ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
September 19, 2016, Missoula, Montana

I. Attendance

The Criminal Rules Advisory Committee ("Committee") met at the University of Montana in Missoula, Montana, on September 19, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Gary Feinerman
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge David G. Campbell, Incoming Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:
Rebecca A. Womeldorf, Esq., Rules Committee Officer, Secretary, Standing Committee
Laural L. Hooper, Esq., Federal Judicial Center
Shelly Cox, Rules Support Office

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy welcomed the Committee, made introductions, and invited Standing Committee Chair Judge Jeffrey Sutton to speak. Judge Sutton thanked Judge Molloy for hosting the Committee in Missoula. He congratulated Judge Molloy on his long service and for the honor of having a courtroom named after him there in Missoula.

B. Review and Approval of Minutes of April 2016 Meeting

Judge Molloy directed the Committee's attention to the draft minutes of the April 2016 meeting. A motion to approve the minutes having been moved and seconded:

The Committee unanimously approved the April 2016 meeting minutes by voice vote.

C. Status of Pending Amendments.

At the invitation of Judge Molloy, Professor Beale asked if any members had comments or questions about the draft minutes of the last Standing Committee meeting. Hearing none, Judge Molloy asked Ms. Womeldorf to report on the status of pending Rules amendments.

The proposed amendments to Rules 4, 41, and 45 were approved by the Supreme Court and transmitted to Congress; if Congress takes no action before December 1 the proposed amendments will become law. She reported that legislation has been introduced to block the amendment to Rule 41, but a hearing before the Judiciary Committee has not been announced. Members confirmed this understanding. Judge Molloy noted there was an identical bill in the House. A member added his belief that nothing would happen this fall, but there may be some activity in the next session. Professor Beale noted that if there is a hearing it might be helpful to respond directly to claims that the Rules process was not transparent. Responding to a question about whether more outreach to legislators is needed, Judge Sutton noted that many contacts have been made to attempt to counter the misleading claims about the process, and additional efforts are probably not needed right away. Another member indicated his impression that critics of the amendment are opposed to the substantive and policy issues, not what the Committee has done concerning venue.

The proposed amendments to Rules 12.4, 45, and 49 have been approved by the Standing Committee for publication. Professor Beale noted these proposed amendments were published August 1, and so far no comments have been filed. But most comments tend to come in at the last minute before the deadline, February 15. It is helpful to get comments earlier, particularly from groups that are likely to comment. Ms. Womeldorf noted that dates for two public hearings have been scheduled, but hearings go forward only if there is sufficient demand. Ms. Womeldorf also noted that in addition to being published in the Federal Register, proposed amendments are sent to every federal judge, as well as a listserve of thousands of people. She added that the rules process worked well with Rule 41, as some of the current critics chose to testify, the Committee held hearings and considered those comments. Professor Beale said that because Rule 49 is linked to similar changes in the other rules, there will likely be issues raised that will require coordination with other committees. The Rule 49 Subcommittee will provide its recommendations on any changes to the Committee at the April meeting.

III. Criminal Rules Actions

A. Rule 5 of the Rules Governing Section 2255 Proceedings (15-CR-F)

Judge Molloy asked Judge Kemp, Chair of the Rule 5 Subcommittee, to report on the Subcommittee's work on Rule 5 of the Rules Governing Section 2255 Proceedings. Judge Kemp agreed with Judge Molloy that this issue turned out to be more nuanced than it first appeared. He praised the Reporters' memorandum, and presented a summary. He began with the history of the 2004 amendment that added the provisions regarding the reply: "A moving party may submit a reply to the respondent's answer or other pleading, within a time fixed by the judge." The intent of that amendment was to make it clear that this was a matter of entitlement, and the judge does not have the discretion, through an order or a local rule of court, to deny the right to file a reply. But this has not been the consistent interpretation of the rule, and some judges have denied the opportunity to file a reply. Judge Wesley of the Second Circuit Court of Appeal raised this with the Committee, noting there are a number of district court decisions stating the rule continues to give judges the discretion to deny a reply.

Judge Kemp reported that the Rule 5 Subcommittee met by telephone in August to discuss whether there is a problem with the language of the rule requiring clarification by amendment, or just a misinterpretation by some judges of an unambiguous rule. Discussion also included whether there is any alternative, other than amending the rule, that would address the problem. The Subcommittee at that point was not enthusiastic about amending the rule, and asked the Reporters to investigate further potential alternatives. Judge Kemp noted that the Reporters' memo in the agenda book goes through why these various alternatives are not appropriate ways to address this. He agreed none of these alternatives are viable.

Judge Kemp asked for a sense of the Committee on the core issue. Is this a situation where the rule is clear, and it would be best just to wait for judges to correct their interpretations? Or is the language of the rule is contributing to this problem? If so, should the rule be amended? He stated that he was in favor of an amendment. There was no consensus at the Subcommittee level about the need to amend the rule or the language and it had not yet had a chance to consider the most recent Reporter's memorandum in the agenda book. He noted that research had revealed that the rationale of some decisions did point to the language in the current rule, which is not as clear as it would be if it simply said the moving party may submit a reply, period. He noted that a number of potential alternative phrasings for an amendment are in the memo.

Judge Kemp added that the Subcommittee also looked at a secondary issue: whether there should be a presumptive time limit for filing a reply added to the rule. Helpful research from the Rules office revealed that the time limit for filing replies is not consistent from district to district or judge to judge, and that time limits initially set are often extended. He noted there was no strong feeling by the Subcommittee that there ought to be a time limit added to the rule.

Finally, Judge Kemp explained his own view that an amendment to clarify the entitlement to file a reply is warranted. Often the petition is relatively bare bones. The government's response goes into more detail, and frequently includes issues the petition does not address. The arguments of the petitioner or movant on these new issues and substantive arguments come first in the reply. So not only is denying the opportunity to file a reply inconsistent with Rule 5, Judge Kemp explained, it also has the potential to have a substantive impact on these proceedings.

Judge Molloy asked if one of the problems with this particular interpretation of the rule is that it is almost impervious to appellate review. Judge Kemp agreed, and explained that no appellate decision addressing this division could be found, even though the problem has been around for twelve years. He noted that appellate decisions reviewing these cases tend to focus on aspects of the cases other than this procedural issue.

Subcommittee members then commented. One member reported her initial view that a rule amendment was not necessary because judges rarely denied the right to reply. It felt like using a sledge hammer to hit a flea. There was also a concern that an amendment that made the filing period more specific would cause problems since districts manage this so differently. But she had changed her mind based on others' comments, the explanation in the Reporters' memo that alternatives to a rule amendment to address this would not work, and the examples of potential amendments that would not require adding more rigid or specific language to the rule about timing. Compared to the clarity of Rule 11, which is also on the agenda and needs no clarification, the lack of clarity in Rule 5 suggests an amendment may be warranted.

Another member agreed, stating he favored options in the memo for amending the rule that would break out the two parts of the provision. He agreed that indicating a time period would be inappropriate given the variation in local practice and mostly pro se litigants filing these cases. He was persuaded that some of these decisions denying the opportunity to reply are relying on the current language of the rule.

Professor Beale pointed out that the suggested alternatives to avoid triggering the concerns of the style consultants are just illustrative and that the style consultants have not reviewed them.

One member thought it would be better if we could change the Note without amending the rule because the rule is clear. Unfortunately, that is not possible. Another member indicated that restricting the opportunity to reply was not a problem in his district.

Ms. Morales stated that the Department believes Rule 5 is clear. This problem is arising in just a handful of the thousands of Section 2255 cases filed every year, she said, and it is not enough of a problem to warrant a rule change. DOJ's appellate chiefs are comfortable that you won't see this again, and she didn't think a brief similar to the one discussed in the memo would be filed again. But Morales conceded she does not know what might happen years from now,

and she observed that Section 2255 cases typically do not go to the most experienced attorneys. She added that because the rule is clear, it doesn't seem viable for the Department to instruct all of its attorneys on this specific issue, and she agreed with Professor Beale that it would be somewhat odd for the DOJ to be responsible for something the judge is supposed to do.

Professor Beale said she'd come around to thinking that the harm in clarifying the rule and running it through the amendment process was negligible, and that the amendment may have a significant benefit to the courts and moving parties and petitioners who have a point to make and deserve to be heard.

Professor King explained that the count of decisions found on Westlaw discussed in the memorandum is not a reliable measure of how often courts deny the right to reply. Most of these decisions and orders do not necessarily end up on Westlaw. Denial of the opportunity to file a reply has occurred in at least this many cases, but we cannot know the actual proportion of cases in which an opportunity to file a reply is being denied. Judge Kemp added that if replies are being denied consistently by all the judges in the districts that include a decision denying a reply, it is affecting about ten percent of cases. Others noted that it is not known if the practice is consistently applied in those districts currently or whether it is the practice of every judge in those districts.

One member indicated he supported an amendment and that it is unacceptable to deny the opportunity to file a reply. First, the reply is the first time to get into the nitty gritty of the substantive issues. Second, the reply is the first time to respond to the various procedural issues raised in the answer, including the issue of procedural default. Rule 5 is being misinterpreted in a non-trivial number of instances, and although it seems clear, some fault may lie with the language of the rule. The language could be improved to make it perfectly clear that the petitioner or movant gets to file a reply; this member favored the first proposal on p. 138 of the agenda book.

Another member agreed the Subcommittee had hoped to find some other way to cure the problem, but the Reporters' memo has shown these alternatives will not work. There is no harm in amending, this member agreed. The word "may" is what caused the problem, so this member stated a preference for getting rid of the word "may" and substituting "entitled." On the time for filing, this member preferred that the Rule include a default period for filing in case the time period for filing is not specified by local rule or by the judge.

Other members agreed there should be an amendment to clarify the Rule. One noted he always had thought the Rule was clear, but thought it meant exactly the opposite of what it actually does. An amendment would be helpful. Another member suggested that the Rule is there to make sure that litigants are properly treated. Because it appears that they are not being protected by this Rule, the Committee ought to clarify it. And a third member said he'd always been confused by the word "may," and that a change that would clarify the meaning of the Rule would be helpful.

Judge Sutton pointed out that one of the things the Rules Committees do is address circuit splits and here, for the reasons in the memo, it appears this issue does not reach the appellate courts. Attempting to address the non-trivial number of district court cases that have misinterpreted the Rule makes some sense. On the "may" point, he stated, it is important to be disciplined about using the same, consistent language across all of the Rules. The Committee should avoid creating negative implications for other rules by getting rid of the word "may" here; this supports an amendment that doesn't change the meaning of the word "may."

Judge Campbell stated this was a real problem with a simple fix, and that in his view the language is not clear now. He recommended simply splitting the current sentence in two by adding a period, and stating in the Committee Note that the movant gets a reply in every case.

Another member agreed and said that the style consultants' concern about negative implication from any amendment was misplaced here because of the second clause. It was the style consultants' suggested rephrasing that creates problems because it adds new concepts with its new clause "although the judge." This member recommended simply separating the two concepts so that the entitlement is not blended with judge's control of timing.

Another member agreed this should be an easy fix and wondered if the second sentence is even needed. Another member responded that the Rule needs to refer to "fixed by local rule or by the judge," because otherwise it may create an unnecessary burden for district judge to set a scheduling order in every case.

Judge Kemp interpreted the comments of Committee members as suggesting that the Subcommittee should go forward with drafting an amendment, and that it should talk further about whether there needs to be some presumptive time limit. Professor Beale noted again that the style consultants will have to address the language of any proposal carefully. Professor King stated that the Committee members' comments suggest that, even if the Subcommittee decides that no specific time period for filing a reply should be added to the Rule, it should consider the separate issue of whether the Rule should specify that some time period for filing must be fixed by judge or local rule. Some members might not want the Rule to require that, but in reading these cases the failure to fix a time sometimes raised problems. Requiring a time to be fixed by a judge or local rule may eliminate those problems. She hoped that members with any additional feedback on these issues will provide it to the Subcommittee.

Judge Molloy indicated that the sense of the Committee was that the Subcommittee would work on proposed language for an amendment, a simple fix preferably, with a recommendation about the time period for filing, and bring it to the Committee for consideration in April.

B. Rule 16.1 (15-CR-B)

Judge Kethledge, Chair of the Rule 16 Subcommittee, stated that at the last meeting the Committee considered a proposal by NYCDL and NACDL to amend Rule 16 to govern judicial management of discovery in complex cases. The proposal was extremely prescriptive, and there was widespread opposition to it at the meeting. The Committee set the specific proposal aside and discussed cases that involve extremely complex financial transactions or massive quantities of data, including a case with hundreds of thousands of audio tapes. The Committee recognized that if the judge fails to recognize and address the difficulties that this overwhelming discovery can pose for defense counsel, counsel's ability to prepare for trial can be impaired; cases that perhaps should be litigated and go to trial may be settled for reasons unrelated to the merits. Judge Molloy appointed a subcommittee and asked it to look at the issue.

At the Subcommittee's first call, Judge Kethledge reported, members decided that the bar proposal was a non-starter, because you can't prescribe wisdom. But the Subcommittee thought it was worth considering a more modest proposal, and the consensus was that it would be useful to create a process that would allow counsel to direct the court's attention to the problems that the defense faces in these kinds of cases. Judge Kethledge stated that this problem is not going to arise in the courtroom of an experienced judge, highly engaged, who will craft case management orders to accommodate these situations. The concern is that if the judge is inexperienced or not as engaged as he should be, Rule 16 procedures become the default and as a result counsel will have great difficulty preparing for trial. The Subcommittee tried to come up with a mechanism to allow defense counsel to engage the court with the problems these cases pose and discussed a number of factors the court could use to consider whether a case is "complex" (a term that is probably too broad).

Several alternatives were drafted after the call, he stated. One was longer, intended to assist judges dealing with this sort of thing for the first time. The first section listed a number of factors to get the court thinking about the difficulties counsel is facing dealing with the volume of data. The second section provided measures that the court could consider if the court determines that a case is complex. The third section provided actions the court could take if the court has implemented measures and one of the parties does not comply. A second version was much shorter and did not lay out all the factors and measures, leaving these to the accompanying Committee Note. Subcommittee members' feedback before the second telephone conference suggested that something in between would be better. A third alternative was drafted that simply says the party can move to have the court determine if a case is complex; if it is complex the court can consider measures that would facilitate preparation for trial; and finally non-compliance could be met with any measure that would advance the interest of justice.

During the Subcommittee's second call, Judge Kethledge said, DOJ expressed the concern that the term "complex" is broader than the problem at hand. If the problem is overwhelming discovery, the term complex captures more than that, such as cases in which expert testimony is particularly difficult. Judge Kethledge reported that the Subcommittee has

asked the Department to suggest more narrowly tailored language that would not raise these concerns. He suggested that the Committee's process might parallel its development of the amendments to Rule 41: the Department came to the Committee with some general language, and the Committee revised the proposal to be more narrowly tailored to address the particular problem the Department had raised.

Ms. Morales agreed that the Department believes using the term "complex" will invite a host of problems. DOJ could support an amendment that would be narrowly targeted to specific sorts of cases, that invites the court to stop and consider whether these cases require some adjustments. But the language of the Subcommittee drafts opened Pandora's box and raised a lot of issues. The Department has drafted two versions which have yet to be approved for submission to the Committee, but she was optimistic that a compromise can be reached.

Another member suggested that the proposed amendment might use "may" instead of "must," and he spoke against narrowing the potential rule. He said that some members had suggested that the rule would make sense in electronic discovery cases, but he is not sure what "an electronic discovery case" is. For example, he described a case in the SDNY, with 18 defendants and 24,000 calls with wiretap materials, and another case with 500,000 audio tapes. "Complexity" does cover more than digital issues, he asserted. He recognized that there may be a need to triage and deal with electronic issues specifically, but the Criminal Rules should be able to accommodate another avenue. This is needed to ensure that judges cannot force trials without allowing proper discovery and without the defense having the opportunity to understand what the charges are and the proof will be. He said he was not sure what the Pandora's box would be other than fairness to the defense.

One member noted there is a lot of scar tissue in this area, as generations of proposals to amend Rule 16 have come and gone, making it more difficult to address. He hoped that compromise language can be reached, and that it will result in a small positive step forward. But the reality, he said, is that you have to trust the common sense, pragmatism, and practicality of district judges, and you can't legislate through Rule or otherwise how to handle pretrial proceedings or access. For every litigant operating in good faith, he commented, there is another trying to figure out reasons to delay a trial or put 400 associates on a case to generate a gajillion gigabytes of data. Sometimes judges get frustrated. Sometimes the tribunal doesn't give as much access as it should. But that would be hard to deal with by rule or otherwise. Appellate courts, knowing how successful trial judges have been in the past, are not going to be keen about trying to manage, outside the bounds of abuse of discretion, how trial judges handle this.

Another member said it may be more helpful to have something in the rules about electronically stored information than it would be to attempt to regulate the discretion of district judges in designating particular complex cases. He said it may be helpful to have hearings or engage in fact-finding efforts to find out exactly what the problem is and what would solve it, to obtain a better understanding of the facts from the defense bar and the government regarding which cases need the most attention.

One member said he was pleased the NYCDL/NACDL proposal was a non-starter with the Subcommittee. He also saw real downsides to the drafts. One draft was so general it didn't say anything at all. Another would transform whatever litigation now takes place concerning claims that the trial judge in a big criminal case has not adequately accommodated the interests of the defendant in a fair trial, whether by aggressive scheduling or insufficient discovery. He said the draft would turn the current claim--that the judge's abuse of discretion resulted in a fundamentally unfair trial that didn't conform to due process—into an argument that nitpicks every term in the Rule. He warned that litigation would question whether the judge adequately considered the complexity of the charged conduct, what quantity of documents is too many, what is the meaning of "likely to be disclosed," etc. Any rule carries unforeseen complications beyond the due process we have now. The problem of inexperienced judges encountering one of these cases also occurs on the civil side, and the solution is very different than what is being proposed here. There is a manual for complex litigation and conferences to educate judges with multi-district litigation. That has worked well without any rule amendments. This approach should be pursued instead of a Rule, if the problem is inexperienced judges.

Another member agreed that these training opportunities could be a supplement to a Rule, but also noted that the Civil Rules—unlike the Criminal Rules—provide for discovery, requiring that the defense be provided with the evidence and witnesses. Normally you can figure out the charge, he said, but when you have hundreds of thousands of tapes and gigabytes of data with no index, and you do not know what evidence the government is going to use to prove its case, it is impossible for the defendant to figure out the defense. It is essential for the defense to know where to find the evidence that is relevant is and what the government is relying on. Unless judges are required to consider how to give the defense access to that information, there cannot be a fair trial. This member also disagreed that the defense would ever want to pour through hundreds of thousands of tapes; the defense wants to know which tapes are relevant and might rebut the government's interpretation of the evidence. He noted that even sophisticated judges sometimes do not feel the need to allow access needed for a fair trial. If the defense were given the index and the government were forced to identify what its exhibits were, the likelihood is that there were be more dispositions sooner. Professor Beale asked if these issues are heightened in the criminal context because of the bare-bones pleading requirements. The member replied that it was both the pleadings and the discovery rules. He added that in criminal cases—unlike civil cases—there are no special masters, magistrate judges closely handling discovery, or interrogatories for the witnesses that will be called.

Another member stated that if the defense could get the civil discovery rules and the time to conduct discovery, she would give up this proposed rule in a minute. The differences between civil and criminal discovery are overwhelming. In 85- 90% of cases defenders in federal cases represent poor people, and in those cases they must go to the judge if they want an expert. That complicates the situation enormously because the judges rightfully have discretion as to how much to spend, who you can hire, at what point you can hire them. Most defense counsel who get huge electronic discovery cases and huge multi defendant cases need someone to give their

time and expertise to work on those cases. Although the protocol for sharing electronically stored information exists, and many people worked really hard on it, it isn't followed, though not because the Department of Justice is deliberately failing to follow it. But the Department of Justice is huge. And its lawyers change. They got the protocol, and they understood it, and then they left. So Federal Defenders are constantly trying to work to get just a table of contents for these huge cases, and they don't always get even that. This is a real problem, she concluded, it impacts all criminal defendants, and it would be worth this Committee's time to do something to make the situation better, even a small first step.

Ms. Morales responded that this may be more of a resource and training issue, rather than a rules issue. She expressed concern that the language of the drafts under consideration by the Subcommittee would invite litigation and confuse Rule 16 further, and hope that the Departments' proposed language will address the issues raised. The ESI protocol includes a pocket guide for judges, which is the result of years of work of collaboration between the Department and Federal Defenders. She said the Department's drafts will reference it. Technology moves quickly, raises many different issues, and requires very careful consideration. The protocol and pocket guide address these issues, and the draft could point directly to the pocket guide or summarize some of those measures.

A judge member stated this is an issue that needs to be addressed, noting he has had several cases in which just before trial defense counsel said "We just had dumped on us this many audio tapes and this many documents." The member's initial reaction was wishing this had been brought to his attention earlier so he could have done something about it, or that the parties could have worked this out. A judge has the authority to regulate these matters and facilitate discovery in this way if the parties cannot work it out themselves. As to how best to bring these issues to the attention of the bench and bar, although the non-rules mechanisms are great ideas, this member said but the best way would be by a rule. If there is a rule, everybody knows about it. Any rule, he said, should put the onus on defense counsel to bring this issue to the court's attention. It is the defendant who is being burdened, and judges should not have to guess when a problem might arise or raise something that might be a can of worms that otherwise wouldn't have been opened. The member favored brevity in a rule as opposed to some sort of detailed code, and thought that electronic discovery is an acceptable way to define the types of cases, but only if that term encompasses voluminous audio tapes.

A member noted that managing criminal discovery is different than civil discovery where lawyers have to do more work. This judge said she took the lead from the defense counsel in criminal cases as to what they need and that in her experience at least one of the defense counsel will take the lead and ask for what they need. Any rule should tell judges what kinds of things make a case complex. Sometimes a case is not complex in a general sense, but there are thousands of wiretapped conversations, and it is the quantity of discovery and how time consuming they are that causes problems. A new judge would want to know what are the things that make the case complex, so if it is the volume of discovery, the rule should say that so that a judge new to criminal cases will know. The judge may not see this until somewhere later down

the road, and if the judge needs the reins a little bit early on, it would be good to have a laundry list of factors.

Another member agreed with the comments of the last two speakers and added that like Rule 17.1 (which states the court may hold pretrial conferences) a new rule could highlight the judge's options. The note could probably explain hypothetical cases that might need attention. Just like 17.1, a short rule could let judges know you can do this on your own, without a defense motion (though it will be the defense lawyer making the motion in the vast majority of cases). And an amendment could help with the case budgeting process, knowing the defense will be going over the CJA limit because they anticipate this sort of discovery, which will be more involved than the ordinary case. A rule would bring it to everyone's attention. Manuals and conferences are also avenues, but this member favored something brief like Rule 17.1 that leaves the discretion to the judge.

One member observed that the proposal was asking for more active judicial management in handling discovery in criminal cases, and also strongly supported the idea of having the Federal Judicial center provide complex criminal case training.

A member responded to an earlier comment about the impact of a rule on appellate litigation, saying he didn't know what would be so bad about the courts of appeals having to articulate guidelines for what constitutes a fair trial. He asked why is it a problem to tell trial judges that defense lawyers need to know what the evidence will be, and that they need an index so that they can find it.

Judge Campbell observed that what is proposed in this rule is something judges already have the authority to do. Judges already can hold status conferences, set schedules, and at least in one circuit, require witness lists from the government and exhibit lists in advance of trial. The question is what do you do with the weakest of judges in order to get them to focus on it and think about it. He noted that the Civil Rules Committee has wrestled with this on the civil side. You write rules for the worst case managers recognizing that the good judges don't need the rules at all, he said.

He said he was surprised that there are complex cases in other districts that are not already coming to the attention of the judges early in the case. Complex cases come to his attention regularly by motions, filed primarily by defense attorneys, asking him to designate a case as complex for purposes of the Speedy Trial Act. The motion is invariably accompanied by a request for a case management conference. He orders the parties to work this out, they provide their agreement, and he tweaks it a bit. If a complex case does not come to his attention under the Speedy Trial Act, he said, they come in under the Criminal Justice Act because the defense lawyers want to get that budget early on, anticipating that it is going to exceed the prescriptive amount.

On fact finding, Judge Campbell reported that the Civil Rules Committee found it useful to hold a focus group meeting, called a mini-conference, with about 25 lawyers, judges and some academics representing a broad spectrum of views, who meet for a day with the subcommittee that is addressing an issue. He said that a month or two ahead of the meeting attendees were sent a list of things being considered, including proposed language changes. They were asked to come prepared to address those issues. The Committee tried to invite people who were involved in bar groups, who would canvas the position of those groups. The day-long session with these very well informed people helped the Civil Rules Committee get a much better sense of what is happening on the ground and how the rules may make a difference.

Judge Sutton expressed support for the criminal equivalent of the manual for complex civil litigation. He agreed with the suggestion that the Committee should study how the ubiquity of email and new technology has changed discovery in criminal cases, whether that leads to rulemaking or not. He expressed some skepticism about a rule. He reported that about 10 years ago the Appellate Rules Committee met at Emory to ask Professor Freer to critique the Rules process. Freer's basic thesis was that the Rules Committees do way too much "small ball," enacting one technical amendment after the other to correct whatever silly problem, on the assumption that such amendments do no harm. But 10% of the time there is harm from amendments because of unintended consequences. And the broader harm is that the Rules have become too complex, increasingly inaccessible to someone who just graduated from law school. Judge Sutton recommended being more careful with the small-ball amendments and not assuming they are cost-free. Professor Freer was very frustrated that we rarely took on big bold projects or stepped back and asked what we are doing here. What concerns me about the proposals before the Committee, Judge Sutton said, is that they seem to be the epitome of small ball. What is added by the language in the shortest version of the rule, which seems so obviously true? On the other hand, he was very skeptical that we could get bolder versions of the amendments done. They would be similar to the Rule 16 Brady amendments. Rule 16 has a big graveyard of proposals, he noted, and DOJ will oppose any bold proposal. So it looks like the options are an amendment that accomplishes very little or facing difficulties in getting approval for a bolder proposal. He suggested further study, including a conference to bring in experts and people who know what is going on. Finally, he said, he was skeptical of importing anything from the civil rules on discovery into the criminal rules.

A member followed up, stating that a substantial body of precedent with the Jencks Act and bills of particulars will make it hard to do anything really bold. He also observed that this discussion about post-indictment discovery is primarily about prosecutions of individuals, because corporations tend not to get to this point.

Judge Kethledge stated that he heard that more clarity about the problem we are addressing is needed, and that the suggestion of more fact finding at a mini conference is a good one. Judge Molloy stated the Subcommittee with its current chair should consult with Judge Campbell about past conferences. He said the proposal makes a legitimate point, but we can use the conference to explore whether this is a judge problem or a rule problem.

C. Cooperators

Judge Molloy asked Judge Kaplan, Chair of the Cooperators Subcommittee, to give a report of the Subcommittee. Judge Kaplan reported that up until June the Subcommittee had been gathering information and looking into questions it had about the survey that underlies the CACM report. It had received a memo from the reporters on First Amendment issues and made other efforts summarized in the agenda book. The Subcommittee had two lengthy conference calls. At about that time, CACM published to all of the district courts what it called "interim guidance."

After talking to Judges Molloy and Hodges, Judge Sutton proposed a different way of attacking this problem: the creation of a task force with balanced representation from CACM and the Subcommittee of the Criminal Rules Advisory Committee. Judge Kaplan would chair the task force, and Judge Martinez and Judge St. Eve would also play leadership roles. The rest of the membership had not been determined, he said. He suggested that the task force broaden the focus to include non-rules solutions—which would obviously involve a major buy-in from the DOJ and from the BOP—to seek new ideas from the Criminal Rules Advisory Committee, from CACM, and from DOJ. Judge Kaplan said that Judge Sutton had indicated that he personally intended to make it a priority to get constructive participation in the task force from the Bureau of Prisons and from the Justice Department. Judge Sutton, Judge Kaplan continued, asked that the Criminal Rules Advisory Committee, at a minimum, draft a proposed rule and provide an analysis or an exposition of views as to the extent with which the Committee agreed or disagreed with the draft and why. From that point forward, the task force would try to see if common ground can be found on a proposal.

Procedurally, Judge Kaplan continued, the Cooperators Subcommittee will draft a rule and develop a position for consideration by the full Committee in April; the full Committee will come to some conclusion, which will then be brought back to the task force. In the meantime, the task force may focus on the DOJ and BOP side of things.

Beyond that the plan was not yet fully developed. Judges St. Eve and Martinez would be meeting with Judge Kaplan in New York on September 27. Once the Rules Committee and CACM finish their work, the task force will attempt to bring order to the situation. Judge Kaplan said he understood from Judge Molloy that Judge Hodges is thinking about a somewhat altered proposal from CACM, and we look forward to seeing what develops and working cooperatively with CACM in an effort to produce a consensus on what is a very, very difficult problem.

Judge Sutton expressed concern that the issue of protecting cooperators has been around since about 2007. CACM said they thought it was a problem and gave it to Criminal Rules, Criminal Rules said we're not sure there is a problem, was concerned about the First Amendment and not sure there was a rules solution. CACM agreed to do a study, and the FJC study found 571 assaults or threatened assaults, and 31 murders. CACM concluded there is a serious

problem. CACM and the Rules Committee have two very different approaches to this problem and two very different senses of how severe it is. He was afraid that we were about to repeat history and end up in the same place, so it made sense to have a task force—which has no power—to bring together the stake holders, including the clerks' offices whose representatives are likely to know what will or will not work. He said he'd been working to identify two or three public defenders with different positions on this issue and see if the three of them could come up with something they could agree on. We have about eight months for each of these stake holders to come forward with ideas that they think might work. In the case of Criminal Rules, he said, he thought it would be helpful to have some proposed language on the table, and it wouldn't necessarily have to be a single rule. There is more than one way to do this. He added that it is likely that to have a national solution you'll need a rule amendment, but a much narrower one that what's been contemplated. Probably we will also have something from CACM saying these are the ways we'll process these cases. The idea is to get open-minded thinking and try to achieve a consensus. This is a priority of the judiciary. The Executive Committee of the Judicial Conference recently met with the Attorney General, and this is the first thing they raised with her. At the recent Judicial Conference meeting, a discussion of the CACM guidance became a discussion about the task force and potential solutions. There was no criticism of this approach, and there were comments that this was a cross committee issue. CACM is doing more research on the constitutional issues, Judge Sutton reported. He said he was not inclined to think the First Amendment issues stand in the way of any rule amendment. This is a complicated issue, which is entirely technology driven. Twenty or thirty years ago an enterprising gang leader could go to the court files to identify the cooperators, but they were lazy and didn't do it. Now PACER, CM/ECF, and technology have made it very easy to identify cooperators. It's hard to say it is just a BOP/DOJ problem because the courts' files are part of this. Judge Sutton stated that there is no doubt that the main problem is with the DOJ and BOP. But it is hard to take the position that it is for them to fix, and we can just do what we do in each district court across the country.

Judge Molloy said that Judge Hodges had a strong feeling that unless there was a uniform national policy, it was all for naught. Judge Molloy asked Ms. Hooper if there was any correlation between the most recent data provided by the BOP and the FJC study. She responded she would be happy to look into that if the BOP data were forwarded to her.

Ms. Morales stated the Department does view this as a priority and looks forward to working on the task force. DOJ doesn't work in a vacuum, and can't solve the problems alone. DOJ has heard from AUSAs seeking to protect cooperators that judges had sometimes denied requests for sealing. We do have to work together, she said, and DOJ thinks the task force will be very productive.

At Judge Sutton's request Ms. Morales agreed the Department would come forward with three or four recommendations for the Task Force regarding how this problem should be addressed as a team. She said that the BOP has already adopted the recommendations of CACM, and the AUSAs office are already adopting some as well. She repeated that the Department is not sure that the Rules are the place to go for this. It is a serious problem, she said, but there are

10,000 people who get credit for cooperation every year. So it is really a small subset of cases, and of those, we don't know how many got that information from court documents. We are very willing to work on it and a task force with different stake holders where we can brainstorm about measures we can take that may or may not be in the form of rules could be very productive.

Judge Sutton responded that the premise is not just to brainstorm, but that each set of stake holders will come forward with three or four concrete ideas about how we can improve things. Everyone agrees we can't eliminate all murders, all threats, and all assaults. But we can do a better job, he said, particularly if each stakeholder comes forward with something concrete.

Judge St. Eve stated that the task force will be guided in part by CACM's tracking of what jurisdictions are doing with the guidance, and if there is any success to the extent they can measure that. Also the general counsel to the BOP stressed that they are looking for a national rule or national guidance, because it won't help or work to do it district by district.

Judge Molloy asked Judge Kaplan if the Subcommittee composition should stay the same. Judge Kaplan said that it should, but that not all of the members of the subcommittee can be on the task force, which would become too large. Judge Sutton suggested that two or three members of the Subcommittee should be selected to serve on the task force and that CACM would also have two or three members.

A member reported the view of a former experienced prosecutor from the SDNY that threats and harm to cooperators result from the way the Marshals implement the witness protection program, not affording protection until after a cooperating witness has been sentenced. But cooperation becomes obvious much earlier from the movements of cooperators when they are in jail, not through court records. Further, cooperators are not separated from the general population until they are sentenced, and sentencing does not occur until after cooperation is complete. Ms. Morales noted that some districts do have measures to address this in place, and that she anticipated bringing in the Marshals Service. Judge Sutton agreed that would be beneficial.

D. Rule 11(a)(2) (16-CR-C)

Judge Molloy asked the Reporters to present the proposal to consider an amendment to Rule 11(a), which governs conditional pleas. He observed that the question seems to be the same as Rule 5. Do we need to change the rule? Or is the language already clear?

Professor Beale reported that Judge Graber, a member of the Standing Committee, invited the Committee to look at Rule 11(a). If a defendant is successful on appeal and the case is remanded, judges appear to disagree about what the Rule means in particular circumstances. She noted that the reporters had not researched district court opinions, but there is some disagreement among appellate opinions. Unlike Rule 5, the question of the proper interpretation of the rule is being debated in accessible court of appeals opinions. The question at this point is

whether the Committee wishes to pursue this suggestion of an amendment, with the appointment of a subcommittee and additional research by the reporters.

Judge Molloy said he'd had a number of conditional pleas, and could not envision defense counsel advising a client that if you win on appeal you can withdraw your plea unless a court says it was harmless error. He thought the language was clear. He invited comments from the other members.

One member stated that unlike Rule 5 which is not clear, the language of Rule 11 is not susceptible of being misinterpreted. For example, the only reason to recommend a conditional plea to a client who has lost a suppression motion is the defense lawyer thinks if that evidence were not admissible the defendant could go to trial. Otherwise no client would plead guilty conditionally. And, this member added, she would have no idea what she would say to a client. "It is pretty likely we might be able to go to trial if we win on appeal"? The member reiterated that she was opposed to trying to change a rule she thought was already clear.

Other members agreed that the Rule is clear and need not be amended, and that no subcommittee was needed to examine it further. A member also expressed the view that the disputes about the effect of Rule 11(a) were unlikely to affect the disposition of cases because of the deferential application of the harmless error standard.

Judge Molloy suggested, with no opposition, that the Committee should place the issue on its study agenda and monitor it.

V. Next meeting; departing members.

Judge Molloy noted that the Committee's spring meeting will be in DC, and that the location places for the fall 2017 meeting is not final. Ms. Womeldorf stated that the tentative plan is to hold the 2017 meeting in Chicago and the 2018 meeting in New York.

Judge Molloy invited Justice Gilbertson and Judge Sutton to make comments. Justice Gilbertson said it had been a great six years, he'd met wonderful people, and will take away good memories. Judge Sutton, completing his term as Standing Committee Chair, thanked everyone on the Committee for all the hard work they'd done, and praised the Reporters Professors Beale and King in particular. He commended Judge Molloy for his leadership. Judge Sutton mentioned that in particular he appreciated the effort members had made to find common ground, particularly with Rule 12, and that we all benefited from the consistent consensus-seeking attitude of the Committee.

After brief logistic instructions about the Committee Dinner, the meeting was adjourned.