ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 1-2, 2007
Park City, Utah

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "committee") met in Park City, Utah, on October 1-2, 2007. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
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
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and its Reporter, Professor Daniel R. Coquillette. Also present were Judge Susan C. Bucklew, former chair of the advisory committee, and Professor Nancy J. King, a former member and now a consultant to the advisory committee. 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
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Two other officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Lisa Rich, Director of Legislative Affairs, United States Sentencing Commission, attended the meeting. Judge Paul G. Cassell, chair of the Criminal Law Committee, was present for part of the meeting. In addition, former committee member Judge

Harvey Bartle III of the Eastern District of Pennsylvania and Appellate Rules Committee Reporter Professor Catherine Struve participated by telephone during parts of the meeting.

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

Judge Tallman welcomed everyone, particularly the new members — Judge Zagel, Judge Molloy, Judge Keenan, and Professor Leipold. Judge Tallman and Judge Rosenthal thanked outgoing chair Judge Bucklew for her nine years of service — six as a member and three as the chair.

B. Review and Approval of Minutes

A motion was made to approve the draft minutes of the April 2007 meeting.

The committee unanimously approved the motion.

II. PENDING RULE AMENDMENTS

A. Proposed Amendments Approved by the Standing Committee for Publication

Mr. Rabiej reported that the Standing Committee had approved publication of the following proposed rule amendments for notice and public comment. He noted that they were posted on the Judiciary's website and that more than 5,000 hard copies were being printed.

1. Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.

2. Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.

3. Rule 32.2. Criminal Forfeiture. The proposed amendment makes several changes to the forfeiture process. It clarifies that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

4. Rule 41. Search and Seizure. The proposed amendment specifies the requirements for a warrant for electronically stored information.

5. Rule 45. Computing and Extending Time. The proposed amendment simplifies the method for computing time.

6. Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Proceedings. Amendments to these rules are

intended to accommodate the new "days are days" time-computation standard specified in Rule 45.

7. Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings. The proposed amendments make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the pertinent Rule 11 and also require the judge to grant or deny the certificate at the time a final order is issued.

B. Proposed Amendments Approved by the Supreme Court

Professor Beale noted that three rule amendments related to *United States v. Booker*, 543 U.S. 220 (2005), a new privacy rule, and an amendment to Rule 45 had all been approved by the Judicial Conference and the Supreme Court and were set to take effect on December 1, 2007.

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 [their] public availability." Mr. McCabe noted that the AO Forms Working Group, chaired by Judge Harvey Schlesinger, had identified a dozen or so forms that required revision to accommodate the privacy rules.

C. Proposed Amendments Approved by the Standing Committee and the Judicial Conference

Mr. Rabiej noted that the following proposed rule amendments, which include those relating to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007, and were about to be forwarded to the Supreme Court.

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 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States.

7. 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.

8. Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

At Judge Tallman's request, Professor Coquillette provided a brief primer on the rulemaking process and the committee's role. Professor Coquillette commended Mr. McCabe's law review article on the nearly 75-year history of the rulemaking process, urging that copies be distributed. He noted that, by enacting the Rules Enabling Act, Congress had delegated an important part of its powers in 1934, creating a common forum for inter-branch cooperation — with significant public input — to produce procedural rules that would supersede all prior

federal law. One member suggested that a brochure setting forth the various constitutional, statutory, and prudential constraints on the rules committee might be helpful.

Judge Tallman urged committee members to resist partisanship and to work cooperatively to approve rule amendment proposals that improve court efficiency while respecting all relevant constitutional rights. Judge Rosenthal emphasized how well the existing deliberative process worked. Mr. McCabe noted that reducing the three-year rulemaking timeline by eliminating steps or shortening time limits had been considered on at least two prior occasions, but ultimately rejected. Mr. Rabiej described the process and underscored the wealth of information available on the Federal Rulemaking website, http://www.uscourts.gov/rules.

III. PROPOSALS FOR COMMITTEE CONSIDERATION

A. Report on June 2007 Meeting of the Standing Committee

Judge Bucklew reported on the Standing Committee's June 2007 meeting. The proposed amendments to Rule 16 generated the greatest interest. She said that the advisory committee's proposed revision had not been approved due to (1) concerns that it would require government disclosure of exculpatory and impeaching evidence without regard to its materiality and (2) questions whether a need for the change had been sufficiently shown. Then-Deputy Attorney General Paul J. McNulty had strongly opposed the proposal at the meeting. Other proposed amendments discussed included the proposed changes to Rule 11 of the rules governing § 2254 and § 2255 proceedings — part of which was remanded for the advisory committee's consideration (see below) — and the CVRA amendments.

Though declining to approve the proposed amendment to Rule 16, Judge Rosenthal reported that the Standing Committee suggested that the advisory committee consider whether to continue studying the Rule 16 amendment proposal. And if so, to ask the Federal Judicial Center to research (a) the effect of the recent change to the U.S. Attorneys' Manual and (b) the experience of courts governed by local rules similar to the Rule 16 amendment proposal. Ms. Hooper reported that, given the Courtroom Usage Study's current demand on resources, the Center could not immediately conduct a substantial survey. One member suggested studying the impact of local rules, which would require fewer resources. Ms. Fisher said that the Department has been carrying out substantial training on the U.S. Attorneys' Manual changes and could already start helping the FJC think of ways to capture the data needed for the Center's study.

Judge Bucklew advised the Standing Committee the reasons the advisory committee did not pursue the proposed amendment to Rule 29 on judgments at acquittal.

B. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings

The committee discussed the portion of the proposed amendments to Rule 11 of the rules governing § 2254 and § 2255 Proceedings that the Standing Committee had deferred for further consideration. Professor Beale noted that these were part of a three-part package of changes originally proposed by the Department, addressing post-conviction remedies. The advisory committee had earlier rejected proposed new Rule 37, which would have regularized the collateral review of criminal judgments and abolished certain writs of error. The Standing Committee approved only the certificate of appealability part of the proposed amendments.

Professor Beale summarized the pending proposal, which would make Rule 11 the exclusive method to obtain relief in these cases, set a 30-day time limit, limit the types of claims allowed, and prohibit use of Civil Rule 60(b) motions in these cases. A member moved that the committee refer the remaining proposals to amend Rule 11 of the rules governing § 2254 and § 2255 Proceedings back to the Writs Subcommittee for further study. Judge Tallman agreed and asked Professor King to remain on the subcommittee in her new consulting capacity, Mr. McNamara to chair it, and Judge Keenan to join it. Judge Tallman later asked Justice Edmunds if he would also serve to provide the group with an appellate perspective.

C. Rule 32(h)

The committee discussed the proposed post-*Booker* amendment to Rule 32(h). Professor Beale noted that, as published, the proposal had generated significant public comment. The Standing Committee had declined to approve it and sent it back for further study. There was discussion over whether the committee should wait until the Supreme Court decides *Gall v. United States*, No. 06-7949. The question presented in *Gall* is: "Whether, when determining the 'reasonableness' of a district court sentence under [*Booker*], it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances." A consensus developed that the Rule 32(h) rule amendment proposal should be referred back to a subcommittee on sentencing issues for further study. Judge Tallman appointed Judge Molloy as the subcommittee's new chair and asked Judge Wolf to join Justice Edmunds, Ms. Brill, Mr. McNamara, and the Department.

D. Rule 15

Ms. Fisher summarized the background of the Department's proposal to amend Rule 15 to permit the deposition of a witness outside the defendant's *physical* presence under certain circumstances where doing so is impracticable or impossible. Ms. Fisher said the proposed amendment was needed in national security and other cases. The Department had sought to address the Confrontation Clause concerns raised in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), and the objections raised by Justice Scalia's opinion when the Supreme Court rejected a proposed amendment addressing a similar issue a few years ago. One member noted that it was unusual for a rule to refer specifically to "defense witnesses" in subparagraph

(c)(3)(B) of the proposed Rule 15 amendment rather than simply to "witnesses." Another suggested that the rule should clarify the burden of proof and who bears it. Based on the comments, the proposal was referred to the Rule 15 Subcommittee. Judge Tallman asked Judge Keenan to chair the subcommittee with Professor Leipold, Mr. Cunningham, and the Department.

E. Rule 12(b)(3)(B) and Rule 34

The committee discussed the Department's proposed amendment of Rule 12(b) to bar claims that an indictment fails to state an offense unless raised before trial. Mr. Wroblewski explained that the Department wanted all challenges to be flagged before a jury is empaneled, when the problem can still be fixed. Several members asked, though, what should be done if an indictment is in fact found to be defective after jeopardy attaches. Should an erroneous indictment be sent to the jury? After further discussion, it was decided that the proposed Rule 12(b) amendment should be referred to a small subcommittee for further study. Judge Tallman asked Judge Wolf to chair the subcommittee, and asked Mr. McNamara and Professor Leipold to serve as members.

F. Time Computation Project — Statutory Provisions

For the benefit of the new members, Mr. Cunningham described the history of the rules committees' coordinated effort to simplify time computations by adopting a "days are days" counting principle, adjusting the time limits specified in individual rules to take account of the new counting method, and to fix shorter deadlines in multiples of 7 days, where feasible. Professor Beale noted that the time-computation rules amendments had been published for public comment. At issue now were the statutory deadlines and statutory time computation rules. Mr. Wroblewski reported that the Department planned to send the rules committees a letter shortly, identifying all U.S. Code provisions that the Department considers critical that the Congress should amend. Judge Rosenthal noted that, ideally, Congress would pass a statute taking effect at the same time as the revised rules that would adjust the relevant statutory deadlines as appropriate in light of the new "days are days" time-counting rule. Mr. Rabiej suggested that reaching consensus on all proposed changes would be challenging. The committee discussed prioritizing the desired legislative changes.

Judge Rosenthal urged members to review the list of proposed changes carefully, warning that relatively few private practitioners were likely to take the time to do so during the public comment period. One member asked whether the committee had examined the interplay of the revised time deadlines with agency deadlines in asset forfeiture and other matters. Professor Beale agreed that this required scrutiny. Judge Wolf asked that he be sent a document that he could forward to bar presidents and others, with applicable questions and a deadline for their responses. One member recommended posting the proposed changes online, for public airing. Professor Coquillette agreed, suggesting that accompanying language be prepared to make clear the substantial improvement that the new time-computation framework represents.

G. Rule Amendments Relating to Crime Victims

After welcoming Judge Cassell to the meeting, Judge Tallman congratulated Judge Jones on his recent appointment as a district representative to the Judicial Conference and asked him to report on the most recent rule amendments being proposed by the CVRA Subcommittee. Judge Jones recounted the history of the effort to implement the Crime Victims' Rights Act in the rules. He noted that the originally published package of proposed rule amendments had generated criticism from both sides. While criminal victims' advocates, including Judge Cassell, contended that the proposals were inadequate, others argued that the proposed changes would improperly tilt the adversarial equilibrium of criminal cases against accused persons. The package of amendments was revised to account for some of the concerns raised during the public comment. A revised version of the original amendment proposals, approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007, is on its way to the Supreme Court.

Judge Jones explained that the CVRA Subcommittee was now recommending adoption of a set of follow-up amendments, in Rules 5, 12.3, and 21. Judge Cassell noted that he had recently announced his resignation from the bench, having recognized that his passions were best pursued as an advocate rather than a judge. Judge Tallman thanked Judge Cassell for his significant input on CVRA-related matters throughout the rulemaking process.

Concern was raised that there were inconsistent references in the proposed rules to "the victim," "any victim," or "a victim"— an issue that will be addressed by the Style Subcommittee. Someone proposed placing the proposed Rule 5 amendment in Rule 46 instead, but others suggested that magistrate judges were more likely to find the provision in Rule 5. It was noted that the reference to 7 days in Rule 12.3(a)(4)(C) might be affected by the time-computation amendments — which the committee might want to flag during the public comment period with an asterisk. After further discussion, Judge Jones moved to approve the CVRA-related amendments to Rules 5(d)(3), 12.3, and 21.

The committee voted to approve the proposed CVRA-related amendments for publication.

H. Rules 32.1 and 46

Judge Battaglia noted that the committee had first discussed his proposal to amend Rules 32.1 and 46 in October 2006. He explained the background of the proposed rules amendment, which would standardize national practices and expressly authorize issuance of an arrest warrant or summons when the government seeks revocation of bail or supervised release. Following discussion of the proposal, Judge Battaglia moved to send the proposed amendments to the Standing Committee for publication. Professor Beale suggested that the committee could approve the proposed rules amendments now, but wait until the next meeting to give final approval to the committee note and the final language of the amendment suggested by the Style Subcommittee.

A member expressed concern about the mandatory nature of the proposed language, noting that a judge could decide to issue either a summons or a warrant, depending on the circumstances. Ms. Fisher said that the Department did not feel strongly about this issue. Judge Tallman suggested that the rule use "may issue" instead of "must issue" in both proposals. It was noted that a judge could decide to issue a summons or might want to issue an arrest warrant. Judge Battaglia accepted the suggestion. One member questioned the reference to "affidavit," which could be construed as excluding a declaration. Judge Rosenthal reported that, as part of the Civil Rules restyling, the term "affidavit" was used, and suggested that this could be clarified in the note. Mr. Wroblewski pointed out that the reference to Rule 41(c)(2)(B) should be to Rule 41(d)(2)(B). Professor Beale commented that, even if approved, the proposal would still need to be restyled, all references cross-checked, and a committee note drafted.

The committee voted, with one dissent, to send the proposed amendments to the Standing Committee as revised and with an accompanying Committee Note, which would be approved by the committee at a later date.

I. Proposal for Victims' Advocate Member on Rules Committee

Judge Tallman informed the committee that the Chief Justice had referred to the Standing Committee — which in turn had referred to the advisory committee — a request that he appoint to the committee a permanent victims' advocate member. Before discussing that request, Judge Tallman asked Ms. Hooper to report on the FJC's work with the Government Accountability Office (GAO) on CVRA-related issues. Ms. Hooper said that a judges' pocket guide and a DVD on the CVRA and related rules amendment were being developed, which should be ready for distribution by year's end. Judge Tallman noted that CVRA issues were also being incorporated into the curriculum of the Center's "baby judges school" training program. Ms. Hooper described the GAO study and FJC's meeting with the Executive Office for U.S. Attorneys to determine what victim data are available.

Judge Tallman expressed concern about adding a victims' advocate as a committee member. Judge Cassell suggested that Lewis & Clark Law Professor Douglas Beloof, would make an excellent addition to the committee. After additional discussion, Judge Rosenthal said that adding members whose express role was to advance a particular agenda raised institutional concerns and that the rules committees should remain forums for people with different experiences coming together to identify solutions to problems. Ms. Fisher said that the Department had every interest in knowing victims' interests and suggested that perhaps it could meet regularly with representatives from the victims' community before each committee meeting to ensure that the Department understood their issues. Based on the members' comments, the committee decided that it was inadvisable, and would set an adverse precedent, to have institutional members appointed to the committee whose sole portfolio is their advocacy on behalf of crime victims.

The committee voted, with one dissent, not to recommend that the Chief Justice appoint a permanent crime victims' advocate member to the committee.

J. Rule 32(i)(1)(A)

The committee resumed its meeting on Tuesday morning with a discussion of the letter sent by Judge Ernest Torres of the District of Rhode Island recommending a change to Rule 32(i)(1)(A). Professor Beale explained that the rule had been amended in 1995 to require courts to "verify that the defendant and the defendant's attorney *have* read and discussed the Presentence Report" — rather than, as the rule had required before 1995, simply to "determine that the defendant and defendant's counsel have had the *opportunity* to read and discuss" it. Judge Torres had suggested that the wording of the rule would create an impasse if a defendant flatly refused to read the Presentence Report.

A few district judges described what they do at sentencing when it becomes apparent that the defendant has not in fact read the report either due to illiteracy or insufficient fluency in English. Often, they said, they simply invite the defendant to take the time during a brief recess to read the report with the help of their attorney or, if needed, an interpreter. It was suggested that, were a defendant willfully to refuse to read and discuss the report, appellate courts would likely interpret the refusal as a waiver of the defendant's right to read and discuss the report. Based on the comments, the committee concluded that amending Rule 32(i)(1)(A) was unnecessary. Judge Tallman said that he would write a letter to Judge Torres, explaining the committee's reasons for not pursuing a change to the rule.

K. Rule 32.1(a)(6)

The committee discussed the suggestion of Magistrate Judge Robert B. Collings of the District of Massachusetts that Rule 32.1(a)(6) be amended to clarify the rule's incorporation of 18 U.S.C. § 3143(a). One member recommended pursuing the proposed amendment as a way to simplify the rule and offer clearer guidance to busy judges. Another member questioned whether "clear and convincing" was the correct standard for establishing that "the person will not flee or pose a danger to any other person or to the community." Judge Tallman cautioned that establishing the proper burden of proof sounded substantive and may be inappropriate under the Rules Enabling Act. It was noted that the rule referenced the statute and that invoking the statutory standard is entirely appropriate. Judge Tallman asked the Reporter to investigate the matter further and to prepare a memorandum for the committee's consideration addressing (a) whether Judge Collings' proposed standard properly reflects the case law and (b) if so, whether there is any impediment to including the standard in the rule. One member suggested that the memorandum might also address whether a separate section is needed on revocation of supervised release. Judge Tallman agreed that this issue should be part of the Reporter's research. Judge Battaglia offered to assist. Mr. Wroblewski offered to contribute a list of relevant statutes.

L. Rule 6(f)

The committee discussed Judge Battaglia's suggestion that Rule 6(f) be amended to allow courts, for good cause, to receive the return of a grand jury indictment by video

conference. Professor Beale and Judge Tallman noted that the proposal was particularly important in districts that are geographically large but have few judges, who sometimes have to drive hours to preside over a 10-minute proceeding. One member proposed striking the phrase "in open court" instead, but others suggested that the phrase was a vital safeguard against the ancient practice of secret Star Chambers indictments. Another member suggested that the phrase "for good cause" be changed to "for judicial convenience," but Judge Battaglia warned that doing so might enable video conference to become the default practice. Further study was necessary. Judge Tallman asked Judge Battaglia to chair a subcommittee, whose members would include Professor Leipold and Justice Edmunds, assisted by Professor Beale and Professor King.

M. Rule 11(b)(1)(M)

Judge Tallman reported that concerns about the recent post-*Booker* amendment of Rule 11(b)(1)(M) had been raised during a recent meeting in Montana of Ninth Circuit chief district judges and clerks that he attended, chaired by Judge Molloy. The amendment, set to take effect on December 1, 2007, requires a court to advise a defendant entering a guilty or nolo contendere plea of the court's obligation, in imposing the sentence, "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Central District of California Chief Judge Alicemarie H. Stotler and District of Arizona Chief Judge John M. Roll, both former rules committee members, asked how extensively the sentencing process needed to be described and whether judges would have to calculate sentencing guidelines at the guilty plea hearing so that they could give notice of "the applicable sentencing-guideline range."

Several members suggested that the language of the amended rule was clear that the court needed only to inform the defendant of the court's future obligations to calculate the sentencing-guideline range at sentencing, not to perform the actual calculation at the guilty plea hearing. The committee decided to wait until after the *Booker* rule amendments take effect on December 1, 2007, and see whether any evidence emerges from the field that the amended rule is causing actual confusion. Judge Tallman suggested that the committee propose language that the FJC could include in the Bench Book.

N. Bail Bond Fairness Act

Judge Tallman noted that legislation had been introduced in Congress at the request of corporate bail bondsmen that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear. Some courts have forfeited bonds when the defendant violates other conditions of release and is rearrested. The Judicial Conference opposes this legislation. Mr. Wroblewski noted that the Department also opposes it.

O. Indicative Rulings

Professor Struve joined by telephone to describe the indicative-rulings project and to ask whether the committee thought that the Criminal Rules should be amended to parallel the proposed amendments to the Civil and Appellate Rules recently published for public comment. Proposed Civil Rule 62.1 would create a mechanism for an appellate court to remand certain post-judgment motions if the district court were to indicate that it considered the motion meritorious. She noted that indicative rulings have also been used in criminal cases. Judge Tallman said that his circuit often handles this type of situation informally, through clerk-to-clerk communications. Ms. Felton said that the Department of Justice was concerned about the scope of the proposed amendment. Judge Rosenthal suggested that it would be helpful for the rules to clarify the options available in these situations, even if they occur relatively infrequently. After further discussion, the committee decided to pursue further study of this proposal.

P. Disclosing Cooperation Agreements

Former committee member Judge Bartle joined by telephone to report on his court's efforts to address the problem posed by www.whosarat.com and similar websites purporting to identify informants in criminal cases.

Judge Bartle described the Eastern District of Pennsylvania's adoption a month ago of a new protocol to address this problem. The protocol was developed with input from the defense bar, the U.S. Attorney, and others. Rather than describing sealed documents on the public docket as "Plea Agreement Entered by Defendant X" or "Memorandum in Support of Reduction in Sentence," they are now described generically as "Plea Agreement," "Sentencing Document," or "Judicial Document." The documents themselves remain publicly available only at the Clerk's Office, but are no longer posted on PACER. Also, the docket does not identify a document as "under seal," because that is often interpreted as indicative of defendant cooperation. Although the new protocol does not solve all problems, Judge Bartle hoped that it would help diminish the threat of witness intimidation.

Professor Beale noted that, in addition to the materials received from Judge Bartle, the agenda book included a memorandum from Judge John R. Tunheim of the District of Minnesota, chair of the Committee on Court Administration and Case Management, opposing the Department's proposal to remove all plea agreements from PACER and limit remote electronic access to court users and participants in the case. The committee concluded that the proposal would not be effective because cooperation agreements would be freely available at the courthouse. The committee sought public comment on other options to address this vexing problem. (At its December 4-5 meeting, the committee reviewed the public comments and concluded that courts should be allowed to develop their own procedures to address this issue.)

Judge Tallman asked whether Judge Bartle had been in touch with Judge Tunheim. Judge Bartle said that he was about to write Judge Tunheim asking that the Judicial Conference not adopt any national policy that would bar his court's new protocol. Mr. Wroblewski said that

the Department considered this a serious matter and had suggested the program in Judge Bartle's court in a recent letter to Judge Tunheim. He noted that in the Southern District of New York, documents indicating cooperation are never filed, but simply returned to the parties — an option that the Department did not view as ideal. Judge Bartle said that his court had also considered, but rejected, that option. Judge Tallman noted that the practice created a record full of gaping holes, which was problematic on appeal. Professor Leipold made a plea on behalf of academic researchers for continued public access to all key documents in criminal cases.

After proposing that the next meeting be held the last week of April 2008, Judge Tallman adjourned the meeting.