ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

Sept. 27-28, 2010
Cambridge, Massachusetts

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Cambridge, Massachusetts, on September 27-28, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Justice Robert H. Edmunds, Jr.
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)

Representing the Standing Committee were its Chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Committee Secretary
John K. Rabiej, Rules Committee Support Office
Jeffrey N. Barr, Senior Attorney, Administrative Office
Henry Wigglesworth, Attorney Advisor, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
David Rauma, Senior Research Associate, Federal Judicial Center

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly Mr. Thomas P. McNamara, who had missed the April 2010 meeting due to illness. Judge Tallman also welcomed two distinguished visitors: the Honorable Emmet G. Sullivan, United States District Judge for the District of Columbia, and the Honorable Mark L. Wolf, Chief United States District Judge for the District of Massachusetts.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2010 meeting.

The Committee unanimously approved the minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the various proposed rules amendments recently approved by the Supreme Court (listed below in Section II.A) were on track to take effect on December 1, 2010, unless Congress were to act to the contrary. Based on his communications with Congressional staff, Mr. Rabiej reported that, at present, no changes were foreseen.

Mr. Rabiej further reported that the Judicial Conference had recently approved the Committee's proposed rules amendments, including technology-related amendments, listed below in Section II.B. The Administrative Office will transmit the amendments to the Supreme Court shortly. Finally, Mr. Rabiej reported that additional proposed amendments had been approved by the Standing Committee for publication (listed below in Section II.C) and had been posted on the rulemaking Web site in August 2010. He expects pamphlets of these amendments to be ready soon for distribution. Hearings on the proposed amendments have been scheduled for January 5, 2011, in San Francisco and January 25, 2011, in Atlanta. (The hearings will not be held if there is insufficient interest in presenting oral testimony.)

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on

pretrial discovery. Accordingly, Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge Keenan.

II. CRIMINAL RULES UNDER CONSIDERATION

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

Mr. Rabiej reported that the following proposed amendments had been approved by the Supreme Court for transmittal to Congress:

1. Rule 12.3. Notice of Public Authority Defense. The proposed amendment implements the Crime Victims' Rights Act.

2. Rule 21. Transfer for Trial. The proposed amendment implements the Crime Victims' Rights Act.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej further reported that the following proposed technology-related amendments had been approved by the Judicial Conference for transmittal to the Supreme Court:

1. Rule 1. Scope: Definitions. The proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. The proposed amendment allows a complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. The proposed amendment adopts the concept of a "duplicate original" warrant from existing Rule 41 and allows returns to be transmitted by reliable electronic means, and authorizes issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. The proposed amendment provides a comprehensive

procedure for issuing complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 6. The Grand Jury. The proposed amendment authorizes grand jury returns to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. The proposed amendment authorizes issuing a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits a defendant to participate by video teleconference.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. The proposed amendment authorizes the use of video teleconferencing.

9. Rule 41. Search and Seizure. The proposed amendment authorizes requests for warrants, the return of warrants, and inventories to be made by telephone or other reliable electronic means as provided by Rule 4.1, and makes a technical and conforming amendment deleting obsolete references to calendar days.

10. Rule 43. Defendant's Presence. The proposed amendment authorizes a defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. The proposed amendment authorizes papers to be filed, signed, and verified by electronic means.

C. Proposed Amendments Approved By the Standing Committee for Publication

Mr. Rabiej further reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 5. Initial Appearance. The proposed amendment provides that an initial appearance for an extradited defendant must take place in the district in which the defendant was charged. In addition, a non-citizen defendant in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

2. Rule 37. Indicative Rulings. The proposed amendment authorizes a district court to make indicative rulings when it lacks authority to grant relief because an appeal has been docketed.

3. Rule 58. Initial Appearance. The proposed amendment provides that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman asked Laural Hooper and David Rauma to describe the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. Judge Tallman noted that the survey had already garnered many compliments, which were reflected in the high response rate that it had generated.

Ms. Hooper presented the preliminary survey results. She began by describing how the survey had been distributed to all district and magistrate judges and 16,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 93 U.S. Attorney's Offices nationwide, but not to individual prosecutors.

The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorney's Offices responded. In addition, respondents provided written comments that Ms. Hooper estimated would amount to over 700 pages of text.

David Rauma described the survey methodology in more detail. He noted that the list of defense attorneys had been collected from all criminal cases terminated in federal courts in 2009. He pointed out that the responses were personal opinions and estimates, and they should not be confused with actual case-related data. He also cautioned that the responses from the U.S. Attorney's Offices were aggregate responses – one response was submitted for all the federal prosecutors in that particular district, as opposed to individual responses by the line prosecutors themselves.

Ms. Hooper reported that the survey focused on the central issue of whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. It also asked many subsidiary questions, such as whether federal prosecutors and defense attorneys understand their disclosure obligations, whether they fulfill those obligations, how violations of Rule 16 are addressed by the courts, and whether the 2007 proposal to amend Rule

16 should be reconsidered. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as "traditional Rule 16 districts" and the latter districts as "broader disclosure districts."

Summarizing the survey results, Ms. Hooper reported that 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. Breaking it down further, Ms. Hooper noted that in the broader disclosure districts, 60% of the judges favor an amendment while in the traditional Rule 16 districts, only 45% favor an amendment.

Regarding the frequency of non-compliance with discovery obligations, 61% of judges in the broader disclosure districts, and 74% of judges in the traditional districts, reported no violations by prosecutors within the past five years. Similarly, 64% of judges in the broader disclosure districts and 68% of judges in the traditional Rule 16 districts reported no violations by defense attorneys within the past five years.

Regarding overall satisfaction with prosecutors' compliance with discovery obligations, 90% of judges in both the broader disclosure districts and the traditional districts said they were either "very satisfied" or "satisfied" with the prosecutors' compliance. As to defense attorney compliance, almost 80% of judges in both types of districts expressed satisfaction.

Among the districts that have broader disclosure, some require prosecutors to disclose exculpatory or impeaching information without regard to the *Brady* "materiality" requirement. *See Strickler v. Greene*, 527 U.S. 281, 281-82 (1999) (defining "materiality" as creating a "reasonable probability that the suppressed evidence would have produced a different verdict.") The survey asked respondents in these districts whether elimination of the materiality requirement reduced discovery problems. Seventy-one percent of defense attorneys believed that elimination of the requirement lessened problems, while 60% of U.S. Attorney's Offices reported that removing the requirement made no difference.

Regarding harm to prosecution witnesses, 73% of judges reported no threats or harm to witnesses due to disclosure of exculpatory or impeaching information in the past five years. Approximately 40% of U.S. Attorney's Offices reported that in the past five years no protective orders had been requested to address security concerns.

In both the broader disclosure districts and the traditional Rule 16 districts, judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason –

eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment.

The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey asked respondents for their view on the possible effects of a proposal to amend Rule 16 that the Committee advanced in 2007, which required the government to release all exculpatory and impeaching information no later than 14 days before trial. Overall, a majority of judges thought that such a proposal would have, or could have, negative consequences in witness security and privacy. Conversely, a majority of defense attorneys felt the opposite – that the 2007 amendment would have no adverse effect, or a minimal effect, on the safety and privacy of witnesses. The Department criticized the broad disclosure required by the 2007 amendment, arguing that it would in effect turn a witness's life into "a virtual open book."

Following Ms. Hooper and Mr. Rauma's presentation, members asked a number of questions and made several comments. One member questioned how the U.S. Attorney's Offices garnered information to respond to the survey. Mr. Wroblewski answered that the survey requested that the U.S. Attorney or a designee solicit the views of individual prosecutors in each district before responding on behalf of each U.S. Attorney's Office.

Ms. Felton asked whether the 43% response rate by judges fell into any sort of distribution pattern, *e.g.*, whether the responses predominately come from urban or rural districts. Mr. Rauma replied that he did not recall either type of district being dominant, but acknowledged that determining whether the distribution of responses to a survey is sufficiently representative is always difficult. However, he reassured members that at least one judge had responded to the Rule 16 survey from every district and that he saw no anomalies in the overall distribution.

A member observed that the frequency of Rule 16 problems is difficult to assess because attorneys often work out problems themselves without involving a judge. A judge member pointed out that the dimensions of the problem are unknowable because "you don't know what you don't know." Although he said that he does not see Rule 16 problems very often, the member added that when they do arise, they tend to be egregious.

Chief Judge Wolf thanked the chair for inviting him to the meeting and made several observations. He said he agreed that it is essentially impossible to measure the scope of discovery problems. Further, in his district, a broad disclosure district, problems continue to arise, even after the Department's recent efforts to emphasize compliance with *Brady*

obligations, and his most common remedy is to compel disclosure. Judge Wolf noted that Rule 16 does not currently require disclosure of even "core *Brady* material."

Judge Sullivan also thanked the chair for inviting him and offered comments. He praised recent efforts by the Department to train prosecutors to better meet their discovery obligations. However, he worries that the strength of the Department's commitment relies too heavily on the support of certain officials, who may not be in charge in the future. Therefore, he favors the more permanent solution of amending Rule 16. He pointed out that a preponderance of judges favors an amendment and urged the Committee to act in the face of such strong support for change. He suggested that further study is not necessary because a well-crafted amendment would generate informative responses when published for comment. The Committee would subsequently have ample time to study the details of any proposal.

Assistant Attorney General Lanny Breuer offered his comments and an update on the Department's efforts. He said that even though statistics reveal that discovery violations by prosecutors are extremely rare, any misconduct by a federal prosecutor is unacceptable. The Department now requires training for all federal prosecutors and paralegals, and it recently hired a deputy to assist the National Coordinator for Criminal Discovery in these efforts. Furthermore, the Department is creating a discovery deskbook to provide guidance to prosecutors. General Breuer added that he is working with federal law enforcement agencies within the Department, including the Federal Bureau of Investigation and the Drug Enforcement Agency, and with key agencies outside the Department to address "data management problems" that currently complicate prosecutors' efforts to make sure they can meet their discovery obligations.

Responding to Judge Sullivan's comments, General Breuer submitted that the Department's current commitment to improving criminal discovery practices will be permanent. He added that the dangers of amending Rule 16 to broaden disclosure were great, particularly as to witnesses' security, and these dangers were most pronounced along the U.S. border with Mexico. He concluded by saying that the Department forcefully opposes any amendment to Rule 16.

Judge Tallman reminded the Committee that the Department's opposition to amending Rule 16 in 2007 had been a significant factor in the Standing Committee's decision not to approve the proposed amendment and to recommit the matter to the Criminal Rules Committee for further study. Essentially, the 2007 proposal was halted based on the Department's promise to address disclosure problems internally. The Department's reform efforts in 2007, Judge Tallman observed, were not nearly as extensive as its current efforts. Therefore, Judge Tallman said, the Department's continued opposition to changing Rule 16 is problematic for the future success of any proposed amendment.

Chief Judge Wolf said that amending Rule 16 would be in the Department's own best interest because an amendment would clarify a prosecutor's discovery obligations and make it

easier to satisfy those obligations. Currently, he observed, Rule 16 does not even incorporate the constitutional mandates of *Brady* and *Giglio*. Further, Judge Wolf argued that dispensing with the *Brady* "materiality" requirement would benefit prosecutors because it would relieve them of the impossible burden of trying to foresee all the defenses that might arise at trial. For these reasons, the Department should support amending Rule 16, and Judge Wolf said he hoped that the Committee would recommend an amendment for publication.

Professor Coquillette observed that any amendment to Rule 16 would be seeking to change attorney conduct, and he questioned whether modifying conduct can best be accomplished through a change in the rules.

A member questioned whether amending Rule 16 to broaden disclosure obligations might run afoul of the Jencks Act, 18 U.S.C. § 3500, which sets out strict parameters for disclosure of statements by government witnesses. Judge Tallman responded that in the event of a conflict between a rule and a statute, the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072, could resolve the conflict in favor of the rule. However, he pointed out that reliance on the supersession clause is a last resort and that it is Judicial Conference policy that such conflicts should be avoided if at all possible. Otherwise, Judge Tallman noted, Congress might focus on the conflict between a proposed change to Rule 16 and the Jencks Act, which could threaten the entire rulemaking process. These risks all underscore the importance of trying to get the Department to agree to support any amendment to Rule 16 that might ultimately be advanced by the Committee.

Judge Sullivan proposed that Rule 16 could be amended by adding a checklist, informing prosecutors of the type of material that must be disclosed. A member added that in addition to the checklist, a "safety valve" could be added that would allow prosecutors to refrain from disclosing certain material if disclosure posed a threat to a witness's safety. Professor Beale noted that some local rules in the broader disclosure districts already employ similar checklists, which could serve as models for a national rule.

A member voiced the view that the Committee was attempting to solve a problem that might be attributable in part to the large size of the federal government. He pointed out that due to the sheer number of federal agents involved in a case, a prosecutor might not even know about the existence of some exculpatory information. The Committee should defer acting on an amendment until the Department has had a chance to address these information-sharing problems, the member argued. The problem is amplified if local, state, or foreign law enforcement officers are involved in a multi-agency investigation.

Judge Tallman observed that the checklist proposed by Judge Sullivan could be placed in the Federal Judicial Center's Judges' Benchbook, as opposed to becoming part of Rule 16. In addition, the Federal Judicial Center might be interested in publishing a guide to the "best practices" in criminal discovery. Supplementing the Benchbook or publishing such a guide

could be effective measures that would avoid the pitfalls of amending Rule 16. Judge Rosenthal added that the recent Civil Litigation Conference at Duke Law School had highlighted the limitations of the rules process and had underscored the usefulness of alternative approaches to solving problems.

Chief Judge Wolf urged the Committee not to be deterred by the nearly even split among judges who responded to the survey. Publication of a proposed amendment would prompt judges to reconsider their views, he predicted, and the resulting debate about the amendment's pros and cons could lead to further support for the amendment.

Ms. Hooper asked Judge Tallman for guidance on how to disseminate the extensive comments that had been submitted in response to the survey. After some discussion, Judge Tallman requested that Ms. Hooper and her colleagues continue to categorize the comments and also to redact any information identifying the authors of the comments. Judge Tallman and members agreed that because respondents had been told that their comments would be confidential, the redacted version should be available only to Committee members. Ms. Hooper will circulate redacted materials when they are ready to be released to the Committee for further study.

Judge Tallman concluded the discussion on Rule 16 by recommitting consideration of any proposed amendment to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 subcommittee, briefly summarized the history of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee, with a recommendation that it be published for comment, an amendment attempting to change Rule 12 in light of *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense *before* trial, and it would have provided relief for failure to raise the defense in certain narrow circumstances. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

In response, Judge England reported that the Rule 12 subcommittee had drafted a new amendment (located on page 120 of the Agenda Book) that was more expansive than the original. Despite having produced a draft, Judge England pointed out that a minority of members of the subcommittee were against the concept embodied in the amendment, *i.e.*, requiring defendants to raise this claim before trial.

A member amplified these comments, explaining that he was against amending Rule 12 because: (1) there is no demonstrated need for the amendment; (2) the amendment creates a trap

for unwary defense attorneys; and (3) it might unintentionally lead to prosecutors becoming lax in crafting indictments.

Another attorney member agreed that the amendment is not needed and also expressed dismay that after trial begins, a defendant would not be able to challenge whether he is charged with a crime, without overcoming procedural hurdles such as those contained in the proposed amendment. A judge member agreed.

Mr. Wroblewski said that the original idea for amending Rule 12 had come from the late Judge Edward Becker, Chief Judge of the United States Court of Appeals for the Third Circuit. The basis for the suggestion was to create a more orderly process for handling pretrial motions. Judge Rosenthal added that an amendment might help sort out the confusion among the courts over how to interpret Rule 12. Ms. Felton agreed that the justification for amending the rule is to clarify for litigants which motions must be raised before trial.

In light of the debate over whether an amendment to Rule 12 was advisable, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 8-4 in favor of proceeding with consideration of the proposed amendment.

Following this vote, discussion centered on seeking a compromise to satisfy the concerns of some members that the proposed amendment would pose an unfair burden to defendants. Chief among these concerns was the procedural barrier that a defendant would face by missing the pretrial deadline for filing a motion. Under the proposed amendment, a defendant who missed the deadline would be deemed to have waived the claim and must show "cause and prejudice" in order to receive relief from the waiver and bring the motion. The change was intended to reflect existing law.

To provide more leeway to a defendant who misses the pretrial deadline, a member noted that there is usually a short period between the pretrial motion deadline and the start of trial and suggested that if the defendant seeks to raise the claim during this period, a district judge should be permitted to consider it without regard to "cause and prejudice." A judge participant agreed, saying that a district judge's discretion to consider such a motion should be unfettered if the motion is filed before jeopardy attaches.

To incorporate this concept into the proposed amendment, a member moved to modify the proposed amendment by deleting in subdivision 12(e)(1) the sentence that reads: "Upon a showing of cause and prejudice, the court may grant relief from the waiver." (lines 91-93 on page 125 of Agenda Book), and inserting in its place the following language:

> The district court, in its discretion, may grant relief from the waiver any time before jeopardy attaches. Thereafter, the court may grant relief from waiver upon a showing of cause and prejudice.

A judge member expressed concern that the proposed modification would be read liberally by attorneys as condoning last-minute motions. He said he preferred the current rule's strict deadlines. Another judge member countered that he thought the amendment captured the current practice in federal court.

Judge England voiced misgivings over crafting a rule that seems solicitous of attorneys who miss an important deadline. Another judge said that he favored the modification because a district judge should have maximum discretion to correct errors when a person's liberty is at stake. A member added that many defense attorneys are inexperienced and make mistakes. They deserve to be helped by the rules.

Professor King pointed out that the proposed amendment already contains new language intended to help defense attorneys: In Rule 12(b)(3), the phrase "if the basis for the motion is then available" (line 15 on page 120 of Agenda Book) was added to allow defense lawyers to raise motions after the pretrial deadline, without a showing of cause and prejudice, if the grounds for the motion were not previously available.

The Committee voted 6-5 against the proposed modification to the proposed amendment to Rule 12(e)(1).

A member moved to insert the word "reasonably" before "available" in subdivision Rule 12(b)(3) (line 15 on page 120 of Agenda Book).

The motion was approved with two dissents.

Discussion turned to proposed Rule 12(e)(2), which would create a different standard of review for a class of specified untimely claims. Instead of requiring a showing of "cause and prejudice," this provision would permit review for plain error, as defined by Rule 52. A member suggested that in addition to an untimely claim that a charge failed to state an offense, untimely motions raising double jeopardy and limitation errors should also receive this more generous standard of review, and moved to insert "double jeopardy" and "statute of limitations" in the bracketed part of subdivision Rule 12(e)(2) (lines 97-98 on page 125 of Agenda Book). Professor Beale noted that the precise wording of this amendment would be subject to revision by the style consultant.

The motion was approved unanimously.

It was moved that the Committee approve the entire proposed amendment to Rule 12 and a conforming amendment to Rule 34 and send both the amendments to the Standing Committee for publication.

The Committee voted 8-4 to approve the proposed amendment to Rule 12, as modified, and a conforming amendment to Rule 34, and send the amendments to the Standing Committee for publication.

C. Rule 11 (Pleas)

Judge Rice, Chair of the Rule 11 subcommittee, reported that the subcommittee had prepared a draft amendment to Rule 11 (page 129 of Agenda Book). It would add a new item to the list of notifications a judge must give a defendant when taking a guilty plea. In response to the recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), which held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation (formally known as "removal"), the proposed amendment would require a judge to inform a defendant that a guilty plea may have significant immigration consequences.

Judge Rice also reported that the subcommittee recommended that the Federal Judicial Center amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

A judge member expressed his strong opposition to the proposed amendment. Adding to the list of matters that must be addressed during a plea colloquy was a "slippery slope," that would open the door to future amendments and eventually turn a plea colloquy into a minefield for a judge. In addition, he noted that *Padilla* is based solely on the constitutional duty of defense counsel and does not speak to the duty of judges. Finally, the member said he had no objection to amending the Benchbook, but urged the Committee not to make the additional warning mandatory by incorporating it into Rule 11.

Another judge member echoed the concern about adding to the already long list of warnings that are compulsory under Rule 11. He mentioned that in his home state, pleading guilty to certain crimes may cause the defendant to forfeit a state pension. He asked whether that consequence should now also be included in the plea colloquy.

A member spoke out in strong support of the amendment, arguing that it is necessary because immigration cases now comprise a huge portion of the federal caseload and because *Padilla* emphasized the importance of immigration consequences.

Ms. Felton pointed out that the Department has advised prosecutors to include a discussion of immigration consequences in plea agreements because of the significance of those

consequences. Similarly, she believes that judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

Several other members spoke in favor of the proposed amendment. One agreed that *Padilla* was limited to the duty of defense counsel to warn a defendant about immigration consequences, but argued that the Supreme Court's logic also supported requiring a judge to issue a similar warning. Addressing the "slippery slope" argument, a member pointed out that the Committee is not a judicial body and if it approved the addition of this new warning to Rule 11, the addition would not create binding precedent that would force the Committee to add more warnings in the future. Deportation, the member continued, is qualitatively different than the loss of other rights triggered by a guilty plea and therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy.

In light of the debate over whether an amendment to Rule 11 should be considered at all, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 7-5 in favor of proceeding with consideration of the proposed amendment.

Following this vote, Judge Rice moved to adopt the actual language of the proposed amendment, which adds a new subparagraph to the list contained in Rule 11(b)(1). (Text of the amendment is located on page 129 of Agenda Book.) Following a brief discussion, it was moved that the proposed amendment be modified by deleting it and substituting the following:

> (O) that a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The motion was approved unanimously.

The Committee acknowledged that the language would be subject to additional restyling by the style consultant.

Turning to the recommended amendment to the Judges' Benchbook (page 130 of Agenda Book), members debated whether it was advisable for a judge to ask a defendant directly if he or she is a United States citizen. Several suggested it was not advisable and recommended that a judge could preface any warning about immigration consequences with a phrase such as, "If you are not a U.S. citizen, then . . . ." However, it was agreed that the publisher of the Benchbook, the Federal Judicial Center, should resolve the issue.

It was moved that the Judges' Benchbook be amended by adding the language on page 130 of the Agenda Book. Judge Rosenthal asked that the Federal Judicial Center keep the Committee informed of any changes to the Benchbook in order to ensure consistency with the Committee's proposed change to Rule 11.

The motion was approved unanimously.

In light of the previous discussion that highlighted the Committee's reluctance to impose greater burdens on judges to give additional warnings under Rule 11, Judge Rice withdrew the proposed amendment dealing with sex offenses (located on page 130 of Agenda Book). He recommended, however, that the Judges' Benchbook be amended by adding the warning (located on page 131 of Agenda Book).

Several members argued that the proposed warning should include broader language to avoid unintentionally omitting any important consequences of pleading guilty to a sex offense, such as the possibility of civil commitment. Judge Rice agreed and requested that Professors Beale and King revise the proposed language accordingly and circulate a draft to members for approval by e-mail. Judge Tallman added that he would also circulate a proposed letter to the Federal Judicial Center recommending the Committee's proposed changes to the Benchbook.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Mr. Rabiej reported that it appeared that Congress would not consider any rules-related legislation before adjourning in October for the mid-term elections.

Mr. Wroblewski noted that the Crime Victims' Rights Act ("CVRA") is due to be reauthorized next year and he anticipates that the law might be revised slightly. He added that in furtherance of the Department's outreach program under the CVRA, the Department has increased its efforts to contact victims' rights groups and solicit their views.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had issued its report to the Standing Committee. It surveyed sealing practices in federal court and made several recommendations. The full report is available on page 136 of the Agenda Book.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported that the Standing Committee's Privacy Subcommittee had concluded its work and would issue its report in January 2011. It will recommend continued study of several problematic areas but will not suggest any specific changes to the rules.

A judge member voiced his concern about protecting the privacy of jurors. He said that he had recently concluded a high-profile trial after which some jurors had been harassed by the press. He related how one juror was afraid to go home because her house was being monitored from the air by a helicopter deployed by the media. According to the member, this treatment of jurors highlights the need for a rule that would require the media to honor a juror's request not to be contacted after a trial. It was suggested that failure to honor the request would result in sanctions.

Judge Raggi agreed that juror privacy was of paramount concern, as the jury's critical role in the administration of justice deserves special consideration. While the Privacy Subcommittee will not make specific proposals to address the matter, she said that the issue will be monitored as the federal courts grapple with how best to resolve it.

D. Administrative Office Forms Regarding Appearance Bonds

Mr. McCabe briefed the Committee on revision of a national form, AO Form 98 (Appearance Bond), designed to ensure the appearance of a criminal defendant in federal court. The AO Forms Working Group of judges and clerks had studied the form and a subcommittee chaired by Magistrate Judge Boyd Boland (D. Colorado) had produced a draft. In addition, other related forms were also revised. (Drafts of the forms are located on pages 155-160 of the Agenda Book). The principal substantive change is to transfer a defendant's agreement to appear from another form to the face of the appearance bond itself. As Judge Boland explained in his memorandum to the Forms Working Group, "the agreement to appear is so fundamental to the purpose of the appearance bond . . . that it should be contained in the Appearance Bond itself." (Agenda Book at 149).

Mr. McCabe reported that he was working on several stylistic changes to the proposed new forms to make them more readable. He added that a style consultant would also be reviewing and revising the forms. Once these changes are made, the final forms will be forwarded to the Criminal Law Committee, which will review them before the forms are posted on the J-Net, the judiciary's intranet, for review and comment.

As an initial matter, Judge Tallman asked whether the Committee had any authority to make suggestions to change the forms, given that a different committee, the Criminal Law Committee, is charged with overseeing them. Mr. McCabe responded that the Director of the Administrative Office has ultimate authority over the forms, and the Forms Working Group would welcome any suggestions by the Committee.

Members then offered several suggestions. One suggested that the various promises listed in the first sentence of the Appearance Bond Form would be easier to follow if they were broken out and listed separately. Professor King suggested that the condition of release listed on Form 199B (Additional Conditions of Release) as subsection "r" (page 160 of Agenda Book) might be more appropriately listed as a condition of release on Form 199A (Order Setting Conditions of Release). Judge Tallman noted that Form 199A appeared to be missing a signature line for the judge issuing the Order Setting Conditions of Release. Finally, Judge Rosenthal suggested that the word "execute" be changed to "sign" on the bottom of Form 199A.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting would take place in Portland, Oregon, on Monday and Tuesday, April 11-12, 2011. He thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor