# ADVISORY COMMITTEE ON CRIMINAL RULES

# MINUTES

**October 24 & 25, 2005**
**Santa Rosa, California**

## I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Santa Rosa, California, on October 24 and 25, 2005. The following members were present:

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
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Michael J. Elston, Counselor to the Assistant Attorney General
Professor Sara Sun Beale, Reporter

Also participating in the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee liaison to the Criminal Rules Committee
Lucien B. Campbell, Esquire, outgoing member of the Committee
Deborah J. Rhodes, Former Counselor to the Assistant Attorney General
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor David A. Schlueter, outgoing Reporter to the Advisory Committee
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office
James N. Ishida, Senior Attorney in the Administrative Office

Timothy K. Dole, Attorney Advisory in the Administrative Office (by telephone)
Laural L. Hooper, Senior Research Associate at the Federal Judicial Center

Judge Bucklew welcomed the new committee members, Judge Mark L. Wolf , who replaced Judge Paul L. Friedman, and Thomas P. McNamara, who replaced Mr. Campbell as the committee's Federal Defender representative. She also pointed out that this was Professor Sara Sun Beale's first meeting as the committee reporter. She noted that Professor Beale has served for the past year as consultant to the committee as Professor David A. Schlueter completed his service as reporter.

Judge Bucklew expressed the committee's gratitude to Judge Friedman for six years of distinguished service. Judge Friedman was unable to attend the meeting, but Judge Bucklew noted that he would attend the April 2006 meeting in Washington, at which time the committee would present him with a resolution of appreciation.

Judge Bucklew thanked Mr. Campbell, who had just completed six years of service as the committee's Federal Defender representative. She noted that he had participated in "practically every subcommittee" and would be greatly missed. She added that the committee would present Mr. Campbell with a resolution commending him for his service at the committee dinner.

Finally, Judge Bucklew thanked Professor Schlueter for his 17 years of service as the committee's reporter and presented him with a resolution of appreciation. Judge Bucklew noted that his "historic perspective," practicality, and wisdom had proven invaluable to the committee.

## II. APPROVAL OF MINUTES

Judge Bucklew moved for approval of the draft minutes of the April 4-5, 2005 committee meeting in Charleston, South Carolina. Following minor corrections, the minutes were adopted.

## III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

### A. Report From Chief of the Rules Office

Mr. Rabiej reported that Senator Arlen Specter, chair of the Senate Judiciary Committee, was considering several grand-jury reform proposals. The scope of the issues currently under consideration was limited. Among other things, the proposals would allow the Congressional leadership to obtain information about a grand jury investigation upon a written request and would enhance the showing that prosecutors must make to extend a grand jury's term of service.

Congressional review might eventually extend to other issues, however, including several proposals that had previously been considered and rejected by the Advisory Committee on Criminal Rules.

### B. Proposed Amendments Approved by the Standing Committee and the Judicial Conference and Being Forwarded to the Supreme Court

Mr. Rabiej reported that the Administrative Office was preparing the package of rules amendments approved by the Judicial Conference at its September 2005 meeting for formal presentation to the Supreme Court. The amendments include:

1. Rule 5. Initial Appearance. The proposed amendment permits transmission of documents by reliable electronic means.

2. Rule 6. The Grand Jury. The amendment is technical and conforming.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits transmission of documents by reliable electronic means.

4. Rule 40. Arrest for Failing to Appear in Another District. The proposed amendment expressly authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who not only fails to appear but also violates any other condition of release.

5. Rule 41. Search and Seizure. The proposed amendment permits transmission of documents by reliable electronic means. It also includes provisions setting forth procedures for issuing tracking-device warrants.

6. Rule 58. Petty Offenses and Other Misdemeanors. The proposed amendment resolves a conflict with Rule 5.1 concerning a defendant's right to a preliminary hearing.

### C. Proposed Amendments Published for Public Comment.

Judge Bucklew noted that the following rules had been published for comment in August 2005. Mr. Ishida reported that only one comment had been received to date.

1. Rule 11. Pleas. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by revising the advice the court provides to the defendant during the plea colloquy to reflect the advisory nature of the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by: (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not previously identified; and (3) requiring the court to enter judgment on a special form prescribed by the Judicial Conference.

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B) and specifying that the sentencing guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to calculate the additional three days given a party 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."

There was a brief discussion of the rules published for public comment. Three issues were raised to which the Advisory Committee will return at the conclusion of the comment period.

Judge Jones expressed concern regarding the amendment to Rule 32--which is designed to prevent parties from being blind-sided if the court intends to make a sentencing departure not recommended in a pre-sentence submission--might be worded too narrowly. The proposed rule might be interpreted to require no notice whenever a ground has been previously identified in *any* way, even for a reason other than "for departure." Judge Bucklew said that the concern had been raised at a recent Sentencing Institute, and that the committee recognized the problem.

Judge Bucklew noted another Rule 32 issue discussed at the Sentencing Institute involving the mandated use of a national Statement of Reasons form. The proposed rule states that, following signature by the judge, "the clerk must enter it." Some judges have understood this to mean that the Statement of Reasons must be "entered" in the public court record. Historically, the Statement of Reasons has not been a public document. Judge Wolf noted, however, that the Massachusetts District Court recently voted to adopt the national Statement of Reasons form but—absent a reason to seal it—to keep it a public court document so judges would remain accountable for their

decisions. Judge Bucklew stated that the amendment was not intended to change the status quo regarding the inclusion of the Statement of Reasons in the public record. The Rules Committee was simply responding to the Criminal Law Committee's request that use of the form be nationally mandated.

There was also discussion of proposed Rule 11 amendment's reference to "the court's *obligation* to calculate the applicable sentencing guideline range ... and to consider that range, [and] possible departures under the Sentencing Guidelines...." Ms. Rhodes expressed concern that this language could have an impact on the appellate case law making discretionary departure unreviewable, because the proposed rule deletes the reference to "discretion to depart" and adds the phrase "obligation to consider." Professor Beale noted that the obligation was not to depart, but simply to "consider" departing, a term that by its nature presumes judicial discretion. Judge Levi urged the committee to bear in mind that this is simply the advice given to a defendant who pleads guilty to inform the defendant about the sentencing process. It is therefore important not to make the rule too complicated.

Judge Bucklew noted that each of the proposed amendments would be reconsidered in light of these comments, as well as all of issues raised during the public comment period.

## IV. SUBCOMMITTEE REPORTS

### A. Rule 29. Proposed Amendment Regarding Appeal of Judgment of Acquittal.

Judge Bucklew briefly recounted the history of the proposal to amend Rule 29. She noted that the Department of Justice in Fall 2003 recommended amending the rule to require that judges defer all rulings on Rule 29 judgments until after a jury has returned a verdict. The Advisory Committee, however, after discussions at several meetings, decided not to proceed with amending the rule. In January 2005, the Standing Committee, at the urging of the Department, referred the matter back to the Advisory Committee. At its April 2005 meeting, the committee approved the concept of revising the rule to require deferral of a Rule 29 ruling unless the defendant consents to waive his or her Double Jeopardy rights and permit the government to appeal an adverse ruling by the trial court. Professor Schlueter had drafted a revised rule and committee note, but the committee had identified a number of thorny problems with the draft. Drafting a rule was then referred to a Rule 29 subcommittee comprised of Judge Bucklew, Judge Trager, Mr. Campbell, Professor King, and Ms. Rhodes.

Professor Beale explained the new draft prepared by the subcommittee. She noted that the reference in the draft to "a defendant" and "an offense," using the singular, was a deliberate acknowledgment of multiple-defendant and multi-offense cases. And as a compromise among

subcommittee members, language was added to expressly permit the court to "invite" a Rule 29 motion. The former language had barred the court from doing so "on its own."

Professor Beale explained that the subcommittee had devoted most of its attention to subdivision (b). Under (b)(1), the court's ruling on a motion for a judgment of acquittal is generally reserved until after the jury verdict. Section (b)(2) spells out what a defendant must understand for the waiver to be valid. Section (b)(2)(B) requires the waiver to be made personally in open court, not simply in writing. The rule is designed to take hung-jury cases into account, to give defendants a choice as to whether to have the judge rule on an acquittal motion, and to allow the government to appeal a judgment of acquittal.

Judge Bucklew said the subcommittee had discussed at length whether, absent a waiver, a judge must defer ruling on the motion in all cases until after the jury verdict, even if a judge decides to deny the motion. She added that the subcommittee was also concerned as to what to do when a jury does not reach a verdict.

A discussion of the proposed Rule 29 draft followed.

One member asked what the rationale had been for requiring mid-trial reservation in all cases, even when the judge plans to deny the motion. Ms. Rhodes said the Department of Justice had suggested this provision out of a concern for facial neutrality. If the court can rule mid-trial only if it rules in the government's favor, the rule would appear one-sided, she argued. On a practical level, she added, the revised rule avoids having to make unnecessary waivers.

One member said that the new rule might have the effect of requiring a Rule 11 hearing in every case. Ms. Rhodes disagreed, explaining that if the defendant makes a motion without merit, the court will simply reserve decision, and the trial will proceed. The defendant remains in control of whether to waive his or her rights. Another member wondered, though, whether, as a practical matter, a waiver will be made in every case, since nearly every defense lawyer will want to make the motion. One member responded that, as a member of the subcommittee, he had accepted the proposed rule because it in no way prevents judges from preemptively informing defendants that they will not grant the motion and advising them not to waste their time on filing it. Ms. Rhodes predicted that the rule would not significantly change current practice.

One member wondered how the colloquy would proceed between a judge and defendant, and whether, if the rule were adopted, it would be entirely accurate for a judge to tell a defendant that he or she has a right under the Double Jeopardy Clause to prevent the government from appealing a judgment of acquittal. He suggested that the language of the rule was awkward and that it would be difficult for the court or a defense lawyer to explain clearly to the defendant his or her rights.

Ms. Rhodes remarked that she thought the subcommittee's language in (i) had been clearer before being restyled. Professor Beale said that the subcommittee had discussed "bar" or "prevent" and that the Style Consultant had changed the term "bar" to "prevent."

Professor King proposed an alternative solution, namely, to re-phrase subdivision (i) in the conditional: "that the Double Jeopardy Clause would bar the government from appealing a judgment of acquittal . . . ." Another member suggested that another sentence would need to be added, explaining that unless the defendant agrees, the judge will be barred from granting the motion. Professor Beale suggested explaining the details further in the committee note. One member said he thought that, while adding clarification in the note might assist attorneys accustomed to the earlier practice, it would not help defendants. Professor Beale said that the subcommittee would grapple with making the language more helpful to a defendant in reaching a decision. Another member suggested modifying Professor King's proposal to say "that the Double Jeopardy Clause would *otherwise* prevent the government from appealing a judgment of acquittal" and to change the word "right" to "protection" in (ii).

One member asked why, if the defendant makes a Rule 29 motion and the judge believes it to be wholly without merit, the judge cannot simply deny the motion outright. Ms. Rhodes said this was not a point the Justice Department felt strongly about. She suggested that the Department had simply sought facial neutrality in the rule.

One member wanted it to be clear that the waiver is only effective if the court *grants* a Rule 29 motion. He expressed concern that line 118 of the note, which states that "the court may rule on the motion for judgment of acquittal before the verdict," could be construed to mean the court can either grant or deny. Professor Beale said the issue remained open to discussion.

One member said there are really three choices on how a court can respond to a mid-trial Rule 29 motion. It can: (a) deny the motion, (b) reserve judgment, or (c) with a waiver, grant the motion. One member emphasized again that a waiver is only effective if the court grants the motion.

Professor Beale suggested the rule could clarify that the judge has the options mid-trial either to deny the mid-trial Rule 29 motion or to proceed to trial. Thus, subdivision (b)(2) might read: "Upon the defendant's request, the court may grant the motion . . . , but only if: . . . ." This formulation might better reflect the point that a judge cannot take a waiver and then deny the motion.

Professor Beale proposed changing line 25 to read that "the court *must* deny the motion or proceed with the trial," and having line 35 read that "the court *may* grant the motion *but only after* . . . ." One member argued that the "invite the motion" language in the rule is critical because a judge who thinks that a Rule 29 motion is meritorious should be allowed to tell the parties that there is the option to stop the case and go on to an appeal. That course might avoid an unnecessary trial.

One member said the statement in lines 122-124 of the note that "[t]he waiver process is triggered only upon request of a defendant" appeared to be inconsistent with the language in the rule saying "[t]he court may invite the motion." Professor Beale said she thought the language was factually correct, since the waiver itself was entirely under the defendant's control. But concern was expressed that the wording allowed an incorrect inference. Professor Beale explained the subcommittee's concern that defendants not feel coerced to waive a constitutional right, which is similar to the policy that courts not pressure defendants to plead guilty.

Judge Bucklew sought to summarize the posture of the committee. First, the amendment ought to be revised to allow a court to deny the motion prior to verdict. Second, the word "right" should be removed, and the waiver language should be made more "user-friendly." One member added that the committee should do more than simply remove the word "right." It should spell out the options clearly.

Judge Bucklew suggested that the subcommittee consider the committee's comments and revise the draft rule. Although she had originally told the Standing Committee at the June 2005 meeting that the Advisory Committee on Criminal Rules would have a final Rule 29 amendment and note by the January 2006 meeting, the rule would not be published before August 2006. Both the Criminal Rules Committee and the Standing Committee each have one more meeting before then. Judge Levi suggested that perhaps a draft could be presented to the Standing Committee in January. Then the Advisory Committee would have the benefit of the Standing Committee's comments and could re-consider the rule and note at its April 2006 meeting. A final rule could then be presented to the Standing Committee in June. Judge Levi's proposal was approved.

### B. Rule 16(a)(1)(H). Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information.

Judge Bucklew briefly summarized the history of the proposed amendment for the new members of the committee. She reported that the American College of Trial Lawyers (ACTL) had first proposed amendments to the Criminal Rules to address disclosure of exculpatory and impeaching information in March 2003. The committee had discussed the proposal at its Spring 2004 meeting, and a Brady subcommittee was appointed, chaired by Mr. Goldberg. At the subcommittee's request, the Federal Judicial Center completed a survey of local rules, administrative orders, and relevant case law in October 2004. The subcommittee then drafted an amendment to Rule 16 for consideration by the committee at its April 2005 meeting. At that meeting by a vote of 8 to 3, the committee endorsed the amendment in principle and asked the subcommittee to continue its drafting efforts.

Judge Bucklew noted that, after further consideration, the subcommittee was now proposing the following amended language:

> (H) *Exculpatory or Impeaching Information*. [Except as provided in 18 U.S.C. § 3500,] upon a defendant's request, the government must make available no later than the start of trial all information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant because it tends to be either exculpatory or impeaching. [The court may order disclosure earlier, but in no instance more than 14 days before trial.]

She also noted that the Department had prepared a new memorandum opposing the proposed amendment, which was included in the committee materials.

One member requested clarification as to whether the committee was simply discussing language changes or whether, given the scope of the latest revisions, the substance of the amendment should be revisited. Judge Bucklew responded that the committee had already approved the amendment in principle at its April 2005 meeting and that its task now was to complete work on the wording. Ms. Fisher said that the Department of Justice understood that the committee had already decided that an amendment was appropriate, that disclosure was important, and that the amendment should be designed not to create serious problems. She argued, however, that the pending proposal went much further than what was originally discussed and well beyond the constitutional standard identified by Supreme Court case law. Unlike the local rules surveyed in the Federal Judicial Center report, the proposed amendment was not merely codifying *Brady*.

Judge Bucklew inquired as to the status of the Department's effort, reported previously to the committee, to amend the U.S. Attorneys' Manual to address concerns raised by the amendment's proponents. Ms. Fisher assured the committee of her personal commitment to work to codify the disclosure obligations in the manual and to include a discussion of best practices. She requested an opportunity to address that task. Mr. Goldberg, the subcommittee chair, commented that although the Department had been talking about amending the manual for more than two years, it had not yet done so. He explained the subcommittee had not attempted to codify *Brady*, but rather to craft a rule of basic fairness that would require prosecutors to provide defense counsel with all exculpatory information—whether or not the prosecutors deemed such information to be material—in a timely manner.

The committee discussed the proposed amendment to Rule 16.

One member supported the rule in principle but expressed concern that the start of trial is too late in the process for exculpatory material to be meaningful, particularly in complex cases. On behalf of the subcommittee, Mr. Goldberg reported that the change reflected a compromise on this issue.

The committee discussed the advisability of omitting a "materiality" standard for information that must be disclosed. One member argued that omitting materiality was necessary to prevent prosecutors from disclosing exculpatory or impeaching information only when they predict that it might cause reversal of a conviction on appeal. Another member supported this view, commenting that, in his long experience as both a federal prosecutor and defense attorney, it was critical that the materiality test be eliminated from the rule.

There was some discussion of how the omission of a materiality standard would affect review on appeal and habeas corpus. On appeal, the addition of a discovery obligation under Rule 16 would allow the defendant to present the failure to provide exculpatory or impeachment information as a rules violation, rather than solely a constitutional violation. As a rules violation, however, the claim would be subject to Rule 52, and accordingly the impact of the failure to disclose would still be considered. However, the government would have the burden of demonstrating that the failure had no impact, instead of requiring the defendant to demonstrate materiality. The standard of review on habeas corpus would not be affected.

The committee discussed whether the language of the rule should refer to "information" or "evidence." Judge Levi noted that the *Brady* standard was "evidence and information that might lead to evidence." He suggested using "evidence or information" in the rule and clarifying the note to say that only information that might lead to evidence is implicated. Professor Beale said she thought "information" included all "evidence." It was noted that Rule 16's current language refers to "information subject to discovery."

Following a brief recess, Judge Bucklew reported that Ms. Fisher had proposed, as an alternative to proceeding with the amendment, allowing the Department to deliver draft language to the committee before its next meeting for possible inclusion in the U.S. Attorneys' Manual. One member asked whether the proposed draft would simply require compliance with *Brady* or do something more. Another asked whether it would retain the materiality standard. Ms. Fisher said she lacked authority to commit to exact language, but while the proposed language would not include every provision in the proposed amendment, it would be more definitive regarding prosecutors' obligations and best practices. After additional discussion, Judge Bucklew stated that the committee looked forward to a proposed change in the United States Attorneys' Manual. The committee then turned its attention to the language of the proposed rule.

Judge Bartle moved that the proposed reference to "information" be retained as drafted. Another member recommended adopting the language of the civil discovery rule, FED. R. CIV. P. 26(b), *i.e.*, "reasonably calculated to lead to discovery of admissible evidence." That is a standard with which courts and practitioners are familiar, unlike "information" that "tends to be exculpatory," whose application would be less clear. The committee discussed whether the language of the civil rule could work in the criminal context. One member suggested the rule would be too broad unless its scope were limited to "admissible evidence or information that could reasonably lead to such

evidence." Another noted that the rule limits "information" to "exculpatory or impeaching" information. After further discussion, the committee voted 7 to 4 in favor of the motion to use the word "information" in the proposed rule.

The committee then considered whether the bracketed language "[Except as provided in 18 U.S.C. § 3500]" should be included. One member argued that it should be left up to judges to wrestle with the inherent tension between *Jencks* and *Brady*. Ms. Rhodes said the Department took no position on whether the language should be included. Judge Jones moved to omit the bracketed language. The committee voted in favor of the motion, without objection.

Professor Beale raised the issue in the final brackets, namely, whether to prohibit a court from accelerating disclosure more than 14 days before trial. One member asked why that would be problematic in the case of impeaching information. Ms. Rhodes said that the Department felt strongly that such a provision was necessary so the government could adequately protect lay witnesses during a fixed window of time under its control.

The committee discussed whether proposed language would conflict with local court rules. One member said that his district had a local rule requiring disclosure of evidence negating guilt within 28 days of arraignment. He did not believe that a defense attorney could properly prepare a case for trial if exculpatory evidence were received less than 14 days before trial. Ms. Rhodes said she thought they were only discussing impeaching evidence, and not exculpatory. One member noted that the bracketed language covered both. Another suggested expressly limiting the bracketed sentence to impeaching evidence. One member noted that virtually every court requires disclosure of exculpatory evidence within a certain number of days after arraignment.

Ms. Rhodes noted that since between 93 and 96 percent of federal cases resulted in a plea rather than a trial, it is critical that lay witnesses be exposed only in those cases that actually proceed to trial. One member noted that impeaching information that might be used to impeach a witness or to support a suppression motion clearly should be handled differently from exculpatory evidence, because the latter is critical whether or not the case proceeds to trial.

Professor King moved that the final proposed bracketed sentence (lines 11-12) be limited to apply only to impeaching evidence. The motion was approved by voice vote, without objection.

One member expressed concern that the phrase "no later than the start of trial" could be misinterpreted as setting the day of trial as the presumptive disclosure deadline, even for exculpatory evidence, which he considered too late in the process. Local court rules, as surveyed by the Federal Justice Center, typically require disclosure of exculpatory evidence a certain number of days after indictment or arraignment. Another member said he thought the deadline should also be earlier for information relating to a motion to suppress, because receiving that information on the day of trial

is also too late. Ms. Rhodes responded that prosecutors often do not come across such evidence until they are actually preparing a case for trial, often about a month before the trial date.

A member moved that the phrase "no later than the start of trial" be deleted and that each court establish a timetable according to its own local culture. The committee approved the motion without objection and decided to amend the language in the final brackets to "The court may not order disclosure of impeachment information earlier than 14 days before trial."

Judge Levi noted that Standing Committee members had been emphasizing that the fundamental purpose of the federal rules is to achieve a level of national consistency. He predicted the committee would probably have concerns about a system where criminal defendants have significantly different procedural rights that could drive outcomes depending on the district in which they are prosecuted. Another participant agreed and suggested that this type of potential discrepancy among districts could prompt the Standing Committee to launch a criminal local rules project examining all local rules relating to criminal procedures in the federal courts.

The committee considered the phrase "information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant." Specifically, the members discussed whether references to "the government" should be changed to "the attorney for the government" and whether the provisions should be expressly limited to apply only to those persons directly involved in the government's investigation of the specific case at issue. One member argued it would be unreasonable for the rule to cover information that "through due diligence could be known to the government," because doing so would require federal prosecutors to verify every statement made by one law enforcement officer with every other officer at the scene. Ms. Fisher said that the Department would favor eliminating the "due diligence" language and adhering more closely to the standard articulated in the case law, namely, that which is known to the attorney for the government and to agents of the government involved in investigating the case. Ms. Fisher moved to change the amendment to read "all information that is known to an attorney for the government or to any law enforcement agent involved in the case." The motion was approved in a voice vote without objection. It was noted that the second use of the term "government" in line 11 should then probably be changed to "they."

Professor Beale requested committee discussion of the Department's contention that the combined effect of "may" and "tends to" in the proposed amendment produces too broad and amorphous a standard. One member moved to change "may be" and "tends to be" to "is" in the phrase "has reason to believe *may be* favorable to the defendant because it *tends to be* either exculpatory or impeaching." The committee approved the motion.

Judge Bucklew suggested that the approved changes be made in the rule and the committee note and that the revised rule and note be reconsidered by the subcommittee and then the full committee at its April 2006 meeting.

The committee discussed whether "exculpatory information" should be defined further in the note. One member moved that the note clarify that if information can reasonably be considered both impeaching and exculpatory, the timing rules governing exculpatory evidence should apply. A majority of the committee voted against the motion by voice vote. Another member moved to define "exculpatory" as any evidence that would negate a defendant's guilt as to any count. The committee voted in favor of the motion, without opposition.

### C. Rules 1, 12.1, 17, 32, 43.1 (Crime Victims Rights Act package of rules)

Judge Bucklew gave a brief explanation of the background. She reported that the committee had approved an amendment to Rule 32 to enhance victim rights. It had been proceeding through the rules process, but the enactment of the Crime Victims Rights Act (CVRA) by Congress had caused the Judicial Conference to ask the Supreme Court to withdraw the proposed rule. The enactment of the CVRA prompted the committee to consider developing a broader package of changes. She noted that she had appointed an ad hoc subcommittee, chaired by Judge Jones, to evaluate suggestions on how best to amend the criminal rules in light of the new legislation. The other members of the subcommittee are Judge Battaglia, Justice Edmunds, Professor King, and Ms. Rhodes. The subcommittee, she noted, had carefully reviewed a set of proposals in a lengthy article prepared by Judge Paul Cassell.

Judge Jones reported that the subcommittee had reached two major decisions early on. First, they decided they should be somewhat conservative in their approach and not create rights beyond those provided by the Act. Second, the subcommittee decided to place most of the amendments in one major rule, Rule 43.1, rather than scatter the provisions throughout the rules. In addition to new Rule 43.1, the subcommittee was also proposing amendments to the following rules: Rule 1, Rule 12.1, Rule 17, Rule 18, and Rule 32.

Judge Jones explained that the subcommittee had decided to define "victim" in Rule 1 by referencing the statute itself. He added that an amendment to Rule 12.1 would still require government disclosure of the identity of a victim who is also a witness on the issue of alibi, but the victim's address and telephone number would be disclosed only if the court is satisfied that they are needed. Professor Beale reported that several non-substantive numbering changes to Rule 12.1 had been proposed by the Style Consultant after her memorandum of September 19, 2005.

Judge Jones described the proposed change to Rule 17 that would prohibit subpoenas for "personal or confidential information about a crime victim" absent a court order. The court would

have the discretion to require that the victim be notified and given an opportunity to move to quash. There was a discussion about whether such a motion would be brought by the government or whether the victim would have to retain counsel. Judge Jones said he thought the government would have standing to represent the victim. Professor Beale noted that the rule does not address exactly what information the government needs to provide victims. Judge Jones said one option would be to place the bracketed material in the proposed rule in the note, given concerns over premature disclosure of the government's theory of the case and work product. Professor Beale noted that the rule says only that the court "may" require, letting the court decide whether to give notice and, if so, what such notice should include. Judge Jones explained that requiring notice in all cases would seem inappropriate in cases involving, for instance, national fraud, where there are balancing factors the court should consider.

Regarding Rule 32, Judge Jones explained the several changes. First, the definition was deleted as no longer applicable. The bracketed phrase "victims [of the crime]" was suggested for subdivision (d) to make clear that it only concerned victims of the crime in question, not victims of other crimes. Professor Beale stated that words such as "verified" and "nonargumentative style" had been deleted to make the wording of the rule more neutral. Judge Jones noted that language about the victim's right to be heard had been left in the "Sentencing" section because the current rule already contained language to that effect. Professor Beale commented that the subcommittee had tried to stick as close as possible to the statutory language and the congressional compromises reflected in the Act. She explained that the phrase "reasonably heard" had come directly from the statute and that courts would have to construe exactly what it meant as situations came before them. Judge Jones noted that future experience could well reveal the need for further victim-related provisions.

Judge Jones said that proposed Rule 43.1 was the main rule setting forth victims' general rights. The subcommittee's conclusion was that this should not be simply a restatement of legal rights, but should specify what needs to be done and when. Some decisions on what and when, though, had yet to be reached. For instance, the proposed rule requires notice of "any public court proceeding involving the crime" and it is not clear whose burden it would be to provide such notice. The Justice Department, which is working with the Administrative Office on a system, is arguably in a better position to do that, since courts often do not know who the victims are, particularly early on. Because of the collaboration between the Department and the Administrative Office on designing a notification system and because certain statutes required other agencies to provide the notice, Professor Beale recommended retaining the passive phrasing. There was further discussion on who is responsible for notifying victims under the CVRA.

One member asked why the rule omitted reference to "parole proceeding" as mentioned in 18 U.S.C. § 3771(a). Professor Beale explained that parole proceedings were outside the scope of the criminal rules, as they take place before parole boards rather than the courts.

One member questioned the practice of restating statutes in the rules. He asked whether it is necessary, for instance, to restate the Jencks Act in the rules. Judge Jones said the subcommittee believes that it is important to clarify certain procedural aspects of the Crime Victims Rights Act in the rules. Professor Beale said there seemed to be a widespread expectation that the federal rules themselves covered all major court procedures. One participant noted that courts were being discouraged from restating federal rules in their local rules, because such restatements: (1) might not be accurate, and (2) might create an expectation that a procedure was less important if not restated in the local rules. Those same considerations might apply to restating federal statutes in federal rules. Professor Beale noted that certain victim rights had existed prior to the legislation, but had been buried in Title 42. The Act had raised the profile of victim rights, and there was a feeling that they should be accorded similar prominence in the rules.

One member asked about the phrase "[district] court" in subdivision (a)(3). Professor Beale said there was a desire to make clear that the rule does not apply, for instance, to a sentence-related hearing in the court of appeals. There was a discussion of whether these rights apply to a civil habeas corpus hearing. One member wondered whether the rules should make it clear that these rights do not apply to oral arguments before a court of appeals or in a civil forfeiture proceeding. Judge Jones responded that was precisely why some had suggested including the bracketed word "district." Professor Beale noted, though, that while victims have no right to be heard in an oral argument, they probably do have the right to be notified that the oral argument is taking place. Although the rule recognizes the right to notice in "any public court proceeding," it restricts the right to be heard to proceedings "involving release, plea, or sentencing involving the crime."

Professor Beale asked whether there was committee support for changing (a)(2) and (a)(3) and the Style Consultant's suggestion for titling subdivision (a) "Rights of Victims – In general." There was no objection to this suggestion.

Judge Levi expressed concern over the final phrase in Rule 43(1)(b)(3), which gives a victim the right to assert rights "if no prosecution is underway, in the court in the district in which the crime occurred." Judge Jones said the Crime Victims Rights Act affords victims certain rights even in the absence of a case. Judge Levi noted, however, that the criminal rules only apply to proceedings in filed cases. Judge Jones explained that the subcommittee had decided to include it because there might be a pre-prosecution proceeding of some sort to which the provision might apply. There was discussion as to whether a grand jury investigation might qualify as such. Professor Beale said that, while the Act might give victims certain rights, such as being treated respectfully, Judge Levi was probably correct that the rights covered by the criminal rules could only be asserted with respect to a case being prosecuted. After further discussion, Judge Jones said the phrase would be deleted, as Judge Levi had suggested.

Several language change suggestions were discussed. One participant asked whether the subcommittee had considered excluding the criminal defendant for all purposes from the definition

of victim. There was discussion over whether a victim accused of the crime or a victim co-defendant would be included. Professor Beale said she thought that a contradiction existed in the statute. Concern was also expressed about the numerous references to "rights" in the context of federal rules. One member suggested changing the beginning of Rule 43.1(b)(4)(A) to "the victim has asked to be heard." Another suggested that the reference to "right under this rule" in Rule 43.1(b)(4) should be changed to "right under these rules," because a few victim rights had been placed in rules other than Rule 43.1. Professor King expressed concern that such broad language might implicate other criminal rules that arguably include "rights" affecting victims—e.g., speedy trial, open trial, sequestration—which, if denied, might indeed "provide grounds for a new trial." It was suggested that the committee wait to see if others expressed this concern during the public comment period. Another member urged retention of the bracketed language "[which may be granted ex parte]" in Rule 17 (p. 6, line 10). There was also discussion about how the definition of "victim" in Rule 1(b)(11) and the note should be worded to exclude someone accused of the crime, so as to prevent a defendant from claiming to be a victim and trying to claim victim rights.

Returning to Rule 32, a participant suggested that the proposed addition to Rule 32(d)(2)(B) read "any financial" instead of "the financial" (line 29), and "any victims" instead of "victims" (line 30). He also recommended against including the bracketed phrase "[of the crime]" (line 31), because the definition of "victim" has already been limited to the relevant crime in Rule 1(b)(11). Several members voiced support for such changes. The participant also suggested replacing one of the two instances of the word "involving" in Rule 43.1(a)(3), possibly with "concerning."

There was a discussion whether deleting subdivision (a) from Rule 32 would require renumbering the remaining subdivisions of that rule or whether it should simply be "reserved." Support for the latter was expressed. Professor Schlueter suggested as an alternative that Rule 32(a) be revised to state: "The term 'victim' is defined in Rule 1."

Judge Bucklew set forth two options on how to proceed: (1) the subcommittee could make the changes just discussed and place the rule back on the next meeting's agenda; or (2) the changes could be circulated to the subcommittee and the committee could send a revised version to the Standing Committee with a recommendation to publish with the changes just discussed along with those proposed by the Style Consultant. Judge Jones moved that the latter option be pursued. The motion carried without objection.

## V. PENDING RULES PROJECTS

### Status Report on the Rules Time Computation Project

Judge Mark Kravitz, chair of the Standing Committee's Time-Computation Subcommittee, reported on the status of the Time Computation Project. The subcommittee, comprised principally of practicing lawyers, is focusing first on how time is computed (e.g., not counting weekends when a period is shorter than 11 days). Professor Patrick J. Schiltz, who serves as the subcommittee's reporter, had prepared a memorandum on the topic, which had been circulated to the reporters of the Standing Committee and the advisory committees. The subcommittee met and discussed adopting a "days are days" principle. They also discussed the "three-day rule" and instances of court inaccessibility in an electronic age (e.g., court servers down but courts up, or servers up but courts closed).

Judge Kravitz said that the subcommittee would try to craft a template that could be used across the rules, as recently done with the privacy rules. He hoped the time-computation principles would be considered by the Standing Committee in January 2006. The advisory committees would then be asked to comment in Spring 2006. If the Standing Committee adopted the proposed principles at its mid-2006 meeting, they would be placed on hold. Each advisory committee would be asked to consider "translating" deadlines determined under the old rules into new deadlines calculated under new time-computation rules. The subcommittee would serve only as a clearinghouse for evaluation of such deadlines. Deadline changes approved by the advisory committees would then be collectively evaluated by the Standing Committee in 2007. The public would be presented with both the revised time computation standards and the deadline changes at the same time.

One member advocated adopting a simpler, "multiple of seven" deadline system. Judge Kravitz said he thought the subcommittee might eventually recommend that approach, but that it was up to each advisory committee to decide. Another member wondered whether the three-day rule should be eliminated. Judge Kravitz said it might not, because of concerns that changing the rule might provide unwelcome incentives to use certain forms of service.

## VI. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

### A. Rules 4 and 5, Professor Malone's Proposal

Judge Bucklew invited the committee's consideration of the proposal by Professor Linda Malone, Marshall-Wythe Professor and Director of Human Rights and National Security Law at William & Mary School of Law that Rules 4 and 5 be amended to provide that foreign citizens be advised of their right to contact the consulate of their country whenever they are either served with

an arrest warrant or arraigned, in accordance with Article 36 of the Vienna Convention. The committee had tabled the proposal at its April meeting, given that a case examining the enforceability of the Vienna Convention was then pending before the Supreme Court. The Court later dismissed certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088 (May 23, 2005). A habeas corpus petition was then filed in a Texas court. The case is still pending.

Mr. Elston stated that the Department of Justice already has internal policies in place advising U.S. attorney's offices of how to proceed and making notification mandatory for defendants from certain countries. Although there are occasional mistakes and omissions, the Department believes that there is no problem that requires a rule, at least not in the federal courts. Judge Bucklew noted that the Texas court had not yet ruled in the *Medellin* case. One member suggested that a rule might indeed be warranted, because the United States had undertaken this obligation in a treaty and yet he had never heard anyone, either in state or federal court, report that they had read a defendant "his Miranda rights and his right to contact the consulate." One member said that he did not believe that the exclusionary rule applies—or should apply—and he did not think that the committee should spend too much time considering this rule, because it would not likely be adopted.

Judge Bucklew said that her district sees a lot of foreign nationals who arrive by boat. She wondered whether agents of the Federal Bureau of Investigation are in fact notifying all of them of their rights under the Vienna Convention. The Justice Department representatives responded that, depending on the country of origin, notification is mandatory. Actually, though, detainees sometimes ask U.S. officials *not* to notify their country of origin. Occasionally, it is not known that a defendant is a foreign national. The Department expressed concern over a federal rule's potential legal ramifications. The Department does not consider such notification discoverable and does not turn it over to defense counsel. One member asked how it would be known whether notification has taken place. The Department said that it kept a record and that, during counsel's interview through a translator, the client could confirm notification. The Department said that it already had every incentive to honor this right, because many Americans travel abroad and want this right honored by foreign governments.

Following discussion, the committee voted to table the proposal indefinitely. Judge Bucklew noted that the proposed amendments could be re-visited at a later date if new developments warranted.

### B. Rule 10, Waiver of Arraignment, Judge McClure's Proposal

Judge Bucklew then invited consideration of a proposal by Judge James F. McClure, Jr. that Rule 10 be amended to permit waiver of arraignment, not just waiver of a defendant's *appearance* at arraignment. Such a waiver is reportedly allowed in state court in two counties of Pennsylvania. The issue had been tabled at the Spring meeting. Judge Bucklew noted that the arraignment was a

triggering event for five other criminal rules, so waiving the arraignment might prove problematic. Judge McClure had suggested that the amendment would save both money and time for the courts.

One member argued that waiving the arraignment would save little court time in southwestern states with a majority of fast-track cases where prosecutions are filed by information rather than by grand jury indictments, because defendants would still have to be present to waive Rule 7 indictment. Another member reported that, in his court, arraignments always take place on the day of trial. One member noted that arraignments represent more than pro forma hearings, because it is often the first time lawyers meet with their clients. Following discussion, the committee voted to table the proposal indefinitely.

## VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew reminded the members that the next committee meeting was scheduled for April 3-4, 2006, in Washington, D.C.