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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

RE: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 8, 2010**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on September 27-28, 2010, in Boston, Massachusetts, and took action on a number of proposals. The Draft Minutes are attached.

Action items:

(1) approval to publish a proposed amendment to Rule 11 (advice concerning immigration consequences of a guilty plea); and

(2) approval to publish a proposed amendment to Rule 12 (motions which must be made before trial), and a conforming amendment to Rule 34.

II. Action Items—Recommendations to Publish Amendments to the Rules

1. ACTION ITEM—Rule 11

The Advisory Committee recommends publication of an amendment to expand the Rule 11 colloquy to advise a defendant who is pleading guilty or nolo contendere of possible immigration consequences.

As explained in the 1974 Committee Notes, the Rule 11 colloquy is designed to insure that a defendant who pleads guilty has made an informed plea. A criminal conviction can lead to a variety of other collateral consequences, and until now the rule did not require judges to discuss them with a defendant pleading guilty or nolo contendere. Despite the lack of a mandate in the rule, however, judges in many districts already include warnings about the collateral consequences of a criminal conviction as good practice.

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a warning regarding possible immigration consequences ought to be required as a uniform practice. *Padilla* 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 Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id.* at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

Although the motion to adopt the language of the proposed amendment passed unanimously, the Committee was initially divided on the question whether to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it does not speak to the duty of judges. Members expressed concern that the list of matters that must be addressed in the plea colloquy is already lengthy, and adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge.

After discussion, the Committee concluded that deportation is qualitatively different than the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's logic also supports requiring a judge to issue a similar warning. Recognizing the distinctive nature of immigration consequences would be consistent with the practice of the Department of

Justice, which now singles out immigration consequences for special treatment and advises prosecutors to include a discussion of those consequences in plea agreements. Similarly judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, as well as the fact that there have been, and likely will be, legislative changes in the immigration laws. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

Following the meeting, the reporters prepared and circulated by e-mail a draft committee note and a proposed revision to the text of the rule as adopted at the meeting. Both were approved by an e-mail vote of the Advisory Committee. One member noted his dissent from the Committee's decision to recommend the amendment.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 11 be published for public comment.

TAB
7-A

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.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement concerning the potential 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, and does not require the judge to provide 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 first attempting to determine the defendant's citizenship.

2. ACTION ITEM—Rule 12

The Advisory Committee recommends publication of an amendment to Rule 12. One element of the present proposal – the treatment of claims that the indictment or information fails to state an offense – was presented to the Standing Committee in 2009 and returned to the Advisory Committee for further study. Following the remand, the Advisory Committee broadened its deliberations to include the application of the "waiver" concept in Rule 12 and its relationship to Rule 52.

Background

Subdivision (b) of Criminal Rule 12 designates which claims and objections must be raised before trial. Subdivision (e) specifies that a party "waives" any claim that should have been raised prior to trial under subdivision (b), and requires "good cause" before a court may grant relief from the waiver.

Although Rule 12 has from its inception used the term "waiver" to describe the failure to raise on time those specific claims addressed in the rule and the term "good cause" to describe the standard for relief, these terms as used in the Rule have a specific meaning that differs from the meaning that has come to be associated with these terms in some other contexts. In Rule 12 the label "waiver" is given to *any* failure to raise a designated claim, even though"waiver" elsewhere suggests only knowing and voluntary abandonments. Rule 12, in other words, has used the term "waiver" to describe all defaults, inadvertent forfeitures as well as fully informed and deliberate relinquishments. Also, the "good cause" test for relief from waiver of claims listed in Rule 12 is different than the test for relief that courts apply under Rule 52(b) for other claims that are not raised on time. The Supreme Court has interpreted the phrase "good cause" in Rule 12 to require a showing of "cause" and "prejudice," a standard well defined in the case law. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). By contrast, under Rule 52(b), relief for an untimely, forfeited claim is not conditioned upon "good cause." Instead, under Rule 52(b), claims not raised on time are reviewed for plain error under the now familiar four-part test first articulated by the Supreme Court in its decision in *United States v. Olano,* 507 U.S. 725 (1993). *See also Puckett v. United States,* 129 S.Ct. 1423 (2009) ("First, there must be an error or defect – some sort of "[d]eviation from a legal rule"– that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. . . . Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." . . . Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error-discretion which ought to be exercised only if the error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' ").

In 2009, the Advisory Committee recommended (with 4 dissenting votes) that the Standing Committee approve for publication an amendment to Rule 12. Rule 12(b) presently exempts from its timing requirements two specific claims: a claim that the charge fails to state an offense and a claim of lack of jurisdiction. These two claims may be raised at any time, even after conviction. In

2002, the Supreme Court made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Committee's 2009 proposal recommended adding to those claims "waived" under Rule 12(e) when not raised prior to trial the claim that a charge fails to state an offense. But rather than condition relief upon "good cause," as Rule 12(e) requires for other claims "waived" under the Rule, the Committee concluded that "cause" should not be required. Instead, the Committee's proposal recommended amended language providing that a judge could grant relief for the failure to state a claim either for good cause or when the error "prejudiced the substantial rights of the defendant." The proposal also included a conforming amendment to Rule 34.

In June of 2009, the Standing Committee remanded the proposed amendments to the Advisory Committee for further study of the relationship between the proposed "prejudice to substantial rights" standard, the"good cause" standard in Rule 12(e), and the standard for relief from forfeited claims under Rule 52. Additionally, the Standing Committee asked the Advisory Committee to consider whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

The matter was once again considered by the Advisory Committee, which broadened its deliberations to include not only the appropriate treatment of a claim that the charge fails to state an offense, but also the application of the "waiver" concept in Rule 12 and its relationship to Rule 52. The result of these deliberations was a proposal that would make more extensive amendments to Rule 12, approved by the Advisory Committee at its September 2010 meeting by a vote of 8 to 4. Following the meeting, the reporters drafted a Committee Note, which was approved by an e-mail vote of the Advisory Committee.

The Proposed Amendment

The major features of the amendments to Rule 12 that the Committee now recommends the Standing Committee approve for publication are summarized in the paragraphs that follow. The most important changes are detailed in paragraphs 1, 4, and 6, below.

1. Requiring Pretrial Objection Based on Failure to State an Offense

Like the amendment recommended in 2009, the proposed amendment would eliminate the timing exemption for claims that the charge fails to state an offense and provide that this claim like other defects in the charge must be raised before trial.

2. Deleting Existing (b)(2)

Rule 12(b)(2) presently provides that "a party may raise by pretrial motion" "any defense, objection, or request that the court can determine without trial of the general issue." The 1944 Advisory Committee Note explains that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised "by demurrers, special pleas in bar and motions to quash." The use of motions is now so well established that it no longer requires explicit authorization. The language is not only unnecessary but also potentially misleading if read literally. As noted, (b)(2) says that any defense, objection, or request that is capable of being determined

before trial "may" be raised by pretrial motion. The permissive term "may" might be understood to indicate that each party has the option of bringing *or not bringing* all such motions before trial. This is in tension with (b)(3), which provides a list of motions that must be brought before trial. Since the language now found in (b)(2) is no longer needed and might create confusion, the Committee proposes that it should be deleted.

3. Relocating Provision on Jurisdictional Claim

The proposal would move to a separate subdivision the text that allows jurisdictional objections to be raised at "any time while the case is pending," rather than leaving it as an exception to the list of various defenses and claims subject to the timing requirements of Rule 12(b)(3). The amendment places this new subdivision in Rule 12(b)(2), replacing current (b)(2), which would be deleted, as discussed above. This avoids renumbering and relettering the most frequently cited and researched provisions in the Rule.

4. Requiring that Basis for Claim Be Available and Determination Possible Before Trial

As a general rule, the types of claims subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. But if the basis for a belated motion was not available to a party before trial, courts currently consider whether the circumstances constitute "good cause" such that the party can be excused for the failure to raise the claim before trial. The Committee agreed that the failure to raise a claim one could not have raised should never be considered waiver and that it would be desirable to make this point explicit in the rule. Defenses, objections and claims "must" be raised before trial only where "the basis for the motion is then reasonably available...."

In addition, parties should not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) addresses this concern by noting that issues depending on a trial "of the general issue" may not be raised prior to trial. If amended as proposed, the Rule would make this point clear through the introductory language of (b)(3), which provides that only those issues that can be determined "without a trial on the merits" "must be raised by motion before trial." The Committee preferred the modern phrase "trial on the merits" over the more archaic phrase "trial of the general issue" now found in (b)(2). No change in meaning is intended.

Under the revised Rule, if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the court would first determine whether (1) the basis for raising the issue was "reasonably available" before trial to the party who wishes to raise it, and, if so, (2) whether it would have been possible for the court to resolve the issue at that time, before trial. Only if both conditions are met would the court need to consider the consequences of the failure to raise the claim on time under subdivision (e).

5. Spelling Out Claims Required Before Trial

The proposal does not disturb the general approach followed in the current (b)(3) to describe those claims subject to waiver: it repeats the two general categories of claims (defects in "instituting the prosecution" and defects "in the indictment or information"), followed by the three specific categories of discovery, suppression, and severance. To add clarity and provide guidance to litigants,

however, the proposed revised Rule lists some of the more common claims that fall in each of the more general categories, while leaving in place the existing description of the general categories.

6. Consequences of Failure to Raise Claims or Defenses Before Trial

The proposal bifurcates subdivision (e). Subdivision (e)(1) applies to all but three of the claims that under (b) must be raised prior to trial, and it preserves the standards of the existing rule, providing that an untimely claim is "waived" and may not be considered unless there is a showing of both "cause and prejudice." The substitution of "cause and prejudice" for "good cause" is intended to clarify rather than modify the standard for relief that is already applied under the current Rule.

Subdivision (e)(2) is new, and provides that a different standard of relief applies to three specific untimely claims: the failure to state an offense, double jeopardy, and a violation of the statute of limitations. These three claims are "forfeited" if not raised in a timely fashion, not "waived," and if raised late are subject to review under Rule 52(b) for plain error. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. This new standard is also consistent with the Supreme Court's holding in *Cotton,* that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12, and the conforming change to Rule 34, be published for public comment.

Rule 12. Pleadings and Pretrial Motions *

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(b) Pretrial Motions.

(1) ***In General.*** Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~ ***Motion That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by motion before trial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution, including:

*New material is underlined; matter to be omitted is lined through.

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution;

(vii) outrageous government conduct; and

(viii) an error in the grand jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

~~— but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) ~~**Waiver of a Defense, Objection, or Request.**~~

Consequence of Not Making a Motion Before Trial as Required.

(1) ***Waiver.*** A party waives any Rule 12(b)(3) defense, objection, or request – other than failure to state an offense , double jeopardy, or the statute of limitations – not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. ~~For good cause~~ Upon a showing of cause and prejudice, the court may grant relief from the waiver. Otherwise, a party may not raise the waived claim.

(2) ***Forfeiture.*** A party forfeits any claim based on the failure to state an offense, double jeopardy, or the statute of limitations, if the claim was not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. A forfeited claim is not waived. Rule 52(b) governs relief for forfeited claims..

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Subdivision (b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that the failure to raise a claim a party could not have raised on time is not deemed to be "waiver" or "forfeiture" under the Rule. Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Subdivision (e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the "waiver" standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language that provides a party "waives" all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as "good cause." "Good cause" for securing relief for an untimely claim "waived" under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words "for good cause" in the existing rule have been replaced by "upon a showing of cause and prejudice."

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court's holding in *Cotton,* that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment <u>if the court does not have jurisdiction of the charged offense.</u> ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

TAB
7-B

III. Discussion Items

A. Rule 16 and Exculpatory Evidence

The Advisory Committee is continuing its consideration of the question whether Rule 16 should be amended to incorporate the government's constitutional obligation to provide exculpatory evidence to the defense or to create a broader pretrial disclosure obligation of potential impeachment information. To inform its deliberations, the Committee is gathering information on how the system is currently functioning and seeking wide input on the question whether an amendment to rules would be desirable.

The Committee received a presentation on the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. The survey was distributed to all district and magistrate judges and 14,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 94 U.S. Attorneys' Offices nationwide, but not to individual prosecutors. The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorneys' Offices responded. In addition, respondents provided written comments that the Center estimated to be over 700 pages of text. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as "traditional Rule 16 districts" and the latter districts as "broader disclosure districts."

The survey focused on the central issue whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. Since the minutes included in the Agenda Book provide a detailed description of these preliminary findings, this report highlights only a few key points. First, 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. In the districts that already have local rules requiring broader disclosure 60% of the judges favor an amendment, but in traditional Rule 16 districts, only 45% favor an amendment.

Second, the survey provides information on the principal reasons for the support or opposition to an amendment. Judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the requirement of materiality as a measure of a prosecutor's pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason – eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment. The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey provides information regarding the perceptions of judges, prosecutors, and defense lawyers regarding the frequency of (1) non-compliance with discovery obligations on the part of both prosecutors and defense lawyers; (2) threats or harm to witnesses due to disclosure of exculpatory or impeaching information; and (3) requests for protective orders. It also reports on their perceptions regarding the effect of the disclosure rules in the broader disclosure districts.

Since the survey gathered an enormous amount of data and the Federal Judicial Center has not yet completed its final report, the Committee's discussion was preliminary and general. In light of the sharp division of opinion regarding the need for an amendment, members expressed an interest in considering not only a possible amendment but also changes in the Federal Judicial Center's Judges' Benchbook that might serve either as an adjunct or an alternative to amending Rule 16. One option that might be included in either an amendment to Rule 16 or the Benchbook is a checklist that would focus the attention of both the prosecution and the defense on the kinds of information that should be disclosed. In addition, the Federal Judicial Center is considering publishing a guide to the "best practices" in criminal discovery. Some members expressed the view that supplementing the Benchbook or publishing such a guide could be effective and avoid the pitfalls of amending Rule 16.

The consideration of any proposed amendment was recommitted to the Rule 16 subcommittee, which Judge Tallman chairs.

B. Rule 15

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on pretrial discovery. Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge John Keenan, which subsequently met by conference call to consider a proposal to amend the Committee Note.