ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 22-23, 2012, San Francisco, California

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in San Francisco, California on April 22-23, 2012. The following persons were in attendance:

Judge Reena Raggi, Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson (by telephone)
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following individuals were also present:

Andrew D. Goldsmith, Esq.
(on Tuesday, April 23, 2012, on behalf of the Department of Justice)

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi welcomed the members and, on behalf of the entire Committee, thanked Judge Richard C. Tallman, the Committee's previous Chair, for arranging the meeting at the James R. Browning United States Courthouse in San Francisco.

B. Review and Approval of Minutes of October 2011 Meeting

A motion to approve the minutes of the October 2011 Committee meeting in St. Louis, Missouri, having been moved and seconded,

The Committee unanimously approved the October 2011 meeting minutes by voice vote.

C. Other Opening Business

The members indicated their review of the Draft Minutes of the January 2012 Meeting of the Standing Committee and the Report of the September 2011 Proceedings of the Judicial Conference.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following proposed amendments, approved by the Judicial Conference, were likely also to be approved by the Supreme Court and transmitted to Congress before May 1, 2012, whereupon they would take effect on December 1, 2012, unless Congress acts to the contrary:

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.

2. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if the court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness

to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

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

Judge Raggi reported that the following proposed amendment was approved by the Judicial Conference at its March 2012 meeting, and would be transmitted to the Supreme Court for review this fall, as part of a larger package of proposed Rules amendments:

1. Rule 16. Proposed technical and conforming amendment clarifying protection of government work product.

B. Proposed Amendments Recommitted by the Supreme Court for Further Consideration

Judge Raggi informed members that two proposed rule amendments had been recommitted by the Supreme Court for further consideration:

1. Rule 5(d). Initial Appearance. Proposed amendment providing that in felony 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.

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.

At the meeting, Judge Raggi identified possible concerns that the proposed amended rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Ms. Felton and Mr. Wroblewski stated that, on behalf of the Justice Department, they had conferred with counterparts at the Department of State, and the departments now jointly proposed some changes to the proposed rule amendments to alleviate concerns such as those identified by Judge Raggi.

After extended discussions, the Committee agreed that Rules 5(d) and 58 should still be amended to address the questions of consular notification, but that the amendments should be redrafted as illustrated in the following version of Rule 5. Judge Raggi noted that, as redrafted, the amendments are a substantive departure from what was published and that it might be prudent to republish them. Judge Raggi further noted that this language would have to be

reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the new language approved by the Committee. She stated that the Reporters would circulate the final language (with any style changes) as well as the accompanying Committee Notes for approval before submission to the Standing Committee.

Rule 5. Initial Appearance

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(d) **Procedure in a Felony Case**.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(F) if the defendant is held in custody and is not a United States citizen:

(i) that the defendant may request that an attorney for the government or a federal law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that in the absence of a defendant's request, consular notification may nevertheless be required by treaty or other international agreement.

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A motion being made and seconded,

With the proviso that final language after restyling and any accompanying changes to the Committee Notes would be circulated for final approval, the Committee unanimously decided by voice vote to adopt the proposed amendments to Rules 5(d) and 58 and to transmit the matter to the Standing Committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been published for notice and public comment with the approval of the Standing Committee:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea.

Judge Raggi reported that the August 2011 publication of the Committee's proposal to amend Rule 11 had prompted six written comments. Judge Rice, Chair of the Rule 11 Subcommittee, stated that the subcommittee had reviewed and discussed these comments at

length. A majority continued to endorse the language of the proposed amendment as published. In discussion among the full Committee, some members voiced concern that the amendment shifts a burden that belongs to defense counsel onto the court, creates a "slippery slope" for expanding Rule 11 procedures in ways that distract from the key trial rights being waived, and is overbroad. A majority nevertheless remained of the view that deportation is qualitatively different from other collateral consequences that may follow from a guilty plea and, therefore, should be included on the list of matters that must be discussed during a plea colloquy. Mr. Wroblewski stated that the Department of Justice supported the proposed amendment as published and had already begun to instruct its prosecutors to include appropriate language in plea agreements concerning the collateral immigration consequences of a guilty plea.

Members agreed that the Committee Note should be modified to address certain concerns raised in the public comments. The Reporters were asked to add language emphasizing that courts should use general statements rather than targeted advice to inform defendants that there may be immigration consequences from conviction.

The full text of the proposed amendment and revisions to the Committee Note follow:

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, 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.

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Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

A motion being made and seconded,

The Committee decided, with nine votes in favor and three opposed, to amend Rule 11 by adopting the language published for public comment with the Reporters' suggested revisions to the Committee Note, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

Judge Raggi reported that the proposed amendment to Rule 12 and the conforming changes to Rule 34 were published for public comment in August 2011, and that numerous submissions were received, including detailed objections and suggestions from defense bar organizations. Judge England, Chair of the Rule 12 Subcommittee, reported that, after a lengthy teleconference, subcommittee members unanimously determined that the concerns raised by the public comments should be considered at a face-to-face meeting, which would be held in conjunction with the full Committee's April meeting in San Francisco. To assist the subcommittee, Professors Beale and King prepared a comprehensive memorandum analyzing the history of the proposed amendment, the relevant law, and each comment received. Judge England and several members praised the Reporters' substantial research and thanked them for their analytical support.

Judge England informed members that the subcommittee would continue to work on the matter over the summer and expected to present its recommendation to the Committee at its fall meeting.

D. Proposed Amendment Referred for Review by Subcommittee

1. Rule 6. Grand Jury Secrecy.

Judge Keenan, Chair of the Rule 6 Subcommittee, reported on its review of Attorney General Eric Holder's October 18, 2011 proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The amendment (as proposed by the Department of Justice) would (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for grand jury materials that had become part of the National Archives.

Judge Keenan stated that the subcommittee had held two lengthy teleconferences to discuss the Attorney General's proposal. It also reviewed written and oral comments from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials to the Committee's past amendments to Rule 6(e). Judge Keenan reported that, at the close of the second teleconference, all members of the subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Judge Raggi summarized a telephone conversation she had with Counsel for the Archivist of the United States, the Chief Administrator for the National Archives and Records Administration (NARA), and a supporter of the proposed rule. She explained that a rule amendment providing for a presumption that grand jury materials would be disclosed after a specified number of years—seventy-five in the case of the proposal—would significantly recalibrate the balance that had long been applied to grand jury proceedings, which presumed that proceedings would forever remain secret absent an extraordinary showing in a particular case. Judge Raggi explained that the Committee might not be inclined to effect such a historic change by a procedural rule, particularly in the absence of a strong showing of need. Judge Keenan added that subcommittee members generally agreed that NARA should not become the gatekeeper for grand jury materials. Several members agreed that no real problem exists that presently warrants a rule amendment.

Mr. Wroblewski thanked Judge Keenan and the subcommittee members for the careful consideration given to the Attorney General's suggestion. He explained that the Department will continue to object to requests for disclosure based on Supreme Court precedent that the Department interprets as establishing a rule that rejects district judges' assertions of inherent authority to release historically significant grand jury materials. Mr. Wroblewski made clear, however, that the Department does think the prudent policy is to permit release under appropriate circumstances.

Judge Kravitz observed that Congress may weigh in on this issue, which also counsels against pursuing further action by rule.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

IV. NEW PROPOSALS FOR DISCUSSION

A. Rule 16 (a)(1)(A)-(C), Pretrial Disclosure of Defendant's Statements

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of a broader range of defendants' prior statements. Discussion revealed consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

V. INFORMATION ITEMS

A. Report of the Rules Committee Support Office and Status Report on Legislation Affecting Criminal Rules

1. Mr. Robinson reported on recent congressional hearings concerning the prosecution of the late Alaska Senator Ted Stevens and the court-ordered investigation into possible prosecutorial misconduct. He advised that legislation introduced by Senator Murkowski would expand prosecutorial disclosure obligations.

2. Judge Raggi reported on the progress of the Federal Judicial Center's Benchbook Committee to identify "best practices" for judges in addressing *Brady*/*Giglio* issues, which would be included in a forthcoming draft of the Federal Judicial Center's *Benchbook for U.S. District Court Judges*.

3. Mr. Robinson reported further on the "Daniel Faulkner Law Enforcement Officers and Judges Protection Act," which would abrogate the application of Civil Rule 60(b)(6) in petitions brought under 28 U.S.C § 2254.

4. Mr. Wroblewski noted that the Justice Department planned to monitor an upcoming hearing on crime victims' rights before the House Judiciary Committee, and would report any issues pertaining to the work of the Committee following the hearing.

VI. ELECTRONIC DISCOVERY

At the Committee's October 2011 meeting, Mr. Wroblewski reported that the Justice Department was participating in a Joint Electronic Technology Working Group (JETWG) with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop a protocol for discovery of electronically stored information (ESI) in federal criminal cases. The Committee invited Andrew D. Goldsmith, National Criminal Discovery Coordinator for the Department of Justice and a co-chair of the JETWG, to attend its April 2012 meeting to discuss the protocol, which was released in February.

Mr. Goldsmith recounted the formation of the JETWG and development of the protocol, which is intended to encourage early discussion of electronic discovery issues, the exchange of data in industry standard or reasonably usable formats, notice to the court of potential discovery issues, and resolution of disputes without court involvement wherever possible. He reviewed with the Committee the four parts of the protocol: (1) an introductory section, which describes several basic discovery principles; (2) a set of recommendations for ESI discovery; (3) strategies and commentary on ESI discovery; and (4) an ESI discovery checklist. Following questions, observations, and suggestions from members, Judge Raggi thanked Mr. Goldsmith and noted that future discussion of the protocol may be warranted after it becomes widely deployed and implemented.

VII. FUTURE MEETINGS AND CLOSING BUSINESS

The Committee mourned the loss of former member Donald J. Goldberg, a well respected private attorney who had contributed significantly to the work of the Committee and became a good friend to many members. Professor Beale recalled with fondness Mr. Goldberg's leadership of the Rule 16 Subcommittee. Other members expressed their condolences.

Judge Raggi also expressed the Committee's deep appreciation for the many contributions of Rachel Brill and Leo P. Cunningham, two distinguished members whose terms will expire before the fall meeting. Members added their sincere thanks for the hard work performed by and friendships forged with Ms. Brill and Mr. Cunningham. Judge Raggi invited Ms. Brill and Mr. Cunningham to attend the fall meeting as guests of the Committee.

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, October 29-30, 2012, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

All business being concluded, Judge Raggi adjourned the meeting.