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Federal Rules Pending Public Comment

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Under the Rules Enabling Act, 28 U.S.C. §§ 2071–77, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees that draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference's Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States, they are forwarded to the Supreme Court of the United States, which reviews the rules, makes appropriate changes, and, in turn, forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years.

In August 2011, the Administrative Office of the United States Courts published several rules—three rules of criminal procedure and one evidence rule—for public comment. (Available at http://tinyurl.com/2736xl4.) The comment period ends February 15, 2012. Comments on the proposed amendments may be sent by mail or made online at rules_comments@ao.uscourts.gov.

Rule 11. Pleas. The Advisory Committee on the Federal Rules of Criminal Procedure has proposed an amendment to Rule 11. The amendment would require the judge to apprise a defendant who wishes to plead guilty that, if convicted and not a United States citizen, the defendant may be deported, denied citizenship, and denied future admission to the United States. The amendment is based upon the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In that case, the court held that defense counsel's failure to advise a client of the possibility of deportation amounted to an ineffective assistance of counsel under the Sixth Amendment. The Committee Note accompanying the proposed amendment states that the warning to the defendant may be general. There is no requirement that the judge tailor this advice to the defendant's individual situation. The note also observes that judges in some districts are already giving this advice and that the proposed amendment adopts that practice as "good policy."

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Rule 12. Pleadings and Pretrial Motions. The Advisory Committee has proposed several significant amendments to Rule 12, which would result in the reorganization of the rule. The proposed amendment addresses two issues. First, the rule would be amended to clarify which motions must be raised before trial—if the motion is based on information that is reasonably available and the motion can be decided without a trial on the merits. The proposed amendment also addresses the consequences and standards of review for untimely motions. In general, if a party fails to file a timely motion, the court may consider the objection, defense, or request for relief if the party can show "cause and prejudice." The Committee Note accompanying the proposed amendment states that that phrase reflects the Supreme Court's interpretation of the phrase "good cause" currently used in Rule 12. In the case of untimely motions asserting a claim of double jeopardy or failure to state an offense, the court may consider those motions if the party shows prejudice. It is important to note that the committee decided that rather than having three standards of review—plain error, prejudice only, and cause plus prejudice—it would be better to abandon the plain error standard and to have double jeopardy claims measured by a "prejudice-only" standard of review.

Rule 34. Arresting Judgment. The proposed amendment to Rule 34 is intended to conform the rule to the proposed amendments to Rule 12, which would remove language that a claim that the indictment or information fails to state an offense may be raised at any time. Under the proposed amendments to Rule 12, those claims would have to be made before trial. A motion arguing that the court lacks jurisdiction may be made at any time.

Federal Rule of Evidence 803(10). Absence of a Public Record. The proposed amendment to Federal Rule of Evidence 803(10) is in response to *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). In that case the Supreme Court

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is e-discovery. As Professor Levenson noted, with today's data overload, where cases will often involve more than a million documents, and electronically stored information of various types, and with social media data such as Facebook pages being used for witnesses, prosecutors may not know what they have. Deciding what to disclose requires an awareness of the universe of information available. The CJS has formed a task force to examine issues, and propose standards, related to e-discovery. Inevitably, *Brady* issues in e-discovery will be addressed by this task force. And on April 13, 2012, at the CJS spring meeting in Los Angeles, there will be a full day CLE program on issues arising in the world of electronically stored information.

CJS Continues to Make Policy

After about eight hours of debate over two sessions of the Criminal Justice Section fall meetings, the CJS Council recommended the approval of a new criminal justice standard for "Law Enforcement Access to Third-Party Records." The product of many years of sometimes contentious discussion, frequently drafting and redrafting to consider the changing world of records and manners of access to those records by the Standards Committee, these new standards reflect the innovative hard work and dedication of many. These newly proposed Standards will be presented to the House of Delegates in February, at the ABA Midyear Meeting.

The breadth of the Section's work was reflected in the agenda for the fall Council meeting, including many other policy resolutions that will also be before the ABA House of Delegates in February. These include three distinct resolutions regarding forensic evidence, one regarding forensic expert testimony, one regarding discovery of forensic evidence, and one regarding forensic evidence and jury voir dire; a resolution on uniform access to therapeutic courts, regardless of citizenship; and a resolution on access to public housing following conviction for a crime. The work of our committees, subcommittees, and task forces continues, with the goal of improving the justice system. ■

SCIENTIFIC EVIDENCE (CONTINUED FROM PAGE 51)

> counsel, I agree with the Court of Appeals, "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The strong force of the prosecution's case, however, was not significantly reduced by the affidavits offered in support of Richter's habeas petition. I would therefore not rank counsel's lapse "so serious as to deprive [Richter] of a fair trial, a trial whose result is reliable." For that reason, I concur in the Court's judgment.

(*Id.* at 793 (citations omitted).)

Even if the right to effective assistance of counsel was not violated, counsel's performance is suspect. ABA Model Rule 1.1(a) provides: "Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation." A competent lawyer would have further investigated the blood evidence.

Conclusion

In dealing with scientific evidence, counsel can be incompetent in several ways. First, an attorney can be ineffective for failing to challenge the prosecution's expert testimony, as in *Richter* and *Hebshie.* Second, an attorney must prepare his or her own witnesses. This duty extends to experts. (*See In re* Warmington, 568 N.W.2d 641, 669 (Wis. 1997) (lawyer disbarred for, among other things, "failing to supervise the preparation of an expert witness").) ■

RULES ALERT (CONTINUED FROM PAGE 52)

stated while the prosecution's use of a testimonial statement in a certificate would violate the confrontation clause, the government could use such evidence if it provided advance notice to the accused and if the accused did not demand—in a timely manner—the presence of the official who prepared the certificate. Thus, as stated in the accompanying Committee Note, the proposed amendment incorporates a "notice-and-demand" rule approved in *Melendez-Diaz.* ■