ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 4-5, Washington D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met Washington D.C. on November 4-5, 2014. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Hon. Leslie Caldwell[1]
Judge Morrison C. England, Jr.
Judge James C. Dever
Judge Gary Feinerman Mark
Filip, Esq. (Nov. 5 only)
Chief Justice David E. Gilbertson
Professor Orin S. Kerr
Judge Raymond Kethledge
Judge David M. Lawson
Judge Timothy R. Rice
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Laural L. Hooper, Federal Judicial Center
Jonathan C. Rose, Rules Committee Officer
Julie Wilson, Rules Office Attorney

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new members Judge James C. Dever, Judge Gary Feinerman, Judge Raymond Kethledge, and Leslie Caldwell, the new Assistant Attorney General for the Criminal Division. She welcomed observers Peter Goldberger of the National Association of

[1] The Department of Justice was represented at various times throughout the meeting by Leslie Caldwell, Assistant Attorney General for the Criminal Division; Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division; David Bitkower, Deputy Assistant Attorney General for the Criminal Division; and Jonathan Wroblewski, Director, Office of Policy and Legislation in the Criminal Division.

Criminal Defense Lawyers and Catherine Recker of American College of Trial Lawyers. Judge Raggi noted that Jonanthan Rose had indicated he might not be able to attend the March meeting and she therefore wished to thank him for his service now in the event she could not do it then. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

For the benefit of new members, Judge Raggi reviewed the process by which the Committee considered new or amended rules of procedure and how its recommendations then proceeded to the Standing Committee on the Federal Rules, the Judicial Conference of the United States, the Supreme Court, and Congress.

B. Review and Approval of Minutes of April 2014 Meeting

A motion to approve the minutes of the April 2014 Committee meeting in New Orleans, having been seconded:

The Committee unanimously approved the April 2014 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Jonathan Rose reported that the proposed amendments to the following Criminal Rules were approved by the Supreme Court and transmitted to Congress and will take effect on December 1, 2014, unless Congress acts to the contrary:

Rule 12. Pleadings and Pretrial Motions
Rule 34. Arresting Judgment
Rule 5. Initial Appearance
Rule 58. Petty Offenses and Other Misdemeanors
Rule 6. The Grand Jury

D. Proposed Amendments Published for Comment

The comment period for the proposed amendments to the following rules concludes February 17, 2015. Committee action on these amendments will be deferred until the spring meeting, following the close of the comment period.

Rule 4. Arrest Warrant or Summons on a Complaint
Rule 41. Search and Seizure
Rule 45. Computing and Extending Time; Time for Motion Papers

Judge Raggi reported that the only comment received to date on the proposed amendment to Rule 4 was supportive. A member reported that those to whom he had spoken about the amendment were satisfied that their earlier expressed concerns were addressed by the language

of the published rule. Many comments have been received on Rule 41, and the Committee would conduct a hearing on that rule on November 5. No comments have been received to date on the proposed amendment to Rule 45.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 11

Judge Raggi asked Judge England, Chair of the Rule 11 Subcommittee, to report on the Subcommittee's review of the proposal from Chief Judge Claudia Wilken of the Northern District of California to amend Rule 11 to state that it did not prevent trial judges from referring criminal cases to other judicial officers for the purpose of exploring settlement.

Judge England summarized the proposal and the Subcommittee's work, also described in the memorandum to the Committee in the agenda book. He reported that at least six districts had engaged in settlement conferences before the Supreme Court's decision in *United States v. Davila*, 133 S.Ct. 2139 (2013), indicated that this practice violated Rule 11. He noted that the Committee had already considered, and not acted favorably on, three prior proposals to approve judicial participation in settlement conferences or plea bargaining. He summarized concerns raised by the proposal, including (1) judicial intrusion on the prosecutorial role of the executive, (2) adverse effects on judicial impartiality if a judge is privy to plea negotiations, and (3) the risk of coercing defendants into plea dispositions that they would otherwise not accept.

Judge England reported that the Subcommittee met twice by telephone, and on the second occasion heard directly from Chief Judge Wilken. The Subcommittee also considered memoranda from the Committee's Reporters and from the Department of Justice. The Subcommittee was unable to reach consensus as to how to proceed and sought full Committee discussion to learn whether the proposal should be pursued.

Subcommittee members were then invited to comment.

A subcommittee member reported on an informal survey of eight federal defenders from the districts where judicial officers had participated in settlement conferences. These defenders unanimously thought the practice was valuable and should be permitted. They reported that it was used very rarely, and they did not feel judicial pressure or interference. They mentioned its most frequent use in three types of cases: (1) large, complex cases, particularly those in which the government was seeking a global disposition by all defendants; (2) cases in which parties were close to agreement on disposition but could not quite get there on their own; and (3) cases where parties wanted a plea disposition but were far apart. Judicial involvement was also helpful in rare cases when a defendant was not heeding his attorney and needed to hear the reality of his situation from a neutral third party. The surveyed defenders reported no cases in which a settlement conference failed to produce an acceptable plea agreement. To the extent defenders feel that circumstances such as mandatory minimum sentences and the Sentencing Guidelines slant the "playing field" in favor of the government, they view judicial involvement in plea negotiations as something that helps level the field. The subcommittee member characterized judicial involvement in plea negotiations as a useful tool that each district could

decide if and how to use.

Another subcommittee member reported that surveyed prosecutors in the districts where judges participated in settlement discussions had mixed reactions, with the vast majority opposed, mostly because they felt the process was designed to put pressure on both the defendant and the prosecution to come to an agreement and to avoid trial. In some cases this is uncomfortable for all parties, and not a healthy dynamic. The member emphasized that the vast majority of cases are already disposed of by plea, so there is no urgent need for the procedure to ensure efficient use of court resources.

A third subcommittee member also expressed concern about the potential for coercion on both parties. When there is a global plea offer that one defendant is reluctant to accept, judicial involvement could exert tremendous pressure on that defendant. This concern can be minimized somewhat by not allowing the trial judge to become involved in the plea negotiation. But a referral judge will not be as familiar with the evidence and the strengths or the weaknesses of the case. The effort necessary for the referral judge to familiarize herself with the case will reduce the efficiencies cited to support the process. The member also agreed with concerns about separation of powers, judicial neutrality, and the perception that this is more a docket management tool than one focused on securing a "right outcome."

A subcommittee member reported that the practice is not followed in this member's district. Despite the government's concerns, this member was of the opinion that if the procedure is limited to cases where there has been a joint request by parties who agree that they need help, it is a good idea for a judge not involved in the case to provide help. State courts have been doing this for years, and the Committee can build sufficient safeguards into a rule to avoid possible abuse.

Another subcommittee member opposed the proposal on three grounds. First, the need for a rule change had not been demonstrated. If there is no significant difference in guilty plea rates as between districts that do and do not involve judges in plea bargaining, why amend the Rule? If defendants now feel coercion to plead from the prosecutor, exposing them to pressure from a judge is not a good idea. Second, although judges routinely mediate civil cases to encourage settlement, criminal cases are different. The former can often be resolved with monetary compensation, while what is at stake in the latter is liberty. The role played by the judiciary in the criminal process thus needs to be purely neutral. Third, there may be troubling consequences if dissatisfied defendants challenge convictions based on judicial conduct in plea negotiations Will judges have to testify regarding what was said at the conference? Must there be a transcript of what goes on? If there is a transcript, will people speak as freely about offers and demands, and, if they do not, will that compromise the process? In sum, even if judicial

involvement in plea bargaining might increase dispositions in some cases, the member concluded that efficiency should not drive the decision to adopt an amendment.

Another subcommittee member stated that even if there is no constitutional prohibition on judicial involvement in the plea process, a risk remains that, at some point, judicial participation can cross the line and interfere with the voluntariness of the plea. How will the judge accepting the plea know whether that line was crossed in the settlement conference?

A subcommittee member saw no need for this procedure, which no court in his circuit employs. The clarity of the present rule is beneficial; judges know what they can and cannot do. Even a true joint request does not eliminate concerns about the independence of the executive's prosecutorial role. This member was also concerned about how the process might work. In cases in which the plea is not pursuant to an agreed-upon Rule 11(c)(1)(C) sentence, any defendant who receives a more severe sentence than that discussed with the settlement judge will be upset and likely try to challenge his conviction. A Magistrate Judge might say a certain sentence would be fair based on the information available at the settlement conference, but later at sentencing the District Judge who received the presentence report (PSR) would have more information and might impose a higher sentence. This will result in an appeal or a 2255 motion. There are also practical issues about either transcribing the conferences or later requiring a Magistrate Judge to submit an affidavit stating what he or she said.

Judge Raggi then reminded the Committee of the specific language of Judge Wilken's proposal and opened the floor for discussion by all Committee members. She noted that it would be particularly helpful to hear whether members who favored the proposal thought the Committee should set safeguards in a rule or whether that should be left to each district that chose to involve judges in plea bargaining. Specifically, should a rule require that settlement conferences be recorded and that the defendant be present? Should a rule indicate whether statements made during negotiations can or cannot be used at any subsequent proceeding?

A Committee member stated that defense attorneys did not have a problem with Judge Wilken's proposal. He noted that the dynamic in criminal cases is different from that in civil cases, where the dispute is often about money, and the parties are eager to have a neutral intermediary help them reach a reasonable settlement. Nevertheless, in criminal cases, defendants often have difficulty accepting the reality of what they have done and what they are facing. At the point of charging and plea, counsel is sometimes helping a defendant pass from someone with no record and a good self-image, to someone who admits he has been guilty of a criminal offense. It is a very emotional and trying experience. Having a third party assist with that transition can be very helpful. There are times when the defense wants help, and if the government consents, why not make this process available to help some defendants with this transition? Maybe the practical difficulties are too difficult to overcome, but the Committee should consider the proposal further.

When another Committee member asked what a judge could do in this situation to help, other than suggest a better offer for the defense, the member responded that when a client has a crisis of confidence in his attorney, just hearing counsel's position reiterated by someone else helps.

A Committee member asked how the referral judge will be sufficiently educated about a case to make an informed plea recommendation. A Subcommittee member responded that some federal defenders write memos for the judge laying everything out. The member was not sure whether that memo also goes to the prosecution, but assumed it does. The settlement judge's main contribution is not providing sentencing information. Defenders reported that the Magistrate Judges conducting these sessions were prior defense attorneys or prosecutors, and are able to comfort the defendant in a way that his attorney cannot. The member emphasized that settlement conferences are not used for clients who are maintaining their innocence; no attorney would agree to it in that situation. It is helpful for a client who has authorized plea discussions, or who says, "I want to see what is out there, but I don't know how."

Another Committee member expressed concern and skepticism, noting how simple it was for a judge to telegraph a preference for plea negotiations, thereby overcoming the safeguard of joint consent. Counsel appearing frequently before the court would be motivated to conform to the apparent wish of the referring judge for a settlement conference or to the recommendation of the referral judge. The member stated that he did not understand how judges are supposed to help with the "transition" defense counsel are talking about.

A Subcommittee member stated that there is already tremendous pressure under the Guidelines to plead guilty in order to get acceptance of responsibility consideration.

A Committee member reported that in state court, judges have long participated in plea negotiations, and it did not produce more appeals or habeas petitions perhaps because the process is initiated by the lawyers, the defendant has bought into the process, and it is always about sentencing.

A Subcommittee member noted a significant difference between state and federal criminal proceedings. The member expressed concern about cases in which a District Judge did not agree with the Magistrate Judge who conducted the settlement conference. The member also voiced concern about conferences at which the defendant was not present or that were not on the record. Acknowledging that judges in some districts had used the practice and favored it, the member nevertheless stated that he did not see the need for it.

Another Subcommittee member stated that the point of negotiating an agreement is to come to an agreement. But the sentencing judge has to be part of the process for there to be a true agreement. In the courts of the member's state it is common for the parties to have a conversation with the judge about sentence and to get an indication from the judge about the likely sentence. This process works because the parties are dealing directly with the decision

maker. In the proposal for the federal system, however, the ultimate decision maker would not conduct the conference, and the member opined that will not work.

Judge Raggi advised the Committee that District Judge Jed Rakoff of the Southern District of New York had recently published an article (copies of which were circulated to the Committee) that, inter alia, also advocated judicial involvement in plea bargaining. But unlike the N.D. Cal. proposal, which emphasized that such involvement facilitated guilty pleas, Judge Rakoff urged judicial involvement to counter what he perceived as too many guilty pleas, including guilty pleas from "innocent" persons, which he attributed in part to the inadequate plea allocutions conducted by "most judges." Judge Raggi noted her own disagreement with the last assertion and observed that, even if such a concern were warranted, it was not apparent that the solution to that problem was to get another judicial officer involved in plea negotiations.

Judge Raggi then suggested that the Committee consider whether to pursue the pending proposal by reference to two questions, focusing first the threshold inquiry for all rules amendments -- Is there a problem that needs to be addressed by a rule?—and second, Would the benefits of the proposed rule outweigh any concerns?

As to need, the N.D. Cal. proposal urged an amendment to Rule 11 to facilitate plea dispositions, particularly in complex cases. Judge Raggi noted that the national guilty plea rate is over 95% (a number that had climbed steadily in recent decades), and that districts urging judicial involvement in plea negotiations were right in the mainstream. So there appears to be no problem of courts being overwhelmed with trials that needs to be addressed by amending Rule

Thus, the benefits of the amendment would seem to apply in only a small number of cases.

Turning to concerns, Judge Raggi attempted to summarize the concerns raised in memoranda received by the Committee and in the Committee discussions.

1. Separation of Powers. The responsibility for prosecuting crimes---which includes discretion to decide what crimes to charge and the pleas satisfactory to dispose of the charges---vests in the Executive branch, just as the responsibility for sentencing vests in the judiciary. Should the judiciary assign itself a role in the former area?

2. Competency. How equipped are judicial officers to make sound plea recommendations, given the need for a thorough knowledge of the case and its context? Acquisition of such knowledge may require a substantial expenditure of resources (both by judges and probation departments). Thus, predictions that judicial plea bargaining will save resources in an area of judicial competence (trials) must be considered in light of increased demands on resources in an area of lesser competence (crafting plea bargains.

3. Transforming Judicial Role. The neutrality that characterizes the judicial rule is nowhere more important---as a matter of fact and of perception---than in criminal cases. That neutrality must be manifested by every judicial officer whom the defendant encounters. Will that

neutrality by undermined once any judicial officer is seen as urging a particular disposition? Will that concern be aggravated if the judicial recommendation matches that of the prosecution?

4. Intrusion on Attorney-Client Relationship. This may be mitigated by the parties' consent. Nevertheless, having judges reinforce or undermine the recommendation made by counsel intrudes on the attorney-client relationship in a way that warrants pause. Further, to the extent it has been suggested that judicial involvement in plea bargaining is helpful because many defendants do not "trust" court-appointed lawyers and will be more inclined to accept recommendations from a neutral judge, query how likely it is that a defendant who does not trust his appointed attorney will trust the judge who appointed his attorney?

5. Legal and Ethical Considerations.

- Does defendant have a right to be present for plea negotiations. It had not been N.D. Cal. practice to require.
- What protections should be afforded defendant for statements he or counsel make to the judicial officer in settlement discussions?
- Are there limits on what the judge can say? Can the judge ask about guilt?
- If defendant or counsel maintains innocence, can a judge ever recommend a guilty plea?
- If defendant later testifies contrary to what he or counsel said during conference what are the referral judge's responsibilities regarding perjury?
- Although the N.D. Cal. had not required settlement conferences to be recorded, query whether any contact between a judicial officer and a criminal defendant should be "off the record." Does a record of the conference stifle candor?

6. Accepting a Guilty Plea. To the extent proponents contemplate that plea negotiations are not revealed to the trial judge, does this apply only if the case proceeds to trial? If negotiations result in a guilty plea, can a trial judge responsibly conclude that the plea is knowing and voluntary without reviewing the record of proceedings before the referral judge? Consider this in light of the error in Davila, which rendered the plea involuntary.

7. Increased Litigation. Will defendants who now invariably bring collateral challenges to conviction based on the ineffective assistance of counsel likely find fault with the conduct of judicial officers during plea negotiations, giving rise to increased litigation about judicial promises or coercion?

Judge Raggi indicated that she herself thought that these concerns, along with the advantages of uniformity, far outweighed the benefits of the proposed amendment.

The Committee's Liaison member opined that having a judge than the sentencing judge

making recommendations about sentencing is asking for trouble. The referral judge will not have the benefit of the PSR, an important document to give a full picture of the defendant. Sometimes the PSR raises criminal history points that the parties may not know about, and the settlement judge would not have the benefit of that information. In addition, judges have different views of sentencing, and may not agree with one another on the appropriate sentence. Plus, whatever efficiency you get on the front end, you will lose on the 2255 end. The member did not want to see judges having to submit affidavits. Finally, the member expressed concern with allowing diverse district practices respecting guilty pleas. The Standing Committee has traditionally favored uniformity on major issues.

Professor Coquillette agreed that the Standing Committee has been concerned about local rules on matters where judicial procedures should be uniform throughout the courts. Congress has also expressed concern that local rules might be used to evade its power to review rules pursuant to the Rules Enabling Act. Thus, local rules may be appropriate when they reflect real demographic or geographic differences between districts, but nothing has been said about why certain districts have a special need for the proposed settlement procedure.

A Committee member questioned how the process would work. Would the defendant be promised a particular sentence during the settlement conference? At the plea colloquy, before the defendant says "yes I am guilty," does the judge accept the agreement reached at the conference, including the sentence expected by defendant? Members agreed that the process would play out differently in cases in which the parties agreed to an 11(c)(1)(C) plea. Some thought judicial involvement would pose fewer problems in such cases because the sentencing judge would not need to know about the give and take during the negotiation. On the other hand, any 11(c)(1)(C) plea must be accepted by the sentencing judge, and injecting a second judge into this process could create problems. A member noted that in one district in New York, 11(c)(1)(C) pleas are unusual, disfavored, and subject to a special review in the U.S. Attorney's Office. That USAO has a committee that reviews all 11(c)(1)(C) proposals before submitting them for approval by the United States Attorney. This process ensures uniformity within a large office, something that could be adversely affected if a judge were to participate in the plea process, and make a recommendation before committee and U.S. Attorney review.

Another member observed that under current practice the District Judge would be telling only the United States Attorney that she is not prepared to accept the plea agreement, but with the proposed amendment, that judge could be telling another judicial officer she is not prepared to accept what that referral judge had agreed to.

With discussion concluded, Judge Raggi asked the Committee to vote on the question of whether the Rule 11 Subcommittee should be asked further to consider Chief Judge Wilken's proposal to amend Rule 11.

The question of whether to pursue further the proposal to amend Rule 11 was put the Committee; it failed with 4 in favor and 6 opposed to continued consideration.

B. Proposed Amendment to Rule 52

Judge Raggi invited Judge Kethledge, Chair of the Rule 52 Subcommittee, to report the Subcommittee's recommendation regarding the proposal from Judge Jon Newman of the Second Circuit Court of Appeals to amend Rule 52 to allow for review of defaulted sentencing errors without satisfying the requirements of plain error if the error caused prejudice and correction would not require a new trial.

Judge Kethledge summarized the proposal and the questions addressed by the Subcommittee and detailed in the Reporters' Memorandum to the Committee included in the agenda book. These questions focused on the frequency with which sentencing errors are not being corrected under the present rule; the scope of the proposal, particularly which types of error would be included; and the extent to which the proposal would generate additional litigation in circuit and district courts. Judge Kethledge noted the Subcommittee's receipt of a memorandum from the Department of Justice responding to the proposal, and that the deliberations of the Subcommittee were informed by the perspective of trial judges and defense attorneys, as well as the government. At the end of its first telephone meeting, the Subcommittee was skeptical of the proposal, but scheduled a second telephone meeting to hear from Judge Newman. Before that call, Judge Newman provided the Subcommittee with a memorandum responding to the points raised by the Department of Justice and revising his proposal to apply only to sentencing errors that increased a defendant's sentence. After hearing from Judge Newman, the Subcommittee discussed the proposal further, and ultimately voted unanimously to recommend that the Committee not take any action on the proposal.

Judge Kethledge explained that the Subcommittee determined that there was not enough of a problem to warrant an amendment. Judge Newman identified a handful of cases in which, he argued, his proposal would have changed the outcome. The Subcommittee was not convinced it would have made a difference in all those cases. As to Guidelines calculation errors increasing sentences, most of those are being corrected on plain error review. Even if there are a small number of cases where this is not happening, the Subcommittee considered the benefit of a rule amendment outweighed by the additional litigation regarding the exception's reach and the causation question of whether a judge would have imposed a lesser sentence but for the Guidelines error. The Subcommittee also discussed whether the proposed amendment could create incentives for counsel to be less vigilant in raising sentencing errors in the district court. Finally there were questions about how receptive the Supreme Court would be to the proposed amendment in light of its decision in *Puckett v. United States*, 556 U.S. 129 (2009), applying the plain error test of *United States v. Olano*, 507 U.S. 725 (1993) and Rule 52(b) to errors in the plea process.

Thus, after extensive discussion, the Subcommittee unanimously agreed to recommend no further action on the proposal.

The Committee then voted unanimously not to pursue the proposal to amend Rule 52.

Judge Raggi thanked both the Rule 11 and Rule 52 Subcommittees and the reporters for the work they had put into considering both proposals for amendment. She also noted that Chief Judge Wilken and Judge Newman seemed appreciative of the opportunity to be heard orally and in writing by the Subcommittees.

C. Proposal to Amend Habeas Rule 5

Professor Beale described a request received from District Judge Michael Baylson of the Eastern District of Pennsylvania for the Committee to consider amending Rule 5 of the Rules Governing 2254 Proceedings to provide that the state is not required to serve a petitioner with the exhibits that accompany an answer unless the District Judge so orders. A discussion ensued regarding whether the proposal should go to a subcommittee.

A member expressed the view that the creation of a subcommittee and further consideration was not warranted. There is no disagreement in the courts on this issue, which expect the state to serve petitioner with all documents accompanying an answer, and the proposed change would generate different practices and less uniformity.

Another member noted that if this proposal is referred to a subcommittee the Department of Justice would want to consider recognizing judicial discretion to order that certain documents not be provided to habeas petitioners, either because they are voluminous or because there is a special concern about releasing certain documents within a correctional facility.

Another member who had worked in the office of a state attorney general stated that it would never have occurred to the attorneys in that office that they could send something to the court that wouldn't also go to the petitioner.

Judge Raggi asked Professor King for her views in light of her extensive scholarship in the area of 2254 motions. Professor King opined that the current rule is not posing a problem. She noted that no concern about the present Rule was being raised by the states' attorneys, who would be the logical ones to complain if there was a problem.

The Committee then voted unanimously not to pursue the proposal to amend Rule 5 of the Rules Governing 2254 Proceedings.

D. CM/ECF

Professor Beale described the work of the CM/ECF Subcommittee of the Standing Committee, on which Judge Lawson is now the Committee's Liaison (replacing Judge Malloy whose term on the Committee has expired). She reported that this Committee will have to decide whether it is time for a uniform, national rule for electronic filing in criminal cases. Criminal Rule 49(e) (which was based on the Civil Rules) presently leaves the question whether to permit

e-filing to local rules. At its October 2014 meeting, the Civil Rules Committee approved a national rule requiring e-filing in all civil cases (with exceptions). Thus, this Committee might create a subcommittee to consider whether to amend Rule 49. Professor Coquillette explained that with the courts moving to the next generation system for electronic filing, there is a lot of experimentation. But it is difficult to get districts to give up a local rule once they have tried it.

Judge Lawson, the liaison to the CM/ECF effort, noted that Criminal Rule 49(b) incorporates the civil rules. If those rules are amended to require e-filing and electronic signatures, that may no longer work for the Criminal Rules. He noted that his district created a set of CM/ECF policies and procedures that can be changed quickly without going through the local rule changing process, in order to adapt to changes in technology more quickly. He also noted it will be important to address these issues in conjunction with the other advisory committees.

Judge Raggi reported she had asked Judge Lawson to chair a new subcommittee that will consider whether the civil rule adequately addresses the concerns in criminal cases to support this Committee's adoption of an identical criminal rule or whether a different electronic filing rule is necessary to address the distinctive needs of criminal cases.

Professor Coquillette stated that the Department of Justice looks at these issues closely, in the past expressing concern about the use of electronic signatures in certain contexts. The views of defense counsel will also be important to defining where carve outs are necessary.

A member responded that the Criminal Division expects to work on this with the entire Justice Department, including investigative agencies, as it did when considering electronic warrants.

E. New Proposal to Amend Rule 35.

Judge Raggi reported that, after the agenda book closed, the Committee received a proposal from the New York Council of Defense Lawyers to amend Rule 35 to afford judges' discretion to reduce sentences after they became final. She asked a member familiar with the proposal to describe it.

The member explained that the proposal would allow a district judge, upon motion, to reduce the sentence of a defendant who had served two thirds of his term in three circumstances: (1) newly discovered scientific evidence cast doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative compassionate release). Another member expressed support for the proposal, noting that this would provide another means for reducing the prison population.

Another member questioned how the proposal would operate in light of temporal statutory limits on collateral review under §§ 2241 and 2255. The member also questioned the Committee's ability to use a procedural rule to authorize sentence reductions below statutorily mandated minimums. At the same time, the member acknowledged that judges with experience

under the old Rule 35 (prior to the Sentencing Reform Act) thought that version of the Rule was beneficial.

Professor Beale reported that the American Law Institute is also considering including a "second look" provision in its draft model sentencing law.

Professor Coquillette stated that the Rules Enabling Act's supersession clause does permit the adoption of rules that supersede existing statutes. But injudicious invocation of that clause may prompt Congress to reconsider it. Thus, the Rules Committees have often pursued a different approach, i.e., sponsored legislation.

A member noted that the proposal intersects with many statutes and policies as well as current pending legislation. For example, a bill just approved by the Senate Judiciary Committee includes a "second look" provision that would apply earlier than the timing of the proposal.

F. New Subcommittees

The Committee adjourned for lunch, and when it reconvened Judge Raggi announced the membership of two new subcommittees:

Rule 35 Subcommittee
Judge Dever, Chair
Ms. Brook
Judge Feinerman
Judge Lawson
Mr. Siffert
Mr. Wroblewski

CM/ECF Subcommittee
Judge Lawson, Chair
Ms. Brook
Judge England
Prof. Kerr Judge
Judge Rice
Mr. Wroblewski

Judge Raggi also announced that Judge Dever would serve as the Committee's liaison to the Evidence Committee, a position formerly held by Judge Keenan, whose term on the Committee expired.

G. Preparation for the Committee's Public Hearing

Judge Raggi then asked the Reporters to provide the Committee with an overview of issues raised in public comments to Rule 41 in preparation for the next day's hearing.

Professor Beale said the issues fell into three categories: (1) whether an alternate venue for remote access searches should be established by rule or by legislation; (2) Fourth Amendment issues as to particularity, the reasonableness of the proposed surreptitious entry into electronic devices, adequate notice, the types of information seized, the nature of the intervention and potential damage to targets and non-targets; and (3) concerns about the unintended effects of remote searches, including unintended damage to both the device to be searched and third parties.

Professor King added that some comments voiced concern that even if Rule 41 is amended only to expand venue, once such an amendment took effect, it would be difficult to litigate the identified constitutional issues.

Judge Raggi asked Professor Kerr to share his views. Professor Kerr stated that every remote access search raised numerous interesting questions beyond the venue issue addressed in the amendment. Some of these questions fall outside the Committee's authority. He noted that the proposed amendment does not affirmatively approve remote access searches, the constitutional status of which is presently unsettled. As for concerns about the adequacy of suppression motions to address all concerns, he observed that not all Title III issues could be raised in a motion to suppress. Some could be litigated only in collateral civil litigation. He thought the comments most helpful to the Committee's work were those that addressed (1) the adequacy of the proposed language about reasonable notice in cases in which a computer is affected by a botnet and the government has obtained a warrant to obtain the IP address, and (2) whether the "concealing" language could be applied more broadly to scenarios beyond those envisioned by the Committee. He also hoped that at the hearing commenters would expand on their concerns about applications of the Computer Fraud and Abuse Act. Professor Kerr observed that although the Justice Department's original proposal had been narrowed considerably by the Committee in the published rule, some of the comments appeared to address the original proposal, not the published rule, or were raising concerns to remote access searches generally. Commenters generally assume that the Committee has approved remote access searches, but the amendment does not do so.

Judge Raggi then asked the Department of Justice member for his views. She noted for the Committee that she had discouraged the Department of Justice from filing a written response to each critical public comment received, urging it to do so only after the November hearing.

Mr. Wroblewski stated that the government acknowledges commenters' legitimate concerns about particularity, nature of entry, ability to find vendors, nature of the procedure, and delayed notice. But those concerns are not implicated by the proposed rule, which only establishes venue. On the question of notice, he indicated that the government provides notice electronically, which when it has only an IP address, is all it can possibly do. He indicated that the government may still have to struggle with notice issues. He also acknowledged that some cases may raise Title III issues. But he noted that a well-established process exists for dealing with these issues if they arise. The government is not trying to avoid those issues, but they are

not part of this proposal. Most of the comments presented interesting questions about the use of various techniques; the use of these techniques is also not really raised by the proposed rule amendment.

A member asked about the Electronic Communications Privacy Act (ECPA), referenced by some commenters. Professor Kerr responded that the ECPA regulates access to remotely stored information, text messages, email, and cloud data. The original proposal presented a possible conflict with the statute because it might have allowed government to go around the provider and, instead, access email accounts directly. But the narrower published rule poses no such concern. If the government does not know where the data is located, the search would not involve data known to be controlled by the provider, so it could not use the ECPA process. And the second prong of the proposed amendment applies to damaged computers.

Professor Beale stated that some of the comments seemed not to understand that the proposed venue amendment did not relieve the government of its constitutional obligation to demonstrate probable cause for a warrant regardless of venue. Thus, the use of technology such as virtual private networks (VPNs) would not support a remote search under the proposed amendment absent probable cause.

Responding to some commenters' concerns that, when a company uses a VPN, the government could get remote access warrant without endeavoring to determine the location of the server, Professor Kerr suggested that the concern was not likely to be a significant issue in practice because it would be easier to find the server location than to do a remote search under the proposed amendment.

Professor Beale added that commenters had also raised concerns about the possible extraterritorial application of warrants issued under the published rule. Is it predictable that the computers to be searched will be outside the U.S.? If so, would this violate MLATs specifically or international law generally? If the foreign country in which the computer is located defines unauthorized access as a crime, could agents carrying out the remote search be charged with crimes by those countries?

Judge Raggi asked whether the government expected to advise United States judges of the possibility that a remote access search could reach beyond this country's borders.

Professor Beale noted that commenters' concern about collateral damage to non-targets, for example, in "watering hole" operations. Might the government exploit vulnerabilities in security protections, affecting computers networked to target computers?

A member observed that these and other concerns about do not seem to be generated by the proposed rule amendment itself, but from a concern that the amendment would increase the likelihood techniques having such effects would be used. In sum, the problems already exist, but the concern is that an amendment would exacerbate them.

Professor Beale also noted that although the proposed rule authorizes searches but not remediation, the government may want to do more than just search. The amendment may make it possible for government to do this in a greater number of cases.

Professor King noted that other rule amendments had established procedures for government conduct whose constitutionality had not yet been conclusively determined. For example, Rule 15 establishes procedures for depositions outside the U.S. where the defendant is not present, even though the admissibility of such a deposition at trial is not established under the Confrontation Clause. Rule 11 requires advice about appellate waivers that might not be deemed valid. Rule 41 established procedures for tracking devices, though at the time of the amendment it was unsettled whether such installations constituted searches subject to the Fourth Amendment. So there are some precedents for the Committee approving a rule of procedure for a process whose constitutionality is not yet settled.

A member noted that the examples just cited were distinguishable in that injury depended on later action (such as the admission of evidence). The injury of concern in the published rule would occur when the search and seizure authorized by the judge in the alternate venue occurs.

Another member noted that the details needed to address the myriad concerns identified by commenters may be more than a procedural rule can handle. But such detail is not needed if we are not attempting to legitimate remote access searches, but merely to provide a procedural framework addressing venue. This might even provoke legislative activity on the larger issues. Perhaps this could be made clearer by having the proposed rule say something such as "a magistrate can issue extraterritorial warrant according to law."

A member suggested that the Committee Note might flag issues raised by commenters, and note that the Committee is not taking any position on them.

Professor Beale responded that the Standing Committee does not want elaborate Committee Notes and generally discourages the citation of cases therein. But she agreed the Committee should be as clear as possible in communicating that the amendment does not foreclose or prejudge any constitutional challenges to remote access searches.

Professor Coquillette added that the philosophy has always been to have each Advisory Committee draft the best rule possible and let the Standing Committee worry about reactions from Congress or the Supreme Court. The Standing Committee has adopted new procedures for previewing rules amendments for the Supreme Court in advance of formal approval by the Judicial Conference, thereby giving the Court more time to consider amendments. He noted two rules philosophies on the Court. One views the Court's promulgation of a rule as a signal of its general constitutionality. The other views promulgation as simply sending the rule forth for application and review on a case-by-case basis. Professor Coquillette observed that the Court now seems to want unanimity on rules it approves. In short, one justice's reservations can defeat a rule.

Professor Beale agreed that although, in the past, some rules were adopted over a justice's dissent, the Supreme Court now generally approves proposed rules only by consensus.

Members agreed on the need for clarity in the Committee Notes. One emphasized the need to disavow any assessment of constitutional issues. Another noted that the Committee may be underestimating the concern about privacy, and public confusion about what the rule does and does not do. The Committee Note needs to make it clear what we are and are not doing.

At the conclusion of this discussion, the meeting adjourned for the day, with the Committee to reconvene on November 5 for public hearings, which were transcribed separately.

Judge Raggi announced that the next regular meeting of the Committee would take place on March 15-16, 2015 at the federal courthouse in Orlando, Florida.