claims in chapter 13 cases. It is common for debtors to attempt to cure their mortgage defaults and maintain their payments under the chapter 13 plan in order to keep their home. But problems arise with mortgage securitization, as holders of the mortgages change. The amounts of arrearages

claimed on the mortgage, as well as various penalties and fees, are not clear to either the debtors or the trustees. Debtors, for example, often believe that they have cured the default, but after the plan is completed and the case closed they face a new default notice with a variety of new fees added on. Accordingly, the proposed rule would require full disclosure by the mortgage holder of both the amounts needed to cure and any fees and charges assessed over the course of the plan. The proposed rule also provides for a final cure and sanctions for not following the prescribed procedures.

Professor Gibson reported that some bankruptcy courts have been following a similar procedure on a local basis with considerable success. The bankruptcy system, she said, should benefit from the national uniformity that the rule will bring.

One member questioned the wisdom of adding new sanctions provisions to the rules. He suggested that it is unusual to have sanctions set forth in separate rules, rather than in a general sanctions provision, such as those in FED. R. CIV. P. 11 and FED. R. BANKR. P. 9011.

Professor Gibson explained that the two proposed amendments are very different from the other rules because they deal with the specific requirement that a creditor give a debtor information about the amount of the mortgage or other consumer claims. Judge Swain added that there are very few other sanctions provisions in the bankruptcy rules, and they tend to deal with very practical disclosure issues. FED. R. BANKR. P. 2019 (representation of creditors and equity security holders in chapter 9 and 11 cases), for example, authorizes a court to refuse to hear from a party that has failed to disclose. Proposed Rules 3001(c) and 3002.1, she said, attempt to have the creditor focus specifically on fees and charges tacked onto mortgages.

OFFICIAL FORMS 22A, 22B, 22C

Professor Gibson reported that the proposed changes in the means test forms were designed to conform the forms more closely to the language and intent of the 2005 bankruptcy legislation. Judge Swain explained that the revisions would replace the term "household size" in several places on the forms with "number of persons" in order to count dependents in a way that is consistent with Internal Revenue Service nomenclature.

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

Informational Items

Judge Swain reported that the advisory committee was working on two major projects that would have a major impact on the bankruptcy rules and forms.

REVISION OF THE BANKRUPTCY APPELLATE RULES

First, Judge Swain said, the advisory committee was reviewing comprehensively Part VIII of the Federal Rules of Bankruptcy Procedure, governing appeals from a bankruptcy court to a district court or bankruptcy appellate panel. The current rules had been modeled on the Federal Rules of Appellate Procedure (FRAP) as they existed more than 20 years ago. Since that time, though, the FRAP have been amended several times and restyled as a body. The Part VIII bankruptcy rules, she said, are no longer in sync with them.

She pointed out that Eric Brunstad, a former advisory committee member and distinguished appellate attorney, had drafted for the committee a revised set of rules to bring the Part VIII rules up to date. The two principal goals that the advisory committee would try to achieve are:

1. to clarify the rules – because the current rules are obscure and difficult in many respects; and

2. to eliminate the "hourglass" effect, under which page limits imposed on appeals from the bankruptcy court to the district court later undercut a party's further appeal to the court of appeals.

Judge Swain reported that the advisory committee had convened a very successful special subcommittee meeting in March 2009, to which it had invited a variety of interested parties to discuss their experience with the current rules and suggest how the rules might be improved. She said that the meeting had demonstrated that there is a great deal of support for pursuing the project to revise the part VIII rules.

On the other hand, concern had been expressed by several participants that it would not be advisable to pattern the bankruptcy rules strictly after the current Federal Rules of Appellate Procedure because the bankruptcy courts have made enormous progress in taking advantage of technology. Since most bankruptcy courts and courts hearing bankruptcy appeals now operate with electronic case files and electronic filing, several of the current appellate rules are outdated or immaterial. For example, she said, courts using electronic records are no longer concerned with the colors of briefs or with many of the other requirements devised for a purely paper world. She said that the advisory committee would attempt to draft new appellate rules that take electronic record-keeping fully into account. She added that the committee will conduct another special subcommittee meeting in the fall and is grateful for Professor Struve's collaboration in its work on the bankruptcy appellate rules.

BANKRUPTCY FORMS MODERNIZATION

Second, Judge Swain reported that the advisory committee had made a good deal of progress on its major project to update and modernize the bankruptcy forms. She noted that its forms subcommittee had conducted an extensive analysis and

deconstruction of all the information contained in the forms currently filed at the commencement of a bankruptcy case. It had also obtained the services of a professional forms consultant who has worked for the Internal Revenue Service and the Social Security Administration in formulating questions for the general public and making forms more user-friendly and effective in eliciting required information.

She added that the advisory committee's forms subcommittee was also working closely with the group designing the "Next Generation" electronic system that will replace CM/ECF with a new system that will take full advantage of recent advances in electronics and add new functionality. She pointed out that several individuals and organizations had asked the judiciary to build a greater capacity into the new system to capture, retrieve, and disseminate individual data elements provided by filers on the standard bankruptcy forms. She noted that the forms modernization subcommittee will meet again on June 26, 2009, at the Administrative Office.

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 8, 2009 (Agenda Item 5).

Amendments for Final Approval

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

Judge Kravitz reported that the advisory committee in August 2007 had published a proposal to eliminate discharge in bankruptcy as an affirmative defense that must be asserted under Rule 8(c) (pleading affirmative defenses) to avoid waiver. He noted, though, that the Department of Justice had objected to the change.

Judge Eugene R. Wedoff, a member of the Advisory Committee on Bankruptcy Rules, had acted as the civil advisory committee's liaison with officials in the Department on the matter, but had been unable to reach an agreement with them. The civil advisory committee then asked the Advisory Committee on Bankruptcy Rules formally to consider the proposed amendment. That committee too supported eliminating the bankruptcy-discharge defense from Rule 8. The civil advisory committee met again in April 2009 and invited both Judge Wedoff and the Department to make presentations.

After a lengthy discussion, the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8. Judge Kravitz explained that the advisory committee was convinced that inclusion of a bankruptcy discharge as an affirmative defense is simply wrong as a matter of law because the Bankruptcy Code for

years has made all debts discharged in bankruptcy legally unenforceable. They cannot be asserted in any judicial proceedings. Nevertheless, the current rule has misled some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense. The advisory committee, he said, believed that it was important to eliminate a rule that is continuing to lead some judges to err.

Judge Swain added that the Advisory Committee on Bankruptcy Rules was in complete agreement with those views. Professor Gibson added that the only complication in the matter was that even though a debtor may obtain a discharge in bankruptcy, there are certain statutory exceptions to the discharge. A question might arise in future litigation, for example, over whether a particular type of debt excluded from the discharge in the bankruptcy litigation may still be enforced legally. She explained that this issue is what had caused the Department's concerns. Nevertheless, she said, the proposed amendment to Rule 8 was needed because it will eliminate a trap.

Judge Kravitz reported that Judge Wedoff had prepared some language that might be added to the committee note to reinforce Professor Gibson's point. Ms. Shapiro said that the Department of Justice rested on the statements that it had already made on the matter. She added, though, that the proposed additional language for the committee note will go a long way to easing the Department's concerns.

The committee without objection by voice vote approved adding the proposed, bracketed language to the committee note.

The committee, with one objection (the Department of Justice), by voice vote approved the proposed amendment to Rule 8(c) for approval by the Judicial Conference.

FED. R. CIV. P. 26

Judge Kravitz expressed his gratitude to Judge David G. Campbell and Professor Richard L. Marcus for serving superbly as chair and reporter, respectively, of the advisory committee's Rule 26 project. He noted that the project had been very thorough and had produced a set of balanced, well-crafted amendments that will reduce discovery costs and make a practical, positive difference in the lives of practicing lawyers.

Judge Kravitz reported that the proposed amendments to Rule 26 (disclosures and discovery) enjoyed wide support among bench and bar, and among both plaintiff and defendant groups. Among the supporters were the American Bar Association, its Section on Litigation, the American College of Trial Lawyers, the Association of the Bar of New Jersey, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, the American Institute of Certified Public Accountants, and the Department of Justice. The amendments had been opposed only by a group of law professors. Their concerns, he said, had been carefully considered, but not shared, by the advisory committee.

Judge Kravitz explained that the amendments would accomplish two results. First, they will require lawyers to disclose a brief summary of the proposed testimony of non-retained expert witnesses whom they expect to use. This change should eliminate the confusion that now exists regarding the testimony of treating physicians, employees, and other non-retained experts.

Second, the rule will place draft reports of retained experts and communications between lawyers and their retained experts under work-product protection. In doing so, it will reduce costs, focus the discovery process on the merits of an expert's opinion, and channel lawyers into making better use of experts. At the same time, though, the amendments will not eliminate any valuable information that may be elicited during the discovery phase of a case. Judge Kravitz explained that little useful information is available today under the current rule because lawyers use stipulations and a variety of other practices to prevent discoverable information from being created in the first place.

These other practices are unnecessary and wasteful. One common practice is to hire two sets of experts – one to testify and the other to consult with the litigation team. In addition to being inefficient, the practice gives a tactical advantage to parties with financial resources. Another artificial discovery-avoidance tactic involves using experienced experts who make extraordinary efforts not to record any preliminary draft report in order to prevent discovery.

He noted that the advisory committee had made a few changes in the draft following publication of the amendments. It had eliminated the last paragraph of the committee note, referring to use of information at trial, and added a new sentence in the

note. Both emphasize that the rule does not undercut the gate-keeping role and responsibilities of judges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The advisory committee had also changed the wording of Rule 26(b)(4) from "regardless of the form of the draft" to "regardless of the form in which the draft is recorded" to better capture the idea of drafts recorded electronically, while precluding the concept of an "oral" draft report.

The advisory committee, however, had decided not to extend the protection against disclosure enjoyed by retained expert witnesses to non-retained experts. There had been, he said, public comments recommending that the protection be extended at least to employees. The advisory committee, he said, may do so in the future. But for now, it had decided to defer the issue for a number of reasons. Most importantly, the committee believed that it could not proceed with a change because it had not signaled it sufficiently to the public and would have to republish the proposal. In addition, he explained, drafting a provision to extend the protection would be very tricky, as many employees are both fact witnesses and experts. There are also questions regarding former employees vis-a-vis present employees. Moreover, if the provision were limited to employees, it may be seen as tilting more towards defendants, rather than plaintiffs, and the advisory committee wants to be scrupulously neutral on the issue.

Several members praised the work of the advisory committee and said that the proposed amendments would eliminate the need for stipulations and artificial devices now used to avoid the rule. They suggested that the amendments will allow discovery of witnesses to proceed more openly and honestly. Members said that the advisory committee had done an excellent job of working through and accommodating the various public comments. Judge Kravitz added that Judge Campbell and Professor Marcus deserved the lion's share of the credit for the work.

The committee without objection by voice vote approved the proposed amendments to Rule 26 for approval by the Judicial Conference.

FED. R. CIV. P. 56

Judge Kravitz reported that the major project to revise Rule 56 (summary judgment) had been an exercise in rule-making at its very best. The advisory committee, he said, had taken full advantage of empirical research by the Federal Judicial Center (Joe Cecil), the Administrative Office (Jeffrey Barr and James Ishida), and Judge Rosenthal's staff (Andrea Kuperman). It had prepared and circulated several different drafts and had conducted three public hearings and two mini-conferences with lawyers, judges, and professors. The advisory committee, he said, had listened carefully to the views of people with very differing ideas, and it had made several changes in the proposed rule as a result of the public hearings and written comments.

The rules process, in short, had worked exactly as it should. He offered his special thanks to Judge Michael M. Baylson, chairman of the Rule 56 subcommittee, for his dedication and leadership in producing a greatly improved rule governing a central component of the civil litigation process. He also thanked Professor Cooper, the committee's reporter, for his enormous assistance and wise counsel during the project.

Judge Kravitz reported that the advisory committee had announced two overarching goals for the project at the outset. First, it did not want to change the substantive standard for summary judgment in any way. Second, it did not want the rule to tilt in either direction, towards plaintiffs or defendants. Both goals, he said, had been achieved.

The advisory committee also had two other goals in mind. First, it had set out to bring the text of the rule in line with the way that summary judgment is actually practiced in the courts today. Second, it wanted to bring some national uniformity to summary judgment practice. The committee, Judge Kravitz said, had accomplished the first goal. The second goal, he said, had been accomplished in part.

Judge Kravitz reported that the advisory committee had made three changes in the rule from the version that had been published.

First, it had eliminated from the rule the requirement of a point-counterpoint procedure based on the comments of several judges and lawyers who have used the procedure and believe that it imposes unnecessary expense. Several judges who testified at the public hearings, including Judges Holland, Lasnik, Wilken, and Hamilton, had been articulate in opposing the point-counterpoint procedure on the basis of their personal experience. But, he said, many other judges and lawyers, including the chair and several members of the advisory committee, believe that the procedure is quite effective.

Judge Kravitz emphasized, though, that all sides agree that, regardless of the specific procedure used to handle summary judgment motions, it is essential that lawyers provide pinpoint citations to the record to back up their assertions. Therefore, the advisory committee had decided to allow districts to continue with their own procedures for eliciting the facts, but uniformly to require pinpoint citations. He added that, even without the prescribed point-counterpoint procedure, the revised rule embodies a number of other good new features, such as specifically acknowledging partial summary judgment, limiting motions to strike, and addressing non-compliance.

The second significant change made following publication was to re-introduce the word "shall" into the text of the rule. As revised in new Rule 56(a) it would specify that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"Shall," he said is an ambiguous term and should not normally be used in drafting. But the dilemma that the advisory committee faced was that the word "shall" had acquired a substantive meaning in former Rule 56(c).

"Shall" had been used in the rule for decades until replaced with "should" as part of the 2007 general restyling of the civil rules. But in revisiting the matter in depth, Judge Kravitz said, the advisory committee simply could not find an appropriate replacement term for "shall," based on the pertinent case law. Neither "should" nor "must" are completely accurate. Many public comments, moreover, had asserted that selecting one or the other term would be viewed as making a change in substance and tilting the playing field. The advisory committee, he said, had even tried to formulate a revision using the passive voice, but decided that the alternative might inflict even more damage.

After hearing all the arguments, Judge Kravitz said, the advisory committee had returned to the vow that it had made at the outset of the project – not to change the substantive standard for granting summary judgment as developed in each circuit under the historical term "shall." Therefore, it decided to return to "shall" and allow the case law to continue to deal with that term. If, however, the Supreme Court were to change the substantive standard in the future, the advisory committee could later adjust the language of the rule. In essence, he said, the advisory committee does not advocate use of the term "shall" in drafting, but it had faced an unsolvable problem. The ambiguity in Rule 56 was so intractable that it could not be changed without affecting substance.

The third change made following publication was to eliminate the national rule's proposed time schedule for filing motions for summary judgment, responses to those motions, and replies to the responses. With elimination of the point-counterpoint procedure, there was no longer a need to retain all the deadlines. The advisory committee had been unanimous in deciding to specify only the deadline for filing a summary judgment motion and not to prescribe a schedule for further filings and responses. He noted that there is, for example, no other place in the Federal Rules of Civil Procedure where the rules fix briefing schedules, and it would not be appropriate to specify them for just one category of motions. In addition, he said, some lawyers recommended that the rule provide for sur-replies, which would have complicated the rule further.

The advisory committee had also been concerned about the time-computation rules that take effect on December 1, 2009. They will incorporate the time periods to respond and reply in the existing Rule 56, only to have a completely revised rule delete those time periods on December 1, 2010, when the new Rule 56 would take effect. The advisory committee concluded, however, that it needed to produce the best rule possible for the future, even though there might be some confusion for a year.

Finally, Judge Kravitz explained that the advisory committee had considered at length whether to republish the rule, since several changes had been made following the August 2008 publication. But it decided unanimously not to do so because, at the Standing Committee's direction, it had already solicited the public's comments on a number of specific issues. The revised rule, he said, does not add any provision not fully noticed to the public. Rather, the advisory committee merely eliminated some provisions of the published rule.

Several committee members agreed that the rules process had worked at its best to facilitate a healthy public debate on summary judgment practice and to produce a very workable new rule. Several noted that legitimate differences of opinion had been expressed on some of the major issues, and the advisory committee had accommodated the differing views as well as possible. Some pointed out that they personally favored the point-counterpoint procedure, but recognized that it could not be forced on all the courts, particularly those that have tried and rejected it. They noted, though, that individual judges and districts that have adopted the procedure will be free to continue using it.

Support was voiced for the advisory committee's decision to return to use of the word "shall' in Rule 56(a) on the grounds that it preserves the substantive standard for granting summary judgment. A few members went further and suggested that "shall" is an appropriate term to use in drafting, despite the style conventions. The committee's style consultant, Professor Kimble, though, disagreed and asserted that "shall" is never appropriate. He suggested that a different formulation might still be developed to maintain the substantive standard.

Judge Rosenthal emphasized that the advisory committee's dilemma had been to resolve a conflict between two competing principles. First, as part of the restyling process, all the advisory committees have consistently eliminated the word "shall." But the higher principle that prevailed was avoiding making any change in the substantive standard for summary judgment. She noted that, in the interests of improving style by changing "shall" to "should" in the 2007 restyling amendments, the committee had actually changed the substantive law in some circuits.

A member suggested adopting a public comment to replace "as to" with "about" in proposed Rule 56(a)(2). The style consultant agreed that the change was better stylistically, but several members urged that the change not be made since it was not essential. One member added that the current language is almost a sacred phrase and should not be tinkered with.

The committee without objection by voice vote agreed not to make the proposed additional change in the language of Rule 56(a)(2).

Another member expressed concern over the language in proposed Rule 56(c)(2) authorizing a party to assert in its response or reply that the other party's material cited to

support or dispute a fact "cannot be presented in a form that would be admissible in evidence." He suggested that the language had been revised from the formulation presented to the public for comment, *i.e.*, that the material "is not admissible in evidence." The revised language, he said, appeared to require the judge to make a ruling on the potential future admissibility of evidence.

Judge Kravitz explained that affidavits and other materials submitted as part of the summary judgment process are not evidence. Professor Cooper added that the published language was too broad because it cannot be known until trial what evidence will be admissible. Some public comments, he said, had suggested alternative language, such as "would not be admissible" or "could not be put in a form that would be admissible." The specific language added after publication was intended to show that something more than an affidavit is needed. There is no need for the objecting party to make a separate motion to strike. In addition, failure to challenge the material during summary-judgment proceedings does not forfeit the party's right to challenge its admissibility at trial.

Other members suggested that the change in language was helpful because it lays out an option for parties to deal with an issue that arises often as part of summary-judgment practice, though not specified in the current rule. When a party objects that a submission cannot be produced in any admissible form, it allows the judge to cut through the issues and remedy any technical problems as part of the summary-judgment motion itself, rather than wasting time on motions to strike. Judge Kravitz pointed out that the revised rule gives the judge flexibility to tell a party that it has not presented the material in an admissible form, to give the party an additional opportunity to correct the defect, and to fashion an appropriate remedy.

One member suggested that the problem with the language may be that it could be construed as requiring the moving party to carry some burden, such as to show that the other party cannot present evidence in an admissible form. The word "cannot" appeared to be the problem. She suggested that it be changed to "could not." It was also suggested that the chair and reporter of the advisory committee consider possible modifications in the language.

Judge Kravitz recommended, alternatively, that an explanatory sentence be added to the committee note. He pointed out that in the situation covered by the provision, there is no doubt that the party has not properly presented the pertinent material, but it is difficult to say that it "cannot" be so presented. He suggested adding language to the note to explain that an assertion that the opponent could not produce material in admissible form functions like an objection at trial. The proponent of the material can then either show that it is admissible or explain the admissible form that is anticipated.

A member stated that the text of the rule was perfectly appropriate. An objector only has to assert that the material cannot be presented. The moving party then has the burden of showing that it can.

Another member suggested that the rule might be rephrased to say something like: "If an objection has been made that the material has not been presented in a form that can be admissible at trial, the court may require (or allow) the proponent of the material to show that it can be presented in an admissible form." Judge Kravitz pointed out, though, that the advisory committee was trying to get away from motions to strike. It would prefer to have parties address the matter in their summary-judgment briefs.

Other members said that the language of the rule, as modified after publication, was correct. One pointed out that proposed Rule 56(c)(2) must be read together with proposed Rule 56(c)(4), which states that an affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. The trial judge can easily handle any problems that arise. A member declared that it is a very interesting issue in theory, but will not be a real problem in practice.

A member suggested substituting the word "object" for "assert." "Assert" requires the opponent to know, or allege, that the material cannot be presented in admissible form. "Object" makes it clear that the opponent is only raising the point, placing the burden on the proponent. Judge Kravitz explained that the advisory committee had used the word "assert" because it is a word commonly used to refer to a point mentioned in a brief. He agreed to change it to "object."

The committee with one objection by voice vote approved changing "assert" and "asserting" in proposed Rule 56 to "object" and "objecting."

The committee without objection by voice vote then approved the proposed amendments to Rule 56 for approval by the Judicial Conference.

The committee without objection by voice vote further approved the proposed amendments without republication.

A member suggested adding language to the committee note to alert the reader that the revised rule places the burden on the parties to raise the point that the submitted material cannot be presented in an admissible form.

The committee by a vote of 7 to 3 approved making the suggested addition to the committee note.

Amendment for Publication

SUPPLEMENTAL RULE E(4)(f)

Professor Cooper noted that Rule E(4)(f) (in rem and quasi in rem actions – procedure for release from arrest or attachment) would be amended to delete the last sentence because it has been superseded by statutory and rule developments. The statutes cited in the rule, 46 U.S.C. §§ 603 and 604, were repealed in 1983. Deletion of the reference to them seems entirely appropriate, and publishing the amendment for public comments might also flush out any arguments that other statutes should be invoked.

Deletion of the reference to forfeiture actions, though, is more complicated. Rule G, which took effect in 2006, governs forfeiture actions in rem arising from a federal statute. It also specifies that Supplemental Rule E continues to apply to the extent that Rule G does not. The problem, he said, is how best to integrate Rule G with Rule E(4)(f). The proposed amendment would strike the last sentence of Rule E(4)(f) and let courts figure it out on a case-by-case basis. The Department of Justice, he said, had suggested adding a sentence stating that Rule G governs hearings in a forfeiture action.

Professor Cooper added that the advisory committee recommended publishing the rule for comment. But since the proposed changes are relatively minor, the publication should be deferred until other amendments to the civil rules are proposed and the proposed amendment to Supplemental Rule E(4)(f) can be included in the same publication.

The committee without objection by voice vote approved the proposed amendment for publication at an appropriate future time.

Informational Items

Judge Kravitz reported that the advisory committee would convene a major conference on the state of civil litigation to be held at Duke Law School in May 2010. He noted that Judge John G. Koeltl would chair the conference, and the Federal Judicial Center was helping him compile empirical data for the program. He pointed out that Judge Koeltl was working with the Litigation Section of the American Bar Association on a survey of its members. In addition, Judge Koeltl had persuaded RAND and others to produce papers and other information for the conference. He had put together a comprehensive agenda and was now securing moderators and panel members. The Chief Justice will deliver a taped message. The program may be broadcast by Duke, and the Duke Law Review is expected to publish the proceedings.

Judge Kravitz reported that a special subcommittee chaired by Judge Campbell and assisted by Professor Marcus was considering a range of potential changes to Rule 45 (subpoenas). The subcommittee was in the process of seeking input and planning for mini-conferences with the bench and bar.

Judge Kravitz reported that a joint subcommittee comprised of members of the civil and appellate advisory committees had been appointed and will begin studying several issues that intersect both sets of rules. In addition, the civil advisory committee was examining issues arising when judges are sued in their individual capacities, including service in those cases. One suggestion is to require that service be made on the clerk of the court where the judge sits.

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 11, 2009 (Agenda Item 9).

Amendments for Final Approval

VICTIMS' RIGHTS AMENDMENTS

FED. R. CRIM. P. 12.3

Judge Tallman reported that the proposed amendment to Rule 12.3 (notice of public-authority defense) would conform the rule with a similar amendment made recently in Rule 12.1 (notice of alibi defense). He noted that the change was appropriate, even though the public-authority defense arises rarely.

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

A member pointed out that proposed Rule 12.3 and Rule 12.1 both permit the district court in certain circumstances to order the government to turn over to the defendant the names and telephone numbers of victims, which would otherwise be protected. She recommended that both rules require the Government to inform the protected persons that their names and numbers are being disclosed. Judge Tallman replied that proposed Rule 12.3(a)(D)(ii) explicitly authorizes a court to fashion a reasonable procedure to protect the victims' interests.

FED. R. CRIM. P. 21

Judge Tallman reported that the proposed amendment to Rule 21(b) (transfer for trial) would allow a court to consider the convenience of any victim in making a decision to transfer a case for trial.

A member questioned the need for the rule since it is not required by the Crime Victims' Rights Act. Judge Tallman pointed out that the advisory committee has been

concerned over criticism that it has not been expansive enough in making changes to the rules to implement the Act. Professor Beale added that this was one of the few rules where the advisory committee had made changes that go beyond what is mandated by the Act. She explained that the advisory committee wants to incorporate victims' rights as fully as possible without doing damage to the carefully balanced criminal justice system. Victims' rights groups, she said, have expressed a particularly strong interest in victims being able to attend court proceedings, and the proposed amendment to Rule 21 would further that interest. She pointed out, though, that the committee had made several other, more significant changes in the rules for victims at earlier meetings.

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

FED. R. CRIM. P. 5

Judge Tallman reported that the advisory committee had withdrawn its proposed change to Rule 5 (initial appearance) because it felt the current language adequately referenced the statutes providing consideration of the safety of victims and the community. The proposal would have required a court, in making the decision to detain or release a defendant at an initial appearance, to consider the right of any victim to be reasonably protected from the defendant.

Professor Beale explained that the advisory committee had been concerned that by singling out one situation, it had put its finger on the scales and changed the substantive law. The proposed amendment, moreover, was redundant and unnecessary. The Bail Reform Act, she said, is a carefully balanced and nuanced law, and just singling out one factor in support of victims could cause more damage than good. But in light of the politics of the situation, the decision to withdraw the amendment had not been an easy one for the committee.

A member agreed that many of the victims' rules amendments were not necessary, but clear political implications counsel in favor of including them. The Crime Victims' Rights Act, he said, emphasizes particularly the safety of victims. Therefore, this may be one area where a rule amendment may be advisable. Victims are particularly vulnerable to being harmed by defendants who have been released. He said, moreover, that he had not been persuaded by the argument that the proposed amendment would change the substantive law.

Judge Tallman pointed out that the Federal Magistrate Judges Association, whose members apply the rule every day, oppose changing the rule because they view the Bail Reform Act and the Crime Victims' Rights Act as sufficient, and changing the rule would upset the careful balance of the statutes. Judge Rosenthal added that the rule already

speaks of detention or release "as provided by statute," which covers both the Bail Reform Act and the Crime Victims' Rights Act.

Members questioned whether the Standing Committee is authorized to initiate its own rules proposals or to forward to the Judicial Conference a proposed amendment that has been withdrawn or rejected by an advisory committee. Professor Coquillette suggested that the Rules Enabling Act appears to contemplate the Standing Committee confining itself to reviewing the recommendations of the advisory committees.

A member recommended sending the matter back to the advisory committee for further consideration. But Judge Tallman pointed out that the advisory committee had already published the rule for comment, had then discussed it thoroughly, and had voted unanimously not to proceed with the amendment. He said that he was not sure that returning the matter to the committee would change the result.

A participant suggested, though, that other statutory changes may be made in the future. Sending the rule back to the advisory committee, rather than rejecting it, would keep the matter alive and be advisable as a matter of policy. A member added that the advisory committee might be asked to include the matter as part of its ongoing study of how the courts are implementing the Crime Victims' Rights Act. Professor Beale added that there is a careful balance between that statute and the Bail Reform Act, and the advisory committee will continue to monitor the situation closely to make sure that any problems are addressed.

The committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

OTHER AMENDMENTS

FED. R. CRIM. P. 15

Judge Tallman reported that the advisory committee had briefed the Standing Committee before on the proposed amendments to Rule 15 (depositions). Recommended by the Department of Justice, they would allow the government – under certain limited conditions – to take a deposition in a criminal case outside the United States and outside the physical presence of the defendant, with the defendant participating by electronic means. Before allowing the deposition to proceed, the trial court would have to make case-specific findings on the following six factors:

1. the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

2. there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
3. the witness's presence for a deposition in the United States cannot be obtained;
4. the defendant cannot be present because: (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;
5. the defendant can meaningfully participate in the deposition through reasonable means; and
6. for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

Judge Tallman explained that the Fourth Circuit had already approved procedures similar to those set forth in the proposed amendment and had held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. *United States v. Ali,* 528 F.3d 210 (4th Cir. 2008), *cert. denied,* 129 S. Ct. 1312 (2009).

Judge Tallman pointed out that an analogous proposal for a change to Rule 26 (taking testimony) had been forwarded to the Supreme Court in 2002, but the Court rejected it on Confrontation-Clause grounds in an opinion by Justice Scalia. The advisory committee, he said, recognized fully that there may also be confrontation issues with the new proposal. But it also recognized that the practical need for the amendment is substantial, and it had been carefully crafted to address the Confrontation-Clause factors considered by the Supreme Court in 2002. He added that, unlike the proposed amendments to Rule 26, the proposed amendment to Rule 15 deals only with the taking of depositions and not the later admissibility of their contents at trial, which is where the Confrontation Clause issue arises.

Judge Tallman noted that there had been opposition to the proposed rule, as expected, from the defense bar. As a result, the advisory committee had limited the rule's reach to make sure that a deposition is restricted to evidence necessary to the government's case. But the committee did not adopt three other suggestions made by the defense bar during the comment period: (1) to limit the rule to government witnesses; (2) to require the government to show that the deposition would produce evidence "necessary" to its case; and (3) to require the government to show that it had made diligent efforts to secure the witness's testimony in the United States.

Deputy Attorney General Ogden thanked the committee for its attention to the matter and emphasized that the proposed rule is of substantial importance to the Department of Justice. It would be needed only in a few cases, but the depositions would

be very important in those cases. The detailed procedures will require the Department to go to a great deal of trouble and expense to obtain the testimony. Arranging for a foreign deposition is costly and difficult, so it will not be pursued lightly, and the rule will be used only in cases that are vitally important to the United States.

Mr. Ogden said that the Department fully recognizes the importance of the issues under the Confrontation Clause. But, he said, the careful conditions that the rule specifies go a long way to shield the proposal from constitutional infirmity. The rule, he assured the committee, will not be taken lightly. Using the rule will be expensive because the government will likely also have to pay for defense counsel. And it will have to get the cooperation of the State Department and the approval of the foreign country involved. Moreover, the trial court has to approve taking the deposition, and it can do so only after having made all the requisite findings specified in the rule.

A member pointed out that subparagraph 15(c)(3)(F) is the only part of the rule that refers to the government. The rest of the rule would also apply to defendants. Professor Beale explained that the federal defenders had wanted to limit the rule to government witnesses, but the advisory committee did not agree. In fact, the committee had been surprised that the suggestion had come from the defenders. The defenders, she said, had suggested that they would very rarely use the device. As a matter of policy, though, the advisory committee believed that the rule should not be just a one-way street.

A participant suggested that the proposed amendments will have an impact on the admissibility of declarations against penal interest under FED. R. EVID. 804(b)(3). To admit evidence under Rule 804, he said, a party must show that the declarant was not only absent from trial, but cannot be deposed. Under proposed Rule 15, and its expanded possibilities to conduct depositions, declarations against penal interest will be admissible less often.

A member expressed strong opposition to the proposed amendments, asserting that they were directly contrary to the Confrontation Clause. He said that the committee should not recommend rules that are constitutionally debatable. That alone, he said, should be grounds for not proceeding further.

In addition, he said, there was no empirical support for the rule. Normally, he said, the advisory committee asks for data and background information. In this case, the procedures differ widely from country to country. The advisory committee needs to have a clearer understanding of the different procedures and requirements imposed around the world. It also needs to know more specifically how big a problem the government actually faces without the rule. In addition, he said, many additional procedural safeguards required by the developing case law had not been included in the proposed amendments, including some of the requirements set forth in the *Ali* case. The key question, he said, is not how rarely the proposed authority will be exercised, but whether it is fundamentally sound.

He noted that subparagraph 15(c)(3)(F) specifies that the procedure may only be invoked if there is "an important public interest." But, he noted, the government claims an important public interest in every prosecution. The provision, consequently, is not meaningful. Subparagraph 15(c)(3)(E) requires that the defendant be able to participate in the deposition by "reasonable means," but that standard is too vague. In addition, it is unclear how the government will show that the witness cannot be obtained. He concluded that if this rule were so important to the country, it should be enacted by legislation, rather than by rule.

A member pointed out that the Confrontation Clause can still be used to prevent any testimony elicited at the foreign deposition from being used in court. Mr. Ogden agreed that admissibility questions must still be addressed in each case, but said that courts are competent to make the case-by-case decisions that the rule requires.

A member suggested that the rule would be very helpful because it would provide national uniformity on a matter that individual courts currently have to struggle with. She said that trial courts need guidance and a framework for dealing with foreign depositions. Another participant said, however, that it may be premature for the committee to bless the specific proposed procedure and suggested that the Department might consider adopting an internal guide rather than seeking a rule.

Professor Beale said, though, that the proposed rule would create a desirable template to guide the Department and the courts on taking depositions. She pointed out that the rule is procedural in nature. She emphasized that the evidence produced at the deposition still must face other obstacles under the Confrontation Clause and the Federal Rules of Evidence when the government tries to admit the testimony.

Another member expressed concern about proceeding by rule at this point and questioned whether the advisory committee had pinned down all the procedures correctly. Perhaps some additional flexibility may be needed. Moreover, she suggested, the advisory committee may be underestimating how often the defense might want to invoke the rule. The principal justification for the rule is that the courts need some procedural guidance on taking foreign depositions. But in light of the lack of definitive information at this point, it might be better to defer on a rule and consider providing other kinds of guidance to the courts, such as memoranda, white papers, or studies.

A participant asked whether the Department of Justice had considered proceeding with an internal Department memorandum based on the existing case law, rather than seeking a controversial rule. Mr. Ogden responded that the Department had conducted an extensive review of the matter and had taken an official position that seeking a federal rule is the best way to proceed.

A member added that the government faces many thorny problems in meeting the requirements and restrictions of other countries' laws. The federal courts, therefore, may

need more advice on how to deal with these problems as a practical matter. Mr. Ogden responded that the Department would not even proceed if there were legal impediments in a particular country. He pointed out that the rule is based on the actual cases that had arisen to date and reflects the current case law.

A member responded, though, that it would be very difficult to obtain additional relevant information without actually having a rule in place. A procedural rule is needed, he said, and the Confrontation Clause and rules of evidence are in place to protect against constitutional violations. The Department of Justice, he said, still has obstacles to face, even if it follows the procedures specified in the rule. He recommended proceeding with the rule and monitoring how it works in practice.

Mr. Ogden noted that the Department had some concern about proposed subparagraph 15(c)(3)(F), which requires the government to establish that the prosecution advances "an important public interest." He pointed out that the requirement would lead to a determination by the court as to what is important, and what is not. The Department, he said, was prepared instead to have the certification made internally by a high-level Department official, at least as high as the Assistant Attorney General level.

Judge Tallman explained that the reason for including the provision was to respond to criticisms by the defense community that it would be too easy for a prosecutor to use the foreign deposition procedure without some greater level of accountability. The defense bar had argued for a certification by the Attorney General. He suggested that the committee might strike subparagraph (F) entirely upon assurance that the Department will impose an internal requirement of high-level approval.

A participant suggested that it is misleading to say that only a few cases will be brought under the rule because there are in fact many cases in this area. The key issue, he said, is preserving the defendant's right to face-to-face confrontation. The situations presented by the rule are similar in ways to those involved in confrontation of child witnesses. He suggested that the advisory committee was, in effect, trying to apply *Maryland v. Craig,* 497 U.S. 836 (1990), and the various statutes that implement it.

Judge Rosenthal concluded that members had expressed discomfort on two levels:

1. Whether the case had been made that the rule is needed.

2. Whether the committee knows enough about how the rule might be applied, even though it would be difficult to obtain that information in advance without having a rule in place.

She added that the advisory committee also needed to decide whether subparagraph 15(c)(3)(F) was needed, and whether the committee was confident enough to let the rule go forward in final form to the Judicial Conference and the Supreme Court.

She noted that the advisory committee had drafted the rule very carefully to respond to all the expressed concerns. She pointed out that Justice Scalia's 2002 opinion was specific in setting forth the minimal requirements for a rule, and the rule that the advisory committee had drafted appeared to respond well to the concerns he had articulated. One member suggested that although the draft rule contained all the minimal requirements, it might also specifically state that a judge may imposed other requirements.

A participant noted that FED. R. EVID. 804(b)(1) (hearsay exceptions – declarant unavailable) deals with admissibility and has its own standard that requires a party to be afforded a trial-like "opportunity" to examine the witness before the witness's testimony may be admitted. He suggested that the criminal provision be dovetailed with the evidence rule or use the language of the evidence rule. Admissibility of the deposition evidence at trial is governed by the standards of FED. R. EVID. 804(b)(1), so a different standard is not needed in proposed FED. R. CRIM. P. 15(c). In fact, if the evidence is admissible under FED. R. EVID. 804(b)(1), it will probably also satisfy the Confrontation Clause under the pertinent case law. But for the evidence to meet the Rule 804(b)(1) standard, the defendant needs a "trial-like" opportunity to confront the witness.

A member moved to adopt the proposed amendments to Rule 15 with two changes:

1. delete proposed subparagraph 15(c)(3)(F) – on the representation of the Department of Justice that before invoking the revised Rule 15, it will require internal approval by an Assistant Attorney General; and

2. amend subparagraph 15(c)(3)(E) to conform it to the provisions of FED. R. EVID. 804(b)(1).

Professor Beale reported, though, that the advisory committee had been persuaded not to import the standard of FED. R. EVID. 804(b)(1) into the revised criminal rule. She explained that the district court evaluates motive and opportunity under Rule 804(b)(1) after the deposition has been taken, while ruling on admissibility of the evidence at trial. The standard in proposed FED. R. CRIM. P. 15(c), however, is different. It articulates the requirements that must be met for approving taking the deposition in the first place.

The member restated his motion to approve the proposed amendments with just one change – elimination of subparagraph 15(c)(3)(F).

The committee by a vote of 9-1 approved the motion and voted to forward the proposed amendments to Rule 15 for approval by the Judicial Conference.

FED. R. CRIM. P. 32.1

Judge Tallman reported that the proposed amendments to Rule 32.1(a)(6) (revocation or modification of probation or supervised release) had been requested by the

Federal Magistrate Judges Association. They would resolve ambiguities and clarify in two ways the burden of proof for obtaining release in revocation and modification proceedings.

First the amended rule would specify the precise statutory provision that governs the revocation proceeding – 18 U.S.C. § 3143(a)(1), rather than all of 18 U.S.C. § 3143(a), which contains other provisions that do not apply and have caused some confusion. Second, the current rule places the burden of proof on the person seeking release, but it does not specify the standard. The revised rule specifies that the person facing revocation or modification must establish by "clear and convincing evidence" that he or she will not flee or pose a danger to any other person or the community.

He noted that an additional change to the rule, to allow video conferencing of these proceedings, was pending separately before the advisory committee for approval to publish as part of the package of technology-related amendments.

A member pointed out that the proposed committee note stated that the amendment reflected established case law. But only a single Ninth Circuit case and a district court case had been cited. She questioned whether the case law was in fact uniform across the country and expressed some concern that the committee may be making a substantive change in the law in some circuits. Professor Beale responded that the case law is, in fact, clear, as is the statute itself. She added that the defense bar did not object to the rule specifying the standard of "clear and convincing evidence."

Professor Coquillette recommended that the case references and the last sentence of the note be eliminated. He pointed out that case law is subject to change. Judge Tallman agreed with the suggestion.

The committee unanimously by voice vote approved the proposed amendments to the rule for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the proposed amendments to Rule 12 (pleadings and pretrial motions) would conform the rule to the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625 (2002). They would also save judicial resources by encouraging defendants to raise all objections to an indictment before trial. Rule 12(b)(3)(B), he said, sets forth the general rule that a defendant must raise before trial any claim alleging a defect in the indictment or information. But it also specifies that the particular objection that the indictment fails to state an offense may be raised at any time. This exception was justified originally on the ground that the latter claim is jurisdictional in nature and therefore may be raised at any point.

In *Cotton*, however, the Supreme Court abandoned that justification by holding that a defective indictment does not deprive a court of jurisdiction. A claim that the indictment fails to allege an essential element of an offense does not raise jurisdictional issues. The claim can be forfeited if not timely raised. Judge Tallman explained that the Department of Justice had asked the advisory committee to amend Rule 12 to require explicitly that a claim that an indictment fails to state an offense be raised before trial.

The proposed amendment would do so. But it also contains a fail-safe provision in proposed Rule 12(e)(2), which states that a court may grant relief from the waiver either: (1) for good cause; or (2) if the indictment's omission of an element of the offense has prejudiced a substantial right of the defendant. The proposed amendment to Rule 34 (arresting judgment) would conform that rule to the proposed amendment to Rule 12(b).

Judge Tallman explained that the advisory committee had wrestled with whether to require a defendant to show both good cause and prejudice to obtain relief from the waiver, but it had concluded that only one or the other should be required. Professor Beale added that the advisory committee wanted to provide judges with greater leeway in dealing with this specific type of error and noted that it is a different standard from that required for relief from other errors.

Several members suggested that "forfeiture" would be a better choice of words than "waiver" because the context makes clear that Rule 12 deals with forfeiture. Moreover, the Supreme Court used the term "forfeiture" in *Cotton.* Judge Tallman replied that "waiver" has always been used in the text of Rule 12, even though "forfeiture" might be a better term if the advisory committee were writing the rule on a clean slate. He suggested that the proposed rule could be published using the term "forfeiture," and the advisory committee could solicit public comments regarding the appropriate choice. It was also suggested that both terms could be used in the publication and placed in brackets to solicit comments from bench and bar.

Some members questioned whether the proposed amendments were completely consistent with *United States v. Cotton* and suggested that there are alternative possible readings of the holding. Judge Rosenthal noted that revising the remedy provision of the rule, Rule 12(e)(2), would pose many drafting difficulties. Professor Beale explained that the advisory committee had struggled with drafting that portion of the rule and suggested that it might be advisable, in light of the comments of the members, for the advisory committee to explore the issues further and consider additional adjustments in the rule. A member suggested that the advisory committee also take a fresh look at all the criminal rules that use the term "waiver," rather than "forfeiture."

Due to the many issues surrounding the provision, Judge Rosenthal suggested that the best course of action might be for the matter to be returned to the advisory committee for further study.

The committee without objection by voice vote approved returning the proposed amendments to Rules 12 and 34 to the advisory committee for further study.

TECHNOLOGY RULES

Judge Tallman reported that the proposed amendments started with a commission given to Judge Anthony J. Battaglia and his subcommittee to review all the Federal Rules of Criminal Procedure with a view towards improving them to take account of technology changes. He added that technology has now reached the stage of high reliability and accessibility that the rules should take specific account of it and make it easier for prosecutors, law enforcement officers, judges, and others to use the system. The proposed changes deal largely with the issuance of arrest and search and seizure warrants, and with the use of video conferencing to avoid having to bring people into court.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope of the rules and definitions) would broaden the definition of "telephone," "telephonic," or "telephonically" to include any form of live electronic voice communication. The definition is intended to be sufficiently broad in order to cover both recent changes and future changes in technology. The committee note, moreover, also speaks of services for the hearing impaired.

Judge Tallman emphasized that use of the technological options is discretionary. Judges, prosecutors, and officers may continue to handle proceedings in the traditional way. But he pointed out that there are many areas in the country where the distance between a judicial officer and a law enforcement officer is great. The proposed rules authorize the use of technology to close the distance gap and improve enforcement of the law.

Professor Beale pointed out that live communication will continue to be required for taking an oath. Under proposed new Rule 4.1, "[t]he judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based." The proposed rules preserve live communication in person by video or telephone.

FED. R. CRIM. P. 3

Judge Tallman reported that Rule 3 (complaint) would be amended to require that a complaint be made under oath before a magistrate judge "except as provided in Rule 4.1."

FED. R. CRIM. P. 4

Judge Tallman explained that Rule 4 (arrest warrant or summons on a complaint) sets forth the procedure for obtaining a warrant on a complaint. The amended rule adopts the concept of a "duplicate original" that has been in Rule 41 for years, dealing with issuance of search warrants by telephone. The term will now be used for other kinds of process besides search warrants. Under proposed Rule 4(d), all warrant applications may be presented to a magistrate judge by telephone or other reliable electronic means.

FED. R. CRIM. P. 4.1

Judge Tallman explained that new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) was the heart of the technology amendments. It would place in one rule the procedure for obtaining electronic process of all kinds. The new rule extends the Rule 41(e)(3) procedures governing the issuance of a warrant on information transmitted by reliable electronic means to the issuance of a complaint and summons. Testimony taken by electronic means must be recorded in writing, but a written summary or order suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means. The applicant must prepare a "duplicate original" of a complaint, warrant, or summons and must read or otherwise transmit its contents verbatim to the judge. When approved by the judge, the duplicate original may serve as the original. The officer, who may be many miles away, may use the duplicate original as an original.

The judge always has discretion to require that the oath be taken in person. In addition, the judge may modify the complaint, warrant, or summons, and transmit the modified version to the applicant electronically, or direct the applicant to modify the proposed duplicate original. The judge, for example, might require more facts or alter the warrant to specify clearly what the agent is authorized to search and seize. The officer at the other end makes the changes and sends them to the judge.

Rule 4.1 also contains a provision in subsection (c), using language now found in Rule 41, specifying that "absent a finding of bad faith, evidence is not subject to suppression." This is derived from the decision of the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

Professor Beale pointed out that the new Rule 4.1 has a number of innovations not found in the current Rule 41. The oath, for example, would be broken out from the rest of the conversation between the law enforcement officer and the magistrate judge. She noted that many judges interpret the current rule to require the judge to write down everything said during the conversation. The new rule allows the judge to prepare only a summary or a brief order (rather than a verbatim record of the conversation) if the conversation was limited to an oath affirming a written affidavit. The rest of the conversation may be recorded. Judge Tallman added that the rule should produce a better record of all the proceedings from start to finish. It may also encourage greater use of the warrant process by law enforcement officers, which is good as a matter of public policy.

A member questioned the numbering of the new rule as FED. R. CRIM. P. 4.1, asking why it should not be placed later in the body of rules. Judge Tallman responded that the advisory committee had considered the matter and had decided to set forth the procedures immediately following the first place in the rules where they could be invoked – after Rule 4, governing issuance of arrest warrants. He suggested that the rule could easily be moved to a later position in the rules. A member suggested soliciting comments from the public on the appropriate numbering of the rule.

FED. R. CRIM. P. 9

Judge Tallman reported that amended Rule 9 (arrest warrant or summons on an indictment) would allow an arrest warrant on an indictment or information to be issued electronically.

FED. R. CRIM. P. 40

Rule 40 (arrest for failing to appear in another district or for violating conditions of release set in another district) would be amended to permit the use of video conferencing to conduct a Rule 40 appearance, with the defendant's consent. The procedure would be discretionary with the court.

FED. R. CRIM. P. 41

Rule 41 (search and seizure) would be substantially reduced in size because its provisions for issuing a telephonic warrant would be moved to the new Rule 4.1. In addition, the revised rule provides that electronic means may be used for the return of a search warrant or tracking warrant.

FED. R. CRIM. P. 43

Rule 43 (defendant's presence) would be amended to include a cross-reference to Rule 32.1. In addition, the court may permit misdemeanor proceedings to be handled by video conferencing.

A member noted that Rule 43 specifies that the entire proceedings in misdemeanor cases could be conducted without the defendant's presence. It would be possible, for example, for the arraignment, plea, and sentencing all to be conducted without the judge verifying in person that the defendant is the correct person before the court. But, she noted, that is already the case under the current Rule 43.

Judge Tallman explained that waiver of the defendant's presence should normally be used only for traffic cases and other low-penalty offenses, even though the language of the rule is broad enough to cover more serious offenses. He said that the system has to rely on the sound judgment of magistrate judges to determine which cases to apply the

rule in. He observed, for example, that the advisory committee had heard of several cases where prison inmates want to get rid of cases outstanding against them to avoid negative effect on their prison condition and opportunities. Professor Beale added that the proposed rule is an improvement over the current rule because it adds the alternative of conducting the proceedings by video conferencing to the current option of proceeding without the presence of the defendant at all.

FED. R. CRIM. P. 49

Rule 49 (serving and filing papers) would be amended to conform the criminal rules with the civil rules regarding electronic filing of documents. It is derived from FED. R. CIV. P. 5(d)(3), and makes clear that a paper filed electronically in compliance with a court's local rule is a written paper.

A participant stated that in the recent restyling of the evidence rules, the term "telephone" had been changed to "phone" in order to capture cell phones. It was recommended that the terminology in the criminal rules and the evidence rules be consistent. During a break in the proceedings, representatives of the criminal and evidence advisory committees and the Style Subcommittee conferred and agreed to change the references in the proposed restyled evidence rules back from "phone" to "telephone."

Professor Beale added that the package of technology amendments also included an amendment to Rule 6(e) (recording and disclosing grand jury proceedings), previously approved by the Standing Committee for publication. It would authorize the taking of a grand jury return by video conferencing.

FED. R. CRIM. P. 32.1

Judge Tallman pointed out that the amendments to Rule 32.1 (revocation or modification of probation or supervised release) were somewhat different from the other technology amendments. They deal with defendants who are subject to revocation or modification of probation or supervised release. At the defendant's request, the court would be able to allow the defendant to participate in the proceedings through video conferencing. The advisory committee, he said, had reviewed the case law and had seen no suggestion that the defendant's waiver would be inconsistent with the Sentencing Reform Act.

A participant suggested that the revised rule appeared to carry the negative implication that a judge may not modify conditions by telephone. In revocation cases where a defendant is far away, a judge may simply telephone the defendant and the probation officer to resolve a matter without the need for a hearing. The rule, he said, should not imply that the judge cannot continue to resolve matters in this manner. As written, though, it appears to apply to all modifications of probation or supervised release.

It should, instead, provide that in appropriate cases a judge may simply use the telephone to resolve problems.

Professor Beale stated that the situation posed is different from that contemplated in the proposed amendments to Rule 32.1. In the former, the defendant is waiving a hearing altogether. The judge then chooses to speak personally with the defendant and the probation officer by telephone and be assured that the defendant's waiver is voluntary and knowing. The proposed amendments to Rule 32.1, by contrast, address holding a hearing – which the defendant has not waived – by video conferencing at the defendant's request.

Another participant suggested that there may be a potential conflict between Rule 32.1(c)(2)(A), specifying that a hearing is not required if the person waives it, and the proposed new Rule 32.1(f) because the latter applies to the entire rule and could be construed as replacing Rule 32.1(c)(2)(A). Another participant recommended adding a heading to Rule 32.1(f).

Professor Beale reported that Rule 32.1 was the only rule in the technology package that had produced any controversy during the advisory committee's deliberations. Some members, she said, had expressed concerns over a judge being able to revoke release by video conference. A member added that the appropriate procedure depends in large measure on what the judge is going to do. Sometimes the modifications will be very minor in nature, but other times they may be more serious. She pointed out that before video conferencing became widely available, judges simply used the telephone to handle many different circumstances. Video conferencing is easier to use than in the past, but it is still a big step to take and is more difficult and inconvenient than using the telephone.

A participant suggested adding a sentence to the committee note to address the issue. Another suggested that the note state that whenever a defendant is entitled to waive a hearing completely, the proceeding may be conducted by telephone. Others agreed that additional language would be helpful.

A participant pointed out that use of the word "proceedings" in Rule 32.1(f) may create some ambiguity. In reality, the rule should refer to a "hearing" conducted by video conference. That term, she said, is used several other places in the rule.

A participant questioned the need for the rule because a defendant may waive the hearing altogether. Professor Beale explained that the rule sets forth alternatives. The advisory committee had decided to exempt Rule 32.1 proceedings from the requirements of Rule 43 because there had been some uncertainty among the members as to whether Rule 43 applied to revocation and modification proceedings.

The committee without objection by voice vote approved Rule 32.1 for publication with additional language to be included in the committee note

emphasizing that use of a telephone is still a permissible alternative to video conferencing in appropriate circumstances.

The committee then without objection by voice vote approved all the other proposed technology-related amendments for publication, including the amendments to Rule 6 approved for publication by the committee in June 2008.

Judge Tallman pointed out that proposed amendments to Rule 47 (motions and supporting affidavits) had been withdrawn by the advisory committee.

Judge Rosenthal extended special thanks to Judge Battaglia for spearheading the technology project and producing a superb package of amendments.

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 6, 2009 (Agenda Item 8).

Amendments for Final Approval

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

Judge Hinkle reported that the proposed amendment to Rule 804(b)(3) (statement against interest) would change the hearsay exception regarding the statement against penal interest of an unavailable witness. The existing rule, he said, requires a defendant in a criminal case to show "corroborating circumstances" in order to have the statement admitted. But the government introducing a statement does not have the same requirement. The amended rule, he said, would apply the corroborating circumstances requirement to the government as well. The Department of Justice, he said, did not object to the amendment, and there had been no written comments objecting to its substance. One comment from a defense lawyer had recommended that corroborating circumstances be deleted as a requirement for a defendant, but the committee did not consider that course appropriate as a substantive matter. The public hearings had been cancelled because no witnesses had asked to testify on the rule.

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

Amendments for Publication

RESTYLED FED. R. EVID. 101-1103

Judge Hinkle reported that the written agenda materials provided background information about the restyling project. The effort to restyle the federal rules started back in the early 1990s under the leadership of committee chair Judge Robert Keeton and committee member Professor Charles Alan Wright. It has been a long and successful process over several years, though not without controversy. Some had thought that it would not be worth the effort to change the rules, even if the end product were improved. But, in fact, the four restyling projects have been very successful, and the rules are clearly much better than before.

He pointed out that accuracy and clarity are the most important values in the restyling effort. It is important, he said, for a judge or a lawyer to be able to look at an evidence rule and know immediately what it means. Consistency is also important, but it does not rise to the same level as the other two values.

The process used to restyle the Federal Rules of Evidence, he said, had started with Professor Kimble rewriting each of the rules in the first instance. Then Professor Capra made his changes. The drafts were then sent to the advisory committee and the style subcommittee of the Standing Committee for comment. The rules were reviewed carefully several times and at several levels. In addition, some members of the Standing Committee had already made specific comments on the proposed rules.

But, he said, that will not be the end of the process. The advisory committee was only asking for authority to publish the rules for comment. It should receive a number of public comments, each of which will be reviewed in 2010. He thanked Judge Hartz for spotting inconsistencies, and he thanked Jeffrey Barr and Stacey Williamson of the Administrative Office for great staff support in getting the package completed.

Judge Hinkle reported that the advisory committee was presenting Rules 801-1103 to the Standing Committee for the first time. All the other rules in the restyling package had been presented to the committee at earlier meetings. The advisory committee was now seeking authority to publish the entire set of evidence rules for comment. It would also like authority to make further corrections before publication.

Judge Hinkle noted that several changes had been made in the restyled hearsay rules from "offered to prove" to "admitted to prove," and the advisory committee will highlight the terminology in the publication. Professor Capra explained that the change had started with the restyling of Rule 803(22). There, it would be a substantive change from the current rule to use "offered to prove" because the judge plays a fact-finding role and so admissibility is not controlled by the purpose of the proffering party. Once the advisory committee had made the change from "to prove" to "admitted to prove", he said,

it decided to change all the instances of "offered to prove" to "admitted to prove" because the judge has some role as to each piece of evidence offered. What is determinative is not what the lawyer states the evidence is offered for, but what the judge admits it to prove. He said that the advisory committee wanted to hear from the public on the use of the terminology so that it can make a reasoned choice on it.

A member questioned the use of unnumbered bullet points, rather than numbers, noting that bullet points cannot be cited. He added, though, that it is not a big problem because a whole rule may be cited. Professor Kimble explained that the style guidelines call for using bullet points where there is no preferred rank order in a list. In Rule 407 (subsequent remedial measures), for example, there is no way to cite each of the measures listed. In addition, he pointed out that when a list is created with numbered divisions, a dangling paragraph may follow. That dangling paragraph cannot be effectively cited. Where a list is created within a rule, with text before the list and more text after the list, bullets work better than numbers. The member pointed out, though, that not every series in the restyled rules appeared to have been broken out and expressed a strong preference for breaking out and numbering all series and lists.

The member also questioned the use of dashes, rather than commas. In some cases, he pointed out, dashes are used to set off an aside, which is an appropriate usage. But often what appears within the dashes follows from what is said before the dash, which is inappropriate usage. Professor Kimble responded that dashes may properly be used for both purposes. They are often more successful than commas, especially if there are other commas in a sentence. One member emphasized that dashes make the text easier to read, and that is the key objective of the restyling effort.

The committee without objection by voice vote approved the proposed amendments for publication, subject to the advisory committee making additional, minor style changes.

Professor Capra thanked Professor Kimble for truly excellent work. He also said that the style subcommittee had accomplished amazing work with a very fast turn around time. In short, he said, the process had been fantastic. Judge Hinkle added that very special thanks are due to Professor Capra for his major, indispensable role in the restyling project.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that the primary changes made in the text of the proposed guidelines since the last meeting had been to strike just the right balance between concerns that the draft guidelines had placed insufficient limits on individual-judge orders and countervailing concerns that individual-judge orders are entirely

appropriate and useful. She thanked Judge Raggi for her help in improving the product to address those competing concerns.

Judge Rosenthal pointed out that the revised guidelines distinguish between substantive rules of practice, on the one hand, and rules of courtroom conduct, on the other. The former should clearly be set forth in local rules of court. But rules of courtroom conduct are appropriate for orders by individual judges. The revised second paragraph of Guideline 4, she said, now makes that distinction clear. In addition, at the request of the Department of Justice a new bullet point had been added to the internal administrative matters listed in Guideline 1 to suggest that standing orders are appropriate to deal with courthouse or courtroom access for individuals with disabilities. In addition, Guidelines 7 and 8 had been supplemented.

Judge Rosenthal reported that a reference had been added to Bankruptcy Rule 9029. She noted that the Advisory Committee on Bankruptcy Rules had suggested that the guidelines address some special needs of the bankruptcy courts. The bankruptcy courts, for example, sometimes need greater flexibility to use standing orders to effect urgently needed changes during the time that it takes for local rules to be put into effect. The recent implementation of the massive 2005 bankruptcy reform legislation demonstrated the value of operating under standing orders.

The committee, she said, planned to send the guidelines to the Judicial Conference with a request that they be distributed to the courts for consideration as non-binding guidance. But Mr. Rabiej suggested that it might be more effective to have the Judicial Conference actually adopt the guidelines. Some members agreed and said that it would be easier to get courts to adopt them if they are approved by the Conference itself. Judge Rosenthal added that the Conference might also be informed that the committee is considering bankruptcy guidelines and may return with additional recommendations.

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

SEALED CASES

Judge Hartz reported that the sealing subcommittee would meet again immediately following the Standing Committee meeting. He pointed out that the subcommittee included a representative from each advisory committee, a Department of Justice representative, and a clerk of court. He noted that the subcommittee was only addressing cases that are entirely sealed, not sealed documents within a case.

He reported that Tim Reagan of the Federal Judicial Center had completed a good deal of work on sealed cases, having examined all the cases filed in 2006 at both the district and appellate levels. He had found no bankruptcy cases in which an entire case

had been sealed by a court. He added that roughly 10,000 magistrate-judge and miscellaneous cases had been found, and a few will be sampled from each court. Most of these matters involve initial proceedings pending formal initiation of a criminal prosecution.

Judge Hartz pointed out that no indications of abuse had been found. In fact, he said, he had only seen one case that he thought might have been sealed improperly. The decisions of courts to seal cases, he said, appear to be reasonable. Nevertheless, there may be some other issues that should be addressed, such as how long cases should remain sealed. Apparently, there is a problem in that some courts appear to overlook the task of unsealing cases.

He noted that the subcommittee would consider whether there should be standards on when cases should be sealed. The subcommittee would also consider whether there should be procedural requirements for sealing, who should order the sealing, whether there should be notice of sealing, whether a record should be made of the reasons for sealing, and whether there should be time limits on the length of sealing. He pointed out that the subcommittee would also look at whether certain administrative measures should be pursued, such as adding special prompts to the courts' electronic case management and filing systems. Finally, the subcommittee would consider whether there is a need for additional empirical research or public hearings.

Judge Hartz pointed out that the subcommittee had contemplated at the start of the project that it would discover that most sealed cases might be national security cases. But, in fact, very few involve national security. The biggest group of sealed cases, he said, are criminal cases that involve danger to witnesses and victims. There are also a number of qui tam civil cases.

He thanked Professor Richard Marcus for participating in all the meetings and working exceptionally hard on the project. Judge Rosenthal added that Professor Marcus is a recognized national authority on sealing.

LONG-RANGE PLANNING

Judge Rosenthal pointed out that the rules committees have been deeply involved in long-range planning for several years. Some examples of current activities include the ongoing work of the privacy subcommittee, the convening of the upcoming conference at Duke Law School on the state of civil litigation, and the major projects of the Advisory Committee on Bankruptcy Rules to reformulate the appellate bankruptcy rules and modernize the bankruptcy forms. She invited all the participants to send the Administrative Office staff any additional ideas for long-range planning that the committees should consider.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi reported that she had been asked to chair the special subcommittee to examine implementation of the new privacy rules. The subcommittee, she said, would hold its first meeting immediately following the Standing Committee meeting. She pointed out that the subcommittee included several colleagues from the Court Administration and Case Management Committee, which had established the original Judicial Conference privacy policies later incorporated into the 2007 amendments to the w1federal rules. She added that Professor Capra will be the reporter for the subcommittee, and Judge Hinkle will participate. She said that the subcommittee would address the following areas:

1. Are amendments needed to the national privacy rules?

2. Are there problems in criminal cases and sealed cases that need to be addressed further? Should, for example, the Judicial Conference policy that certain documents not be included in the public case file be stated expressly in the national rules? If so, should the list of documents be expanded or contracted?

3. Should the policy of placing the burden on the parties to redact sensitive information be reviewed with an eye towards simplification? Are there viable alternatives that will assure protection of private information without imposing undue burden on the courts? Is more public education needed to inform the parties of their obligations to redact private information from transcripts?

4. Are additional efforts needed to implement the existing rules, especially in response to Congressional concerns that personal information still appears in some court case files?

NEXT MEETING

The committee agreed to hold the next meeting in January 2010, 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 Thursday and Friday, January 7-8, 2010, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

II. A

March 26, 2009

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

Dear Madam Speaker:

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

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

Sincerely,

/s/ John G. Roberts, Jr.

March 26, 2009

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 5.1, 7, 12.1, 12.3, 29, 32, 32.2, 33, 34, 35, 41, 45, 47, 58, and 59, and Rules 8 and 11, and new Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts, and Rules 8 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

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

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2009, 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.

Rule 45. Computing and Extending Time

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

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5.1. Preliminary Hearing

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

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Rule 7. The Indictment and the Information

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(c) Nature and Contents.

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

to dismiss the indictment or information or to reverse a conviction.

* * * * *

(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 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.

Rule 12.1. Notice of an Alibi Defense

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

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(2) ***Defendant's Response.*** Within 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 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 14 days before trial.

* * * * *

Rule 12.3. Notice of a Public-Authority Defense

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

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(3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within 14 days after receiving the defendant's notice, but no later than 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 21 days before trial.

(B) *Defendant's Response.* Within 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 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.

* * * * *

Rule 29. Motion for a Judgment of Acquittal

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(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 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Rule 32. Sentencing and Judgment

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(d) Presentence Report.

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(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;

(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.

* * * * *

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) ***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, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court

must conduct a hearing after the verdict or finding of guilty.

(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, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. 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. 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.

(5) ***Jury Determination.***

(A) *Retaining the Jury.* 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.

* * * * *

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 14 days after the verdict or finding of guilty.

Rule 34. Arresting Judgment

* * * * *

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

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * * * *

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

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

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and

designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

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

* * * * *

(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.

(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.

* * * * *

* * * * *

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 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.

* * * * *

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 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 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.

* * * * *

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 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 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.

* * * * *

AMENDMENTS TO RULES GOVERNING 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 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.

* * * * *

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.

Rule 12. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

AMENDMENTS 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 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.

* * * * *

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.

II. B

March 26, 2009

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

Dear Madam Speaker:

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

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

Sincerely,

/s/ John G. Roberts, Jr.

March 26, 2009

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 5.1, 7, 12.1, 12.3, 29, 32, 32.2, 33, 34, 35, 41, 45, 47, 58, and 59, and Rules 8 and 11, and new Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts, and Rules 8 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

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

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2009, 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.

Rule 7. The Indictment and the Information[5]

* * * * *

(c) Nature and Contents.

* * * * *

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

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

* * * * *

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

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[6]

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(d) Presentence Report.

* * * * *

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

(A) the defendant's history and characteristics,

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

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[7]

* * * * *

(e) Issuing the Warrant.

* * * * *

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

* * * * *

(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.

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

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][8] 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.

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

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[8]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.

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.

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II. C

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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

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At its September 15, 2009 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide.*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

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.

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

(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).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS CONCERNING RULE 12.3

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment

(taking the place of Mr. Hillier). Based upon an unwarranted assumption that every defendant poses a risk to prospective government witnesses, the amendment introduces uncertainty about whether the defendant will receive reciprocal discovery that is critical to pretrial preparation. Moreover, the amendment is unnecessary because it is so unlikely that the government will rely on a victim to rebut a public authority defense.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on several grounds: (1) it forces the defendant to provide the names and addresses of his witnesses without any guarantee of reciprocal discovery of the same information regarding the government's rebuttal witnesses; (2) it violates the defendant's right to due process and compromises the judge's neutrality; (3) any alternative to the provision of this information will be insufficient to satisfy due process; (4) when the defendant does not receive full reciprocal discovery he will be unable to retract his disclosures and the government will receive an unfair advantage; (5) the rule reverses the constitutionally required presumption that the defendant is entitled to investigate a witnesses background to discover avenues for impeachment. Since the amendment tracks the recent amendment to Rule 12.1, the Committee should defer this proposal until the constitutionality of Rule 12.1 has been litigated, particularly since there has been no showing of any need for the amendment.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers . Mr. Goldberger and Mr. Genego oppose the amendment on several grounds: (1) the rule should reflect the reality that defendants will

always have a need for this information and will seldom pose anythreat to the witnesses against him and should require a special need for secrecy to justify withholding this information, (2) this information is critical not only to make it possible to contact the witnesses but also to conduct an investigation, and (3) even when the information may properly be withheld from the defendant, there is no justification for withholding it from counsel if disclosure to the defendant is prohibited.

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition 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.* Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in

custody has the right upon request to be present at the deposition, 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 the following:

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

(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 because:

(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;

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

(F) for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

* * * * *

COMMITTEE NOTE

Subdivision (c). 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 other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. 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.

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.*, *Lego v. Twomey*, 404 U.S. 477, 489 (1972). 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 supersede 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.

The Committee recognizes that authorizing a deposition under Rule15 (c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts applying the Federal Rules of Evidence and the Constitution.

CHANGES MADE TO PROPOSED AMENDMENT

RELEASED FOR PUBLIC COMMENT

The limiting phrase "in the United States" was deleted from Rule 15(c)(1) and (2) and replaced with the phrase "Except as authorized by Rule 15(c)(3)." The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant's presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive.

In subdivision (c)(3)(D) the introductory phrase was revised to the simpler "because."

Two changes were made to restrict foreign depositions outside of the defendant's presence to situations where the deposition serves an important public interest. The limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A), and new subdivision (c)(3)(F) requires the court to find that the attorney for the government has established that the prosecution advances an important public interest.

The Committee Note was revised in several respects. In conformity with the style conventions governing the rules, citations to cases were deleted. Other changes were made to improve clarity.

PUBLIC COMMENTS ON RULE 15

08-CR-004, Wendy H. Goggin, Chief Counsel, DEA. Ms. Goggin questioned whether the rule (1) should be limited to cases where no reasonable conditions can assure the defendant's presence at trial or sentencing, and (2) should require both that there be no conditions that can assure the defendant's presence and that the defendant be able meaningfully to participate in the deposition.

08-CR-006, Richard Anderson, Federal Public Defender. Mr. Anderson testified in opposition to the amendment, stressing that overseas depositions are an inadequate substitute for live testimony because of problems with technology as well as restrictions imposed by local laws and procedures that hamper both direct and cross examination, and may offer inadequate opportunities to consult with the defendant. In any event, even the best video taped depositions are not the equivalent of live testimony. Finally, he urged that if the amendment went forward it should be more narrowly tailored and should set standards for the effective participation of the defendant.

08-CR-007, Richard Anderson, Federal Public Defender. Mr. Anderson's written statement urges that the amendment be withdrawn because it creates a process which "strikes at the core of the Confrontation Clause, by denying face-to-face confrontation" and "threatens . . . to significantly impair the defense function, which relies on the defendant's presence with counsel when confronting and cross-examining a witness." He also proposes several changes be made if the amendment is not withdrawn, including requiring authorization of the Attorney General or his designee, heightening the standard to be made by the government, and requiring that the defendant be able to participate by the least restrictive means available.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association "believes that this rule is reasonable

and necessary in those few cases where a foreign deposition is necessary, and the defendant cannot be physically present."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on the grounds that (1) it exceeds the authority of the Rules Enabling Act, (2) it would effectively deprive the defendant of his constitutional right to confront the witnesses against him, thus achieving the purpose of the failed 2002 proposed amendment to Rule 26, (3) it is not limited to a narrow class of transnational crimes or critical witnesses, and (4) its safeguards are insufficient, and do not even guarantee that the defendant would be allowed to view and listen in real time and consult confidentially with counsel.

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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS CONCERNING RULE 21.

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment to Rule 21 on the grounds that it would subordinate the convenience of parties and witnesses to those of non-witness victims, and it might even be construed to allow a transfer to accommodate voluntary public attendance despite imposing substantial costs on parties, witnesses, and government lawyers.

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). The convenience of those who are required to attend the trial–the defendant, government, and witnesses–should stand on a different footing than the preferences of those who regard themselves as victims. The CVRA gave victims a right not to be excluded from trial, not a right to attend. This rule goes beyond the CVRA and may cause practical problems, especially in cases with hundred or even thousands of victims, and may also generate time consuming mandamus actions.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on the grounds that (1) the CVRA does not give non-testifying victims a right to have the proceedings held at a place convenient for them, (2) the interests of the non-

testifying victims should not be placed on an equal footing with the convenience of the defendant, the prosecution, and the witnesses, and (3) the victim's ability to file a mandamus action might as a practical matter mean that the convenience of an alleged victim would be given greater weight than that of the parties and witnesses.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association supports the amendment because the rule now specifically requires that the convenience of parties and witnesses must be considered, and "it is prudent to include victims' entitlement to the same consideration."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers . Mr. Goldberger and Mr. Genego argue that (1) the amendment exceeds the authority granted by the Rules Enabling Act because it necessarily creates a substantive right not included in the CVRA; (2) the amendment would allow the court to "allow the convenience of a would-be spectator to override the combined interests of the defendant, the government, all the witnesses, and the interests of justice;" and (3) the amendment is unnecessary, because the "interest of justice" already allows the courts to consider the interest of non-witness victims.

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

Subdivision (a)(6). 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).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS ON RULE 32.1(a)(6)

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment on the ground that it requires the person seeking release to prove a negative and sets an impossibly high standard of proof by clear and convincing evidence, which will result in imprisonment for even the most minor infraction of release conditions.

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). He urged that the burden of proof

should be placed on the defendant only in cases in which the applicable Sentencing Guidelines policy statement provides for imprisonment, and that burden of proving a risk of flight or danger should be shifted to the government in other cases.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier agrees that an amendment is needed, but argues that it should (1) require a preliminary finding of probable cause, and (2) place the burden of proof on the government when the applicable policy statement would provide for a modific ation (rather than imprisonment) for the alleged violation.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal to clarify the burden of proof.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego endorse Mr. Hillier's comments in 08-CR-005.

II. D

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 12, 2009

TO THE BENCH, BAR, AND PUBLIC:

Proposed Rules and Forms Amendments

The Judicial Conference Advisory Committees on the Bankruptcy, Criminal, and Evidence Rules have proposed amendments to federal rules and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments to the federal rules, with reports from each Advisory Committee, are posted on the Judiciary's Federal Rulemaking web site at <www.uscourts.gov/rules>. A proposed comprehensive "style" revision of the Federal Rules of Evidence is published separately. All the Advisory Committees welcome comment on all aspects of each proposal.

Opportunity for Public Comment

Please provide any comments and suggestions on the proposed amendments, whether favorable, adverse, or otherwise, as soon as possible. **The comment deadline is February 16, 2010**. Comments, suggestions, or other correspondence may be submitted electronically to <Rules_Comments@ao.uscourts.gov> or in hard copy to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. The Advisory Committees will review all timely comments. All comments are made part of the official record and are available to the public.

The Advisory Committees on the Bankruptcy, Criminal, and Evidence Rules will hold public hearings on the proposed amendments on the following dates:

- Bankruptcy Rules in Phoenix, Arizona, on January 6, 2010, and in New York, New York, on February 5, 2010;
- Criminal Rules in Phoenix, Arizona, on January 8, 2010, and in Atlanta, Georgia, on January 11, 2010; and
- Evidence Rules in Phoenix, Arizona, on January 5, 2010, in San Francisco, California, on January 29, 2010, and in New York, New York, on February 4, 2010.

If you wish to testify, you must contact the Committee Secretary at the above address **at least 30 days before the hearing**.

After the public comment period, the Advisory Committees will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure. At present, the Standing Committee has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to nor considered by the Judicial Conference or the Supreme Court.

Lee H. Rosenthal	Peter G. McCabe
Chair	Secretary

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

* * * * *

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

* * * * *

(11) "Telephone" means any form of live electronic voice communication.

~~(11)~~(12) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

* * * * *

Committee Note

Subdivision (b)(11). The added definition clarifies that the term "telephone" includes technologies enabling live voice conversations that have developed since the traditional "land line" telephone. Calls placed by cell phone or from a computer over the internet, would be included, for example. The definition is limited to live communication in order to ensure contemporaneous

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

communication and excludes voice recordings. Live voice communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. ~~It~~ Except as provided in Rule 4.1, it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means, however, the Rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permit electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

Rule 4. Arrest Warrant or Summons on a Complaint

* * * * *

(c) Execution or Service, and Return.

* * * * *

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

* * * * *

(4) ***Return.***

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

* * * * *

(d) Warrant by Telephone or Other Reliable Electronic Means. In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1 (b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) In General. A magistrate judge may consider information communicated by telephone or other reliable electronic means when deciding whether to approve a complaint or to issue a warrant or summons.

(b) Procedures. If a magistrate judge decides to proceed under this rule, the following procedures apply:

(1) ***Taking Testimony Under Oath.*** The judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based.

(2) ***Recording Testimony.*** The judge must make a verbatim record of the testimony with a suitable recording device, if available; by a court reporter; or in writing. But a written summary or order

suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means.

(3) ***Certifying Testimony.*** The judge must have any verbatim 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. But the judge must simply sign and file with the clerk any written verbatim record or any written summary or order.

(4) ***Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons.*** The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the judge.

(5) ***Preparing an Original Complaint, Warrant, or Summons.*** If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original.

(6) ***Modification.*** The judge may modify the complaint, warrant, or summons. The judge must transmit the modified version to the applicant by reliable electronic means or direct the applicant to modify the proposed duplicate original accordingly.

(7) ***Signing.*** If the judge decides to approve the complaint, or to issue the warrant or summons, the judge must immediately:

(A) sign the original;

(B) enter on its face the exact date and time it is approved or issued; and

(C) transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original.

(c) **Suppression of Evidence Limited.** Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Committee Note

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. The procedures that have governed search warrants "by telephonic or other means," formerly in Rule 41(d)(3) and (e)(3), have been relocated to this Rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic

communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. Limited to "magistrate judges," the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The Rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retains the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2). Former Rule 41(d)(3)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to the written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge can simply prepare a written *summary* or order memorializing the affirmation of the oath. Rule 4.1(b) (7) specifies that any written summary or order must be signed by the magistrate judge and filed with the clerk. This process will maintain the safeguard of documenting the warrant application process.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

* * * * *

(d) Warrant by Telephone or Other Means. In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(f) On a defendant's request, the court may allow the defendant to participate in proceedings under this rule through video teleconferencing.

Committee Note

Subdivision (f). New subdivision (f) of Rule 32.1 allows a defendant to participate in revocation proceedings via video teleconferencing on the defendant's consent and the court's approval. This option may be especially useful in a case in which the defendant is arrested in one district and would otherwise have to be transported to another district where the original sentence was imposed. If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel. The amendment does not address whether victims, witnesses, or others may participate in any hearing under Rule 32.1 through video teleconferencing or other means. The same standards and procedures for the use of video teleconferencing that were suggested in the Committee Note accompanying the 2002 amendment to Rule 5 are applicable here.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

* * * * *

(d) **Video teleconferencing.** If the defendant consents, video teleconferencing may be used to conduct an appearance under this rule.

Committee Note

The amendment provides for video teleconferencing, in order to bring the Rule into conformity with Rule 5(f).

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Reliable Electronic Means.*** In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic 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.

* * * * *

~~(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.

* * * * *

(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 officer may do so by reliable electronic means. 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. The officer may do so by reliable electronic means.

* * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (f)(2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large

districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, ~~or~~ Rule 10, or Rule 32.1 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present.

(2) ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one

year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

* * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

Rule 49. Serving and Filing Papers

(a) When Required. A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

* * * * *

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

Committee Note

Subdivision (e). Filing papers, by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

III. A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 16

DATE: September 20, 2009

In April Judge Emmet Sullivan of the District of Columbia, who presided over the trial of Senator Ted Stevens, wrote Judge Tallman urging the Advisory Committee "to once again propose an amendment to Federal Rule of Criminal Procedure 16 requiring disclosure of all exculpatory information to the defense." His letter follows this memorandum.

Because many members of the Rule 16 subcommittee have completed their terms and are no longer on the Advisory Committee, Judge Tallman appointed a new Rule 16 subcommittee to once again review the issue:

Judge Richard Tallman, Chair
Judge Morrison C. England, Jr.
Andrew D. Leipold
Rachel Brill
Lanny Breuer, AAG, Criminal Division/Jonathan Wroblewski

Professors Sara Beale and Nancy King will both assist the subcommittee.

Beale and King provided the subcommittee with a memorandum summarizing the issues raised by the Rule 16 proposal and the arguments that have been made for and against an amendment dating back to 2006-07 when the issue was last before the Committee. Additionally, Henry Wigglesworth from the A.O. Rules Support Office provided the subcommittee with a memorandum summarizing the history of the proposals to amend Rule 16. Both memoranda are included infra.

On September 10, 2009, the subcommittee held a teleconference, in which they were joined by Judge Lee Rosenthal and John Rabiej. Judge Rosenthal provided background on the Standing Committee's action in June of 2007 when it declined to publish the Advisory Committee's proposed amendment to Rule 16. The Standing Committee did not close the door on further consideration of Rule 16. Standing Committee members indicated, however, that if the Advisory Committee wished

to return with a proposed amendment, it would be helpful to have additional information on the efficacy of the new provisions in the United States Attorneys Manual and the local rules that mandate disclosure in some districts. This Agenda Book includes the portion of Judge Susan Bucklew's (former Chair of the Criminal Rules Committee) report to the Standing Committee explaining the amendment proposed in 2007 and Deputy Attorney General Paul McNulty's letter opposing the amendment.

Assistant Attorney General Breuer was out of the country and unable to participate in the teleconference, but Jonathan Wroblewski reported that the Department of Justice now has underway a working group focusing on all of the issues raised by the Stevens trial and Rule 16, including (1) defining the constitutional, statutory and ethical obligations of Justice Department attorneys, and (2) determining how to best and most consistently meet those obligations. He expressed the hope that the Department would be able to provide the Advisory Committee with its plan and the position the new leadership of the Department of Justice will take on the issue by the time of the October meeting.

Judge Tallman sought input on what assistance the Advisory Committee should seek from Federal Judicial Center to develop additional information to assist the Committee's deliberations. Topics mentioned included the effect of the changes in the United States Attorneys Manual and the experience under state and local district court federal rules that require earlier disclosure than the current version of Rule 16. Subcommittee members also expressed interest in learning more about the function and experience of the Justice Department's Office of Professional Responsibility.

The subcommittee then turned to the question how best to proceed. Judge Tallman suggested that the subcommittee might wish to solicit views and experience beyond the membership of the Rules Committee. The Civil Rules Committee has found it helpful to hold one or more small informal consultative meetings. These meetings typically include about 15 participants representing different constituencies or practice areas that would be affected by or have views on the matter in question. In the case of Rule 16, for example, this might include representatives from the American College of Trial Lawyers, A.B.A. Criminal Justice Section, and National Association of Criminal Defense Lawyers, as well as persons whose focus might be disclosure of information pertaining to victims and the special problems in national security cases.

Subcommittee members supported the proposal that one or two such consultation sessions be scheduled for the early spring, and they discussed in a preliminary fashion the issues that should be the focus on the subcommittee's work and the information that would be needed. There was agreement that the subcommittee would recommend the procedure outlined above to the Advisory Committee at its October meeting.

Appendices

(1) Judge Emmett Sullivan's April 28 letter to Judge Tallman

(2) Excerpt Criminal Rules May 2007 Report to Standing Committee

3. Text of Rule 16 proposal as submitted to Standing Committee May 2007
4. June 5 letter from DAG Paul McNulty to Judge Levi
5. Beale/King Rule 16 Memo Aug. 31
6. Wigglesworth memo Rule 16 Aug. 31
7. DOJ memo Sept. 25, 2009

APPENDIX 1

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Emmet G. Sullivan
United States District Judge

(202) 354-3260

April 28, 2009

VIA FACSIMILE AND FEDEX
The Honorable Richard C. Tallman, Chair
Judicial Conference Advisory Committee
on the Rules of Criminal Procedure
Attn: Rules Committee Support Office
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20054

Dear Judge Tallman:

I write to urge the Advisory Committee on the Rules of Criminal Procedure (the "Rules Committee") to once again propose an amendment to Federal Rule of Criminal Procedure 16 requiring the disclosure of all exculpatory information to the defense. My understanding is that on September 5, 2006, the Rules Committee voted eight to four to forward such an amendment to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee").[1] However, the Department of Justice ("DOJ") strongly opposed the amendment and argued that a modification to the United States Attorneys' Manual – which added, for the first time, a section addressing federal prosecutors' disclosure obligations – would obviate the need for an amendment to the federal rule.

There were compelling reasons for eight of the twelve members of the Rules Committee to support the proposed amendment in September 2006. Those reasons are no less compelling today. Moreover, it has now been nearly three years since the United States Attorneys' Manual was modified to "establish[] guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligations as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case."[2] While I recognize and respect the commitment and hard work demonstrated by federal prosecutors every day in courtrooms throughout the country, it is

[1] *See* Minutes of September 5, 2006 Special Session at 7, *available at* http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf.

[2] *See* United States Attorneys' Manual § 9-5.000, Comment, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

uncontroverted that *Brady* violations nevertheless occur.

Earlier this month, Attorney General Eric H. Holder, Jr., for whom I have the highest regard, took the highly unusual, if not unprecedented, step of moving to set aside the verdict and dismiss the indictment with prejudice in the case of *United States v. Theodore F. Stevens*, Criminal Action No. 08-231 (EGS) (D.D.C.). At a hearing on that motion, the government informed me that during the course of investigating allegations of misconduct, which included several discovery breaches, and preparing to respond to the defendant's post-trial motions, a new team of prosecutors had discovered what the government readily acknowledged were two serious *Brady* violations:

> THE COURT: All right. Let me ask you this, Counsel, and I need a very precise answer to this question. The Government counsel will concede, will it not, that the failure to produce the notes or information from the April 15, 2008 interview with Bill Allen in which he did not recall having a conversation with Bob Persons about sending a bill to the Senator was a *Brady* violation.
>
> MR. O'BRIEN: It was a *Brady* violation. It was impeaching material, and the Court knows that *Giglio* is a subset of *Brady*.
>
> THE COURT: Right.
>
> MR. O'BRIEN: Also, there was – I failed to mention this and I should have. The Court did mention it, but there was also information about the value of the work that was performed.
>
> THE COURT: And that was going to be the second question. Indeed, was that a *Brady* violation as well?
>
> MR. O'BRIEN: I believe that it was. At a minimum, it was favorable evidence to the Defense that should have been turned over pursuant to the instructions that Your Honor previously mentioned.

Motion Hrg. Tr. 13-14 (Apr. 7, 2009). These *Brady* violations – revealed for the first time five months after the verdict was returned – came to light only after an FBI agent filed a complaint alleging prosecutorial and other law enforcement misconduct, a new Attorney General took office, and a new prosecutorial team was appointed to respond to the defendant's post-trial motions. Attorney General Holder's response to these issues has been commendable, and I understand that he has since discussed instituting training for prosecutors regarding their discovery obligations and has publicly reminded prosecutors that their obligations to fairness and justice are paramount to all other concerns.[3] These developments provide further support for such an amendment.

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[3] *See* Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says*, The Boston Globe, Apr. 9, 2009, at 8 ("'Your job as assistant U.S. attorneys is not to convict people,' said Holder. 'Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do

An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and, ultimately, the public. Such a rule would eliminate the need for the court to enter discovery orders that simply restate the law in this area, reduce discovery disputes, and help ensure the integrity and fairness of criminal proceedings. Moreover, such a rule would also provide clear guidance to the prosecutor and indeed protect prosecutors from inadvertent failures to disclose exculpatory information. Finally, a federal rule of criminal procedure mandating disclosure of such information – whether or not the information is requested by the defense – would ensure that the defense receives in a timely manner all exculpatory information in the government's possession.

The importance of the government's disclosure obligations cannot be overstated. Indeed, as articulated by the U.S. Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999):

> In *Brady,* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. [83, 87 (1963)]. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs,* 427 U.S. 97 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley,* 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also Kyles v. Whitley,* 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.* at 438. In order to comply with *Brady,* therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles,* 514 U.S. at 437.
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

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something other than that is to be ignored. Any policy that is in tension with that is to be questioned and brought to my attention. And I mean that.'" (quoting remarks by Attorney General Holder at a swearing-in ceremony)).

In a decision issued today, the Supreme Court reiterated these principles in equally strong terms. Both the language used by the Supreme Court, and the fact that the Court was faced with yet another case raising important *Brady* issues, strongly countenance in favor of the Rule 16 amendment previously proposed by the Rules Committee:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. *See Kyles*, 514 U.S. at 437 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"). *See also* ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. *See Kyles*, 514 U.S., at 439; *U.S. v. Bagley*, 473 U.S. 667, 711, n. 4 (1985) (STEVENS, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 108 (1976).

Cone v. Bell, No. 07-1114, slip. op. at 21 n.15 (U.S. Apr. 28, 2009).

A federal rule of criminal procedure requiring all exculpatory evidence to be produced to the defense would eliminate the need to rely on a "prudent prosecutor" deciding to "err on the side of transparency," *id.*, and would go a long way towards furthering "the search for the truth in criminal trials" and ensuring that "justice shall be done." *Strickler*, 527 U.S. at 281. I welcome the opportunity to discuss this issue further.

Respectfully,

Emmet G. Sullivan

cc: Members of the Advisory Committee on the Rules of Criminal Procedure (via facsimile)
The Honorable Eric H. Holder, Jr. (via facsimile)
Counsel of record in *United States v. Theodore F. Stevens*, Criminal Action No. 08-231 (EGS) (D.D.C.) (via ECF)

APPENDIX 2

B. Rule 16

ACTION ITEM–Rule 16 Discovery and Inspection; Proposed Amendment Exculpatory and Impeachment Information

The proposed amendment to Rule 16 is the result of four years of discussion and consideration by the full Advisory Committee and by two subcommittees. This portion of my report provides a summary of the justifications for and issues raised by the proposed amendment.

I have provided the following related materials as attachments: (1) an American College of Trial Lawyers 2003 position paper; (2) the Federal Judicial Center's 2004 Report on the Treatment of *Brady v. Maryland* Material and supplemental 2005 data; (3) a letter from the Federal and Community Defenders; (4) excerpts from the American Bar Association's Model Rules of Professional Conduct and Criminal Justice Standards; (5) the Department of Justice's new *Brady* policy; (6) two lists of *Brady* cases, one covering the period through July 2001, and the other listing more recent cases; and (7) excerpts from an ALR annotation discussing other cases. In addition, the Federal Judicial Center is completing a new research report that should be available in time for inclusion in the materials distributed to the Standing Committee, and I understand that the Department of Justice expects to submit additional materials.

The proposed amendment reflects the Advisory Committee's conclusions that (1) there is a strong case for codifying the prosecution's duty to disclose exculpatory and impeachment evidence in the Federal Rules, and (2) the disclosure under the rules should be broader in scope than the constitutional obligation imposed by *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny. The proposed amendment makes the prosecution's disclosure to the defense of exculpatory and impeachment material a standard part of pretrial discovery in federal prosecutions.

The Committee did not come to the decision to recommend this amendment lightly. The Department of Justice has consistently opposed the idea of amending Rule 16 to encompass exculpatory and impeachment material. The Committee has considered the Department's concerns, and it revised the draft amendment, narrowing it substantially in several respects, in an effort to be responsive to these concerns. During the time the amendment was under consideration, as discussed below, the Department also adopted an internal policy intended to address many of the concerns that prompted the consideration of an amendment. The Advisory Committee welcomed the new policy, but ultimately concluded that it did not take the place of a judicially enforceable amendment to the Federal Rules. The proposed rule and the Department's policy are not in conflict. Rather, they would complement one another and focus appropriate attention on the importance of providing exculpatory and impeachment evidence and information to the defense in a timely fashion.

After the Department's presentation of its new internal policy, the Committee voted 8 to 4 to forward the proposed amendment to the Standing Committee for publication.

The need to address the issue in Rule 16

The failure of the Federal Rules of Criminal Procedure to provide a duty to disclose exculpatory evidence is an anomaly that should be remedied. Although the Federal Rules contain very detailed provisions requiring pretrial disclosure of a wide variety of material and information, there is a gap within the rules. They contain no requirement that the government disclose evidence that would tend to establish the defendant's innocence or tend to cast doubt on key elements of the government's case. In contrast, virtually all states define the prosecutor's obligation to disclosure evidence favorable to the defendant by court rule or statute,[2] and approximately one third of federal districts have local rules that codify the obligation, define what constitutes *Brady* material, and/or set requirements for timing and conditions of disclosure.[3]

There is strong support for amending Rule 16 to include a requirement that the government disclose exculpatory evidence. The Advisory Committee's consideration of this issue was prompted by its receipt of a lengthy 2003 position paper from the American College of Trial Lawyers that advocated an amendment to Rule 16 (as well as a companion amendment to Rule 11). The position paper--which was adopted by the College's Board of Regents--reported the experience of the members of the College's Federal Criminal Procedure Committee. In essence, the College concluded that defense efforts to obtain *Brady* material are often unsuccessful because neither the scope of the obligation nor the timing requirements are clear. In the absence of a clear definition, federal prosecutors have adopted various interpretations of their obligations under *Brady* that improperly restrict disclosure, and disclosure has often been delayed or even denied. The practitioners on the Advisory Committee reported that similar experiences are common. A letter from the Federal and Community Defenders that is included as an attachment and additional communications from individual Federal Defenders also support this view.

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[2]The state rules are described in 2004 report of the Federal Judicial Center, which is included as an attachment. Because it is not critical to know the precise count of states that have each variation of the rules in question, the Federal Judicial Center has not been asked to update that portion of its report. This could, of course, be done during the comment period if it were deemed helpful.

[3]In its 2004 report the Federal Judicial Center found (p. 4) that 30 of the 94 districts had a relevant local rule, order, or procedure governing disclosure of *Brady* material. As noted above, the FJC is presently updating this report to provide a completely current count, and its new report will be included in the agenda materials.

The Committee is also aware of a significant number of cases in which the courts have found *Brady* violations, as well as many more cases in which the courts have found that exculpatory material was not disclosed–or was not disclosed in a timely fashion–but nevertheless found no constitutional violation because the failure to provide the evidence did not deprive the defendant of due process. In many cases, the court found that the undisclosed evidence was favorable to the defendant–and material in the sense that term is generally used under Rule 16–but not material in a narrower constitutional sense. In order to meet this elevated constitutional standard of materiality, the defense must establish a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, *Kyles v. Whitley*, 514 U.S. 419 (1995). The attached materials include brief descriptions of cases considering *Brady* issues,[4] as well as an annotation collecting cases.[5]

The reported cases are not, however, a true measure of the scope of the problem, which it is impossible to measure precisely. The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light. There is, however, no way to determine how frequently this occurs. For that reason, the Advisory Committee places substantial weight on the experience of highly respected practitioners, such as the members of the American College of Trial Lawyers and the practitioner members of the Advisory Committee, who strongly support the need for an amendment to Rule 16. Similarly, the Federal and Community Defenders believe that a rule is needed. One of the values of publishing the proposed rule, of course, would be to gain further information on this point.

It is also important to note that in a large number of districts the local rules or standing orders require disclosure of some or all of the information that would be addressed by the proposed amendment. The local rules, it should be noted, vary widely regarding both the scope of the material to be disclosed, as well as the timing. These variations will be described in the forthcoming Federal Judicial Center report, which will be distributed with the agenda materials. For present purposes, it is sufficient to note two points. First, the development of numerous local rules supports

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[4]Cases prior to July 2001 are summarized in an excerpt from the Habeas Assistance and Training Project. Later cases were summarized by Professor Beale.

[5]This annotation is of interest because it contains not only cases in which the court found that exculpatory or impeachment information was "material" in the sense that term is used in *Brady*, but also a large number of cases in which the court found that exculpatory material was not provided, but that the error was not of constitutional dimensions because the defendant was unable to show a reasonable probability that the result of the trial would have been different if the evidence has been disclosed.

the Advisory Committee's view that exculpatory and impeachment evidence and information can and should be addressed by rulemaking. Second, the variety of these rules suggests that it may be time to replace the patchwork of varying local rules with a single uniform rule.

One new factor emerged during the course of the Committee's consideration of this issue: the Department of Justice, under the leadership of Assistant Attorney General Alice Fisher, adopted a new policy in the United States Attorneys Manual (USAM) requiring disclosure. This is the first time that the Department's written policies have mandated disclosure of exculpatory and impeachment evidence and information, and the Committee was extremely supportive of the Department's action. Moreover, the Department took the unusual step of providing Committee members with drafts of the policy and seeking their comments. The Committee applauded the Department's action, and specifically its broad statement of the duty of disclosure. In the end, however, the Advisory Committee concluded that the new policy, though a major step forward, did not obviate the need for the proposed rule, which differs from the USAM policy in two key respects. First, the USAM policy retains a subjective limitation on the duty to disclose information that is exculpatory or impeaching, but which the prosecutor concludes is "not significantly probative of the issues before the court." USAM § 9-5.001(E)(C). Second, the new policy, like the remainder of the USAM, is not judicially enforceable; it "does not create a general right of discovery," "[n]or does it provide defendants with any additional rights and remedies." USAM § 9-5.001(E). *See also* USAM § 9-5.100 (Preface) ("GIGLIO POLICY") (same). The Committee considered deferring consideration of the amendment to give the new policy time to take effect, but felt that it would not be feasible to monitor compliance. As noted above, the defense is generally unaware when the prosecution fails to provide exculpatory or impeachment information. Accordingly, although it welcomed the Department's recognition of the prosecution's constitutional and professional obligations in the United States Attorneys Manual, the Committee concluded that the new policy did not eliminate the need for a rule making disclosure a part of pretrial discovery.

The rationale for the scope of the proposed Amendment

The proposed amendment is not intended simply to codify the prosecution's constitutional duty under *Brady*. Under *Brady* and the cases that followed it, due process is denied and reversal of a conviction required only if the defense establishes a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667, 682 (1985), or that the trial did not result in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). Although the Supreme Court refers to this as a "materiality" requirement, it is not the same standard of materiality used in Rule 16, which requires disclosure of documents, objects, reports and examinations that are "material to preparing the defense." *See* Rule 16(a)(1)(E)(I) & (F)(iii). Under *Brady*, materiality is a requirement that the defense show prejudice.

The proposed rule requires disclosure of "all ... exculpatory or impeaching information" that is known to the attorney for the government or law enforcement agents who are involved in the investigation of the case. The committee note defines information as exculpatory "if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information." The note also states what is implicit in the text of the rule: there is no additional requirement of materiality as that term is used in cases such as *Kyles v. Whitley*. As a policy matter, this is desirable for several reasons. First, the materiality standard in *Brady* and its progeny was developed for the purpose of appellate review and collateral attack, and it focuses on the impact of undisclosed evidence in light of the record as presented at trial. This standard is obviously ill suited to application prior to trial, particularly in light of the fact that full discovery is not available to either the prosecution or the defense. It is nearly impossible to assess before trial the likelihood that particular information would change the outcome of trial. Second, the materiality standard in the *Brady* line of cases is a constitutional minimum, imposed in state as well as federal cases, not a rule of best practice. Showing a "true" *Brady* violation is an extremely difficult burden for the defense to bear, because it encompasses only a narrow range of information. *Cf. Strickler v. Green*, 527 U.S. 263, 281-82 (1999) (recognizing the distinction between "so-called *Brady* violations" – violations of a "broad obligation to disclose exculpatory evidence" – and "true" *Brady* violations, which occur only when the defendant can show a reasonable probability that the result would have been different if exculpatory or impeachment evidence had been disclosed).

Codifying a requirement that the prosecution disclose all evidence that casts doubt on the defendant's guilt as to any essential element of the case as well as information that impeaches the government's case would bring the Federal Rules in line with current statements of the prosecution's ethical responsibilities and professional statements of good practice, which go substantially beyond the constitutional requirements under *Brady*. The American Bar Associations's Model Rules of Professional Conduct and the ABA Criminal Justice Standards both articulate a broad standard for pretrial discovery. The Model Rules state that the prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor *that tends to negate the guilt of the accused or mitigates the offense....*" AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(d) (2002) (emphasis added).[6] Similarly, the ABA Standards for Criminal

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[6]The American Bar Association's Criminal Justice Standards for Discovery states the same obligation. It provides that the prosecution should disclose:

> (viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, Standard 11-2.1 (a)

Justice: Prosecution and Defense Function provide that broad disclosure is required at the earliest possible time "of the existence of all evidence or information *which tends to negate the guilt of the accused* or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.11 (3 ed. 1993) (emphasis added).

Codifying a general discovery obligation that goes beyond the constitutional minimum would also bring the Federal Rules in line with state procedural rules. A 2004 study by the Federal Judicial Center (included as an attachment) found that most states have adopted procedural rules codifying the prosecution's duty to disclose exculpatory and impeachment evidence, and that many states have adopted the language of the ABA's Model Rules and the Criminal Justice Standards. According to the FJC study, twenty three states have adopted rules that require disclosure of "any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused's punishment therefore." LAUREL L. HOOPER, ET AL., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES, REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (October 2004). Ten additional states provide for a duty to disclose "exculpatory evidence" or "exculpatory material." *Ibid.* Five states require the disclosure of evidence "favorable to the accused" that is also "material and relevant to the issue of guilt or punishment." *Id.* at 20. Many states also provide for the disclosure of types of evidence and information, not included in Rule 16, that would be helpful to the defense. *Id.* at 21.

Specific aspects of the proposed rule

There are two critical features of the proposed rule: the scope of required disclosure, and the timing of the disclosure.

Scope of required disclosure. As noted above, the proposed rule is stated without any separate "materiality" requirement, though evidence is certainly material in the general sense used in Rule 16--"material to preparing the defense"--if it "is ... either exculpatory or impeaching." The proposed rule further defines exculpatory in the committee note as information "that tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment." This is similar to the ABA Standards noted above and many state statutes and court rules based upon them, all of which refer to evidence or information that tends to negate the guilt of the accused. The committee note does not define the term impeachment.

(3rd Ed. 1996).

The rule refers to "information." This word was chosen, instead of evidence, to make it clear that the discovery obligation was not limited to admissible evidence. The Advisory Committee discussed whether to use the phrase "evidence and information," which is used in many of the state provisions as well as the ABA Standards and Model Rules. The Committee felt that the term information was broad enough to encompass both, but can rephrase the amendment following notice and comment if there is any confusion on this point.

The rule refers to information "known to" the prosecution team, without limiting it to information that is within the prosecution's "possession, custody, and control," as is the case with several other parts of Rule 16. *See, e.g.*, Rule 16(a)(1)(E). Since the rule is phrased in terms of "information," rather than evidence or material, it is fair to ask the government to provide exculpatory information even if it does not have custody of any specific piece of evidence (because, for example, it is in the custody and control of state officials). Providing the defense with the information that such exculpatory evidence exists would permit the defendant to subpoena the evidence from a third party or to investigate in an effort to find admissible evidence.

Timing. The Committee considered at length the issue of the timing of disclosure, which is a critical issue for both prosecution and defense. From the defense perspective, the earliest possible disclosure is desirable, and one of the key objections from both the American College of Trial Lawyers and other practitioners is that if disclosure is made, it often occurs on the eve of, or even during trial. As a result, it is difficult for the defense to make use of the information without a continuance, if one can be obtained. The defense seeks exculpatory and impeachment information as part of routine pretrial disclosure, and that is, in fact, how it is treated in many jurisdictions (including a number of federal districts). The Department of Justice, however, expressed grave concern that disclosure significantly in advance of trial could have adverse consequences. The most pressing concern, from the Department's perspective, is the need to protect witnesses from intimidation and even physical harm. Accordingly, the Department placed a high priority on deferring the disclosure of any information that would identify witnesses, directly or indirectly, in order to limit the time during which any prospective witness is subject to coercion or threats. Moreover, deferring disclosures about witnesses until the eve of trial means that the identity of many prospective witnesses will never be disclosed, since most cases do not go to trial.

The rule proposed by the Committee reflects a compromise on timing. It distinguishes between the timing for exculpatory information and information that merely goes to impeachment. It is impeachment information, by definition, which raises most of the concerns about revealing the identity of prospective government witnesses. The rule defers the duty to provide impeachment information, providing that "[t]he court may not order disclosure of impeachment information earlier than 14 days before trial." In the case of exculpatory information, in contrast, the rule states that prosecution must make this information available "[u]pon a defendant's request," without setting a particular time. This follows the pattern of other pretrial discovery obligations under Rule 16.

Thus the rule would permit the district courts to include such disclosure within the other timing requirements applicable to pretrial discovery. In contrast, the American College of Trial Lawyers proposed a requirement that disclosure be provided within 14 days after the defendant's request. The College noted (p. 23) that early discovery is especially important in the federal system, where the Speedy Trial Act requires cases to be brought to trial quickly, and the time for pretrial preparation is limited, even in complex cases which may have been under investigation for years.

Other features not included. The American College of Trial Lawyers also proposed (pp. 23-24) a due diligence certification, which would require the government attorney to certify in writing that he or she has exercised due diligence in locating all information favorable to the defendant, provided all such information to the defendant, and acknowledged the continuing obligation to disclose such evidence until final judgment has been entered. This certification requirement was intended to avoid a situation where evidence known to investigators was never known to the prosecutor or disclosed to the defense, and to highlight the critical importance placed upon compliance with this requirement. The Committee's proposal does not include a certification requirement.

The Committee also discussed, but did not include in this proposal, a requirement to provide information that would be relevant to sentencing. The Committee has received proposals for disclosure requirements related to sentencing, but did not make that part of this proposal.

Effect on appellate review and collateral attack

One issue that concerned members of the Advisory Committee was the effect that the amendment would have on cases on direct appeals and collateral attack. The short answer is that (1) defendants who could establish a violation of Rule 16 would likely find it somewhat easier to obtain a new trial on direct appeal than if they had to prove a constitutional violation, but (2) it is doubtful that there would be any difference on collateral attack.

Direct appeals. The adoption of the proposed rule would have two effects in cases on direct appeal. First, because the rule would define the duty to provide exculpatory and impeachment material more clearly and more broadly, it should simplify the court's task in determining whether a violation occurred. The rule would also change the standard of review, though there is sufficient variation in law at the circuit level that the picture is not entirely clear. A showing of prejudice is a necessary element of a constitutional violation under *Brady* and the cases that follow it. To establish a constitutional violation the defendant must demonstrate a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, *Kyles v. Whitley*, 514 U.S. 419 (1995). In contrast, once a defendant has established that a violation of the Rules of Criminal Procedure, the burden in on the government to demonstrate that any error raised in a timely fashion

was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002). In *Vonn* and *United States v. Olano*, 507 F.3d 725, 733 (1993), the Supreme Court stated that the government has the burden of persuasion on the prejudice issue under Rule 52(a), but a defendant who did not raise the issue in a timely fashion bears the burden of persuasion on prejudice under the plain error provision of Rule 52(b). Although both *Vonn* and *Olano* were plain error cases, and the discussion of Rule 52(a) was technically dicta, the Court was clear on the point that in contrast to Rule 52(b) the government has the burden of showing harmlessness under Rule 52(a).

Many circuit decisions, however, still cite older precedents and hold that the defendant seeking relief on appeal from a discovery violation must always show prejudice. *See, e.g., United States v. Rosario-Peralta*, 199 F.3d 552 (1st Cir. 1999), and *United States v. Figure on-Lopez*, 125 F.3d 1241 (9th Cir. 1997). It is doubtful whether these cases can be squared with the Supreme Court's decisions in *Vonn* and *Olano*.

Collateral attacks. In § 2255 proceedings a defendant must establish "a violation of the Constitution or laws of the United States." Nonconstitutional claims can be raised, however, only if the error is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). Since *Hill* involved a violation of the Federal Rules of Criminal Procedure, the same standard should be applicable to a violation of Rule 16. It seems likely that the "complete miscarriage of justice" and "rudimentary demands of fair procedure" standards would be similar the principles the Court has articulated in the *Brady* line of cases. If so, then the adoption of the amendment would have no effect in collateral proceedings.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 16 be published for public comment.

C. Forfeiture Rules

Working through a subcommittee, and with the substantial assistance of forfeiture specialists in the Department of Justice and Mr. David Smith (an authority on forfeiture who presented the views of the National Association of Criminal Defense Lawyers), the Committee developed and approved a package of amendments intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000. Although the Committee heard proposals for more fundamental changes, in general it chose not to break new ground, and adopted what are largely consensus proposals. All members of the Committee concurred in recommending that the proposed amendments be forwarded to the Standing Committee for publication. Three rules are affected: Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture).

APPENDIX 3

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) *Information Subject to Disclosure.*

* * * *

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

COMMITTEE NOTE

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information.

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

APPENDIX 4

Office of the Deputy Attorney General
Washington, D.C. 20530

June 5, 2007

The Honorable David F. Levi
Chair, Committee on Rules of
Practice and Procedure
United States District Court
for the Eastern District of California
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Dear Chief Judge Levi:

This letter sets out the Department's deep concerns with the Rule 16 proposal that will be considered by the Standing Committee next week. While the proposal suffers from a number of practical defects that this letter will address in significant detail, it is worth emphasizing certain broad points at the outset. The objective of the criminal justice system is to produce just results. This includes ensuring that the process we use does not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – i.e., victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice. Over the past several decades, a careful reconciliation of these interests, as they relate to disclosure of exculpatory and impeachment information, has been achieved through the interweaving of constitutional doctrine (i.e., Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419, 439 (1995)), statutory directive (i.e., Jencks Act and Crime Victims' Rights Act), and Rules (i.e., Rule 16). The Advisory Committee on Criminal Rules, Practice and Procedure ("Advisory Committee") now proposes a dramatic reworking of that balancing, one the Committee itself recognizes will extend far-beyond current Brady and Rule 16 obligations and would be a significant change in the current adversary system. Given the breadth of this proposal, it would be reasonable to expect there to be a well-documented case that this proposal is necessary to solve a fundamental problem of regular false conviction of the innocent. That is not the case. Instead, what the Advisory Committee offers is reference to a relatively small number of Brady cases (which needs to be put in the context of the more than 70,000 federal defendants convicted each year) and the general supposition of "highly respected practitioners" that change is needed.

In the same way that there is an absence of a compelling justification for such a significant change, the Committee's report also ignores the very substantial costs additional

disclosure will impose – costs to the reputational and privacy interests of witnesses, costs in additional litigation, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. These are real costs and ones that both the Supreme Court and Congress have taken pains to avoid. The Committee offers the proposed rule and its rejection of a materiality requirement for the disclosure of exculpatory information despite the fact that the Supreme Court has observed that failure to limit the scope of Brady to material evidence "would entirely alter the character and balance of our present systems of criminal justice." United States v. Bagley, 473 U.S. 667, 675 n.7 (1985) (quotation omitted). Similarly, the Bagley Court declared that a rule eliminating materiality "would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." Id. Fundamental changes of this magnitude, which contemplate a departure from over forty years of Supreme Court precedent as well as established statutes and procedural rules, should not be entered into without significant pause and a corresponding and well-documented need. Because no such need has been demonstrated, the proposal should not move forward.

It is not simply the lack of an empirical case for change which should give pause, but also the fact that the Department's new modifications to the United States Attorney's Manual, ("USAM") which address many of the Advisory Committee's concerns regarding the disclosure of exculpatory and impeachment information, have not yet been given an opportunity to take full effect. The Department released this new USAM provision only after giving extensive and serious consideration to the rule amendments circulating in the Committee. In fact, the provision represents an unprecedented effort on the part of the Department to collaborate with Rule 16 subcommittee members to address their concerns while still preserving the balanced discovery system sought by Congress.[1] The new USAM provision did not merely codify a prosecutor's constitutional disclosure obligations under the pre-existing Supreme Court precedent but went further – by expanding the disclosure obligations both in substance and process.[2] This new

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[1] As stated in the Committee's report, the Committee "applauded" the Department's efforts to create a new USAM policy that required broad disclosure. In fact, during the drafting process, the Department obtained the approval of Committee members with respect to the USAM's coverage of exculpatory information. Although sections of the Committee's report focus almost exclusively on exculpatory information (see "The need to address the issue in Rule 16" discussion in Committee report), it is the Department's understanding that the Committee moved forward with the proposed amendment in large part because it disagreed with the USAM's coverage of impeachment information.

[2] It deserves mention that violating the USAM has serious repercussions: an attorney can be investigated by the Office of Professional Responsibility ("OPR"), disciplined or dismissed from the Department, and reported to his or her licensing Bar. A review of OPR investigations closed on or after January 1, 2002, through the present revealed that seventy investigations led to a finding of misconduct and the Department taking disciplinary action based on the misconduct. In addition, there are an additional twenty-one investigations pending before the Department in

provision is still in its infancy – having only taken effect on October 19, 2006 – and has not yet been given an opportunity to prove its effectiveness.

These factors are not the sole reasons to counsel against approving the proposal. Indeed, there are numerous problems with the Advisory Committee's proposed modification to Rule 16. They include:

- As noted above, the proposed amendment is inconsistent with forty years of Supreme Court precedent as it seeks to obliterate any materiality requirement for both the disclosure of exculpatory and impeachment material. As the Court stated in United States v. Agurs, 427 U.S. 97, 112 n. 20 (1976), any effort to focus the impact of government disclosures on "the defendant's ability to prepare for trial" deviates from the holding of Brady, which addresses the Court's "overriding concern" with the justice and accuracy of the finding of guilt. Id. at 112. In reaching these decisions, the Court has recognized that eliminating the materiality requirement would "impose an impossible burden on the prosecutor and undermine the interest in the finality of judgements." Bagley, 473 U.S. at 675 n. 7.

- The proposed amendment clashes with other provisions of the Rules of Criminal Procedure, including other portions of *Rule 16 itself*. For example, the government's disclosure obligations under both Rule 16(a)(1)(E) and 16(a)(1)(F) are triggered by items that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)-(F). Likewise, Rules 16(a)(2) and 16(a)(3) leave the timing of the disclosure of non-expert witness statements to the provisions of the Jencks Act, as does Rule 26.2. The proposed amendment, however, does not even discuss how it should be reconciled with these provisions, passed by the Advisory Committee's predecessors and codified by years of federal practice.

- The proposed amendment disregards the statutory requirements of the Jencks Act, 18 U.S.C. § 3500, which governs the disclosure of witness statements. This statute, which has been law for decades, represents the congressional balancing of the competing interests of witness security and privacy with the defendant's interest in disclosure, and was intended to prevent defendants from rummaging through government files for helpful information. United States v. Palermo, 360 U.S. 353, 354 (1958). The proposed rule, however, utterly disregards that balance and consigns the statute, and the concomitant congressional balancing of interests contained in the Act, to a distant memory.

- The proposed amendment is inconsistent with discovery procedures which are

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which OPR found misconduct and recommended disciplinary action.

applied every day in most of the federal courts in the United States where the materiality provisions of the Brady line of cases are applied routinely and effectively. Moreover, the Advisory Committee overstates the effect of local rules and practices in district courts across the country, a subject that augurs at a minimum for further study before enacting such a sweeping modification.

- There is no demonstrated need for such a significant change. The Advisory Committee relies principally on anecdotal evidence and the premise that, given the nature of the problem, the full scope of disclosure will never be known – an assertion that is virtually impossible for the government to refute. In contrast to the Advisory Committee's position, our assessment of the Brady cases raised in the materials presented by the Committee[3] suggests that on average there are less than two reported federal cases each year that find a Brady violation. This is hardly evidence of a substantial problem warranting such a fundamental change to existing practice.

- The proposal would sow confusion through the federal legal system by creating confusion in application, remedy and review. The rule contains little or no guidance on how it should be applied. For example, the Advisory Committee makes no effort to define "impeaching," thus subjecting courts and practitioners to contend with multiple interpretations and leading to virtually unlimited disclosure obligations on the government to turn over innuendo, hearsay, and rumor, no matter how remote or speculative. Moreover, the proposal would create further confusion as to how courts should view violations that are disclosed before trial, after conviction, on appeal and on collateral review. For instance, the simple question of what is the proper remedy if a trial judge discovers before trial that a disclosure is incomplete remains unanswered. What if that discovery is made after the witness has testified? What if it occurs after a verdict? Should that verdict be set aside, or does a harmless error analysis apply? If so, what does that mean for the intended aim to dispense with a materiality requirement? What standard should be applied on appeal to allegations of a failure to comply with Rule 16? Does that change if the case is on collateral review? These questions – and many more – are left unanswered.

- The proposal risks treading on the current policy balance between disclosure and privacy interests and witness protection, while it also clashes with statutes, such as the Crime Victims' Rights Act ("CVRA") and federal and state rape shield laws, that are intended to safeguard the rights of crime victims. Congress enacted the CVRA, for example, to make crime victims full participants in the criminal justice

[3] Our evaluation is based on the cases summarized in an excerpt from the Habeas Assistance Training Project.

system by providing them a procedural mechanism to enforce a number of rights and protections, including the right to have their privacy protected. Similarly, Congress has also made it a federal priority to help states combat child abuse and to promote the reporting and prosecution of rape and sexual assault through the enactment of rape shield laws and statutes protecting the confidentiality of child abuse investigative records. These statutes serve the compelling interest of protecting victims by making it easier for them to report such heinous crimes. The proposed rule, however, would require disclosure of such information regardless of its relevance, admissibility or materiality. Likewise, the new rule conflicts with state statutes, such those in California, that govern the disclosure of the personnel files of state and local law enforcement officials, as well as federal practices regarding the release of such information.

- The proposal disregards the legitimate interests of the federal government in protecting the safety and integrity of witnesses, many of whom are private citizens. The prospect of testifying in a federal criminal trial – regardless of the type of crime involved – can be frightening and intimidating, and it is difficult and challenging to secure the cooperation of the victims and witnesses of crime. It is a sad reality that many witnesses are threatened, harassed or, in some instances, assaulted or killed by those against whom they are asked to testify. The proposed rule, however, further threatens these witnesses by requiring the government to turn over all potential impeaching information, without limits to its admissibility, materiality or relevance, and then puts the burden upon the government to prove that witness safety is at risk – a burden that can be difficult to discharge before any harassment actually takes place. Thus, the proposed rule would ask victims and witnesses to shoulder an even heavier burden and would detract from effective law enforcement, all in the absence of a demonstrated need for such a radical change.

The Department of Justice strongly urges the Standing Committee to reject the Advisory Committee's proposal in its entirety as there is no justification for such a fundamental change to existing law. Should the Standing Committee decline to reject this proposal outright, the Department requests that it send the matter back to the Advisory Committee and direct it to study this issue further over several years. If, after a careful and studied review of the USAM's impact on the practice of discovery, the Advisory Committee determines that the USAM provision is not working, empirical evidence supports the need for a fundamental change, and a rule is required for achieving the desired results, then, and only then, the Standing Committee should ask the Advisory Committee to draft a new proposal – one that is consistent with existing law and Supreme Court precedent, properly balances the policy interests at stake, uses definitive and

precise language, answers the unanswered questions and addresses the concerns raised in this letter.[4]

I. The Proposal Upsets the Purpose, Operation, and Balance of the Current Law

A. The Proposal Is Inconsistent with Supreme Court Precedent

The rule announced in Brady is a constitutional right. Its purpose is to guarantee defendants the right to a fair trial and sentencing. It ensures that the factfinder can be made aware of any evidence that is exculpatory or impeaching and material to the factfinder's decision. Like many other constitutional guarantees under the Fourth, Fifth, and Sixth Amendments, it has never been codified. Like other constitutional protections, Brady provides no remedy unless the defendant shows that the Constitution has been violated. Unlike Rule 16, Brady's purpose is not to provide discovery – either for trial preparation or plea negotiations. Rule 16 serves that purpose and does so in a manner that is parallel and reciprocal for both parties. This distinction between Brady and Rule 16 discovery – reaffirmed in forty years of case law – is fundamental to the purpose and operation of the rules.

It is axiomatic that "[t]here is no general constitutional right to discovery in a criminal case." Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Nevertheless, the Supreme Court has held that the disclosure of certain information is necessary to protect a defendant's right to a fair trial under the Due Process Clause of the Fifth Amendment.

In Brady, the Court granted a criminal defendant a new sentencing hearing because the prosecutor had withheld evidence of a co-defendant's confession. The Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due

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[4] The procedural history begins in October 2003, when the American College of Trial Lawyers ("ACTL") first submitted a proposal to the Judicial Conference's Advisory Committee on the Rules of Criminal Procedure ("Advisory Committee") to codify and dramatically expand the Government's disclosure obligations as set forth in Brady and Giglio. The Advisory Committee formed an initial subcommittee to consider the proposal. After its May 2004 meeting, the Advisory Committee agreed to continue its study of the proposal and formed a second subcommittee. The Department of Justice expressed its opposition to the ACTL proposal in written and oral submissions to both subcommittees. Despite numerous conference calls, a series of opposition memoranda, and the government-initiated creation of a policy in the United States Attorneys' Manual ("USAM") requiring disclosure beyond the constitutionally required minimum, the subcommittee, over the Department's objection, voted to submit a draft amendment of Rule 16 to the Advisory Committee which greatly expanded the Government's disclosure obligations. After a series of revisions, the Advisory Committee, in turn, now presents new draft amendment language along the same lines to the Standing Committee and requests that it be published for public comment.

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The principle supporting that holding, the Court explained, is "avoidance of an unfair trial to the accused." Id.

In Giglio, the Court extended Brady to impeachment evidence, holding that the prosecution violated due process when it failed to disclose that it had promised its key witness that he would not be prosecuted if he testified at the defendant's trial. The Court reasoned that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the Brady] rule." Giglio, 405 U.S. at 154 (citation and internal quotation marks omitted).

In subsequent cases, the Court has consistently limited Brady to the nondisclosure of exculpatory and impeachment information that results in the denial of a fair trial by undermining confidence in the reliability of the jury's finding of guilt or of the resulting sentence. In United States v. Agurs, 427 U.S. 97 (1976), for instance, the Court emphasized as "a critical point" that "the prosecutor will not have violated his constitutional duty of disclosure [under Brady] unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. at 108. The Court further explained that, because "[t]he proper standard of materiality must reflect *our overriding concern with the justice of the finding of guilt*," a prosecutor's failure to disclose exculpatory evidence violates the Constitution only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." Id. at 112 (emphasis added). Notably, the Court rejected as inconsistent with Brady a standard that would instead "focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." Id. at 112 n.20.

Similarly, in Bagley, the Court considered and rejected the expansion of Brady to reach nonmaterial, inadmissible information. The Court explained that the purpose of the Brady rule "is not to displace the adversary system . . . but to ensure that a miscarriage of justice does not occur." Bagley, 473 U.S. at 675. For that reason, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Id. (footnote omitted). The Court explained that failure to limit the scope of Brady to evidence that is material "would entirely alter the character and balance of our present system of criminal justice." Id. at 675 n.7 (quotation omitted). Such a rule "would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." Id. The Court then reiterated that "[c]onsistent with our overriding concern with the justice of the finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." Id. at 678 (citation and internal quotation marks omitted).

Subsequently, in Kyles, the Court explained that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." 514 U.S. at 436-37 (citing Bagley, 473 U.S. at 675 n.7). A constitutional violation

occurs only "when the government's evidentiary suppression undermines confidence in the outcome of the trial." Id. at 434 (citation and internal quotation marks omitted). And in Strickler v. Greene, 527 U.S. 263, 281 (1999), the Court observed that, while the phrase "'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Id. (footnote omitted).

In contrast with this established precedent, the Committee's proposal requires disclosure of "all information . . . that is either exculpatory or impeaching," without regard to whether its suppression would deprive the defendant of the benefit of a fair trial. The proposal intentionally eviscerates Brady's "materiality" requirement and transforms Brady – which is intended to protect the fairness of trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence – into a trial preparation right by providing the defense with what inevitably will be, under the proposed rule, open file discovery. The Supreme Court has rejected earlier calls for expanding Brady in this manner, see Agurs, 427 U.S. at 112 n. 20; Weatherford, 429 U.S. at 557, and so should the Standing Committee.

As the case law uniformly recognizes, the purpose of the Supreme Court's Brady line of cases is to protect the fairness of criminal trials, not to provide defendants with an additional discovery tool for assisting in trial preparation. Rule 16 – *which already overlaps with Brady in areas other than witness statements* – serves this latter purpose. As the Court explained, any broader right – such as the one currently proposed – would fundamentally alter the character and balance of our present systems of criminal justice. Bagley, 473 U.S. at 675 n.7 (quotation omitted).

B. The Proposal Is Inconsistent with Rule 16

The concept of materiality is a fundamental part of Rule 16 which governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly state that in revising Rule 16 "to give greater discovery to both the prosecution and the defense," the Committee had "decided not to codify the Brady Rule." Fed. R. Crim. P. 16 advisory committee's note. The Committee noted, however, that "the requirement that the government disclose documents and tangible objects '*material* to the preparation of his defense' underscores the importance of disclosure of evidence favorable to the defendant." Id.

The elimination of the materiality requirement is contrary to the Committee's existing discovery policy, the tenants of the other provisions of Rule 16, and the discovery practice occurring every day in courts throughout the country. For example, current Rule 16(a)(1)(E) requires disclosure of books, papers, documents, data, etc. if "the item is *material* to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(I) (emphasis added). Similarly, Rule 16(a)(1)(F) requires disclosure of reports of scientific tests or experiments if "the item is *material* to

preparing the defense . . . . " Fed. R. Crim. P. 16(a)(1)(F)(iii) (emphasis added). The proposed rule ignores the fact that Rule 16 already provides for significant discovery. It ignores the fact that Rule 16 already overlaps with Brady by requiring the Government to disclose documents, objects, and reports that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(I). It ignores the fact that the Committee recognized this overlap and intentionally decided not to go further. Fed. R. Crim. P. 16 advisory committee's notes. It ignores the fact that Rule 16 explicitly *excludes* non-expert witness statements from its scope – a protection granted to both parties – and, instead, recognizes that their disclosure and the timing of their disclosure is entrusted to the Jencks Act. See Fed. R. Crim. P. 16(a)(2)-(3) (reaffirming that the Jencks Act is the exclusive means for compelling the disclosure of statements of government witnesses for impeachment purposes). It ignores the policy underlying these rules – the unfortunate but real world fact that the premature disclosure of witness statements increases the risk of witness intimidation and creates opportunity for the opposing party to script the testimony of their witnesses in response – all of which taints the integrity of the trial itself.

The notion, suggested in Committee meetings and materials and by the ACTL in its original submission to the Committee, that the materiality requirement of Brady and Giglio is appropriate only in the context of appellate review or "cannot realistically be applied by a trial court facing a pre-trial discovery request" is simply false. The plain language of Rule 16, coupled with existing policy and practice demonstrates that not only is it possible to assess materiality accurately before trial but it is in fact done on a daily basis and has been codified in the current rules. The Committee's report also incorrectly suggests that the decision not to require disclosure of exculpatory evidence within Rule 16 creates an "anomaly" within the Rules of Criminal Procedure. It is the proposal that would create an anomaly within the rules because it threatens to change Rule 16's status as a limited rule requiring disclosure of material evidence and aims to drastically alter the provisions so that the government is effectively turned into an investigative agent for the defense.

C. The Proposal Is Inconsistent with the Jencks Act and Rule 26.2

The Jencks Act and Federal Rule of Criminal Procedure 26.2[5] control the disclosure of non-expert witness statements and reports. The Jencks Act provides:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United

[5] Rule 26.2 was drafted to include the substance of the Jencks Act within the Criminal Rules. This Rule applies equally to the prosecution and defense as it allows either party to move for the production of any statement of a witness, other than the defendant, who has testified, that is in the possession of the non-moving party and that relates to the subject matter of the witness's testimony. Fed. R. Crim. P. 26.2.

States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b). The Jencks Act balances the importance of disclosure in contributing to accurate determinations regarding guilt and punishment against the costs of offering open access to defendants of the government's investigative files. Compare Goldberg v. United States, 425 U.S. 94, 104 (1976) (noting that "[t]he House committee expressed its goal as that of preventing defendants from 'rummag[ing] through confidential information containing matters of public interest, safety, welfare, and national security.'") (quoting H.R. Rep. No. 700, at 4), with id. at 107 (describing the Jencks Act as "'designed to further the fair and just administration of criminal justice'" by requiring disclosure of certain witness statements) (quoting Campbell v. United States, 365 U.S. 85, 92 (1961)). The Act and the procedural rule designed to implement it achieve this balance by requiring the disclosure of only those witness statements that fall within their relatively narrow definition and only after the witness testifies.

In a Supreme Court case decided shortly after the enactment of the Jencks Act, the Court stated: "The Act's major concern is with *limiting and regulating defense access to government papers*, and it is designed to deny such access to those statements which do not satisfy [the definition of statement], or do not relate to the subject matter of the witness' testimony." Palermo v. United States, 360 U.S. 343, 354 (1959) (emphasis added). In keeping with these concerns, the Palermo Court described how certain materials if disclosed as impeachment information would defeat the purpose of the Act:

> One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of Jencks would compel the undiscriminating production of agent's summaries or interviews . . . [It would be] grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations.

Id. at 350.

The Committee's proposal is inconsistent with the stated purpose of the Jencks Act – limiting and regulating defense access to government papers – in that its enactment essentially mandates disclosure akin to open file discovery. Requiring disclosure of all impeachment information, without regard to its evidentiary value or significance, is so sweeping that prosecutors will have little choice but to provide open file discovery. See infra pp. 15-16 (discussion of breadth of rule). The proposal also threatens to disrupt the delicate balance of interests achieved in the Act – the defendant's right to disclosure versus the government's interest in protecting against unfettered access to government files. In addition, the proposal contradicts the Court's reasoning in Palermo – to protect witnesses from improper impeachment. Moreover, the Committee's proposal contains no mention of Rule 26.2, which contains the current procedures for witness statement disclosures. Thus, the proposal creates yet another

inconsistency within the Rules without any attempt to reconcile these provisions.

Moreover, Congress recognized the risks and difficulties involved in testifying against a criminal defendant when it adopted the policy embodied in the Jencks Act that as a matter of law protects government witnesses, their identities, and their statements until they testify. This protection against premature disclosure of identifying information exists without the government carrying any additional burden of proving that the safety of a witness is endangered. The Committee's proposal would reverse that policy and expand the government's obligation to disclose information to a defendant to such a degree that the identity of government witnesses would have to be disclosed weeks before trial is scheduled to begin and potentially months before the witness testifies unless a court concludes that the prosecutor has met her burden to show that safety concerns exist. This would, without question, put witnesses and their families at greater risk – in direct contravention of the stated policy objective of the Jencks Act.

D. The Proposal Is Inconsistent with Criminal Discovery Practices in Most Federal Courts

In July 2004, the Advisory Committee requested that the Federal Judicial Center ("FJC") study and report on the local rules of the U.S. district courts, state laws, and state court rules that address the disclosure principles contained in Brady. What the FJC report[6] revealed was that most federal districts did not codify any aspect of Brady in local rules, orders, or even in customary procedures before the court. Nevertheless, the Advisory Committee points to the existence of some local rules, orders, and procedures to augment its argument for an amendment to Rule 16. According to the Committee, the local rules that govern Brady disclosures vary widely from one district to another; thus, the Committee argues, the proposed changes to Rule 16 will create consistent prosecutorial obligations throughout the federal system.

What the Committee fails to recognize is that while some[7] district courts have adopted local rules or some other prevailing standard to address Brady disclosures, none of those local

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[6] This report is titled, "Treatment of Brady v. Maryland Material in United States District and State Courts Rules, Orders and Policies." Although the Advisory Committee notes that FJC will release an updated report in 2007, at the time of writing this letter we had available to us only the 2004 FJC report and 2005 supplement data.

[7] The FJC Report notes that thirty, or approximately one-third, of the ninety-four district courts have some form of a local rule, order or procedure addressing the disclosure of Brady material. In a memorandum from John K. Rabiej to the Brady subcommittee containing supplemental data to the FJC Report, the District of the Northern Mariana Islands is cited as another example of a district court with a local rule addressing Brady obligations. Memorandum from the Rules Comm. Support Office of the Admin. Office of the U.S. Courts to the Brady Subcomm. 1 (Mar. 2, 2005).

rules accomplish this task with the breadth that the proposed revisions to Rule 16 seek to implement. The three orders[8] that require disclosure, "without regard to materiality," of all evidence "within the scope of Brady" have separate provisions for disclosure of Giglio information[9] that do not expressly waive the materiality requirement. None of the other local rules come even remotely close to the proposed amendment's breadth. Thus, with respect to exculpatory evidence, the proposed rule, which does away with the materiality requirement, is broader than local rules or orders in 97% (91 out of 94) of federal districts; and with respect to impeachment evidence, the proposed rule is broader than any of the local rules or orders in all 94 federal districts.

In addition, the Committee appears to overstate the impact of the local rules, orders, and procedures that currently are in effect. First, the report examined any rule or order addressing the disclosure of favorable evidence. Many of these orders appear to apply only to the practice before a particular magistrate or judge, and thus, do not have the force and effect of a local rule applying to all of the criminal cases in a district.[10] Second, many of the orders refer to disclosure of "Brady" information, which necessarily includes a materiality requirement unless it states otherwise.[11] Others contain express language indicating that the evidence must be material.[12]

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[8] These orders include: M.D. Ala., S.D. Ala., and N.D. Fla.

[9] For instance, the local rules for the Southern District of Alabama provide for the disclosure of Giglio material defined as "[t]he existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of United States v. Giglio." S.D. Ala. R. 16.13(b)(1)(c). The Middle District of Alabama has a standing order on criminal discovery with identical language, which can be found at: http://www.almd.uscourts.gov/Web%20Orders%20&%20Info/Criminal%20Discovery%20General%20Order.htm (last visited Feb. 23, 2007). The Northern District of Florida employs the same language in its Rule 26.3(D)(2). N.D. Fla. R. 26.3(D)(2) (West 2004).

[10] For example, the report lists: D. Idaho, Magistrate Procedural Order; E.D. Tenn., Magistrate Criminal Scheduling Order; W.D. Mo., Magistrate Judge Procedural Order; N.D. Ga., Magistrate Judge Order; M.D. Ga., Standard Pretrial Order; W.D. Ky., Magistrate Arraignment Order; D. Nev., Joint Discovery Statement; S.D. W. Va., Arraignment Order and Standard Discovery Request. The District of Nevada's Joint Discovery Statement is only customary, however, and not required of the parties.

[11] These orders include: D. Neb., W.D. Mo., E.D. Tenn., W.D. Tex., M.D. Ga., N.D. Ga., S.D. Fla., D. Conn., D. Vt., N.D. W. Va., M.D. Tenn., D. N.M., N.D. N.Y., and W.D. Okla.

[12] D. Nev., Joint Discovery Statement ("suppression by the prosecution of evidence favorable to an accused, . . . violates due process where the evidence is *material* either to guilt of punishment."); D. Idaho Procedural Order ("[d]isclose all *material* evidence within the scope of

While there may be a legitimate reason to regularize the practice of how the government handles disclosures of impeaching and exculpatory information, the proposed revisions to Rule 16 do not offer a workable solution. In essence, the Committee wants a prosecutor to disclose any impeachment material regardless of materiality – a standard vastly different from each district that has addressed the Brady disclosure requirements within its local rules.

Moreover, while the FJC studied and reported on which federal district and state courts adopted formal rules or standards for guiding prosecutors' disclosure obligations under Brady, the FJC report did not assess local compliance with or the success of these rules or the consequences for violating them. Before the Standing Committee publishes for public comment a rule that is broader than any of the local rules and threatens to disrupt the adversarial balance in the federal criminal justice system, it should ask the Advisory Committee to conduct thorough research on the effectiveness of these local rules in practice.

E. The Proposal Is Unnecessary

The proposed amendment would not only be a fundamental deviation from current law, precedent and practice, but it is also entirely unnecessary. The Supreme Court has issued a series of rulings over the four decades since Brady was decided that clearly define the scope of the Brady rule. Accordingly, no further clarification or codification of those responsibilities is warranted.

Moreover, contrary to the Committee's position, there is no demonstrated need to change the rules. The Committee cites anecdotal evidence from the ACTL and the College's Federal Criminal Procedure Committee to suggest that the lack of guidance to prosecutors in the form of a rule results in the improper restriction of or outright refusal to disclose exculpatory information. In addition, the Committee points to cases summarized in its materials where Brady evidence was not disclosed as evidence of a significant problem. The Committee cites this small number of federal cases as proof that a substantial problem exists and then, presumably recognizing the weakness of the empirical support for its argument, suggests that "a true measure of the scope of the problem" cannot be known because "[t]he defense is, by definition, unaware of exculpatory information that has not been provided by the government." (See "The need to address the issue in Rule 16 " discussion in Committee's report).

In essence, the Committee's position is that there is no possible way to measure the scope of the problem and thus there is no possible way to know whether anything other than its proposed rule is sufficient to remedy the problem. This puts the Government in the impossible position of trying to argue against an irrefutable point because if there is no possible way to know

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Brady . . .); W.D. Wash. ("provide . . . evidence favorable to the defendant and *material* to the defendant's guilt or punishment."); and D. N.H. ("[t]he government shall disclose any evidence *material* to issues of guilt or punishment . . .").

whether sufficient cause exists for the dramatic remedy suggested by the Committee's proposed rule amendment, then there is equally no way to argue against the Committee's declaration.

Fortunately, there is hard data, and it does not mesh with the Committee's account of Brady violations in the federal criminal justice system. The government has studied and evaluated the list of cases set forth in the Habeas Assistance Training Project's "Successful Cases Under *Brady v. Maryland*" (circulated by the Advisory Committee) and determined that it does not demonstrate a need to change the federal rules. The majority of these cases are based upon state prosecutions.[13] Specifically, 58 of the 106 cases listed under the Court of Appeals section are based upon state prosecutions that do not provide a basis for a change to the federal rules. The remaining 48 cases are federal prosecutions which span 40 years – an average of less than two cases per year. Even recognizing that this list is not comprehensive, it is hardly overwhelming. If there were a systemic Brady problem in the federal system, one would expect the list to include many more cases.

Further the majority of the cases listed involve impeachment Brady evidence, rather than exculpatory Brady evidence. Most impeachment information is covered by the Jencks Act. As with all witness statements, the proposal requiring the disclosure of this information "[no] earlier than 14 days before trial" directly conflicts with the Jencks Act. And it does so without any reason to believe that it would solve the "problem" it claims to address.

There is also no reason to believe that the proposal will be a more effective rule than the combined force of Brady and the Jencks Act – which already requires material impeachment and exculpatory evidence to be disclosed, just later. The errors described in the cases are regretful, however it is not at all clear that they would have been less likely to occur under the proposal. In short, the best way to address Brady error is to reverse any conviction tainted by it and to grant a new trial. The Constitution already provides this remedy and proposed amendment to Rule 16 cannot improve upon it.

II. The Proposed Rule Would Create Confusion

A. Widely Broad and Undefined Language Creates Confusion for Application and Will Lead to Open File Discovery

The proposed rule states that: "Upon a defendant's request, the government must make

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[13] Considering that this proposed rule of federal procedure would only have effect in the federal system, the extent of a problem with state prosecutors' failure to disclose exculpatory information is irrelevant. Moreover, as the Committee notes in its report, while most states have statutes and rules governing disclosure, the states nonetheless appear to shoulder the vast majority of violations.

available *all information*[14] that is known to the attorney for the government . . . that is either exculpatory or *impeaching*" (emphasis added). The proposed committee notes make clear that disclosure is not limited to "material" information, but rather prosecutors must disclose "*all* exculpatory or impeaching information." The sweeping language contained in the proposed rule is designed to eliminate any prosecutorial decision-making in the disclosure of evidence. It is the Departments's firm belief that some prosecutorial filtering is not only necessary in the pursuit of justice, but also consistent with volumes of history and precedent supporting the proposition that prosecutors are in the proper position to make these evaluations of materiality. See Fed. R. Crim. P. 16(a)(1)(E)-(F) (entrusting prosecutors to disclose certain documents, papers, books, scientific reports or tests when the item is "material to preparing the defense"); Kyles, 514 U.S. at 439 (noting that the prosecutor at "some point [has] to determine when [he/she] must act" by making "judgment calls about what would count as favorable evidence" in light of the "existing or potential evidentiary record"); United States v. Causey, 356 F. Supp. 2d 681, 689-90 (S.D. Tex. 2005) ("[P]rosecutor is duty bound to become informed about available information and to evaluate the cumulative effect of all the evidence withheld from the defendants."); see also Strickler 527 U.S. at 283 n.23 (noting that the defense counsel may "reasonably rely" on the prosecutor's representation that disclosure included all relevant exculpatory materials); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969) ("[T]he assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies denial of a motion for inspection that does not make some particularized showing of materiality and usefulness.").

Also notably absent from the proposed rule and committee notes is any attempt to define the term "impeaching."[15] The problem with the expansive language chosen by the Committee is that it is subject to multiple interpretations and is broad enough to encompass virtually any information that might be used to challenge a witness' testimony. Without substantial guidance on what information is considered "impeaching," a prosecutor's disclosure obligations will have no bounds.

A review of how federal courts have defined impeachment makes clear that in the absence of a precise or narrowed definition, the proposed language will generate confusion, inconsistency, and limitless disclosure. In federal courts, impeachment has been defined as that which contradicts, see Klonski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998), attacks a witness'

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[14] The Rules Committee voted 7-4 in favor of stating the rule in terms of "information" rather than "evidence." The Department of Justice and some members of the subcommittee continue to favor the term "evidence" in the rule and the committee note.

[15] The Committee report expressly states that it has made no attempt in the rule or committee notes to define the term "impeachment." (See "Scope of required disclosure" discussion in Committee Report).

credibility, see United States v. Conroy, 424 F.3d 833, 837 (8th Cir. 2005), reveals the bias or interest of a witness, see Berry v. Oswalt, 143 F.3d 1127, 1132 (8th Cir. 1998), and provides a reason to disbelieve all or some of a witness' testimony, see United States v. Leary, 378 F. Supp. 2d 482, 491 (D. Del. 2005). Black's Law Dictionary defines "impeachment of [a] witness" as the calling into "question the veracity of a witness . . . or the adducing of proof that a witness is unworthy of belief." See Black's Law Dictionary 753 (6th ed. 1990). In the absence of additional guidance, prosecutors considering these varied definitions of impeachment will feel compelled to disclose anything that casts any doubt on anything that any witness has to say.[16] Essentially, the rule requires limitless, open-file disclosure, including a prosecutor's own thoughts about a witness as explained in a prosecution memo or email.

The rule would require the government to disclose not only evidence but all hearsay, innuendo, and rumor no matter how remote or speculative. As the proposed committee note indicates, "[t]he rule contains no requirement that the information be 'material' to guilt . . . [but rather] requires prosecutors to disclose to the defense all exculpatory or impeaching information . . . without further speculation as to whether this information will ultimately be material to guilt." While the Supreme Court has held that information that would not be admissible at trial is not covered by the requirements of Brady and need not be disclosed unless it would lead to the discovery of admissible evidence, Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995) (per curiam) (noting that the state was not required by Giglio to disclose to defendant inadmissible polygraph evidence concerning a key prosecution witness), the proposed rule eliminates this consideration.

Without a well-defined materiality requirement limiting the required disclosure, prosecutors will be compelled to provide the defense with their entire investigative file for fear that a conviction would be reversed if immaterial impeachment information goes undisclosed. Instead of assuming this risk, prosecutors will operate as they almost always do – erring on the side of disclosure – and will quickly learn that the only way to ensure compliance with the proposed rule is to turn everything over. The proposed rule, therefore, essentially codifies the fishing expedition that courts consistently have warned against. See generally Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951) (invalidating a "catch-all provision" in defendant's Rule 17 subpoena on the basis that it was "not intended to produce evidentiary materials" but instead was "merely a fishing expedition"); United States v. Cuthbertson, 630. F.2d 139, 144 (3d Cir. 1980) (citation omitted) (stating that under Rule 17 "[t]he test for enforcement is whether the [Rule 17] subpoena constitutes a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device") (citations omitted); United States v. White, 450 F.2d 264, 268 (5th Cir. 1971) (noting

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[16] For instance, under the current Giglio rubric, prosecutors need not turn over impeachment information for unimportant government witnesses when their "reliability . . . [is not] determinative of guilt or innocence." 405 U.S. at 154. Under the proposed rule, this all changes as prosecutors will now need to disclose *any* impeaching information regardless of its insignificance. A failure to do so may result in a new trial.

that while Rule 16 does not require the defendant to designate the materials sought, "it would seem that the defendant should not be allowed to conduct a fishing expedition"); United States v. Sermon, 218 F. Supp. 871, 872-73 (D. Mo. 1963) (stating that although fishing expeditions are the standard in a civil action, they are not allowed in criminal actions where only limited discovery is permissible).

The breadth of the proposed rule will also raise national security and foreign policy concerns in some cases. This can be demonstrated by considering a prosecution of an alleged terrorist suspect. The government may have cooperating witnesses that apply to the particular prosecution and also to ongoing intelligence gathering. Moreover, multiple foreign law enforcement agencies may be involved in the investigation of the case. Under the proposed rule, the government may have to disclose the identities of all the cooperating witnesses and foreign witnesses interviewed by foreign law enforcement agencies, even if the government ultimately makes the decision not to use the testimony at trial for national security, foreign relations, or other reasons. Under the proposed rule, the government may have to disclose information on these witnesses from any foreign law enforcement source regardless of whether the information is material to preparing the defense. It is evident from this one example that the government's attempt to meet this increased burden would implicate serious national security and foreign policy concerns, a topic about which the Committee's proposal says virtually nothing.

B. Disparity and Confusion for Review and Remedy

The proposed rule creates confusion for both trial and appellate courts in determining the proper standard on review and the appropriate remedy for violations. This confusion occurs regardless of when, in the course of the proceedings, a prosecutor's failure to disclose impeachment material manifests itself. The questions raised by the proposal encompass every stage of the judicial proceedings. For instance, if in the middle of trial, the trial judge determines that impeachment material was withheld for a witness that already testified, what is the proper remedy? Should the trial judge recall the witness to afford the defendant an opportunity to use the impeachment material? Or should the trial judge assess whether the withholding of the impeachment material was harmless error? If so, how is the harmless error analysis different than a review for materiality? What if the withheld impeachment material was discovered after a jury reached a guilty verdict but before sentencing? Should the unanimous verdict of twelve jurors be overturned even when the impeachment information was not material? What if the rules violation is first discovered when the case is on direct appeal or on a petition for habeas review – what is the proper standard to apply then?

Under the proposal, additional questions surface when evaluating the importance of the withheld information with respect to the proper remedy. Would a new trial be required when the testimony of a witness, who would have been impeached but for the prosecutor's failure to disclose impeaching information, was corroborated by additional testimony? What if the

suppressed impeachment evidence merely furnished an additional basis on which to impeach a witness whose credibility was already greatly diminished on cross examination? In the case of a rules violation, when, if ever, is the materiality of the undisclosed information relevant?

1. Harmless Error Under Rule 52 Versus Review for Materiality[17] on Direct Appeal

The proposed rule creates confusion (not to mention, disparity) in the way government suppression of impeachment information will be reviewed on direct appeal. The standard of review for appeals raising Brady violations – materiality review – is not the same as the standard contained in Rule 52 applicable to rules violations, which is harmless error review.

Different standards of appellate review apply to Brady claims and claims under Rule 16. Courts of appeals generally review Brady claims de novo. See, e.g., United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004); United States v. Wooten, 377 F.3d 1134, 1141-42 (10th Cir. 2004); United States v. Tarwater, 308 F.3d 494, 515 (6th Cir. 2002); United States v. Kates, 174 F.3d 580, 583 (5th Cir. 1999) (per curiam).[18] However, courts of appeals review Rule 16 decisions for abuse of discretion. United States v. Lanoue, 71 F.3d 966, 973 (1st Cir. 1995) (noting that under Rule 16, defendant must show that the trial court abused its discretion), abrogated on other grounds by United States v. Watts, 519 U.S. 148 (1997); accord, e.g., United States v. Duvall, 272 F.3d 825, 828 (7th Cir. 2001); United States v. Clark, 957 F.2d 248, 251 (6th Cir. 1992).

Under Brady, due process is violated if the *defendant* can meet his burden to show that the government suppressed "material" favorable evidence. "[T]he materiality standard for Brady claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Banks v. Dretke, 540 U.S. 668, 698 (2004) (citation omitted). That is, the defendant must demonstrate a reasonable probability that had the information been properly disclosed, the result of the proceeding would have been different. Kyles, 514 U.S. at 433-34; see also United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995) ("[T]he defendant is required to show more than just that the error was not harmless

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[17] The Committee prepared and presented research on the different standards of review used to assess Brady violations and rules violations on direct appeal.

[18] Some circuits review motions for new trial, including those raising Brady claims, for an abuse of discretion. See, e.g., United States v. Garcia-Torres, 341 F.3d 61, 70 (1st Cir. 2003); United States v. Chorin, 322 F.3d 274, 277, 282 (3d Cir. 2003); United States v. Gary, 341 F.3d 829, 832 (8th Cir. 2003); United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002); United States v. Bender, 290 F.3d 1279, 1284 (11th Cir. 2002); United States v. Ross, 245 F.3d 577, 584 (6th Cir. 2001); United States v. Wilson, 237 F.3d 827, 831-32 (7th Cir. 2001).

beyond a reasonable doubt."). Once the defendant meets his burden of showing that a due process violation has occurred, reversal is appropriate and there is no further harmless error analysis. Kyles, 514 U.S. at 435 ("[O]nce a reviewing court * * * has found constitutional error [under the materiality standard] there is no need for further harmless-error review.").

In contrast to the well-established standard of review for Brady claims, Federal Rule of Criminal Procedure 52(a) provides for harmless error review for a properly preserved claim of a rules violation and plain error review for those that are not.[19] Fed. R. Crim. P. 52(a). For properly preserved claims, after the defendant establishes that a rules violation occurred, the *government* bears the burden of proving that the error was harmless – that is, that any error did not affect the defendant's substantial rights.[20] See United States v. Vonn, 535 U.S. 55, 62 (2002). Reversal is not required where the Government meets this burden. United States v. Phillip, 948 F.2d 241, 250 (6th Cir. 1991). Moreover, because Rule 16 error is non-constitutional, the government only has to prove that a Rule 16 violation is harmless by a preponderance of the evidence. United States v. Hicks, 103 F.3d 837, 842 (9th Cir. 1996).[21]

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[19] Claims of rules violations that are not properly preserved in the trial court are reviewed on appeal for plain error. Fed. R. Crim. P. 52(b). When rules violations are reviewed for plain error, the *defendant* carries the burden of establishing that the error affected his substantial rights. United States v. Vonn, 535 U.S. 55, 62-63 (2002) (citations omitted) ("[T]he defendant who sat silent at his trial has the burden to show that his 'substantial rights' were affected."); United States v. Olano, 507 U.S. 725, 733 (1993). Moreover, because relief on plain error review is discretionary, the defendant bears the additional burden of convincing the court that the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." Vonn, 535 U.S. at 63 (quotation marks, brackets, and citations omitted).

[20] With respect to whether the proposed rule would alter the standard of review, the Committee admitted in its report that there is "sufficient variation in law at the circuit level that the picture is not entirely clear." In fact, the report continues stating that "[m]any circuit decisions . . . hold that the defendant seeking relief on appeal from a discovery violation must always show prejudice." (See "Effect on appellate review and collateral attack" discussion in Committee report). Thus, for the defendants in those circuits, a prosecutor's violation of the proposed rule requiring disclosure will require the defendant to meet the same burden of proof as a Brady violation.

[21] If the defendant failed to object in the district court to the suppression of evidence, the analysis on appeal will be the same under Brady and Rule 16. In this instance, the defendant must prove that there was plain error under Federal Rule of Criminal Procedure 52(b). Rule 52(b) requires defendants to show that the error was plain, that it "affected the defendant's substantial rights," and that it "seriously affected the fairness, integrity or public reputation of [judicial proceedings]." Compare United States v. Quiroz, 374 F.3d 682, 684 (8th Cir. 2004) (Brady claim); United States v. Crayton, 357 F.3d 560, 569 (6th Cir. 2004) (same); and United

Assuming, then, that the government suppressed impeachment information and that the defendant properly raised the issue before the district court, the question raised by the proposal is whether a failure to disclose impeachment information would be reviewed on appeal for harmless error under Rule 52 or whether it would be reviewed for materiality using a Brady analysis. Take for instance, the government's failure to disclose portions of a prosecution memorandum that contain initial skepticism about a key government witness' credibility – how should an appellate court evaluate a properly preserved claim that the prosecutor failed to disclose this impeachment information? Should the burden rest with the defendant to show that the information regarding the witness' credibility was material or should it rest with government to show that any resulting prejudice was more probably than not harmless? Notwithstanding the different language used in these different standards, it is hard to fathom an occasion where failure to disclose nonmaterial impeaching information would be grounds for reversal under the harmless error standard. What if the withheld impeachment information was that a key prosecution witness in a domestic violence case received anger-management counseling ten years earlier? Would an appellate court ever have the occasion to reverse a case such as this where the information withheld was not material? When, if ever, would the withholding of nonmaterial impeaching information affect a defendant's substantial rights? The rule fails to address these questions and raises the specter of a risk of creating substantial confusion in district and appellate courts.

2. Questions for Collateral Review

The harmless error standard used for determining whether a petitioner is entitled to habeas corpus relief is whether the trial error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quotation omitted). The Supreme Court has defined trial errors as constitutional violations that "occur[ ] during presentation of the case to the jury" and are amenable to harmless error analysis because they "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial.]" Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).

As an initial matter, rule violations generally cannot be the basis for habeas relief because they are not constitutional violations.[22] While this is generally the case, the Committee fails to

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States v. Vinyard, 266 F.3d 320, 331 (4th Cir. 2001) (same), with United States v. Navarro, 90 F.3d 1245, 1259 (7th Cir. 1996) (Rule 16).

[22] The Committee initially argued that changes to Rule 16 will not create confusion for collateral review because a violation of the proposed Rule 16 amendment is not constitutional and therefore cannot be the basis for habeas relief. The Committee's most recent report, however, states that nonconstitutional claims, such as a Rule 16 violation, can be raised if "the error is a 'fundamental defect which inherently results in a complete miscarriage of justice [or]

contemplate the quasi-constitutional position that the proposed Rule 16 amendment occupies. At the very least, defense attorneys will craft arguments that the Rule 16 amendment is grounded in a defendant's constitutional right to a fair trial – after all, the initial ACTL proposal sought to codify the constitutional rule of Brady – and, thus, habeas review would be proper when a prosecutor fails to deliver impeaching information.

As is evident from the above series of unanswered questions, the proposal raises substantial questions that have the potential to cause a great impact on cases in all phases of adjudication and review. Before a proposal of this magnitude should be published, these questions, at the very least, should be raised and considered, with definitive answers provided so that the public can understand the precise implications of the proposal being offered.

III. The Proposal Destabilizes the Current Policy Balance in Relation to Privacy Interests and Witness Protection

A. Legitimate Privacy Concerns

Proponents of the proposal have not adequately considered how the proposal will interact with the underlying policies of other laws and established rules in the federal system. Specifically, they have failed to reconcile the proposal with policies that have at their core the protection of individuals' privacy interests. The broad and far-reaching language contained in the proposal ensures an unmanageable divide between the competing policy interests of privacy rights and a defendant's right to a fair trial. This section will cover four such policies: (1) the Crime Victims' Rights Act; (2) child protection laws; (3) rape shield laws; and (4) police officer protection laws. These listed items are not intended to be exhaustive of all the privacy interests potentially compromised by the proposal, but rather are mere examples of the important conflicts that will arise if the proposal were enacted in its current form.

1. Protection of Victims' Rights

The Crime Victims' Rights Act ("CVRA"), codified at 18 U.S.C. § 3771, provides that a crime victim has "[t]he right to be treated with fairness and with respect for the victim's dignity and *privacy*." 18 U.S.C. § 3771(a)(8). The objective behind the eight victims' rights delineated in the CVRA is to balance the rights provided to the accused and make crime victims independent participants in the criminal justice system. H.R. Rep. No. 108-711, at 3-4, reprinted in 2004

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an omission inconsistent with the rudimentary demands of fair procedure.'" (See "Effect of appellate review and collateral attack" discussion in Committee report (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). The Committee report then summarily states that these standards *should be "similar" to* the principles the Court articulated in the Brady line of cases (emphasis added). Based on this assumption, the Committee report concludes that the adoption of the amendment would have no effect on collateral proceedings. (See "Effect of appellate review and collateral attack" discussion in Committee report). There is confusion already.

U.S.C.C.A.N. 2274, 2276-77; 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) at S4265 (statement of Sen. Kyl) ("We are not trying to take one single right away from any defendant. That would be wrong under our system. But we do think it is time to balance the scales of justice."); see also Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006) (noting that "[t]he statute was enacted to make crime victims full participants in the criminal justice system"). The CVRA provides victims with a new set of statutory rights[23] that are enforceable in court by either the government or the victim, see 18 U.S.C. § 3771(d) (permitting victims to petition the court of appeals for a writ of mandamus when the district court denies the relief sought), and also imposes on the judiciary an affirmative obligation to "ensure" that those rights are "afforded." Id. § 3771(b).

While the text of the statute and the legislative history are silent as to what specifically Congress intended to require or prohibit with the inclusion of this right, the Senate sponsors made clear that they expected a liberal reading of the statute to result in interpretations that promote victims' interests in fairness, respect, dignity, and privacy. See 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) at S4269 (statement of Sen. Kyl); see also United States v. Turner, 367 F. Supp. 2d 319, 335 (E.D.N.Y. 2005) (noting that "[t]he provision's broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom").

The Committee's proposal – advocating for the disclosure of all impeachment information – fails to take into account the victim-privacy protection policy contained in the CVRA. Under the proposal, all information (not merely admissible evidence) that might be used to impeach a victim-witness must be provided to the defense, regardless of materiality. This means that any information that might possibly be used to disparage, discredit, or dispute a victim's testimony will be disclosed to the defense, without any regard to whether such information would increase confidence in the outcome of the trial or even be admissible at trial.

For example, under the proposed rule, prosecutors would be required to disclose the existence of any mental health treatment undertaken by a victim regardless of how minor, any financial issues no matter how tangential, and familial interactions with law enforcement no matter how insignificant. Moreover, because the proposed rule makes no effort to balance a victims' interests with any limit to the required disclosure, courts can expect victims to readily exercise their new right to petition courts for writs of mandamus each time the district court permits disclosure of nonmaterial evidence that treads on their privacy interests. The result will be increased litigation which will likely burden the courts. The broad nature of this proposed disclosure requirement will, without question, directly conflict with a liberal reading of the

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[23] Many of the rights contained in the CVRA already existed in Title 42, however, there was no independent enforcement mechanism. The right we are concerned with – the right to be treated with fairness and respect for the victim's dignity and privacy – was part of the original statutory language. See 42 U.S.C. § 10606 (repealed Oct. 30, 2004).

CVRA's policy to protect a victim's privacy and with its stated purpose of affording victims' rights comparable to those afforded to the defendant.

2. Child Protection Laws

Since the mid-1970's, Congress has made it a federal priority to help states combat the problem of child abuse. See S. Rep. No. 108-12, at 5 (2003) ("The first Federal programs specifically designed to address concerns regarding child abuse and neglect in this country were authorized under the Child Abuse Prevention and Treatment Act of 1974."). To that end, Congress has made funds available to states for creating, enacting, and supporting child abuse and neglect prevention and treatment programs. See 42 U.S.C. § 5106a. In order to be eligible for this funding, Congress requires states to have a law or a program that includes "methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians." Id. § 5106a(b)(2)(A)(viii). Nonetheless, there are exceptions for disclosure to "a grand jury or court, upon a finding that information in the record is *necessary* for the determination of an issue before the court or grand jury" and to federal, state, or local government entities "that ha[ve] a *need* for such information in order to carry out [their] responsibilities under law to protect children from abuse and neglect." Id. § 5106a(b)(2)(A)(viii)(V) & (b)(2)(A)(ix) (emphasis added). All fifty states and the District of Columbia have enacted state statutes that protect the confidentiality of state child abuse investigative records. See Pennsylvania v. Ritchie, 480 U.S. 39, 61 n.17 (1987) (citing Brief for State of California ex rel. John K. Van de Kamp, et al. as Amici Supporting Petitioner, Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (No. 85-1347)).

Confidentiality protects the privacy rights of the victim, encourages reports of abuse, enhances the reliability of investigations, and assists families in seeking treatment. In a case deciding whether a defendant accused of child abuse had a due process right to review the state's child abuse investigative file concerning the child-victim, the Supreme Court recognized the strong public interest in protecting such sensitive information:

> Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child 's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth – like all other States – has made a commendable effort to assure victims and witnesses that they may speak to [Child Protection Services] counselors without fear of general disclosure.

Ritchie, 480 U.S. at 60-61 (footnote omitted). Notwithstanding the state's compelling interest in

confidentiality, the Court affirmed the Pennsylvania Supreme Court decision to remand the case for an *in camera* review of the confidential child protective services records. The Court stated that if the lower court's review revealed information that "probably would have changed the outcome of [the defendant's] trial" – i.e., information that is *material* – then the grant of a new trial would be the appropriate remedy. Id. at 58. Notably, the Court did not accept the defendant's argument that he was entitled to view the entire file so that he might uncover statements inconsistent with the victim's trial testimony or tending to show her improper motive. Id. at 52-53 (stating, in the context of a Confrontation Clause challenge, that "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony"). The Court noted that a broad reading, such as that articulated by the defendant, would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." Id. at 52.

Under the proposal advanced by the Committee, however, this substantial privacy interest is threatened. In a case involving criminal charges against a defendant for child abuse, it is hardly likely that *immaterial* impeachment information on the child-victim would be *necessary* for the determination of an issue before the court. See generally, 42 U.S.C. § 5106a (b)(2)(A)(viii)(V). Nonetheless, under the proposal, immaterial impeachment information would need to be disclosed without regard to the substantial policy interests in keeping this information confidential and private. For example, a child advocate's impressions of the credibility of the abused child during his initial interview would need to be disclosed as impeachment material. This disclosure of immaterial impeachment evidence is required even if evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. Because the child advocate's initial impressions could be used to discredit, disparage, or dispute the victim's testimony, the Rule 16 proposal anticipates its disclosure. The Committee has not adequately considered the consequences of such a broad rule of disclosure or squared the proposal with the dictates of the Supreme Court.

3. Rape Shield Laws

The proposal does not adequately consider how it will interact with other established rules in the federal system and state laws enacted to protect sexual assault victims. Rule 412 of the Federal Rules of Evidence provides that "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" or "to prove any alleged victim's sexual predisposition" is not generally admissible in a criminal case.[24] Detailing the purpose of the rule, the Advisory Committee notes state that:

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[24] Exceptions exist for evidence of "specific instances of sexual behavior . . . offered to prove that a person other than the accused was the source of the semen, injury or other physical evidence;" "evidence of specific instances of sexual behavior . . offered . . . to prove consent;" and evidence that if excluded would violate the defendant's constitutional rights. Fed. R. Evid. 412(b).

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details . . . . By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Fed. R. Evid. 412, advisory committee's notes.

"Rape shield laws are evidentiary measures that aim to protect rape complainants' privacy and dignity by preventing the disclosure of damaging and irrelevant information about their sexual history at trial." Richard I. Haddad, Shield or Sieve? People v. Bryant and the Rape Shield Law in High Profile Cases, 39 Colum. J.L. & Soc. Probs. 185, 187 (2005). As a result of the dogged defending of these "privacy interests," advancements are made in the reporting and successful prosecution of these cases. Forty-nine states, the District of Columbia, and the federal government have enacted rape shield statutes (or the equivalent) that prohibit the disclosure of identifying information on victims of sex crimes. See generally, Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 81 (2002) (noting that Arizona is the only state without a rape shield law).

The Committee's proposal requires disclosure of "all *information* that is . . . impeaching," without regard to materiality or whether it would be admissible as evidence. Under a reasonable interpretation of the rule, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense even though it may not be admissible as evidence at trial.[25] But irrespective of whether the potential impeachment evidence is properly excluded at trial, it would be too late to remedy the problem because the damage to the witness's privacy rights that the legislature sought to protect against happens upon disclosure of the information. Thus, a subsequent motion *in limine* decision to bar use of the disclosed information at trial does little to protect privacy rights and chills victims from reporting these serious crimes. Disclosure of this type of impeachment information cuts against the very policy aims of rape shield laws – protection of a rape victim's privacy and dignity.

4. Police Officer Protection Laws

Under current Department policy,[26] law enforcement agents used as witnesses for the

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[25] While Rule 412 provides for only specific exceptions, the defense might attempt to use the existence of the amended Rule 16 (an expanded codification of the constitutional obligation of Brady and its progeny) to advocate for the position that failure to allow this evidence for impeachment purposes would deny the defendant his due process right to a fair trial.

[26] This provision is titled "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('Giglio Policy')."

prosecution are protected from open file disclosure of their personnel file. The policy's purpose, contained in USAM 9-5.100, makes clear that the provision aims to protect the "legitimate privacy rights of Government employees" while also ensuring that prosecutors meet their obligations under Giglio so that defendants receive fair trials. USAM 9-5.100.[27] While the policy specifically notes that "[t]he exact parameters of potential impeachment are not easily determined," it goes on to state that potential impeachment information is generally defined as that "which is material to the defense," "information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged" or that which "might have a significant bearing on the admissibility of prosecution evidence." Id. Bearing in mind these definitions of impeachment information, the Department's policy makes clear that law enforcement agencies must provide a requesting prosecutor with "any finding of misconduct that reflects upon the truthfulness or possible bias" of the law enforcement agency witness, "any past or pending criminal charge" brought against the witness, and "any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the [witness] that is the subject of the pending investigation." Id.

It is common knowledge that law enforcement agents are in regular contact with the criminals in their communities – be it through surveillance, investigation, or arrest. It is this close contact that causes law enforcement agents to be the target of numerous fabricated allegations of misconduct. These allegations range from serious misconduct, such as the use of excessive force, to less-than-serious misconduct, such as exhibiting rude behavior. After a complaint is filed, the allegations typically are investigated by a police department's Internal Affairs Section (or the equivalent) and ultimately resolved. In most instances, the investigation determines that the allegation is unfounded and paperwork to that effect is submitted to the law enforcement agent's file.

While the USAM provision requires disclosure of material impeachment information,[28] it goes on to exclude from disclosure those allegations which are unsubstantiated, not credible or have resulted in exoneration of the witness.[29] This Department policy makes practical sense because the damage is done to the police officer's privacy interests when the information is turned over – privacy interests are compromised once the nonmaterial information leaves the officer's

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[27] With the enactment of USAM 9-5.001, USAM 9-5.100 was amended to be consistent with the policy of more expansive disclosure.

[28] The policy reads: "potential impeachment information, however, has been generally defined as impeaching information which is *material* to the defense." USAM 9-5.100 (emphasis added).

[29] Under certain specific circumstances where allegations which are unsubstantiated, not credible, or result in exoneration of the witness contain information which reflects upon the truthfulness or bias of the witness, they can also be disclosed upon request.

file and enters the public realm. Moreover, without this protection of their privacy interests, case agents testifying for the prosecution will be subject to the embarrassment and harassment implicit in any disclosure of ill-founded allegations as well as the additional risk of public exposure of matters with no relevance to their credibility, bias or the testimony at hand. This can occur even when a court refuses to allow defense counsel to extensively develop a line of cross examination as for example, in the instance where the government is required to file pre-trial motions *in limine* to preclude more extensive use at trial. Under the broad view of impeachment information advocated by the proposed rule, a prosecutor would be required to turn over anything that casts any doubt on anything that any witness has to say. For instance, under the proposed rule's sweeping treatment of impeachment information, the government would be required to disclose an allegation in the testifying officer's file that he planted a handgun on a habitual drug-offender even when the subsequent investigation revealed that this allegation was completely unfounded. This remains true even if the investigation of the allegation has revealed the "planted" handgun was registered to the drug-offender, had the offender's fingerprints, and eyewitnesses state that the testifying officers retrieved it from the offender's waistband.

Moreover, protective policies for law enforcement agency witnesses are not limited to the federal government. States also embody these principles of privacy in their state laws regarding disclosure. Because it is not uncommon for state law enforcement to team up with federal law enforcement in forming joint task forces to combat issues impacting both state and federal laws, the existence of state policies prohibiting certain disclosures needs to be considered before moving forward with the rule. Take, for instance, section 832.7 of the California Penal Code, which provides that peace officers' and custodial officers' personnel files[30] "are confidential and shall not be disclosed in any criminal . . . proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Cal. Penal Code § 832.7(a) (West 2007). These discovery provisions authorize disclosure upon written motion which must contain "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the *materiality* thereof to the subject matter involved in the pending litigation . . . ." Cal. Evid. Code § 1043(3) (West 2007). The conflict between the proposal's requirement for "all [impeachment] information" and California's law requiring a showing of "materiality" in order to obtain the protected material highlights one of the problems that will ensue if the proposal, in its current form, were to become law. When a state law enforcement officer is called as a witness in a federal case, it is unclear whether state protection laws automatically would be trumped by the proposed federal policy of complete disclosure. In all likelihood, this federal/state policy conflict will become an area of contention and will generate extensive litigation over the conflict of law, and, at the very least, create disparities amongst the district courts faced with the question of elevating federal policy over state policy. See generally, In re Grand Jury, John Doe No. G.J. 2005-2, 478 F.3d 581 (4th

[30] Citizen complaints against officers can be maintained in the officer's general personnel file or in a separate file designated by the agency. However, citizen complaints that are determined to be unfounded, frivolous, or that result in the exoneration of the officer cannot be maintained in the officer's general personnel file but must be maintained in other separate files.

Cir. 2007) (upholding a district court's order quashing a federal subpoena for state police officer statements from an internal investigation based on the state's interest in maintaining confidentiality in internal investigations).

Under the theory of the proposed rule and the overly broad and undefined "impeachment information" language contained therein, federal prosecutors would be required to obtain the testifying agent's personnel file and turn it over in its entirety to the defense – including every unsubstantiated, unfounded and even ridiculous allegation previously made against the testifying officer. This is so because any allegation of misconduct, even one unsubstantiated by a single shred of evidence, will be considered impeachment material and thus discoverable – even if the material is inadmissible or the material's impeachment value is a mere fraction of a percent. This complication highlights the problem of language that is overly broad to achieve its purpose. The Advisory Committee should be required to find an alternative that at least attempts to preserve the interest in the privacy rights of law enforcement agents before releasing any rule for public comment.

B. Legitimate Government Witness Protection Concerns

The proposed rule will impose a substantial cost on the criminal justice system in that it provides for the disclosure of witness information weeks prior to trial and therefore, in some cases, prior to a final decision even to call a witness and perhaps, in a long trial, months prior to a witness's actual testimony. This is a dramatic departure from current law, which mandates no such disclosure prior to trial. Apart from discovery orders, prosecutors often do not disclose impeachment information until just before trial[31] because doing so would reveal the identities of

[31] The Department of Justice recognizes and acknowledges that in many cases, the identities of witnesses can be and in fact are disclosed well in advance of trial without putting them at risk. Prosecutors routinely disclose the identities of law enforcement and expert witnesses – witnesses who are paid to testify either as part of their job or are specifically hired to testify in the case – prior to trial to expedite trial proceedings. Yet current law recognizes that the United States is under no obligation to disclose any witness before trial. The law requires disclosure of impeachment material only after the witness testifies. See 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2. If a defendant requires additional time to review and make use of the impeachment material – in other words, if the timing of the disclosure is insufficient to satisfy the defendant's right to due process of law – the remedy is a continuance. This remedy is rarely necessary, however, precisely because the government regularly turns over more than what is required to satisfy due process and does so earlier than mandated. Moreover, if, as the Committee's report suggests, defendants regularly find themselves presented with information that requires time to investigate (see "Timing" discussion in Committee report) – a claim that has no empirical support – the answer is to address the law of continuance.

cooperating witnesses, undercover investigators, or other prospective witnesses.[32] That practice is based on the well-grounded fear that such information could disrupt ongoing investigations and expose prospective witnesses to harassment, intimidation, injury, or even death. United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting that the "careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both Congress and the Federal Rules Committees that such concerns are valid") (citing 18 U.S.C. §§ 3422 & 3500; Fed. R. Crim. P. 16(a)(2)).

Testifying against an accused in a federal criminal trial is difficult and intimidating, even for the most worldly and experienced person. When the defendant is the chief executive officer of the witness's company or a member of an international terrorist organization, testifying against the defendant as a witness for the United States becomes an act of genuine courage. In terrorism cases, the United States often needs to shield the identities of witnesses until trial either because there are risks to them and their families (especially if the witness is from a country where the terrorist organization is based), or because their cooperation is particularly sensitive and may have an impact on our relationship with another country or, even more importantly, our ability to gather intelligence and protect national security interests. Under the proposed amendment, the government is expected to carry a burden of proving that witness safety is put at risk by the disclosure in order to delay disclosure until the witness testifies. The problem with requiring this proof of a safety risk is that, in most cases, it is simply unattainable in advance of any intimidation and harassment. Obtaining proof of intent to intimidate, before any intimidation occurs, would require undercover surveillance or informant cooperation, neither of which can be pursued on a regular basis. Moreover, the proposed amendment makes it difficult for the government to offer the necessary assurances to obtain the testimony of witnesses or the continuing cooperation of other countries, thereby seriously undermining our ability to investigate terrorists, and other criminals, and bring them to justice. The fact that a court might, in its discretion, enter an order of protection *if* the prosecution makes a sufficient showing will be of no comfort to a witness and, consequently, will discourage them from coming forward. As a result, if the proposal to amend Rule 16 is approved and becomes law, there will be more witness intimidation, more witness harassment, and, over time, less witness cooperation in the reporting, investigation and prosecution of crime.

The Committee has offered no compelling reason to hasten and expand impeachment information disclosure and thereby expose cooperating witnesses, jeopardize ongoing investigations, or subject victims or witnesses to an increased risk of harassment, intimidation, retaliation or coercion.

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[32] It deserves mention that 97% of all criminal cases are resolved without trial. The proposal's broad approach to impeachment information, however, appears to be aimed more at issues arising in the small percentage of cases that go to trial, and it neglects to square the competing interests of witness security, victims' interest and privacy rights in a plea environment.

IV. The United States Attorneys' Manual Policy on Disclosure Is a Workable Solution

As discussed in its report, the Advisory Committee had concerns that a prosecutor's constitutional disclosure obligations under the Brady line of cases and the remedy of a new trial for violations were not enough to ensure that the necessary information would be disclosed and the defendant would receive a fair trial. While not conceding that current practice produced any fundamental unfairness, the Department nevertheless responded by creating a new provision in the USAM which obligates a prosecutor well-beyond the disclosure requirements in existing law. This amendment to the USAM – entitled "Policy Regarding Disclosure of Exculpatory and Impeachment Information" – was precipitated by the Advisory Committee's interest in there being a clear pronouncement to all prosecutors about their obligations on disclosure. In fact, the Department worked assiduously with members of the subcommittee to formulate a USAM amendment that would address the concerns raised by the Committee[33] while still preserving the system of discovery contemplated by existing case law and the Federal Rules of Criminal Procedure.

A. The USAM Provision – Designed To Expand a Prosecutor's Disclosure Obligations

In a memorandum sent to all holders of Title 9 of the United States Attorneys' Manual, the amendment's stated purpose reads as follows:

> The purposes of this amendment to the U.S. Attorneys' Manual are to ensure that all federal prosecutors are fully aware of their constitutional obligation to disclose exculpatory and impeachment evidence, and to further develop the Department's guidance to federal prosecutors in relation to disclosure of information favorable to a defendant.

See Memorandum from the Deputy Attorney General of the U.S. Dep't of Justice to the Holders of the U.S. Attorneys' Manual, Title 9 (Oct. 19, 2006). The memorandum goes on to state that the policy "requires prosecutors to *go beyond* the minimum obligations required by the Constitution and establishes broader standards for the disclosure of exculpatory and impeachment information," while also recognizing "the need to safeguard witnesses from harassment, assault, and intimidation and to make disclosure at a time and in a manner consistent with the needs of national security." Id. (emphasis added).

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[33] The consensus from the Committee was that while the USAM provision requires disclosure of exculpatory information that is inconsistent with any element of the crime (thereby severely limiting any independent prosecutorial analysis), the impeachment disclosure language contained in the new USAM policy continues to permit prosecutors to evaluate the information's materiality prior to disclosure.

The USAM amendment restates a prosecutor's constitutional obligations under the Brady line of cases to disclose "material exculpatory and impeachment evidence." USAM 9-5.001(B). "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial," the amendment affirmatively encourages prosecutors to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM 9-5.001(B)(1). Moreover, the policy encourages prosecutors to err on the side of caution by disclosing exculpatory or impeaching information that may not be admissible in court if its admissibility is a "close question." Id.

The amendment then goes further by requiring "disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles and Strickler." USAM 9-5.001(C) (citations omitted). The amendment stresses that this requirement is grounded in the fact that a fair trial often includes "examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, . . . make the difference between guilt and innocence." Id. At the same time, the amendment warns that information "which is irrelevant or not significantly probative of the issues before the court" is not subject to disclosure. Id. The policy specifically references the expansion of disclosure, stating that a prosecutor must now disclose: (1) exculpatory information that is inconsistent with any element of the crime or that establishes a recognized affirmative defense; (2) impeachment information that either casts a substantial doubt upon the accuracy of any evidence the prosecutor intends to rely on to prove an element of the offense or that might have a significant bearing on the admissibility of certain prosecution evidence; and (3) exculpatory or impeachment information meeting this definition regardless of whether the information would itself constitute admissible evidence. USAM 9-5.001(C)(1)-(3). Finally, the policy reminds prosecutors to look at the information cumulatively to determine if it meets the expanded standards of disclosure. USAM 9-5.001(C)(4).

The policy also covers the timing of disclosure for both exculpatory and impeachment information. The policy provides that exculpatory information must be disclosed "reasonably promptly after it is discovered." USAM 9-5.001(D)(1). This standard accelerates the timing of disclosure from the due process standard of in sufficient time to permit the defendant to make effective use of that information at trial. See, e.g., Weatherford, 429 U.S. at 559. The policy's timing of impeachment disclosure is more flexible because it recognizes that a prosecutor might have to balance the goals of early disclosure against significant interests such as witness and national security. Thus, impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." USAM 9-5.001(D)(2).

B. The USAM Provision Strikes a Proper Balance of Interests

This newly-enacted USAM provision strikes a better balance than that proposed by the Rule 16 amendment. The USAM provision properly accounts for the myriad interests affected by criminal discovery policy. While the USAM provision requires prosecutors to make broader

disclosures than that which are constitutionally mandated under Brady and its progeny, it expressly balances the scope of exculpatory and impeachment disclosures against other interests such as national security and witness protection to name a few. USAM 9-5.001 (A). Moreover, even though the provision requires more liberal disclosure, it does not encourage (or require) limitless disclosure. In its statement that disclosure under the USAM is not limited to information that is "material" to guilt, the provision reminds prosecutors that broader disclosure does not include "irrelevant" information, information that is "not significantly probative of the issues before the court," or information involving "spurious issues" which improperly divert the court's attention. USAM 9-5.001(C). These pronouncements, alone, make significant headway in addressing the legitimate privacy and witness safety concerns raised by breadth of the proposed amendment.

In an effort to promote regularity and consistency in disclosure practices, the provision contains clear statements on what additional exculpatory or impeachment information must be disclosed. Instead of employing vague and undefined language designed to eliminate any prosecutorial discretion, the USAM embraces the reality (and desirability) of prosecutorial discretion while providing eminently clear guidance on what must be disclosed. For exculpatory information, a prosecutor "must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense." USAM 9-5.001(C)(1). For impeachment information, a prosecutor "must disclose information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." USAM 9-5.001(C)(2).

Moreover, the USAM provision does not generate additional confusion on review because the policy, unlike the proposed amendment to Rule 16, does not "provide defendants with any additional rights or remedies." USAM 9-5.001(E). Defendants could, of course, still challenge disclosure violations under the Brady line of cases, but a prosecutor's failure to disclose the additional information required in the USAM would not be grounds for review.[34]

Finally, the USAM provision remains loyal to the standards developed in forty years of Brady case law, Rule 16, and the Jencks Act. At the outset, USAM 9-5.001's stated purpose reminds prosecutors of their role to "seek a just result in every case." USAM 9-5.001(A); cf. Agurs, 427 U.S. at 112 (footnote omitted) (noting that "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt"). Although the policy expands required disclosures, the provision does not create additional defense discovery rights.

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[34] However, the lack of any rights or remedies for a defendant should not lead to the conclusion that the USAM provision lacks enforcement teeth. As stated above, a prosecutor who violates the USAM could be investigated by the Office of Professional Responsibility, disciplined or dismissed from the Department, and reported to their licensing Bar.

See generally Bagley, 473 U.S. at 675 n.7 (quotation omitted) (noting that any broader right of discovery "would entirely alter the character and balance of our present systems of criminal justice"). Likewise, the provision does not create internal inconsistencies in Rule 16's "materiality" requirements nor does it disrupt Rule 16's parallel and reciprocal discovery objective. The USAM provision also gives proper deference to the policies underlying the Jencks Act by: (1) expressly excluding from disclosure "irrelevant" information and information that is "not significantly probative of the issues before the court," or that which involves "spurious issues;" and (2) allowing flexibility in the timing of impeachment disclosures. USAM 9-5.001(C) & (D)(2).

V. Conclusion

The proposed amendment to Rule 16 is completely unwarranted and entirely inconsistent with existing law. A fundamental change of this nature should only be considered where corresponding and compelling justifications exist. The Committee has not made a case for the need to expand so drastically a discovery process that has been working effectively over the past forty years. If the Standing Committee wishes to study this issue further, the government requests that the Standing Committee eliminate the existing proposed rule from consideration and assess the USAM's productivity over the next several years. Although the new USAM policy requires prosecutors to make broader disclosures than that which are constitutionally mandated, it also preserves the balanced discovery system sought by Congress and adheres to the congressionally-stated policy interests of protecting victim and witness privacy interests and ensuring witness safety. The proposal's language is clear, concise, and consistent with the language and standards developed in existing case law, Rule 16, and the Jencks Act. While the provision requires more liberal disclosure, it does not encourage (or require) limitless disclosure. Instead, it remains loyal to the clearly defined purpose and scope of the Brady rule, and, yet expands upon its reach to ensure consistency and reliability in what is (and is not) discoverable. Moreover, the USAM proposal does not create confusion for courts reviewing and assessing remedies for impeachment or exculpatory information disclosure violations.

Based on the foregoing, the Department respectfully requests that the Standing Committee reject the proposed amendment to Rule 16.

Sincerely,

Paul J. McNulty
Deputy Attorney General

APPENDIX 5

To: Rule 16 Subcommittee
From: Nancy King and Sara Beale
Re: Issues and History for Considering Rule Requiring Disclosure of Exculpatory or Impeachment Information
Date: August 31, 2009

Judge Tallman has asked the staff of the Administrative Office to summarize the four decades of Committee history behind Rule 16 amendments that have previously been considered by the Advisory Committee on Criminal Rules. He has also asked us to prepare a legal memorandum to aid the Committee in its consideration of the proposal endorsed by U.S. District Judge Emmett Sullivan in light of the dismissal of all criminal charges in *United States v. Stevens* (D.D.C. 2009). This memo has been compiled to provide a summary of the arguments and issues that have previously been considered or which might arise again in discussions about amending the Rules to require pre-trial disclosure of exculpatory and impeachment evidence. It supplements the memo provided by Henry Wigglesworth of the Administrative Office.

The first part is a summary of past Committee consideration of related proposals. The second part includes a table of potential arguments and issues, divided into four categories: (1) The need for a rule and regulatory alternatives; (2) Potential conflicts with existing law; (3) Questions concerning the scope of required disclosure; (4) Questions about sanctions and enforcement.

In 2007, by a divided vote, the Criminal Rules Committee endorsed a proposed change in Rule 16 that would have substantially broadened the obligations of a prosecutor to disclose pretrial all exculpatory and impeachment information in the government's possession or control. The Department of Justice urged in its memo of June 5, 2007, to the Standing Committee on Rules, that the 2007 proposal left several questions unanswered, and "these questions, at the very least, should be raised and considered, with definitive answers provided so that the public can understand the precise implications of the proposal being offered." An attempt has been made to include in this summary all of the questions identified by the Department. Based upon strong opposition from the Department, the Standing Committee declined to endorse the proposed change and it was rejected in favor of giving the Department some time to amend the UNITED STATES ATTORNEYS MANUAL and to implement new training to increase awareness among prosecutors of their discovery obligations in criminal cases.

Part I. **Past Efforts to Require Disclosure**

The Advisory Committee and Congress have on multiple previous occasions considered proposals to amend Rule 16 to deal directly with exculpatory and impeaching evidence, or to require pretrial disclosure that might yield exculpatory or impeachment information (such as the names and prior statements or criminal records of witnesses to be called by the government). All such proposals have been strenuously opposed by DOJ, and all have failed at one or another stage of the process. They are described below in reverse chronological order.

1995 Following three years of discussion (and publication of a proposed amendment) the Judicial Conference rejected a proposed amendment requiring the government to provide the defense with **names of witnesses** it intends to call in its case-in-chief **seven days before trial**. An earlier version of the amendment also required disclosure of the **witnesses' prior statements and their addresses**, but those provisions were deleted in response to DOJ's concerns about witness safety.

The proposed rule also included a provision allowing the government to file an **unreviewable** ex parte statement under seal declining to disclose if it had a good faith belief that disclosure could threaten the safety of any witness or might lead to obstruction of justice.

The Standing Committee had voted to recommend this amendment with one member and the DOJ representative in opposition.

1991 The Advisory Committee was informed that the ABA favored **codification of *Brady***, but no formal motion was made. The minutes note that the Committee had recently rejected a similar proposal.

1988 The Advisory Committee considered and rejected a proposal to require disclosure of **witness names, witness statements, and discovery for sentencing purposes**, as well as a proposal to track the requirements of the ABA Criminal Justice Standards . Discovery and Procedures Before Trial, Chapter 11 (approved Aug. 9, 1978).

It also considered and deferred (apparently with no later action) proposals to add:

> subsection (H) to Rule 16 (a)(1) which would require the government to provide all **exculpatory (*Brady*) material** to the defense, and
>
> subdivision (G) that would require the prosecution to disclose **prior Jencks Act statements made by a prosecution witness**. 18 U.S.C. § 3500.

1986 The House Judiciary Committee held hearings on a bill that would have amended the Jencks Act to provide for the pretrial discovery of **witness names and statements**. See HR 4007, 99th Cong., ___ Sess. (also providing for protective orders).

The bill was not enacted.

1975 A proposed amendment approved by the Supreme Court provided for **reciprocal discovery three days before trial of the names and addresses and any prior felony convictions of all witnesses** either party intended to call in its case in chief, and also required the government to disclosure the prior **criminal convictions**

of any of these witnesses. The Committee Note stated that the court could modify this general requirement upon a sufficient showing, either precluding pretrial disclosure of a particular witness or accelerating the schedule for discovery. DOJ strongly opposed this proposal, which also drew criticism from the defense bar.

This provision was deleted by Congress. The Committee note quotes the following statement from the conference report: "A majority of the Conferees believe it is not interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witness and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy."

1968 The Committee voted not to attempt to codify *Brady v. Maryland*, leaving it to the development of the case law. It appears that the motion was prompted by a proposal to require disclosure of the names and addresses of all government witnesses and any known prior felony convictions.

Part II. Issue Catalogue

Issue	Generally	Pro-Amendment/Expansive disclosure	Con-Amendment/ Restricted disclosure
I. NEED FOR A RULE	The most fundamental point debated by opponents and proponents of the earlier amendment to require pretrial disclosure of exculpatory evidence was whether or not a rule amendment is really necessary.	Some argue *Brady/Giglio* violations are common, though they are only occasionally discovered. On frequency, see Oct 2005 agenda book at III-B-i (collecting US cases through 2001) Recent *Brady/Giglio* violations after the new USAM took effect (October 19, 2006) illustrate why there remains a need despite the change in DOJ internal policy. Others felt a rule was needed to state a clearer definition of what must be disclosed and when disclosure must be made, and argued it should be more than the constitutional minimum.	*Brady/Giglio* violations are not frequent. DOJ's June 2007 memo to Standing Committee refers to "a relatively small number" "on average... less than two reported federal cases each year," which is "hardly evidence of a substantial problem warranting such a fundamental change..."
A. Existing enforcement	Enforcement of the duty to disclose includes * Brady/*Giglio* claims on appeal and in 28 USC § 2255 proceedings * Line assistant supervision by section supervisors and the United States Attorney in offices around the country; supervisory review by section supervisors at Main Justice * Internal DOJ controls include	Other approaches have not worked: OPR is a "Roach Motel" – cases check in but never check out. Internal controls are not enforceable by parties or the judiciary. There is no way to track or verify compliance with internal rules. Violations are not discovered in time for appeal; few reach § 2255	DOJ June 2007 memo states a review of OPR investigations closed 2002 to the present revealed 70 investigations led to a finding of misconduct and the Department taking disciplinary action based on the misconduct, plus 21 pending investigations in which OPR found misconduct and recommended disciplinary action. DOJ has also argued that before consideration of an amendment there should be (1) a careful review of the USAM's impact, (2) a finding that the USAM provision is not effective.

	formal internal investigations by the Office of Professional Responsibility ("OPR"), discipline or dismissal from the Department, and reports to the licensing Bar) * state ethics proceedings	proceedings.	There is no reason to believe that a new discovery rule will be more effective at controlling any present failures to disclose than the combined force of *Brady* and the Jencks Act - which now already require material impeachment and exculpatory evidence to be disclosed (though later than required under the pretrial proposal).
B. Alterna-tives to immediate amend-ment	Even if an amendment is called for, should it be proposed immediately? Would local rule pilots be an option?	State and local district rules may provide the pilot/study information needed. A limited FJC Local Rules Study appears in Oct 2005 agenda book at III-B-5 & 6 e.g., N.C.Gen. Stat. 15A-903(a)(1) (requires disclosure of the complete files of all law enforcement and prosecutorial agencies involved); Minn. R. Crim. P. .9.01(1); N.J.R. Ct. 3:13-3. State provisions are also collected in the FJC study, in the Oct 2005 agenda book at II-B-5 & 6	DOJ has argued that before consideration of an amendment there must be thorough research on the effectiveness of the local rules in practice; DOJ also argued that none of the local rules go as far as 2007 amendment: "The three orders that require disclosure, "without regard to materiality," of all evidence "within the scope of *Brady*" have separate provisions for disclosure of *Giglio* impeachment information that do not expressly waive the materiality requirement."

II. POTENTIAL CONFLICTS WITH EXISTING LAW	What existing provisions of state and federal law might conflict with an amendment to Rule 16, and how might such conflicts be minimized?		
A. Jencks Act and Rule 26.2	Current law requires disclosure of one key form of impeachment material (a witness's prior statements) only after the witness testifies for the government on direct examination. 18 U.S.C. § 3500 (Jencks Act); Fed. R. Crim. P. 26.2. The Jencks Act specifically states that no statement by a government witness in the possession of the U.S. "shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination...." The apparent conflict with the Act (and the policies it reflects) has been a major factor in the consideration of prior proposals to amend Rule 16. At least one proponent of the rule change conceded that "if there is a conflict between disclosure of favorable evidence and the Jencks Act, the latter controls." Ap 2005 Comm minutes, at 2. But ultimately the Committee decided to remove proposed language that would have stated: "Except as provided in 18	The rule could modify the Jenks Act by supersession. Requiring pretrial disclosure of impeaching information as the default would be a significant change in the policy reflected in the Jencks Act. The balance between witness security and privacy on the one hand and fair trial on the other can be preserved by permitting the government to delay disclosure or secure other protective measures on a case by case basis. Rule 16(d)(1), for example, provides that "the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." It provides for ex parte applications for such relief. Model Rule Prof. Conduct R. 3.8(d) , cmt 3 (http://www.abanet.org/cpr/mrpc/rule_3_8.html) requires disclosure of all favorable evidence but authorizes prosecutors to seek protective orders when disclosure could result in substantial harm to an individual or to the public interest."	DOJ has argued: Requiring pretrial disclosure of witness information would disturb "the congressional balancing of the competing interests of witness security and privacy with the defendant's interest in disclosure." Disclosing the identity of government witnesses 14 days before trial (potentially months before the witness testifies) unless a court concludes that the prosecutor establishes that safety concerns exist would put witnesses and their families at greater risk. Proof of a safety risk is generally unattainable in advance of any intimidation and harassment. Proof of intent to intimidate, before any intimidation occurs, would require undercover surveillance or informant cooperation, neither of which can be pursued on a regular basis. The amendment would make it difficult for the government to offer the necessary assurances to obtain the testimony of witnesses or the continuing cooperation of other countries, undermining our ability to investigate and prosecute terrorists, and other dangerous criminals. The fact that a court might, in its discretion, enter an order of protection if the prosecution makes a sufficient showing will be of no comfort to a witness

	U.S.C. 3500." Minutes Oct 2005 mtg, at 18.	Alternatively, the proposed amendment could be (expressly) limited by Rule 26.2 and the Jencks Act. The Jenks Act governs only prior witness statements, not all exculpatory or impeaching information.	and, consequently, will discourage them from coming forward.
B. federal victim witness protection laws	A crime victim has "[t]he right to be treated with fairness and with respect for the victim's dignity and *privacy.*" 18 U.S.C. § 3771 (a)(8) (emphasis added) Would a new rule requiring disclosure of impeachment information conflict with this statute? This issue was not raised by DOJ during the Committee's consideration of the 2007 proposal, and was not specifically discussed by the CVRA subcommittee.	There is no conflict if the Committee concludes that the CVRA does not protect against the disclosure of impeachment evidence when a victim chooses to testify. However, a mechanism for protecting particular witness information could be added to the rule (e.g., requiring the prosecutor to seek an exemption from the Rule; or imposing extra protections for categories of evidence, such as mental health records of victims, or impeachment evidence concerning witnesses under age 18).	DOJ has argued: If "all information (not merely admissible evidence) that might be used to impeach a victim-witness must be provided to the defense, regardless of materiality," then "any information that might possibly be used to disparage, discredit, or dispute a victim's testimony will be disclosed to the defense, without any regard to whether such information would increase confidence in the outcome of the trial or even be admissible at trial." This could include "the existence of any mental health treatment undertaken by a victim regardless of how minor, any financial issues no matter how tangential, and familial interactions with law enforcement no matter how insignificant." Victims will "petition courts for writs of mandamus each time the district court permits disclosure of nonmaterial evidence that treads on their privacy interests," claiming a violation of the CVRA.
C. Child witness protection laws	42 U.S.C. § 5106 a (b) (2) (A) (viii) requires states to have a law or a program that includes "methods to preserve the confidentiality of all records in order to protect the rights	See above - same restrictions possible	If there is no "materiality" or "need" requirement, DOJ argues, a child advocate's impressions of the credibility of an abused child during his initial interview would need to be disclosed as impeachment material even if evidence against the

	of the child and of the child's parents or guardians." There are exceptions for disclosure to "a grand jury or court, upon a finding that information in the record is *necessary* for the determination of an issue before the court or grand jury" and to federal, state, or local government entities "that ha[ve] a *need* for such information in order to carry out [their] responsibilities under law to protect children from abuse and neglect." § 5106a(b)(2)(A)(viii)(V) & (b)(2)(A)(ix). How would a new rule interact with such statutes? DOJ did not raise this issue in the Committee, which accordingly did not address it in the deliberations leading to the 2007 proposal.		defendant included his own confession and videotapes of the defendant committing the abuse.
D. Rape Shield Laws	Federal Rule of Evidence 412 provides that evidence "offered to prove that any alleged victim engaged in other sexual behavior" or "to prove any alleged victim's sexual predisposition" is not generally admissible in a criminal case. How would a new rule interact with this provision? DOJ did not raise this issue in the	Rule 412(b) allows the admission of evidence concerning the victim's prior sexual behavior under limited circumstances, and Rule 412(c) provides for a pretrial process for determining admissibility. There is no conflict between Rule 412 and a pretrial duty to disclose in cases where the information would be admissible.	DOJ has argued: Absent some limitation, the proposed rule might require disclosure of information about a sex-crime victim's sexual history, partners, and sexual predisposition even though it may not be admissible as evidence at trial. Even if a new rule is limited to "evidence," a "subsequent motion *in limine* to bar use of the disclosed information at trial does little to protect privacy rights and chills victims from reporting these serious crimes."

	Committee, which accordingly did not address it in the deliberations leading to the 2007 proposal.	Should the proposed rule allow broader discovery of any impeaching evidence, relying on the process defined in Rule 412(c) to determine admissibility? The case by case approach in Rule 16(d)(1) providing for the court to modify or limit disclosure is another alternative, or a mechanism for limiting disclosure in this specific situation could be added.	
E. Law Enforcement witnesses	DOJ's policy gives it the exclusive authority to withhold information based on its determination that allegations are "unsubstantiated" or "not credible," even in cases where the witness has not been formally exonerated. DOJ did not raise this issue in the Committee, which accordingly did not address it in the deliberations leading to the 2007 proposal.	Again, these concerns could be addressed either case by case (as under Rule 16(d)(1)), or a categorical mechanism for limiting disclosure in this situation could be added.	DOJ argues that the close adversarial contact between law enforcement officials and criminals (thorough surveillance, investigations, and arrests) causes them to be the subject of numerous fabricated allegations of misconduct. The DOJ policy protects the officers' privacy interests and prevents embarrassment and harassment based upon ill-founded allegations.
F. State laws	Some state laws prohibit disclosure of impeachment material without a showing of materiality (e.g., section 832.7 of the California Penal Code provides that peace officers' and custodial officers' personnel files "are confidential and shall not be disclosed in any criminal. . . proceeding except by discovery	State law prescribing rules of evidence and discovery in state criminal cases does not bind federal courts in federal criminal cases. These concerns could be addressed either case by case (as under Rule 16(d)(1)), or by a categorical mechanism for limiting disclosure in	DOJ has argued: When state officers are called in federal cases, "In all likelihood, this federal/state policy conflict will become an area of contention and will generate extensive litigation over the conflict of law, and, at the very least, create disparities amongst the district courts faced with the question of elevating federal policy over state policy."

	pursuant to Sections 1043 and 1046 of the Evidence Code." Cal. Penal Code § 832.7(a) (West 2007)). These discovery provisions authorize disclosure upon written motion which must contain "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the *materiality* thereof to the subject matter involved in the pending litigation. . ." Cal. Evid. Code § 1043(3) (West 2007). *Brady* trumps state privilege and protection laws, but would Rule 16?	this situation which could be added. Addressing this issue in the federal rules might be seen as desirable, since it would result in greater uniformity in federal criminal cases.	
G. National Security concerns	The 2007 amendment made no special provisions for national security cases. The Classified Information Procedures Act contains additional provisions governing the protection of classified information before and during trial. Do these provisions sufficiently address DOJ's concerns?	The Rules provide for the procedure applicable in all federal criminal cases, and the default rules should not be restricted because of considerations applicable only to the relatively small number of national security cases. Rule 16(d)(1) and CIPA both provide courts the authority to withhold information. If necessary, additional exceptions could be crafted for such cases. CIPA also provides for alternatives to disclosing classified information, including providing redacted	DOJ has argued: "The government may have cooperating witnesses that apply to the particular prosecution and also to ongoing intelligence gathering. Moreover, multiple foreign law enforcement agencies may be involved in the investigation of the case. Under the proposed rule, the government may have to disclose the identities of all the cooperating witnesses and foreign witnesses interviewed by foreign law enforcement agencies, even if the government ultimately makes the decision not to use the testimony at trial for national security, foreign relations, or other reasons. Under the proposed rule, the government may have to disclose information on these witnesses from any foreign law enforcement source regardless of whether the information is material to preparing the defense" – "In terrorism cases, the United States often needs to

		information, stipulating to certain facts, etc. Similar alternatives could be explored in this context.	shield the identities of witnesses until trial either because there are risks to them and their families (especially if the witness is from a country where the terrorist organization is based), or because their cooperation is particularly sensitive and may have an impact on our relationship with another country or, even more importantly, our ability to gather intelligence and protect national security interests."
G.. Conflict with other aspects of Rule 16			
"Material"	Should this requirement abandon materiality when other Rule 16 provisions require it? Rule 16(a)(1)(E) and 16(a)(1)(F) are triggered by items that are "material to preparing the defense." If "materiality" is required, would this be the Rule 16 standard of materiality applicable to the preparation of the defense, or the standard of constitutional materiality as defined in the *Brady* cases? Are they the same or different?	Isn't all information that is "exculpatory" or "impeaching" by definition material in the sense that term is used in Rule 16, i.e., "material to the preparing the defense"? See also comments under scope, materiality, below.	If materiality is not included–or is defined differently than it is in other sections of Rule 16–the new rule itself, or subsequent litigation about its meaning, would have to clarify how they are different and if different, which trumps when two different provisions apply.
Work product	Would a new amendment requiring disclosure trump information now protected as work product?	The protection in Rule 16(a)(2) for work product is already subject to disclosure requirements elsewhere in the rule.	See comments about scope - below. The concern is that even strategy, thoughts, etc. would have to be disclosed if impeaching or exculpatory if not limited by a materiality and/or evidence requirement.

III. SCOPE OF PROPOSED REQUIREMENT			
A. Scope - Materiality and Relevance	At the heart of the debate about requiring disclosure under the rules has been the dispute over whether prosecutors should be required to disclose all exculpatory and impeaching information/evidence (complete Open File discovery), or only that information/evidence that is "material" in the *Brady* sense, i.e., it has some likelihood of making some difference in the outcome of the trial. See e.g, Comm Minutes Ap 2006, at 10. Many of the arguments the DOJ raised in opposition to the last proposal were based on the failure to require any showing of materiality for mandated disclosure.	Case law defining scope of the government's *constitutional* duty does not dictate optimal policy under statute or rule. The Federal Rules should require more than the bare constitutional minimum. Retaining any authority allowing the prosecutor to pick and choose which exculpatory evidence to disclose will lead prosecutors to resolve close calls, consciously or unconsciously, against disclosure (e.g., evidence that does not shake a prosecutor's belief in guilt will not matter to jurors either. Bibas, Brady, Crim Pro Stories). Neither the prosecution nor the trial judge can know in advance of trial what is material to the defense. On the other hand, not every failure to turn over information will result in a new trial because harmless error still applies under Rule 52. (See sanctions and enforcement, below.) [For a recent collection of articles discussing the materiality standard, see Burke, Revisiting Prosecutorial	Without some limitation on what must be turned over, prosecutors will be forced to turn over everything, which the Supreme Court has described as an "impossible burden." *Bagley.* "Requiring disclosure of all impeachment information, without regard to its evidentiary value or significance, is so sweeping that prosecutors will have little choice but to provide open file discovery" or risk that their failure to do so will result in a new trial. Materiality is a well-established concept used elsewhere in Rule 16, and prosecutors can make the distinction if required. Prosecutors are in the proper position to make these evaluations. If they can be relied upon to determine what is "exculpatory" then they can determine what is material.

		Disclosure, 84 Ind. L.J. 481 (2009)]	
B. Scope – Evidence, information, strategy	The 2007 amendment referred to exculpatory and impeaching "information" -- rather than "evidence." Some state laws and local rules use the phrase "evidence and information." DOJ and 4 members of the Committee favored limiting duty to evidence rather than information. The Committee rejected the suggestion of one member that the rule reference "information reasonably calculated to lead to discovery of admissible evidence," a phrase that at least one member thought would be too broad unless limited to "admissible evidence or information that could reasonably lead to such evidence." Minutes, Oct 2005, at 18.	Use of the term "evidence" might not require the government to disclose information that could lead to the discovery of admissible evidence now required under *Brady*. Other options include a modification of the word information such as that rejected earlier by the Committee.	The rule should be limited to "evidence." Inadmissible information that would lead to the discovery of admissible evidence would still be subject to disclosure under *Brady*, even if not mandated by an amended rule. Limiting the rule to evidence would reduce the risk that the rule would be employed to reach opinions, hunches, rumors, strategy, etc.

C. Scope - Timing of disclosure before trial / plea	The 2007 proposal distinguished the timing of disclosure for "exculpatory" information, (not specified, so presumably the same as with other Rule 16 obligations), and impeachment information (which the court could not order disclosed earlier than 14 days before trial). The timing choices in the proposal were "a compromise" see p. 17 Minutes Oct 2005 Mtg. The Committee discussed and rejected a requirement of pre-plea disclosure. See Goldberg's letter to Bucklew, Sept. 30, 2004; Comm minutes Ap. 2005 at 2. Compare the original ACTL proposal, in May 2004 agenda book, which would have required disclosure 14 days after request. The Committee modified the subcommittee's proposal that exculpatory evidence be disclosed "no later than the start of trial" - deleting that phrase upon motion of one member who argued that each court should be able to establish a timetable according to its own local culture. The Committee also rejected a	Rule 16 makes no general provisions regarding the timing of the required disclosures, which is often governed either by local rules or by a court's standing order. Since disclosure of the identify of witnesses raises special concerns, it may be helpful to limit the timing of disclosure of evidence that is impeaching but not exculpatory. Additionally, a protective order can be issued under Rule 16(d)(1) in individual cases where pretrial disclosure would raise special problems.	DOJ has argued: Restricting disclosure to the period 14 days before the scheduled trial date provides insufficient protection for witnesses, since the trial may be deferred and in any event any particular witness may not testify for weeks or months after the beginning of the trial.

	suggestion to allow the trial judge to order earlier disclosure of exculpatory and impeaching evidence, and voted to apply the no-earlier-than-14 days-before-trial restriction to impeaching evidence only. Oct 2005 minutes at 19.		
D. Scope – Defining exculpatory impeaching	The Committee note to the 2007 amendment defined the term exculpatory: " Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information." The Committee rejected language that would have required disclosure of information that "may be" or "tends to be" exculpatory or impeaching" in favor of language requiring disclosure only if it "is" so. Minutes Oct 2005 mtg, at 20. It did not define the term "impeaching." The Committee rejected a suggestion that the note clarify that if information is both exculpatory AND impeaching, the timing rules for exculpatory evidence would	The definition of "exculpatory" information was drawn from various sources, including the ABA Standards for the Prosecution and Defense, and many state statutes and court rules based upon them.	DOJ argues that failing to limit "impeaching" information means that it will include "virtually any information that might be used to challenge a witness' testimony" (i.e., "anything that casts any doubt on anything that any witness has to say"), creating "limitless, open-file disclosure" which might include a prosecutor's own thoughts about a witness as explained in a prosecution memo or email, including "hearsay, innuendo, and rumor no matter how remote or speculative."

	apply.		
E. Scope – duty of government to find out/ "known"	The 2007 Proposal applied to information "known to the attorney for the government or agents of law enforcement involved in the investigation. of the case..." This was a change, made upon motion of the Department, to replace earlier proposed language requiring disclosure of "information that is known to the government -- or through due diligence could be known to the government -- that the government has reason to believe may be favorable to the defendant." See Oct 2005 minutes, and October 2005 agenda book at 244.	This is already required-- under *Brady* prosecutors already have an obligation to determine what information is known to their investigative team.	
F. Scope – possession or control by government	Should the rule be limited to material that is within the possession or control of the government? Much of Rule 16 is already so limited. The 2007 proposal did not include this limitation. Instead, it applied to all information known to the government This was not discussed during deliberations about the 2007 proposal	This is not a separate requirement under *Brady*, and shouldn't be under a rule.	Without a similar limit, would the government be responsible for obtaining and then disclosing documents, etc. from third parties when the existence of those documents is "known" to any agent involved in the investigation, but they are in the possession of third parties?
G. Scope –	A constitutional breach does not	The other provisions of Rule 16 do not	Without this limitation the government could be

known already to defense included/ defense diligence	occur when the government fails to provide material that is already known or could be known to the defense if it had exercised due diligence. Should this limitation be included in a rule as well? The FJC study notes one local rule contains this restriction. This was not discussed during deliberations about the 2007 proposal.	encourage the government to withhold information on the ground that the defense could develop this information on its own. There is no reason to take a different approach to information that is exculpatory or impeaching.	responsible under the rule for providing information that is readily available from public records or already in the defendant's own possession.
H. Scope – sentencing?	The *Brady* requirement applies to capital sentencing, should the rule as well? The 2007 proposal did not speak to sentencing at all.		
I. Scope – continuing duty during or after trial?	Rule 16 includes a continuing duty to disclose if material was either requested or ordered disclosed. Would this apply to a proposed requirement to disclose exculpatory and impeaching information? This was not discussed during deliberations about the 2007 proposal.	The *Brady* duty to disclose does not turn on the presence of a request or order and neither should this.	Requests (and orders) for disclosure of all information discoverable are so routine this won't make any difference
IV. SANCTIONS AND ENFORCEMENT			
A. Sanctions and enforce-ment – trial	Could a judge refuse to review information alleged to fall within the rule in camera? Insist on disclosure	These decisions should be left to the discretion of trial judges just like any other Rule 16 dispute.	Because of witness safety and the other concerns raised above, more certainty about the process to be used for enforcement should be required.

court - pretrial	before accepting plea? Are sanctions the same as for any discovery violation or different?		
B. Sanctions and enforcement – trial court – mid trial	What if a violation was discovered mid trial? How would the remedy vary from a *Brady* violation discovered mid-trial? Vary from Jencks? Should the trial judge recall the witness in order to afford the defendant an opportunity to use the impeachment material?	These decisions should be left to the discretion of trial judges just like other Rule 16 disputes.	Because of witness safety and the other concerns raised above, more certainty about the process to be used for enforcement should be required.
C. Sanctions and enforcement – trial court – post trial	What if the withheld impeachment material was discovered after a jury reached a guilty verdict but before sentencing? Motion for new trial? What standard would apply – Harmless error?	See appeal below	See appeal below
D. Sanctions and enforcement review on appeal	What if the rules violation is first discovered, or first raised, on direct appeal? How would Rule 52 apply? If suppressed, would Rule 52(a) or (b) apply? What would proper preservation entail? * De novo (as for *Brady*) or abuse of discretion (Rule 16) review? * Harmless error? * Who has burden – defendant must prove prejudice (*Brady*; plain error) or gov't must disprove (Rule	The same standard for review of other Rule 16 violations should apply: harmless error. Whatever standard governs in each circuit will apply to this aspect of Rule 16 just as to other aspects. That the standard for other violations of Rule 16 is unsettled is no reason to hold off making a needed change to the disclosure required by the Rule. These decisions are no more difficult	The harmless error standard in use in many circuits for some violations of Rule 16 will result in the reversal of more convictions than the current standard used for reviewing *a Brady/Giglio* violation (defendant has burden of showing reasonable probability of difference in outcome). The standard is not settled among circuits, and invites litigation. Even if the review standard were settled, its application is uncertain: would a new trial be required when the testimony of a witness, who would have been impeached but for the prosecutor's failure to

	52 review of preserved rule violation). The Committee discussed this but did not include any provision about review in the 2007 proposal	than applying harmless error standards to other errors in the presentation of testimony or in the limitation of cross- examination.	disclose impeaching information, was corroborated by additional testimony? What if the suppressed impeachment evidence merely furnished an additional basis on which to impeach a witness whose credibility was already greatly diminished on cross examination?
E. Sanctions and enforce-ment Collateral review	What if first discovered in § 2255 or on habeas? Would a violation of the new rule be cognizable in habeas?	*Brady* claims would remain cognizable, but not rule violations. The risk is low that a court would conclude a rule violation fits the *Hill* standard "fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure" but does not amount to a *Brady* violation. Alternatively, a proposal could amend § 2255 to expressly exclude violations of the new rule.	Defense attorneys will argue that the Rule 16 amendment is grounded in a defendant's constitutional right to a fair trial and accordingly that habeas review would be proper when a prosecutor fails to deliver impeaching information.
F. Subject to waiver in plea or sentencing agreement?	Discovery rules are often waived as part of a plea agreement. Should a new disclosure requirement be subject to waiver?		There is no convincing reason to make this particular discovery rule impervious to waiver but not others. Defendants regularly waive the right to challenge their convictions and sentences in § 2255 or on appeal, on ANY ground, including *Brady* and *Giglio* violations. Appeal waivers have been upheld in every circuit.

APPENDIX 6

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Director

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Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 31, 2009
Via E-mail

MEMORANDUM TO JOHN RABIEJ

FROM: HENRY WIGGLESWORTH

SUBJECT: Fed. R. Crim. P. 16 and *Brady* Issues

INTRODUCTION

In 1963, the Supreme Court announced in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added). *Brady*'s requirement that only "material" evidence must be disclosed has been interpreted to mean evidence that "would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Since *Brady* was decided, the Criminal Rules Committee ("Committee") has on several occasions considered amending Fed. R. Crim. P. 16 (Discovery and Inspection) to incorporate and amplify *Brady*'s constitutional obligation to disclose exculpatory evidence. The most recent attempt concluded in 2007, when the Standing Committee declined to publish for comment a proposed Rule 16 amendment. This memorandum summarizes the salient issues that have been discussed in the past, with particular focus on the most recent attempt to amend Rule 16.

RULE 16 AMENDMENTS OVERALL

The Committee has considered amending Rule 16 on four separate occasions to codify *Brady*'s prosecutorial duty to disclose exculpatory evidence: briefly in 1968, 1989, and 1991, and for an extended period from 2003 to 2007.

In addition, in 1992-95, the Committee considered a separate amendment to Rule 16 to require the government to disclose the names of government witnesses before trial, unless the prosecutor believed that such disclosure would threaten the safety of a witness or risk obstruction of justice. In those cases, the prosecutor could file an "unreviewable" statement to that effect, avoiding disclosure. The Committee approved the proposal and forwarded it, over the Department of Justice's objection, to the Standing Committee. The Standing Committee revised

the proposal and forwarded it to the Judicial Conference, which did not approve the amendment in September 1995.

2003-07 RULE 16 AMENDMENT

In 2003, the Committee began its study of the proposal by the American College of Trial Lawyers ("College") to amend Rule 16 to incorporate *Brady*'s disclosure requirement. The request was based on the College's belief that numerous convictions had resulted from prosecutors withholding exculpatory and impeaching evidence. The College proposed that Rules 11 and 16 be amended to "codify the rule of law first propounded in *Brady v. Maryland*, clarify both the nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information."

The Department of Justice opposed the College's proposal, arguing that there was no demonstrated need for such an amendment because the government's obligations under *Brady* were clear.

The Committee discussed the College's proposal at its Spring 2004 meeting and a *Brady* subcommittee was formed, chaired by Donald J. Goldberg, Esq. At the Committee's request, the Federal Judicial Center surveyed the courts and found that 30 of the 94 federal district courts had a "relevant local rule, order, or procedure specifically governing disclosure of *Brady* material." An updated 2007 survey found that this number had increased to 37 districts.[1]

The Committee considered a host of issues in deciding whether to incorporate *Brady*'s holding into the national rules, including:

- Has the need for an amendment been adequately shown?
- How broad or narrow should the disclosure requirement be? Should it cover all exculpatory information? Impeaching information? Only exculpatory information that is "significant" or "material"?[2]

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[1] A recent survey by the Rules Committee Support Office did not find any increase in this number since 2007.

[2] As Prof. Sara Beale pointed out in a memorandum to the Committee on September 24, 2005, *Brady*'s "materiality" standard was developed in the context of appellate courts determining whether the failure to disclose resulted in an unfair trial. Determining *before* trial whether exculpatory evidence would result in a different verdict can be difficult.

- Should the requirement apply only to exculpatory evidence or also to information that may lead to any such evidence?

- When should disclosure of exculpatory or impeaching evidence take place to minimize risk to witnesses while providing the defendant adequate time to respond? No later than 14 days before trial?

- Should there be a "due diligence" requirement to ensure that prosecutors and law enforcement officers have reviewed all appropriate files to uncover exculpatory evidence?

- What are the consequences of failing to disclose? What standard of review on appeal would apply to a failure to disclose?

At each of the Committee's spring and fall meetings in 2004, 2005, and 2006, the Department of Justice consistently opposed any proposed amendment to Rule 16, asserting the following arguments:

- The need for the amendment has not been adequately demonstrated and the proposal would upset the careful balance of competing interests that has been established regarding criminal prosecutions.

- Requiring disclosure in advance of trial would jeopardize the safety of witnesses and victims. Further, because impeaching information generally relates to testimony, its disclosure would increase risk to witnesses and victims.

- Amending Rule 16 would generate unnecessary "satellite" litigation to resolve disputes about compliance.

- If the national rule were to impose an unqualified duty to disclose all exculpatory evidence, instead of limiting the prosecutor's obligation to disclosure of only significant or material exculpatory evidence, such a broad requirement would conflict with existing local rules that have such a limitation.

- Imposing a duty to disclose in the national rules will lead to unnecessary appeals based on an alleged failure to comply and will confuse the standard of review in those cases.

- Proceeding with such a dramatic change to the rules instead of following an incremental approach may harm the reputation of the Committee as a careful, deliberative body.

In 2006, the Department drafted a revision to the U.S. Attorneys' Manual to require disclosure of *Brady* material. The revision, which was eventually adopted in 2007, generally requires prosecutors to disclose exculpatory or impeaching information that is "significantly

probative." In the meantime, between 2004-06, the Committee drafted several versions of an amendment to Rule 16, with the final version reading as follows:

> (H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment earlier than 14 days before trial.

The Committee met in a special session by teleconference on September 5, 2006, to determine whether the proposed revision to the U.S. Attorneys' Manual was sufficient or whether the amendment was still necessary. The Committee considered the following arguments in favor of proceeding with the rule amendment:

- The need to make *Brady* part of the national rules is great. Although the number of published cases that cite *Brady* violations is relatively small, this type of data underestimates the magnitude of the problem because *Brady* violations usually go undetected. Only prosecutors know for sure when and how much exculpatory material is not turned over to defendants. Thus, there is no way to get a completely accurate picture of the problem and the anecdotal evidence of instances when material is not disclosed appears to reflect a much greater problem.

- The local rules and orders of the 37 districts that have adopted a *Brady* standard vary greatly. A national rule is needed for uniformity.

- The revision of the U.S. Attorney Manual, although helpful, does not go far enough. It is not judicially-enforceable and leaves too much to the discretion of prosecutors. (In addition, the effectiveness of the U.S. Attorney's Manual has been called into question by recent well-publicized *Brady* violations.)

- A national rule would bring federal court practice more in line with practice in state courts, most of which already impose a *Brady* requirement on state prosecutors.

Although some members believed that the Department's proposed revision to the Manual was helpful, the Committee ultimately concluded that such an internal rule was not an effective substitute for a judicially-enforceable rule. Over the objections of some members who felt that the Committee should proceed slowly and incrementally in the face of strong opposition by a co-equal branch of government, the Committee voted 8-4 to forward the amendment to the Standing Committee, with the recommendation that it be published for public comment.

In June 2007, the Standing Committee considered the proposed amendment. After extended discussion, the Standing Committee voted, with one objection, not to publish the proposed amendment and to defer further consideration of it indefinitely. At the meeting, Deputy

Attorney General Paul McNulty asked the Committee to give the recent change to the U.S. Attorney's Manual time to have a demonstrable effect on federal prosecutors. Mr. McNulty argued that the proposed amendment lacked adequate protections for witnesses and victims whose identities would be disclosed under the revised rule. In addition to the arguments raised by Mr. McNulty, several members voiced concern that proceeding with a controversial amendment that the Department strongly opposed would undermine the Standing Committee's reputation as a cautious, deliberative body. The Committee voted to not publish the proposed amendment and table its consideration indefinitely. However, the Committee left the door open for the Criminal Rules Committee to "study the matter further and take such further action as it deems appropriate at some future date."

HISTORY OF COMMITTEES' CONSIDERATION OF AMENDMENTS TO RULE 16
TABLE OF CONTENTS WITH SUMMARY OF ACTION

Part I – "*Brady*" Proposal

October 2007 Criminal Rules Committee Minutes – (Reported on action by Standing Committee) (Page 1)[1]

- Advisory Committee Chair reported on the Standing Committee's June 2007 meeting. The proposed amendments to Rule 16 generated the greatest interest.
- Advisory committee's proposed revision had not been approved due to
  - concerns that it would require government disclosure of exculpatory and impeaching evidence without regard to its materiality; and
  - questions as to whether a need for the change had been sufficiently shown.
- Standing Committee suggested that the Advisory Committee consider whether to continue studying the Rule 16 amendment proposal, by asking the Federal Judicial Center to research (a) the effect of the recent change to the U.S. Attorneys' Manual and (b) the experience of courts governed by local rules similar to the Rule 16 amendment proposal.
- Ms. Hooper reported that the FJC could not immediately conduct a substantial survey.
- One member suggested studying the impact of local rules, which would require fewer resources. Department has been carrying out substantial training on the U.S. Attorneys' Manual changes and could already start helping the FJC think of ways to capture the data needed for the Center's study.

June 2007 Standing Committee Minutes – (Deferred consideration of "*Brady*" amendment indefinitely) (Page 5)

- Federal Judicial Center had compiled and analyzed the local district court rules, orders, and policies dealing with Brady v. Maryland requirements.
  - 37 of the 94 federal judicial districts currently have a local rule or district-wide standing order governing disclosure of Brady materials. The Center had not searched beyond local rules and standing orders to identify the orders of individual district judges, which may be numerous. Additionally, most states have statutes or court rules governing disclosure.
- Center would be prepared to conduct further research on how the rules, orders, and policies actually work in practice, if the committee requests it.
- The advisory committee had recommended publishing amendments to Rule 16 requiring the government, on request, to turn over exculpatory and impeaching

[1] Page numbers refer to page on which the document begins as contained in the 542-page compilation of committee reports and minutes assembled by AO intern Danielle White in the summer of 2009. The compilation may be found under the Rule 16 Subcommittee agenda materials at www.uscourts.gov/rules/Agenda_Books.htm.

evidence, or information, favorable to the defendant, "known" to the government – including attorneys and law enforcement agents – regardless of materiality.

- DOJ amended USAM as an alternative to amending the Rule.
    - Advisory committee ultimately decided for two reasons that the manual changes alone could not take the place of a rule change.
        - First, there was no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases.
        - Second, the USAM is a purely internal document of the Department of Justice and not judicially enforceable.
        - Reported case law does not provide a true measure of the scope of possible *Brady* problems because defendants and courts generally are not made aware of information improperly withheld.
        - Advisory committee had received a letter from one of its judge members strongly supporting the proposed amendment because in a recent case before him the prosecutor had improperly failed to disclose exculpatory material and, despite the judge's prodding, the DOJ failed to discipline the attorney appropriately for the breach of *Brady* obligations..
        - Local rules and orders of many district courts address disclosure obligations, but they vary in defining disclosure obligations and specifying the timing for turning over materials to the defense.
            - Some rules impose a "due diligence" requirement on prosecutors, while others do not.
            - Sheer number of local rules – together with the lack of consistency among them – support argument for a national rule to provide uniformity.
        - Publishing a proposed rule for comment could produce meaningful information as to the magnitude of the non-disclosure problem. If the public comments were to demonstrate that the problems are not serious, the advisory committee could withdraw the amendment.
        - DOJ concerns:[2]
            - Breadth of proposed rule.
            - Impeaching evidence generally pertains to testimony and early disclosure may increase potential danger to witnesses
                - Limits disclosure of impeaching evidence to no earlier than 14 days before trial.
                - Government has the option of asking for a protective order.
                - Amendment would fundamentally change the way the DOJ does business.

[2] These concerns are described in detail in the letter dated June 5, 2007, from Deputy AG Paul McNulty to Judge David Levi. The letter starts at page 14.1.

        - Unnecessary because Constitution, SCOTUS and USC have all specified the requirements of fairness and obligations of prosecutors.
        - Goes beyond constitution requirements.
            - Would upset "careful balance" of current discovery.
            - Conflict with victims' rights, disclosure might reveal sensitive information on victims.
        - In federal-state task force cases, it might require state information be turned over to the defense in violation of state law.
        - Inconsistent with Jencks, the rest of Rule 16 and other criminal rules limiting disclosure/timing of disclosure.
        - Rule would generate substantial amount of litigation as to whether exculpatory or impeachment information is "material."
            - Because it is unclear whether materiality is in fact removed as a disclosure standard.
            - If in fact removed, it is inconsistent with local court rules, very few of which have eliminated materiality.
            - Also inconsistent with rest of Rule 16
        - Rule not thought through or studied adequately.
        - Significant revisions to USAM should be given time to work.
        - Would create "major" instability and insecurity among witnesses, who will be less willing to come forward.
- No inclusion of "material:"
    - Might be read to imply all the familiar constitutional standards.
    - other parts of the rule use it in a different sense
        - Committee member deemed elimination to be "radical".
        - Would inundate courts with disputes over whether immaterial information must be turned over.
    - Prosecutor's determination of "material" will likely be subjective, potentially inaccurate.
- Proposed amendment would establish a consistent national procedure, bring the federal rules more in line with local rules and the rules of professional responsibility.
- Introduces a judicial arbiter to make the final decision as to what must be disclosed.
- Concern that Rule would create a new standard of review for failure to disclose.
- Not the intention of the Rule, which is aimed at pretrial disclosure.
    - Comparison with civil pretrial disclosure: vastly less for criminal cases.
    - Court more likely to follow FRCRP than case law.

- Gather more anecdotal evidence
    - May turn out that disclosure is not handled the same way in different types of cases.
- Expanded defense rights to pretrial discovery a fundamentally bad idea.
- Potential for damage to Standing Committee's reputation as a body that proceeds with caution and moderation.
    - Publication should only come when the rule has been substantially vetted.
        - Empirical research difficult to obtain because defense does not find out about withheld information.
- Rules takes a constitutional fairness standard and converts it to a pretrial discovery procedure that gives defense new trial prep rights
- Would bring federal practice closer to that of state courts.

- OUTCOME: Chair concluded that advisory committee should proceed slowly and methodically with any study, opposed immediate publication but did not reject amendment entirely.
    - Deferred further consideration indefinitely.
    - Advisory committee free to take such further action as it deems appropriate in the future.

April 2007 Criminal Rules Advisory Committee Minutes – (Forward "*Brady*" amendment to Standing Committee) (Page 15)

- Judge Bucklew noted that the committee had voted in October 2006 to forward to the Standing Committee for publication the proposed amendment to Rule 16 (obligating prosecutors to disclose exculpatory or impeaching evidence without regard to its materiality).
- Mr. Rabiej had advised Federal Judicial Center staff that the committee would like an update of its October 2004 study of local rules and how they treat a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).
- Judge Bucklew reported that the proposed rule amendment would be presented to the Standing Committee at its June 2007 meeting.

January 2007 Standing Committee Minutes – (Returned "*Brady*" amendments to Advisory Committee for further consideration) (Page 20)

Advisory Committee approved a proposed amendment to Rule 16 codifying *Brady;* USAM modified to accomplish same goals in lieu of rules change.

- Standing Committee:
    - Creation of national uniform rule would be beneficial.
    - Although USAM not judicially enforceable, they are being noticed by the defense bar and prosecutors.
    - Because amendment would be a policy shift, it will be closely monitored
        - Advisory committee might consider giving USAM time to work.
- Advisory committee argued that a rule change still necessary because:
    - USAM not judicially enforceable.
    - USAM only provides internal guidance.

- Advisory committee expected to propose amended rule with recommendation of publication to standing committee at June 2007 meeting.
    - Concerns (from Standing committee chair):
        - Expansive language would impose too great a burden on government to produce relevant impeachment materials.
        - Proposed amendments could lead to uncertainty involving the standards and burdens for setting aside convictions on appeal.
    - Recommendations:
        - Reexamine the proposed amendments.
        - Review the experiences of courts with local rules on the same subject.

October 2006 Criminal Rules Committee Minutes – (Reaffirmed Recommendation to Forward "*Brady*" amendment to Standing Committee) (Page 24)

- Chair recounted the history of the effort to amend Rule 16:
    - **March 2003:** American College of Trial Lawyers first proposed requiring disclosure of exculpatory and impeaching evidence without regard to its materiality. The Department had consistently opposed the proposed rule amendment.
    - **Spring 2004:** committee discussed the proposal and a Brady subcommittee was appointed, chaired by Mr. Goldberg.
    - **October 2004**: At the subcommittee's request, the Federal Judicial Center completed a survey of local rules, administrative orders, and relevant case law.
    - **April 2005:** The committee considered the subcommittee's drafted amendment to Rule 16. By a vote of 8 to 3, the committee endorsed the amendment in principle and asked the subcommittee to continue its drafting efforts.
    - **April 2006 meeting:** the committee had initially voted to table consideration of the proposed amendment until the next meeting in light of the Department's proposal to amend the U.S. Attorneys' Manual to address a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).
    - **September 5, 2006 teleconference:** the committee voted to send the Rule 16 amendment proposal to the Standing Committee with a recommendation that it be published for public comment.
    - **October 19, 2006:** Attorney General Paul J. McNulty had signed the blue sheet approving the Manual amendment and that the amendment had been posted on the internet and sent to all U.S. attorneys, assistant U.S. attorneys, and litigation divisions.

- Judge Wolf stressed that the committee and the Department had a common interest in the fairness and finality of proceedings, and he encouraged the Department to go beyond formally publishing the new policy and to actively help law enforcement agencies internalize the policy and incorporate it into their practices.

- The committee discussed whether the committee note accompanying the proposed Rule 16 amendment should address the provision's effect on direct appeals or collateral motions.
    - Judge Bucklew said that it probably would shift the burden in direct appeals in some circuits, but have no effect on collateral motions. The question, though, was whether a statement to this effect should be added to the committee note.
    - Professor Beale said that the circuit split made it difficult to sum up the amendment's impact on direct appeals.
    - Professor King said that she opposed adding the proposed language on the amendment's impact on collateral proceedings, because § 2255 proceedings do occasionally consider non-constitutional issues such as fundamental statutory provisions.
    - Judge Bucklew commented that, unless there was a desire to change the note, it would be sent to the Standing Committee in its current form.
    - Judge Trager objected to the reference to "fundamental fairness" in the first line of the committee note, but noted that he had been on the losing side of the vote approving the proposed amendment.
    - Judge Wolf asked, as a procedural matter, whether the committee should be revisiting its September 5 decision to approve the proposed Rule 16 amendment, given that Mr. Fiske and Mr. Goldberg were no longer present.
    - Judge Bucklew agreed that the only issue pending was whether to add language to the note to clarify the amendment's effect on direct appeals or collateral motions.
    - Judge Wolf said that he would consider it a positive development if the amendment made it more difficult at the appellate level for the government to defend inadvertent and intentional prosecutorial violations of their disclosure obligations in district court, because fear of causing a guilty person to go free would foster compliance among prosecutors far more effectively than a provision in the U.S. Attorneys' Manual.

September 2006 Criminal Rules Committee Teleconference Minutes – (Forward "*Brady*" amendment to Standing Committee) (Page 29)

- Arguments Against:
    - DOJ – Concern about the pretrial disclosure of the identity of prosecution witnesses.
    - Ms. Fisher: the problem is limited to a few bad actors.
        - Mr. Campbell suggested that bad actors who would violate a Manual provision would also disregard a rule (violation of USAM subjects a prosecutor to an Office of Professional Responsibility (OPR) investigation, possible dismissal, and even, as occurred in Detroit recently, criminal prosecution; Judge Wolf considers OPR investigations dubious).
        - Mr. McNamara: across the board problem.
- Arguments in Support:
    - USAM not enforceable.

- Revised language pertaining to exculpatory evidence would eliminate any subjective analysis by the prosecutor and require prosecutors to disclose any information — bar none — that was inconsistent with any element of a crime, the proposed inclusion of the qualifier "substantial" and "significant" in the Manual section on disclosure of impeaching information, creates the same kind of issue as the materiality element by calling for a subjective assessment by the prosecutor (retention of prosecutorial subjectivity).
    - Materiality qualification makes USAM insufficient substitute for Rule 16 amendment

- Incremental Approach (Judge Tallman): recommended that the committee defer consideration of a Rule 16 amendment until the impact of the Department's proposed revision to the Manual could be assessed. He added that he would not vote for the rule amendment if the Department intended to oppose it at the Standing Committee. Concern re: affect scope of review; and would affect sustainability of convictions
    - Judge Jones: Rule 16 amendment would not lead to an increase in overturned sentences, but only prosecutorial sanctions (Goldberg, King agreed; suggest addition of a note).
    - Mr. Fiske: Even 2 years out, there would be insufficient data to indicate success of USAM changes.
    - Professor King: revising the rule should have no effect on collateral review, and even on direct appeal it would not necessarily shift the burden in all circuits, because it would not change the constitutional standard for reversal.
    - Judge Wolf: commented that the only thing that would ease the job of appellate courts would be to reduce the number of these types of cases by promoting greater fairness and integrity at the trial level in what has proven to be a very problematic area.
- The committee voted 8-4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.

June 2006 Standing Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 39)

- Advisory committee working on a proposed amendment to Rule 16 to expand the government's obligation to disclose exculpatory and impeaching information to the defendant.
    - DOJ strongly opposed to any rule amendment.
    - Offered to draft amendments to the USAM as a substitute.
    - The matter was still in negotiation.

April 2006 Criminal Rules Committee Minutes – (Proposed "*Brady*" amendment is tabled until a special session before Sept. 30, 2006) (Page 43)

- To allow the DOJ additional time to revise proposed USAM change (7-6 vote to table)
    - add a new section on disclosure of exculpatory and impeaching information

- ensure the wording adequately addressed the main concerns raised by Mr. Fiske and others (eliminating the materiality test and providing notice of which disclosure standard is being used in each case).

- Opposition to Amendment:
  - DOJ: (1) unnecessary; (2) concern for safety of witnesses
    - USAM sufficient – could encourage early disclosure to defense of exculpatory or impeaching evidence, promote prosecutorial uniformity, exceptions necessary for protection of witnesses.
- Support for Amendment: (1) necessity of judicial enforcement; (2) need for having a judge, not a prosecutor, determine what is exculpatory.
  - USAM not sufficient – wording vague, hortatory, subject to exceptions; no mechanism for measuring compliance.
- Support for Tabling Proposed Amendment:
  - Allow USAM time to work.
    - 3 years of work on amendment already completed would be lost.
  - Allow USAM if it removes "materiality" test and provide notice in each case of degree of disclosure.

January 2006 Standing Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 50)

- Advisory committee considering an amendment that would clarify when and what type of exculpatory and impeachment evidence must be disclosed before trial in accordance with *Brady*.
  - DOJ opposed to amendment.
  - Advisory committee has agreed in principle to amendment but has not yet drafted actual language.

October 2005 Criminal Rules Committee Minutes (Approved changes to language, "*Brady*" amendment pending further consideration) (Page 57)

- Gave Standing Committee notice that Advisory Committee would bring a proposed rule for consideration at June 2006 meeting.
- The committee discussed Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information.
- Issues:
  - Start of trial is too late in the process for exculpatory material to be meaningful, particularly in complex cases.
  - Advisability of omitting a "materiality" standard for information that must be disclosed.
    - necessary to prevent prosecutors from disclosing exculpatory or impeaching information only when they predict that it might cause reversal of a conviction on appeal.
  - Discussed how omission of a materiality standard would affect review on appeal and habeas corpus.
    - On appeal, the addition of a discovery obligation under Rule 16 would allow the defendant to present the failure to provide exculpatory or

impeachment information as a rules violation, rather than solely a constitutional violation.

- As a rules violation, however, the claim would be subject to Rule 52, and accordingly the impact of the failure to disclose would still be considered.
- Government would have the burden of demonstrating that the failure had no impact, instead of requiring the defendant to demonstrate materiality. The standard of review on habeas corpus would not be affected.

- The committee discussed whether the language of the rule should refer to "information" or "evidence."
  - The Brady standard was "evidence and information that might lead to evidence."
  - Rule 16's current language refers to "information subject to discovery."
  - Language of the civil discovery rule, FED. R. CIV. P. 26(b) is "reasonably calculated to lead to discovery of admissible evidence."
    - Standard with which courts and practitioners are familiar, unlike "information" that "tends to be exculpatory," whose application would be less clear.
    - But, too broad unless its scope were limited to "admissible evidence or information that could reasonably lead to such evidence."
    - Rule limits "information" to "exculpatory or impeaching" information.
    - Committee voted to use "information."

- DOJ proposed delivering draft language to the committee before its next meeting for possible inclusion in the U.S. Attorneys' Manual.
- Committee then considered whether the bracketed language "[Except as provided in 18 U.S.C. § 3500]" should be included.
  - Should be left up to judges to wrestle with the inherent tension between Jencks and *Brady*.
  - Department took no position on whether the language should be included.
  - Committee voted to omit the bracketed language, without objection.
- Whether to prohibit a court from requiring disclosure more than 14 days before trial.
  - Problematic in the case of impeaching information.
  - Department felt strongly that such a prohibition was necessary so the government could adequately protect lay witnesses during a fixed window of time under its control.
  - Issue: whether proposed language would conflict with local court rules.
    - Question of whether a defense attorney could properly prepare a case for trial if exculpatory evidence were received less than 14 days before trial.
    - Virtually every court requires disclosure of exculpatory evidence within a certain number of days after arraignment.

        - Since between 93 and 96 percent of federal cases resulted in a plea rather than a trial, it is critical that lay witnesses be exposed only in those cases that actually proceed to trial.
        - Impeaching information that might be used to impeach a witness or to support a suppression motion clearly should be handled differently from exculpatory evidence, because the latter is critical whether or not the case proceeds to trial.
    - Final proposed bracketed sentence (lines 11-12) was limited to apply only to impeaching evidence.
    - Concern that the phrase "no later than the start of trial" could be misinterpreted as setting the day of trial as the presumptive disclosure deadline, even for exculpatory evidence, which is considered too late in the process.
        - Local court rules typically require disclosure of exculpatory evidence a certain number of days after indictment or arraignment.
        - Deadline should be earlier for information relating to a motion to suppress, because receiving that information on the day of is also too late.
        - Prosecutors often do not come across such evidence until they are actually preparing a case for trial, often about a month before the trial date.
        - Phrase "no later than the start of trial" deleted and each court allowed to establish a timetable according to its own local culture.
            - Standing Committee members had been emphasizing that the fundamental purpose of the federal rules is to achieve a level of national consistency; would probably have concerns.
- The committee considered the phrase "information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant."
    - Issue: whether references to "the government" should be changed to "the attorney for the government"; whether the provisions should be expressly limited to apply only to those persons directly involved in the government's investigation of the specific case at issue.
        - It would be unreasonable for the rule to cover information that "through due diligence could be known to the government," - doing so would require federal prosecutors to verify every statement made by one law enforcement officer with every other officer at the scene.
        - DOJ would favor eliminating the "due diligence" language and adhering more closely to the standard articulated in the case law - that which is known to the attorney for the government and to agents of the government involved in investigating the case.
            - Approved in a voice vote without objection.

June 2005 Standing Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 66)

- Notice of ACTL's proposal for Rule 16 amendment

- Advisory committee had reviewed pertinent local rules and decided to proceed with drafting an amendment.
- DOJ firmly opposed
  - Prosecutorial obligation laid out under *Brady*.
  - Prosecutors err on the side of disclosure.
  - Burden of showing that government has turned over all information that tends to be exculpatory is too massive to bear.
  - System not broken, rule not justified.

April 2005 Criminal Rules Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 71)

- Ms. Rhodes (DOJ): two key concerns about the proposal; **timing** and **materiality**
  - Goldberg: A majority of the Subcommittee supported some sort of amendment to Rule 16. He noted that the Subcommittee had decided not to propose a 14-day requirement in the amendment, and that the Subcommittee had decided to delete the "materiality" requirement from any proposed rule.
- Additional concerns:
  - often difficult to distinguish between inculpatory and exculpatory evidence.
  - Rule 16 already provides adequate discovery in several significant respects.
  - potential impact of the proposed amendment on the Jencks Act requirements
  - issue of protection of prosecution witnesses.
- Mr. Fiske agreed that if there is a conflict between disclosure of favorable information and the Jencks Act that the latter controls.
- Whether an amendment to Rule 16 would require the government to shoulder the burden of proof on appeal if the defendant alleged a violation of the discovery requirement.
- Mr. Goldberg moved that the Committee proceed with the amendment to Rule 16. Mr. Fiske seconded the motion, which carried by a vote of 8 to 3.

October 2004 Criminal Rules Committee Minutes – (Voted to proceed with consideration of "*Brady*" amendment) (Page 77)

- Subcommittee had reviewed the materials included in the agenda book and had reached a consensus that the Committee should proceed with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence.
  - Judge Carnes: Committee had not recommended other amendments to the Criminal Rules because there was insufficient statistical data to support the need for an amendment. That problem, could also exist with regard to any amendment concerning *Brady* information.
  - Ms. Rhodes: there's no problem to fix, Rule 16 and *Brady* working; no culture of withholding exists at DOJ; issue is re: the timing.
- Judge Battaglia: 30 districts had developed local rules addressing this very issue and those rules had taken various approaches in dealing with the *Brady* issue; might lead to a lack of uniformity and provide more reason for an amendment to Rule 16.

- Wroblewski: observed that it is a myth that there is a national, uniform, practice in criminal cases and that it is not essential that there be absolute uniformity.
- Professor Coquillette: § 2071 requires that the local rules be consistent with the national rules.
- Judge Jones: if there was a national rule on this issue, the Department would ultimately benefit.

- Tallman: issue re: effect on appeals; Congress should address the issue.

May 2004 Criminal Rules Committee Minutes – (Voted to consider ACTL's proposal and form a Rule 16 Subcommittee) (Page 82)

- ACTL proposed amending Rule 16; Judge Carnes appointed Subcommittee to consider.
- Subcommittee previously appointed to review proposal identified issues to be addressed before proceeding:
  - Definition of "favorable" evidence, in light of large amount of case law interpreting *Brady.*
  - Change in the meaning of the term "materiality."
  - DOJ's view that *Brady* is a post-trial rule; amendment would transform a "trial right" into a "discovery right" (confliction with *Jencks*).
  - Focus on developing a bright line rule for timing of disclosure to create uniformity.
  - Ms. Rhodes – no showing that the current law or practice was inadequate
- Subcommittee subsequently appointed to draft amendment following a 9-3 vote to proceed.

January 2004 Standing Committee Minutes – (Notice of ACTL proposal) (Page 87)

- American College of Trial Lawyers had proposed amendments to Rule 16 that would, in effect, supersede the Supreme Court's 2002 decision in *United States v. Ruiz*, involving application of the rule in *Brady v. Maryland* to guilty pleas.
  - Unusual for the committee to propose an amendment to the Supreme Court that would overrule one of the Court's decisions so soon after it has been issued.

Part II – Amendment Requiring Disclosure of Names of Witnesses

October 2003 Criminal Rules Committee Minutes – (Voted against reviving consideration of amendment to disclose witnesses' names) (Page 89)

- Judge Wilson, a former member of the Standing Committee, had written to Judge Davis, the former chair of the Committee, in 1999 asking the Committee to once again address the issue of government disclosure of the names of its witnesses to the defense (a similar amendment had been proposed by the Criminal Rules Committee, published for comment, and approved by the Standing Committee. The amendment did not receive the support of the Judicial Conference and the issue had not been revisited since then.)

- Judge Friedman recommended that the Committee consider the issue again; failed by a vote of 3 to 8.

October 1995 Criminal Rules Committee Minutes – (Reported that Judicial Conference had rejected amendment to disclose witnesses' names) (Page 143)

- Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement.
- Judicial Conference rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements.
    - not clear from the Judicial Conference's action whether they specifically intended to reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

September 1995 Standing Committee Report Submitted to Judicial Conference – (Recommended Judicial Conference approve amendment to disclose witnesses' names) (Page 146)

- Rule 16 Amendments to require:
    - government disclosure of names of its expert witnesses seven days prior to start of trial.
- Discussion of arguments:
    - Variation between ease of discovery in civil matters, difficulty in criminal cases.
    - No national uniform policy on disclosure.
        - Some prosecutors disclose, others do not.
        - Extent of disclosure determined by local rules.
    - Plea bargain process would be expedited by early disclosure because defense would understand strength of prosecution's case.
    - Amendments recognize and account for potential risk to disclosed witnesses
        - Even though most federal criminal cases do not involve such risk.
    - Amendments intend to create fairer trials.
        - Reduce the hardships that defendants face in preparing for trial without adequate discovery.
    - Decreases delay in trials that presently exist because recesses are needed in order for defense to review statements, upon introduction of new government witness.
    - Pretrial disclosure of witnesses is common practice in many federal districts, as well as state criminal justice systems and the military.
    - Less demanding than the 1974 amendments approved by the Supreme Court, rejected by Congress.

        - Conflicted with the Jencks Act by requiring pretrial disclosure of statements.
        - Were consistent with Jencks in recognizing the importance of defense pretrial discovery while allowing safeguards.
    - Current amendments are procedural and similar to other previously approved amendments that require defense and prosecution to disclose certain information before trial.
    - DOJ continues to oppose any amendment requiring pretrial release of witnesses names.
        - Believes that a Rule is unnecessary because most prosecutors disclose anyway.
        - A rule would impose restraints on a prosecutor that believes disclosure would create potential risk for witness but does not want to incur disapproval of trial judge.
        - Would impose risks on witnesses who would otherwise not be identified when a plea bargain was entered immediately before trial.
        - Would create unnecessary satellite litigation on review.
- Standing committee voted to recommend approval of Rule 16 amendments with one member and a DOJ representative in opposition.

July 1995 Standing Committee Minutes – (Recommended transmitting to Judicial Conference amendment requiring disclosure of witnesses) (Page 190)

- Proposed amendments to Rule 16(a)(1)(F) and Rule 16(b)(1)(D) would require the government to disclose 7 days before trial the names and statements of witnesses that it intends to call during its case-in-chief. Disclosure would not be required, however, if the attorney for the government:
    - believes in good faith that pretrial disclosure of this information would threaten the safety of any person or lead to an obstruction of justice, and
    - files under seal an ex parte, unreviewable written statement to that effect.
    - The amendments would apply reciprocal discovery requirements on the defense.
        - Under recommendation from Magistrate Judges, the amendment was limited to felony cases.
        - Amendment was also clarified to state that the government could withhold name or statement.
- Judge Jensen: such pretrial disclosure would further good trial management; would eliminate the need to stop mid-trial.
    - BUT – potential conflict with Jencks
        - Argued it was appropriate to proceed under REA
            - Opposed by Easterbrook
- DOJ: strongly opposed to amendment; disclosure requirements different from/conflicting with Jencks.
    - Department already following the practices to the extent possible, so amendment unnecessary.
        - Complying with judge-ordered pretrial disclosure in cases
        - No existence of a systemic problem; few complaints from judges

    - Certification requirement that witness in danger overly burdensome and impracticable
        - DOJ's inability to research every case before certification could endanger witnesses
    - DOJ planned to fight the amendment in Congress; anticipated Victim Groups to oppose as well.
- Prof. Schleuter: Advisory Committee had already made a number of concessions and delays.
    - Several amendments to FRCRP and Evidence had been made to require similar disclosure.
    - Most state courts and the military routinely provide defendants with the names, addresses, and statements of witnesses before trial.
    - Public comments had been overwhelmingly favorable.
- Motion: to allow judge the discretion to set deadline for disclosure within 7 days of trial.
- Committee voted to amend the rule to limit it to witness names only (to avoid conflict with Jencks).
- Substitute language proposed by Judge Easterbrook (not in text of minutes) was approved.
    - Committee voted 9 – 2 to send amendments to Judicial Conference.

April 1995 Criminal Rules Committee Minutes – (Forward amendment requiring disclosure of witnesses to Standing Committee) (Page 195)

- The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text.
    - Issue: Timing – Federal Prosecutors don't generally know who all of their witnesses will be by 7 days prior to trial.
        - Aimed at ensuring prosecutors do not intentionally withhold information.
        - At worst, a late disclosure would delay trial.
    - Issue: what was meant by "unreviewable" in the proposed amendment
        - concern that that language placed too much power in the hands of the prosecutor.
    - Issue: whether a judge might see non-disclosed evidence in such non-reviewable statements which might later be considered on sentencing.
        - Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense
    - Conflict with the Jencks Act.
    - Protection of witnesses (who do not fall under the exception).
        - Limited to pre-trial protection only; names revealed at trial regardless.

September 1994 Standing Committee Report – (Information item on amendments allowing disclosure of witnesses' names previously approved for publication) (Page 206)

- Proposed amendments to Rule 16 (Discovery and Inspection) would provide limited disclosure by the prosecution of the names and statements of witnesses at least seven days before trial. Government may refuse to disclose the information if it believes in good faith that pretrial disclosure of this information would threaten the safety of a person or risk the obstruction of justice. In such a case, the government simply would file a non-reviewable, ex parte statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendment also would provide reciprocal discovery by the defense.
- DOJ has opposed because:
    - Many prosecutors already follow open file disclosure, but some follow a more restrictive disclosure policy.
    - DOJ has been working internally to reach a more liberal disclosure policy.
    - Strongly recommended that it should be given more time to resolve the matter by policy directive, rather than by mandatory rules.
- Standing committee delayed publishing the proposed amendments to the rule at its January 1994 meeting to allow the Department to reach a resolution internally.
- Standing committee was concerned with possible Jencks Act inconsistencies.
    - Found that similar amendments to the Criminal Rules - presumably also inconsistent with the Jencks Act - were adopted without objections and put into effect.
- Advisory committee had already delayed consideration of the proposal to publish the amendments at its April 1993 meeting to provide the newly appointed Attorney General with an opportunity to study it.
- Standing committee considered the Department's renewed request for additional delay.
    - Additional delay was unwarranted.
    - Determined that publication of the proposed amendments would be useful in eliciting comment from the bench and bar on the Jencks Act issue and on the overall merits of the proposal.
    - Advisory committee chair accepted the recommendation to revise the Note to the amendments to highlight the Jencks Act issue before publishing it for public comment.

September 1994 Proposed amendment requiring disclosure of names of witnesses is published for comment.

June 1994 Standing Committee Minutes – (Amendment requiring disclosure of witnesses approved for publication) (Page 210)

- Proposed amendments to Rule 16:
    - To require the government to disclose information about government witnesses to the defendant seven days before trial (names and statements only).
        - Conflict with Jencks Act?
            - Act does not bar disclosure, only governs timing.
        - DOJ raises concern over witness safety.

May 1994 Criminal Rules Committee Report – (Forwarding amendment requiring disclosure of witnesses' names to Standing Committee for publication) (Page 216)

- Production of Witnesses Names – Amendment to require production 7 days prior to trial.
    - General support for intent of amendment among Standing Committee.
    - DOJ requested more time to work on a compromise with Advisory Committee.
    - Amendment sent back to Advisory Committee for coordination with DOJ and consideration of conflict with Jencks.
    - Potential separation of powers issue.
    - Exclusion of Witnesses Addresses – supported (8-1) under agreement that DOJ would facilitate access to witnesses.
    - Proposed amendment is too narrow in stating the reasons which could be relied upon by the prosecution to refuse to disclose information about a witness; reasons should include recognition that witnesses often face hardships, intimidation, and economic or social disadvantage by agreeing to testify for the government.
    - Timing of production – DOJ requested 3 days.
- Committee voted 9 to 1 to send the amendment to the Standing Committee for public comment.
- Proposed Amendment presented to Standing Committee
    - Omitted inclusion of witnesses' addresses for protection purposes
        - Permits government to block disclosure where there is a danger to the witness.
    - Reciprocal Discovery
    - Committee note expanded to address concerns:
        - Supercession clause of the REA
        - Circuit split over Jencks' requirement of pretrial disclosure of witness statements.
            - Legislative intent to forbid pretrial witness statement disclosure?
                - Congressional expansion of pretrial discovery
    - Policy arguments in support of amendment:
        - Necessary, strikes balance between witness protection and pretrial discovery; will result in greater efficiency in criminal trials.

January 1994 Standing Committee Minutes – (Deferred consideration of amendment requiring disclosure of witnesses' names upon request from DOJ) (Page 246)

- Advisory committee had approved a proposed amendment to Fed.R.Crim.P. 16 requiring the government, on request of the defendant, to disclose the names, addresses, and statements of witnesses at least seven days before trial.
    - A similar proposed rule change had been approved by the Supreme Court in 1974, but had been rejected by the Congress as a result of vigorous opposition from the Department of Justice.
        - Had contained less protection (including a protective order provision) than the current proposal.

- Recognition of a natural tension between the need for a fair trial and the need to protect government witnesses.
- Draft rule approved by the advisory committee presented a good balance between these two principles; provided a presumption of disclosure, but allowed exceptions freely in the unreviewable discretion of the United States attorney where there could be danger to witnesses or obstruction of justice.
- Previous changes – mostly to Rule 12 – had been adopted in the past with the goal of eliminating surprise in trial (thrust of current rule amendment).
    - Changes had been promoted by the Department of Justice to prevent surprise to the government at trial.
    - Surprises occurring during a trial lead to interruptions in the process in order to obtain additional information.
- Potential Jencks conflict: Advisory committee saw only as a timing issue.
    - DOJ concerned that it was a direct conflict, and this proposal would amend the law by rule.
    - Additional time will allow for further review to avoid conflict.
- DOJ would oppose if submitted as proposed; having the support of DOJ would give the proposal more weight in Congress.
- State courts were clearly moving towards disclosure.
    - Practice was common in federal courts as well.
    - Rule change would merely codify current practice.
        - Chief Justice Veasey came from open disclosure state and the only issue was re: the inconsistency with Jencks.
            - 28 U.S.C. §2072(b) provided that the amended rule would supersede the Jencks Act.
                - Easterbrook concerned the supercession clause unconstitutional.
- Committee deferred consideration until the DOJ had time to review current practices and problems.
- New DOJ staff reviewing proposed amendments to determine if accommodations can be made without promulgating a new rule.

December 1993 Criminal Rules Committee Report[3] – (Forward amendment requiring disclosure of witnesses' names to Standing Committee) (Page 250)

October 1993 Criminal Rules Committee Minutes – (Forward amendment requiring disclosure of witnesses' names to Standing Committee) (Page 262)

- Proposal to amend Rule 16 to require the government to disclose the identity and statements of its witnesses 7 days before trial.
- Deferred at the request of Attorney General Janet Reno who had requested time to study the issue.
- August 4, 1993, Attorney General Reno wrote to then chair, Judge Hodges, indicating her opposition to any effort to amend Rule 16 to require such disclosure.
    - Detailed memo prepared by Mr. Pauley, raising concerns:

[3] This Report reflects actions taken by the Committee at its October 1993 meeting, the minutes of which appear at page 262 and are summarized below.

        - Amendment potentially infringes on REA because of Jencks Act in place.
        - Committee should defer to Congress.
        - Current trials not unfair.
        - Threat of dampening witnesses' willingness to testify; needlessly invade privacy interests.
        - Amendment has technical drafting problems.
        - Post-trial litigation re: request/decision to not release a name.
            - Real deterrent to abuse is desire to retain credibility.
    - Judge Jensen noted that the Reporter had prepared an alternative draft.
        - Discovery encourages efficient trials; early disclosure has a positive impact on trials.
        - Draft presented a balance between protecting witnesses and the defendant's right to prepare for trial.
        - Current state discovery practices have posed no threat to witnesses
        - Danger to witnesses is a very small part of the federal system.
- Advisory Committee approved a proposed amendment to Rule 16 which requires the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial.
    - 1974: Congress rejected a similar amendment after a vigorous protest from the Department of Justice.
    - Intervening years, similar amendments were proposed, debated, and rejected by the Advisory Committee.
- The present amendment was approved by an overwhelming vote of the Committee members (9 to 1).
- Creates a presumption that defense is entitled to discovery of government's witnesses
- Committee note expectation of concerns:
        - Supercession clause of the REA
        - Circuit split over Jencks' requirement of pretrial disclosure of witness statements.
            - Legislative intent to forbid pretrial witness statement disclosure?

October 1992 Criminal Rules Committee Minutes – (Tasked Reporter with drafting amendment that provides for disclosure of government witnesses) (Page 300)

- Mr. Wilson proposed that the Committee consider amendments to Rule 16 to expand federal criminal discovery.
    - No meaningful discovery under the rule.
    - In a complex case a defendant cannot get a fair trial.
- Professor Saltzburg indicated that he too was concerned about Rule 16 vis a vis names of government witnesses.
    - in a complex case there cannot be a fair trial without complete discovery.
    - potential danger to witnesses if their identity is revealed to the defense.
- Suggested that the prosecutor disclose the names of its witnesses unless the prosecution submits in writing reasons why doing so would present a danger to the

witnesses. The court's decision on whether to disclose those witnesses is not reviewable.

- Judge Hodges noted that in the past most prosecutors had provided an "open file" to the defense but that in some districts that was no longer the policy.
    - If the "open file" system is no longer as commonly in effect, it is probably due to the increase in drug prosecutions where there is often danger to government witnesses.
        - The prosecution is in the best position to decide whether there is a danger to witnesses.
- Marek - permit the court to decide, under all the facts and circumstances, if production of a witness's name was required.
- Tasked with drafting language for Rule 16 which would address the disclosure of government witnesses to the defense.

November 1991 Criminal Rules Committee Minutes – (No motion was made on ABA proposal to codify *Brady*) (Page 342)

- ABA proposed codification of *Brady*.
    - Previously considered and rejected by committee.
        - Question of whether *Brady* applies to sentencing.

May 1989 Criminal Rules Committee Minutes – (Amendments re: witness information failed by vote; both *Brady* and Jencks amendments tabled) (Page 399)

- Committee considered amendment to Rule 16 which would:
    - require the prosecution to furnish to the defense a written list of names and addresses of all government witnesses.
        - DOJ Opposition -
            - Dangers of witness intimidation, loss of life.
            - Trial judges will inevitably err on determining when to disclose witnesses name, creating such dangers.
        - Support:
            - Trials without adequate defense preparation are inherently unfair.
    - provide for reciprocal discovery of names and addresses of defense witnesses.
    - prohibit comment upon the failure to call a witness on either list.
    - impose a continuing duty to disclose the names and addresses of witnesses.
- The proposed changes followed proposals approved by the Supreme Court in 1974.
    - Amendment failed.
    - Motion to have DOJ present position on requiring disclosure OR certification to trial judge that witness information should not be disclosed because doing so would pose risk of injury or loss of life to witness (passed unanimously).
- Marek: Proposed adding a Subsection (H) to Rule 16(a)(1) which would require the Government to provide all exculpatory (*Brady*) material to the defense.
    - Practical problem of moving back the period of disclosing the exculpatory evidence.
- Deferred until the next meeting.

- Marek: Proposed adding a Subsection (G) to Rule 16(a)(1) which would require the prosecution to produce, before trial, any prior Jencks Act statements made by any prosecution witness.
    - Rules Enabling Act permits the Committee to initiate discussion on a particular rule by adopting amendments. Judge Weis recommended that the Committee recommend an amendment and thus give notice to Congress that the area needs some attention. Judge Hodges moved to table the proposal and Judge Huyett seconded the motion which passed.

November 1988 Criminal Rules Committee Minutes – (Proposal to require disclosure of witnesses' names tabled until subsequent meeting) (Page 405)

- Proposed Amendments to Rule 16 to include provisions for witness names, witness statements, reciprocal discovery, discovery for sentencing purposes, and disclosure by the prosecution of other acts of uncharged misconduct which might be introduced at trial under Fed. R. Evid. 4(b).
        - The Department stated its objection to any potential amendments based on their consideration that any amendments would constitute an interference with Congressional prerogatives to amend the Jencks Act and noted that it would continue to reject strongly any attempts to require prosecutors to reveal in every case witness names and statements.
    - Issue: whether the Committee was the most appropriate body to initiate changes in criminal discovery practice.
    - Move to adopt proposed revision which would track with the ABA Criminal Justice Standards, Discovery and Procedure Before Trial, Chapter 11, approved August 9, 1978 ; passed by a 5 to 4 vote, reconsidered, failed, tabled until next meeting.
        - Support: in light of developments in State discovery practices and the trend to avoid trial by ambush, more discovery of information in the hands of the prosecution was appropriate.
        - Opposition: (1) disclosure of information such as the names of prosecution witnesses would present substantial danger to those individuals; (2) Congress was the appropriate body for proposing any changes in criminal discovery.

June 1986 Criminal Rules Committee Minutes – (Notice of Jencks-related legislation) (Page 410)

- Proposed Amendment of Jencks Act--Discovery Reform
    - Representative Conyers' Subcommittee held hearings on a proposal to amend the Jencks Act to provide discovery of witness names and statements prior to trial. Tom Hutchison noted that the hearings were over and that the bill would be marked up, but said that the Criminal Rules Committee had not been asked to take a position on the proposed change.
    - No member of the Committee expressed a desire to indicate views on the bill, and the matter was dropped.

March 1986 Standing Committee Report – (Notice of Jencks-related legislation) (Page 412)

- Notice of introduction of HR 4007, 99th Congress, to amend 18 USC 3500 (The Jencks Act) to provide for increase defense discovery in criminal cases
  - Would require government to disclose, prior to trial, the names of its witnesses
  - Protective order provision
- Public hearings to be scheduled
  - Never got out of committee

Part III – Amendment Requiring Reciprocal Discovery

December 1975 Reciprocal Discovery Amendments Take Effect[4]

October 1972 Judicial Conference Approves Proposed Reciprocal Discovery Amendments

April 1972 Standing Committee Report – (Recommended that Conference approve amendment requiring reciprocal discovery) (Page 421)

- Proposed Amendment to Rule 16 to give greater discovery rights to both prosecution and defense.
  - Both parties are related, and expanding the rights of one requires expanding the rights of the other.
- Prosecution's right of discovery independent of defense discovery request.
- Discovery should be completed by the parties themselves, without an order of the court, unless there is a dispute.
- Intended to prescribe the minimum amount of discovery.
  - Argument: broad discovery contributes to fair and efficient administration of criminal justice.
    - Provides defendant enough information to make an informed decision as to a plea.
    - Minimizes the undesirable effects of surprises at trial.
    - Contributes to an accurate determination of guilt or innocence.
- Requires pretrial disclosure, raising issues of --
  - Timing of when defendant determines plea;
  - Admissibility objections made at this time.
- Requires request from defendant.

- Recommendation: that the Conference approve and submit to the Supreme Court for approval

January 1972 Criminal Rules Committee Minutes – (Forward amendment requiring reciprocal discovery to Standing Committee) (Page 447)

- Agreed that Rule 16 prescribes a minimum level of discovery that judges may permit.
  - Should be indicated in the notes, inclusive of grand jury minutes.

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[4] Consideration of the amendments was delayed by congressional deliberations and thus the amendments did not take effect until 1975.

September 1971 Criminal Rules Committee Minutes – (Some portions of amendment requiring reciprocal discovery approved, some deferred) (Page 450)

- Issue: Independent government discovery (16(b)).
  - Concern: violation of defendant's rights?
    - Unanimously agreed that Rule 16 would not violate 4th and 5th Amendment rights.
  - Members of the committee felt that the government as well as the defendant should have independent discovery rights.
    - The alternative draft of Rule 16 was rejected.
- Discovery under Rule 16(a) should proceed on request rather than under court order.
  - Language of the rule was changed in Rule 16(a)(i),(iii),(iv) and (v) to read, "Upon request of a defendant, the government shall permit the defendant . . . "
  - This is in contrast to 16(a)(vi) where discretion was left with the court.

Part IV – Early Consideration of *Brady* Issues and Rule 16

September 1968 Criminal Rules Committee Minutes – (Moved to keep *Brady* obligations out of proposed amendment) (Page 458.1)

- Suggestion that the rule of Brady v. Maryland should be left to the development of the case law and should not be in the rule. A note should be added to the effect the committee is not attempting to codify Brady v. Maryland at present.

May 1966 Criminal Rules Committee Minutes – (Received notice from Committee Staff re: Rule 16 related legislation) (Page 461)

- Congress: Proposed legislation dealing with issues in new Rule 16.
  - Variation between civil and criminal rules with respect to discovery.
  - Concern re: uniformly meaningful use of the Rule.
- Legislation includes broader discovery than granted in Rule 16
  - Indication from staff the Court may want broader discovery but be reluctant to buck the Advisory Committee's proposal.
- Issues with Rule 16:
  - Permissive rather than directive ("may" as opposed to "shall").
  - Doesn't allow for discovery of issues not actually in the government's possession.
- Issue re: disclosure of witnesses where protection might be necessary.

June 1965 Standing Committee Minutes (Approved amendment requiring limited discovery) (page 476)

January 1964 Criminal Rules Committee (Approved amendment requiring limited discovery) (Page 489)

October 1963 Criminal Rules Committee (Deferred consideration of amendment until next meeting) (Page 499)

APPENDIX 7

U.S. Department of Justice

Office of Professional Responsibility

Washington, D.C 20530

SEP 2 5 2009

MEMORANDUM

TO: Jonathan Wroblewski
Deputy Director
Office of Policy and Legislation
Criminal Division

FROM: Judith B. Wish
Deputy Counsel

SUBJECT: Allegations of Professional Misconduct Relating to the Government's Disclosure Obligations under *Brady* and *Giglio*

This is in reply to your request for information regarding the role of the Office of Professional Responsibility (OPR) in investigating allegations that Department of Justice (DOJ) attorneys failed to comply with disclosure obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

I. OPR Jurisdiction and Practices

OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. This jurisdiction includes the conduct of law enforcement agents who may not share with prosecutors all the information in their agency's files that may constitute *Brady* or *Giglio* material. Under OPR's analytical framework, professional misconduct occurs when an attorney, investigator or law enforcement agent intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.

A. Receipt and Review of New Allegations

Many allegations on which OPR opens investigations and inquiries are reported by the DOJ attorney involved or by his or her supervisors pursuant to the Department's self-reporting policy.[1] In addition, OPR regularly reviews court decisions to identify instances of serious judicial criticism or judicial findings of professional misconduct by DOJ attorneys. In recent years, more than 50% of OPR investigations have been initiated based on serious judicial criticism or findings of professional misconduct. OPR also receives a large number of complaints each year from other sources, such as defense counsel and inmates.

OPR reviews each allegations and determines whether further investigation is warranted. If it is, OPR determines whether to conduct an inquiry or a full investigation. The majority of complaints reviewed by OPR are determined not to warrant further investigation because, for example, the allegation is outside OPR's jurisdiction, or is vague and unsupported by any evidence. In some cases, OPR initiates an inquiry because more information is necessary to resolve the matter. In such cases, OPR may request additional information from the complainant or obtain written responses from the attorney(s) against whom the allegation was made, and may review other relevant materials such as pleadings, transcripts, and additional evidence requested from the complainant. Most inquiries are resolved based on the additional written record.

In cases that cannot be resolved based solely on the written record and in most matters involving serious judicial criticism or judicial findings of misconduct, OPR conducts a full investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). The interviews ordinarily are conducted by two OPR attorneys. Interviews of subject attorneys are ordinarily transcribed by a court reporter. At the end of the interview, the subject is given an opportunity, subject to a confidentiality agreement, to review the transcript and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations, and to give information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, including removal.

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[1] All Department employees must report to their United States Attorney, Assistant Attorney General, or other appropriate supervisor any evidence or non-frivolous allegation of professional misconduct. The supervisor must evaluate whether the misconduct at issue is serious, and if so, must report it to OPR. Any statement by a judge or magistrate indicating a belief that a Department attorney has engaged in misconduct, or taking under submission a claim of misconduct, must be reported. Judicial findings of attorney misconduct and judicial requests for an inquiry into possible misconduct must immediately be reported to OPR and the attorney's supervisor, regardless of whether the matter is regarded as frivolous or non-serious. Judicial findings of misconduct are, except in extraordinary cases, expeditiously investigated by OPR, without awaiting further judicial or appellate proceedings. *See* United States Attorneys' Manual, Chapter 1-4.100.

B. OPR Findings and Conclusions

OPR finds professional misconduct when it determines that a DOJ attorney, investigator or law enforcement agent intentionally[2] violated or acted in reckless disregard[3] of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.

Where OPR concludes that the elements of a professional misconduct finding are lacking, it may conclude that the attorney used poor judgment, made an excusable mistake, or acted appropriately under the circumstances. We find poor judgment when a DOJ attorney, faced with alternative courses of action, chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.[4] Finally, poor judgment differs from a mistake in that the latter is the result of normal human error despite an attorney's choice of an appropriate course of action.

C. OPR's Independent Analysis in Matters Involving Judicial Criticism and Judicial Findings of Misconduct

OPR has occasionally been asked to explain how in some cases it concludes that no professional misconduct occurred despite the fact that a court has made a finding of prosecutorial misconduct or directed significant criticism at a Department attorney. It is important to consider, however, that the roles of OPR and the courts in addressing possible misconduct by DOJ attorneys are significantly different. The courts focus on protecting the rights of defendants, and on the effect government conduct may have on those rights. Courts rarely conduct evidentiary hearings addressing the conduct of DOJ attorneys or law enforcement personnel. A court is generally limited

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[2] An attorney intentionally violates an obligation or standard when the attorney (1) engages in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits, or (2) engages in conduct knowing its natural or probable consequence and that consequence is a result that the obligation or standard unambiguously prohibits.

[3] An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows, or should know based on his or her experience and the unambiguous nature of the obligation or rule of conduct, of an obligation or rule of conduct, (2) the attorney knows, or should know based on his or her experience and the unambiguous applicability of the obligation or rule of conduct, that the attorney's conduct involves a substantial likelihood that he or she will violate or cause a violation of the obligation or rule of conduct, and (3) the attorney nevertheless engages in the conduct, which is objectively unreasonable under all the circumstances.

[4] Poor judgment differs from professional misconduct in that a Department attorney may act inappropriately and thus exhibit poor judgment even though he may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding.

to considering the record in the case before it, and often does not permit the individual prosecutor to address his or her individual culpability.

OPR, on the other hand, focuses on the individual attorney's personal responsibility to uphold the standards of professionalism established by the Constitution, statutes, court and bar rules, and Department regulations and policies. In so doing, OPR takes a more in-depth look at what led to the court's criticism, and delves into the entire background of the case. In addition, OPR interviews relevant witnesses, including prosecutors, supervisors, agents, and judges, and thus has a more complete factual record upon which to base its findings. Thus, we look at such factors as the attorney's communications with the client agency, investigators, and supervisors, what he or she knew or should have known based on his or her experience and the obvious applicability of the rule to the situation, and his or her options for dealing with unexpected problems in order to make an assessment of the attorney's culpability in handling the matter.

We should also note that courts use varying definitions of what constitutes "professional misconduct" and often criticize attorneys without using that term at all. For example, a court may use the term "professional misconduct" to describe conduct that OPR refers to as "poor judgment" or a "mistake."

D. Post-Investigation Procedures

OPR sends a report of the results of its investigation to the head of the component in which the subject attorney works. A copy of every OPR report is also sent to the Office of the Deputy Attorney General and, in some cases, to the Office of the Attorney General. When OPR finds that an attorney employed by the Department engaged in professional misconduct, OPR recommends a range of disciplinary action appropriate to the finding. This recommendation is reviewed by the component head, whose designee is responsible for taking appropriate disciplinary action. Disciplinary action based on conduct investigated by OPR is monitored by ODAG to ensure prompt follow-through. The Department also has a policy of advising bar disciplinary authorities in each jurisdiction where the attorney is licensed of a finding of professional misconduct. Such notifications are made by OPR once disciplinary action is concluded.

II. OPR Matters Involving Allegation of *Brady* and *Giglio* Violations from 2000 to the Present

A. Summary of Statistics Involving Alleged *Brady* and *Giglio* Violations

From January 1, 2000, through September 15, 2009, OPR conducted investigations that reviewed 107 allegations of *Brady* or *Giglio* violations. OPR found that a DOJ attorney committed professional misconduct with respect to 15, or approximately 14% of the allegations. Discipline imposed for those violations ranged from a reprimand to suspensions without pay. Several attorneys found by OPR to have committed professional misconduct resigned or retired from the Department of Justice prior to the initiation of disciplinary proceedings. OPR found that a DOJ attorney exercised poor judgment with respect to 11, or approximately 10% of the allegations. Thus, OPR found problems with the conduct of DOJ attorneys in approximately 24% of the allegations we

investigated.

In the same time frame, OPR conducted inquiries that reviewed 113 allegations of *Brady* and *Giglio* violations. Each of these matters was resolved without any finding of professional misconduct or poor judgment.

B. OPR's Annual Report

OPR's Annual Reports, which are posted on OPR's public website, contain statistical information demonstrating the number of investigations and inquiries OPR has conducted each year that address alleged *Brady* and *Giglio* violations, and contain summaries of the results of OPR investigations, many of which address such violations.

I hope this information is useful to you. Please contact me if additional information is needed.

III. B

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**
Professor Nancy King, Reporter

RE: **Proposed Amendments to Rules 12 and 34**

DATE: **September 19, 2009**

BACKGROUND

At its April meeting, the Advisory Committee voted, with four dissents, to recommend that the Standing Committee approve for publication an amendment to Rule 12(b). The proposal was a response to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. This aspect of the decision in *Cotton* undercut the justification for the current rule, which allows such claims to be raised at any time, even on appeal.

The Committee's proposal (1) made the general rule that claims not raised prior to trial are "waived" applicable to claims that an indictment fails to state an offense, and (2) provided for relief from this waiver for good cause or when the defect in the indictment "has prejudiced the substantial rights of the defendant." Finally, the proposal included a conforming amendment to Rule 34. The proposed amendments are reproduced at the end of this memorandum. These proposals represented the culmination of two years of work at the subcommittee and full Advisory Committee level.

STANDING COMMITTEE ACTION

After discussion, the Standing Committee remanded the proposed amendments to the Advisory Committee for further study. Standing Committee members raised interrelated several issues and concerns.

(1) Discussion focused on the use of the term "waiver" in the Committee's proposal. Some members of the Standing Committee suggested that the term "forfeiture" would be preferable, because it more accurately defines the operation of Rule 12. Others noted that in *Cotton* the

Supreme Court had used the word "forfeiture."

(2) A related concern was that the proposal might not be consistent with the Supreme Court's opinion in *Cotton*, which as noted had used the term "forfeiture."

(3) Finally, some questions were raised regarding the relationship between the two clauses of the proposed amendment to Rule 12(e).

DISCUSSION OF ISSUES RAISED AT THE STANDING COMMITTEE

1. Use of the term "forfeiture" rather than "waiver"

One Committee member suggested that it was time for the rules to stop using the term "waiver" and instead adopt the term "forfeiture," suggesting this would be more consistent with the judicial treatment of the rule. This issue has not previously been discussed by the Advisory Committee, which had intended simply to conform the treatment of one class of errors to the remainder of Rule 12(b)(3).

Rule 12(b)(3) requires certain claims to be made by pretrial motion, and Rule 12(e) states that a party "waives" any defenses or objections not raised as provided by Rule 12(c) unless the court grants relief for "good cause." The rules do not clearly state, however, how these provisions interact with Rule 52. Are claims and defenses not raised in conformity with Rule 12(b)(3) "waived" in the sense that judicial review is entirely foreclosed, or are they nonetheless subject to review if the defendant can show plain error under Rule 52(b)? If the latter, then it might be preferable to refer to "forfeiture" rather than "waiver."

A memorandum prepared by Professor King for the subcommittee in March 2008 canvassed the circuits and found that they were divided on the question whether errors not raised in a timely fashion under Rule 12(b)(3) are "waived" if the court does not grant relief for good cause, or instead are "forfeited" (and thus subject to relief for plain error). In several circuits there are precedents going both ways. For a recent decision describing separate lines of authority within one circuit applying "waiver" and "plain error" analysis as well as conflicting precedents from other circuits, see United States v. Rose, 538 F.3d 175, 179-82 (3rd Cir. 2008).

Whatever the merits of the forfeiture versus waiver debate, it goes significantly beyond the terms of the Committee's proposal, which sought to make no fundamental change in Rule 12 itself, and left in place whatever approach each circuit had adopted on the question of "waiver" versus "forfeiture." Rule 12(b)(3) and the waiver provisions of Rule 12(e) govern a variety of different defenses and objections, including defects in the institution of a prosecution, motions to suppress, motions to server, and motions for discovery. If the Committee wishes to pursue this suggestion, further study and discussion would be required.

2. Consistency with *Cotton*

In *Cotton* the defendant was convicted of participating in a drug conspiracy under 21 U.S.C. 841 and 846 and sentenced to life in prison based upon the court's finding that he was responsible for 50 grams or more of cocaine base. The indictment did not allege the drug amount or quantity, and those issues had not been not presented to the trial jury. On appeal, he challenged his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which had been decided after his sentencing. The court of appeals held that the failure to include drug amount and quantity in his indictment was, after *Apprendi*, a jurisdictional error. *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001). Although the issue was first raised on appeal, the Fourth Circuit found this to be plain error and it vacated Cotton's sentence.

The Supreme Court granted review and defined the question presented as "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." 535 U.S. at 627. The Court first focused on the question whether the omission from the indictment was a "jurisdictional" error, and concluded that the omission of the drug type and quantity was not jurisdictional. *Id.* at 629-30. Then "[f]reed from the view that indictment omissions deprive a court of jurisdiction," the Court applied the plain error test of Rule 52(b) to what it called the defendant's "forfeited claim." *Id.* at 631. The Court made one other passing reference to forfeiture, noting that the important role of the petit jury had not prevented it from applying "the longstanding rule 'that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right....' " *Id.* at 634 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

The Supreme Court did not mention Rule 12, and the rule received very little attention in the briefs. The defendant mentioned the rule in only one paragraph of this brief, in support of the argument that the "discretionary nature" of such review is "logically incompatible with jurisdictional error," as reflected in Federal Rule 12's requirement that courts notice at any time an error in an indictment that fails to show the court's jurisdiction or state an offense. The government dealt equally briefly with Rule 12, referring to it in only one paragraph of text and one footnote. It argued that Rule 12(b)–if applicable to failure to allege the facts in question–simply did not address the standard to be applied by a reviewing court, and that Rule 12 and Rule 52 should be read together. *See* Petitioner's Brief at 36 n.11; Petitioner's Reply Brief at 5.

Thus nothing in *Cotton* suggests that the Supreme Court intended to foreclose an amendment that would end Rule 12's exceptional treatment of claims that an indictment fails to state an offense by bringing them within the general rule requiring a variety of claims and defenses to be presented by pretrial motion under Rule 12(b). Indeed, the Court's ruling that such errors are not jurisdictional is fully consistent with treating them similarly to all other nonjurisdictional errors under Rule 12(b)(3).

The Court did apply the plain error analysis under Rule 52(b) to the claim asserted in *Cotton*.

In so doing, it may be seen to have implicitly accepted the government's argument that Rule 12 did not speak to the standard to be applied to claims that were not raised in the district court, but were nonetheless not barred under Rule 12. Under *Cotton* these claims were not barred, but they warranted relief only if the defendant could show plain error. Since the defendant in *Cotton* was unable to make such a showing, the Court held that he was not entitled to relief.

3. Issues concerning the standard for a relief under Rule 12(e)

The proposed amendment retained the current language in Rule 12(e) stating that the court may grant relief for "good cause" when an objection was not timely raised under Rule 12(b)(3), but it also added a provision allowing relief "when failure to state an offense in the indictment or information has prejudiced the substantial rights of the defendant."

Standing Committee members expressed several concerns about this language. Specifically, how does this language interact with Rule 52(b)? Does it eliminate the last prong of the plain error test, which under *United States v. Olano*, 507 U.S. 725, 731 (1993), requires not only a plain error that has affected "substantial rights," but also a showing that the error seriously affects the fairness, integrity, and public reputation of judicial proceedings. Why not just follow the ordinary standards under Rule 52(b)? Another member expressed concern that the prejudice to substantial rights prong of the proposed amendment would allow sandbagging (perhaps if only by counsel).[1] Is that correct and, if so, is it desirable?

The language of proposed Rule 12(e) was the most difficult problem facing the Advisory Committee. The Committee struggled to balance competing concerns. On the one hand, there was considerable sympathy for the government's argument that defendants should not be able to benefit from their failure to raise errors in the indictment before trial, when the errors could be remedied efficiently. The rules should not encourage game playing and sand bagging. On the other hand, if the government makes an error in the indictment, and the defendant would be severely prejudiced at trial by the lack of notice of this element of the government's case, there was concern that the "good cause" standard–as applied in some circuits–might provide no relief.

The Committee recognized that it was not possible to predict precisely how the language it proposed would be applied, particularly given the fact that the considerations might differ if it were raised at different points in the process, from mid-trial to appeal. It intended to leave these issues to judicial development.

In light of the discussion at the Standing Committee, the Advisory Committee may wish to

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[1]Additionally one member thought that the committee did not intend to allow relief in a case of failure to state an offense if "good cause" alone were shown. This assumption was incorrect. Since the Committee meant to allow relief under either prong of proposed Rule 12(e), his proposed rewording did not reflect the Committee's intent.

reconsider this language or the policy position it reflects. Alternatively, it may wish to retain the current language but clarify its expectations in the proposed Committee Note and in the report that would accompany the proposal if it were resubmitted.

CONCLUSION

The issues raised by the remand are on the agenda for the October meeting in Seattle as a discussion item.

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~~;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver of a Defense, Objection, or Request.

(1) Generally. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides.

(2) Relief from Waiver. ~~For good cause,~~ Tthe court may grant relief from the waiver:

(A) for good cause; or

(B) when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.

* * * * *

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 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). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

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 instead requires that such a defect be raised before trial.

III. C

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 5 and Crime Victims

DATE: September 21, 2009

The Advisory Committee's second package of Crime Victim amendments, which included a proposed amendment to Rule 5(d), was published for public comment in August 2008. The proposed amendment is included at the end of this memorandum. At its meeting in April of 2009 the Committee considered the public comments and heard testimony on the published rules, including Rule 5.

The public comments and testimony focused on two points. First, the amendment is unnecessary, because the rules already requires consideration of public safety (including but not limited to the victim's safety) and the Crime Victim's Rights Act is already applicable. Thus the amendment would add nothing. Second, it is unwise to single out one factor among the many the courts must consider under the Bail Reform Act, which sets the substantive standard. Indeed, concern was expressed that the rule might be interpreted as changing the standards under the Bail Reform Act.

After discussion, the Committee voted not to forward the proposed amendment to the Standing Committee, rejecting by a vote of 9 to 3 a motion to resolve the issues raised during the comment period by adding a reference to the Bail Reform Act. The current rule requires the decision to detain or release be made "as provided by statute or these rules," which necessarily incorporates both the CVRA and the Bail Reform Act.

In his report to the Standing Committee, Judge Tallman noted that the Advisory Committee was not recommending the published amendment to Rule 5. There was considerable interest in and support for the proposed amendment in the Standing Committee, and members noted the importance placed on victim safety in the CVRA. After discussion, the Standing Committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

This item is on the agenda for the October meeting in Seattle.

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 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."

III. D

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32(h) and Procedural Rules for Sentencing

DATE: September 23, 2009

A proposal to amend Rule 32(h) has been under consideration since the initial efforts to conform the rules to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Although the Advisory Committee drafted a proposed amendment to extend the notice requirement from departures to variances (also called statutory or *Booker* sentences), litigants also argued that the current rule already required such notice. The Circuits were divided on this issue, and in *Irizarry v. United States*, 128 S.Ct. 2198 (2008), the Supreme Court resolved the conflict, holding that the current rule is not applicable to a variance from the recommended range.

The Standing Committee remanded the proposed amendment to the Advisory Committee for further study. The Advisory Committee now has before it not only the proposal to amend Rule 32(h) to extend the notice requirement of that rule to variances as well as departures, but also an American Bar Association proposal to amend other portions of Rule 32 to provide the parties with disclosure of the information provided to and relied upon by the probation officer writing the presentence report (PRS). The Federal Defenders have also suggested that other modifications to Rule 32 would be appropriate.

Both the Advisory Committee's proposed amendment and the ABA proposal generated widely varying reactions within the Advisory Committee and beyond, and the environment has been evolving rapidly. The Supreme Court's decisions in a trio of cases decided in 2007 have made clear the breadth of the district courts' discretion to sentence outside the advisory guidelines. *See Kimbrough v. United States*, 552 U.S. 85 (2007), *Gall v. United States*, 128 S.Ct. 586 (2007), and *Rita v. United States*, 127 S.Ct. 2456 (2007). The Department of Justice now has underway a comprehensive review of sentencing policy and practice, and the Sentencing Commission is undertaking a wide ranging effort to solicit comments on the sentencing process and procedures as well as the substance of the Guidelines.

In light of these ongoing developments, the Sentencing Subcommittee was not asked to meet over the summer, and there is no action item proposed for the October meeting in Seattle.

III. E

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Indicative Rulings**

DATE: **September 22, 2009**

Appellate Rule 12.1 and Civil Rule 62.1, which are scheduled to go into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." The question is whether to propose a parallel provision in the Criminal Rules. This issue was discussed briefly at the October 2007 meeting of the Advisory Committee. The Committee expressed interest in considering such a rule, but further action was deferred to allow the Civil and Appellate Rules to work their way through the process.

1. The New Civil and Appellate Rules

New Civil Rule 62.1 will establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case in which the district court indicates that it would grant the motion.

New Appellate Rule 12.1 sets out procedures to be followed for motions that the district court cannot grant because an appeal is pending. In a memorandum to the Appellate Rules Committee (excerpted infra), Professor Catherine Struve describes the origins of the proposal to incorporate indicative rulings explicitly in the rules, and also notes they have been employed in criminal as well as civil cases. In *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), the Supreme Court recognized the practice of indicative rulings in criminal cases, and the local rules of the D.C. and 7th Circuits, which appear to be applicable to criminal cases, provide procedures for indicative rulings. Appellate Rule 12.1 was intentionally drafted in broad terms that would not limit the existing authority for indicative rulings in any case – civil, criminal, or bankruptcy.

The Committee note to Rule 12.1 addresses the possibility of indicative rulings in criminal cases. It states:

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) *(see United States v. Cronic,* 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

2. Indicative Rulings in Criminal Cases: Action in the Appellate Rules Committee and the Standing Committee

During the consideration of the Rules 12.1, the Solicitor General expressed concern over the possibility that the new rule might be subject to misuse in the criminal context. Both the Appellate Rules Committee and the Standing Committee addressed these concerns in the context of the language of the Committee Note.

After the public comment period, the Solicitor General suggested that Rule 12.1's Committee Note be revised to read: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronic*, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)." (emphasis added). The Solicitor General's letter of February 14, 2008, explained:

> We make this proposal after extensive consultations with our criminal law experts within the Justice Department, including in the United States Attorneys' offices throughout the United States. Their broad experience makes clear that the issue of possible indicative rulings legitimately arises only in the context of FRCrP 33(b)(1) (dealing with motions for a new trial based on newly discovered evidence), FRCrP 35(b)) dealing with motions by the Government for a reduced sentence because of a defendant's substantial assistance), and 18 U.S.C. 3582(c) (dealing with motions for a reduction in sentence from the Director of the Bureau of Prisons or based on a retroactive guidelines amendment); we are not aware of any other types of motions in criminal cases for which an indicative ruling might be appropriate. We are concerned that, without the change to the Committee Note that we are urging, the federal district courts will be swamped with inappropriate motions by prisoners acting pro se who do not understand the limited purposes for which indicative rulings are warranted.

At its April 2008 meeting in the Advisory Committee on Appellate Rules discussed the Solicitor General's concerns, but declined to adopt the language he suggested. The minutes reflect the following discussion:

> A member asked how the DOJ could be sure that the three situations listed in its suggested language are the only criminal contexts in which the indicative-ruling practice might prove useful. A judge member questioned how likely the indicative-ruling practice

is to be used in the criminal context. Another judge observed that in a recent Tenth Circuit decision, the court abated an appeal in order to permit the appellant to file a Section 2255 motion in the district court; he observed that it would be undesirable for the Note to state that such a procedure is foreclosed. Another judge member asked the DOJ to explain the reason for its concern about the Reporter's suggested Note language. Mr. Letter responded that the DOJ is concerned that without limiting language in the Note, the indicative-ruling mechanism might be misused by jailhouse litigants. The judge member responded that his instinct is to avoid defining or limiting the uses to which the mechanism can be put. The Solicitor General asked whether the Committee would be willing to say "envisions" rather than "anticipates." A member wondered whether, given the DOJ's concerns, it might be better to remove the Note's reference to the criminal context. It was noted, however, that the Criminal Rules Committee is planning to consider whether to adopt an indicative-ruling provision for the Criminal Rules; the Criminal Rules Committee might benefit from the opportunity to observe how the practice develops under new Appellate Rule 12.1. A member expressed support for the term "anticipates." By voice vote, the Committee decided to adopt the Reporter's suggested changes to the Note language for the Note's second paragraph and for the first sentence of the Note's last paragraph.

The issue was raised again at the Standing Committee, and the language of the Committee Note was modified to address the concern that the language proposed by the Advisory Committee was "too restrictive" and might not allow for the use of the procedure in unforseen situations where it would be of value. The minutes describe the discussion of this concern as follows:

> 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.

After the chair of the Advisory Committee and the reporter accepted the language that had been proposed to avoid an unduly restrictive interpretation of Rule 12.1 in criminal cases, the Standing Committee approved the Rule with the new language in the Committee Note.

3. Issue Presented

The question is whether to move forward at this time with a proposed amendment to the Federal Rules of Criminal Procedure that would parallel Civil Rule 62.1 and dovetail with new Appellate Rule 12.1.

An amendment to the Criminal Rules is not necessary in order for the parties in criminal cases to seek indicative rulings. As described in Professor Struve's memorandum, this practice is already employed from time to time in criminal cases. The practice was recognized by the Supreme Court in *United States v. Cronic*, 466 U.S. 648 n.42 (1984), and made applicable to criminal cases by the local rules in some circuits.[2]

Although the practice of indicative rulings was also established in civil cases prior to the adoption of Rules 12.1 and 62.1, those rules were adopted in order to promote awareness of the possibility of indicative rulings, ensure that the possibility was available in all circuits, and render the relevant procedures uniform throughout the circuits. The question is whether the same justifications warrant a new Rule of Criminal Procedure.

In general, Judicial Conference policy is to be consistent throughout the rules in dealing with the same general issue. On the other hand, there are distinct concerns in the criminal context. Solicitor General Waxman, who first proposed an appellate rule on indicative rulings, favored explicitly excluding criminal cases. And, as noted above, the Department of Justice continued to express concerns that pro se prisoners would clog the system with inappropriate efforts to employ the indicative ruling procedure unless it was limited to a specific class of cases: Rule 33 motions based upon newly discovered evidence, Government motions for substantial assistance sentence reductions under Rule 35(b), and motions for a reduction based upon a retroactive change in the Sentencing Guidelines.

Since the new Civil and Appellate rules have not yet taken effect, we do not know whether they will increase the frequency with which the parties will seek indicative rulings in criminal cases.

4. Additional materials

The following materials are included as attachments to this report:

- A draft rule of Criminal Procedure based on Civil Rule 62.1
- Civil Rule 62.1, Appellate Rule 12.1, and the accompanying Committee Notes

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[2]Those local rules may be repealed or revised when Rules 12.1 and 62.1 go into effect on December 1, 2009.

- Professor Struve's memorandum to the Appellate Rules Committee – providing the history of the proposals and addressing the question whether indicative rulings should be available in criminal cases

- The Minutes of the Standing Committee (June 2008)

DRAFT CRIMINAL RULE BASED ON CIVIL RULE 62.1

Rule XX. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) **Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) **Notice to the Court of Appeals.** The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party

makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule XX does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule XX applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal

jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(a) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned — despite the absence of any clear statement of intent to abandon the appeal — merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the

district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

CC: Reporters and Advisory Committee Chairs

FROM: Catherine T. Struve

RE: Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.[3] The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.[4] The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001 meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.[5]

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[3] *See* Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

[4] *See id.*

[5] *See* Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because "the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures." Mark Langer, the D.C. Circuit clerk, states: "I prefer not to have any rule. We handle things pretty well here without a rule." Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

II. Current circuit practices concerning indicative rulings

Ordinarily, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).[6] Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under

[6] *See also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) ("The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....").

Rule 60(b).[7] The court has three options: (1) deny the motion,[8] (2) defer consideration of the

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[7] By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of such a motion does not "become[] effective" until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

[8] *See Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...."); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (**2d Cir.** 1999) ("Like most circuits ... , we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, *see, e.g., Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, *see Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, *see New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)."); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (**3d Cir.** 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order."); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order."); *Kusay v. United States*, 62 F.3d 192, 195 (**7th Cir.** 1995) ("Many cases, including *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general."); *Hunter v. Underwood*, 362 F.3d 468, 475 (**8th Cir.** 2004) ("Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.").

The Supreme Court has stated in passing that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But

motion,[9] or (3) indicate its inclination to grant the motion and await a remand from the Court of Appeals for that purpose.[10] The district court's options are further limited within the Ninth

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a number of courts "have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

[9] *Cf. LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit "cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.").

Some circuits, however, have suggested that deferral is generally inappropriate. *See, e.g.*, *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....").

[10] *See Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose."); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order."); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (**6th Cir.** 2001) ("Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand."); *Kusay v. United States* , 62 F.3d 192, 195 (**7th Cir.** 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose."); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (**8th Cir.** 1977) ("If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); *Hoai v. Vo*, 935 F.2d 308, 312 (**D.C. Cir.** 1991)

Circuit, because that circuit takes the view that the district court lacks power to deny a Rule 60(b) motion while an appeal is pending.[11] Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.[12]

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,[13] Seventh[14] and D.C.[15] Circuits. I was unable to find local rules or handbook provisions

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("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

[11] *See Smith v. Lujan*, 588 F.2d 1304, 1307 (**9th Cir.** 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. *See S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

[12] *See, e.g., Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

[13] Sixth Circuit Rule 45 provides in relevant part:

> Duties of Clerks--Procedural Orders
> (a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:
> ...
> (7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: "[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

[14] Seventh Circuit Rule 57 provides:

> Circuit Rule 57. Remands for Revision of Judgment
> A party who during the pendency of an appeal has filed a motion under

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

III. Questions to be addressed

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A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that

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Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

[15] D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand
(*See* D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g., Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See Smith v. Pollin*, 194 F.2d at 350.

envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33[16] is made during the pendency of an appeal, "[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).[17]

Under the current rules,[18] a pending appeal affects motions under Criminal Rule 35(a)

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[16] Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

[17] *See U.S. v. Graciani*, 61 F.3d 70, 77 (**1st Cir.** 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (**2d Cir.** 2002) (citing *Cronic* and stating that "the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court"); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (**5th Cir.** 1978) (per curiam) ("A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion."); *U.S. v. Phillips*, 558 F.2d 363, 363-64 (**6th Cir.** 1977) (per curiam) ("[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act."); *U.S. v. Frame*, 454 F.2d 1136, 1138 (**9th Cir.** 1972) (per curiam) ("By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court."); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (**10th Cir.** 1984) (per curiam) ("It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.").

[18] The caselaw concerning motions under Criminal Rule 35 is complicated because of courts' readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Applying that Rule, the Ninth Circuit held that "the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending." *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress's amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided "that district courts

differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to modify a final judgment under Rule 35(b)[19] while an appeal from that judgment is pending.[20] Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.[21]

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a

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are to 'correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.'" *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

[19] *See, e.g., U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (**3d Cir.** 2002) (nonprecedential opinion) ("After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government's motion."); *U.S. v. Bingham*, 10 F.3d 404, 405 (**7th Cir.** 1993) (per curiam) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order.").

[20] This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. *See Berman v. U.S.*, 302 U.S. 211, 214 (1937) ("As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.").

[21] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." The brevity of Rule 35(a)'s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 ("The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.").

new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

Excerpt from Minutes of the Standing Committee on Practice and Procedure, June 9-10, 2008

* * * * *

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 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.

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IV. A

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 11 advice regarding immigration consequences**

DATE: **September 23, 2009**

Judge Rosenthal has asked the Advisory Committee to discuss whether to undertake a review of the desirability and feasibility of amending Rule 11 to require as part of the plea colloquy that the district court warn an alien defendant that there might be adverse immigration consequences from conviction.

1. Prior consideration of similar proposals

The Advisory Committee has twice previously studied the question whether Rule 11 should be amended to require advice on this issue and has declined to take action. Most recently, in April 2001, Richard Douglas of the Senate Foreign Relations Committee requested that the Committee consider an amendment that would require the district court to advise non-citizens of potential collateral consequences when accepting guilty pleas. The proposal also had the support of Judge Paul Friedman and Roger Pauley.

At its April 2003 meeting the Committee considered the proposal and declined to act on it. The minutes describe the Committee's views as follows:

> **B. Rule 11. Proposal to Require Judge to Address Defendant re Collateral Consequences of Plea.**
>
> Judge Friedman, participating by telephone, recommended that the Committee consider an amendment to Rule 11 that would require the court to inform an alien who is pleading guilty of the possible collateral consequences that might result, i.e., deportation.

Judge Friedman pointed out the suggestion had originated in a memo prepared by Mr. Roger Pauley, after he had left the Committee. The Reporter pointed out that the Committee had considered, and rejected a similar proposal in 1992. Judge Trager responded that since 1992, there had been a change in the law, to the effect that currently, a finding of guilt for an aggravated felony results in mandatory deportation. Judge Tashima added that offenses other than an aggravated felony may serve as grounds for deportation, but that requiring the advice could prove to be a slippery slope.

Professor King noted that she was aware of cases where defendants had alleged ineffective assistance of counsel where the defendant had not been informed by counsel of the possibility of deportation if he or she entered a plea of guilty to an aggravated felony. Mr. Campbell expressed the view that the general advice regarding possible consequences would be sufficient and Judge Roll observed that the area of immigration statutes and regulations was a highly technical area and that it would be dangerous to require judges to give any specific warning about possible deportation.

Mr. Wroblewski pointed out the possible legal implications of amending Rule 11 to require the warning and noted that the ABA is studying the issue of collateral consequences. Judge Miller added that if the proposal were adopted, that there might be other areas where a warning about collateral consequences would be required, e.g., tax consequences, civil liability, etc. Judge Trager believed that no amendment was required; judges could give the advice, without being required to do so.

Following additional comments, Judge Trager moved to table the proposal. The motion was seconded and failed by a vote of 5-6. Judge Roll then moved that Rule 11 not be amended to include a warning requirement concerning collateral consequences vis a vis, immigration issues. Judge Miller seconded the motion, which carried by a vote of 6-3-1.

2. Related issue before the Supreme Court

A related issue is before the Supreme Court this term. On October 13, 2009, the Court will hear argument in *Padilla v. Kentucky*, 08-651,[22] in which the questions presented are (1) does the Sixth Amendment right to effective assistance of counsel require a criminal defense attorney to advise a client who is not a citizen that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation, and (2) if the criminal defense attorney misadvises his noncitizen client that

[22]I wish to draw to the Advisory Committee's attention that I am one of the 37 legal ethics, criminal procedure, and criminal law professors who submitted an amicus brief supporting the petitioner in the Supreme Court. The brief is grounded in the amici's interest in the doctrinal, historical, and policy issues involved in the interpretation of the Sixth Amendment's guarantee of effective assistance of counsel, and the related issues surrounding standards of attorney competence.

a guilty plea will not lead to deportation, does that misadvice amount to ineffective assistance of counsel and warrant setting aside the guilty plea? The relationship between the judicial colloquy when a plea is taken and the advice provided by defense counsel was stressed in the ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (3d ed. 1999). Standard 14-1.4(c) states that before accepting a plea of guilty the court should advise the defendant that he may face additional consequences, including a change in the immigration status if he is not a U.S. citizen, and that he should consult with counsel for additional information concerning the consequences of the plea. The Comments recognize that federal law now provides for the automatic initiation of deportation proceedings for many offenses and note that in the federal courts it is "the better practice" to warn a defendant about the immigration consequences of a guilty plea. *Id.*, cmt. at 58-59.

3. Additional issues presented by the proposal

An amendment requiring the court to advise the defendant about the immigration consequences of a plea would raise issues not discussed in this memorandum.

The first issue is how feasible it would be for the court to determine the immigration consequences of a guilty plea to the whole panoply of federal offenses. Further research will be needed on this issue if the Advisory Committee decides to pursue an amendment, and it may be desirable to consult an immigration law specialist (as we did, for example, when we revised the forfeiture rules).

The second issue is whether to require advice during the plea colloquy on any other "collateral" consequences of conviction if an amendment is proposed. The ABA CRIMINAL JUSTICE STANDARDS describe a wide range of collateral consequences, some of which are imposed by the government itself (such as debarment) and others which flow from private actions.

The issue is on the agenda for the October meeting in Seattle as a discussion item.

IV. B

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposed Amendment to Rule 12.2**

DATE: **September 21, 2009**

Enoc Alcantara Mendez has written requesting the Advisory Committee to consider an amendment to Rule 12.2 that would, inter alia, require that the court advise the defendant of his right to appeal from an order to submit to a competency examination or from a commitment.

Mr. Mendez's letter is attached.

This item is on the agenda for the October meeting in Seattle.

May 25, 2009

Enoc Alcantara Mendez, Suggestor
Reg. No. 25861-069
Metropolitan Detention Center, Unit 2-A
P.O. Box 2005
Cataño, P.R. 00963-2005

09-CR-B

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Committee on Rules of Practice and Procedure
Washington, D.C. 20544

Re: U.S.A. v ENOC ALCANTARA MENDEZ, Crim. No. 07-086(ADC) D. P.R.

Subject: Suggestion and Recommendation With Respect to Fed.R.Crim. P. 12.2

To the Secretary of the Committee:

E.A.M.

In the name of the **Fourteenth Amendment** to the Constitution of the United States, **28USC, Sec. 1291** et seq., and the decision of the Supreme Court of the United States, **Sell v United States,** 539 U.S. 166 (2003), I, as a Citizen of the United States of America, hereby suggest and recommend that the Rule **Fed.R.Crim.P. 12.2** be amended as follows:

"**Rule 12.2** Notice of an Insanity Defense; Mental Examination

(f) Defendant's Right to Appeal

(1) Advice of a Right to Appeal

(A) Appealing an Order. If the defendant did not notify an attorney for the government of an intent to assert a defense of insanity and was ordered to submit to a competency examination under **18USC, Sec. 4241,** after ordering the court must advise the defendant of any right to appeal the order.

(B) Appealing a Commitment. After commitment -regardless of the defendant's notice- the court must advise the defendant of any right to appeal the commitment.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

Please acknowledge in writing the foregoing suggestion or recommendation herein presented and refer the same to the Advisory Committee on Criminal Rules. Thank you and God Bless America!

Honestly and fairly presented,

E.A.M.

Enoc Alcantara Mendez
Suggestor and U.S. Citizen

V. A-B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

201 Third Street NW • Suite 1870
Albuquerque, NM 87102

Chambers of
Harris L Hartz
Circuit Judge

Telephone
(505) 843-6196
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July 24, 2009

Dear Member of the Sealing Subcommittee:

My sources inform me that things are moving right along in the two subsubcommittees. This letter is just to clean up a couple matters mentioned in my prior letter of June 29.

First, no one has expressed any interest in expanding Dr. Reagan's empirical research to include any additional courts. I will therefore consider that matter to be settled.

Second, it is time to decide what types of matters should be considered cases for our work. Typical civil suits and criminal prosecutions are clearly cases. But Dr. Reagan identified 25 other types of files; and we should try to categorize them. My June 29 letter mentioned as a possibility that we would not consider the following to constitute cases:

1. Warrant-type applications (search and arrest warrants, inspection warrants, wiretaps, pen registers, trap and trace, tracking devices, etc.).
2. Criminal complaints and indictments.
3. CJA matters (appointment and payment of defense counsel).
4. Administrative appointments (such as the appointment of a commissioner or of a security officer to handle classified information).
5. Naming of Interpreters.
6. Subpoenas.
7. Target letters.

The letter also mentioned the following as possible categories to be considered as cases:

8. Grand-jury matters.
9. Attorney discipline and bar admission.

10. Child custody.

11. Extraditions.
12. Foreign cases (e.g., letters rogatory).
13. Forfeitures.
14. FTC orders.
15. Juror contempt.
16. Magistrate-judge appeals.
17. Material witnesses.
18. Medical and mental-health issues.
19. Prisoner petitions for protection.
20. Procedures for prosecution in another jurisdiction (e.g., Rule 5 transfers).
21. Restraining orders.
22. Return of illegally seized property.
23. Temporary transfers of custody.
24. Transfer of jurisdiction for supervised release.
25. Writs.

It is now time to vote on these 25 categories. Perhaps the easiest way to do this would be for each member to just send me an email listing the numbers of the categories that he or she thinks should be treated as cases (e.g., I vote for treating 1, 5, and 16 as cases). If two or more members disagree with the majority view on any one category, I will consider raising it for discussion and a revote.

Of course, it may be worth thinking about what difference it makes whether or not we view a type of filing as a case. Originally, I think that the general view was that we shouldn't worry about how to deal with filings that are not considered cases. But I would like to suggest that we might want to say something about those matters. It seems to me that the issue of sealed files is likely to recur over the years and we might want to make it easier in the future to investigate whether the system is working properly. Dr. Reagan has spent a great deal of time and effort to develop the empirical data from which we are working. If we believe that it is unlikely that a future committee would want to examine certain types of cases, perhaps we can recommend something that will make it easier in the future to focus just on the cases of interest. The problem now is that one cannot easily tell whether a sealed file is a case or not a case; Dr. Reagan has had to examine the file or ask someone else to describe it for him. Consequently, we may want to recommend something like having a code for certain types of cases so that, for

example, one can immediately tell that it is a warrant matter. Such a code would not disclose anything confidential, but it would remove those cases from the

workload of the next Dr. Reagan. Anyway, we can think about this more at the subsubcommittee level.

Thanks again to everyone.

Very truly yours,

Harris L Hartz

HLH/cir

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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August 4, 2009

Dear Member of the Sealing Subcommittee:

The votes are in. I have treated a vote as conclusive if there was not more than one member in disagreement. Accordingly, the following matters will be considered cases:

2. Criminal complaints and indictments
11. Extraditions.
13. Forfeitures.
15. Juror contempt.
19. Prisoner petitions for protection.
22. Return of illegally seized property.
25. Writs.

The following matters will not be considered cases:

1. Warrant-type applications (search and arrest warrants, inspection warrants, wiretaps, pen registers, trap and trace, tracking devices, etc.).
3. CJA matters (appointment and payment of defense counsel).
4. Administrative appointments (such as the appointment of a commissioner or of a security officer to handle classified information).
5. Naming of Interpreters.
6. Subpoenas.
7. Target letters.
8. Grand-jury matters.
10. Child custody.
12. Foreign cases (e.g., letters rogatory).
24. Transfer of jurisdiction for supervised release.

Two or three votes were cast for treating the following matters as cases:

9. Attorney discipline and bar admission
14. FTC orders.
16. Magistrate-judge appeals.
17. Material witnesses.
18. Medical and mental-health issues.
20. Procedures for prosecution in another jurisdiction (e.g., Rule 5 transfers).
21. Restraining orders.
23. Temporary transfers of custody.

Rather than trying to resolve these matters now, however, I will defer final decision in the hope that further discussions within the subsubcommittees will enlighten us and enable us to reach consensus. But to the extent that it may affect subsubcommittee deliberations, it will probably be useful to consider how proposed recommendations would apply to these matters.

Very truly yours,

Harris L Hartz

Harris L Hartz

HLH/cir

V. C

RULES COMMITTEE SUBCOMMITTEE ON PRIVACY

AGENDA FOR SUBCOMMITTEE MEETING

Washington, D.C.

September 10, 2009

I. Opening Remarks of the Chair

II. Finalizing Survey Questions

III. Presentation by Michel Izakian on the Electronic Public Access (EPA) Working Group of the Administrative Office.

IV. Report of Noel Augustyn on Implementation of the Banner Notice.

V. Report by Henry Wigglesworth on Research Into Alleged Disclosures of Social Security Numbers in Court Filings.

VI. Report on the Work of the Subcommittee on Sealed Cases.

VII. Report on Local Rules and Website Notices on Redaction Requirements.

VIII. Discussion of Background Materials Provided for Subcommittee Consideration.

IX. Discussion of "Next Steps" to be Taken by Subcommittees. (Including preliminary preparations for a conference or hearing).

MEETING MATERIALS

SUBCOMMITTEE ON PRIVACY RULES

September 10, 2009

VI.

Calendar for March–May 2010 (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			

7:◑ 15:● 23:◐ 29:○

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	

6:◑ 14:● 21:◐ 28:○

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					

6:◑ 13:● 20:◐ 27:○

Holidays and Observances:

Mar 1 St. David's Day	May 5 Cinco de Mayo
Mar 17 St. Patrick's Day	May 6 National Day of Prayer
Mar 20 Vernal equinox	May 9 Mother's Day
Apr 4 Easter Sunday	May 15 Peace Officers Memorial Day
Apr 15 Tax Day	May 15 Armed Forces Day
Apr 21 Administrative Professionals Day	May 21 National Defense Transportation Day
May 1 Law Day	May 22 National Maritime Day
May 1 Loyalty Day	May 31 Memorial Day

Calendar generated on www.timeanddate.com/calendar