

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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Implementing E-Government Act

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules submitted proposed uniform language for an amendment to Appellate Rule 25, and for new Bankruptcy Rule 9037, new Civil Rule 5.2, and new Criminal Rule 49.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and new rules implement the privacy and security provisions of § 205 of the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), governing electronic filings in federal court. The amendments and rules were published for public comment for a six-month period. The scheduled public hearings were canceled because only one witness requested to testify. That witness testified at the Committee's January meeting with the chairs of the advisory committees present.

The proposed package of amendments and new rules is derived from the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The Conference policy requires that documents in case files generally be made available electronically to the same extent that they are available at the courthouse, provided that certain "personal data identifiers" are redacted in the public file, including the first five digits of a social-security number, the name of a minor, and the date of a person's birth.

In accordance with the Act's call for uniformity, the proposed new rules are identical in many respects. For example, certain pre-existing records of administrative, agency, and state-court proceedings and pro se habeas corpus filings are exempted from the redaction requirement under each of the proposed rules. Under another uniform provision, a court may, for good cause, authorize redaction of information in addition to personal identifiers or limit a nonparty's remote electronic access to documents to safeguard privacy interests. Each proposed rule also permits the filer of a document to elect not to redact the filer's own personal-identifier information, waiving the rule's protections.

There are a few differences in the proposed rules to account for factors unique to each set of rules. Proposed Civil Rule 5.2 specifically limits remote access to social security and immigration electronic case filings. The Social Security Administration and Department of Justice asked the advisory committee to give special treatment to these cases due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited in these cases to the docket and the written dispositions of the court unless the court orders otherwise. Proposed new Criminal Rule 49.1 permits the partial redaction of an individual's home address and an exemption from redaction for certain information needed for forfeitures. Additional filings are exempted from the redaction requirement, including arrest and search warrants, charging documents, and documents filed before the filing of a criminal charge. Proposed Bankruptcy Rule 9037 uses several different terms consistent with terms used in the Bankruptcy Code. It also requires disclosure of the full names of a debtor, even if a minor. New Appellate Rule 25(a)(5) would apply the privacy rule that had applied to the case below to govern in the case on appeal.

The Committee on Court Administration and Case Management raised a concern during the public-comment period that remote electronic access to an indictment might jeopardize the

safety of the foreperson signing it. Under Criminal Rule 6(c), the foreperson must sign all indictments, and under Rule 6(f) an indictment must be returned in open court. No empirical data has been presented showing added risks to forepersons whose signatures on indictments have been publicly available. Such evidence as there is suggests that forepersons have not been subject to threat because the indictment has been part of the public case file. Nor is an easy practical administrative solution apparent to redact a foreperson's name from the record. For these reasons and because the advisory committee determined that redaction of the foreperson's name would raise sensitive policy questions about the public nature of criminal proceedings, the advisory committee decided that the issue requires further careful study. The advisory committee will undertake this study promptly. However, the advisory committee decided that the study should not delay proceeding with the proposed new rule. The Committee on Court Administration and Case Management approves of this approach to this issue.

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 11, 32, 35, and 45, and new Criminal Rule 49.1 and abrogation of Form 9 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in February 2005. Two witnesses testified at the public hearing.

The proposed amendments to Rules 11, 32, and 35 bring them 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 Sentencing Guidelines mandatory violate the Sixth Amendment right to jury trial.

Rule 11 would be amended to require the sentencing court to advise the defendant of the court's "obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)" in accordance with *Booker*. The advisory committee carefully considered comments that the proposed amendment: (1) gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the sentencing factors in § 3553(a); and (2) implied that a full-scale guideline calculation was required in every case. It concluded that the proposed amendment captured the approach taken by most courts after *Booker*, which is to first calculate the applicable sentencing-guideline range in determining a sentence, with the possible exception of a sentence in a case involving a calculation that is entirely unnecessary to resolve a particular guideline issue.

Rule 32 would be amended to clarify the court's authority to instruct a probation officer to gather and include in the presentence report any information relevant to the factors in § 3553(a). The request can be made by an individual judge in a particular case or by the court as a whole in a local rule or standing order, requiring information affecting all cases or a class of cases.

The advisory committee withdrew a proposed amendment to Rule 32(h), which would have required the court to notify the defendant that it was considering factors not identified in the presentence report or in the submission of the parties that could result in a departure or a sentence outside the guideline range. The proposed amendment was intended to avoid unfair surprises to the parties in the sentencing process. Recent case law developments in the area, however, convinced the advisory committee to withdraw the proposal for further study. The proposed amendment to Rule 32(k), requiring courts to use a standard statement of reasons form,

had been withdrawn earlier by the advisory committee in light of a recent statutory provision superseding the proposal.

Rule 35 would be amended to remove the restriction on the court's authority to reduce a sentence of a defendant who provides substantial assistance in investigating or prosecuting another person only on condition that the reduced sentence accords with the Guidelines and Sentencing Commission's policy statements. The restriction is stricken as inconsistent with *Booker* because it treats the Guidelines as mandatory.

Rule 45 would be amended to remove any doubt about the method for extending the time to respond after service by mail, by leaving with the clerk of court, by electronic means, or by other means consented to by the party served. The amendment parallels the 2005 change to Civil Rule 6(e). It is unclear whether the additional three days provided in the extant rule are to be added before or after the prescribed period. The amendment makes clear that the three days are added after the prescribed period otherwise expires. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.

Proposed new Rule 49.1 implements the E-Government Act. It was discussed earlier in this report.

The Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue in the Appendix of Forms to the Rules Governing Section 2254 Cases in the United States Courts (Model Form 9) would be abrogated. The abrogation of the form was published in August 2002 with a notice that the advisory committee was planning an extensive revision in the future. The public hearing was cancelled because no one requested to testify.

Model Form 9 was intended to facilitate a court's consideration of a delayed or successive petition filed under Rule 9 of the Rules Governing Section 2254 Cases. Rule 9 was extensively amended in 2004 as part of a general restyling project. The rule was also amended

to account for the Antiterrorism and Effective Death Penalty Act of 1996 to delete then subdivision (a) and require the court of appeals to approve a second or successive petition as a condition for proceeding further. As a result, the extant Model Form 9 is out of date, containing references to subdivisions in Rule 9 that no longer exist and including provisions that have been superseded by statute.

The form is no longer useful. Many legal publishing firms do not include it in their publications because it may cause confusion. Most courts have devised a local form, and they have expressed a desire to retain flexibility to adapt their forms to local conditions instead of following a national form.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 11, 32, 35, and 45 and new Criminal Rule 49.1 and abrogation of Form 9 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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