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

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MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Reena Raggi, Chair**
Advisory Committee on Criminal Rules

RE: **Report of Advisory Committee on Criminal Rules**

DATE: **May 5, 2014**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on April 7-8, 2014, in New Orleans, Louisiana, and took action on a number of proposals. The Draft Minutes are attached. (Tab E).

This report presents three action items for Standing Committee consideration:

(1) approval to publish a proposed amendment to Rule 4 (service of summons on organizational defendants); and

(2) approval to publish a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches); and

(3) approval to publish a proposed amendment to Rule 45 (additional time after certain kinds of service).

In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, including one proposal that has been referred to subcommittees for further study.

II. Action Items — Recommendations to Publish for Public Comment

1. ACTION ITEM — Rule 4 (service of summons on organizational defendants)

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings." The Department's proposal was referred to a subcommittee which met multiple times by teleconference and proposed an amendment for consideration at the New Orleans meeting.

In New Orleans, the Committee unanimously approved a proposed amendment making the following changes in Rule 4:

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

Following the meeting, the Committee unanimously approved style changes and slight changes in the committee note that were circulated electronically. The text of the proposed amendment and accompanying committee note are provided at Tab B.

A. Authorizing sanctions if an organizational defendant fails to appear

As a preliminary matter, the Committee identified a gap in the current rule concerning organizational defendants who fail to appear. Rule 4(a) presently provides that both individual and organizational defendants may be served with a summons. Although the rule provides for the issuance of an arrest warrant if an individual defendant fails to appear in response to a summons, it is silent on the procedure to be followed if an organizational defendant fails to appear.

The Committee concluded that this omission should be addressed, and it proposes that the following sentence be added to the end of paragraph (a): "If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by law."

There is little precedent defining the actions that a court may take if an organizational defendant fails to appear. The Department of Justice emphasized that such cases have rarely arisen, and it anticipates that would continue to be the case if the proposed amendment is adopted. Foreign as well as domestic corporations have many incentives to appear and resolve criminal charges once service is made. Given the paucity of available authority, the Committee concluded it would be premature to attempt any determination of the scope of the courts' authority to employ the sanctions identified by the government. By stating that the court has the authority to "take any action authorized by law" the amendment provides a framework for the courts to evaluate the scope of that authority if and when cases arise in which organizational defendants fail to appear after being served.

B. Restricting the Mailing Requirement When Delivery Is Made in the United States

The current mailing requirement in Rule 4(c)(3)(C) is a major impediment to prosecution of foreign entities, and the Committee agreed that the requirement is unnecessarily overbroad. At present, in every case involving an organizational defendant, the rule requires not only service by delivery to an agent but also mailing to the entity, which must be made "to the organization's last known address within the district or to its principal place of business elsewhere in the United States." Accordingly, it is not possible to serve a foreign entity–even one that conducts both real and virtual business within the United States–that has neither a principal place of business in the U.S. nor a known address within the district of prosecution.

The Committee's proposed amendment follows the approach of the Civil Rule 4(h): it restricts the mailing requirement to cases in which service has been made on a statutorily appointed agent when the statute itself requires a mailing as well as personal service. Moreover, the proposed amendment does not restrict the address to which the mailing may be made.

C. Providing for Service of Organizational Defendants Outside the United States

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).[2]

Given the increasing number of criminal prosecutions involving foreign entities, the Subcommittee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization, and it proposes the following addition to Rule 4(c)(2), which governs the location of service: "A summons under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States." This general provision is implemented in the Subcommittee's proposed amendment to Rule 4(c)(3), which governs the manner of service.

The Subcommittee's proposal – like Fed. R. Civ. P. 4 – enumerates a variety of methods of proper service, but also provides a more general provision authorizing other methods. New subdivision (c)(3)(D) authorizes several forms of service "on an organization not within a judicial district of the United States,"[3] and it enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant. Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a managing or general agent. This is a permissible means of serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

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[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

[2] Fed. R. Civ. P. 4(h)(2) provides, however, that service on an entity may not be made under Rule 4(f)(2)(c)(i) (delivery "to the individual personally").

[3] Fed. R. Civ. P. 4(h) provides for service on a corporation "at a place not within any judicial district of the United States," but the Subcommittee deliberately omitted the reference to service *at a place* outside a judicial district of the United States. Thus the new provision authorizes additional means of service on *organizations* that are not within a judicial district of the United States. Although the authorized means for such service would generally occur outside any U.S. judicial district, in some cases service by stipulation or service under the general catch-all provision might occur within a U.S. judicial district.

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements, regional agreements, and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

The Committee viewed these methods as uncontroversial. Using these well-developed procedures should ordinarily provide notice to an organizational defendant. However, if notice has not been afforded in an individual case, the Committee Note recognizes that the defendant may later choose to raise a challenge on this basis. The Committee also concluded that the listed means of service posed neither concerns under the principles of international law nor institutional concerns. Service in a manner authorized by the foreign jurisdiction's law is respectful of that nation's sovereignty. The same is true of service that the foreign sovereign itself undertakes in response to the various types of requests identified in proposed subdivision (c)(3)(D)(ii)(b). Moreover, as described more fully in memoranda prepared for the Committee by the Department of Justice, the Criminal Division's Office of International Affairs will be involved in assisting individual prosecutors in determining which means of service will be most effective in individual cases, and will consult with the Department of State regarding any special concerns.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means.[4] One of the principal issues considered by the Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement

[4] The Rule 4 Subcommittee considered and rejected a requirement that would have limited service under (D)(ii)(c) to cases in which service in a manner authorized by the foreign jurisdiction's law, undertaken by the foreign authority, or by stipulation was unavailable. The Subcommittee concluded that requiring the government to demonstrate that it had tried and failed to effect service in these ways it would impose unnecessary burdens and delays.

of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[5]

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, the court would not be deprived of jurisdiction. Under the Committee's proposal – which does not require prior judicial approval of the means of service – a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law.

The Committee noted that eliminating a requirement for prior judicial approval may also be preferable from the defense perspective. Prior judicial approval would place a defendant later challenging the effectiveness of the notice provided in a difficult position. In effect, the defendant would be asking the judge who approved the service to change her mind, rather than to consider a question of first impression.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be published for public comment.

2. ACTION ITEM — Rule 41 (venue for approval of warrant for certain remote electronic searches)

The proposed amendment (Tab C) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue

[5] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3).

a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district. The proposed amendment was unanimously approved by the Committee in New Orleans. Following the meeting, the reporters circulated style changes and new language for the Committee note, which were unanimously approved by an electronic vote.

The proposed amendment had its origins in a letter from Acting Assistant Attorney General Mythili Raman. The proposal was referred to a subcommittee, which held multiple telephone conference calls before approving a proposal to amend Rule 41(b)(6).

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[6] but permits out-of-district searches in specified circumstances.[7] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

A. Reasons for the proposal

Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated

[6] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

[7] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

anonymizing technologies. For example, persons sending fraudulent communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee should consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a botnet, which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

B. The proposed amendment

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

The Committee agreed that the use of anonymizing software to mask the location of a computer should not prevent the issuance of a warrant if the investigators can satisfy the Fourth Amendment's threshold requirements for obtaining a warrant, describing the computer to be searched with particularity and demonstrating probable cause to believe that evidence to be sought via the remote search will aid in apprehension or conviction of a particular offense. It is appropriate in such cases to make a narrow exception to the general territorial limitations governing the issuance of search warrants. The proposed amendment addresses this problem by relaxing the venue requirements when "the district where the media or information is located has been concealed through technological means." Because the target of the search has deliberately disguised the location of the media or information to be searched, the amendment allows a magistrate judge in a district in which activities related to a crime may have occurred "to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information *located within or outside that district.*" (Emphasis added).

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[8] where the media to be searched are "protected computers" that have been "damaged without authorization." The

[8] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when a electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

3. ACTION ITEM — Rule 45 (additional time after certain kinds of service)

The proposed amendment (Tab D) is part of the work of the Standing Committee's CM/ECF Subcommittee, and it parallels amendments to the civil, criminal, bankruptcy and appellate rules. The proposed amendment of Rule 45 would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that advances in the reliability of technology have undermined the principal justifications for the current rule. Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, concerns about the reliability of electronic service were cited as justifications for allowing three additional days to act after electronic service. At that time, there were concerns that (1) the electronic transmission might be delayed, (2) incompatible systems might make it difficult or impossible to open attachments, or (3) parties might withhold their consent to receiving electronic service unless they had three

additional days to act. The CM/ECF Subcommittee concluded that those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

The CM/ECF Subcommittee also noted that elimination of the three day rule for electronic service would also simplify time computation. To ease the task of computing time, many rules were amended in 2009 to adopt 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the proposed amendment (and the parallel amendment to the other rules) includes new parenthetical descriptions of the forms of service for which three days will still be added.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be published for public comment.

III. Information items

The Committee also discussed suggestions for amendments to Rules 29, 52, 53, and Rules 11 and 32. It referred the proposal to amend Rule 52 for in-depth study by a subcommittee, and it declined to proceed further with the others.

1. Rule 52

Judge Jon O. Newman wrote to suggest consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors. In contrast to the correction of trial errors by retrials, which impose very significant burdens on the judicial system, he noted that the correction of sentencing errors is much less burdensome. Moreover, the cost of sentencing errors can be very high. An uncorrected guideline miscalculation may lead to months or years of unwarranted imprisonment. Accordingly, he proposed an amendment that would permit appellate courts to consider sentencing errors not first raised in the district court–even if they would not meet the standard of plain error–when the error was prejudicial to the defendant and its correction would not require a new trial. The Advisory Committee concluded that this proposal was worthy of further study by a subcommittee (which should coordinate with the Appellate Rules Committee). Judge Raymond Kethledge will chair the subcommittee

2. Rule 29

Jared Kneitel wrote to the Committee suggesting that it consider amending Rule 29 to provide a procedure for making a motion for acquittal in a bench trial. He argued that the current

rule provides a procedure for such motions in a jury trial, but not in a bench trial. The Committee was not persuaded that the current rule has posed a problem for litigants and judges, and it declined to move forward with the proposal.

3. Rule 53

Writing on behalf of the Criminal Law Committee, Judge Irene Keeley forwarded the suggestion of Magistrate Judge Clay Land for an amendment to Rule 53 permitting reporters to Tweet from the courtroom. Prior to the New Orleans meeting the proposal was referred to a subcommittee, and the reporters prepared a research memorandum that discussed (1) the history of Rule 53, (2) Twitter use in the federal courts, (3) developments in the state courts, and (4) issues raised by the limited law review and practice commentary. At the New Orleans meeting, the subcommittee reported its conclusion that it would be premature at this time to undertake a full review of Rule 53. Rather, it would be preferable to defer action, allowing district judges to develop more experience with Twitter (and other forms of technology) before undertaking any revision of Rule 53. The Advisory Committee agreed, and declined to move forward with the proposal.

4. Rules 11 and 32

Professor Gabriel Chin wrote to suggest that the Committee consider amending Rules 11 and 32 to make Pre-Sentence Reports (PSR) available in advance of a guilty plea so that all parties would be aware of the potential sentence. He drew the Committee's attention to the opinion in a 1993 decision of the D.C. Circuit as well as his own article to support this proposal. The Committee decided not to pursue Professor Chin's proposal at this time. The advance preparation of the PSR would be a major change in many districts requiring a duplication of effort and imposing very significant burden on Probation Officers. Advance preparation and disclosure to the defense would also raise concerns about the protection of victims and government witnesses, as well as the need for a mechanism to resolve disputes about the contents of PSRs. In light of these concerns, the Committee was not persuaded that there had been a sufficient showing that change is needed, and it declined to move forward with the proposal.

At the New Orleans meeting Judge Donald Molloy raised a question about Rule 32(i)(2), which states that at sentencing "[t]he court may permit the parties to introduce evidence on the objections." He noted that the district judge has a great deal of discretion in determining how a sentencing will proceed, but wondered whether it is necessary to allow proof in support of a request for a "variance" as opposed to a contest about the guidelines themselves. In light of the many other items on the agenda, the Committee decided not to undertake a study of this aspect of Rule 32 at the present time.