

**ADVISORY COMMITTEE ON CRIMINAL RULES  
FINAL MINUTES  
October 31, 2011, St. Louis, Missouri**

**I. ATTENDANCE AND PRELIMINARY MATTERS**

The Criminal Rules Advisory Committee (“Committee”) met in St. Louis, Missouri on October 31, 2011. The following persons were in attendance:

Judge Reena Raggi, Chair  
Judge Richard C. Tallman, Outgoing Chair  
Rachel Brill, Esq.  
Carol A. Brook, Esq.  
Leo P. Cunningham, Esq.  
Kathleen Felton, Esq.  
Chief Justice David E. Gilbertson  
James N. Hatten, Esq.  
Judge John F. Keenan  
Judge David M. Lawson  
Professor Andrew D. Leipold  
Judge Donald W. Molloy  
Jonathan Wroblewski, Esq.  
Judge James B. Zagel  
Professor Sara Sun Beale, Reporter  
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Standing Committee Incoming Chair (by telephone)  
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Judge Morrison C. England, Jr.  
Judge Timothy R. Rice  
Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

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

The following invited observer was present:

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

## **II. REVIEW AND APPROVAL OF MINUTES OF APRIL 2011 MEETING**

A motion to approve the minutes of the April 2011 Committee meeting in Portland, Oregon, having been moved and seconded,

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

## **III. CHAIR'S REMARKS**

Judge Raggi introduced (1) new member Carol Brook, the Executive Director of the Federal Defender Program for the Northern District of Illinois; (2) new Standing Committee liaison, Judge Marilyn Huff, of the Southern District of California; (3) new clerk representative, James Hatten, Clerk of Court for the Northern District of Georgia; and (4) invited observer Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers. Judge Raggi noted that, at the suggestion of Standing Committee Chair, Judge Lee Rosenthal, and following the practice of the Civil Rules Committee, the Committee had extended invitations to various criminal defense organizations to send observers to Committee meetings.

On behalf of the entire Committee, Judge Raggi thanked Judge Richard C. Tallman, the outgoing Chair, for his outstanding leadership over four years that had brought many challenging issues before the Committee requiring a number of amendments to the Criminal Rules.

Judge Raggi noted that Committee member, Judge Keenan, had recently been honored by the New York County Lawyers Association with the Edward Weinfeld Award for his outstanding service on the bench.

Judge Raggi reported on cost containment efforts by the Judicial Conference of the United States, noting that few affected the Committee, whose mandate did not involve making decisions about the expenditure of public monies.

Judge Raggi also reported on her communications with members of the Federal Judicial Center's Benchbook Committee, and particularly with Benchbook Committee Chair Judge Irma Gonzalez, and member, Judge Paul Friedman, regarding the Criminal Rules Committee's referral to the Benchbook Committee of the question of "best practices" regarding the government's *Brady/Giglio* disclosure obligations. Judge Raggi advised that the Benchbook Committee has invited her continued participation as it pursues the matter.

#### **IV. CRIMINAL RULES ACTIONS**

##### **A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress**

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2011, unless Congress acts to the contrary:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.
2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.
3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of “duplicate original,” allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.
4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.
5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.
6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.
7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.
8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video conferencing.
9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.
10. Rule 43. Defendant’s Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

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

**B. Proposed Amendments Approved by the Judicial Conference**

Judge Raggi reported that the following amendments were approved by the Judicial Conference at its September 2011 meeting, and will be transmitted to the Supreme Court for review:

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.
2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.
3. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.
4. Rule 37, Indicative Rulings: Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

With respect to Rule 15, Professor Beale reminded the Committee that, to the extent the Supreme Court's return of an earlier version of the amended rule without comment signaled possible Sixth Amendment concerns about the admissibility of evidence obtained under the rule, the amendment had been revised so that Subsection (f) now stated explicitly that an order authorizing a deposition to be taken under the rule does not determine its admissibility.

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

Judge Raggi reported that the following proposed amendments had been approved by the Standing Committee for publication:

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

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.
3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

With respect to Rule 12(b), Judge Raggi advised that questions had been raised in the Standing Committee regarding the rule's treatment of double jeopardy claims and its possible diminution of district court discretion to entertain late motions before trial. The Standing Committee approved publication, concluding that it would be useful to learn whether such concerns were expressed in public comments.

## **V. NEW PROPOSALS FOR DISCUSSION**

### **A. Rule 16(a)(2), Pretrial Disclosure of Government Work Product**

Judge Raggi reported that Standing Committee Chair, Judge Lee Rosenthal, had called attention to *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), which identified “scrivener’s error” in Rule 16(a)(2), in that restyled language could be construed to eliminate protection from discovery expressly provided to government work product under the predecessor rule. A report prepared by Professors Beale and King agreed with *Rudolph*’s assessment and noted that a total of four courts had now concluded that the revised rule contained a scrivener’s error. The reporters provided the Committee with language for a possible amendment.

Judge Raggi invited discussion, noting that the matter did not require subcommittee consideration but could be addressed by the Committee as a whole. There was general agreement with one member’s observation that the error “is an embarrassment to the Committee” and warranted prompt correction. A motion being made and seconded to correct the scrivener’s error by amending the rule as recommended by the reporters,

***The Committee unanimously voted to amend Rule 16(a)(2) by adopting the language suggested by the reporters and to transmit the matter to the Standing Committee.***

Judge Raggi asked Professors Beale and King to draft a Committee Note to accompany the rule amendment, which Committee members would review by email. Mr. McCabe observed that because the proposed amendment only corrected scrivener’s error, it could probably be reviewed under the Standing Committee’s expedited procedures, which permit technical and conforming changes to rules to be adopted without a hearing period and public comment.

### **B. Rule 17, Seal of Court on Subpoenas**

The Administrative Office’s “Forms Working Group” asked the Committee to consider amending Rule 17(a) to eliminate the requirement that criminal subpoenas bear the seal of the issuing court. The Working Group noted the elimination of a parallel sealing requirement in the civil rules.

Judge Raggi and Judge Kravitz observed that there may be reasons for treating civil and criminal subpoenas differently to ensure compliance with the latter.

Judge Raggi asked Mr. Hatten to comment on the burden for clerks' offices in having to place seals on criminal subpoenas. Mr. Hatten stated that the seal requirement imposes no burden.

Discussion revealed the Committee's agreement that the seal of the court on a criminal subpoena served the useful purpose of ensuring compliance.

A motion having been made and seconded,

*The Committee unanimously decided by voice vote not to amend Rule 17(a).*

**C. Rule 6, Grand Jury Oaths**

A citizen request from Eric DeLeon asked the Committee to amend Rule 6(c) to state the oath required in grand jury proceedings or to provide a cross-reference to the text of that oath. Judge Raggi and the Committee reporters recommended no action but invited discussion. The Committee agreed that there was no problem requiring rule amendment. A motion having been made and seconded,

*The Committee unanimously decided by voice vote not to pursue an amendment to Rule 6(c).*

**D. Rule 24(b), Peremptory Challenges**

Judge Raggi reported that Judge Robert E. Jones of the District of Oregon suggested that an amendment to Rule 24(b) to eliminate or reduce peremptory challenges would reduce costs for the judiciary. Members generally agreed that any cost reduction from such an amendment would be minimal. Such a significant change in the jury selection process would, however, undoubtedly prompt strong opposition from the bar. No member of the Committee voicing support for the proposal, and a motion having been made and seconded,

*The Committee unanimously decided by voice vote not to amend Rule 24(b).*

**E. Rule 29, Summary Judgment Prior to Trial**

The Committee considered a proposal from Assistant Professor Carrie Leonetti of the University of Oregon School of Law to amend the criminal rules to authorize pre-trial awards of summary judgment to the defense. Upon review of a report prepared by Professor King that recommended against the proposal, no member of the Committee voiced support for an amendment. A motion having been made and seconded,

*The Committee unanimously decided by voice vote not to amend Rule 29.*

**F. Rule 6(e), Historically Significant Grand Jury Materials**

After the October agenda materials were distributed, the Committee received a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials, which some courts have done by invoking “inherent authority.” At Judge Raggi’s request, Kathleen Felton summarized the views expressed in the Attorney General’s letter.

Judge Raggi formed a subcommittee to study the matter and report to the full Committee at its April meeting. Judge Keenan agreed to chair the subcommittee. Judges Malloy and Zagel, Professor Leipold, Ms. Brook, Ms. Felton, Mr. Wroblewski and Mr. Hatten will also serve, with Professors Beale and King providing legal support.

**G. Rule 17.1, Pretrial Procedures**

Judge Lawson noted that, at the Portland meeting, he had suggested that Rule 17.1 be amended to provide for certain matters, notably *Brady/Giglio* compliance, to be discussed at a pre-trial conference. He indicated that he had sent a draft proposal to Judge Tallman and wished to have the matter put on the next meeting agenda. In response to Judge Raggi’s inquiry as to whether the content of pre-trial conferences should really be the subject of a rule (rather than best practices), Judge Lawson indicated that the Committee’s recent *Brady/Giglio* discussions persuaded him that the matter was important enough to deserve a rule. Judge Raggi asked Professors Beale and King to secure a copy of Judge Lawson’s proposal and to prepare a report for the Committee so that the matter could be discussed at the next meeting.

**VI. INFORMATION ITEMS**

**A. Status Report on Legislation Affecting Criminal Rules**

Mr. Rose reported that no legislation was anticipated that would affect the Criminal Rules.

**B. Electronic Discovery**

Judge Raggi observed that district courts were increasingly confronting questions about electronic discovery in criminal cases, a matter that might merit future Committee consideration. Because the Civil Rules Committee has already done considerable work in the area, Judge Raggi stated that she would discuss the subject with Judge Kravitz and Ed Cooper, the Civil Rules Committee reporter, to benefit from their experience.

Mr. Wroblewski advised that the Justice Department was working with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop protocols for discovery of electronically stored information and drafts were expected in six to eight months. Judge Raggi asked if these protocols might be shared with the Committee for possible discussion as an information item.

**C. Inter-Committee Forms Subcommittee**

Judge Lawson and Professor King, the Committee’s representatives to the Inter-Committee Forms Subcommittee, reported that the Subcommittee was exploring the possibility of a unified approach to forms among the five advisory rules committees and, thus, sought information as to each advisory committee’s practices.

Professor King advised that until 1983, Criminal Rule 58 encouraged the use of some 27 appended forms pertaining to complaints, indictments, informations, etc. In 1983, Rule 58 and the appended forms were abrogated, so that no mention of forms is made in the criminal rules. (There are, however, forms appended to the rules governing habeas procedures under 28 U.S.C. §§ 2254 and 2255.) Rather, a Forms Working Group in the Administrative Office develops forms for use in criminal proceedings. Judge Lawson asked whether this Forms Working Group should be added to the Inter-Committee Forms Subcommittee. Judge Raggi stated that, because there have been no complaints about forms produced by the AO’s Forms Working Group, there appeared to be no reason for the Committee to seek to reassume a role in that area. Accordingly, Judge Lawson and Professor King will report to the Forms Subcommittee that the Criminal Rules Committee, in contrast to other advisory committees, has played little role in the process of developing and revising criminal forms and that the assignment of that responsibility to the AO Forms Working Group seems satisfactory.

**VII. SUBCOMMITTEE ASSIGNMENTS**

Judge Raggi identified the Committee’s active subcommittees as follows:

**A. Rule 12 Subcommittee**

Judge England, Chair  
Judge Lawson  
Professor Leipold  
Ms. Brook  
Ms. Felton  
Mr. Wroblewski

**B. Rule 11 Subcommittee**

Judge Rice, Chair  
Judge Lawson  
Judge Malloy  
Professor Leipold  
Mr. Cunningham  
Ms. Felton  
Mr. Wroblewski

**C. Rule 6(e) Subcommittee**

Judge Keenan, Chair  
Judge Malloy



Judge Zagel  
Professor Leipold  
Ms. Brook  
Ms. Felton  
Mr. Wroblewski  
Mr. Hatten

All other subcommittees having completed their work, Judge Raggi declared them dissolved.

### **VIII. FUTURE MEETINGS AND HEARINGS**

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, April 23-24, 2012, at the Federal Courthouse in San Francisco, California. The autumn 2012 meeting will be held on Thursday and Friday, October 18-19, 2012, at the Administrative Office in Washington, D.C.

Hearing dates on criminal rules published for public comment are scheduled for January 6, 2012, in Phoenix, Arizona, in conjunction with the Standing Committee meeting; and February 12, 2012, in Washington, D.C. Members will be advised in advance as to whether public comments are received necessitating one or both of these hearings.

Before the Committee adjourned, Judge Tallman expressed his thanks to all members and staff for the honor of serving as chair, congratulated Judge Raggi on her appointment, and promised his continued support for the work of the Committee.

All business being concluded, Judge Raggi adjourned the meeting.