ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 13, 2009
Seattle, Washington

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Seattle, Washington, on October 13, 2009. The following members participated:

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

Two members were unable to attend: newly-appointed member Timothy R. Rice, U.S. Magistrate Judge of the Eastern District of Pennsylvania, and Thomas P. McNamara, Federal Public Defender of the Eastern District of North Carolina (excused due to illness).

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

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court and Thomas Hillier, Federal Public Defender of the Western District of Washington also attended as a representative of the Federal Public Defenders.

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

Judge Tallman welcomed everyone to the newly-renovated William K. Nakamura Courthouse in Seattle. Judge Tallman particularly welcomed newly-appointed Committee members Judge David Lawson and Assistant Attorney General Lanny Breuer.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2009 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

Mr. Rabiej reported that the following proposed rule amendments simplifying the computation of time had been approved by the Supreme Court and transmitted to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2009.

1. Rule 45. Computing and Extending Time. Proposed amendment simplifying time-computation methods.

2. Related amendments regarding the time periods in Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58 and 59; Rule 8 of the Rules Governing § 2254 Cases; and Rule 8 of the Rules Governing § 2255 Proceedings.

In addition, the following proposed amendments had also been approved by the Supreme Court and submitted to Congress, to take effect December 1, 2009:

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.

2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.

3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.

4. Rule 41. Search and Seizure. Proposed amendments specifying procedure for warrants to search for or seize electronically stored information.

5. Rule 11 of the Rules Governing § 2254 Cases. Proposed amendments clarifying requirements for certificates of appealability.

6. Rule 12 of the Rules Governing § 2254 Cases. Proposed amendment renumbering provision regarding applicability of Civil Rules.

7. Rule 11 of the Rules Governing § 2255 Proceedings. Proposed amendments clarifying requirements for certificates of appealability.

Mr. Rabiej further reported that the following proposed amendments had been approved by the Judicial Conference at its September 2009 session for transmittal to the Supreme Court:

1. Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the presence of the defendant in limited circumstances outside the United States after the court makes case-specific findings.

3. Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

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

Finally, Mr. Rabiej reported that the following proposed amendments had been approved by the Standing Committee for publication, and had been posted on the internet in August 2009 for review and comment:

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

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

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

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

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment authorizing defendant to participate by video teleconferencing.

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

8. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrant and inventory by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross-referencing to Rule 32.1 provision for participation in revocation proceedings by video teleconference and authorizing defendant to participate in misdemeanor proceedings by video teleconference.

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

Professor Beale asked whether any comments had yet been received. Mr. Rabiej replied that none had been received but that the deadline was February 16, 2010, and comments typically do not come in until the end of the period.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman introduced the discussion of again considering amendments to Rule 16 by briefly summarizing the Committee's prior attempts to amend the rule to codify and expand the requirements to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). First, Judge Tallman pointed out that the Committee has wrestled with this issue almost since *Brady* was decided forty years ago. He informed members that the Rules Committee Support Office had compiled documents of the Committee's prior consideration of amendments to Rule 16. They are available, along with a table of contents, on the rulemaking website.

Second, Judge Tallman recounted that in 2007, the Committee had approved an amendment to Rule 16, over the objection of the Department of Justice (the "Department"), and had sent the amendment to the Standing Committee to approve for publication for notice and comment. Before the Standing Committee, the Department argued, among other things, that the amendment unnecessarily upset the careful balance of interests in the criminal justice process. As an alternative, the Department had agreed to change the U.S. Attorneys' Manual ("the Manual") to explicitly set forth a prosecutor's disclosure obligations under *Brady* and undertook a commitment to additional training of all litigating prosecutors. The Standing Committee declined to approve the amendment for publication and remanded the matter to the Committee for further consideration as it deemed appropriate at some future date after sufficient time had passed to assess the impact of the Department's changes.

In April 2009, Judge Emmet Sullivan, who had presided over the trial of Senator Ted Stevens in the United States District Court for the District of Columbia, wrote a letter to Judge Tallman urging the Committee to reconsider amending Rule 16 to require disclosure of all exculpatory evidence to the defense. Judge Tallman appointed a subcommittee consisting of himself, Judge England, Professor Leipold, Rachel Brill, and Assistant Attorney General Lanny Breuer. On September 10, 2009, the subcommittee held a teleconference, with Jonathan Wroblewski filling in for General Breuer who was out of the country. Mr. Wroblewski told the subcommittee that a working group had been formed at the Department to review issues related to Rule 16 and said that by the Committee's October meeting, he anticipated that the Department would be able to articulate its position on how to best resolve these issues.

After Judge Tallman's summary, Lanny Breuer addressed the Committee. General Breuer pledged that he and the Attorney General are committed to making federal prosecutors the most professional and ethical lawyers in the nation. He described steps that the Department had taken in the aftermath of the Stevens trial, including forming a working group to study discovery in criminal proceedings and to suggest improvements. He said that while the Department took its obligations seriously, an Office of Professional Responsibility report of alleged *Brady* violations over the past nine years did not reveal evidence of a widespread problem. Indeed, according to OPR, only 15 instances of sustained misconduct during that period had been substantiated.

Nonetheless, General Breuer said that the Department recognized that further steps are necessary to address what he characterized as two different types of problems: prosecutorial misconduct and prosecutorial error. Because prosecutorial misconduct is by definition "knowing and intentional," General Breuer suggested that changing the rule to make disclosure obligations more stringent would not be an effective deterrent. Rather, prosecutorial misconduct can only be rectified by robust enforcement and sanctions, which General Breuer maintained the Department was ready to implement once the Deputy Attorney General had reviewed the report of the working group.

To address prosecutorial error, General Breuer said the Department was adopting a multi-faceted approach, emphasizing training, guidance, strong leadership, and more uniformity. All federal prosecutors will be required to undergo training on discovery issues. Each U.S. Attorney's Office will be required to designate an expert on discovery to advise prosecutors on individual cases. At the Department's headquarters in Washington, D.C., a new position will be created to oversee these efforts. In addition, the Department will create an on-line repository of material on *Brady* issues and is considering developing a manual that deals exclusively with disclosure obligations.

Although the Department is committed to a comprehensive approach to the issue, General Breuer reiterated that the Department remained opposed to amending Rule 16 to expand disclosure requirements beyond the dictates of *Brady*. He said that such an approach would be inconsistent with Supreme Court precedent, would upset the careful congressionally-mandated balance inherent in criminal discovery under the Jencks Act, and would disregard critical interests such as the rights and safety of witnesses and special concerns relating to cases implicating national security. He outlined several hypothetical scenarios involving criminal cases to illustrate the problems that the Department feared would be created by amending the rule.

General Breuer concluded by stating that the Department would not object to amending Rule 16 simply to codify the disclosure requirements of *Brady*, but would object to any proposed amendment that went beyond *Brady* and unnecessarily impinged on these concerns. If the Committee decided to amend Rule 16 to require more disclosure than *Brady* currently requires, General Breuer said that the proper course of action would be for the Committee to write a report to Congress seeking statutory authorization for such a change, necessitating amendment of the Jencks Act.

Following General Breuer's presentation, Judge Tallman recounted his efforts in meeting with the Director of the Federal Judicial Center to devise a research project that could measure the effectiveness of the Department's 2007 changes to the Manual. (The FJC had issued reports in 2004 and 2007 on local rules that incorporated *Brady*.) Judge Tallman's discussion with the FJC revealed that any research project on this issue poses numerous methodological problems. He concluded from those discussions that measuring the efficacy of the Manual change does not easily lend itself to research using the FJC.

A member cautioned against giving undue weight to any research that might be done if that research is fundamentally unsound. Another member said that after-the-fact review of cases to determine if there were any *Brady* violations would be very difficult and that perhaps a better approach is to develop best practices at the outset of cases.

Professor Beale suggested that it might be feasible to emulate a model used by hospitals to improve the delivery of health care, whereby the hospital reviews the treatment of patients in cases selected at random. Such a random review could be performed by the Department in

various U.S. Attorneys' offices to see if any undetected discovery problems had occurred. General Breuer expressed interest in considering the idea and said he would look into it.

A participant voiced a concern over *Brady* violations that are relatively minor, and therefore do not become the subject of litigation, but still have a significant effect on the case. He suggested that the training of federal prosecutors should include presentations by members of the defense bar who could offer their perspective on discovery issues. He also suggested that the determination of whether information is "material" and therefore should be divulged is better made by a judge than by a prosecutor. Judicial members expressed concern that it is very difficult to determine such a question *in camera* without greater familiarity of the underlying facts and theories of a particular case.

A member pointed out that regardless of the amount of empirical data demonstrating *Brady* violations, it only takes one case to skew perception of the problem. In addition, he expressed concern that there is so much variation nationwide among the 94 U.S. Attorney's Offices and the litigating divisions within Main Justice itself in handling discovery in criminal cases. General Breuer responded that the Deputy Attorney General was aware of the variation and is considering whether and how best to achieve greater uniformity.

Another member said she agreed that prosecutors should not be in charge of determining what information is material and therefore must be disclosed. She also said that in some districts, a change in culture was necessary before improvements could be made.

Judge Tallman pointed out that if Rule 16 were amended to require the government to disclose a witness's information before trial, such an amendment could conflict with the Jencks Act, codified at 28 U.S.C. § 3500. In the event of such a conflict, there remains a legal issue under the "supersession clause" whether the Rules Enabling Act, 28 U.S.C. § 2072(b), would give the rule precedence over the statute. However, both Judge Tallman and Judge Rosenthal cautioned that as a general matter, the rules committees prefer not to rely on the supersession clause and that committees should strive to avoid conflicts with statutes wherever possible.

Discussion then ensued over whether the so-called "open-file" policy that has been adopted by some U.S. Attorney's Offices produced fewer *Brady* problems. One member thought that the policy had been successfully used in the Northern District of California. However, Judge Tallman noted that as an appellate judge, he sees *Brady* issues arising in many state convictions reviewed on habeas from so-called "open-file" districts in California.

Judge Tallman proposed that the FJC conduct a limited survey of judges and lawyers to find out whether the districts that employ a broader discovery policy had fewer discovery issues. Mr. Wroblewski said that the Department could seek similar information from the U.S. Attorney's Offices in those districts. Judge Rosenthal pointed out that the FJC could accept data from the Department but must retain its own independence when analyzing that data.

As another way to gain information, Judge Tallman proposed that the Rule 16 subcommittee host a "consultative session" on the topic, to which experts from the bench, bar, and academia would be invited to share their views. A member suggested that it might be valuable to ask participants in the session to reverse roles so that prosecutors and defense lawyers would see things from the other's perspective.

Judge Rosenthal said that it might be helpful for participants in the session to work with actual drafts of the rule in order to focus on the various issues presented by any amendment. Mr. Wroblewski offered to provide Judge Tallman with examples of drafts that were debated by the Committee when it last considered amending Rule 16 in 2007.

A member said that she felt it was important to hold the Department accountable for assessing and reporting the effects of the 2007 changes to the Manual, since the changes had essentially functioned as an alternative to amending the rule.

Judge Tallman finished the discussion of Rule 16 by noting that due to the time required to perform research and hold the consultative session, the Committee was unlikely to see a draft amendment for consideration at its next meeting in the spring of 2010. He further commented that ultimately, the Committee might decide that any rule change would be better accomplished by Congress than through the rulemaking process. Judge Tallman concluded by recommitting consideration of whether to amend the rule to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant.

The Standing Committee declined to publish the proposed amendment and remanded it to the Committee for further study. Specifically, as Judge Raggi pointed out, members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12 but wanted the Advisory Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Committee had used "waiver" because it was part of the existing language of Rule 12.

Judge Tallman observed that the Committee had not previously considered the option of using "forfeiture" and the impact of such a choice was unclear. Judge Rosenthal pointed out that the use of either term should be consistent with the use of those terms in other rules.

Judge Tallman recommitted the issue of whether to use "waiver" or "forfeiture" to the Rule 12 subcommittee, with the goal of presenting a revised draft to the full Committee at the spring meeting in 2010.

C. Rule 32 (Sentence and Judgment)

In April 2009, the Committee deferred consideration of two amendments to Rule 32: (1) an amendment to Rule 32(h) that would require a judge to give notice to parties when the judge was considering imposing a sentence that was a "variance" from the sentencing guidelines; and (2) an amendment to Rule 32(c) that would ensure that parties receive the same information as the probation officer who prepares the presentence report ("PSR"). Both amendments were deferred because the law regarding federal sentencing is in flux, with both the Department and the U.S. Sentencing Commission currently undertaking comprehensive reviews.

Mr. Wroblewski reported on the status of the Department's sentencing review. He said that many reforms were under consideration and that he anticipated that a final report would be ready for the Attorney General's review within a few months. Judge Tallman asked whether it would make sense for the Committee to await further developments before proceeding with its own amendments. Mr. Wroblewski responded in the affirmative.

Members commented that the current version of Rule 32 puts defendants and prosecutors at a disadvantage because it does not require probation officers to provide them with information gathered in preparing a PSR. If a defendant or prosecutor does not discover errors in the information used to prepare the PSR until the actual time of sentencing, the members contended that raising a challenge at that late date then causes delay which prejudices the defendant or the government.

Judge Tallman noted, however, that even if a rule change were to address this problem, such a change would not take effect for three years, given the multiple steps inherent in the rulemaking process. During that time, federal sentencing law might change in ways that could affect the rule. Accordingly, further action on the amendments was deferred to await further developments in federal sentencing law.

D. Rule 5 (Initial Appearance)

In April 2009, the Committee had decided against forwarding to the Standing Committee an amendment to Rule 5 that would have required a judge, when deciding whether to detain or release the defendant, to consider the right of any victim to be reasonably protected from the defendant. The Committee based its decision on its belief that the current version of Rule 5

already provides adequate protection for victims because the rule requires a judge to apply all relevant statutes – including the Bail Reform Act, which requires a judge to consider danger to the community – in making the decision to release or detain.

In June 2009, the Standing Committee considered the Committee's decision not to amend Rule 5 and recommitted the matter to the Committee for further study as part of its ongoing monitoring of the implementation of the Crime Victims` Rights Act ("CVRA"). Judge Tallman commented that the Committee must continue to review all the rules to determine whether the Crime Victims' Rights Act is being fully implemented. Professor Beale added that the area of victims' rights needs constant monitoring to ensure that victims and witnesses are being protected.

Mr. Wroblewski reported that there had been no mention of any rules amendments at a recent CVRA oversight hearing on Capitol Hill. He also said that he would be willing to serve as a liaison between the Committee and advocates for victims' rights. Judge Tallman asked him to report any dissatisfaction on the part of victims with how Rule 5 was being applied. Professor Beale reiterated the importance of remaining vigilant regarding the needs of victims in order to determine whether any adjustments to the rules are warranted.

E. Indicative Rulings

Appellate Rule 12.1 and Civil Rule 62.1 are scheduled to go into effect on December 1, 2009. These rules are designed to facilitate remands to the district court to enable the court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. In light of the adoption of these new rules, the question before the Committee is whether to propose a parallel provision in the Criminal Rules permitting "indicative rulings."

Professor Beale noted that courts are already issuing indicative rulings in criminal cases, and adopting a new rule would merely formalize the existing procedure. Judge Tallman said that as an appellate judge, he appreciated the efficiencies of indicative rulings which obviate appeals by permitting the district court to grant relief if given the opportunity before the appellate court takes action. Judge Rosenthal said that since new rules permitting indicative rulings had been adopted in the appellate and civil context, the question is whether the criminal context is different and somehow incompatible with adoption of such a rule.

Mr. Wroblewski noted that the Department had earlier voiced a concern about language in the Committee Note to Appellate Rule 12.1, which interprets the rule as permitting indicative rulings in the criminal context. The Department's concern had been that the rule might be viewed as an invitation by jailhouse lawyers to file frivolous motions. A member replied that this fear is overstated because in his experience as a trial judge, jailhouse lawyers do not need an invitation to file such motions. In addition, Judge Rosenthal pointed out that the Standing Committee had considered and rejected a proposal to limit the appellate rule's applicability in the criminal arena.

As an initial matter, Judge Tallman suggested that the proposed rule allowing indicative rulings, "Rule X.X" (page 319 of agenda book) be renamed either Rule 37 or Rule 39. After the meeting, it was decided by email that the new Rule be called "Rule 37."

After discussion of whether the new Rule would apply to motions under 28 U.S.C. § 2255, it was concluded that the rule did not so apply, because § 2255 motions, while disfavored, are not precluded during the pendency of a direct appeal. Because the new Rule would apply solely to motions that a district court is unable to consider during an appeal, the rule does not cover § 2255 motions.

The Committee voted unanimously to approve the new Rule and send it to the Standing Committee for publication.

Turning to the Note following the new Rule, the Committee considered whether to amend the Note by inserting the following paragraph immediately before the last paragraph (page 320 of agenda book):

> The procedure formalized by Appellate Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). This rule applies to motions that the court lacks authority to grant, and therefore does not include motions under 28 U.S.C. § 2255.

The Committee voted unanimously to amend the Note following the new Rule by inserting the above paragraph before the last paragraph.

IV. NEW PROPOSALS

A. Rule 11. Advice on Immigration Consequences of Conviction

The Committee had been asked by Judge Rosenthal to consider the desirability and feasibility of amending Rule 11 to require a district court to warn an alien defendant who is pleading guilty of the possible collateral consequences that might flow from a conviction, *i.e.*, deportation. Professor Beale introduced the topic by remarking that by coincidence, the Supreme Court was hearing argument that day in *Padilla v. Kentucky*, No. 08-651, a case presenting the related question of whether the Sixth Amendment requires that counsel advise an

alien defendant who pleads guilty of the immigration consequences of the conviction. Professor Beale noted that the Committee has twice previously declined to add immigration consequences to the list of warnings required to be issued by a judge conducting a plea colloquy under Rule 11.

Judge Tallman expressed concern about pursuing such an amendment because of the complexity of immigration law and the added burden that such a requirement would place on the district courts. A member suggested that the Committee table the proposal until the Supreme Court issues its decision in *Padilla* and the obligations of defense counsel become clearer. Mr. Wroblewski added that the Department had recently awarded a grant to a project conducted by the American Bar Association to create a computer database compiling the collateral consequences of various offenses.

In light of these concerns, the Committee decided to defer consideration of amending Rule 11.

B. Rule 12. Advice on Right to Appeal

Mr. Enoc Alcantara Mendez wrote the Committee a letter requesting that it consider amending Rule 12.2 to require a district court to advise a defendant of his right to appeal from an order to submit to a competency examination or from an order of commitment.

Judge Tallman noted that in general, notice of the right to appeal is not given in specific hearings. He asked whether any special circumstances warranted giving such notice in competency hearings, when it is not given, for example, in bail hearings. No special circumstances were identified and, accordingly, the Committee decided not to pursue Mr. Mendez's suggestion of amending Rule 12.2.

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

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

Mr. Rabiej reported that there is no legislation currently pending in Congress that would affect the Criminal Rules.

B. Update on Work of Sealing Subcommittee

Judge Zagel reported that the Sealing Subcommittee had divided its work into two sub-subcommittees. These panels are making progress in analyzing the following issues: Should there be a standard to guide district courts in deciding when to seal cases? What constitutes a "case" for the purposes of calculating how many cases are sealed? Is there an effective way to prompt judges to unseal cases once the need for sealing no longer exists? In addition, the subcommittee was awaiting a further report by Timothy Reagan of the FJC, collecting and

analyzing data on sealed cases. Judge Zagel concluded by saying that he anticipated the Sealing Subcommittee would finish its work by the end of the year or shortly thereafter.

C. Update on Work of Privacy Subcommittee

Judge Raggi reported that the Privacy Subcommittee was addressing concerns about the privacy of court records raised by Congress and also issues raised by the judiciary. Of particular interest in the criminal context, Judge Raggi cited the need to protect the privacy of cooperating defendants whose names might be mentioned in plea agreements or other court documents. Judge Raggi reported that the courts have developed various techniques to deal with this issue, ranging from sealing such documents to not filing them at all. The subcommittee's first task has been to gather information on these various techniques and evaluate their effectiveness.

Judge Raggi also cited the need to protect the privacy of jurors as an important issue that the subcommittee is reviewing. To illustrate this point, Judge Raggi recounted a recent incident involving a juror who had served in a murder trial in Chicago and whose address and phone number were subsequently posted, along with derogatory comments, on a website. Such a threat to the privacy of jurors undermines the judiciary's ability to find people willing to serve as jurors, Judge Raggi observed, which in turn undermines the system as a whole.

The subcommittee will collect further information about privacy concerns by sending out a survey in a few weeks to federal judges, prosecutors, and members of the defense bar. In addition, the reporter for the subcommittee, Professor Dan Capra, is arranging an all-day conference focusing on privacy issues, to be held at Fordham Law School in New York City in April 2010.

In response to a question regarding minute entries by docket clerks that contain private information, Judge Raggi expressed hope that some privacy issues could be resolved by additional training and education of court staff. In addition, Judge Raggi noted that court CM/ECF websites have been revised to contain a "banner" that requires lawyers filing documents electronically to certify that they have read and are complying with the court's privacy rules.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman proposed several dates in April 2010 for the next meeting of the Committee. After the meeting was adjourned, the Committee decided by email that the meeting would take place on April 15-16, 2010, in Chicago, Illinois.