COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on the Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 12, 2022

Introduction

The Advisory Committee on Criminal Rules met on April 28, 2022. We presented draft Rule 62 with the other reports on emergency rules. What remains for this report are one action item and several information items.

I. Action item: Juneteenth Amendments

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, Pub. Law No. 117–17, 135 Stat. 287 (2021), which amends 5 U.S.C. § 6103(a) to add to the list of legal public holidays "Juneteenth National Independence Day, June 19."

The Committee has approved two amendments to incorporate the Juneteenth National

Independence Day into the holidays listed in the Rules of Criminal Procedure. At its fall meeting in 2021, the Committee approved an amendment adding Juneteenth to the definition of "legal holiday" in Rule 45(a)(6) (which governs time computation), and by a later email vote the Committee approved an amendment adding it to Rule 56(c), which allows courts to open the clerk's office except for certain listed federal holidays. The text of the proposed amendments and committee note appear at the end of this report.

II. Information items

A. Rule 49.1

The Committee has begun consideration of Judge Jesse Furman's proposal to amend Rule 49.1 to address a concern about the committee note. The note quotes a portion of the 2004 Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files. The note and guidance state the "following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse"—and include in the list that follows financial affidavits filed in seeking representation pursuant to the Criminal Justice Act.

Judge Furman is concerned that this language in the note is contrary to the views taken by most courts that have ruled on the issue. He has proposed that the Committee amend the rule to read as follows:

> **(d) Filings Made Under Seal.** Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

The new Rule 49.1 Subcommittee, chaired by Judge André Birotte, met once via Microsoft Teams. There was consensus that the rule and note should not take a position on the substantive legal question whether financial affidavits are judicial documents subject to a public right of access. The subcommittee's next step will be to draft a truly neutral amendment and committee note that avoids taking a position on substantive law.

Judge Kethledge informed the chair of the Committee on Court Administration and Case Management, Judge Audrey Fleissig, of the proposal, and she saw no impediment to the Committee's consideration of an amendment.

B. Rule 17

The White Collar Committee of the New York City Bar has suggested a major revision to Rule 17, which governs subpoenas. The purpose of the revision is "to address the systematic impediments to criminal defendants' ability to obtain documents and objects in support of their defenses and thus to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions; at the same time, the amendments have also been

tailored to protect the privacy of individual third parties and empower courts to prevent misuse of the rule."

The proposed amendment includes the following elements:

- Changes directed to the scope of the items sought;
- Changes in the provisions governing subpoenas for personal and confidential information;
- Changes to the scope of limitations on obtaining witness statements; and
- A new provision authorizing courts to modify orders to require advance approval of subpoenas in individual cases.

At the April Committee meeting, Judge Kethledge named Judge Nguyen as chair of a new subcommittee to consider the proposal.

C. Rule 5

Judge Bruce Reinhart suggested a change in Rule 5(f), which was added by the Due Process Protection Act, Pub. Law No. 116–182, 134 Stat. 894 (2020). The Act requires the court to give a reminder of prosecutorial obligations "on the first scheduled court date when both prosecutor and defense counsel are present." Judge Reinhart wrote that this wording is confusing because it might refer either to the initial appearance or to a later date. Accordingly, he suggested that it would be preferable to require that the reminder be given at arraignment.

At the April Committee meeting, the Committee declined to pursue the suggestion, which would require that the amendment recently added by Congress be deleted from Rule 5, so that a new amendment could be added to Rule 10, governing arraignment.

D. Rule 62

As noted in our report concerning the draft emergency rule, the Department of Justice's comments on Rule 62 recommended adding a new paragraph (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. Because the proposed change was not included in the amendment published for public comment, it could not be added without republication of the whole rule, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules.

Accordingly, the Committee is treating the Department's suggestion as a proposal to amend Rule 62. In order to avoid confusion while the emergency rules are moving through the final stages of the Rules Enabling Act process, the Committee deferred consideration of this suggestion until that process is completed, placing the proposal on its study agenda.

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Corrective Technical Amendment to Rule 16

DATE: May 16, 2022

Although Rule 16's new amendments on expert discovery are on track to take effect this December, the Department of Justice recently brought to our attention a typographical error in the amendments. This memo adds an action item to the Standing Committee's June 7th agenda, to approve a technical and conforming amendment to correct the error.

The Rule 16 amendments revise both the provision governing expert witness disclosures by the government – 16(a)(1)(G) – and the provision governing disclosures by the defense – 16(b)(1)(C). Both new (a)(1)(G) and (b)(1)(C) contain two exceptions to a new requirement that the expert must approve and sign the disclosure. One exception applies if the disclosing party had previously provided the information in a report signed by the witness.

The text for **government disclosures** – 16(a)(1)(G)(v) – has the correct cross reference. It states that a witness need not approve and sign the disclosure if the government "previously provided **under (F)** a report, signed by the witness, that contains all the opinions and the bases and reasons for them . . . ." 16(a)(1)(F) is titled "Reports of Examinations and Tests."

The text for **defense disclosures** – 16(b)(1)(C)(v) – has identical language, but should have referred to a report previously provided **under (B)**, not (F). 16(b)(1)(B) is the subparagraph titled "Reports of Examinations and Tests" for defendant's disclosures.

The technical amendment, approved by email vote of the Committee, would correct this typo as shown below:

> **(v) Signing the Disclosure.** The witness must approve and sign the disclosure, unless the defendant:
>
> * * * * *
>
> - has previously provided under (~~F~~B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

As a technical and conforming amendment, this correction would not need to be published. However, it would not take effect until December 1, 2023.

The delay before the correction takes effect is not likely to cause significant problems. The structure of the rule makes it clear that the correct reference should be to (B). Indeed, there is no (F) in the defense disclosure rule; the only (F) is in the prosecution disclosure section. Additionally, we expect that the Department of Justice and the Federal Defenders will inform their attorneys about the error. Finally, if the issue were litigated, judges could apply the doctrine of scrivener's error to apply the rule as intended, despite the typographical error.