

AMENDMENTS TO FEDERAL RULES OF CRIMINAL
PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCE-
DURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT,
PURSUANT TO 28 U.S.C. 2072



MAY 10, 2018.—Referred to the Committee on the Judiciary and ordered
to be printed

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WASHINGTON : 2018

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 26, 2018.

Hon. PAUL D. RYAN,
Speaker of the House of Representatives,
Washington, DC.

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

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Sincerely,

JOHN G. ROBERTS, JR.,
Chief Justice.

April 26, 2018

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.4, 45, and 49.

[*See infra* pp. _____.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2018, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE**

Rule 12.4. Disclosure Statement

(a) Who Must File.

- (1) *Nongovernmental Corporate Party.*** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.
- (2) *Organizational Victim.*** Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by

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Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time to File; Later Filing. A party must:

- (1)** file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance; and
- (2)** promptly file a later statement if any required information changes.

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service.

Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and (E), 3 days are added after the period would otherwise expire under subdivision (a).

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Rule 49. Serving and Filing Papers**(a) Service on a Party.**

(1) *What is Required.* Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(2) *Serving a Party's Attorney.* Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) Service by Electronic Means.**(A) Using the Court's Electronic-Filing System.**

A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system.

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A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) *Using Other Electronic Means.* A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.

(4) *Service by Nonelectronic Means.* A paper may be served by:

(A) handing it to the person;

(B) leaving it:

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- (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
 - (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
- (C) mailing it to the person's last known address—in which event service is complete upon mailing;
- (D) leaving it with the court clerk if the person has no known address; or
- (E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person

making service delivers it to the agency designated to make delivery.

(b) Filing.

(1) *When Required; Certificate of Service.* Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) *Means of Filing.*

(A) *Electronically.* A paper is filed electronically by filing it with the court's electronic-filing system. A filing made through a person's electronic-filing account

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and authorized by that person, together with the person's name on a signature block, constitutes the person's signature. A paper filed electronically is written or in writing under these rules.

(B) *Nonelectronically.* A paper not filed electronically is filed by delivering it:

- (i) to the clerk; or
- (ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Means Used by Represented and Unrepresented Parties.***

(A) *Represented Party.* A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court

for good cause or is allowed or required by local rule.

(B) *Unrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) *Signature.* Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is

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promptly corrected after being called to the attorney's or person's attention.

(5) *Acceptance by the Clerk.* The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) *Service and Filing by Nonparties.* A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) *Notice of a Court Order.* When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of

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Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

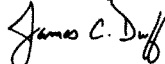
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 4, 2017

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: James C. Duff 

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 12.4, 45, and 49 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Attachments

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3 **(1) *Nongovernmental Corporate Party.*** Any
4 nongovernmental corporate party to a proceeding
5 in a district court must file a statement that
6 identifies any parent corporation and any
7 publicly held corporation that owns 10% or more
8 of its stock or states that there is no such
9 corporation.

10 **(2) *Organizational Victim.*** Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity.~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~

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

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15 ~~government must file a statement identifying the~~
 16 ~~victim.~~ If the organizational victim is a
 17 corporation, the statement must also disclose the
 18 information required by Rule 12.4(a)(1) to the
 19 extent it can be obtained through due diligence.

20 **(b) Time ~~for~~to Filing; Supplemental~~Later~~ Filing.** A
 21 party must:

- 22 **(1)** file the Rule 12.4(a) statement within 28 days
 23 after~~upon~~ the defendant's initial appearance; and
 24 **(2)** promptly file a ~~later~~supplemental statement if
 25 any required information changes~~upon any~~
 26 ~~change in the information that the statement~~
 27 requires.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Code of Conduct for United States Judges. The 2009 amendments to Canon 3(C)(1)(c) of the Code require recusal only when a judge has an “interest that could be affected substantially

by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “affected substantially by the outcome of the proceeding.”

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance.

Because a filing made after the 28-day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have been revised to refer to a later, rather than a supplemental, filing. The text was also revised to be more concise and to parallel Civil Rule 7.1(b)(2).

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1 **Rule 45. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**

4 Whenever a party must or may act within a specified
 5 time after being served and service is made under
 6 ~~Federal Rule of Civil Procedure~~ 49(a)(4)(C), (D), and
 7 (E)5(b)(2)(C) (mailing), (D) (leaving with the clerk),
 8 ~~or (F) (other means consented to)~~, 3 days are added
 9 after the period would otherwise expire under
 10 subdivision (a).

Committee Note

Rule 49 previously required service and filing in a “manner provided” in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain means of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

1 **Rule 49. Serving and Filing Papers**

2 **(a) Service on a Party.**

3 **(1) ~~What is~~When Required.** ~~A party must serve on~~
4 ~~every other party.~~ Each of the following must be
5 served on every party: any written motion (other
6 than one to be heard ex parte), written notice,
7 designation of the record on appeal, or similar
8 paper.

9 **~~(b) How Made.~~** ~~Service must be made in the manner~~
10 ~~provided for a civil action.~~

11 **(2) *Serving a Party's Attorney.*** Unless the court
12 orders otherwise, ~~W~~hen these rules or a court
13 order requires or permits service on a party
14 represented by an attorney, service must be made
15 on the attorney instead of the party, ~~unless the~~
16 ~~court orders otherwise.~~

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17 **(3) Service by Electronic Means.**18 (A) Using the Court's Electronic-Filing System.

19 A party represented by an attorney may
20 serve a paper on a registered user by filing
21 it with the court's electronic-filing system.

22 A party not represented by an attorney may
23 do so only if allowed by court order or local
24 rule. Service is complete upon filing, but is
25 not effective if the serving party learns that
26 it did not reach the person to be served.

27 (B) Using Other Electronic Means. A paper
28 may be served by any other electronic
29 means that the person consented to in
30 writing. Service is complete upon
31 transmission, but is not effective if the
32 serving party learns that it did not reach the
33 person to be served.

- 34 **(4) Service by Nonelectronic Means.** A paper may
35 be served by:
- 36 (A) handing it to the person;
- 37 (B) leaving it:
- 38 (i) at the person's office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or
- 42 (ii) if the person has no office or the office
43 is closed, at the person's dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;
- 47 (C) mailing it to the person's last known
48 address—in which event service is
49 complete upon mailing;

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50 (D) leaving it with the court clerk if the person
51 has no known address; or

52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.

57 **(b) Filing.**

58 **(1) *When Required; Certificate of Service.*** Any
59 paper that is required to be served must be filed
60 no later than a reasonable time after service. No
61 certificate of service is required when a paper is
62 served by filing it with the court's electronic-
63 filing system. When a paper is served by other
64 means, a certificate of service must be filed with
65 it or within a reasonable time after service or
66 filing.

67 **(2) Means of Filing.**

68 (A) Electronically. A paper is filed
69 electronically by filing it with the court's
70 electronic-filing system. A filing made
71 through a person's electronic-filing account
72 and authorized by that person, together with
73 the person's name on a signature block,
74 constitutes the person's signature. A paper
75 filed electronically is written or in writing
76 under these rules.

77 (B) Nonelectronically. A paper not filed
78 electronically is filed by delivering it:
79 (i) to the clerk; or
80 (ii) to a judge who agrees to accept it for
81 filing, and who must then note the
82 filing date on the paper and promptly
83 send it to the clerk.

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84 **(3) Means Used by Represented and Unrepresented**85 **Parties.**

86 (A) Represented Party. A party represented by
87 an attorney must file electronically, unless
88 nonelectronic filing is allowed by the court
89 for good cause or is allowed or required by
90 local rule.

91 (B) Unrepresented Party. A party not
92 represented by an attorney must file
93 nonelectronically, unless allowed to file
94 electronically by court order or local rule.

95 **(4) Signature.** Every written motion and other
96 paper must be signed by at least one attorney of
97 record in the attorney's name—or by a person
98 filing a paper if the person is not represented by
99 an attorney. The paper must state the signer's
100 address, e-mail address, and telephone number.

101 Unless a rule or statute specifically states
102 otherwise, a pleading need not be verified or
103 accompanied by an affidavit. The court must
104 strike an unsigned paper unless the omission is
105 promptly corrected after being called to the
106 attorney's or person's attention.

107 **(5) Acceptance by the Clerk.** The clerk must not
108 refuse to file a paper solely because it is not in
109 the form prescribed by these rules or by a local
110 rule or practice.

111 **(c) Service and Filing by Nonparties.** A nonparty may
112 serve and file a paper only if doing so is required or
113 permitted by law. A nonparty must serve every party
114 as required by Rule 49(a), but may use the court's
115 electronic-filing system only if allowed by court order
116 or local rule.

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117 ~~(e)~~**(d) Notice of a Court Order.** When the court issues an
118 order on any post-arraignment motion, the clerk
119 must ~~provide notice in a manner provided for in a~~
120 ~~civil action~~serve notice of the entry on each party as
121 required by Rule 49(a). A party also may serve
122 notice of the entry by the same means. Except as
123 Federal Rule of Appellate Procedure 4(b) provides
124 otherwise, the clerk's failure to give notice does not
125 affect the time to appeal, or relieve—or authorize the
126 court to relieve—a party's failure to appeal within
127 the allowed time.

128 ~~(d)~~**Filing.** A party must file with the court a copy of any
129 ~~paper the party is required to serve. A paper must be~~
130 ~~filed in a manner provided for in a civil action.~~

131 ~~(e)~~**Electronic Service and Filing.** A court may, by local
132 ~~rule, allow papers to be filed, signed, or verified by~~
133 ~~electronic means that are consistent with any technical~~

134 ~~standards established by the Judicial Conference of~~
135 ~~the United States. A local rule may require electronic~~
136 ~~filing only if reasonable exceptions are allowed. A~~
137 ~~paper filed electronically in compliance with a local~~
138 ~~rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party

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represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, “Each of the following must be served on every party” restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the “unless” clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals,

filers who often lack reliable access to the internet or email. Although access to electronic-filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic-filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve,

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and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing “in a manner provided for in a civil action” has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state “Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.” A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court’s electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court’s electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court’s electronic-filing system and includes a provision, drawn from the Civil Rule, stating that a filing made through a person’s electronic-filing account and authorized by that person, together with the person’s name on a signature block, constitutes the person’s signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(e), providing that e-filed papers are “written or in writing,” deleting the words “in compliance with a local rule” as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court’s electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by

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unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word “party” changed to “person” in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court’s electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former

language requiring that notice be provided “in a manner provided for in a civil action” has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(b).

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

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:**

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 12.4, 45, and 49, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2016.

Rule 12.4 (Disclosure Statement)

Criminal Rule 12.4 governs the parties’ disclosure statements. When Rule 12.4 was added in 2002, the committee note stated that “[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a ‘financial interest in the subject matter in controversy.’ Code of Judicial Conduct, Canon 3C(1)(c) (1972).”

When Rule 12.4 was promulgated, the Code of Conduct for United States Judges treated all victims entitled to restitution as parties. As amended in 2009, the Code no longer treats any victim who may be entitled to restitution as a party, and requires disclosure only when the judge has an “interest that could be affected substantially by the outcome of the proceeding.” The proposed amendment to Rule 12.4(a) aims to make the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments. The proposed amendment allows the court to relieve the government’s burden of making the required disclosures upon a showing of “good cause.” The amendment will avoid the need for burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small.

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

Rule 12.4(b) would also be amended. First, the proposed amendments specify that the time for making the disclosures is within 28 days after the defendant's initial appearance. Second, it revises the rule to refer to "later" (rather than "supplemental") filings. As published, the proposal included a third amendment adding language to make clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were submitted. One stated that the proposed changes were unobjectionable. The other suggested that the phrase "good cause" should be limited to "good cause related to judicial disqualification." The advisory committee fully considered this suggestion, but concluded that in context the amendment was clear as published.

Following the public comment period, the advisory committee learned that the proposed clarifying language in subsection (b) would be inconsistent with language used in Civil Rule 7.1(b)(2). To make the language in the parallel rules consistent, the advisory committee revised its proposed amendment to Rule 12.4(b)(2) to require a party to "promptly file a later statement if any required information changes."

Rules 49 (Serving and Filing Papers) and 45 (Computing and Extending Time)

The proposed amendments to Criminal Rule 49 and a conforming amendment to Rule 45(c) are part of the inter-advisory committee project to develop rules for electronic filing, service, and notice. The decision by the Advisory Committee on Civil Rules to pursue a national rule mandating electronic filing in civil cases required reconsideration of Criminal Rule 49(b) and (d), which provide that service and filing "must be made in the manner provided for a civil action," and Rule 49(e), which provides that a local rule may require electronic filing only if reasonable exceptions are allowed.

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

In its consideration of the issue, the advisory committee concluded that the default rule of electronic filing and service proposed by the Advisory Committee on Civil Rules could be problematic in criminal cases. Therefore, with the approval of the Standing Committee, the advisory committee drafted and published a stand-alone criminal rule for filing and service that included provisions for electronic filing and service.

Substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5 include the provisions regarding unrepresented parties—under proposed Rule 49, an unrepresented party must file non-electronically, unless permitted to file electronically by court order or local rule. In contrast, under proposed Civil Rule 5, an unrepresented party may be required to file electronically by a court order or local rule that allows reasonable exceptions. Proposed Rule 49 also contains two provisions that do not appear in Civil Rule 5, but were imported from other civil rules: it incorporates the signature provision of Civil Rule 11(a); and substitutes the language from Civil Rule 77(d)(1), governing the clerk’s duty to serve notice of orders, for the direction in current Rule 49 that the clerk serve notice “in a manner provided for in a civil action.”

Proposed Rule 49 also requires all nonparties, represented or not, to file and serve non-electronically in the absence of a court order or local rule to the contrary. If a district decides that it would prefer to adopt procedures that would allow all represented media, victims, or other filers to use its electronic filing system, that remains an option by local rule.

A conforming amendment to Rule 45 eliminates cross-references to Civil Rule 5 that would be made obsolete by the proposed amendments to Rule 49. The proposed conforming amendment replaces those references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

Following the public comment period, the advisory committee reviewed both the public comments on Rule 49 specifically, as well as the comments that implicated the common provisions of the electronic service and filing across the federal rule sets. In response to those comments, the advisory committee revised two subsections in the published rule and added a clarifying section to another portion of the committee note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required, as well as certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised during inter-committee discussions. The published criminal rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed “within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court’s electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court’s electronic filing system, the certificate must be filed “within a reasonable time after service or filing, whichever is later.” Because that might be read as barring filing of the certificate with the paper, subsection (b)(1) was revised to state that the certificate must be filed “with it or within a reasonable time after service or filing.”

The second change revised the language of the signature provision in proposed Rule 49(b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. In consultation with the other advisory committees, minor revisions were made to clarify this provision.

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

In response to concerns expressed by clerks of court, a clarifying sentence was added to the committee note to Rule 49(a)(3) and (4) stating that “[t]he rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

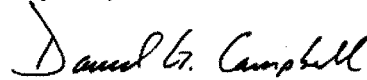
The advisory committee also considered, but declined to adopt, recommendations by some commentators that it extend the default of electronic filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to electronic filing was considered extensively during the drafting process and after publication. The advisory committee adhered to its policy decision and made no further changes following publication.

The Standing Committee voted unanimously to support the recommendations of the advisory committee.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 12.4, 45, and 49 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Gregory G. Garre	Rod J. Rosenstein
Daniel C. Girard	Amy J. St. Eve
Susan P. Graber	Larry D. Thompson
Frank M. Hull	Richard C. Wesley
Peter D. Keisler	Jack Zouhary

Excerpt from the May 19, 2017 Report of the Advisory Committee on Criminal Rules

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

DAVID G. CAMPBELL
CHAIR
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SECRETARY

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CIVIL RULES
DONALD W. MOLLOY
CRIMINAL RULES
WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure
FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules
RE: Report of the Advisory Committee on Criminal Rules
DATE: May 19, 2017

I. Introduction

The Advisory Committee on Criminal Rules met on April 28, 2017, in Washington, D.C. This report presents five action items. The Committee unanimously recommends that the Standing Committee approve and transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) Rule 49 (filing and service),
- (2) Rule 45(c) (conforming amendment), and
- (3) Rule 12.4 (government disclosure of organizational victims).

* * * * *

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II. Action Item: Rule 49

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. Because Rule 49(b) and (d) currently provide that service and filing be made in the "manner provided for a civil action," the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. With the approval of the Standing Committee, the Advisory Committee drafted and published a stand-alone Criminal Rule for filing and service that included provisions for e-filing and service. Parallel amendments providing for e-filing and service are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees. All were published for public comment in August of 2016.

The Committee reviewed the public comments received on the Criminal Rules, as well as comments that implicated common provisions. In response, the Committee revised two subsections in the published rule, and added a clarifying section to another portion of the Committee Note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required and certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised by the reporters and Advisory Committees. The published Criminal Rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed "within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court's electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court's electronic filing system the certificate must be filed "within a reasonable time after service of filing, whichever is later." Because that might be read as barring filing of the certificate with the paper, (d)(1) was revised to state that the certificate must be filed "with it or within a reasonable time after service or filing." Parallel changes have been recommended for Civil Rule 5(d).

The second change revised the language of (b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. The revised language, which is also proposed for Civil Rule 5, states:

An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, serves as the person's signature.

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One clarifying change was made to the Committee Notes to Rule 49(a)(3) and (4) and Civil Rule 5. In response to concerns expressed by clerks of court, a sentence was added to the Note stating that “The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

The Committee also considered, but declined to adopt, public comments recommending that it extend presumptive e-filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to e-filing was considered extensively during the drafting process, and the Committee was not persuaded that the comments warranted a change.

The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 49 governing service and filing in criminal cases, and the Committee Note, for submission to the Judicial Conference.

III. Action Item: Conforming Amendment to Rule 45

No comments were received on the published amendment revising cross references that would be made obsolete by the proposed amendment of Rule 49. Although this is a technical and conforming amendment, it was published with Rule 49 to avoid any concern that might arise. The Committee made no changes following publication.

The Committee unanimously recommends that the Standing Committee approve the proposed conforming amendment to Rule 45 governing computing and extending time, and the Committee Note, for submission to the Judicial Conference.

IV. Action Item: Rule 12.4

The proposed amendment to Rule 12.4, which governs the parties’ disclosure statements, was initially recommended by the Department of Justice. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the Committee Note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest “that could be substantially affected by the outcome of the proceedings.”

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of making the required disclosures upon a showing of “good cause.” The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. The published amendment also made changes in

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Rule 12.4(b): (1) specifying that the time for making the disclosures is within 28 days after the initial appearance; (2) revising the rule to refer to “later” (rather than “supplemental”) filings; and (3) making clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were received. One stated that the proposed changes were unobjectionable. The other suggested that the phrase “good cause” should be limited to “good cause related to judicial disqualification.” The Committee declined to make that change, concluding that in context the amendment was clear.

The Committee was also made aware of concerns that its proposed clarifying language in 12.4(b) would be inconsistent with the language in Civil Rule 7.2(b)(1). The Committee concluded that clarification was not necessary, and that it would be desirable to track the language now in the Civil Rule. A motion to revise the published amendment to adopt the language drawn from Civil Rule 7.2(b)(1) was approved unanimously. As revised, Criminal Rule 12.4(b)(2) requires a party to “promptly file a later statement if any required information changes.”

The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 12.4 governing disclosure statements in criminal cases, and the Committee Note, for submission to the Judicial Conference.

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