ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

April 6-7, 2009
Washington, D.C.

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Washington, D.C. on April 6-7, 2009. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morris C. England, Jr.
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Rita M. Glavin, Acting Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

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

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

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

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court.

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

Judge Tallman welcomed Bruce Rifkin and Rita Glavin, Acting Acting Assistant Attorney General, Criminal Division, Department of Justice.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2008 meeting.

The Committee unanimously approved the minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

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

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

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

Judge Rosenthal added that corresponding statutory amendments had been introduced in Congress, with bipartisan support. Mr. Rabiej stated that in anticipation of changes to the rules and statutes governing time computation, the Administrative Office was preparing a memorandum that would be circulated to all courts reminding them to check their local rules to conform them to the new changes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed amendment to Rule 15 (Depositions)

The Committee discussed the proposed Rule 15 amendment that had been published for public comment. Judge Keenan, Chair of the Subcommittee on Rule 15, reported that the Subcommittee anticipated that the amendment would be challenged on the basis of *Crawford v. Washington*, 541 U.S. 36 (2004), but remained convinced that the amendment was needed in limited circumstances. The Subcommittee had reviewed the comments made during the public comment period and agreed with the suggestion made by the Federal Defenders and supported

by the Department of Justice that the Attorney General ("AG") or his designee certify or authorize that the deposition is necessary to a prosecution that advances an important public policy interest. The Subcommittee revised the proposed amendment to include this requirement.

There was discussion about which word – "certify" or "authorize" – was appropriate to describe the AG's required action. Adopting any language that *requires* action by the AG raised a separation of powers issue. Debate ensued with some members pointing out that the Department did not object to the requirement and that the requirement served a valuable purpose in limiting the scope of the Rule, while others agreed that requiring specific action by the AG raised concerns.

As an initial matter, it was moved that Rule 15(c)(3)(A) (page 148 of agenda book) be amended to exclude misdemeanor prosecutions from the rule's application by adding "in a felony prosecution" after "material fact."

The motion was approved unanimously.

To avoid directing the AG to act and sidestep the separation of powers issue, Judge Molloy moved to amend the proposed language of Rule (15)(c)(3)(F) (page 149 of agenda book) to read, in its entirety, "for the deposition of a government witness, that the prosecution advances an important public interest."

The motion passed by a vote of 8 to 4.

To impose accountability on federal prosecutors who might invoke the rule, Rachel Brill moved to amend Rule (15)(c)(3)(F) (page 149 of agenda book) to add "the attorney for the government has established" before "that the prosecution."

The motion passed by a vote of 10 to 2.

With these changes, it was moved that the Rule 15 amendment be approved, as revised, and sent to the Standing Committee.

The Committee voted, with three dissents, to approve the proposed Rule 15 amendment, as revised, and send it to the Standing Committee.

The Committee then discussed amendments to the Committee Note following Rule 15. Professor Coquillette reminded the Committee of the general principle that cases should not be cited in a Note because of the danger that they could later be overruled. He also stated that a Note should be neutral and not bear the burden of justifying the accompanying Rule. A member suggested that the cases cited in the first full paragraph of the Note on page 150 of the agenda book were outdated.

It was moved that the Note be amended by striking the case citations on page 150.

The motion was approved unanimously.

To state more broadly the purposes underlying the rule, Judge Molloy moved to amend the first sentence of the first full paragraph on page 150 by substituting "other public interests" for "public safety interests."

The motion was approved unanimously.

To make the Note more concise, Judge Battaglia moved to amend the first sentence of the first full paragraph on page 150 by striking "public policy." Judge Raggi offered a further amendment to end the sentence after the words "trial court." It was so moved.

The motion was approved, with one dissent.

Professor Leipold moved to amend the last paragraph in the Note on page 151 by striking the first sentence in its entirety. The sentence was defensive in tone and was unnecessary.

The motion was approved unanimously.

To make it more readable, Judge Zagel offered a complete substitute for the last paragraph on page 151. Following brief discussion, it was moved that the Committee amend the Note by deleting the final paragraph and substituting the following paragraph in its place:

> The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility are left to the development of the law.

With these changes, it was moved that the Committee Note be approved, as revised, and forwarded to the Standing Committee.

The Committee voted, with one dissent, to approve the proposed Committee Note, as revised, and send it to the Standing Committee.

Judge Rosenthal pointed out that because the amendment to Rule 15 implicated the Rules of Evidence, it might be prudent to refer the amended Rule and accompanying Note to the Advisory Committee on Evidence Rules for review. The Committee agreed.

B. Proposed Amendment to Rule 5 (Initial Appearance)

The Committee discussed the proposed Rule 5 amendment that had been recently published for public comment (page 130 of agenda book). Judge Jones, Chair of the Subcommittee on the Crime Victims' Rights Act ("CVRA"), observed that passage of the CVRA sent a message that victims' interests should be given greater weight. Notwithstanding this observation, several members expressed concern about amending Rule 5 to require a judge to specifically consider the right of a victim to be protected when making a decision on whether to release or detain a defendant. One member stated that the amendment seems redundant and perhaps unconstitutional. Another expressed reservations about whether pressure from Congress should influence the Committee's work in general. A member commented that if the purpose of the amendment is purely to highlight a victim's right to be protected – a right that is already covered through the Rule's incorporation of the Bail Reform Act (18 U.S.C. § 3143) – that such a purpose does not justify changing the Rule.

To incorporate into the rule the principles of the CVRA, Judge Jones moved that Rule 5(d)(3) be amended by adding at the end the following new sentence: "In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant and the requirements of the Bail Reform Act."

The motion to amend Rule 5 failed by a vote of 3 to 9.

The Committee thus decided to leave Rule 5 unchanged and not to send it to the Standing Committee for amendment.

C. Proposed Amendment to Rule 12.3 (Notice of Public-Authority Defense)

The Committee discussed the proposed Rule 12.3 amendment recently published (page 132 of agenda book). The amendment exempts a victim's name and address from the general disclosure requirements of the Rule. Judge Tallman noted that this amendment mirrors a provision that has already become part of Rule 12.1 (Notice of an Alibi Defense). Recalling the witness Michael Nachmanoff's comment that he could not imagine a scenario in which the amendment would be necessary, Judge Zagel described an actual case of his in which the amendment could have been used. After a brief discussion, Judge Jones moved that the Committee send the proposed Rule 12.3 amendment to the Standing Committee.

The Committee voted unanimously to send the proposed Rule 12.3 Amendment to the Standing Committee.

D. Proposed Amendment to Rule 21 (Transfer for Trial)

The Committee discussed the proposed Rule 21 amendment recently published (page 137 of agenda book). The amendment requires a judge to consider the convenience of victims in deciding whether to transfer a trial to another location. Members observed that although the

CVRA established a victim's right not to be excluded from a trial, the law did not create a substantive right to attend a trial. In response, other members underscored the discretionary nature of the amendment, which only requires a judge to consider, as one factor, the convenience of the victims. After further discussion, it was moved that the Committee send the proposed Rule 21 amendment to the Standing Committee.

The Committee voted, with two dissents, to send the proposed Rule 21 Amendment to the Standing Committee.

E. Proposed Amendment to Rule 32.1 (Revoking or Modifying Probation or Supervised Release)

The Committee discussed the proposed Rule 32.1 amendment recently published (page 158 of agenda book). The proposed amendment specifies that a Magistrate Judge must apply the provisions of 18 U.S.C. § 3143(a)(1) in deciding whether to release or detain an alleged violator of probation or supervised release conditions. The amendment also clarifies the burden of proof the alleged violator must meet in order to be released. After discussing the amendment, Rachel Brill moved to revise the proposed amendment by adding the "burden-shifting" language suggested by the Federal Public Defenders (page 166 of agenda book). The proposal places the burden of proof on the government in certain cases when imprisonment is an unlikely result of revocation.

The motion failed by a vote of 4 to 7.

It was then moved that the Committee send the proposed Rule 32.1 amendment as published for comment to the Standing Committee.

The Committee voted, with one dissent, to send the proposed Rule 32.1 Amendment to the Standing Committee.

III. REPORTS OF SUBCOMMITTEES

A. Subcommittee on Rule 12 – Proposed Amendment to Rule 12(b)

Judge England, Chair of the Subcommittee on Rule 12, provided some background to the amendment under consideration. Rule 12 currently sets forth a general requirement that defects in an indictment must be raised before trial. However, the Rule exempts from this requirement motions based upon an indictment's failure to state an offense. *See* Rule 12(b)(3)(B). In 2002, the Supreme Court held in *United States v. Cotton*, 535 U.S. 625 (2002), that defects in an indictment are not jurisdictional and, accordingly, if a defendant fails to raise such a claim at trial, the claim is not necessarily waived and will be subject to only plain error review. In 2006, the Department of Justice asked the Committee to consider amending Rule 12 to eliminate the exemption for claims of failure to state an offense, thereby requiring such a claim to be raised *before* trial and purportedly bringing it into conformity with *Cotton*. The Department submitted

a proposed amendment to this effect. The Federal Defenders oppose the Department's amendment, which they contend imperils rights of defendants, and urge the Committee to let Rule 12 stand.

Since the October 2008 meeting, the Subcommittee on Rule 12 has revised the Department's original proposal and has crafted a compromise that seeks to encourage defendants to raise this issue before trial while preserving a limited option to raise it later, upon a showing that the government's failure to state an offense in the indictment "has prejudiced a substantial right of the defendant."

The Committee discussed the amendment as revised. One member expressed concern that the amendment was unnecessary because the government had not shown that the present Rule was causing problems. The member further expressed concern that the amendment implicated the Fifth and Sixth Amendments. Another member was troubled by the vagueness of the words "prejudice" and "substantial right." However, other members thought that the meaning of these words could be developed through case law and that the amendment was needed to clarify how courts should handle such motions after *Cotton*.

After further discussion, Judge England moved that Rule 12 be amended to require that an indictment's failure to state an offense be raised before trial (as shown on pages 250-251 of the agenda book).

The Committee voted, with four dissents, to send the proposed Rule 12 Amendment to the Standing Committee for publication.

The Committee briefly discussed the proposed amendment to Rule 34 (Arresting Judgment), which conforms the Rule to the amendment approved above to Rule 12(b). It was moved that Rule 34 be amended as shown on page 253.

The Committee voted, with two dissents, to send the proposed Rule 34 Amendment to the Standing Committee for publication.

B. Subcommittee on Technology – Proposed Amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43, 47, and 49.

Judge Battaglia, Chair of the Subcommittee on Technology, reported on the Subcommittee's efforts to incorporate technological advances into the rules. He said that the Subcommittee employed a two-step process: (1) identify those rules which could benefit from advances in technology; and (2) determine whether changing a rule to accommodate new technology would undermine any rights of the parties. Judge Battaglia cited eight rules that the Subcommittee had identified as amenable to technological amendments: Rules 3, 4, 9, 32.1, 40, 43, 47, and 49.

The Committee discussed the Subcommittee's proposed amendments to Rule 3 (The Complaint) and Rule 4 (Arrest Warrant or Summons on a Complaint). The amendments under

consideration would allow a magistrate judge to consider a complaint or issue an arrest warrant "based on information communicated by telephone or other reliable electronic means." Judge Battaglia pointed out that in districts such as his (S.D. Cal.), the distance between a law enforcement agent in the field and a magistrate judge can be vast and these amendments would save considerable time and resources. Another member observed that by making it easier to apply for an arrest warrant from a remote location, the amendments would minimize the number of warrantless searches and provide more judicial oversight of the arrest process.

A member asked whether e-mail would qualify under the rule as a "reliable electronic means." The consensus was that e-mail would qualify but several members pointed out that e-mail alone would not be sufficient under the proposed Rule to obtain an arrest warrant or to have a complaint considered. A live conversation between a judge and an agent would also always be necessary, at a minimum, to place the agent seeking the warrant or consideration of a complaint under oath. Judge Battaglia added that the process would always result in a written document that reflected how the warrant was obtained.

Discussion ensued about whether the Rules should continue to permit a state or local judicial officer to issue a warrant or consider a complaint if a federal judge is unavailable. Given that some districts encompass huge geographic areas and have few federal judges assigned to them, the Committee agreed that keeping state and local judges as a backup if federal judges were not available was a good idea. The Committee recognized that even though the amendment would make it easier to reach a federal judge, occasions would arise when no federal judge would be available. To preserve this option, Judge Zagel moved to retain the language in Rule 3 (lines 20-21 on page 255 of agenda book) that permits a state or local judge to consider a complaint in person.

The motion was approved unanimously.

It was further moved that the "electronic means" option under Rules 3 and 4 be restricted to federal judges.

The motion was approved unanimously.

To facilitate the return of an executed warrant, it was further moved that the proposed amendment to Rule 4(c)(4) providing that an officer may return an arrest warrant to a judge by electronic means (page 258, lines 8-9) be approved.

The motion was approved unanimously.

To allow for the use of a "duplicate original" document, it was further moved that the proposed amendment to Rule 4(c)(3)(A) (page 257, lines 18 and 21), providing that an officer executing an arrest warrant may show a defendant either an original or a "duplicate original," be approved. Judge Battaglia explained how obtaining a warrant by electronic means creates two different documents that both function as originals, leading to the phrase "duplicate original."

The motion was approved unanimously.

The Committee turned to the procedures for obtaining a warrant or considering a complaint. The amendment proposed by the Subcommittee incorporated by cross reference the procedures set forth in Rule 41(d)(3) and 41(e)(3). A member pointed out the danger of relying upon a cross-reference, *i.e.*, that if the procedures contained in Rule 41 were later amended or repealed, the same changes would be incorporated into Rule 4. Instead of using a cross reference, the Committee considered the alternative of repeating the Rule 41 procedures in Rule 4. Several members suggested a third alternative: to consolidate the procedures for all electronic applications into one Rule.

Acting on this suggestion, Judges Battaglia and Tallman, with the assistance of Professors Beale and Leipold, drafted a consolidated rule, entitled "Rule X.X" as a placeholder, which was circulated to members of the Committee. Rule X.X consolidates the procedures for using electronic means to obtain search and arrest warrants or to obtain a complaint. In addition, the draft included new versions of Rules 3 and 4, newly-revised to contain a cross reference to Rule X.X.

It was moved that the Committee approve the amended Rule 3, as revised by the group, and send it to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 3 to the Standing Committee for publication.

The Committee briefly discussed the new Rule 4(d), as revised by the group. It was moved that the Rule be approved with two minor changes to make the subdivision more readable: substitution of "A magistrate judge" for "The court," at the beginning of the sentence, and deletion of "a" before "telephone." So revised, it was moved that the amended Rule be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 4 to the Standing Committee for publication.

The Committee proceeded to discuss the new, consolidated Rule X.X. After brief discussion, it was moved that to concisely state the purpose of the rule, subdivision (a) of the proposed rule be amended to read as follows:

> (a) *In General*. Where a magistrate judge deems it appropriate, he or she may consider information communicated by telephone or other reliable electronic means when deciding whether to approve a complaint or to issue an arrest warrant, a summons, or a search warrant.

The motion was approved unanimously.

Turning to subdivision (b) of the proposed Rule X.X, the Committee discussed the procedures that would apply to the approval of a complaint or the issuance of a warrant or summons under the Rule. A member asked whether the requirement that a judge place an applicant under oath could be fulfilled by e-mail or a means other than by telephone. Another member suggested that the Rule should not limit itself to a specific technological method in this regard. Judge Raggi suggested that this subdivision should be drafted to present judges with a clear checklist that they could easily follow. To that end, it was suggested that the subsequent subdivisions (c) through (f) be redesignated as paragraphs (4) through (7) of subdivision (b). A member observed that amending the rules to embrace technological advances raised the question of whether the rules should actively encourage the use of technology or merely make it available as an option.

After further discussion, it was moved that the Committee approve proposed paragraph (1) of Rule X.X(b), which requires a judge proceeding under the rule to place the applicant for a warrant under oath.

The motion was approved by a vote of 9 to2.

It was then moved, by individual motions, that the Committee approve proposed paragraphs (2) through (7) of Rule X.X(b). The paragraphs list the procedures applicable to the issuance of warrants under the rule.

The motions were each approved unanimously.

The Committee discussed subdivision (c) of Rule X.X, which limits the suppression of evidence obtained pursuant to an arrest or search warrant to cases when law enforcement officers have acted in bad faith. A member noted that the subdivision is based upon the Supreme Court decision in *United States v. Leon*, 468 U.S. 897 (1984), which was recently extended to evidence seized based upon a defective arrest warrant. *See Herring v. United States*, __ U.S.__, 129 S. Ct. 695 (2009). It was moved that subdivision (c) be approved.

The motion was approved by a vote of 10 to 1.

A member noted that through its promotion of the use of technology, Rule X.X might indirectly discourage face-to-face encounters between judges and applicants for warrants. To counterbalance that effect, a member suggested that a new paragraph be added to subdivision (b) that would read as follows:

> The magistrate judge may examine the applicant or affiant and any witness that the applicant or affiant produces.

It was moved that the new subdivision be approved and added to Rule X.X(b).

The motion was approved by a vote of 10 to 1.

It was moved that the Committee send the new Rule X.X, as revised, to the Standing Committee for publication. (The placement and number of the rule will be decided at a later time.)

The Committee voted unanimously to send the proposed Rule X.X to the Standing Committee for publication.

The Committee then considered the final part of the group's draft, which amended Rule 9 (Arrest Warrant or Summons on an Indictment or Information) by adding at the end a new subdivision to permit a judge to consider information communicated electronically. With the deletion of "a" before "telephone," it was moved that the new subdivision be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 9 to the Standing Committee for publication.

Professors Beale and King pointed out that in light of the creation of Rule X.X, Rule 41 (Search and Seizure) needed to be amended to contain a cross reference to the new rule. Accordingly, it was moved that Rule 41(d)(3) and (e)(3) be amended to read as follows:

> **Requesting and Issuing a Warrant by Telephone and Other Reliable Electronic Means**. A magistrate judge may issue a search warrant based on information communicated by telephone or other reliable electronic means. The procedures in Rule X.X govern the application for and the issuance of such a warrant.

The motion was approved unanimously.

It was further moved that Rule 41, as amended, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 41 to the Standing Committee for publication.

The Committee then considered two l amendments to Rule 47 and 49 (pages 269-70 of agenda book). The proposed amendments clarified that motions can be filed electronically (Rule 47) and that if so filed, the motion will be considered a "written paper" for purposes of the rules (Rule 49). It was moved that the proposed amendment to Rule 47 be approved, and, so revised, the proposed amendment be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 47 to the Standing Committee for publication.[1]

The proposed amendment to Rule 49 was revised to correct a typographical error by replacing "or" before "the United States" with "of," after which it was moved that it be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 49 to the Standing Committee for publication.

The Committee turned to the proposed amendment to Rule 1 (page 272 of agenda book). The amendment adds a definition of "telephone" to the list of definitions that apply to the rules. After revising the Note following the proposed amendment by striking as unnecessary the word "new" on line 9, it was moved that the amendment be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 1 to the Standing Committee for publication.

The Committee discussed the proposed amendment to Rule 32.1 (Revoking or Modifying Probation or Supervised Release) (page 261 of agenda book). The amendment adds a new subdivision (f) at the end of Rule 32.1 to permit a defendant on request to participate in proceedings under the Rule through video teleconferencing. A member noted that this amendment would be very useful in situations when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence. Rather than require the defendant to return to the original district, causing delay and inconvenience for the defendant, the proposed amendment allows the individual to remain where the alleged violation occurred. Another member voiced a concern that although useful, the amendment could become a "slippery slope" towards sentencing by video. Another raised a concern that defendants might be pressured into appearing by video, to save the government transportation costs if the defendant was indigent. Professor King pointed out that the use of video teleconferencing could be triggered only by the defendant's request, which ensures that it is the defendant's choice whether to proceed by video or in person.

It was moved that the proposed amendment to Rule 32.1 permitting teleconferencing be approved and sent to the Standing Committee for publication.

The Committee voted with four dissents to send the amended Rule 32.1 to the Standing Committee for publication.

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[1] The Committee subsequently voted, by email, to withdraw this amendment after it was deemed unnecessary.

The Committee considered the Note accompanying Rule 32.1 (page 261 of agenda book). Judge Raggi suggested that the language on lines 10-12 be amended to give a judge greater flexibility in choosing how to preserve the defendant's rights. Judge Tallman offered an amendment that substituted the following sentence for the sentence beginning on line 10: "If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel." It was moved that the Note be approved as revised and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Note to Rule 32.1 to the Standing Committee for publication.

Finally, the Committee considered two conforming amendments that reflect the proposed amendment to Rule 32.1(f), permitting video teleconferencing. First, it was moved that Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) (page 261 in agenda book) be amended by adding at the end a new subdivision, permitting video teleconferencing to be used, and, so revised, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 40 to the Standing Committee for publication.

Next, it was moved that Rule 43 (Defendant's Presence) (page 268 in agenda book) be amended to include a cross reference to Rule 32.1 and to add video teleconferencing as an option for a defendant who does not wish to appear in person for a misdemeanor offense, and, so revised, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 43 to the Standing Committee for publication.

With that, the Committee concluded its consideration of the amendments proposed by the Technology Subcommittee. Judge Tallman thanked Judge Battaglia for his diligent efforts and leadership of that subcommittee.

C. Subcommittee on Sentencing – Proposed Amendment to Rule 32(h) and Procedural Rules for Sentencing

Judge Molloy, Chair of the Subcommittee on Sentencing, reported on the two amendments under consideration to Rule 32 (Sentence and Judgment). Under Rule 32(c)(1)(A), a probation officer prepares a presentence report (PSR) for the court's consideration in sentencing. Under Rule 32(h), the court must give the parties reasonable notice if it is contemplating a departure from the applicable sentencing range and the ground for the possible departure is not mentioned in the PSR or in submissions filed by the parties. The first amendment under consideration, which originated in a proposal from the American Bar Association (ABA), would ensure that parties receive the same information as the probation

officer preparing the PSR. The second amendment would require a court to give notice not just of a possible departure but also of a possible "variance" from a sentence under the guidelines.

1. Procedural Rules for Sentencing

To assist the Committee in its deliberations of the first amendment under consideration, two members of the Pretrial and Probation Division of the Administrative Office presented their views. Jim Olsen, Chief of Criminal Law Policy, spoke first and briefly discussed how the proposed amendment would increase the workload of probation officers and might alter a probation officer's neutral role in the sentencing process. Next, John Fitzgerald, Probation Administrator, expanded on these points. Referring to the ABA's proposed amendment on page 286, Mr. Fitzgerald described in more detail how the amendment would greatly increase a probation officer's workload by requiring the officer to distribute to the parties written summaries of interviews conducted by the officer in preparing the PSR. An officer might have 15-20 such interviews to summarize under the ABA amendment. This new duty has the potential to increase a probation officer's workload tremendously.

Mr. Fitzgerald also cited other concerns with the proposed amendment. The amendment could place probation officers in the middle of disputes between the parties. In addition, the proposed duty to disclose information could conflict with confidentiality restrictions imposed by law. Mr. Fitzgerald suggested that the goal of the proposed amendment – to increase transparency in the preparation of the PSR – could be achieved in other ways, such as revising portions of the manual used by probation officers or making an officer's sentencing recommendation more available to the parties.

The Committee briefly questioned Mr. Olsen and Mr. Fitzgerald. Mr. Wroblewski pointed out that the Department had prepared an alternative to the ABA proposal that sought to increase the flow of information but with a more modest change to the probation officer's duties. A member observed that the Federal Defenders had concerns about the Department's proposal.

Professor Beale noted that at this point, there was no consensus on how to best proceed to make the preparation of PSRs a more transparent process. She suggested that perhaps an academic conference could be arranged to bring together interested parties to further examine the issue. Another member said that many defense attorneys are not able to challenge important information underlying PSRs and the issue needs attention.

Judge Tallman said that although he felt some pressure to address the issue, the sense of the Committee appeared to be to collect more information and become more fully informed before acting. He noted that a study by the Federal Judicial Center on the views of probation officers was being prepared and that the Sentencing Commission was holding regional meetings. Accordingly, he recommitted to the Sentencing Subcommittee consideration of the Rule 32(c) issue, with a request that it prepare a draft amendment for presentation to the Committee at the meeting in October.

2. Rule 32(h)

The Committee turned to the proposed amendment to Rule 32(h), which would require a court to give notice to parties of a possible "variance" from a sentence under the guidelines, in addition to notice of a "departure" from the guidelines. Several members expressed concern about the difficulty of giving such notice, because the information upon which a judge relies may be continually supplemented right up to the time that sentence is pronounced. Therefore, it is hard to predict whether a variance from the guidelines may be imposed. Judge Raggi suggested that perhaps the issue is premature and the Committee might consider waiting until the Supreme Court had provided more clarification on post-*Booker* guidelines sentencing.

Noting that there was no consensus among the members at this point to change Rule 32(h), Judge Tallman said that further consideration of the amendment would be deferred.

D. Subcommittee on Victims' Rights – Proposed Amendment to Rule 12.4

Judge Jones reported on the Subcommittee's consideration of a possible amendment to Rule 12.4 (Disclosure Statement). Rule 12.4(a)(2) requires the government to disclose the identity of any organization that is a victim of a crime and, if the organization is a corporation, to make further financial disclosures. The Committee on Codes of Conduct had asked the Committee to look at whether the disclosure requirements should be expanded so that judges would be able to decide more easily whether recusal is advisable. The Subcommittee had considered whether Rule 12.4 should be expanded to include disclosure of individuals' identity, and also to require organizational victims themselves – as opposed to the government – to make financial disclosures.

Judge Jones reported that after due consideration, the Subcommittee had concluded that no amendment to Rule 12.4 is necessary. Judge Jones stated that the privacy concerns raised by disclosure of an individual's identity would outweigh any marginal assistance the information would provide to a judge. Therefore, the Subcommittee recommended that no action be taken. It was so moved.

The motion was approved unanimously.

Judge Tallman stated that he would write a letter to Judge Margaret McKeown, Chair of the Committee on Codes of Conduct, informing her of this result.

Mr. Wroblewski reported on efforts by the Department of Justice to communicate with the victims' rights community. As described more fully in his letter dated March 2, 2009 (page 332), Department representatives have held biannual discussions with victims' groups. During these discussions, the Department has informed the groups of relevant work being done by the Committee and solicited their concerns, if any, about the Federal Rules of Criminal Procedure. The Department also plans to continue meeting periodically with other victims' groups to seek their views.

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

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

Mr. Rabiej reported that bipartisan bills amending 28 statutes that contain time provisions affecting court proceedings had been introduced in the House and Senate. The bills use the exact language proposed by the rules committees. Judge Rosenthal has met with members of Congress as well as staff and prospects for quick passage of the bill seem good.

B. Update on Work of Sealing Subcommittee

Judge Zagel reported that he had no updates on the work of the Sealing Subcommittee, whose next meeting is scheduled for June 2, 2009.

C. Criminal Forms

Mr. Wroblewski reported that the AO's Forms Working Group had requested the Department of Justice to review many of the criminal forms that the Group has been revising. He said that the Group had accepted many of the Department's suggestions but that one disagreement remained regarding AO Form #102, used to apply for a tracking warrant (page 382 in agenda book). The Department is concerned with language in the form that refers to a request to "use the tracking capabilities of" a device such as cell phone. Mr. Wroblewski stated that courts were in disagreement over whether this type of request required probable cause and that the AO form implicitly endorsed a position that probable cause was required. (The full details of DOJ's concerns are contained in the letter from Assistant Attorney General Elisebeth Cook on page 380 of the agenda book).

Mr. McCabe stated that the form in question had been created in response to a request from magistrate judges for a generic form for all tracking devices. He said that Judge Russell Eliason, a member of the Forms Working Group, had addressed Ms. Cook's concerns in a letter to Judge Harvey Schlesinger (page 367 of agenda book). Summarizing Judge Eliason's views, Mr. McCabe said that the form takes no position with regard to whether probable cause is required. He added that the AO decided to post the form on its website, notwithstanding the controversy, due to the requests from magistrate judges. Professor Beale added that the website also had a caveat regarding the legal issue. Judge Battaglia said he thought the form was a good starting point that could be adapted and revised by a local court as the law develops. Mr. Wroblewski concluded the discussion by saying that the Department was not requesting any action by the Committee and that discussion of the form at today's meeting was merely for informational purposes.

Mr. McCabe further reported that the Forms Working Group had removed personal identifiers from forms, consistent with the privacy protections set forth in Rule 49.1 (Privacy Protection for Filings Made with the Court).

D. Memorandum from Judge Rosenthal regarding Privacy Subcommittee

Judge Rosenthal reported that the Executive Committee of the Judicial Conference had revived the Subcommittee that had been formed after passage of the E-Government Act of 2002, and its new name is the Privacy Subcommittee. It will be chaired by Judge Raggi and its first meeting will be in June 2009. The Privacy Subcommittee will examine many issues related to the difficult task of providing public access to court documents while simultaneously protecting the privacy rights of those involved with the judicial process.

Judge Raggi offered two observations: (1) that advances in technology make it increasingly hard to shield sensitive information; and (2) new challenges will likely arise with the advent of computers in prisons. Several members confirmed that prisons in their districts already had computers accessible to prisoners.

Judge Tallman remarked that alien registration numbers are often indispensable to the judicial process. For example, he cited immigration cases that he had worked on that involved individuals with identical names. Without the "A number" assigned to each individual and their respective administrative file, he would not have been able to tell which file pertained to which individual.

Mr. Wroblewski commented that people frequently assume that "publicly available" means "available on the internet." However, competing values, such as privacy, challenge that assumption and weigh in favor of a distinction between the two. He offered as an example financial disclosure forms, which he said could be available for public inspection, but not posted on line.

Judge Rosenthal asked all judges to keep Judge Raggi informed of any effective measures that they had taken to address these concerns.

E. Criminal Law Committee's Proposal Regarding Probation/Pretrial Officers

Judge Tallman reported that he had communicated with Judge Julie E. Carnes regarding the Criminal Law Committee's proposal to authorize Probation and Pretrial Services officers to obtain search warrants. He said that according to Judge Carnes, further consideration of the matter was awaiting completion of a study by the AO.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman advised the Committee that the next meeting was scheduled for October 13-14, 2009, at the newly-renovated William K. Nakamura Courthouse in Seattle, Washington. Judge Tallman thanked Judge Jones and Judge Battaglia, who were leaving the Committee after finishing their terms, for their exemplary contributions. The meeting was adjourned.