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

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 16, 2019

I. Introduction

The Advisory Committee on Criminal Rules met on September 24, 2019, in Philadelphia, Pennsylvania. The draft minutes of that meeting are attached at Tab B. This report discusses several information items. There are no action items.

This report focuses principally on the committee's draft of amendments to Rule 16 to expand the scope of expert discovery. It also briefly describes several other information items: (1) the implementation of recommendations by the Task Force on Protecting Cooperators; (2) the response of the Committee on Court Administration and Case Management (the CACM Committee) to the committee's transmittal of a suggestion concerning delays in the resolution of petitions and motions under Sections 2254 and 2255; and (3) the committee's discussion of several cross-committee suggestions.

II. Rule 16; Discovery Concerning Expert Reports and Testimony

At its September meeting, the Criminal Rules Committee approved unanimously the text of draft amendments to Rule 16, as well as much of the note to accompany those amendments. The committee asked the Rule 16 Subcommittee to develop for the note additional language that would incorporate several points made during the meeting. The draft amendment and note, attached as an appendix to this report, include the additional note language later approved by the subcommittee. The committee plans to incorporate any comments from the Standing Committee into a revised draft for discussion at its April meeting. The goal is to present a proposal to the Standing Committee in June 2020 with a recommendation to publish in August.

This report begins with a brief description of the origins of the project and the committee's process, and then turns to a description and discussion of the draft proposal.

A. The background of this proposal

The committee received three suggestions to amend Rule 16 so that it would more closely follow Civil Rule 26 in the disclosures regarding expert witnesses. *See* 17-CR-B (Judge Jed Rakoff);19-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). To help the committee evaluate the proposals, two informational sessions were arranged.

At the committee's fall 2018 meeting in Nashville, the Department of Justice provided several speakers[1] whose presentations covered the Department's development and implementation of new policies governing disclosure of forensic evidence, its efforts to improve the quality of its forensic analysis, and its practices in cases involving forensic and non-forensic expert evidence. The presentations allowed the committee to compare discovery in criminal cases with discovery provided under Civil Rule 26(a). The meeting materials also included a report by Ms. Elm of expert discovery issues noted by federal defenders.

In April 2019 the Rule 16 Subcommittee hosted a miniconference to learn more about the experiences of practitioners. The participants were experienced practitioners from both the prosecution and defense, selected to provide perspectives from different districts and different kinds of cases.[2] Participants were invited to discuss several issues: (1) what problems (if any)

[1]The speakers were: Andrew Goldsmith, National Criminal Discovery Coordinator; Zachary Hafer, Chief of the Criminal Division, District of Massachusetts; Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General; Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory; and Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York.

[2]The participants were: Marilyn Bernardski, private practice, CDCA (by telephone); Marlo Cadeddu, private practice, ND TX; Michael Donohoe, Deputy Federal Defender, D MT; Andrew Goldsmith, Associate Deputy AG & National Discovery Coordinator; John Ellis, CJA, SDCA; Zachary Hafer, Criminal Chief, U.S. Attorney's Office, D MA; Robert Hur, U.S. Attorney, D MD; Tracy McCormick, U.S. Attorney's Office, ED VA; Mark Schamel, private practice, Washington, D.C.; Elizabeth Shapiro, DOJ Representative to Evidence & Standing Committees; John Siffert, private practice, SDNY; Douglas Squires, Special Litigation Counsel, U.S. Attorney's Office, SD OH; and Lori

they had encountered with pretrial disclosure of forensic evidence before trial; (2) what problems (if any) they had encountered with pretrial disclosure of non-forensic evidence before trial; (3) what changes or practices would prevent any problems they had identified; and (4) whether the requirements should be the same, or different, for government and defense disclosure.

The defense practitioners identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received expert witness summaries a week or even the night before trial, which significantly impaired their ability to prepare for trial. Second, they said they do not receive disclosures in sufficient detail to prepare for cross-examination. They recounted several examples of this problem. Department of Justice representatives, for their part, stated that they were unaware of any problems with the rule. Based on the experiences reported by the defense participants, the judges who provided the suggestions for amendments, and the members of the committee, it appeared that practices varied between districts and, in some districts, from prosecutor to prosecutor.

Department of Justice representatives said that framing the problem in terms of timing and sufficiency of the notice was very helpful. It was useful to know that defense practitioners were not primarily concerned about forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. Department personnel who focused on these other issues were not aware of the timing and sufficiency problems with expert disclosures identified by the defense participants. The Department's representatives expressed willingness to work with the committee to develop language that would address the timing and sufficiency of disclosures regarding expert testimony and be acceptable to the broad community of federal prosecutors. The current proposal is the result of those collaborative efforts.

B. The Committee's proposal

The proposed amendment addresses two shortcomings of the current provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment would clarify the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

The draft amendment makes no change in the reciprocal structure of the current rule, which provides that the government's obligation to disclose information about its experts is triggered only if the defendant requests that disclosure under (a)(1)(G). The defense is required to disclose information about its experts under (b)(1)(C) only if it has made that request and the government has complied. This sequencing remains unchanged by the committee's draft amendment. Once triggered, the disclosure obligations of the prosecution and defense under (a)(1)(G) and (b)(1)(C) are generally parallel under the current rule, and the expanded discovery

Ulrich, Chief of the Trial Unit, Federal Defender, MD PA. Professor Dan Capra, Reporter to the Evidence Rules Committee, also attended.

obligations required of the prosecution and defense under the committee's draft proposed amendment also mirror one another.

The draft amendment achieved unanimous support because members agreed that there are serious problems that could be addressed by amending the current rule; that the amendment constitutes a fair and workable compromise reflecting the needs of both the prosecution and the defense; and that the changes effectively address the problems the committee identified. The committee believes that adding these additional provisions would be a significant improvement over the current rule.

1. The timing of disclosures

The committee concluded that the amendment should include specific and enforceable provisions on the timing of disclosure. Although many members initially supported the inclusion of a default deadline for the disclosures (*e.g.*, 45 days before trial for the government's disclosures), the committee ultimately concluded that approach was unworkable. Given the enormous variation in the caseloads of different districts, as well as the circumstances in individual cases, a default deadline would inevitably generate a large number of requests for extensions of time, burdening both the parties and the courts. Members also noted that default deadlines might prove problematic—rather than helpful—to the defense, because there are structural reasons that might delay its determination whether to use expert testimony. The committee therefore chose to adopt a functional approach, focusing on the goal of providing specific and enforceable deadlines that would allow each party to prepare adequately for trial.

To ensure there are in fact enforceable deadlines in each case, subparagraphs (G)(ii) and (C)(ii) provide that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. These disclosure times, the amendment mandates, must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. The committee note provides additional guidance on the appropriate considerations for the deadlines. This portion of the committee note reflects information developed at the miniconference as well as the experience of committee members. For example, the note states that a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. The note also reminds counsel and the courts that deadlines for disclosure must be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases.

At the September 2019 meeting, members debated how best to word the requirement that the court set a date for these disclosures. They recognized that this might be accomplished in a variety of ways: local rules, standing orders, or orders in individual cases. Although in some sense all of these are orders of the court, the committee thought it desirable to draw attention to the possibility of setting a default deadline by local rulemaking. Accordingly, proposed

(a)(1)(G)(ii) provides that "[t]he court, by local rule or order, must set a time for the government to make the disclosure." Subsection (b)(1)(C)(ii) contains a parallel provision for setting the time for the defendant's disclosures.

These parallel provisions do not specify *when* the court must enter the order setting the deadline, leaving that decision to the court. To respond to concerns that courts (or parties) might mistakenly assume that these deadlines must be set very early in the prosecution, perhaps before the parties and the court had a sufficient understanding of the individual case, the committee added language to the note emphasizing the court's discretion in deciding when to set—and if necessary alter—the deadlines for disclosure. It states:

> Subparagraphs (G)(ii) and (C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leaves to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) and the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

This portion of the note is also helpful because it draws attention to the connection between the timetable for disclosure and the new requirement under Rule 16.1 (which went into effect December 1, 2019), that the parties meet to "confer and try to agree on a timetable" for pretrial disclosures no later than 14 days after arraignment.

2. The Contents of the Disclosure

The current rule states that the parties have a duty to provide "a written summary." The Committee concluded that the word "summary" was responsible, at least in part, for the very cursory and incomplete information sometimes provided about expert testimony. To ensure that parties receive adequate information about the content of expert witness testimony and potential impeachment, the amendments delete from (G)(i) and (C)(i) the phrase "written summary" and substitute an itemized list of what must be disclosed.

Subsections (a)(1)(G)(iii) and (b)(1)(C)(iii) require that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years.

Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate practice in civil cases, which of course differ in many ways from criminal cases. And, indeed, the draft amendment departs in important respects from Civil Rule 26. As noted above, the discovery obligations regarding expert witnesses may be triggered only by a defense request. Like current Rule 16 and unlike Civil Rule 26, it does not distinguish between different types of experts, or require more complete disclosures from only

one class of expert witnesses. (Indeed, Mr. Goldsmith, the Department's National Criminal Discovery Coordinator, cautioned against any attempt to bifurcate experts in criminal cases into two distinct categories, citing concerns about the Department's ability to control certain government experts.)

To address the concern that the use of language drawn from Civil Rule 26 might suggest, erroneously, that the amendment incorporates civil practice concerning expert discovery, the note states (emphasis added):

> To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (G)(i) and (iii)—and the parallel provisions in (C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. *Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to transplant practice under the civil rule to criminal cases, which differ in many significant ways from civil cases.*

The committee note also addresses the Department's concern about the feasibility of obtaining the required list of cases in which its experts provided prior testimony for those expert witnesses who testify very frequently (such as local police or state forensic experts who may testify virtually every week in state court). Speaking to this issue, the note draws attention to Rule 16(d), which allows the court "for good cause," to "deny, restrict, or defer discovery." At the Department's suggestion, it also states that a request for relief under (d) may be made at scheduling conferences or by other means. It provides

> On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying discovery under Rule 16(d).

By anticipating and addressing possible concerns from prosecutors, this portion of the note may assist in securing broad acceptance of the proposal and be helpful in implementing it smoothly.

3. Exempting information previously disclosed

The proposal recognizes that in some situations information required by the amended provisions may have been disclosed to the opposing party already in a report of an examination or test under (a)(1)(F) or (b)(1)(B), or in supporting materials that accompany those reports. To avoid a costly duplication of effort, the draft amendment states that information already provided in one of these reports need not be provided again in the expert disclosure. This exemption be particularly important when the reports and disclosures are provided by forensic experts whose

professional standards would require time consuming procedures to be repeated whenever a new report is prepared.

Accordingly, (a)(G)(1)(iv) and (b)(1)(C)(iv) state that if the party has previously provided a report under (a)(1)(F) or (b)(1)(B) that contained information required by (iii), "that information may be referred to, rather than repeated, in the expert witness disclosure." The reference to the prior report in this disclosure is important because the opposing party might otherwise be unaware that the prior report contained this information, particularly where voluminous discovery has been provided under (a)(1)(F) or (b)(1)(B).

4. Preparing, approving, and signing the report

The proposal distinguishes between the preparation, approval, and signing of expert witness disclosures. Unlike Civil Rule 26(a)(2)(B), the amendment does not require the witness to prepare the disclosure. The committee concluded that in some circumstances it may be appropriate for the prosecutor or defense counsel to draft the disclosure. Disclosures drafted by counsel must, however, accurately portray the witness's testimony. Accordingly, with two exceptions, (a)(1)(G)(v) and (b)(1)(C)(v) of the proposal require the disclosure to be "approved and signed" by the expert.

The first exception to the requirement that the expert sign grew out of the committee's recognition that in criminal cases (as in civil cases) some experts are not under the control of the party who will present the evidence. Examples could include a member of a local police department, a treating physician, or an accountant employed by a defendant. Although these individuals can be subpoenaed to testify, it may not always be possible for the party who will introduce the testimony to obtain the witness's signature on the pretrial disclosure. The proposal deals with this possibility, providing an exception to the approval and signature requirement. The first bullet in subsections (a)(1)(G)(v) and (b)(1)(C)(v) requires the disclosure to be approved and signed by the witness unless the party who will call the witness states in the disclosure "why [the government or the defendant] could not obtain the witness's signature through reasonable efforts." The committee note explains:

> First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts.

The second exception to the requirement that the expert sign the disclosure dovetails with the provisions allowing information previously provided in an expert report to be referenced rather than repeated in a disclosure under (G)(i) and (C)(i). The second bullet in subsections (a)(1)(G)(v) and (b)(1)(C)(v) provides an exception from the signature requirement when the

party "has previously provided [under the rule] a report, signed by the witness, that contains all of the opinions and the bases and reasons for them required by (iii)." The committee note explains:

> Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications, publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

5. Supplementing and correcting disclosures

To deal with the possibility that a party might decide to have the expert testify on additional, different, or fewer issues than those covered in the first disclosure, subsections (G)(vi) and (C)(vi) require a party promptly supplement or correct each disclosure to the other party in accordance with Rule 16(c), the rule that sets forth the parties' continuing duty to disclose. This provision is meant to ensure that if there is any modification, expansion, or contraction of a party's expert testimony after the initial disclosure, the other party receives prompt notice of that correction or modification.

6. Clarifying that the scope of the defendant's disclosure obligation is no broader than the government's obligation.

The proposal makes one additional change to the current rule to ensure that the defendant's disclosure obligations under the rule remain no broader than those of the government. A close comparison of current (a)(1)(G) and (b)(1)(C) revealed one difference in the two provisions that the committee proposal eliminates. Subsection (a)(1)(G) now restricts the government's disclosure obligation to testimony it intends to use in its "case-in-chief." That limiting phrase is not presently included in the defense provision, (b)(1)(C), which requires disclosure of expert testimony the defendant intends to use under Evidence Rules 702, 703, or 705 "as evidence at trial." The reporters and the Rules Committee Staff were unable to find any explanation for this difference in the committee's archives, and members were unable to identify any explanation. The committee concluded that the defendant's disclosure obligation should be no broader than the government's. Accordingly, it added the limiting phrase "case-in-chief" to (b)(1)(C)(i), making it fully parallel to (a)(1)(G)(i). The addition of this phrase makes clear that the amendment does not require the defendant to provide information about evidence intended for use only on cross-examination. As explained in the draft committee note, this is not intended to be a change from current practice. It appears that practitioners have not focused on the difference between the wording of (a)(1)(G) and (b)(1)(C).

III. Update on implementing the recommendations of the Task Force on Protecting Cooperators

The Committee received an update from Judge Kaplan, chair of the Task Force on Protecting Cooperators and the Criminal Rules Committee's Cooperators Subcommittee, as well as from representatives of the Department of Justice.

Although there have been some delays, the Department is going forward with the Task Force's recommendations concerning the Bureau of Prisons (BOP), and Judge Amy St. Eve is continuing to work with the Department on these issues. The most difficult problem for the BOP is providing prisoners access to their own sentencing-related material in a secure area with no copies permitted out into the population. At present, the BOP does not have the space or money to create all of these secure areas. Because the estimated cost to build secure areas for viewing was $500 million, the BOP is exploring the use of electronic kiosks where these materials can be viewed.

The second part of the Task Force recommendations involved changes to Case Management/Electronic Case Files (CM/ECF) that would make less readily available any information from which individuals could infer who was cooperating with the government. Ms. Womeldorf reported that the CACM Committee is working on the implementation of this portion of the Task Force's recommendations, trying to coordinate it with "Next Gen." That is proving to be very complicated.

IV. The CACM Committee's Response to Suggestion 18-CR-D Concerning Delays in §§ 2254 and 2255 Proceedings

Suggestion 18-CR-D expressed concern about delays in ruling on petitions under 28 U.S.C. § 2254 and motions under 28 U.S.C. § 2255. The committee transmitted the suggestion to CACM, noting that the current exemption of habeas cases from the list of motions that must be reported as pending might be contributing to the delays.

Judge Molloy reported that the chair of the CACM Committee, Judge Fleissig, had written to say that the CACM Committee had studied the issue and concluded that the current approach was appropriate given the unique issues associated with Section 2254 petitions and Section 2255 motions. Judge Fleissig also stated, however, that the CACM Committee has asked its case management subcommittee to look into other steps that might address the problem of long delays, including additional staffing.

V. Cross-Committee Proposals

A. 19-CR-A, calculation of IFP and CJA status.

A suggestion addressed to the Civil, Criminal, and Appellate Committees seeks changes in the process of determining IFP (in forma pauperis) status. In a footnote, the proposal states that IFP includes CJA status in criminal cases.

As an initial matter, the proposal errs in equating IFP status with CJA status. Those statuses are governed by different statutes and have different processes and different standards. And CJA status is very different from IFP status. Thus, to the extent the suggestion is focused only on IFP status, the members of the committee saw no reason for it to play a major role in pursuing the suggestion.

That said, the Criminal Rules Committee does have an interest in IFP status for filings under 28 U.S.C. §§ 2254 and 2241. Although those proceedings are technically civil, they fall under the jurisdiction of the Criminal Rules Committee. Accordingly, if the other committees take up the issue of redefining IFP status, it would be appropriate for the Criminal Rules Committee to participate.

B. 19-CR-B; court calculation and notice of all deadlines.

A second cross-committee suggestion went to the Criminal, Appellate, Bankruptcy, and Civil Rules Committees. The proposal sought to require that courts give immediate notice to all filers of (1) the applicable date and time (including time zone) for future events, (2) whether and how the time could be modified, and (3) whether the event was optional or required. The notices would be cumulative, continuously updated, and user friendly, not requiring users to look up applicable rules or do calculations. It also proposed that the rule specify that filers could rely on the court's computed times.

Although members expressed sympathy with the difficulties that pro se parties (and often counsel as well) sometimes have in calculating the time limits, they were strongly opposed to this proposal. The clerks' offices are already overburdened and simply do not have the resources to take on this responsibility. As one member put it, the clerk's office in his district was already "running as fast as they can." Some members expressed an interest in determining whether there were computer applications that could provide this information to the parties, as well as to the court itself, but others expressed concern that even this approach would require resources that are not available. Moreover, filings are sometimes given the wrong description, which would then lead to the wrong date if calculated automatically. Finally, members recalled the Supreme Court's ruling that a habeas petition was out of time even though the filer had relied on the district court's erroneous calculation of when it was due.

One judicial member stated that he sought, when possible, to specify a date certain in his own orders. Although that approach is far easier for pro se parties to understand, other members noted it has other downsides. Dates specified in an order may be affected by later events. If the court has specified dates certain, then they must all be adjusted. That is not the case if one specifies that an action must be taken within a certain period before or after a given event.

C. 19-CR-C, E-filing Deadline Joint Subcommittee.

The committee received a short briefing on the E-filing Deadline Joint Subcommittee. The subcommittee is considering a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office

closes in the court's respective time zone. The subcommittee's membership is comprised of members of all of the rules committees. This committee's reporters and Ms. Recker, a member of the committee, are representing the Criminal Rules Committee.

A representative from the Department of Justice asked whether the subcommittee had a member from the Department. Judge Campbell and Ms. Womeldorf stated that a Department of Justice representative should be added to the subcommittee.