COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 20, 2005 (revised July 20, 2006)**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items: approval of published Rules 11, 32, 35, 45, and 49.1. for transmission to the Judicial Conference; approval of proposed amendments to Rules 29 and 41 for publication and comment; and approval of the time computation template for eventual publication. In addition, the Committee has several information items to bring to the attention of the Standing Committee, most notably continued discussion of a draft amendment to Rule 16.

II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial. With these provisions excised, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 543 U.S. at 222. Rule

11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

There were many public comments received on this and the other *Booker* amendments. The Sentencing Commission stated that the amendment tracked the approach the Commission believes to be implicit in *Booker*, but it suggested that the word "calculate" be replaced with "determine and calculate." Other comments suggested that the amendment gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). There was extensive discussion of the public comments and an additional concern, raised at the meeting, that the amendment might be read as requiring a complete guideline calculation in every case. That would be inconsistent with cases such as *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005). *Crosby* recognized that the district courts would "normally" have to determine the applicable guideline range. *Id.* at 111. However, in some cases the court may conclude that it is unnecessary to resolve a particular guideline issue because statutory factors under 3553(a) require a variance that moots the guideline issue. *Id.* at 112. Consideration was given to adding a reference to *Crosby* in the note, but this effort was ultimately abandoned because of the difficulty crafting a statement that would be consistent with the varying approaches in the circuits.

The Committee agreed that the function of the rule is to advise a defendant who is pleading guilty of the manner in which the court will determine the defendant's sentence. The published language captures the approach taken by most courts after *Booker*. Here, and in the other *Booker* amendments, the Committee agreed to delete from the Committee Note a reference to the Fifth Amendment requirement of proof beyond a reasonable doubt from the description of *Booker*.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32, Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

These amendments adapt two subdivisions of the Rule 32 to *United States v. Booker*, 543 U.S. 220 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). The Committee is proposing amendments only to subdivisions (d) and (h), which govern presentence reports and notice of possible departures. As noted below, the Committee has withdrawn the proposed amendment to subdivision (k) because of legislative activity that occurred after the approval of the amendments for publication and comment.

Subdivision (d) Subdivision (d) of the rule establishes the requirements for presentence reports. It already requires that the report include the applicable Guidelines and information relevant to the guideline calculations. The amendment adds the requirement that the report include

information relevant to the statutory criteria under § 3553(a). However, in light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included only when required by the court.

The Committee received critical comments from the Federal Public Defenders and the National Association of Criminal Defense Lawyers who saw the published amendment as improperly giving primacy to the Guidelines in the sentencing process. They also urged that the rule address individually each of the sentencing factors under 3553(a) and that the rule be revised to require the probation office to collect all information relevant to each of the statutory factors. Additionally, they suggested that the title of the heading should be amended to refer to the "advisory" character of the Guidelines.

The Committee agreed that the heading should be revised to refer to the Guidelines as "advisory," and with that change it approved the amendment as published. The Committee felt the published language accurately reflects the approach most courts are taking after *Booker*, and it avoids placing an open-ended and unmanageable obligation on the probation office.

In the Committee Note accompanying the amendment to this subdivision and subdivision (h), the Committee also deleted the Fifth Amendment from the description of the *Booker* decision.

Subdivision (h). The Standing Committee approved publication of an amendment to Rule 32(h) to conform to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or pleadings. The proposed amendment stated that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or prehearing submissions.

The public comments to the published draft revealed several ambiguities in the language. The language was interpreted by some as overly broad (requiring notice whenever the court intends to rely on a non-guideline factor) and by others as too narrow (requiring no notice when a factor has been identified for one purpose, but the parties are unaware that the court is considering it for a wholly different purpose). Given the potential for misinterpretation, the Committee agreed that a modification of the published language was needed, and it unanimously accepted the alternative language proposed by the Sentencing Commission.

After discussion at the Standing Committee of recent decisions taking various approaches to the question whether notice must be given, the proposed amendment to subdivision (h) was withdrawn to permit further study.

Subdivision (k). The Standing Committee also approved the publication of a proposed amendment to subdivision (k) intended to standardize the collection of data regarding post-*Booker* sentencing by requiring all courts to enter their judgments, including the statement of reasons, on forms prescribed by the Judicial Conference. This provision, which provoked considerable controversy, was withdrawn by the Committee in light of the enactment of § 735 of the USA Patriot Improvement and Reauthorization Act, which amended 28 U.S.C. § 994(w). The amended statute requires the chief judge of each district to provide the Sentencing Commission with an explanation of each sentence including "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee withdrew its request for an amendment to Criminal Rules, and the Advisory Committee concluded that an amendment to subdivision (k) was no longer necessary.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(d) be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), holding that the Guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the Guidelines do not currently include provisions governing the correction of sentences under Rule 35, the amendment removes the rule's language that seems, on its face, to be inconsistent with the decision in *Booker*.

Both the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL) suggested changes in either the amendment or the note. After discussion, the Committee decided not to alter the amendment. In essence, the proposed changes introduced additional issues that were not part of the amendment as published. NACDL suggested that given the advisory character of the Guidelines, it is no longer appropriate for the rule to require that the motion be made by the government, since powerful evidence of cooperation should be considered under 18 U.S.C. § 3553(a) even in the absence of such a motion. The language of the rule, however, was enacted by Congress. Even if the Committee had the authority to delete this requirement under the Rules Enabling Act, it could not do so without publishing such an amendment for public comment. The Sentencing Commission raised the question whether the *Booker* remedial opinion is applicable to the post-sentencing context. It suggested that the Committee Note be amended to address this issue. The Committee unanimously declined to introduce the new language to the Note, or otherwise to alter the rule as published for public comment. (The only exception was the agreement to eliminate the reference to the Fifth Amendment in the description of the *Booker* decision in this Note, as well as the notes accompanying the other *Booker* amendments.)

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D). The amendment of the Civil Rule became effective on December 1, 2005. The proposed amendment to Rule 45 tracks the language of the civil rule.

The Committee received only one comment on the proposed amendment, which consisted of a statement of strong approval for the change. Without objection the Committee approved the amendment of Rule 45.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes provisions regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1 because they are governed by procedural rules recently restyled by the Criminal Rules Committee.

The e-government rules, including Rule 49.1, generated extensive public comment. A subcommittee reviewed the public comments and considered the advice of Professor Capra and the reporters for the other committees prior to the Committee's April meeting.

Many of the public comments dealt with considerations common to all of the e-government rules, and the Committee sought to incorporate the common changes recommended by Professor Capra after consultation with all of the reporters. These included (1) using of the term "individual" rather than "person" throughout the rule, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary

to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed.

The Committee also discussed the provisions for filing under seal and protective orders. The provisions, which were common to all of the e-government rules, were the topic of considerable commentary from the public and members of the Committee. The Committee ultimately endorsed a change in the provision on protective orders, and we understand that language may be adopted by the other advisory committees. The discussion focused on the difference between the standards for sealing and those for protective orders, which were not parallel in the amendment as published for comment. Protective orders were authorized only "[i]f necessary to protect private or sensitive information," while no similar restriction is placed on sealing. The Committee was satisfied with the explanation that the standard for sealing is well established, and there should be no effort to restate that standard in Rule 49.1. The Committee concluded, however, that the provision for protective orders should be modified to incorporate the more flexible standard for the issuance of protective orders set forth in Civil Rule 26(c), which employs the phrase "[f]or good cause shown." The Committee amended subdivision (d) to incorporate this language, and Professor Capra said that he would bring this change to the attention of the other advisory committees. After the Committee meeting all of the reporters agreed to recommend language based on this change to Rule 49.1, but to shorten the phrase to "cause shown." This phrasing is used elsewhere in the Criminal Rules, so we have conformed Rule 49.1 as well to "cause shown." (Note that this provision is now found in (e) due to the renumbering following the addition of a new subdivision (c) regarding immigration cases; the new subdivision is discussed below.)

Other issues addressed in the public comments and Committee discussion were specific to Rule 49.1 or bear most heavily on that rule.

Several issues related to information identifying individuals, particularly date of birth and social security number. After consultation with CACM staff and Professor Capra, the Committee was persuaded that the current rule reflects a careful balancing of interests, and it declined to make any changes. It thus rejected the request of background screeners, who urged that the public record in criminal cases should include full identifying information, such as date of birth, in order to aid private criminal records searches. It also rejected a suggestion from within the Committee that even the disclosure of the last four digits of an individual's social security number might create a danger of breaches of privacy or identity theft. The Committee was informed that CACM had considered the privacy and security issues relating to social security numbers, and had based the rule permitting disclosure of the last four digits on the practice of the Social Security Administration.

Several issues concerned actions under 18 U.S.C. §§ 2254, 2255, and 2241, which as noted above are covered by both Civil Rule 5.2 and Criminal Rule 49.1.

CACM and the National Association of Criminal Defense Lawyers (NACDL) expressed concern that a categorical exemption from redaction for filings in proceedings under 18 U.S.C.

§§ 2254, 2255, and 2241, was unnecessarily broad. The Committee's rationale for exempting these actions was its conclusion that, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. To meet the overbreadth objection, the Committee decided to restrict the exemption to filings by pro se plaintiffs in these actions. The Committee declined, however, to eliminate the exemption entirely. It rejected the suggestion that it would be sufficient merely to relax the application of the redaction requirements in the case of pro se filings. If the rule as a technical matter requires redaction in the case of pro se filings, there could be adverse legal consequences for pro se plaintiffs who failed to redact sensitive information. If a pro se filing under §§ 2254, 2255, and 2241 contains unredacted information that raises security concerns, the court can issue a protective order.

Subsequent to the Advisory Committee meeting, Professor Cooper raised an additional issue regarding actions under 18 U.S.C. § 2241 raising immigration claims. Without going into great detail, the issue that emerged concerned efforts under Rule 5.2 to mesh the special considerations attendant to immigration cases (including limited remote access) with the considerations applicable to actions under §§ 2254, 2255, and 2241. All of the reporters agreed that it was important to apply the same standards to all 2241 cases involving immigration rights. Rather than import additional provisions into Rule 49.1 to deal with such cases, the reporters agreed that it would be preferable to deal with 2241 cases involving immigration rights exclusively under Rule 5.2. Accordingly, subdivision (c) was added to provide that such cases are governed exclusively by Rule 5.2. Since this change was needed to prevent a potential conflict with some or all of the provisions in Rule 5.2 governing immigration claims, it seemed to fall well within the authority that the Committee agreed to give to Judge Bucklew and the reporter.

CACM objected to the categorical exemption from redaction in Rule 49.1(b)(8), (9), and (10), for charging documents, affidavits in support of charging documents, arrest or search warrants, and filings prepared before the filing of a criminal charge that is not part of a docketed case. In CACM's view, redaction of specific private or sensitive information should be sufficient. The Committee reviewed the reasons for its original decision to exempt these filings, particularly the importance of particularity and identification in documents such as arrest or search warrants. Also, the public has a right to know with some specificity who has been charged with a criminal offense or where a search was executed. After discussion, the Committee agreed without objection to retain the exemptions as published.

CACM also expressed strong concern that Rule 49.1 as published did not protect the confidentiality of a grand jury foreperson's name, because it exempts charging documents from the redaction requirement. Disclosure of a grand juror's name, CACM noted, was inconsistent with its policy of protecting the privacy of jurors. Although the published draft includes the CACM policy in the Committee Note, the policy would require sealing on a case by case basis, which CACM deemed insufficient. In discussing this issue, the Committee noted that the petit jury verdict forms present a similar issue, since they are also signed by the foreperson.

The Committee considered an amendment to the published rule that would have redacted the foreperson's name and substituted that person's initials. After extended discussion of the problems posed by requiring redaction, the Committee concluded that the rule should be recommended to the Judicial Conference as published, though the concerns raised by CACM may warrant further study. Several considerations weighed against requiring redaction at this time. Some of the concerns were practical in nature, given the importance of having an original signed version of the documents initiating a criminal prosecution and recording the verdict in the public record. Although it might be possible to have two versions of these documents, one signed and filed under seal and the other merely initialed and filed in the public record, it was unclear exactly how that would work. Moreover, that procedure had not been the subject of notice and public comment. Committee members also expressed concern about an anonymous system of justice. Under Rule 10(a)(1) the court must ensure that the defendant has a copy of the signed grand jury indictment at the time of arraignment. Rule 6(f) provides for the return of a grand jury indictment in open court, and there was support for the view that absent specific findings the public should be entitled to see any document filed in open court. Given the complexity of the issue, the Committee thought that it would be desirable to have a study to determine whether public disclosure of foreperson signatures has caused significant problems before proposing a new rule requiring redaction of every grand jury indictment and every petit jury verdict form.

Finally, the Committee clarified the relationship between the CACM policy statement, which was included in the Committee Note as published, and the rule itself. At Professor Capra's suggestion, the Committee Note was revised to state more clearly that when the rule itself does not exempt the materials listed in the CACM policy statement from disclosure, privacy and law enforcement concerns are to be accommodated through the sealing and protective order provisions of the rule.

Professor Capra also asked the Committee to give the chair and reporter the authority to work with their counterparts on the other advisory committees to work out any last-minute wording issues and to bring all of the e-government rules into agreement as far as possible.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be approved, as modified after public comment, and forwarded to the Judicial Conference.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

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(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

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(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range ~~apply the Sentencing Guidelines, and the~~

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

~~court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

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COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004)." *Id.* at 245-46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment. One change was made to the Committee note. The reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*.

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Rule 32. Sentence and Judgment

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(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

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

(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) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical

impact on any individual against whom the offense has been committed;

(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).

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COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing

statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of subdivision (d) in response to public comments. In subdivision (d), the Committee revised the title to include the word "Advisory" in order better to reflect the guidelines' role under the *Booker* decision. It withdrew proposed subdivisions (k) and (h).

Proposed subdivision (h) would have expanded the sentencing court's obligation to give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties' submissions. The amendment was intended to respond to the courts' expanded discretion under *Booker*. In light of a number of recent decisions in the lower courts considering the proper scope of

this obligation in light of *Booker*, the proposed amendment was withdrawn for further study.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of § 735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. § 994(w) to impose a statutory requirement that sentencing information for each case be provided on "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

Finally, here—as in the other *Booker* rules—the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

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Rule 35. Correcting or Reducing a Sentence

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(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: the defendant, after sentencing,

provided substantial assistance in investigating or prosecuting another person.

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

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COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here—as in the other *Booker* rules—the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

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Rule 45. Computing and Extending Time

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(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may ~~to~~ act within a specified period after ~~a notice or a paper has been served on that party~~ service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~.

COMMITTEE NOTE

Subdivision (c). Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If

Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No change was made in the rule as published for public comment.

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Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

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

(2) the year of the individual's birth;

(3) the minor's initials;

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

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

(b) **Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) **Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) **Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be

construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1 (a) as to the person's own information by filing it without redaction and not under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made

available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is

intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets

out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by

the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Numerous changes were made in the rule after publication in response to the public comments as well as continued consultation among the reporters and chairs of the advisory committees as each committee reviewed its own rule.

A number of revisions were made in all of the e-government rules. These include: (1) using of the term "individual" rather than "person" where possible, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed. Additionally, some changes of a technical or stylistic nature (involving matters such as hyphenation and the use of "a" or "the") were made to achieve clarity as well as consistency among the various e-government rules.

Two changes were made to the provisions concerning actions under §§ 2241, 2254, and 2255, which the published rule exempted from the redaction requirement. First, in response to criticism that the original exemption was unduly broad, the Committee limited the exemption to pro se filings in these actions. Second, a new subdivision (c) was added to provide that all actions under § 2241 in which immigration claims were made would be governed exclusively

by Civil Rule 5.2. This change (which was made after the Advisory Committee meeting) was deemed necessary to ensure consistency in the treatment of redaction and public access to records in immigration cases. The addition of the new subdivision required renumbering of the subdivisions designated as (c) to (g) at the time of publication.

The provision governing protective orders was revised to employ the flexible "cause shown" standard that governs protective orders under the Federal Rules of Civil Procedure.

Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

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