ADVISORY COMMITTEE ON CRIMINAL RULES

MEETING MINUTES

April 11-12, 2011, Portland Oregon

I. ATTENDANCE AND PRELIMINARY MATTERS

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States met in Portland, Oregon, on April 11-12, 2011. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

The Hon. Lanny A. Breuer, Assistant Attorney General, Criminal Divison, Department of Justice (ex officio), participated in the meeting by telephone. One member, Judge James B. Zagel, was unable to attend.

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
Andrea Kuperman, Chief Counsel, Rules Committee Support Office
James Ishida, Attorney, Administrative Office
Jeffrey Barr, Attorney, Administrative Office
Holly Sellers, Supreme Court Fellow, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
Charlene Koski, law clerk to Judge Tallman

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director

of the Office of Policy and Legislation, Kathleen Felton, Deputy Chief of the Appellate Section, and Andrew Goldsmith, National Criminal Discovery Coordinator.

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

Judge Tallman welcomed everyone, particularly the committee's newest member, Chief Justice David E. Gilbertson of the Supreme Court of South Dakota, who is replacing Justice Edmunds. Judge Tallman also welcomed a distinguished visitor, Judge Emmet G. Sullivan of the United States District Court for the District of Columbia.

The committee noted that this was the last meeting for the chair, Judge Tallman. Judge Rosenthal conveyed the great thanks of the Standing Committee for the outstanding work of Judge Tallman and all that he has done.

The committee also noted that this was the last meeting for Mr. McNamara. Judge Tallman lauded Mr. McNamara as a wonderful representative of the Federal Public Defenders. The committee agreed that both Judge Tallman and Mr. McNamara had made superb contributions to the committee's work.

B. Review and Approval of the Minutes

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

The committee approved the minutes unanimously by voice vote.

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

Ms. Kuperman reported that the Supreme Court recently approved the committee's proposed amendments (see below) that will take effect on December 1, 2011, unless Congress were to act to the contrary. In addition, in fall 2010, the committee's proposed amendments to Rules 5, 58, and 37 were published for public comment. The public comment period ended in February 2011.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved By the Judicial Conference for Transmittal to the Supreme Court

Ms. Kuperman reported that the following proposed amendments had been approved by the Judicial Conference for transmittal to the Supreme Court, and now have been approved by the Supreme Court for transmittal to Congress:

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

2. Rule 3. The Complaint. Proposed amendment allows 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. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing 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. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendment Approved by the Standing Committee for Publication in August 2011

Ms. Kuperman further reported that the following amendment had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

Prof. Beale reported that the Standing Committee approved this proposal for publication at its January 2011 meeting. The amendment will be published for comment in August 2011.

She added that the committee had discussed the idea that, in addition to the rule amendment, related changes might be made to the section of the judges' benchbook addressing the plea colloquy, perhaps touching on more issues than the rule amendment does. The committee had before it a draft letter to Judge Rothstein of the FJC requesting the changes in the benchbook. The committee that oversees the benchbook, chaired by Judge Irma Gonzalez, will make the final determination on such changes.

A member questioned whether it is a good idea to ask the defendant whether he has discussed the issue of immigration consequences with his attorney. This could lead into a morass. Another member responded that discussing this with your attorney is at the heart of *Padilla v.. Kentucky*, 130 S. Ct. 1473 (2010). That is the whole point, that the judge should not accept your plea if you have not discussed this with your attorney.

A member argued that the Rule 11 issue relates to advice from the court to the defendant about collateral consequences, which has nothing to do with what the defendant has discussed with his attorney. Even if the defendant has had discussions with his attorney, if he still doesn't understand, then the court cannot accept his plea. In *Padilla*, the issue was incorrect advice given defendant by his attorney, not a failure to have the conversation.

A member added that if the defendant says yes, I talked to my attorney about this, all that means is that the topic has come up. It does not mean that defendant got good advice, or full advice, or the right advice. Is the judge in any position to do anything about that? The judge cannot give the defendant any advice at all.

Judge Tallman emphasized that the committee is not writing a script for the plea colloquy here. The committee is merely trying to identify issues that need to be considered at the plea. Every judge will ask about this in the judge's own way.

Judge Tallman called for a vote on whether to include the language in the letter regarding the immigration consequences of a guilty plea.

The committee voted unanimously by voice vote to approve this language.

A member stated that the remaining issue, the language in the letter relating to sex offenses, is more complicated. It could be simplified by not getting into issues of civil commitment. Another member disagreed and argued that that language should be included, because these civil commitment issues are arising more often and are proving to be quite challenging for defense counsel.

Prof. Beale noted that under the statute addressed in *United States v. Comstock*, 560 U.S. ___ (2010), any defendant leaving the custody of the Bureau of Prisons can be subject to civil commitment, no matter what the offense for which the defendant was imprisoned, if the government can show that the defendant has committed a sex offense previously. Also, if someone pleads guilty to a federal sex offense, they are subject to both federal and state civil commitment and sex offender registration laws.

A member stated that with all of this added to the benchbook, the plea allocutions are going to be too lengthy. If it's not in the rule, the committee should not add it to the benchbook. A member agreed that every judge can decide for himself, but said it's a good idea to flag issues.

Mr. Wroblewski reported that in the Department of Justice manual, which discusses this topic, the coverage is limited to the consequences that flow directly from the guilty plea. Otherwise, you could go on forever. There are a whole host of possible indirect consequences.

Judge Tallman called for a vote on whether to include the language in the letter regarding the collateral consequences of a guilty plea to a sex offense.

The committee voted unanimously by voice vote to approve this language.

The chair subsequently transmitted the final letter to the benchbook committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2010

Ms. Kuperman reported that the following amendments had been published for public comment in August 2010.

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

Prof. Beale reported that the comments received on the proposed amendment were generally very positive.

There were comments suggesting that the rule should state that the initial appearance must take place without unnecessary delay. But a different part of the rule already says that, and the draft Committee Note mentions it, so there is no need for any change.

Some comments suggested that the rule should also require certain advice and warnings from the court to the defendant. This is something the government has long opposed. The language of the current rule amendment was carefully negotiated. It is not the court's responsibility to give the diplomatic notification. Perhaps, Prof. Beale suggested, language could be added to the draft Committee Note addressing this issue.

Judge Tallman stated that he does not think the committee needs to further tinker with the draft Committee Note.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

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

Prof. Beale reported that Rule 58 contains a provision parallel to the provision in Rule 5 that is to be amended. Accordingly, this is a conforming amendment to Rule 58.

The committee vot ed unanimously by voice vote to approve the amendment for transmission to the Judicial Conference.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

Prof. Beale reported that this amendment dovetails with similar provisions that have recently been adopted in the Civil and Appellate Rules governing indicative rulings. Among the comments received, the Federal Magistrate Judges Association has endorsed this. The National Association of Criminal Defense Lawyers approves of the rule, but has suggested changes to the Committee Note to help guide practitioners about the kinds of cases in which this procedure could be employed. Prof. Beale expressed doubt that the committee should expand the Note to specify more details. The Standing Committee prefers shorter Notes. Even if the committee gave more examples, that would

not exhaust all the situations in which the rule might be employed. Listing more examples starts down a slippery slope.

She added that the draft Committee Note contains the words "if not exclusively," suggesting there might be no other proper uses of the procedure. The committee could delete those three words, but the Standing Committee added those words after much negotiation, because the Department of Justice had concerns. Those words reflect a considered policy judgment by the Standing Committee.

Judge Rosenthal added that this same language is now in the Committee Note accompanying the Appellate Rule. If the language is not here, and it remains there, that will create questions.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

III. CONTINUING AGENDA ITEMS

A. Rule 12 (Pleadings and Pretrial Motions)

Judge Tallman noted that the committee's proposals to amend Rule 12 had been remanded back to the committee, once again, by the Standing Committee at its meeting in January. Judge England, the chair of the Rule 12 subcommittee, reported that the committee's effort to amend Rule 12 began in 2006 as a surgical attempt to simply require that a claim that the indictment failed to state an offense must be raised before trial. It turned out, however, that that change raised other, difficult issues surrounding the standard to be applied when such a claim was not timely brought before trial. The subcommittee has met many times to take up these issues, including issues specifically raised by the Standing Committee.

Judge England added that the subcommittee believes it is important that the reasons for the committee's latest round of modifications to its Rule 12 proposal are fully explained to the Standing Committee. The subcommittee believes that in the past there may have been a disconnect between what the committee recommended and the way the Standing Committee perceived it.

Prof. Beale explained that at the urging of the Standing Committee in 2010, the committee had reworked the proposal to address the relationship between Rule 12 and plain error review. The proposal the committee sent to the Standing Committee for its January 2011 meeting distinguished between those claims "waived" absent a showing of cause, as the current language of Rule 12 provides, and those claims "forfeited" and subject to plain error, the approach applied by the Supreme Court in *United States v. Cotton*, 535 U.S. 625 (2002). That proposal was again remanded by the Standing Committee, which expressed concerns about the confusion from the use of the terms "waiver" and "forfeiture" in the rule. The proposal now before the committee eliminates the terms "waiver" and "forfeiture" altogether.

But even without use of these terms, there still remains the continuing issue of distinguishing between the treatment of most untimely claims and the treatment given a smaller special group of untimely claims, e.g., the indictment's failure to state an offense and double jeopardy. The current proposal attempts to avoid confusing terms like "waiver" and "forfeiture" and instead clarify as much as possible the standard for raising an untimely claim. Thus the current proposal has some very different language from the proposal considered by the Standing Committee at its June 2011 meeting.

There is also the question of filing the claim late in the district court, as distinguished from raising the claim for the first time in the court of appeals. In *United States v. Vonn*, 535 U.S. 55

(2002), the Supreme Court held, with regard to the harmless error provisions of Rule 11, that because Rule 11 did not specifically state that Rule 52 did not apply to claims analyzed under Rule 11, Rule 52 did apply. For that reason the current proposal states explicitly, "Rule 52 does not apply." If the amended Rule 12 does not specify that the Rule 52 "plain error" standard does not apply, then *Vonn* would appear to dictate that the Rule 52 standard will apply.

Prof. King noted that the committee's new proposed language makes it clear that the two standards – i.e., the standard applied to late claims of an indictment's failure to state an offense or of double jeopardy, and the standard applied to all other late claims – are exactly the same except for "cause." That is all that stands between them. "Cause" must be shown to raise the latter claims late, but need not be shown to raise the former claims late.

A participant observed that the committee's Rule 12 amendment process started with the purpose of eliminating from the rule, in the light of the Supreme Court's ruling in *Cotton*, the exception permitting a claim of the indictment's failure to state an offense to be raised at any time. But now, the proposed Rule 12 amendment has gone way beyond that. Under the current rules, all untimely motions can be heard under Rule 12(e) for good cause. Now, instead, the committee is considering a new review standard that would apply in both the district courts and the courts of appeals. It is not clear that this is the correct standard on appellate review in the court of appeals. It is good that the committee's new proposal no longer uses the terms "waiver" and "forfeiture," since use of those terms would create a morass. But the new proposal still threatens to mess with appellate review standards. The committee seems to believe that it's not enough for the Supreme Court to tell the courts of appeals what the standard of review on appeal is, the committee also has to tell them in a rule. The courts of appeals may follow the Supreme Court, not the rule.

Prof. Beale disagreed, stating that the committee had researched the question and the current proposal for considering these untimely claims only after a showing of cause and prejudice states the current standard for review applied by most courts of appeals. A member agreed that this is the same standard. The only thing that is new under the current proposal is that it adds to the list of claims that must be raised before trial a claim that an indictment fails to state an offense. Also, the committee is trying to help the courts by making the existing standard clearer for everyone to understand.

Prof. King added that there is disagreement, not just confusion, about this question in the courts. The courts of appeals do not agree on what the correct standard should be. So the committee is trying to clarify this. If the committee wishes to make clear to a court of appeals that wants to review such questions for "plain error" that it should not do so, the best way to achieve that is to say expressly, "Rule 52 does not apply."

A participant stated that to a district judge, the reference to Rule 52 means nothing. To the extent that the committee's Rule 12 proposal is directed at district judges, any reference to Rule 52 muddies the waters. A member agreed that removing any reference to Rule 52 from the amendment will make the standard clear for district judges, and allow the courts of appeals to do whatever they normally do.

A member reported that the defense bar is opposed to any change at all to Rule 12, but if there must be an amendment, the defense bar wants a statement that Rule 52 will not apply. Otherwise the amendment will be even more unfair to defendants.

Prof. Beale reiterated that it would be very helpful, in light of *Vonn, supra*, to be explicit about whether or not Rule 52 applies. If the rule does not mention Rule 52, then courts will continue to struggle with the question whether Rule 52 should apply.

A member stated that the debate about the review standard in the courts of appeals is an exercise in futility. The committee should just clarify the standard for considering untimely claims in the district courts, and leave the court of appeals alone, making no mention of Rule 52. The committee can always return to the issue of the appellate standard in two or three years, if that is needed. Judge Tallman expressed hesitation about the committee having to revisit this yet again since this is our third effort at settling the language.

A member suggested that the committee publish the proposal with "Rule 52 does not apply" in brackets as an alternative. Judge Tallman noted that the rules committees typically use bracketed language as a method of flagging an issue in order to seek input on something the committee believes may be controversial or has had trouble resolving.

Prof. Beale reiterated that the committee originally wanted to just fix the *Cotton* problem, and the committee's original proposal only addressed the failure-to-state-an-offense claim in *Cotton*. It was the Standing Committee that asked the committee to do more, stating that there was confusion among the courts of appeals on these issues generally, which the committee could dispel by revising Rule 12.

Judge Rosenthal advised that in sending its proposal to the Standing Committee, the committee should be clearer in explaining the arguments raised and the reasons for the committee's decisions. Also, the committee should send the Standing Committee a clear signal about severability, whether the committee believes the committee's Rule 12 amendment should still go forward if the issue of the appellate review standard is severed. The committee should explain the debate on this question to the Standing Committee, and solicit comment on how the appellate review standard can best be conveyed.

Prof. King noted that, in fact, the Rule 12 proposal started as a response to cases in which the defendant's claim was raised for the first time on appeal. Judge Rosenthal acknowledged that, but reminded the committee of the need to step back from the history that brought the committee to this point, and look at the committee's proposal instead from the viewpoint of someone reading it for the first time.

Judge Tallman called for a vote on proceeding with a Rule 12 amendment which includes the language, "In such a case, Rule 52 does not apply."

The committee voted 8-3 in favor of proceed ing with consideration of the proposed amendment containing this reference to Rule 52.

Prof. Beale reported that the category of "outrageous government conduct" had been deleted from the list of defects contained in the Rule 12 amendment. The Seventh Circuit has ruled that such a defect does not exist. If the committee includes it, it will look as though the committee concluded that nevertheless this defect does exist. The amendment's list of defects is non-exhaustive, so excluding it does not mean or imply that it does not exist. This is an easy call to avoid taking an unnecessary position on a controversial question.

In addition, claims based on the statute of limitations have been removed from the list of favored untimely claims that are to receive a more generous standard of review. Under the current proposal, there are only two such claims, not three as before: claims that the indictment fails to state an offense, and double jeopardy claims. Removing statute of limitations claims from the list of favored claims would preserve the current case law.

Judge Tallman called for a vote on the Rule 12 amendment before the committee.

The committee voted 8-3 to approve for publication the proposed amendment to Rule 12, and a conforming amendment to Rule 34.

Prof. Beale reported that the committee had failed to delete two references in the draft Committee Note to statute of limitations claims. Now that statute of limitations claims have been deleted from the amendment's list of favored claims, these Note references are obsolete.

The committee voted 8-3 to revise the draft Committee Note to delete these references to statute of limitations claims.

Judge Tallman asked whether the committee wanted to take a position on the severability of the question of including the reference to the application of Rule 52.

A member stated that the committee should make it clear that this issue is severable. If the Standing Committee wants to delete the reference to Rule 52, the remainder of the Rule 12 amendment stands and should be approved. The member added that if the reference is ultimately deleted, and the appellate standard of review is left to case law development in the appellate courts, then the Committee Note should not state a position on the question.

Judge Tallman noted the consensus of the committee that if the Standing Committee wants to delete the reference to Rule 52, the committee favors proceeding to publish the amendment without the Rule 52 language.

B. Rule 16 (Discovery and Inspection)

Judge Tallman reported that the Rule 16 subcommittee, which he chairs, has been unable to agree on any acceptable amendment to Rule 16. He had circulated a discussion draft of a proposed amendment in order to stimulate a full committee discussion. The Department of Justice, at Judge Tallman's request, also prepared language along the lines the Department had previously mentioned it would not oppose, merely incorporating or codifying the principles of the Supreme Court rulings in *Brady* and *Giglio*. The Department made clear that it is not advocating that this language be adopted, and that it was prepared solely at Judge Tallman's request.

Mr. Breuer reported that the Department has taken unprecedented steps to ensure that federal prosecutors meet their disclosure obligations. The Department has appointed Andrew Goldsmith as its first national criminal discovery coordinator. They have amended the U.S. Attorneys' Manual to address this issue. They have adopted a groundbreaking and transparent policy on criminal discovery, going beyond the basic Supreme Court requirements. They have directed each U.S. Attorney to develop granular discovery policies suiting the needs of that particular district. All federal prosecutors are now required to take annual discovery training.

The Department is also training thousands of law enforcement personnel in discovery practices, including personnel of the FBI, DEA, ATF, Marshals Service, and Bureau of Prisons. When that is done, they will train personnel from IRS and other agencies outside the Department of Justice. Then they will train district attorneys and local law enforcement.

The Department has also emphasized the use of software to manage discovery electronically. They have published a bluebook dealing with discovery requirements, written by senior prosecutors who have dealt with discovery matters for many years.

When, on rare occasions, the Department does not meet its discovery obligations, it's not for lack of a rule, but because of the demands on prosecutors and the lack of resources. The Department's comprehensive approach is what is needed to improve its performance. A rule change will not address anything. There will still be mistakes no matter what the rule says.

Mr. Goldsmith reported that he has traveled all over the nation addressing this issue. He now has a Deputy Coordinator helping him, another senior prosecutor. When he spoke to this committee in Chicago in April 2010, one participant lauded the performance of Attorney General Holder in this area, but expressed concern about what will happen when Attorney General Holder leaves. Mr. Goldsmith said that the Department has tried in a serious way to change the culture of the Department in this respect, so that compliance with disclosure obligations will be ongoing and will not depend on the efforts of a particular Attorney General.

Some have objected that the Department has been great at training prosecutors, but the prosecutors only know what the agents tell them. So now the Department is also training the agents, getting everyone on the same page with respect to disclosure obligations. If it is perceived as just a situation of prosecutors telling agents what to do, the agents won't listen. But now, with all this training, the agents are buying in. The Department is training 26,000 agents on a national basis, telling them, "When in doubt, disclose." Disclosure is the default position.

The Department has also trained federal prosecutors from around the nation, actually going out there and speaking with them. It's not just a situation of local prosecutors getting faceless memos from Washington about discovery. Meetings are also underway about training state and local prosecutors. Also, the Department has been interacting with Federal Public Defenders about the idea of coming up with a protocol for exchange of electronic information.

Mr. Wroblewski explained that the rule language the Department drafted at Judge Tallman's request recognizes that the disclosure obligations are not just those of the attorney for the government, but the entire prosecution team. The language refers to *Brady*, *Giglio* and their "progeny," because there is a lot of case law dealing with nuances of *Brady* and *Giglio*.

Judge Tallman wondered whether there are any current rules that cite cases in the text of the rule, as this proposal would. Judge Rosenthal responded no. The Standing Committee even worries about citing cases in Committee Notes because case law changes.

Judge Tallman stated that to the extent the committee wants to make a modest change in Rule 16, one way to do that would be to incorporate the two Supreme Court rulings. That would be a significant step. The question before the committee now is whether to go forward with any rule change at all. The Federal Judicial Center survey shows an even split among judges on the issue, with the Department of Justice opposing any rule amendment and the defense bar in favor of a rule amendment. Consequently, the chance that the committee can come up with a Rule 16 proposal that has any chance of success is slim.

Judge Tallman stated that Ms. Brill also had produced a draft of a Rule 16 amendment. Ms. Brill reported that she worked on the draft with several Federal Public Defenders and private defense lawyers around the country. Their draft attempts to be more descriptive than merely citing *Brady*, *Giglio*, and their progeny. Their idea, like the Department of Justice's approach, was just to codify the current law, but they did try to flesh out what that means. They stated that if their proposal is shown to go beyond current law, they will change their proposal. They are not trying to slip in a clandestine expansion of existing law.

Ms. Brill argued that the need for such a rule amendment is there. There have been instances of prosecutors not understanding discovery obligations after the Department started all its changes and training, and not just with complex electronic discovery, but with traditional kinds of materials not being disclosed. Further, there really is common ground to support such a modest proposal. The FJC survey reveals that 51% of judges favor a rule change, even though a majority of those judges are happy with prosecutors' performance of discovery obligations. This is compelling. The judges who oppose a rule change may be motivated by security issues, which she expressed willingness to accommodate by providing exceptions to disclosure.

A member responded that Ms. Brill's proposal does not even mention witness security. And it does not even mention the Jencks Act, which is a huge problem here. If prosecutors are determined to break the law governing disclosure obligations, then they will, rule or no rule.

A member stated that the member has received messages from Federal Public Defenders saying that they are still seeing disclosure problems out there. It is great that the Department of Justice is taking these steps, but why are they so afraid of a rule? With a rule, there are teeth there. The biggest problems are with agents. The prosecutor will give the defense at the last minute some statement he says he didn't know his agent had.

Mr. Wroblewski said that the Department does not deny that it faces challenges in complying with existing discovery obligations. There are complex electronic repositories of information, and a lot of federal and state actors. But changing the rule does not help with any of that. If the goal is to increase the amount of material that is actually disclosed, then it's not about the rule. Merely codifying the existing law in a rule would not affect that. A member agreed that the Department has problems with limited budgets and expanding technology.

Members lauded the admirable job done by the Department in this area, but asked, how do you institutionalize these policies and practices without a rule change, without black letter law requiring them? A member expressed doubt that some future administration's Department of Justice is going to place much emphasis on this. The committee needs to provide real guidance in a rule. With a rule, the particular policies of each future Attorney General may matter less.

Mr. Wroblewski responded that the Department needs to put all the information about discovery in one place, and that's what they are doing now. Errors typically are not about a bad decision the prosecutor made about disclosure of a particular document – and, in any event, no rule change will help with that. The typical situation is that the prosecutor finds out about the information late, so the prosecutor turns it over late. Rule changes won't help with that either. The Department does not believe that a rule is the best way to ensure compliance with discovery obligations. And the proposed rule amendments do not address victims' rights and witness security.

Mr. Goldsmith responded that he has worked for years at the Department, and he rejects the notion that if the Republicans win the White House in 2012, all his work on criminal discovery will go up in flames. He would be beyond shocked if that happened. That's not how the Department works. Making the Department's policies clear and well-disseminated is far more important than a rule change; it gives prosecutors meaningful guidance, which a rule amendment would not do. A member agreed that a new administration is not going to remove these procedures from the U.S. Attorneys' manual.

A member expressed skepticism about the value of trying to capture moving, changing case law in a rule. That would be very difficult, and perhaps not very useful.

A member stated that the timing issues only come up with impeachment materials. Core *Brady* materials must be turned over immediately. Mr. Wroblewski agreed. He predicted that the committee could come to some agreement fairly quickly on just core *Brady* materials. It is the timing of disclosure of impeachment materials that is the most complex issue.

A member stated that whatever rule is adopted, any rule amendment will create additional satellite litigation. In a large district like the Southern District of New York, games playing is simply what lawyers do. Litigation already takes forever, and any rule amendment will add another layer of satellite litigation. Another member agreed, arguing that prosecutors are not intentionally violating the *Brady* principle. No rule would have changed what happened in the Sen. Ted Stevens case. If a prosecutor is going to ignore 47 years of Supreme Court case law, they'll ignore a rule. Budget limitations may be a factor when the prosecution falls short.

Judge Tallman added that he worries that the Department won't get the money it needs for the steps it wants to take to meet its disclosure obligations in the electronic discovery area.

A participant pointed to Fed. R. Evid. 901, which is unique in that it provides a non-exhaustive checklist of possible methods to authenticate evidence and satisfy the requirements of Fed. R. Evid. 901. That rule comes closest to merging the concept of a checklist with a Department of Justice manual, and gives some rule teeth to it. There are no teeth to a mere checklist or manual, no penalty if you fail to comply.

A participant expressed skepticism about the committee's ability to create a rule to give rule-effect to the principles of *Brady* and *Giglio*. It is a false premise that the current administration is somehow the first to discover *Brady* obligations. Another false premise is that half of all judges want a rule amendment. Studies are useful but do not provide conclusive information. 50% of judges indicated some approval of a rule, but also 60% said they had seen no *Brady* violations in the last five years. A rule amendment may be a solution without a problem, since there have really been only a handful of highly publicized violations.

People keep saying that we need a rule, with teeth. But there already is a "rule," it's *Brady* and *Giglio*. There are hundreds of cases about sanctions for violations of *Brady* or *Giglio*. That's already out there, and sanctions are teeth. What some people are really looking for are consequences beyond what *Brady* and *Giglio* already provide. A rule will just create a lot of satellite litigation for those who will game the system.

Judge Tallman noted this discussion underscores the complete lack of consensus about what the committee should do. He tried, in his discussion draft of a proposed amendment, to break out what would be exculpatory material and what would be impeachment material. The feedback he got was that any rule language, even closely based on existing case law, would create more litigation over the precise meaning of the language. He stated that he does not know of any way to draft around that. He is concerned about the time courts would have to devote to such satellite litigation, and the expense that would impose on defense counsel and the Department of Justice. The result would be to transform criminal litigation into civil discovery practice.

In addition, the Jencks Act is almost an insurmountable obstacle. Judge Tallman stated that his attempt to work around the Jencks Act would have provided that prosecutors need not disclose witness statements until later, as the Act provides, but would nevertheless require earlier disclosure of <u>summaries</u> of the witness statements. But DOJ objected that preparing these summaries is going

to take time. And then there will be a new wave of satellite litigation over the content and accuracy of the summaries. His draft also contained "trump" language that would permit the government to withhold disclosure of dangerous information upon the filing of an unreviewable statement of the need to do so. That provision, too, would invite satellite litigation.

Judge Tallman reiterated that he is not now advocating adoption of his discussion draft, which many have opposed. But he noted no consensus draft has emerged. He suggested that the committee could vote to abandon, at least for now, its consideration of any Rule 16 amendment.

A member argued that the committee could issue a proposed amendment for public comment, and see what develops. Judge Tallman reminded the committee that the Standing Committee would need to approve such publication. In 2007, the Standing Committee refused to publish a proposed Rule 16 amendment after hearing impassioned objections from the Department of Justice, which had made changes to the U.S. Attorneys' manual on this issue. The Standing Committee instead remanded the issue back to this committee. The issue then was reopened in light of the Sen. Ted Stevens case after the chair received a letter from Judge Emmett Sullivan requesting reconsideration. If the committee decides to take no action now, the committee can still revisit the subject down the road. The Department has done a lot more this time than the last time. For that reason, it may be even tougher to win Standing Committee approval for publication, given that the Department's position opposing any rule amendment has not changed.

A member stated that, speaking for the defense side, the defense bar is interested only in putting forth a proposal that would have the support of – or at least that would not be actively opposed by – the Department of Justice. That is why representatives of the defense bar attempted to draft a proposal that found common ground, hoping that the Department would not oppose a mere codification of the existing case law.

Judge Tallman called for a vote on whether to make any change at all in Rule 16. A yes vote would favor proceeding to consider some change. A no vote would oppose making any change in Rule 16.

The committee voted 6-5 against any amendment to Rule 16.

Judge Tallman stated that in light of the committee's vote, the committee would table any further work on amending Rule 16. The committee will not go forward with any rule change. But that does not mean that the committee will abandon its initiatives that do not involve a rule change, such as working with the Federal Judicial Center to include this issue as a checklist in the judges' benchbook, asking the FJC to compile a "best practices" guide for criminal discovery, and expanding judicial education efforts. He emphasized that the issue of improving criminal discovery by amending rule 16 – which the committee has looked at for forty years – will not go away.

Judge Rosenthal observed that there can be beneficial effects and improvements as a result of the rulemaking process, even if there is no rule change. This is the best example of that she has ever seen. Because of the committee's process, the Department of Justice and others have

undertaken major policy changes and extensive education initiatives that they would not otherwise have done, or at least would not have done so quickly.

Judge Tallman promised that the issue of non-rule initiatives on criminal discovery will be pursued with the FJC. He pointed to the materials in the current agenda book listing specific points the committee might recommend that the FJC include in the judges' benchbook, and in a best-practices manual, on this issue.

Ms. Hooper reported that the FJC will probably conduct nationwide interviews with judges about best practices. As for the benchbook, there is a judges' committee, chaired by Judge Irma Gonzalez, that oversees changes in the benchbook. Judge Tallman stated that he would follow up by letter with that committee and be sure that this issue gets on that committee's agenda. Subsequent to the meeting the chair transmitted the committee's proposals to the FJC.

A participant suggested that it is imperative that the FJC conduct annual education of judges – not just new judges, but all judges – about criminal discovery. Judge Tallman stated that he has already discussed this with Judge Rothstein of the FJC and she is very supportive.

A participant suggested that any transmittal to the FJC make clear that the committee is looking for a list of best practices, not some kind of exhaustive checklist that encourages judges to turn their brains off. Judges must stay aware of a wide variety of unforseen problems that can arise. Judges must understand the difference between what the law mandates, and the actual practices favored across the courts. Judges should not conclude that once they go through the checklist, they don't have to think about *Brady* any further.

A member asked if this material goes in a benchbook, what does a judge do with it? Meet with the lawyers and tell them to do what's in the benchbook? If they don't, what should be the consequence? Judge Tallman responded that this issue does require more active judicial involvement in criminal discovery. A member agreed that the civil model of the Fed. R. Civ. P. 16 and 26 conferences might be useful. Mr. Wroblewski emphasized that the timing is important. If such a conference is held just before trial, a lot of this makes sense. But at the start of a case, a lot of this material will not yet have been disclosed.

Prof. King stated that a big point of contention will be whether such a criminal discovery conference has to happen before a guilty plea. Judge Tallman responded that the Supreme Court already has decided that is not constitutionally required. Prof. King agreed as to impeachment material, but noted that the Court's decision in *Ruiz* did not directly address known information establishing factual innocence.

A participant stated that sometimes guilty pleas are negotiated precisely to resolve the case quickly and spare the government additional investigation costs. The committee should not require the government to prepare every case for trial when the defendant is ready to plead guilty. A member agreed, but suggested that prosecutors be required to disclose material that the prosecutor actually knows about, without imposing any further duty on the prosecutor to investigate. Mr.

Wroblewski stated that usually the defendant is ready to plead right away, and warned that requiring the government to put off plea negotiations pending a *Brady* investigation would be a big change in practice. A member observed that sometimes defendants want to plead right away to avert any further government investigation, because defendants are afraid of what more the government will discover. Another member added that if defendants are going to re-plead after receiving *Brady* disclosures, that will wreak havoc in a busy district.

A participant objected that nevertheless this material has to be produced. A defendant cannot plead guilty, for example, without knowing of a recanting witness' statement. Prof. King noted that she'd read that some states consider it unethical for a prosecutor to sign a plea agreement in which the defendant waives the right to known exculpatory information. This is seen as the prosecutor gaining a waiver of the prosecutor's own misconduct.

A participant noted that the FJC will survey judges to ask what best practices judges are actually using. They are not going to find many judges requiring *Brady* disclosures before guilty pleas.

A member stated that the current draft checklist contains too many adverbs, too many quantitative words and intensifiers. These kinds of words plant the seeds of future disputes and should be removed from the checklist. Prof. King responded that most of that language was lifted from the U.S. Attorneys' manual. Judge Tallman agreed that the checklist is not a rule, and does not need to be so precise and didactic. The actual wording lies in the jurisdiction of the Benchbook Committee chaired by Judge Gonzalez.

A member stated that some of the objections to codifying disclosure obligations in a rule have to do with the dicey proposition of correctly characterizing the current case law, which is a moving target. It might be better to create in a rule an early conference to discuss the timing of disclosure of certain items, and then a pre-trial conference to discuss what has been disclosed. This could be placed in Rule 17.1 (pre-trial conference). The committee could graft ideas from Civil Rule 16 about such conferences into Rule 17.1. A whole variety of issues could be worked out at such a conference. This approach would not impose black-letter requirements on the government and, flexibly administered, it would not bog down the processing of routine cases.

Judge Tallman asked what judges' current practices are. Two members responded that they conduct a very general conference early on, and following that conference, issue an order setting schedules and deadlines. Another member reported that only one judge in the member's district does this, the other judges are "old-school" and do not. Another member reported that every judge in the member's district holds a conference almost immediately. There are several conferences, usually, in the average case, with a pre-trial conference usually two weeks before trial. Another member reported that in the member's district, three of the seven judges set a trial date in a vacuum, without any conference, which creates chaos every time.

A participant expressed skepticism about the notion of trying to create a formula for a Rule 17.1 conference. This cannot simply copy civil procedures, with Fed. R. Civ. P. 16 and 26 conferences. There are usually many more than two conferences in a criminal case.

A member objected to forcing mandatory conferences on judges. Another member agreed, but stated that the proposal was not mandatory and would maintain judicial discretion. The proposal is merely an attempt to set forth best practices with some kind of formality.

Judge Tallman stated that the committee had already voted not to amend the rules now to address *Brady*, and instead to pursue best practices and education through the FJC and others. Accordingly, he stated, he was concerned that this Rule 17.1 proposal is meant to address the same subject indirectly and is thus inconsistent with the committee's vote. And in any event, what would this Rule 17.1 proposal accomplish that the FJC best practices approach could not?

Judge Rosenthal added that there is a real concern in the civil area that judges and lawyers are not adequately using Civil Rule 16. Until the committee identifies some concrete problem that an amendment to Rule 17.1 would seek to solve, the committee is going to face opposition from district judges, who do not want mandatory practices imposed on them.

Judge Tallman stated that he will refer the Rule 17.1 proposal to the criminal discovery subcommittee. But, in light of the vote, amending Rule 16 is off the table for now.

C. Rule 15 (Depositions)

Judge Keenan, chair of the Rule 15 subcommittee, reported that years ago the Department of Justice pointed out to the committee that in terrorist or certain international criminal cases, there is some need for foreign depositions outside the physical presence of the defendant. Suppose a witness in a foreign country refuses to, or is unable to, come to the U.S. to testify. For whatever reason, the defendant cannot get to the foreign country to be present at a deposition of that witness. The committee drafted a proposed Rule 15 amendment to address this problem. The amendment would authorize the deposition outside the presence of the defendant – with the defendant participating by video technology – only under very limited circumstances. The court must first make case-specific findings on a whole list of requirements.

The Standing Committee and Judicial Conference approved this proposal, but the Supreme Court sent it back, apparently on Confrontation Clause grounds. The committee has been informally advised that the Court was concerned that the rule did not clarify that compliance with the procedures for gathering the evidence did not resolve the ultimate admissibility of such a deposition at trial. The committee has added language to the Committee Note further explaining that the rule amendment only addresses the taking of the deposition, and the later admissibility of such evidence at trial is determined by the Federal Rules of Evidence and the Constitution.

Judge Tallman explained that the committee had considered this issue before, and a sentence at the end of the current Committee Note addresses this. Now the committee has elevated that discussion to an entire paragraph at the beginning of the Committee Note to clarify the point.

Judge Rosenthal cautioned that the informal advice given about the Supreme Court's view of this amendment was just advice. There are no guarantees that the Court will accept what the committee has done. Judge Tallman agreed.

Prof. King pointed out that, nevertheless, the second-to-last paragraph of the Committee Note is about the admissibility of the evidence. She suggested that that paragraph be deleted. A member suggested deleting everything in that paragraph except the first sentence, and moving that first sentence to be the concluding sentence of the preceding paragraph.

The member also suggested, in the second paragraph of the Committee Note, inserting the language, "*As is true of every other deposition,* questions of admissibility of the evidence . . . ." This would make clear that the committee is not creating some new creature governed by new standards – the standards are the same as for any other deposition.

Judge Rosenthal suggested that it would be useful to run this Committee Note language, as revised, by the chair and reporter of the Advisory Committee on Evidence Rules.

Judge Tallman called for a vote on the above revisions to the draft Committee Note.

The committee unanimously by voice vote approved the above revisions to the Committee Note.

Judge Tallman called for a vote on final approval of the rule amendment and Committee Note, to be sent to the Judicial Conference.

The committee by voice vote, with a single dissenting vote, approved the amendment for transmission to the Judicial Conference.

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

A. Status Report on Legislation and Other Matters Affecting the Federal Rules of Criminal Procedure

Ms. Kuperman reported that nothing is happening on the legislative front right now that would affect the Criminal Rules.

She stated that the Standing Committee is in the process of revising the procedures under which the rules committees operate. One change from the current procedures will be to recognize

that there is now a rules web-site, and to specify what items must be posted there. The revised procedures will be presented to the Standing Committee at its June 2011 meeting.

Judge Rosenthal noted that the current procedures are not very readable, and are being restyled. Also, it is useful to think about what it means to be a sunshine committee in an electronic age, and what must be posted on-line. Mr. McCabe added that these procedures have not been changed since 1983.

B. Rule 45(c) and the "Three Days Added" Rule

Prof. Beale reported that Rule 45(c) on computation of time is parallel to the time-computation provisions in the other federal rules, and is modeled on Fed. R. Civ. P. 6(d). An academic published an article noting that a styling change to these provisions had produced an unintended consequence. The party who made service may benefit from the extra three days, which were intended only to benefit the party receiving service.

But in the Criminal Rules, only one provision, Rule 12.1(b)(2), could even conceivably be affected by this, and even then only in limited circumstances. The Civil Rules, by contrast, contain a number of affected provisions. For that reason it would be best for the committee to let the Advisory Committee on Civil Rules take the lead on this.

Judge Rosenthal agreed. If the committee doesn't like what the Civil Rules committee is doing, let them know. This is part of a potential larger project to remove from all the rules the vestigial remnants of the paper age. If the default filing method is electronic, not paper, then adjustments are needed. But doing that is tricky, where there are still a lot of paper filers such as pro se litigants. There is also a question whether to make such changes piecemeal, thereby pestering the bar with many small changes dribbling out over time, or instead to do it all at once in a large future project.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting of the committee would be held on October 31-November 1, 2011, in St. Louis. After discussion, Judge Tallman stated that the spring 2012 meeting of the committee would be held on April 23-24, 2012, in San Francisco.