ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

April 16-17, 2007
Brooklyn, New York

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Brooklyn, New York, on April 16-17, 2007. All members participated during all or part of the meeting:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King (by telephone)
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee at the meeting was Judge Mark R. Kravitz. Also 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
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laurel L. Hooper, Senior Research Associate, Federal Judicial Center

The following officials from the Department's Criminal Division also participated:

William A. Burck, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Acting Director, Office of Policy and Legislation
Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section

Ovie Carroll, Chief, Cybercrime Laboratory, Computer Crime and Intellectual Property Section
Richard W. Downing, Assistant Deputy Chief for Technology and Procedural Law, Computer Crime and Intellectual Property Section

Also participating in the meeting, for the discussion of the Forfeiture Subcommittee's recommendations, was David Smith of the National Association of Criminal Defense Lawyers.

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

Judge Bucklew welcomed the committee to Brooklyn and thanked Judge Trager for hosting it. She noted that this would be her last meeting as chair and that the terms of Judge Trager, Judge Bartle, and Professor King would also expire on September 30, 2007. She announced that the committee's next meeting, on October 1-2, 2007, would be held in Park City, Utah. She thanked the reporter and subcommittee members for their especially hard work in recent months and thanked the Administrative Office staff for their coordination assistance.

B. Review and Approval of Minutes

Judge Tallman moved to approve the draft minutes of the October 2006 meeting.

The committee unanimously approved the motion.

C. Report of the Rules Committee Support Office

Mr. Rabiej said that the Rules Committee Support Office had nothing to report other than information relating to specific amendments, which he would relate later in the meeting.

II. CRIMINAL RULE CHANGES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court

Judge Bucklew reported that the three rule amendments relating to *United States v. Booker*, 543 U.S. 220 (2005), the new criminal privacy rule required by the E-Government Act of 2002, and the Rule 45 amendment, all previously approved by the Judicial Conference, were pending before the Supreme Court:

1. Rule 11. Pleas. The proposed amendment conforms the rule to the Supreme Court's decision in *Booker* by eliminating the requirement that the court advise a defendant during plea colloquy that it must apply the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

B. Proposed Amendment Approved by the Criminal Rules Committee for Consideration by the Standing Committee

Judge Bucklew noted that the committee had voted in October 2006 to forward to the Standing Committee for publication the proposed amendment to Rule 16 obligating prosecutors to disclose exculpatory or impeaching evidence without regard to its materiality. She said that Mr. Rabiej had advised Federal Judicial Center staff that the committee would like an update of its October 2004 study of local rules and how they treat a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Bucklew reported that the proposed rule amendment would be presented to the Standing Committee at its June 2007 meeting. Professor Beale noted that she was preparing a memorandum in support of the amendment.

C. Proposed Amendments Related to the Crime Victims' Rights Act Published for Public Comment

Judge Bucklew noted that the following published rule amendment proposals, relating to the Crime Victims' Rights Act (CVRA), had been the subject of significant public comment, including substantial testimony at the public hearing held on January 26, 2007, a letter from Senator Jon Kyl, and a law review article by Judge Paul Cassell:

1. Rule 1. Scope; Definitions. The proposed amendment defines a "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

3. Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

4. Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of "victim" and "crime of violence or sexual abuse" to conform to other amendments, clarifies when a presentence report must include restitution-related information, clarifies the standard for including victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

6. Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

7. Rule 61. Conforming Title. The proposed amendment simply renumbers the existing Rule 60.

After highlighting Professor Beale's written summary of the public comments, Judge Bucklew invited Judge Jones to report on the work of the CVRA Subcommittee in response to the public comments. Judge Jones began by acknowledging the hard work of the other subcommittee members: Judge Battaglia, Justice Edmunds, Professor King, Mr. Cunningham, and the Department's Mr. Wroblewski. In addition to participating in lengthy conference calls, the members had performed a significant amount of "homework," Judge Jones reported.

Complaints regarding the proposed CVRA rule amendments had been received at the public hearing "from both sides," he reported, some accusing the committee of showing indifference to victims' rights and others claiming that the committee's proposal violated a defendant's constitutional rights. After carefully reviewing all the comments received, the subcommittee recommended making certain changes to its original proposal. Two central principles that guided the original design of these amendments, however, were retained: first, the need to be prudent and wait for greater practical experience with the CVRA before a wholesale revision of the Federal Rules of Criminal Procedure is undertaken, particularly because these rules often serve as a model for state procedural rules; and second, the placement of most of the CVRA-related provisions in one central rule rather than sprinkling them throughout the rules, thereby emphasizing their importance and giving practitioners easy access.

The subcommittee continued urging adoption of the definitional provision in Rule 1, Judge Jones reported, but suggested moving a reference to the Act's ban on a defendant asserting victim's rights to the note accompanying proposed Rule 60(b)(2), where the rule discusses who may represent victims. The subcommittee recommended making clear in the note that courts have authority to determine who qualifies as a "victim" through appropriate fact finding and legal rulings. Professor Beale pointed out that certain commentators had urged broader substantive changes that, if adopted, would likely require republication and a new public comment cycle. Rather than delay the effective date of these proposed rule changes, she suggested that the committee maintain an ongoing list of additional CVRA-related proposals for consideration in future meetings. Judge Jones agreed and noted that republication of all the proposed CVRA-related rule amendments would cause a two-year delay, which seemed contrary to Congress's clear directive in 2004 that implementation of victims' rights be a high priority.

Professor Beale said that some commentators had expressed concern that giving the term "victim" the statutory definition in Rule 1 could have a broader, inadvertent impact on other areas of the law, such as restitution. Judge Jones suggested that the Rule 1 definition clearly governed the term only as used within the Federal Rules of Criminal Procedure, noting that Rule 1(b) begins as follows: "The following definitions apply to these rules: . . . ." It was noted, though, that courts often treat such definitions as gap fillers. Professor Beale suggested that courts could cite the CVRA's definition of "victim" directly without referring to Rule 1. After further discussion, a member recommended allowing the case law to sort out this issue.

The committee discussed the proposed Rule 12.1 amendment. Judge Jones noted that the proposal had been criticized for placing the burden on the defendant to show a need for witnesses' names and addresses. The subcommittee continued to believe, though, that the proposed language struck the proper balance. Reciprocal disclosure is maintained, he said, because once the defendant has shown a need for the information — not a heavy burden — the court is obligated to protect the defendant's right to trial preparation. Also, even now, he noted, the present rule allows an exception to disclosure obligations for good cause.

Mr. McNamara reported that the federal defenders community felt strongly that the proposed Rule 12.1 amendment was unconstitutional, because it would create a new right for victims and an unfair advantage for the government by requiring a defendant to disclose the names and addresses of alibi witnesses, but to wait before receiving the same information for the alleged victim. Professor Beale said that the question was who should bear the burden of showing that this is an unusual case. Judge Jones said that, in cases where the defendant knows the victim, disclosure of the name and address was unnecessary, and in most other cases, the defendant could easily show a need. The question, one member noted, was simply how to tee up the issue for the court's resolution. Another member questioned whether it made sense, though — particularly in the context of an alibi rule, one of the few circumstances where defendants must disclose aspects of their defense — to require defendants to show a need for basic contact information that they would nearly always require to carry out an investigation. Mr. Wroblewski suggested that the issue was not whether the government has to disclose whether the victim will be a rebuttal witness or whether the person must be produced, but simply the mechanism for

producing the person — whether the government is required to disclose the name and address to the defense or whether an alternate procedure could be followed. Referring to proposed Rule 12.1(b)(1)(B)(ii), one judge noted that he had often just required the government to bring the witness to the jury room and permit the defense to interview the person there.

A member reported that someone is currently being prosecuted for issuing threats against him, which gave him real concerns about having defendants know where victims live. Concern was expressed that not all judges would be as reasonable as those in the room and that some might refuse to give defendants access to addresses and phone numbers. It was suggested that sometimes the address should be given, but not the phone number. After further discussion, an alternative motion was made to amend the "Exceptions" provision in Rule 12.1(d) as follows:

> (1) In General. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).
>
> (2) Victim's Address and Telephone Number. If on motion in accordance with Rule 60(b)(1)-(4), the court finds that disclosure to the defendant of the address or telephone number of a victim whom the government intends to rely on a rebuttal witness to the defendant's alibi defense would violate the victim's right to be reasonably protected from the accused, the court shall fashion a reasonable alternative procedure that ensures effective preparation of the defense and also reasonable protection of the victim.

Professor Beale suggested that, because making this change could require republishing for a new round of public comment, it might make sense to proceed with the amendment as proposed and consider further adjustments at a future date. A participant questioned whether republication would be required. It was recommended that, given Senator Kyl's letter to the committee dated February 16, 2007, and the floor statements on the CVRA made by Senator Kyl and Senator Dianne Feinstein, the committee should preserve the careful balance between competing concerns that is struck in the Act itself, as the subcommittee's proposal does.

After further discussion, Judge Bucklew suggested that the committee vote on each proposed CVRA-related rule amendment separately instead of as a package and that, before considering the motion to revise the amendment to Rule 12.1, the committee first vote on the proposal as originally recommended by the CVRA Subcommittee. Judge Jones moved to forward to the Standing Committee the subcommittee's Rule 12.1 amendment proposal.

The committee voted 9-2 to forward the proposed Rule 12.1 amendment to the Standing Committee as drafted by the CVRA Subcommittee.

Judge Jones moved for adoption of the subcommittee's proposed Rule 1 amendment.

The committee voted 10-1 to forward the proposed Rule 1 amendment to the Standing Committee.

Following a break, Professor King, who was unable to travel to New York, joined the meeting by telephone. The committee discussed the proposed amendment to Rule 17(c)(3). In response to public comment, the CVRA Subcommittee recommended omitting the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. Also, the last sentence was revised to provide that, absent exceptional circumstances, the court must notify the victim before a subpoena for a victim's private or confidential information can be served upon a third party. This was a compromise. Victims should normally be notified. But without ex parte applications, the government could learn of the subpoena request, which might reveal defense strategy. The proposed rule amendment would also not deprive courts of their inherent power to entertain any application ex parte where good cause for doing so was shown.

One member suggested adding "or otherwise have the opportunity to be heard or object" to the end of the proposed language of Rule 17(c)(3), because victims may not have lawyers and may not know how to file a formal motion. Another member said that perhaps adding the words "or otherwise object" would be sufficient. Mr. McNamara reported that the defenders community considered the entire amendment proposal unnecessary and unwise, but that at the very least the phrase "unless there are exceptional circumstances" should be replaced with "for good cause shown." It was suggested that the rule acknowledge the fact that victims sometimes communicate directly with the court. Concern was expressed, though, about endorsing such informality in the rule, given the CVRA's effort to effect a paradigm shift and give victims formal status in the case and the need to give all parties proper notice. Judge Bucklew pointed out that, as a practical matter, she treated any request for relief contained in a letter from a victim as a motion. After further discussion, it was suggested that judges be allowed to sort out the proper application of this rule on a case-by-case basis. A motion was made to add the phrase "or otherwise object" at the end of the Rule 17(c)(3) amendment proposed by the subcommittee.

The committee voted 9-3 to add the phrase "or otherwise object" to the proposed Rule 17 amendment.

A motion was made to replace the phrase "there are exceptional circumstances" in the subcommittee's Rule 17 amendment proposal with the phrase "good cause is shown."

The motion was rejected by a vote of 8-4.

The committee then discussed the two-step process envisioned by the proposed Rule 17 amendment. Because the question for the judge was whether to require *any* notice to the victim, it was suggested that the rule set a high standard — "exceptional circumstances" — because normally victims should be informed when, say, their psychiatric records are being subpoenaed. The last sentence should therefore be changed to require that, absent exceptional circumstances, notice be given to both the victim and the government. This rule is all about notice, and most subpoenas are ex parte. Several members voiced support for addressing this issue in the committee note. After further discussion, a motion was made to add the following clarifying sentence to the note accompanying the proposed Rule 17 amendment: "The committee leaves to

the judgment of the district court the determination as to whether the judge will permit the matter to be decided ex parte and authorize service of the third-party subpoena without notice to anyone." A suggestion that the addition to the note refer simply to "court" rather than "district court" was readily accepted.

The committee voted 10-0 to add the sentence suggested by Judge Tallman, as modified, to the committee note.

The committee considered a suggestion that the phrase "would include" replace the phrase "might include" in the last sentence of the second paragraph of the note accompanying the proposed Rule 17 amendment. Mr. Wroblewski said that he agreed that "exceptional circumstances" would include "evidence that might be lost or destroyed if the subpoena were delayed," but disagreed that "would include" was proper to a "situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy." It was suggested that the note discuss the fact that "exceptional circumstances" may mean different things depending on the nature of the information sought. One member noted that retaining the phrase "exceptional circumstances" would make clear that the bias remained in favor of notification.

The committee voted 7-5 to replace the phrase "might include" with the phrase "would include" in the last sentence of the second paragraph of the note accompanying the proposed Rule 17 amendment.

Judge Jones moved to forward the proposed Rule 17 amendment and its accompanying committee note, as modified, to the Standing Committee.

The committee voted 9-3 to forward the proposed Rule 17 amendment and its accompanying note, as modified, to the Standing Committee.

The CVRA Subcommittee recommended adding the phrase "any victim" to Rule 18 to make clear that courts must consider the convenience of the victim(s) when setting the place of prosecution and trial. The defenders community opposed the change because the CVRA gives victims only a right "not to be excluded from any such public proceeding," not a right to attend them. Professor Beale agreed that there was a problem with the reference in lines 11 and 12 of the note to "right to attend proceedings under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(b)," because the statute indeed creates no such right. She also said that lines 16 and 17 of the note were included to underscore the court's need to balance competing interests. Judge Wolf moved that the Rule 18 amendment be adopted.

The committee voted 9-2 to forward the proposed Rule 18 amendment to the Standing Committee.

Three suggestions to the note were discussed. Professor Beale proposed revising the first sentence of the note accompanying the proposed Rule 18 amendment to read as follows: "The rule requires that courts consider the convenience of victims — as well as that of the defendant

and witnesses — in setting the place for trial within the district." It was suggested that the sentence in lines 13 and 14 of the note was unnecessary and should be omitted: "If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered." One member recommended rewording the final sentence to read, "The Committee recognizes that the court has substantial discretion to balance any competing interests."

The committee without objection approved the three suggested changes to the note.

The CVRA Subcommittee had decided to retain the statutory phrase "right to be reasonably heard" as originally proposed in the Rule 32 amendment. The subcommittee had considered a suggestion that the rule be amended to give victims an express right to disclosure of all or parts of a presentence report, but ultimately had concluded that this was another area where future experience would better inform the rulemaking process.

A motion was made to reject the subcommittee's proposal to change the term "permits" to "requires" in Rule 32(c)(1)(B). The rule currently provides: "If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution."

The motion was rejected by a vote of 9-3.

A motion was made to reject the CVRA Subcommittee's proposal to change the current requirement in Rule 32(d)(2)(B) that the presentence report contain "verified information." The subcommittee had proposed replacing the phrase "verified information, stated in a nonargumentative style" with the word "information." Professor Beale suggested that any concerns about the inclusion of unverified information in presentence reports could be addressed in a separate, future agenda item. It was noted that there was already a formal procedure affording both parties ample opportunity to object to statements in the presentence report.

One member suggested that perhaps more important would be to amend Rule 32 to require fair notice to defendants of what a victim intended to say at the sentencing hearing. It was suggested that any such requirement would raise serious practical difficulties. Mr. Wroblewski said that victim impact statements were included in most presentence reports. Professor Beale suggested that this was perhaps a topic for a future agenda item.

The motion was rejected by a vote of 10-2.

After a suggestion to revise the accompanying committee note was discussed and ultimately withdrawn, Judge Jones moved to forward the CVRA Subcommittee's Rule 32 amendment proposal to the Standing Committee.

The committee voted 10-2 to forward the proposed Rule 32 amendment to the Standing Committee.

Following lunch, the committee discussed proposed Rule 60. In response to the comments received, the subcommittee had revised paragraph (b)(2) to make clear that a victim's lawful representative could assert the victim's rights and had changed the note to clarify that a victim's representative could be counsel.

It was noted that paragraphs (3) and (4) of proposed Rule 60(b) incorrectly referred to "subsection" instead of "subdivision" in lines 30 and 34. Professor Beale added that the reference to the specific provision should be replaced by a broader reference to the rights described "in these rules." A motion was made that the phrase "under these rules" replace "described in subdivision (a)" in lines 30 and 34. Concern was raised about having paragraph (b)(3) apply to victim's rights other than those described in subdivision (a). Following substantial discussion, the committee decided to vote first whether to replace the reference to "described in subsection (a)" with "described in these rules" in line 34 of proposed Rule 60.

The committee voted 10-2 to replace the reference to "subsection (a)" with "these rules" in line 34 of proposed Rule 60.

It was noted that the rule included other instances where the phrase "under these rules" was used instead of "described in these rules." Professor Beale suggested that "under these rules" was broader and could include rights implied but not expressly "described" in the rules. A motion was made to change all references to "victim's rights under these rules" to "victim's rights described in these rules," including lines 23, 25, and 46, and that the chair and the reporter be given discretion to make similar wording changes elsewhere, as appropriate.

The committee voted 10-2 to replace all references to "victim's rights under these rules" with "victim's rights described in these rules" and to give the chair and the reporter discretion to make similar wording changes elsewhere, as appropriate.

The committee returned to a discussion of whether the "Multiple Victims" provision in paragraph (b)(3) should apply to victim's rights other than those described in subdivision (a). One member questioned whether the provisions set forth in subdivision (a) were actually "rights," particularly those in paragraph (a)(2). A motion was made to change the phrase "described in subdivision (a)" in line 30 to "described in these rules." One member voiced support for the change because 18 U.S.C. § (d)(2), the CVRA's "multiple crime victims" provision, includes rights other than those set forth in subdivision (a) of proposed Rule 60.

The committee voted 9-2 to change the phrase "described in subdivision (a)" in line 30 to "described in these rules."

It was suggested that the last two sentences of proposed Rule 60(a)(2) were unnecessary and should be deleted: "The court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record." Another member, though, recommended retaining the sentences so that a clearer record is created for purposes of appeal. Several

members defended the decision to import key language from the statute directly into the text of the Criminal Rules. One member questioned, though, whether the second sentence of paragraph (a)(2) really added anything to what is already stated earlier in proposed Rule 60. Another argued against including a phrase like "fullest attendance possible" in the rule.

A motion was made to change the beginning of the first sentence of paragraph (a)(2) as follows: "In determining whether to exclude a victim, the court must . . . ."

The committee voted 11-0 to insert the introductory phrase, "In determining whether to exclude a victim," at the beginning of the first sentence of paragraph (a)(2).

After a discussion of whether the statutory phrase "highest offense charged," incorporated in proposed Rule 60(b)(5)(C), was sufficiently clear, Judge Jones moved to forward proposed Rule 60 to the Standing Committee, as revised.

The committee voted 10-2 to forward proposed Rule 60, as revised, to the Standing Committee.

Judge Bucklew asked whether there was any objection to renumbering Rule 60.

The committee decided without objection to forward the proposal to renumber Rule 60 to the Standing Committee.

D. Other Proposed Amendments Published for Public Comment

Judge Bucklew noted that public comment had also been received with respect to the following two published rule amendment proposals:

1. Rule 29. Motion for Judgment of Acquittal. The proposed amendment prohibits a judge from entering a judgment of acquittal before verdict, unless the defendant waives his Double Jeopardy rights.

2. Rule 41. Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside of the United States.

Judge Bucklew noted that the overwhelming majority of the public comments opposed the Rule 29 amendment. Judge Tallman, who chaired the subcommittee that worked on the Rule 29 amendment proposal, reported that the subcommittee had voted 3-2 to recommend tabling the published proposal to revise Rule 29, which included a double jeopardy rights waiver. In response, the Department had submitted an alternative, which would essentially require a judge to defer ruling on a Rule 29 motion from mid-trial until after the jury announces its verdict or announces that it is unable to reach a verdict. The only remaining question was whether a defendant has some inchoate constitutional right, either under the Double Jeopardy or Due Process clauses, to have the court decide a Rule 29 motion promptly — mid-trial — rather than

have the ruling postponed until later. Judge Tallman noted that both he and Judge Wolf had prepared memoranda on the issue, which had been distributed to all committee members. Judge Tallman added that the new version would have to be published.

Judge Tallman requested additional time for his subcommittee to work on the Department's alternative version for consideration by the committee in October 2007. One member urged that the committee continue considering the Double Jeopardy waiver provision proposed by Judge David Levi, which he considered a sound and constitutional approach to solving the infrequent, but troubling problem of erroneous court acquittals. Ms. Fisher said that the Department was not walking away from the proposal due to constitutional concerns, but was mindful of the public comments and thought that it should offer an alternative as a further compromise to prevent its three-year effort to amend Rule 29 from dying.

Judge Wolf moved that the published Rule 29 amendment proposal be tabled, but that the subcommittee continue working on it for subsequent consideration by the full committee. It was suggested that an effort to limit the power of a district court judge required a statutory change rather than a rule amendment. Judge Wolf noted that his memorandum included a discussion of this and related legal issues. Judge Bucklew said that the Department had indicated at one point that it considered it appropriate to take this issue directly to Congress, but that it wanted to give the rules committees the opportunity to have input.

If public criticism had changed the committee's estimation of the published proposal's merits such that it wished to table it and consider an alternate, the Standing Committee would likely be interested in understanding the new timeline, Judge Kravitz said. He added that a coordinated memorandum analyzing the Rules Enabling Act question was needed. Professor Beale noted that the committee had voted to table this proposal once before and that the Department had then gone to the Standing Committee and persuaded that body to direct the advisory committee to resume its consideration. One member voiced opposition to the motion to table the rule amendment proposal, given how much time the committee had already invested in the effort to amend Rule 29. In light of the comments, the motion was withdrawn.

Judge Bucklew inquired whether the Department would once again take its case to the Standing Committee if the advisory committee decided to table the proposal. Ms. Fisher said that the Department considered this a very important effort and would continue working to have the advisory committee approve a version of the rule amendment that the Standing Committee could vote on. It was noted that the Standing Committee had asked the advisory committee to take a second look at the Department's proposal because it preferred that the Department come to the rules committees rather than go directly to Congress. The new proposal dropped the double jeopardy waiver provision and altered only the timing of the court's decision. Another member said that the most controversial aspect of the proposal remained, namely, elimination of the court's power to issue its ruling mid-trial and thereby relieve one or more defendants of the burden of sitting through a lengthy trial.

Judge Wolf moved that the committee recommend to the Standing Committee that it not adopt the proposed Rule 29 amendment as published for public comment.

The committee voted 9-3 to recommend that the Standing Committee not adopt the Rule 29 amendment as published.

Ms. Fisher moved to send the revised version to the Standing Committee instead.

Professor Beale said that the new version would likely need to be published for public comment first. After further discussion, Judge Tallman suggested that it would be a waste of the subcommittee's time to continue working on the revised amendment if it lacked committee support. One member noted that Judge Tallman's memorandum of March 28, 2007, had indicated that further research was required and expressly stated that the new materials were being circulated "for informational purposes only at this time." He added that if the Department was intent on pursuing the amendment, the committee should take the time needed to consider the Department's latest proposal properly. It was suggested, though, that if there was limited committee support for amending Rule 29 at all, investing more time would be pointless. Judge Bucklew and Professor Beale noted that the Department's new Rule 29 amendment proposal had not yet been properly reviewed by the subcommittee, much less by the full committee.

Judge Jones moved that the proposal to revise Rule 29 be tabled indefinitely, *sine die*.

After further discussion, Judge Bucklew sought and received Ms. Fisher's consent for postponing consideration of her motion until the committee had first voted on the motion to table the proposal. One member stated that, although the Department had initially persuaded her that a serious problem existed in certain cases and although she saw no constitutional problem with any of the Rule 29 amendment proposals, the recent public testimony had convinced her that this was not an issue that requires a change of this magnitude.

Ms. Fisher said that the committee had previously been furnished empirical data showing the significant scope of the problem that the proposed Rule 29 amendment was designed to solve. Mr. Wroblewski said that, although the defense community had raised certain questions, it was clear that between 50 and 150 mid-trial Rule 29 motions are granted each year. Mr. McNamara said that the defenders had examined every case cited by the Department and had concluded, after talking to the persons involved, that the Rule 29 judgments were proper down the line.

Procedurally, one member asked whether tabling the Department's new Rule 29 proposal would end the matter. It was noted that the Standing Committee could still decide to proceed. Indeed, Judge Bucklew noted that the Standing Committee had returned the proposal to the advisory committee with instructions that it draft a rule amendment. Asked whether he thought that the Standing Committee would do so again, Judge Kravitz recounted the historical circumstances of the Standing Committee's reasoning. Although it was impossible to predict what the Standing Committee would do this time, the Standing Committee traditionally would

not try to draft a rule itself. Professor Beale suggested, and Judge Bucklew agreed, that if the committee decided not to amend Rule 29 as proposed, it should make clear to the Standing Committee the basis for its decision not to do so.

Following a break, Judge Bucklew invited the members to announce their votes on the motion to table the proposed Rule 29 amendment, and, if supporting it and if they felt comfortable doing so, to identify the primary reasons motivating the vote. The members who voted in favor of the motion cited one or more of the following reasons:

- Because the value of having trial judges prune cases before they go to the jury outweighs the cost of a few improvident acquittals not being appealable.
- Because the proposed amendment is a substantive change that would, if approved, violate the Rules Enabling Act and which should instead be handled by Congress.
- Because there is insufficient evidence of a problem, there being only anecdotal, not empirical, data to justify disrupting Rule 29's careful balance of interests.
- Because courts rarely decide Rule 29 motions prior to verdict. (One member reported having recently granted his first such motion in 15 years on the bench.)
- Because the proposal has failed to garner support despite the Department being afforded four years to make a persuasive case.
- Because the problems created by not being able to appeal erroneous judgment of acquittal do not outweigh the costs of making this rule change.

***The committee voted 7-5 to table the proposal to revise Rule 29 indefinitely,* sine die.**

The committee then turned its attention to the proposed Rule 41(b) amendment, which, Judge Bucklew noted, would authorize magistrate judges to issue search warrants in locations under U.S. control but outside the jurisdiction of any U.S. judicial district. The only aspect of the proposal that elicited significant comment, she said, was whether to exclude American Samoa, as requested by the Pacific Islands Committee of the Ninth Circuit Judicial Council.

Judge Bucklew noted that, according to the Department's letter of March 7, 2007, "the High Court of American Samoa has now had an opportunity to review the proposed amendment . . . and has not objected to it." Mr. Wroblewski said that the court could have objected, but had not done so. Judge Tallman reported having made clear during his conversation with Judge J. Clifford Wallace, chair of the Ninth Circuit committee, that further action was needed if his committee was opposed to the inclusion of American Samoa in this proposed amendment. Because no such action was taken, Judge Tallman said he favored going forward with the proposed amendment without excluding American Samoa.

Professor Beale noted that the style consultant had felt strongly that the statutory phrase "ancillary and appurtenant to" is redundant and should not be imported into the rule. The language therefore had been simplified and the following sentence added to the note: "The difference between the language in this rule and the statute reflect the style conventions used in these rules, rather than any intention to alter the scope of the legal authority conferred." She

noted that the word "reflect" should actually be "reflects," and that "magistrate" in the previous sentence of the note should actually read "magistrate judge."

Justice Edmunds moved to forward the Rule 41(b) amendment to the Standing Committee with a request that it be adopted without the bracketed exclusion of American Samoa.

The committee voted unanimously to forward the Rule 41(b) amendment to the Standing Committee without the bracketed exclusion of American Samoa.

III. REPORTS OF THE SUBCOMMITTEES

A. Rule 45, Time Computation Amendment and Related Rules Changes

Mr. Cunningham reported on the work of the Time Computation Subcommittee, which he chaired. He noted that the time computation template proposed for Criminal Rule 45(a) was virtually identical to what is being considered for Civil Rule 6(a). The controversial issue, he added, was what to do about statutory deadlines. Professor Beale noted that because Civil Rule 6(a), unlike Criminal Rule 45, stated that its time counting method applied to "any applicable statute," the following language, not found in the general template, had been added in brackets to the first paragraph of the note accompanying the proposed Criminal Rule 45(a) amendment:

> In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nevertheless applied the restyled Rule 45(a) when computing various statutory periods.

It was noted that different courts count statutory periods differently, despite the fact that the Civil Rules expressly say that they apply to computation of statutory deadlines. Professor Beale noted that the proposed Rule 45(a) amendment would apply only to a "statute that does not specify a time-computation method." One member wondered whether the proposed rule would abrogate a recent Third Circuit decision and suggested that it might be preferable not to comment on whether the time counting rules applied to statutes. It was suggested, however, that providing greater uniformity on this issue was important, at least with respect to the hundreds of deadlines statutes where Congress did not specify a time counting method. A list would be compiled for Congress of non-controversial statutory changes that could be approved parallel to the rules changes, so that everything could take effect in December 2009. It was reported that staff on Capitol Hill had raised no objections to the proposal and in fact seemed to favor it.

There was a discussion about the circumstances under which a court would be considered inaccessible. It was noted that a decision had been made not to try to define inaccessibility in the electronic age. One member asked whether time counting in § 2254 and § 2255 habeas cases

was governed by Civil Rule 6(a) or Criminal Rule 45(a). It was later reported that the only deadline affected by the time counting change in the Rules Governing § 2254 and § 2255 Proceedings themselves is the 10-day deadline in Rule 8(b) referring to a magistrate judge's ruling, which would presumably be changed to 14 days.

Judge Tallman moved that the proposed Rule 45(a) amendment be forwarded to the Standing Committee for publication.

The committee voted unanimously to forward the Rule 45(a) amendment to the Standing Committee for publication.

The members discussed individual deadlines found in various criminal rules that the subcommittee recommended amending to account for the time computation change. Mr. Cunningham explained that, as illustrated in the proposed amendment to Rule 5.1(c), the rule of thumb was for time periods under 30 days to be expressed in multiples of seven. Professor Beale referred to the chart provided in the materials and noted that the time period in Rule 5.1 is derived from 18 U.S.C. § 3060(b). When the proposed rule change was published for public comment, it could be made clear that this change would only take effect if Congress changed the statute. Mr. Wroblewski noted that there were numerous changes that would all have to take place simultaneously, an approach that the Department supported.

Judge Bucklew reported that, in some instances where the existing deadline is 7 days, such as in Rule 12.3(a)(4)(B) and Rule 12.3.(a)(4)(C), the subcommittee had recommended leaving the deadline at 7 days rather than increasing it to 14 days. It was suggested that, if the Standing Committee decided to adopt the waiver version of the proposed Rule 29 amendment, it might need to consider changing the 7-day deadline to 14 days. A member questioned changing the 7-day deadline in Rule 32(g) to 14 days. Professor Beale said that this was an inadvertent error and that the subcommittee actually had recommended leaving that deadline unchanged.

The committee discussed the current 10-day deadline for executing warrants in Rule 41(c)(2)(A)(i). Professor Beale said that the subcommittee had discussed staleness concerns, but ultimately decided to follow the rule of thumb of increasing deadlines to 7-day multiples. It was suggested that the staleness issue be addressed in the note by stating that this deadline change was not intended to change the staleness analysis.

A member asked why references in Rule 41(f)(2)(B) and (C) to "10 calendar days" were not also being changed to 7-day multiples. After further discussion, Professor Beale suggested changing all "10 calendar days" references in the criminal rules to "14 days." One member recommended retaining 10-day deadlines throughout Rule 41, due to the staleness concerns mentioned. Mr. Wroblewski suggested bracketing the number for public comment. It was suggested that the proposed amendment be published as "14 [7] days."

Professor Beale said that the committee did not recommend changing the 10-day deadline in Rule 46(h)(2) because the time period is derived from 18 U.S.C. §§ 3142 and 3144, which

provide their own time counting rules. Judge Kravitz suggested explaining why the deadline in Rule 46 was not changed in the nearby note accompanying the proposed Rule 45 amendment.

Mr. Cunningham reported that the subcommittee recommended changing the 5-day deadline in Rule 47(c) to 7 days and the 10-day deadlines in Rule 58(g)(2)(A) and (B) and in Rule 59(a) and (B)(2) to 14 days. It was noted that the Appellate Rules Committee was proposing changing the 10-day deadline in Rule 58's appellate rules counterpart to 14 days.

Judge Bartle moved to forward the entire package of rule changes prompted by the time computation change to the Standing Committee. Judge Trager moved to include similar changes to the rules governing habeas corpus cases filed under 28 U.S.C. § 2254 and § 2255.

The committee voted unanimously to forward to the Standing Committee for publication all the time computation rule amendments identified in the Criminal Rules and in the Rules Governing § 2254 and § 2255 Proceedings.

The Department reported having circulated the proposed deadline changes to all U.S. attorneys' offices and had received a number of comments, including two significant ones. First, there was concern about the interaction between the changes in the federal rules and time periods found in local rules. Because the federal time computation rules would trump any local time computation rules, it was important that courts and local bars begin focusing on this issue over the next year so that all changes can be made in a coordinated fashion. Second, there was concern over certain statutory deadlines. By the end of June 2007, the Department planned to provide a complete list to the Standing Committee and the Criminal Rules Committee of all statutes that needed changing, and over the summer, it hoped to draft legislation that Congress could enact to effect the desired changes.

Judge Bucklew adjourned the meeting for the day.

B. Proposed Amendment to Rule 41, Warrants for Electronically Stored Evidence; Department of Justice Presentation

The meeting resumed on April 17 with a two-hour PowerPoint presentation by Messrs. Carroll and Downing, both of the Computer Crime and Intellectual Property Section of the Department's Criminal Division, on issues involving electronically stored information ("ESI") and the proposed amendment to Rule 41. Following the Department's presentation, Judge Battaglia, chair of the ESI Subcommittee, led a discussion of the proposal to modify Rule 41 to embrace the concept of searching for electronically stored information. As suggested by George Washington University Law Professor Orin Kerr, the process involved two stages: execution of an on-site search for the storage device, followed by an off-site search for the stored information.

Judge Battaglia said that the ESI Subcommittee was recommending that a new subparagraph (B) be added to Rule 41(e)(2), stating that the normal deadline "for execution of the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or

electronically stored information and not to any subsequent review of the media or electronically stored information." The subcommittee also suggested adding a provision to Rule 41(f)(1) permitting the inventory of seized electronic information to be limited to a description of the physical electronic device on which the information is stored. He noted that there were many related issues that the subcommittee ultimately decided not to try to address by rule amendment.

Originally, Judge Battaglia said, he had thought that the rule should include a presumptive time period limiting the search of the electronically stored information, but had been convinced that such matters were best decided on a case by case basis, depending on the circumstances. Judge Bucklew noted that how long these searches took varied considerably depending on the law enforcement resources in a particular area of the country. Judge Battaglia mentioned that the Department had reported experiencing a 7-month backlog in some regions.

Mr. Wroblewski said that the Department was pleased with the subcommittee's work. He said that this was an area that courts would likely be grappling with for years to come. He noted that the Ninth Circuit had recently issued an opinion relating to the issue. Although the Department was satisfied with the language of the proposed rule amendments, it had a few concerns with the accompanying notes. He suggested that the following two sentences, while currently true, should be deleted because they might soon be outdated: "Local technical offices that handle the forensic work vary in their capability, and backlog of media awaiting imaging and review. While in some major metropolitan areas, a sixty day time period might be generally feasible, it can be many months in other areas." Professor Beale responded that she thought that the committee should document its current reasoning so that if the facts prompting this rule amendment ever changed, another appropriate rule change could be considered.

Mr. Wroblewski also reported Department concerns with the first sentence of the third paragraph of the note accompanying the proposed Rule 41(e) amendment, which appeared to invite the imposition of deadlines: "The rule does not prevent a judge from imposing a deadline for the return of the property at the time the warrant is issued." In addition, the Department recommended changing the sentence that begins on line 31, "Recording a description at the scene is likely the exception," to read instead, "Recording a description of the electronically stored information at the scene is likely the exception."

The committee was asked whether it intended to adopt the civil rules' definition of electronically stored information. Professor Beale suggested clarifying this in the note.

One member recommended against deleting the first sentence of the third paragraph of the note accompanying the proposed Rule 41(e) amendment, because it was important for judges to understand that deadlines for the return of property could be issued when the warrant is issued. Another member agreed, adding that she had "serious reservations" with not providing any presumptive deadlines for searches of electronically stored information, given her recent experience filing a Rule 41(g) motion for the return of seized property. The government's response to her motion was that the property was the subject of an "ongoing investigation," and there seemed to be nothing else that she could do to recover the seized property. Judge Battaglia

said that he understood Rule 41(g) to be an interactive process where the court sought to balance the owner's and the government's interests. The Department reported that it supported Judge Battaglia's practice and opposed identifying any presumptive deadline in the rule.

One member noted that seizure of a company's computer server can sometimes force the entire business to shut down, raising concerns that a business could be improperly pressured to cooperate as a result. Professor Beale suggested stating in the note a preference for copying on-site or otherwise minimizing any interference. Mr. Wroblewski responded that the rule has to apply to a variety of situations, including child pornography cases where the electronic information is itself contraband, the owner has no right to possession, and the preference would actually be to take the electronic storage device off-site. It was noted that the proposed Rule 41(e)(2)(B) amendment simply provides that a warrant "may authorize" — not "must authorize" — "the seizure of electronic storage media or the seizure or copying of electronically stored information," so that a warrant can be limited if the judge believes that seizing a business' entire computer server, for instance, would be unnecessarily disruptive. It was suggested that the language in the note should be retained to remind judges of the option of imposing a deadline for the property's return.

Language was suggested that would discourage physical seizure of an electronic storage device whenever copying it is feasible. Mr. Wroblewski said that such language would be inappropriate in cases where the electronic information was contraband. It was suggested that, the government be required — *except* in contraband cases — to return the storage device as soon as feasible after being copied. Declaring "feasibility" a loaded term, one member recommended allowing judges to determine what is appropriate on a case-by-case basis.

It was suggested that a reference to "access to the media" be added after the word "property" in the first sentence of the third paragraph of the note accompanying the proposed change to Rule 41(e)(2). After some discussion, it was recommended that the sentence read as follows: "The rule does not prevent a judge from imposing a deadline for the return of the media or access to the electronically stored information at the time the warrant is issued."

After further discussion, Judge Trager moved to forward the proposed Rule 41 amendment to the Standing Committee for publication. It was clarified that the vote was limited to the rule, not the accompanying note. It was suggested that "upon a proper showing" be added between the word "may" and "authorize" in the proposed language of Rule 41(e)(2)(B). Another member recommended addressing such concerns in the note, not the rule. Mr. Wroblewski remarked that probable cause to obtain a warrant was already required under Rule 41(d)(1).

The committee voted 9-3 to forward the proposed Rule 41 amendment to the Standing Committee for publication.

The committee discussed a few suggested changes to the note accompanying the proposed Rule 41 amendment. Professor Beale noted that the Department had suggested deleting the two sentences on lines 27-30 from the note. One member expressed surprise at the

Department's request, because these were the reasons that the Department had given the committee in support of omitting from the rule a presumptive time period for searching electronic storage devices. Voicing skepticism about the Department's backlog claim, another member suggested that the sentences be deleted. It was noted that publishing the Department's backlog claim could prompt the public to comment on the issue. One member suggested that the second sentence added little to what preceded it, which adequately documented the committee's rationale for omitting a presumptive time period such that, were the Department's claimed backlog to disappear at a future point, the committee would then have a basis to revisit the issue.

The committee voted unanimously to delete the sentence beginning, "While in some major metropolitan areas."

A motion was made to delete the sentence beginning, "Local technical offices."

The committee voted unanimously to delete the sentence beginning, "Local technical offices."

It was noted that the 10-day period in Rule 41 was being changed to a 14-day period under the new time counting framework. It was suggested that the reference to "electronically stored data" in line 21 of the proposed amendment to Rule 41(f)(1) be changed to "electronically stored information." Professor Beale warned that further massaging of the note might be required, in which case a final version would be disseminated by e-mail for committee approval.

C. Rule 49.1, Redaction of Arrest and Search Warrants

The committee discussed the request of the Committee on Court Administration and Case Management that arrest and search warrants not be exempted in proposed Rule 49.1(b)(7) and (b)(8) from the general requirement in proposed Rule 49.1 that personal identifiers, such as home addresses and Social Security numbers, be redacted. Judge Bartle, who chairs the E-Government Subcommittee, reported that it was the group's unanimous conclusion that requiring redaction of arrest and search warrants would be impractical and ill-advised and that the language of the criminal privacy rule as originally recommended should be retained.

It was noted that an affidavit in support of a search warrant issued after a case has been filed would not appear to be covered under the exemptions in proposed Rule 49.1(b)(7) and (b)(8). It was suggested that the rule might need to address such a situation. Professor Beale pointed out that it was probably too late to change the current rule amendment at this point.

Judge Bartle moved that a recommendation be made to the Standing Committee that no change be made to proposed Rule 49.1's exemption of search and arrest warrants from the redaction requirement.

The committee decided without objection to recommend to the Standing Committee that no change be made to proposed Rule 49.1's exemption of search and arrest warrants from the redaction requirement.

D. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings; Proposed New Rule 37

The committee discussed the proposed amendments to Rule 11 of the Rules Governing § 2254 Proceedings and Rule 11 of the Rules Governing § 2255 Proceedings, and the proposed new Rule 37. Professor Bucklew noted that the Department's original proposal, submitted in January 2006, had been to abolish all writs other than habeas corpus. At the October 2006 meeting, the committee had voted initially to table the entire proposal, but then decided to continue working on it for reconsideration at the April 2007 meeting. Professor King, who chaired the Writ Subcommittee, noted that two different versions of proposed Rule 37 were provided for the committee's consideration: one favored by the subcommittee's majority, and an alternative minority-supported version.

It was emphasized that, unlike proposed Rule 37, the Rule 11 amendments had been unanimously supported by all the subcommittee members. The subcommittee had designed the proposed Rule 11 amendments to standardize the process for considering a certificate of appealability in § 2254 and § 2255 cases, requiring that the certificate be issued or denied at the time that the judge enters the final order. The bracketed language in subdivision (a) of the proposed Rule 11 amendments had been suggested by Professor Catherine Struve, Reporter for the Advisory Committee on Appellate Rules, who reported that appellate judges favored specific documentation of why a certificate of appealability had been denied. One member said that he saw no value in adding the sentence to the Rule 11 amendments, because the trial court would be denying the certificate of appealability after having just issued an opinion denying the habeas corpus petition. If required to state why he was denying a certificate, another member said, he would likely just incorporate by reference the reasons cited in his opinion. A motion was made not to include the bracketed language in the proposed Rule 11 amendments.

The committee voted by a clear majority not to include the bracketed language in the proposed Rule 11 amendments.

The committee discussed a second issue raised in Professor Struve's memorandum: the proposed amendment's lack of an express reference to post-judgment motions filed under Civil Rule 52(b) or 59(b). Following discussion, the consensus of the committee was to change the last sentence of Rules 11(b) as follows: "Federal Rule of Civil Procedure 52(b), 59(b), and 60(b) may not be used . . . ." One member questioned including the reference to motions for amendment of judgment under Civil Rule 52(b). Mr. Wroblewski said that everything should be funneled through this single rule. Another member said that there may be a problem where a judge holds a factual hearing in a § 2255 case and then makes an erroneous statement of facts. Professor King suggested addressing this in the note. It was questioned, though, whether Civil Rules 52(b) and 59(b) should be referenced in Rules 11(b). Professor Beale suggested flagging

this issue with brackets for public comment, an idea that was well-received. Following a discussion, it was determined that the 30-day provision in the proposed Rules 11(b) provisions did not need changing under the new time counting rules.

After further discussion, Professor King moved that the proposed amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings be forwarded to the Standing Committee with a recommendation that they be published for public comment.

The committee voted unanimously to forward the proposed Rule 11 amendments to the Standing Committee for publication.

Committee members discussed proposed new Rule 37. Professor King noted that, if a majority believed that the committee lacked authority under the Rules Enabling Act to go forward with the proposed rule change, there was no need to discuss the second issue, involving whether a statute of limitations should be imposed on writs of error coram nobis. Professor Beale suggested that the committee keep in mind both the technical legal questions raised by this proposal and the prudential question of whether this step should be pursued at this time. One participant suggested that if, as the Department's memorandum asserted, there is "considerable and increasing confusion in the courts" about the availability of these writs and their implementation, the amendment might be worth pursuing, but there is significant skepticism that this is truly a pressing problem. Mr. Wroblewski said that the goal was simply to regularize the process by which final judgments in criminal cases are challenged and that the subcommittee was recommending revised language that, rather than abolish these writs, would simply bar their use "to seek relief from a criminal judgment." Professor Beale said that the original language for the proposal had been patterned after Civil Rule 60(b).

Asked whether empirical support had been developed to demonstrate a significant problem, Mr. Wroblewski responded that the Department was seeing the coram nobis writ sought used with increased frequency and that it was the affirmative responsibility of the rules committees to adopt rules to regularize the process by which final criminal judgments are challenged. He added that the new proposed Rule 37 was simply the logical extension of the broad legal trend reflected in the Antiterrorism and Effective Death Penalty Act and that no one had been able to articulate the value of preserving, say, the writ of audita querela. He said that a person in custody could file a habeas corpus petition and someone out of custody could seek a writ of coram nobis, and that no other writs were needed.

One member said that he agreed with the Department that much of the resistance to the proposal was unfounded and that the rule should identify "the sole procedures for seeking relief from a judgment in a criminal case," as stated at the beginning of proposed Rule 37(a). But, he suggested, the committee might want to consider omitting the last sentence of proposed Rule 37(a), which states: "Writs of error coram nobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment."

Judge Kravitz suggested that the Standing Committee would likely be interested in how the writs had been used over the past decade. Noting that a significant amount of supporting data had been gathered and presented before the Civil Rules Committee even began considering abolishing writs in Civil Rule 60, he asked whether it might make sense to ask the Federal Judicial Center or some other group to conduct a similar empirical study.

Judge Wolf moved that the committee not forward the Rule 37 proposal to the Standing Committee. Additional data substantiating the need for an amendment was required, and the proposal should be studied to determine whether it is proper under the Rules Enabling Act. Mr. McNamara noted that it was hard to tell, based solely on the Department's report that there were 284 coram nobis cases in 2005, what had happened in these cases and whether there truly were problems. Professor King said that she had been studying collateral review in the district courts for two years and that her impression is that courts are overwhelmed by them.

One judge expressed frustration with the many coram nobis petitions that he receives and urged support for the Rule 37 proposal, which he said would make it easier to find the one meritorious case in a hundred. Concern was expressed that the proposal would clearly represent a substantive amendment of the All Writs Act (28 U.S.C. § 1651) and therefore violate the Rules Enabling Act. The Department acknowledged that, in regularizing the process, this proposal would, at least in some circuits, reduce the remedies available, prompting one member to comment that the proposal therefore sounded substantive.

Following further discussion and a lunch break, the committee reconvened and voted on the motion not to forward the Rule 37 proposal to the Standing Committee.

The committee voted 7-4 not to forward the Rule 37 proposal to the Standing Committee.

There was a discussion about additional steps that could be taken with respect to the proposed amendment. Mr. Wroblewski asked whether the Federal Judicial Center or some other entity would be asked to collect data for presentation to the committee. Judge Bucklew asked whether there was support for avoiding the Rules Enabling Act problem by drafting a proposal for Congress to consider enacting directly. Mr. Wroblewski said that the Department would need some time to consider the matter and could inform the committee by letter at a later time.

E. Forfeiture Rules

Professor Bucklew acknowledged the hard work of the Forfeiture Subcommittee, chaired by Judge Wolf. She noted that two forfeiture experts had been invited to attend, Mr. Cassella from the Department and Mr. Smith from the defense side. Judge Wolf explained that, soon after the subcommittee began examining the Department's rule amendment proposal about a year ago, it became clear that this was a complicated, esoteric area of the law, that the subcommittee would benefit from the input of experts, and that it might be important to make the

expert presentations symmetrical. Early on, Professor Beale consulted with both sides in an effort to identify common ground and reach consensus around the key rule amendments needed.

The subcommittee recommended amending Rule 32.2(a) to generate a uniform practice by clarifying that: (1) notice of forfeiture is not a count or element of the offense and (2) the exact amount of money or precise property subject to forfeiture need not be specified in the indictment or information. It was noted that the potential use of a bill of particulars to elicit more information about the identity of the property is addressed in the committee note. Professor Beale noted that additional suggestions were expected from the style consultants.

The subcommittee recommended amending Rule 32.2(b)(1) to make clear that the rules of evidence are inapplicable to forfeiture procedures even if a jury decides. The Department had at one point recommended allowing "any relevant evidence," but the subcommittee had ultimately decided instead to adopt the phrase "any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." It was noted that the subcommittee had bracketed the final sentence of the note to encourage public comment on the question of live testimony during forfeiture proceedings.

The Department advised that it would submit further suggestions during the public comment period, such as adding the phrase "unless the court determines that neither live testimony nor oral argument would aid the court in its determination" after the word "must" in the following sentence of the Rule 32.2(b)(1)(B) amendment proposal: "If the forfeiture is contested, on the request of either party the court must conduct a hearing after the verdict or finding of guilt."

With respect to Rule 32.2(b)(2), the Forfeiture Subcommittee recommended requiring the court, unless impractical, to enter a preliminary forfeiture order sufficiently before sentencing to allow the parties to make suggestions before it becomes final.

Following further discussion, the committee's attention was directed to the proposed Rule 32.2(b)(2)(C) amendment:

> If the court is not able to identify all of the specific property subject to forfeiture or to calculate the total amount of the money judgment prior to sentencing, the court must [may] enter an order describing the property to be forfeited in generic terms, listing any identified forfeitable property, and stating that the order will be amended pursuant to subdivision (e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

The Forfeiture Subcommittee had placed the word "may" in brackets to reflect disagreement about whether "must" or "may" was preferable in subparagraph (C). Mr. Cassella said that the Department considered secondary whether "must" or "may" is used, as long as the court's authority to issue a generic forfeiture order is clear. In the absence of such express authority, courts too often have postponed forfeiture questions for months or even years after the

sentencing, which has proven problematic, he said, because defendants have challenged a forfeiture order on the ground that it does not comply with the rule's requirement that it be made part of the sentence. Mr. Smith said that the defense community felt strongly that the term "may" should be used rather than "must," reflecting the sparing use of generic forfeiture orders. In light of the positions taken, Judge Wolf suggested deleting the term "must" altogether and simply using the term "may." There was no objection. Another member noted that footnote 2 could therefore be deleted. Professor Beale noted that the style consultants would likely be making additional changes to the proposed language of the amendments or the subheadings.

With respect to the proposed amendments to Rule 32.2(b)(3) and (4), Professor Beale said that she was aware of no controversy or significant policy issues raised by them. Rather, these proposed amendments were an attempt to make the process clear to those who may not be regularly involved in these types of proceedings.

The committee discussed the proposed Rule 32.2(b)(5) amendment, which would clarify the procedure for requesting a jury determination of forfeiture. One member noted that his practice was not to inform the jury that it might have to return to decide forfeiture matters if it found the defendant guilty, because doing so could improperly affect the verdict. Mr. Burck said that the Department had concerns about the possibility of reversible error if all the proposed procedures were not followed.

There was a discussion of the proposed amendments to Rules 32.2(b)(6) and (7) and Rule 32(d)(2)(G). Professor Beale noted that the style consultants had further suggestions on wording. One member suggested deleting the word "and" in Rule 32.2(d)(2)(E). The Department suggested that the following obsolete reference in Rule 7(c)(2) also be deleted as part of the same forfeiture rules amendment package:

> No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

Judge Wolf agreed that it had been superseded by Rule 32.2(a) and that this should be corrected as part of the package. He moved to forward the proposed forfeiture rule amendments to the Standing Committee for publication, along with a proposal to abrogate Rule 7(c)(2).

The committee without objection decided to forward the forfeiture rule amendments to the Standing Committee for publication.

IV. OTHER PROPOSED AMENDMENTS

A. Pre-Trial Deadline for Challenges for Failure to State an Offense

Professor Beale noted that the Department had proposed amending Rules 12(b) and 34 to require the defense to raise before trial any claim that the indictment or information fails to state

an offense. The proposal had been initially discussed at the committee's April 2006 meeting, but had been tabled to the October 2006 meeting for further information and then deferred again pending the Supreme Court's decision in a potentially related case. Professor Beale noted that the Court had since decided *United States v. Resendiz-Ponce*, 549 U.S. ___, 127. S. Ct. 782 (2007), clearing the way for a resumed consideration of the rule amendment proposal.

It was suggested that the proposal should be referred to a subcommittee for further discussion. Judge Tallman, who had already left the meeting, had reportedly indicated particular interest earlier in the legal issues raised by the proposal. Mr. Wroblewski said that the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), had clarified that indictment defects are not jurisdictional. He added that he saw no need for subcommittee work on this amendment, because the proposal simply required indictment challenges to be raised at a time when something could be done about it, namely, before trial. One member said that he would like to have more time to think through the issue. After a few other comments were offered, Judge Bucklew suggested continuing the discussion of these proposed amendments at the committee's October 2007 meeting. There was no objection.

B. Update on Previously Proposed Amendments to Rules 15, 32(h), 32.1, and 46

Judge Bucklew drew the members' attention to a memorandum by Professor Beale summarizing the status of previously proposed amendments to Rules 15, 32(h), 32.1, and 46. She noted that the Department had withdrawn its proposal to amend Rule 15, which would have permitted deposing a prospective witness outside the defendant's physical presence if the court made certain specific findings. Meanwhile, the Rule 32(h) amendment proposal, originally published with the other *Booker*-related rule amendments, had been deferred pending resolution of two relevant cases by the Supreme Court. Also deferred, for the committee's consideration in October 2007, were proposed amendments to Rules 32.1 and 46, which would provide a procedure for issuing warrants when a defendant violates the conditions of pretrial release.

C. Proposed Amendment to Rule 32(i)(1)(A)

Judge Bucklew noted that Judge Ernest Torres of the District of Rhode Island had suggested amending Rule 32(i)(1)(A) to prevent an impasse at the sentencing stage if a defendant declines to read the presentence report. She said that she thought the issue was not an urgent matter and could probably wait to be discussed in October 2007.

D. Indicative Rulings

Judge Bucklew suggested also deferring discussion of the "indicative rulings" project, being led by the Civil Rules Committee, until the October 2007 meeting.

The meeting was adjourned.