

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

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MEMORANDUM

TO: Hon. 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 17, 2018

I. Introduction

The Advisory Committee on Criminal Rules met on April 24, 2018, in Washington, D.C. This report presents two action items. The Committee unanimously recommends that the Standing Committee transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) New Rule 16.1 (pretrial discovery conference), and
- (2) Amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings (right to file a reply).

The report also discusses several other information items, including the Committee's decision to undertake a full review of proposals to bring pretrial discovery concerning expert witnesses under Criminal Rule 16 closer to that required by Civil Rule 26.

II. Action Item: New Rule 16.1

Proposed new Rule 16.1 has its origins in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “gigabytes of information.” The Committee’s work on the proposal revealed that discovery issues involving electronically stored information (ESI) could be adequately addressed in most cases by an early discussion between counsel, and were not limited to “complex” cases, or cases with a high volume of ESI. Accordingly, the proposed rule is not limited to such cases, and provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified.

The proposed amendment is not included in Rule 16 itself, but would instead be a new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the Committee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The new rule has two sections.

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting “no later than” 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial discussion, which can then be followed by additional conversations. Subsection (b) bears some resemblance to Civil Rule 26(f), but is more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. A modification would be required, for example, if the schedule or manner of discovery in the case is governed by a standing order or local rule. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached. The rule does not prescribe a time period for seeking judicial assistance.

The proposed rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the court to accept their agreement or otherwise limit the court's discretion. Under the proposed rule, district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders. To avoid any confusion, this point is emphasized in the Committee Note, which states: "Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure."

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving electronically stored information (ESI). The Committee Note draws attention to this point and states that counsel "should be aware of best practices." As an example of these best practices, it cites the ESI protocol developed by the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) (Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (2012)). The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

Publication of the rule produced six comments. Although all were supportive of (or did not question) the amendment's general approach of requiring the prosecution and defense to confer about discovery soon after arraignment, several expressed concerns and/or suggested changes in the text or Committee Note. The comments raised the following issues:

- (1) Should the text or note state that the amendment does not preclude shorter times for discovery required by local court rules or court orders?
- (2) Should the text or note be amended to state that the amendment does not grant new discovery authority or override current statutory limitations (e.g., the Classified Information Procedures Act (CIPA) and the Jencks Act)?
- (3) Should the rule explicitly state that it does not apply to pro se defendants?
- (4) Should the amendment be relocated or renumbered?
- (5) Should the rule require the parties to confer "in good faith"?
- (6) Should the rule require the parties to file a joint discovery report?

The Committee concluded that the existing Committee Note was sufficient to address the concern about local rules and orders setting shorter times for discovery, but it agreed to propose revisions to the Note addressing statutory limitations such as CIPA and the applicability of the rule to pro se defendants. It also accepted the suggestion that the wording of subsection (b) should be revised to parallel Rule 16(d)(2)(A). With the exception of a few minor changes recommended by the style consultants, the Committee declined to make other changes in the rule as published.

a. Local rules

Two comments (CR-2017-0009 and CR-2017-0011) expressed concern about the effect of the proposed rule in districts where local rules already require the government to make specific disclosures at particular times, especially where those disclosures must be made before the time set for the pretrial discovery conference (14 days after arraignment). The comments suggested changes to the text or Committee Note. In the drafting process the Committee sought to preserve the authority of district courts to impose additional discovery requirements by local rule or court order. As published, the Committee Note states (emphasis added):

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

The Committee concluded that no further clarification is needed, in either the text or the Committee Note, to respond to the concerns about local rules requiring early disclosures.

b. New discovery authority

The Department of Justice (CR-2017-0010) expressed concern that the language in (b) might be read to “grant[] new discovery authorities that could cause serious problems and undermine important protections contained in other laws.” As published, (b) provided (emphasis added):

(b) Modification of Discovery. After the discovery conference, one or both parties may ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.

The Department noted that this language varies slightly from current Rule 16(d)(2)(A).

The Committee agreed to conform the language of the proposed rule to the phrasing of Rule 16(1)(b). There is no substantive difference between the phrasing used in the rule as published (“the timing, manner, or other aspect of disclosure”) and the parallel words in Rule 16 (“time, place, or manner, or other terms and conditions of disclosure”). Although it seems unlikely that these slight differences would form the basis for a successful argument that Rule 16.1 was intended to be different in some important respect, the Committee had no objection to tracking the phrasing of Rule 16(d)(2)(A) in new Rule 16.1(b). As revised, the proposed rule provides:

After the discovery conference, one or both parties may ask the court to determine or modify the ~~timing, manner, or other aspect of disclosure~~ time, place, or manner, or other terms and conditions of disclosure to facilitate preparation for trial.

The Department also suggested that the text of the rule be amended to state that the court may determine or modify the disclosure “in accordance with Rule 16 and other applicable law,” and that the following language be added to the Committee Note:

. . . nothing in this new rule is designed to change substantive discovery rules, grant the courts authorities in addition to what is provided for under Rule 16 and other applicable law, or change the safeguards provided in various security and privacy laws such as the Jencks Act or the Classified Information Procedures Act (“CIPA”).

In its comment on the rule, NACDL (CR-2017-0012) opposed that suggested change, praising the flexibility of the rule as published and stating its understanding that the rule “rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case.”

The Committee did not accept the Department’s suggestion that the text of the rule be revised to add references to Rule 16 “and other applicable law.” Adding a requirement that the court must act “in accordance with . . . other applicable law” to this rule might suggest that unless the same language is added to other rules the courts have carte blanche to ignore other relevant laws. The style consultants were unanimous in rejecting this language.

The Committee agreed, however, that it would be appropriate to add language to the Committee Note addressing the Department’s concern by recognizing the limited nature of the new rule. The placement of the new language (underlined below) shows that the new rule alters neither existing statutory safeguards for security and privacy, nor local rules or standing orders:

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

c. Pro se parties

Two comments addressed the application of the amendment to pro se parties, though they disagreed on the proper approach. The Department of Justice (CR-2017-0010) suggested that the Committee Note squarely address the point, implicit in the text, that the requirement of a pretrial conference is applicable only to attorneys and hence not to pro se defendants. NACDL (CR-2017-0010) disagreed, suggesting that “‘attorney for the defendant’ is properly understood to include defendants representing themselves.” Further, NACDL argued, the Committee Note

should confirm this understanding. It observed that where conferring with a pro se defendant would be impractical, the government can seek relief on a case-by-case basis.

These comments squarely presented for Committee discussion the question whether the prosecution should have a duty to confer with a pro se defendant concerning discovery within 14 days after arraignment, assuming that it would be feasible to do so. On the one hand, most pro se defendants lack the training and experience to understand the discovery process, and conferring in such circumstances would often be difficult. On the other hand, cases involving pro se defendants may include quantities of ESI, and such defendants—even more than those represented by counsel—have a very significant interest in the timing and form of discovery.

The Committee again concluded, consistent with its assumption prior to publication, that for a variety of practical reasons it would not be appropriate to require the government to confer about discovery with each pro se defendant within 14 days of arraignment, and that the text should make this point more clearly. As published subsection (a) required “the attorneys for the government and the defendant” to confer and try to agree on the timetable and procedures for pretrial disclosures. As revised, subsection (a) refers to “the attorney for the government and the defendant’s attorney.”

Although the Committee agreed that it is not practical to require discovery conferences with pro se defendants, it also recognized that it is essential for such defendants to have pretrial access to material necessary to prepare their defense. To emphasize this point, the Committee unanimously supported adding to the Committee Note a statement about the courts’ existing discretion to manage discovery and their responsibility to ensure pro se defendants “have full access to discovery.” An addition to the Committee Note reads:

For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

d. Relocating or renumbering the amendment

Two comments addressed the location of the new provision. The Justice Department suggested that it might be desirable to delete subsection (b) and move the new provision imposing a duty to confer to Rule 16. A Concerned Citizen suggested (CR-2017-005), instead, that the new rule come after Rule 10 (arraignment) and before Rule 16 (discovery). This would, Concerned Citizen urged, preserve the present order of the rules, which follows the chronology of the typical criminal case. Citizen favored placing the new rule between Rules 11 and 12.

The Committee concluded that no change should be made in the numbering or location of the rule. A new, separate rule will be much more visible than placement within Rule 16, which

is already very long and complex. A simple freestanding rule also parallels Rule 17. The Committee saw no reason to relocate the new rule.

e. Additional requirements of good faith and joint discovery reports

One commentator, Professor Daniel McConkie (CR-2017-0007), suggested that Rule 16.1, like the Civil Rules, should expressly impose the requirement of conferring in “good faith.” He noted that there are situations in which one party is not engaged and the other party “needs the ability to file a motion with some teeth to call out that bad behavior.” In the drafting process the Committee considered including a good faith requirement, but it declined to do so. Indeed, members noted that discovery in criminal cases currently proceeds more smoothly than it does in civil cases, despite the explicit requirement of “good faith.”

Professor McConkie also described local rules that require both discovery conferences and pretrial joint discovery reports, and he urged the Committee to add similar provisions to Rule 16.1. Although the Committee did not specifically consider the requirement of a joint defense report, in the drafting process it did consider—and decided against—more detailed requirements beyond conferring within 14 days after arraignment. Members were not persuaded that it would be desirable to add such a requirement.

f. Style changes

The Committee accepted several changes recommended by the style consultants, which did not affect the substance of the proposed rule.

The consultants recommended changes in the captions to more accurately reflect the subject of subsection (b). The revised caption is “Request for Court Action.”

The consultants recommended the text in subsection (a) refer, for clarity, to “the attorney for the government and the defendant’s attorney” rather than the “the attorneys for the government and the defendant.”

Finally, the consultants recommended the deletion of a comma.

The Committee unanimously recommends that the Standing Committee approve new Rule 16.1 and the accompanying Committee Note, as amended after publication, for transmittal to the Judicial Conference.

III. Action Item: Rule 5(d) of the Rules Governing Section 2255 Proceedings and Rule 5(e) of the Rules Governing Section 2254 Cases

Judge Richard Wesley first drew the Committee’s attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that “The

moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the Committee Note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a review of the cases, the Committee concluded that the text of the current rule is contributing to a misreading of the rule by a significant number of district courts. A similar problem was found in cases interpreting parallel language in Rule 5(e) of the Rules Governing 2254 actions. Both rules currently provide that a prisoner may file a reply "within a time fixed by the judge." Apparently the reference to filing "within a time fixed by the judge" can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The amendment published for public comment makes it clear that the moving party (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.

The Committee Note states that the Rule "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'"

A parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings was also published for public comment. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The Committee that revised the amendments saw no reason to treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

Only three comments were received. Two addressed issues that had been considered before publication: whether there was any need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." These issues had been debated at length before publication, and the Committee decided there was insufficient reason to revisit them.

The third comment, from NACDL, expressed support for the proposed amendments to Rule 5 of both the 2254 and 2255 Rules, but suggested a related change. NACDL argued that inmates should be told about the reply and when it should be filed at the time the court orders the respondent to file a response; it proposed an additional amendment to Rule 4 of the Section 2254 and 2255 Rules. Although the Committee was not persuaded that an amendment to the Rules was warranted, it did approve the addition of the following sentence to the Committee Notes accompanying the Rule 5 amendments dealing with notice to prisoners of the time to reply:

Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

In the Committee's view, this addition would serve as a helpful reinforcement of best practices, and it would not require republication.

With this change to the Committee Notes for both Rules 5, the Committee voted unanimously to approve the Rule 5 amendments for transmittal to the Standing Committee.

The Committee unanimously recommends that the Standing Committee approve the amendment to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings, and the accompanying Committee Notes as amended after publication, for transmittal to the Judicial Conference.

IV. Information Items

The Committee also decided to take a close look at the provisions governing discovery of expert witnesses, and it tabled or decided not to pursue several other proposed amendments.

The Committee received two proposals from district judges suggesting that it would be beneficial to expand pretrial discovery of expert witness testimony, bringing the requirements in criminal cases closer to the current requirements in civil cases. Both judges urged that expanded discovery was needed to help the parties prepare for trial, and to provide the necessary basis for rulings on *Daubert* motions. Members agreed that the scope of pretrial disclosure of expert testimony is an important issue that needs to be addressed, though it will not lend itself to a simple solution. There are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil proceedings. Additionally, the Department of Justice has adopted new internal guidelines calling for significantly expanded discovery of expert forensic witnesses. It has now trained all of its prosecutors on the new departmental guidelines, but it may take some time for the effects to be fully realized. The Committee will gather information from a wide variety of sources, and hopes to hold a mini-conference to help it understand the issues and develop a proposal.

The Committee also considered a suggestion that it amend Rule 32(e)(2), which it tabled. Rule 32(e)(2) requires the provision of the presentence report (PSR) to defendants as well as defense counsel. The concern is that direct provision of the PSR to individual defendants may contribute to the problem of threats and harm to cooperating defendants, since defendants can be pressured to provide their PSRs to third parties. The requirement that the PSR be provided to both the defendant and counsel was added to Rule 32 to increase the reliability of the PSRs. Defendants need time to review the PSR to identify errors or omissions, and often possess information not known to counsel. This information is critical during the preparation for sentencing. Accordingly, the Bureau of Prisons (BOP) permits inmates to have their PSRs before designation, but it treats PSRs as contraband after designation. Because the Cooperator

Task Force is recommending significant changes in BOP's procedures to protect cooperators, the Committee thought it best to table the Rule 32(e)(2) suggestion while that effort is underway.

The Committee also voted not to pursue several other proposed amendments. Two amendments clearly fell outside the scope of the Committee's authority under the Rules Enabling Act. The third was a suggestion that the Criminal Rules Committee (and other sister committees) undertake a comprehensive review of the work product doctrine. The Committee was not persuaded that it should undertake that task at the present time.

TAB 4B

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

**Rule 16.1. Pretrial Discovery Conference; Request
for Court Action**

- (a) **Discovery Conference.** No later than 14 days after the arraignment, the attorney for the government and the defendant’s attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.
- (b) **Request for Court Action.** After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

Committee Note

This new rule requires the attorney for the government and counsel for the defendant to confer shortly after arraignment about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically stored information (ESI) or other voluminous or complex discovery.

For practical reasons, the rule does not require attorneys for the government to confer with defendants who

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are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

The rule states a general standard that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenge increase. Moreover, the rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

Subsection (b) allows one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address

modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

Changes Made After Publication and Comment

There were no substantive changes. The captions were revised to more accurately reflect the subject of subsection (b), which is a “Request for Court Action.” The phrase “timing, manner, or other aspects” was revised to “time, place, manner, or other aspects” to track Rule 16(d)(2)(A). Two changes were made in response to concerns about possible ambiguity in the text as published. First, subsection (a) was revised to require a conference between “the attorney for the government and the defendant’s attorney,” and the Committee Note was revised to state that for practical reasons the Rule does not require a discovery conference with a pro se defendant. Second, the Note was modified to include a statement that the Rule does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act.

Summary of Public Comment

CR-2017-0005. A Concerned Citizen. Because Rules 3 through 38 are generally “organized chronologically based on how a federal prosecution typically unfolds,” Citizen suggests placing the new rule between Rules 11 (“Pleas”) and Rule 12 (“Pleadings and Pretrial Motions”).”

CR-2017-0007. Daniel McConkie. Prof. McConkie supports the rule but recommends two changes: (1) the parties should be required to confer in good faith, and (2) the parties should, following their discovery conference, file a joint discovery report with the court.

CR-2017-0009. Federal Magistrate Judges Association (Linda R. Anderson). FMJA “support[s] the concept of directing counsel in criminal cases to confer on these matters.” But FMJA “suggest[s] that the Committee Note include a sentence or paragraph saying, in words or substance, that nothing in the amended rule is intended to delay times for producing discovery set forth in a local rule, or a Court order in a particular case, particularly when a local rule or Court order requires more prompt disclosure than the amended rule contemplates.”

CR-2017-0010. U.S. Department of Justice, Criminal Division (John P. Cronan, Acting Assistant Attorney General). DOJ “fully support[s] the rule’s primary requirement that prosecutors and defense lawyers in federal criminal cases confer about discovery soon after arraignment.” However, DOJ expresses two concerns: (1) the Rule will “be read by some . . . to provide *new* authorities to district courts to expand or contract discovery obligations or change discovery procedures . . . otherwise governed by existing law” (such as CIPA and the Jencks Act), and (2) it is not clear “how this rule will apply in cases where defendants exercise their constitutional right to represent themselves.” DOJ advocates clarification in the text or Committee Note to address these concerns.

CR-2017-0011. Aderant CompuLaw (Ellie Bertwell). To make it clear that the proposed rule allows the District

Courts to set a different deadline for the discovery conference, Aderant Compulaw recommends adding the prefatory phrase “Unless otherwise provided by local rule or court order.”

CR-2017-0012. National Association of Criminal Defense Lawyers (Peter Goldberger et al.). NACDL praises the flexibility of the proposed rule, which requires the parties to address discovery issues “early and with resort to the court’s assistance.” NACDL opposes any attempt to limit the rule, which “rightly empower[s] trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case.” It urges that the Committee Note should “make[] the judge’s discretion and authority to manage discovery in each case in the interest of fairness and trial management unambiguously clear.” NACDL also opposes a “blanket exception” for *pro se* defendants.

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As amended, the second sentence of the rule retains the court's discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

Change Made After Publication and Comment

A sentence was added to the Committee Note drawing attention to the value of including the date for any reply in the order requiring the government to file an answer or other pleading.

**RULES GOVERNING SECTION 2255
PROCEEDINGS FOR
THE UNITED STATES DISTRICT COURTS¹**

Rule 5. The Answer and the Reply

* * * * *

- (d) **Reply.** The moving party may ~~submit~~file a reply to the respondent’s answer or other pleading ~~within a time fixed by the judge.~~ The judge must set the time to file unless the time is already set by local rule.

Committee Note

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under § 2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent’s answer or pleading. It retains the word “may,” which is used throughout the federal rules to mean “is permitted to” or “has a right to.”

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

No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

Changes Made After Publication and Comment

A sentence was added to the Committee Note drawing attention to the value of including the date for any reply in the order requiring the government to file an answer or other pleading.

Summary of Public Comment

CR-2017-0003. Joseph Goodwin. Goodwin “do[es] not see the need for this amendment” because “[t]he District Court has discretion to deal with any scheduling issues.”

CR-2017-0004. Patrick Kite. Kite states “‘may’ should be replaced by ‘has a right to’ or ‘is entitled to,’” because “[c]asting doubt on the meaning of ‘may’ is inconsequential when it is already misunderstood.”

CR-2017-0012. National Association of Criminal Defense Lawyers (Peter Goldberger et al.) NACDL expresses support for “the proposal to clarify that a habeas petitioner or § 2255 movant has an unambiguous right to file a reply to the respondents’ or government’s Response.”

However, because the proposed rules “do not advise the court when or how it is that the petitioner/movant should be advised of the right to reply and the time during which s/he may do so,” NACDL “suggests that the time and place for such notice is in the court’s Order under Rule 4 directing the filing of an Answer or Response.”

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 24, 2018, Washington, D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee (“Committee”) met in Washington, D.C., on April 24, 2018. The following persons were in attendance:

Judge Donald W. Molloy, Chair
John P. Cronan, Esq.
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
James N. Hatten, Esq.
Judge Denise Page Hood
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Joan L. Larsen
Judge Bruce McGivern
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Professor Cathie Struve, Standing Committee Associate Reporter (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Rules Committee Staff
Patrick Tighe, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order. After congratulating several members on career developments, Judge Molloy recognized Professor Daniel Coquillette, who is leaving his position as Reporter to the Standing Committee, and the outgoing members of the Criminal Rules Committee, and invited them to make remarks.

Mr. Siffert recalled hearing outgoing members praise the Committee’s integrity and state how meaningful they found its work. He agreed that being able to watch and participate in this

process had been one of his most valuable professional experiences. He stressed his affection for the other members and the reporters, and his hope to stay in touch.

Judge Larsen said it had been a real pleasure to serve on the Committee, noting that her tenure was short because as a federal judge she could not continue to serve as the state court representative. She wished the members well and looked forward to seeing them again.

Professor Coquillette thanked the Committee, and said that his 34 years as a reporter had been an extraordinary privilege. He expressed his gratitude for so many dear friends among the reporters, commended Ms. Womeldorf in the Rules Office for her fantastic work, and praised Professor Struve who will be taking over as a terrific Reporter for the Standing Committee.

Judge Molloy thanked the outgoing members and Professor Coquillette for their many, many years of great service, and then introduced John Cronin, Acting Head of the Criminal Division at the Department of Justice. Mr. Cronin said it was an honor to attend and hoped that a permanent Assistant Attorney General would be available soon to work with the Committee.

Judge Molloy turned to the approval of the Minutes from the Fall 2017 Criminal Rules Committee Meeting.

Professor Beale noted receipt of several typographical corrections, indicated those corrections will be made, and invited members to let the reporters know of any other typographical corrections.

The minutes were approved unanimously on voice vote.

Judge Molloy asked Ms. Womeldorf to report on the Rules Office.

Ms. Womeldorf first drew attention to the minutes of the January meeting of the Standing Committee in the agenda book. At that meeting, the report from the Criminal Rules Committee consisted primarily of this Committee's long and thorough consideration of the cooperators issue, and the various rules provisions dealing with that issue. She noted that Judge Campbell had thanked the Reporters and members for their thorough and careful work on that issue. The Standing Committee was asked if it agreed with the Committee's recommendation not to go forward with any of those Rules amendments. Although there was no formal vote, the sense of the Standing Committee was agreement with this Committee's recommendation.

Ms. Womeldorf noted that the Report to the Judicial Conference in the agenda book included only information items, namely the complex criminal litigation manual, the cooperation material, and possible changes to Rule 32(e)(2).

Ms. Wilson drew the Committee's attention to the chart in the agenda book compiling relevant legislative activity and reviewed the legislation listed there. She informed the Committee of a communication from Senator Wyden's office, which had been active on the Rule 41 issues. They were contemplating suggesting an amendment to Rule 41 to require delayed notice to the target when the government obtains emails from an internet service provider. The

Rules Office provided the Senator's office with information on how to propose a rules change to the Committee, and we will have to see if anything develops.

Judge Molloy then asked Judge Kethledge, chair of the Rule 16 Subcommittee, to lead the discussion of the proposed amendment to Rule 16.1. Judge Kethledge noted that publication produced six comments, some suggesting changes. The Subcommittee met to discuss the comments and agreed on several changes to the proposed rule and note.

Two comments were concerned about districts where local rules have a shorter period of time for discovery than the rule provides for counsel's meeting. The Subcommittee had already included language in the Committee Note to address that concern: "The Rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure." Districts are able to tighten those timelines.

Judge Kethledge said the Department of Justice submitted a lengthy letter. The Department was concerned about a slight variation between the language in proposed subsection (b) and the language in Rule 16(d)(2)(A), because courts might read something into that variation. Seeing no substantive difference, the Subcommittee recommends that the language in proposed Rule 16.1 be modified to track the language in Rule 16.

The Department also suggested that the rule should say that the court must comply with Rule 16 and other applicable laws. The Subcommittee thought it was unnecessary to say that the court had to comply with some other law. If the premise of that change were correct, Judge Kethledge explained, it would be necessary to list all of the existing laws in every rule. The Department also wanted to revise the Committee Note adding fairly broad language to the effect that the rule does not change substantive discovery rules, the requirements of Jencks Act, or other acts. The Subcommittee modified the note in a more limited manner, stating that the rule "does not modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act." That seemed to assuage the Department's concerns.

Judge Kethledge noted that the Department was also concerned that the rule published for comment did not make it clear that the government's lawyer would not need to meet with a pro se defendant for these initial conferences. The style consultants proposed a very helpful clarification: "the attorney for the government and the defendant's attorney must confer."

Although the new rule would not require the government to meet with pro se defendants, the Subcommittee recognized the importance of the courts' obligation to ensure that pro se defendants get the discovery they are entitled to and the courts' power to regulate the process in cases with pro se defendants. To address this concern, the Subcommittee added the following language to the committee note: "However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure that such defendants have full access to discovery."

Other comments addressed issues the Subcommittee had already considered very carefully before the rule went out for comment. One suggested renumbering the rule, another adding that the parties have to confer in “good faith.” The Subcommittee decided not to revisit those decisions.

Judge Kethledge concluded that the changes made by the Subcommittee after publication were basically modest tweaks.

Mr. Cronin asked if the section titled “Changes After Publication” was published along with the rule. Professor Beale responded that publication of this section is required.

Professor Beale commented that the style consultants had been very helpful on this rule, especially in clearing up the ambiguity in the published rule, which stated “the attorneys for the government and the defendant must confer.” As the public comments noted, this could be read (though the Committee had not intended this) to require the government to confer with the defendant. Both the Department and the National Association of Criminal Defense Lawyers (NACDL) thought it was unclear. The government thought it should be clarified that there is no duty. NACDL thought it should be clarified, and that there should be an obligation to meet with pro se defendants. The Subcommittee discussed whether the government should meet with pro se defendants about discovery, and the consensus on the Subcommittee was that it would not be practical. Accordingly, the committee note says “For practical reasons,” the rule does not require this. We would not want anyone to think that pro se defendants are not as important as any other defendants or do not need as much assistance and preparation before trial and discovery. But the Subcommittee did not think the two-week window for these discussions was going to be practical as an across-the-board rule.

One member suggested that the Committee should feel good about this rule. If he could change anything about the federal process he would enhance discovery. The proposed rule first came to the Committee with a highly prescriptive draft, which met with very strong opposition. Judge Kethledge found a solution to this complex problem that all could accept. It is a small step but important.

Professor Beale and Judge Kethledge noted that Judge Campbell had suggested that we hold a mini-conference, and that is where the solution emerged. When the Committee started we didn’t have any idea that we would have a rule ready to be published in 2017, requiring only these minor tweaks after publication. The process worked really well. Thanks to the NACDL and New York Council of Defense Lawyers for getting this started.

Judge Molloy agreed that a great deal of this was based on an epiphany that arose from some very robust discussion at the mini-conference. It reflects how these Rules Committees work.

A motion to approve the Subcommittee’s amended Rule and Committee Note for transmittal to the Standing Committee passed unanimously on voice vote.

Judge Molloy asked Judge Dever, Chair of the Rule 5 Subcommittee, to address the Committee on the pending proposals to Rules 5 of the 2254 and 2255 Rules.

Judge Dever summarized the status of the proposed amendments, which are a response to decisions of several district courts that Rule 5 allowed a judge to deny the opportunity to file some kind of reply. The proposed amendments were intended to make clear that, assuming the court did not dismiss the petition, once the government files a response, the inmate has a right to file a reply. After publication, the Committee received a few comments, including one that argued that the word “may” caused the problem. The proposed amendment persists in its use of “may,” he said. The Subcommittee thought the proposed change makes clear the inmate has a right to file a reply. A number of courts have local rules that set deadlines for replies. Like the Rule 16.1 proposal, the amendment recognizes these existing local rules and seeks to avoid conflicts. It provides that the judge has to set the time to file, unless it is already set by local rule. The Subcommittee made one change in the committee note in response to a suggestion from NACDL. The new language states that if the court is setting a time for a reply, it can also provide notice of any other deadlines associated with that piece of the litigation. The Subcommittee unanimously supported this change to help clarify this very important issue. There are many pro se petitions under 2254 and 2255, and this takes into account the reality that many courts have local rules or standing orders that address these timing issues.

Professor Beale reminded the Committee that the proposal came from Judge Richard Wesley on the Standing Committee, who praised the Committee’s proposed amendments at the last Standing Committee meeting. He said when a law clerk came to him, they were outraged that the petitioner or moving party had not been allowed to file a reply. So he sent the issue to us. It was not possible to demonstrate how many cases there were, because many of them are not recorded. Although many (including the style consultants) said “the rule is clear,” demonstrably, it wasn’t, not to the people who needed to know, including the district courts. So we will see if the amendments solve the problem. If the Rule was clear and the courts weren’t reading it, perhaps this will provide more notice. She noted the style consultants had prohibited the use of “has a right to” or “is entitled to,” because (in their view) “may” is clear.

Judge Molloy asked whether the change of “submit” to “file” had been approved.

Professor Beale answered yes, that there is no change to the text as published. The only change to what was published was the last sentence added to the committee note. This was responsive to NADCL’s suggestion that there should be a change to Rule 4 adding that the court ought to give notice, and do it at a certain time. NACDL’s suggestion fell outside of what had been published, and the Subcommittee thought it was not necessary. The Subcommittee thought, however, it would make sense to nod in the direction of a reminder that there should be notice. There may be some concern about who knows about the deadlines in some places, such as courts that handle timing with a standing order. Without republication we could not amend Rule 4, as NACDL had suggested. Nor, she said, should we be saying what judges have to tell these pro se parties in writing, when there are lots of things they ought to also be telling. It is a slippery slope.

Judge Molloy confirmed that the changes to Rule 5(d) and Rule 5(e) are identical.

A member raised a question about the additional sentence for the note. He agreed an addition to the note, rather than a change in the rule, was the right approach. But the proposed sentence, he said, seemed to imply that the court's order giving the time to file the reply will necessarily come when the court orders the response. Perhaps it should. But in some cases, the court might set the time to reply after the government files a motion to dismiss the petition or answers the petition.

Professor King stated that the Subcommittee did recognize that there might be instances where the time to file the reply to the answer or response would need to be decided after that response or answer was received. The Subcommittee's proposal can accommodate such cases. In such a case, if the time to reply had been set earlier, it could be modified. Moreover, the new sentence was not a command that judges must add a reference to the time to file a reply in the order requiring the government to file an answer or other pleading. It states only that if the court does so, it provides notice. The original suggestion included the contingent language "would" provide notice, which the Subcommittee deleted. The sentence was not intended to require the judge to do that. Rather, it is just a statement that when the judge does so, it gives notice.

The member asked if the sentence implies that the court's order would have to be simply at that one time, but not other times. Professor Beale responded that the Subcommittee didn't think so, but asked if the member had a suggestion for different language.

The member responded that the sentence could just refer to any order, any order providing a time to file a reply provides notice to all the parties.

Professor King noted that that formulation does not really respond to the concern that motivated the addition of the sentence. The concern was the one raised by NACDL that the petitioner or movant receive notice early on. So substituting "any order" doesn't do much more than the text of the rule that says to "set." It does suggest that the "set" take the form of an order, which is perhaps the member's intent, but it doesn't reflect what the Subcommittee was doing. The Committee could amend the language to do that, but it would have a different meaning.

The member indicated that answered his concern.

Motions to transmit the proposed Rules 5(d) and 5(e), with the amended Committee Notes, to the Standing Committee passed unanimously on voice vote.

Judge Molloy then turned to Rule 32(e), and asked the Reporters to introduce that issue.

Professor Beale stated that Judge Kaplan, the Chair of the Cooperator Subcommittee was not able to attend the meeting. In his absence, she would put a few things on the table for discussion. This proposal came from Judge Molloy. Probation officers in his district expressed concern that the rule at present directed them to give a copy of the presentence report (PSR) not only to defense counsel but also to the defendant. The concern was that this was closely related to the issues being considered by the Cooperators Subcommittee. Having possession of the PSR

can enhance the potential for coercion to show one's "papers," leading to the inference that those who won't show their "papers" have cooperated. Possession of the PSR is part of this mix of threats and harm to cooperators. The issue was discussed briefly at the Criminal Rules Committee Meeting in the fall and then sent to the Cooperators Subcommittee, which held a call to discuss these issues.

Rule 32(e)(2) is quite unusual in that copies of the PSR must go to the attorney for the government, to the defendant, and to defense counsel. It is the only place in the rules that Professor Beale could think of that says you have to give something to the defendant. And as the materials in the agenda book demonstrate, that was very deliberate. The 1983 Committee Note has italics – "*both* defendant *and* his counsel." The Committee thought this was the best way to correct errors in the PSR. Defendants know a lot more about some of the information in their PSRs than defense attorneys, and they really need time to look this over. So on the one hand there is an accuracy concern, and the Bureau of Prisons (BOP) recognizes that when the defendant is preparing for sentencing, he needs to have the PSR, and it is not contraband. The Task Force on Protecting Cooperators is not suggesting any changes to that BOP policy. But there is a concern that possession of the PSR may create a situation where threats and harms can be exacerbated, and we have a general system where material for represented defendants is served on counsel.

The Subcommittee did not reach agreement on whether it would be a good idea to move ahead with an amendment to the rule. Members debated whether an amendment is warranted, whether it would solve the problem, and whether it would be a good idea to try to restrict the availability of PSR to a defendant in this period before a technological fix may come along. Eventually, kiosks could be available and defendants could have as much time as they want to review their own materials. Professor Beale noted that the defenders commented on how feasible it is to spend as much time as they would like going over the PSR face to face with their clients, and that practices seem to differ in various parts of the country.

The question before the Committee was whether a Subcommittee should be appointed to discuss whether and how to draft such an amendment.

Professor King added that those opposed to an amendment were convinced either that changing Rule 32 wouldn't make that much difference in the defendant's access to the PSR, or that it was very important to ensure access by the defendant to the PSR and it didn't make sense to impede all defendants' ability to check the accuracy of their PSRs for the sake of a small segment that might be cooperating. The conversation also emphasized the relationship between counsel and client. Defense attorneys indicated that they would have to give the PSR to a client if the client asked. Given ethical rules, an amendment wouldn't move the ball in terms of protecting against the possession of the PSR as it might be intended to do. On the other side, judges did not want to have to deal with requests from prisoners for their PSRs, or have their clerk's staff deal with these requests. If the rule was clear, prisoners would know they could not write to the court or the clerk's office demanding copies of their PSRs. There really was no consensus.

Judge Molloy noted that in working on the Task Force with Judge St. Eve and the BOP, he learned what prisoners are actually doing in demanding that new prisoners post their papers. Coincident with that work, a defendant in Judge Molloy's district demanded his copy of his PSR, and the Probation Officer brought this to Judge Molloy's attention. He said that for years he had been overlooking that the rule said the Probation Officer was required to give a copy of the report to the defendant. He noted that requirement is honored in the breach. He didn't think many districts give a copy of the PSR to the defendant. If the defendant has a right under the rule to have that PSR, he wondered, can the BOP make it contraband? His suggestion was to amend the rule to remove the requirement of giving the PSR directly to the defendant. After a good conversation, the Subcommittee rejected the idea. Professor Beale noted that the Subcommittee was split 50-50. If a consensus was needed, that wasn't enough.

Judge Molloy asked members to give their thoughts.

One member said she believed that defense attorneys have to be able to give the PSR to clients. One reason is that the client needs to be able to review it and think about it. If it is a long PSR and the member does not have four hours to sit down and go through it in person, she may give it to the defendant, have him look it over, and arrange for a phone call in a few days, or make a car trip back to see him. Ethics rules also affect this. Every jurisdiction in the country except Florida says that attorney files belong to the client, and the client has the right to see his file. Defense counsel have the PSR, she said, and we have to put it into our files, which belong to the client. There are many situations in which defense counsel needs to provide the PSR to the client. She has had clients who don't speak English, and has had to send an interpreter. Maybe she can't go because she is in trial. Certainly by the time you are doing pro se litigation in habeas, or 2255, you may want the PSR. All of these things make it really problematic if the client is not allowed to have the PSR. She liked the idea of a kiosk, a really smart idea for a lot of documentation. But a very small minority of her defendants are in federal detention centers. Most of them are in state jails. The ability of clients to access electronic evidence at a kiosk would be easy in federal detention centers but not in jails.

Judge St. Eve said she had been unable to join the Subcommittee's conference call as she was in trial. She said the Task Force's work with cooperators found that the threats to cooperators began once they were designated and sent to a designated facility, not during presentence detention. There may be some issues there, but what the Task Force found was that these threats occurred when cooperators were at the higher security facilities. She suggested that Rule 32(e)(2) is really just for the presentencing stage. BOP makes a PSR contraband once an inmate is designated, not at this prior presentencing stage. She urged the Committee to see what happens with the BOP recommendations before looking into this further. One of the BOP recommendations coming out of the Task Force is to make sure that once a defendant leaves a pretrial facility and is designated and sent to where he is going to serve his time, BOP staff will go through whatever that defendant will take with him, to make sure that he is not taking the PSR or other documents. Once he arrives, they will check whatever the inmate brings with him to make sure he is not bringing the PSR or other documents. The PSR will be considered

contraband at that point. The Task Force did not hear about problems at these pretrial facilities with cooperator status, or pressure on inmates to show the papers. She recommended tabling this until we know which of the Task Force recommendations go through, and then wait a little to see if there is any improvement. If there is still a problem maybe we can go back and look at this.

A member made a motion to table, following Judge St. Eve's suggestion.

Judge Molloy said his only concern is that the language in the rule is mandatory and we are not following that rule. He saw something that said 61% of the probation officers give PSRs to the defense lawyer, who in turn provide them to their clients. If the rule is honored only in the breach by most districts, then the Committee should address that issue.

Judge St. Eve stated she thought that was a separate concern from the cooperator issue. Whether defendants are getting their PSRs in the first instance is separate from whether they should, or should not, be getting them.

A member asked if the rule gives a time frame during which the defendant is entitled to keep the PSR. Professor Beale said the Rule states when he must receive it, but it does not specify how long he can keep it. He must receive it within 35 days.

A member asked if there is an implication in the rule that the defendant must be allowed to keep a copy of the report on his or her person. Professor King noted that years ago the rule said that the defense had to return the physical copy of the PSR. That was later deleted.

Professor Beale added that the rule does not prohibit BOP from having rules about what you can bring into prison after you have been designated. The focus of Rule 32 is to help people prepare for sentencing. There is no inconsistency with separate rules by the BOP specifying what you are allowed to bring with you after you have been designated.

The member said he could imagine the PSR being helpful to the defendant if the case was on appeal. Professor Beale agreed and mentioned that there is some discussion of that in the memo. Also, 2255 movants may also need PSRs, and they may make FOIA requests to get them. Courts have been asked to allow them when they are trying to do some kind of motion or on appeal. But Rule 32 doesn't really speak to those situations one way or the other. Courts are dealing with those issues, as the memo reports. However, you might conclude there would not be much point to limiting possession up front if courts say you have to be able to have it later.

Professor King stated that the rule is really about notice before sentencing.

The member asked if this issue about whether BOP would make this contraband remained on the Task Force agenda.

Judge St. Eve stated that PSRs are already contraband, after sentencing once a defendant has been designated. A defendant can still get *access* to his PSR at the BOP facility. It is just kept in the defendant's file. What he cannot do is take it back to his cell with him, or have copies. So defendants still have access to the PSR, for court purposes, though it is contraband in the cell. And that has been in place since the mid-1990s.

Judge Campbell noted that in his district, what typically happens is the probation officer sends the report to the defense attorney and the attorney sends it to the defendant. If we change this rule, the defendant could still get the PSR from the defense attorney. So it does not seem like a very efficient way to try to solve the problem of a defendant having the PSR in a facility. In addition, in his district (and he suspected in others), the PSR does not say anything about cooperation. It is deliberately left out of the PSR, and dealt with in a separate document. So you are not really tipping anybody off to cooperation by anything that is in the PSR. He is not sure amending Rule 32 is an efficient way to address the problem the Task Force is trying to solve.

Professor Beale stated that there is quite a bit of variation nationwide on how PSRs are provided to prisoners. There are district to district differences, and in some cases differences judge to judge. When the Task Force met with defense lawyers in January, she asked some of them what happens with this in their districts. Each had a different way of doing this. One said probation officers just ask us: “Do you want it sent directly to the defendant or do you want it to come to you?,” so they ask the client. This person also said the sex offenders do not want it to come to them, but a lot of others want it to come directly to them. It certainly is not being done exactly as written in all jurisdictions. But as Judge St. Eve said, that was not the question that prompted this initial review by the Subcommittee.

A member said that the motivation for this proposal was safety of cooperators, which is being looked at by the Task Force. He renewed the motion to table to see what the Task Force does.

Judge Molloy asked if there are other places in the rule where it says “must,” the Probation Officer “must” give, not may give, or should give.

Professor Beale said if the question was whether there are other places where the rules say must give to the defendant, it is the only one she knew of, and it was deliberate. There were italics on that in the Committee Note. The information in the PSR is something defendants know a lot about: their life and what they have done.

Professor Coquillette also said he could not think of any other situation where a rule said something must be provided to the defendant as well as the lawyer.

Professor King noted Rule 11 does provide the court must address the defendant personally, not just the lawyer, but that does not involve a document.

A member asked if the Task Force thinks that the current rule would preclude a procedure that would provide, for example, that the defendant must be given a copy of the PSR but that the defendant need not be allowed to retain a copy.

Judge St. Eve answered that the way the rule is written now, the defendant can retain that copy in detention in the pretrial facility. Once the defendant is designated after sentencing, the BOP rules kick in when he arrives at his designated facility, and the PSR becomes contraband. So the defendant cannot retain a copy of the PSR in his cell. But there is a file on the defendant,

and if he needs to see the PSR, he can go to the special room where his file is and look at the PSR.

Professor Beale asked Judge St. Eve if it was correct that under the BOP's rule, in the period before he is designated, he may have his paper copy in his own cell, and that the Task Force does not suggest that that should change.

Judge St. Eve answered that was correct, the harm to cooperators, based on what we investigated, is coming once the defendant is designated and arrives at the designated facility.

Professor Beale said this reflected that they have more need to have the PSR in that predesignation period, and there is less danger. Judge St. Eve agreed.

The member renewed his motion to table once more, and it was seconded.

The motion to table any change to Rule 32(e)(2) until the Committee learns how BOP responds to the recommendations of the Task Force on Protecting Cooperators passed unanimously by voice vote.

After a short break, the Committee turned to a report on the Task Force by Judge St. Eve. She reported that the Task Force is completing its work, and has divided its report into two parts: recommendations for the BOP and everything else. She said they wanted to get going on the BOP recommendations because it would take some time for them to work their way through the BOP. That report is complete and on Jim Duff's desk to go to the Director of the BOP. There are 18 separate recommendations for the BOP to put in place to help protect cooperators. The second part, the rest of the report, is still being completed. Judge St. Eve hoped that the report would be completed before the Committee's next meeting. It will likely come back to a Committee, possibly the Committee on Court Administration and Case Management (CACM), possibly Criminal Rules, for some implementation work. She thought changes to CM/ECF were among the recommendations likely to be approved, and that would have to go through some committee. She believed that part of the report would be finished before the Committee's next meeting.

Judge Molloy asked if anyone had any questions.

Professor Beale asked if the Task Force has accepted the idea that there will be no slate of rules proposed for the CACM guidance. Judge St. Eve answered that was correct.

Professor King asked if it was possible that the second part of the report will include something for this Committee to work on. Judge St. Eve said she was not sure, because she was not sure how things are divided jurisdictionally. One aspect that the Task Force is going to recommend is that the Federal Judicial Center (FJC) conduct education for judges on these issues. She was not sure whether that would come back through the Criminal Rules Committee, or go directly to the FJC, or to the Criminal Law Committee, or to the Standing Committee. But she did not expect it to come back for proposed rules.

Professor Beale asked if she was able to say whether there are going to be any proposed limitations on remote electronic access via CM/ECF. Judge St. Eve said that there is a proposal in this CM/ECF part that is not final. There is a proposal to put certain limitations on CM/ECF. The PSF (plea and sentence folder) approach has been rejected.

Judge Molloy then turned to the next item on the agenda. He noted the Committee received suggestions from both Judge Jed Rakoff and Judge Paul Grimm regarding the disclosure of expert opinions and how detailed it might be. He commented that it was very interesting to read the history of the discovery rules, and to learn that in 1992 or 93 when the both the Civil Rules and Criminal Rule 16 were amended the Committee originally planned to require the same kind of disclosure for experts in criminal cases and civil cases. But late in the process DOJ objected, and Rule 16 was scaled back after Judge Hodges, the chair of the Criminal Rules Committee, broke a tie vote. Judge Molloy asked Judge Kethledge to lead the discussion.

Judge Kethledge reported that the Rule 16 Subcommittee had a call, and there was a consensus in favor of having the Subcommittee consider the idea of making the expert disclosures under the criminal rules more like those under Civil Rule 26.

But there was a difference of opinion about timing of when to move forward. On the one hand, there was the sense that some innocent people might be convicted because of the inadequate disclosure the government makes particularly regarding forensic testimony. A forthcoming article by Professor McDiarmid details some of those cases, and some members felt that is an urgent problem on which we should move as quickly as we can. On the other hand, the Department has adopted a new policy recommended by the national forensic commission, which Judge Rakoff chaired, that more or less provides the information required by the civil rules, in cases involving forensic experts. Judge Kethledge understood from the call that the policy is rolling out right now, the AUSAs have been trained, and they are supposed to be making those disclosures in cases that involve experts in federal court. His sense was that the policy makes the situation less urgent. He thought the issue probably would require a mini-conference, because it is so fact intensive, and we need practitioners to tell us what the problems and needs are, and how best to address those. He thought that a mini-conference would probably be a lot more fruitful if it took place after the DOJ policy has been in place for some significant period of time, at the end of the year or the beginning of next year. Professor McDiarmid's article proposed something quite different from what was proposed by Judges Rakoff and Grimm. It is not just mirroring Rule 26, but instead calls for information more specific to criminal cases, such as chains of custody, bench memos, and more. He thought the Committee would only get one shot at a mini-conference, and would get the most out of it if members could see if the policy mimicking Rule 26 is working well, or is it pointed in the wrong direction.

A member of the Subcommittee stated that he had been in direct contact with the Innocence Project, and had spoken to the lead scientist and Peter Neufeld, one of the Project's founders. He had also had some conversations with Mr. Wroblewski. In his view, waiting to see whether the DOJ's protocols are properly used is not acceptable. It will result in innocent people

being convicted, bad science being tendered into evidence, and the admission of testimony that is not supported by scientific practices. He read that in at least one area of forensic evidence, something like 10% of science is mistaken, and none of it is discovered until after the defendant is convicted. That's not acceptable. It is complacent to say, "the DOJ is taking care of it." We may not be able to formulate a working rule until after we see the effect of DOJ policies, but there are other things we should do now. We should have a mini-conference to learn what defense lawyers say they need.

The member observed that many of the scientists who are giving the opinions are not federal scientists, they are not from the FBI, they are not from accredited labs, and there are no reports. These experts are from state labs, and from independent places. The result is that defendants do not know what the expert will testify to at trial. And defendants do not know what the basis of those reports are, notwithstanding Rule 16. He did not understand why there is that gap, because Rule 16 does say that on request, the government should give a written report. But he was told the gap is real, and indeed based on the McDiarmid article it is an unacceptable margin of error. He said the Subcommittee ought to canvas the legal aid, federal defender, and private practice lawyers who deal with expert testimony and get that done quickly. It ought to canvas the scientists to get an understanding of just what the labs do, whether they are federal, state, or private. We need to know whether a rule can solve the problem. The McDiarmid article identifies some issues that have to do with fraud. If a scientist is purposely lying about the evidence or conclusion reached, no rule is going to solve that problem. But in Peter Neufeld's view, the problem is primarily that scientists get on the witness stand and exaggerate what the science says in their testimony, and they make mistakes. Because there is no prior written statement of what the scientist will say, which would bind the scientist to that testimony, there is no cross examination available. Exaggerations lead the jury to conclude there is evidence when there isn't.

The member said that one of the issues the Committee will have to confront is when the rule kicks in. He said he understood from Jonathan Wroblewski that the current federal labs issue reports. The government does not want those labs to have to write a second report. Maybe the existing report is sufficient for *Brady* purposes and other purposes, prior to a plea if you get whatever there is in the open file. But maybe more is required before trial. But the member doesn't deal with this type of issue himself, and he wanted to know what the people who do deal with it need and when they need it. Another thing that has to be addressed in the mini-conferences and in drafting a rule is the form of discovery. And obviously we are going to have to get input from the DOJ before drafting any rule.

But it is only after we do all that work that we will see whether or not what is being done by the DOJ is sufficient. Otherwise it will be, "we're doing this and it's OK." But there has already been a change of the administration which has resulted in a change of policy affecting scientific evidence on a related issue concerning uniform language testimony and reports about what the scientist can say. That is not a discovery issue; it has to do more with can a scientist evaluate and say this is a match or can he only say this is a 95% chance that this fingerprint

might be similar to the one that is left at the scene. The need for uniform language arises from learning that for decades, the FBI was testifying that the hair sample identified the defendant. And for decades, the FBI was testifying that a bullet could be traced to a particular source, and it turns out that is not true. Hair follicles do not correspond adequately, and bullets cannot be traced properly to their sources. And these examples showed the need for some agreement on how far scientists could testify to things like fingerprints. Apparently, the way that process had been going under the prior administration is very different from the way that is going now. Peter Neufeld told him there had been a transparent process, and the scientific community had access to what the Department of Justice was doing in formulating these rules. But Neufeld said it no longer does. There does appear to have been a change in policy about how to formulate those rules. Any change in administration means that a policy of training prosecutors to do something that does not have the force of law. It can be changed. He did not think any of the judges in the room want to tolerate a situation where DOJ decides what the discovery rule will be. It ought to be the court, and you need a rule for that. We should not wait a substantial amount of time (whether it be one year or eighteen months) to get started on a problem this urgent, where there innocent people being convicted, where there is documented testimony that is incorrect being admitted at trial and being used.

Judge Kethledge noted that he was not advocating that the Committee limit its enquiry to whether the DOJ protocol by itself will be an adequate solution, but he did think the Committee ought to get the benefit of that policy empirically in crafting a rules based solution. He noted that the scandals that are described in the McDiarmid article are basically state scandals. The real five alarm fire problems that she is describing are happening in state courts, such as the Detroit and West Virginia labs. He was not aware of anything like that in federal court. The Committee's jurisdiction is federal. DOJ has told us that in cases involving forensic experts, they are going to mimic disclosure under Civil Rule 26 now going forward. That is a meaningful stop gap while potentially we get information about how that approach works.

The member responded that the problem is that state labs frequently offer evidence in federal court. And private labs frequently offer evidence in federal court. This requires some oversight.

Another member agreed, saying this really does need to be addressed. She applauded what DOJ is doing, and she was glad to hear the Subcommittee is looking at moving forward. The problem in relying on DOJ's proposed fix, is that it is subject to the DOJ's administration, and the effectiveness of implementation. She gave two examples. After Senator Ted Stevens' prosecution, all the DOJ lawyers were trained about giving *Brady*, but the prosecution was still withholding *Brady* in the Pulse nightclub shooting case. We saw this with the ESI protocol, too. Everyone was trained and taught to use it, but we are still hearing "What protocol?" So it's the effectiveness of implementing that concerned her. She liked the idea of having smaller meetings where we can get more information. In addition to tracking what is going on in DOJ and how effective it is, we should also consider a number of things that are not in the DOJ's policy. She applauded the idea of having another mini-conference or maybe two, and the idea of bringing in

the scientific community as well as the defense. It would be a good idea to bring in people from the labs to ask them whether they can you provide these reports, and how much trouble that would be. So it is important, and she hoped the Committee would go forward with it actively and promptly.

Professor Coquillette added that the Evidence Rules Committee sponsored a President's Council of Advisors on Science and Technology (PCAST) conference at Boston College involving the scientific community. If the Criminal Rules Committee goes ahead with a mini-conference, it would find that some of the fundamental work has already been done by the Evidence Rules Committee.

Mr. Cronin said the DOJ agrees this is an important issue that needs to be addressed. The guidance – which DOJ put out about a year ago, and trained prosecutors on through 2017 – will go a long way whether as a stop gap or permanent solution. The guidance on forensics covers DNA testing, chemists, and ballistics testing, and goes much farther than Rule 16. It provides very clear and explicit guidance to the AUSAs. Other sorts of guidance may have ambiguity that could confuse individual prosecutors, but there is really no ambiguity here. It is very explicit as to what prosecutors should disclose. The forensic expert's laboratory report explains the scope of the assignment, the evidence tested, the means and methodology, and conclusions drawn. It requires a written summary of what the testimony will be, and provides for an open case file for the expert and also disclosure of the expert's qualifications. In terms of clear and explicit guidance, and ensuring that the prosecutors are aware of that guidance, DOJ has moved considerably.

Mr. Cronin could not say how many state or private labs are involved in federal cases. As a prosecutor in New York for a decade he dealt only with federal labs, which were accredited. There may have been a different practice in other districts, but his sense was that the majority if not the overwhelming majority of labs you are dealing with here would be federal, accredited labs.

Mr. Cronin said DOJ welcomes anything it can do to ensure that we are putting defendants in a fair position to be able to address the expert testimony coming in. It is the most important testimony in many of these cases, which is why DOJ adopted the guidance.

Judge Molloy asked if there was any auditing of individual prosecutors to find out if they are following the guidance. It is one thing to say this is what you should do, it is another thing to find out if they are doing it. Mr. Cronin said he was not aware of any specific auditing, but could check. He thought the way it probably works out in practice is if a prosecutor is not providing what the guidance requires, that is going to be made known to the supervisor very quickly, and resolved very quickly. He was not aware of any nationwide audit. The guidance is now accessible on line, as part of the United States Attorney's Manual (USAM).

Professor Beale noted that the McDiarmid article has been updated, so when it comes out in the *Indiana Law Review* it will state that the Guidance is in the USAM.

Mr. Wroblewski acknowledged that members had made many very good points. He stressed that it is very important to distinguish between two related issues, one of which is very controversial. There is tremendous controversy about what only government experts can say. The PCAST report, which Professor Coquillette mentioned, suggests there should be no expert testimony unless a particular discipline has “validated” the statistical information that can clearly identify the likelihood of a match between a particular piece of evidence and a known piece of evidence. DOJ disagrees with that very, very strongly. There has been a lot of give and take about that at multiple conferences, and precisely what language our experts should be able to use when that statistical evidence is not available is very controversial. DOJ is undertaking an exercise called the “Uniform Language for Testimony and Reports” to try to address that controversy and ensure that that information is, first of all, peer reviewed, and that our experts testify only as far as the science permits. But there’s controversy about that. For example should there be any expert testimony in a case involving a shoe print. The PCAST report suggests there should be no expert testimony in such a case. The Department disagrees. Even though you cannot identify precisely how many Nike size nines are available in a particular area and therefore the likelihood that a particular shoe was associated with the print, we still think the experts can add something. The question is how far can they go, and that’s a controversial subject.

Mr. Wroblewski emphasized that is not what this Committee is dealing with, and it is not what Judge Grimm and Judge Rakoff are asking the Committee to address. They are asking the Committee about discovery. On that, the government can’t give you more than it has. The DOJ policy is open file, giving the defense everything that we have, and a summary of what the witnesses are going to say. And of course part of accreditation is to ensure that they have reports and that the reports indicate what they will say. Again what the language they can use in any particular discipline is very much up for debate. But in terms of discovery, there is no risk in delaying consideration for a year or two. And there is tremendous benefit. When we bring people in, we ask, “Is this the kind of discovery process that should be codified within the rules?” There is no way they’re going to be able to know yet. Government experts testify 100 or 200 times a year nationwide. Remember there are less than two thousand trials in any year, and experts are not testifying in most of them. So to get a read on how the DOJ policy is working is going to require some time. It is not going to be particularly useful to bring people in the few couple of months and ask them how this is going, because no one is going to have experience. On discovery in particular, it would benefit the Committee to delay a little bit.

This whole issue is going to be quite complicated, Mr. Wroblewski said, because there are forensic experts, for which one set of rules will apply, and then there are other kinds of experts, for which he believes a different set of rules should apply. For example, when an expert is brought in to testify to the amount of loss in a fraud on the market case, would you want the kind of report that is suggested and required by the Civil Rules? In that context, DOJ does not think that would be appropriate. There are other experts, such as doctors who treat victims of sexual assault, where there are different concerns, such as privacy. This will be a complicated

exercise. But in terms of discovery in forensic cases, he thought the Committee would benefit from just a little bit of time to see how the new guidance plays out

Another member noted he had a 2255 where the defendant disclosed the expert and the government asked for a Rule 26(a)(2)(B) report from the defendant. It is actually up in the air under 2255, because Rule 12 says both the civil and criminal rules apply unless the rules say otherwise. So sometimes the shoe will be on the other foot in terms of whether the defendant or the government wants more disclosure. He agreed with the comments from the government representatives. The Committee needs to distinguish between the Evidence Rule 702 issues with junk science and Criminal Rule 16 disclosure issues. He would be interested in hearing about how can we craft the criminal rules to allow the defendant or the government to make the case to the judge that whatever information is being disclosed does not satisfy the requirements of Evidence Rules 702, 703, or 704. He asked whether the defense has been challenging government disclosures under Rule 16(a)(1)(g) on the ground that the disclosure does not sufficiently provide the basis or reasons for the opinion. Maybe it would be sufficient if the government discloses an expert and does not provide sufficient information for the defendant to move to strike the expert under 16(a)(1)(g) on the ground that the government didn't provide sufficient explanation of bases and reasons for the opinion. Or maybe more is required, something along the lines of Civil Rule 26. A mini-conference would be in order, he said, and he was leaning in the direction of allowing the current DOJ policy to play out for several months or a year or so, because that will give us data points where the disclosure is more like Civil Rule 26, because right now our data will be primarily under Rule 16. So it would give us some data that would probably be helpful in deciding which disclosure regime would be more helpful to allow for challenge.

Another member also agreed a mini-conference is needed, but was also concerned about the timing. He thought probably be something less than a year, depending upon what information DOJ has about how frequently the policy has been used. Maybe a little more assurance about people using it and how that is monitored.

Judge St. Eve noted that the DOJ guideline covers forensic evidence only, and there are many more types of experts that come in these cases. She thought a mini-conference was a great idea, but it should not be limited to just forensic evidence, it should cover the gamut. She'd had a lot of issues with late disclosure. If the parties want to come in on a late *Daubert* challenge, it fouls up the trial date. Accordingly, she recommended putting the timing of disclosure on the agenda for the mini-conference.

Another member agreed with the need to distinguish between the discovery issue, including the timing, and the separate issue of how judges are applying Evidence Rules 702 to 704. Based on his experience in many trials, there is an important issue of the adequacy of discovery to provide sufficient notice for a *Daubert* motion that we can deal with before trial. This is critical to the defense, and also when the government seeks to exclude defense experts. It would be helpful to put off a mini-conference until the end of the year, if DOJ could gather information about how many cases are getting forensic testimony admitted, and how many other

experts are testifying, like an agent who interprets wiretaps and says this is drug code language and gets qualified. It would provide much better sense about crafting a discovery related rule and seeing how that is being implemented. And then there is a whole separate issue under the evidence rule. There are some egregious errors, a lot of them on 2254s where the state court judge lets somebody testify to 100% certainty this bite mark matches, and the science is just doesn't support that at all. Discovery rules will help attorneys bring a timely *Daubert* motions, saying this is junk science, don't let it in. Even if they don't keep it out, it would be more akin to civil cases where *Daubert* is where the bulk of time is spent, and then a lot of trials go away because of that. But again gathering that information over some period of time would help us.

Another member noted that the question is fundamentally a discovery question. State labs are a problem, but that does not seem that that is the issue on the table. A mini-conference is a good idea but having the DOJ's experience, even though it is just the forensic evidence, would be helpful.

Another member agreed it is an important issue, which is not going away, and stated that he supported one or more mini-conferences. If there is any disagreement, he thought it was about when rather than what we should be looking at. There are a lot of pieces to this large and complicated puzzle. He would like to start as soon as possible and do what can be done now, realizing that important ingredients may be informed by the DOJ guidance. Are there some discrete issues, or some ground work that an initial mini-conference could identify, that we could get started on? The Justice Department guidance is limited to forensics, but that is only part of the universe. Can we get started on the other part of the universe?

Another member indicated his preference to try a mini-conference sooner rather than later. This has the feel of a complicated problem, and after mini-conferences in the past we have usually emerged with a much better sense of the scope of the problem and what the options are.

A member noted the general agreement on the desirability of having a mini-conference, and suggested there might also be other sources of information, such as an FJC judicial survey to help define the issue to address, allowing the Committee to learn what judges who are hearing these cases consider to be the scope of the problem. A survey might also provide some information about the timing of mini-conference. It would also give a point of reference of where things are versus where they might be under the new policies. It might show that there is real progress or that there is no progress, that AUSAs are not getting the information.

Judge Molloy asked about the interaction between the Speedy Trial Act (STA) and any change in the Rule 16 that would require disclosure like the Civil Rules. He noted a study that revealed every continuance causes the cost of paying out CJA lawyer to go up. When you get four continuances, you almost double the cost of the defense. It seems like you have the obligation to disclose, but then the defense is put in the position where it needs to get an expert. He wanted to know if the government had given any thought to the interplay between the STA and what might come down in terms of the change in discovery rule.

Mr. Cronin answered that DOJ had not thought much about the implication of the STA in this context. He noted the application of the Act varies considerably from district to district. It is now very important from the prosecution side that the obligation be reciprocal. It may have the impact of moving a lot of this much farther up. It would probably depend on the district how much impact it would have under the STA.

Mr. Cronin thought DOJ would be able to get statistics as to number of times forensic expert testimony has been received since its guidance came out. They have been keeping track of that. A complication will be there is no one size fits all for experts. The government and the defense offer a large number and variety of experts, everything from a drug agent testifying about the movement of cocaine from Colombia, to experts in organized crime gangs talking about their operations, to interpreters providing translations. So being asked to deal with the different varieties of expert testimony will be an added complication.

In response to the earlier question about motions challenging disclosure under Rule 16, in his last job before coming to Main Justice Mr. Cronin supervised a terrorism case in SDNY and saw a lot of motions saying the discovery had not provided enough information to allow the defense to cross examine the expert. If the motion was made well enough in advance of trial, the judges generally granted the motion and ordered more disclosure or denied the motion. But on the eve of trial, if more discovery would delay the trial, the judge would not allow the expert to testify because the disclosure was not enough and would prejudice the relevant party.

Judge Campbell followed up on the idea about a survey and asked if there a way to survey the federal public defenders in advance of the mini-conference, and maybe go to U.S. Attorneys' offices around the country to try to collect some information about what kind of experiences people are having with disclosures.

A member responded that a survey of defenders is possible, they are all on listservs and might be good to try to do that to get some information. It would also be helpful to survey panel lawyers in every district.

Judge Campbell emphasized it is important to keep in mind the different kinds of expert disclosures that are in Rule 26 of the Civil Rules. Under Rule 26(a) there are three kinds of expert disclosures. Rule 26(a)(2)(A) just requires disclosure of the expert's identity. Two different regimes govern what the party has to disclose about what the party's expert will say. For specially retained experts, there is 26(a)(2)(B) report; he thought that was what Judges Grimm and Rakoff are talking about. But if experts are not specially retained to testify, Rule 26(a)(2)(C) requires only what Criminal Rule 16 requires: disclosure of the subjects and the substance of the testimony. And that's what applies to in-house people testifying, treating physicians, or police officers, people who weren't retained but have some expertise to bring to the case. That's nothing like the report requirement that is being spoken of. If the Committee is going to pursue a Rule 26(a)(2)(B) type report, it is important to recognize how extensive it is in the civil rules. In the 1993 amendments when that was adopted, the Committee made clear in the note what exactly was required. The expert must prepare a detailed and complete written report

stating the testimony the witness is expected to present during direct examination together with the reasons therefore. It is supposed to be almost a recitation of the expert's testimony. The note goes on to say, if the experts do this you don't even need to depose them. Because you know everything they will say at trial. There are a lot of trial judges who will have the report with them during the testimony, and if there is an objection they will ask the lawyer to show them where that is in the report. If it is not in the report, the expert will not be permitted to testify to it. You even have to disclose the exhibits the expert will use ahead of time. He didn't know if Judge Grimm and Judge Rakoff are suggesting that level of detail be adopted for experts in criminal cases, or whether they are just asking for a more robust report. That is a distinction to keep in mind. And Civil Rule 37 says if you don't disclose what you are required to disclose under Rule 26(a), you can't use it at trial. So the consequence of failing to put a subtopic in the report is the expert cannot testify about that subtopic at trial. It is not clear if we are talking about getting to that level of detail for retained and non-retained experts in criminal cases, or whether we are just talking about something more robust.

Mr. Wroblewski said that was precisely what was discussed when the National Commission on Forensic Science issued its recommendation. DOJ's guidance based on the Commission's recommendations does not track Civil Rule 26 precisely because of the federal forensic lab administrators' fear that it would not be good enough to have the forensic report required by any accredited lab, and not good enough to open the file. Writing a report that is the equivalent of a deposition would be immensely burdensome. It is not 100% clear whether our forensic experts would fall into that category or the other category with the summary. So if you look at DOJ's guidance, it does not precisely track Civil Rule 26. It goes beyond it in allowing an examination of everything in the file. And it cuts a little bit short by requiring the summary that is in Criminal Rule 16, rather than the kind of very, very detailed report that is required in at least one category of Civil Rule 26. This is precisely the concern that DOJ has about a rule that would tremendously burden an already overwhelmed forensic lab system.

Professor Coquillette said that when the scientists saw this recommendation in Civil Rule 26, they commented that the word "complete," looked like an unnecessary word we should omit. They did not understand the whole thrust of the committee note, that the complete report is supposed to be almost a verbatim statement of testimony. He also noted that because of these detailed expert reports, the civil rules adopted a revised work product approach to what a party has to disclose in terms of the lawyers' communications with the experts and draft reports. They were trying to eliminate a lot of unnecessary discovery. The amendment is now in Rule 26(b)(4). This was an outgrowth of the complete disclosure requirement of Rule 26(a). He urged the Committee to keep in mind some of the details in Rule 26 and consider whether we should incorporate that level of detail into the criminal rules.

Professor Beale added that when the parallel amendments were originally proposed in the 1990s, there were some negative comments from the defense bar focusing on the reciprocal nature of the obligations, saying the defense could not afford to and did not want to have to make these disclosures. The further you go, the more it is going to cut both ways. On a potential

survey, she asked Ms. Hooper if FJC could help write the questions and Ms. Hooper said absolutely.

Another member suggested reaching out to NACDL as well.

Judge Kethledge expressed the view that there should only be one mini-conference rather than several, to avoid compartmentalizing different experts and to allow the Committee to talk to people on both sides.

Judge Molloy expressed support for a mini-conference and said he would work with Judge Kethledge and reporters and lay out a plan of attack. Timing is a question. Some members felt this was an important issue the Committee should begin work on immediately, but others wanted to know how the DOJ memo is being implemented and if there are any problems. He also noted the concern that Rule 26 is not just a blanket rule, there are different types of experts.

Judge Molloy then asked Professor Beale to present the new rules suggestions.

Professor Beale drew the Committee's attention to the brief descriptions in the agenda book and the email submissions. Ms. Albanese wants a uniform set of national procedural rules. Even if this was a good idea that is not within our Committee's authority. Mr. Ahern also is asking for some things that we cannot really provide. He wants a procedure that would allow small businesses to collect restitution. That does not appear to fall within the jurisdiction of our Committee. We were consulted by the Rules Committee Staff on whether to list these as suggestions. And we did because it is respectful to do that, whether or not on their face they appeared to fall within our jurisdiction.

Judge Molloy asked if anyone on the Committee was interested in pursuing either of these suggestions, and no one was. He asked Professor Beale to turn to the next proposal on work product.

Professor Beale stated that Mr. Blasi wrote to suggest that the relationship between *Hickman v. Taylor* and rules is very unclear, and he suggested that the rules should clearly codify all aspects of work product production. The civil and criminal rules should be reconsidered together, he argued, and a very comprehensive review undertaken. He set out his views at some length in a law review article. Because he is seeking a comprehensive review, Professor Beale reached out to the reporters for the Civil and Evidence Rules Committees. They were not enthusiastic, and did not favor gearing up for a major cross-committee project on this topic. Professors Beale and King agreed.

No member responded to Judge Molloy's invitation to discuss or pursue this further.

A motion was made to remove all three suggestions from the Committee's agenda. It was seconded and passed unanimously by voice vote.

Judge Molloy then turned to the report from the Rules Committee Staff.

Ms. Womeldorf noted that Rules 12.4, 45, and 49 are pending before the Supreme Court. If they are sent to Congress and Congress takes no action, they will become law as of December 1 of this year.

Judge Molloy reminded the Committee that the October 2018 Committee meeting will be held in Nashville, at Vanderbilt. He thanked the departing members and Reporter Daniel Coquillette for their service.

The meeting was adjourned.

DRAFT