COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2007
San Francisco, California

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Monday and Tuesday, June 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

The Department of Justice was also represented at the meeting by Ronald J. Tenpas, Associate Deputy Attorney General, and Alice S. Fisher, Assistant Attorney General for the Criminal Division.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Administrative Office senior attorney
Jeffrey N. Barr	Administrative Office senior attorney
Joe Cecil	Research Division, Federal Judicial Center
Matthew Hall	Judge Levi's rules law clerk
Professor Geoffrey C. Hazard, Jr.	Committee consultant
Professor R. Joseph Kimble	Committee consultant

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Levi noted that the agenda materials for the meeting were voluminous, consisting of five binders and several separate handouts. He suggested that the committee consider taking further steps to distribute the work more evenly between its January and June meetings, since the January meetings tend to have a lighter agenda. He expressed his gratitude to Judge Rosenthal for agreeing, on behalf of the Advisory Committee on Civil Rules, to lighten the committee's agenda by deferring consideration

of a proposed revision of FED. R. CIV. P. 56 (summary judgment) in order to pursue further dialog with the bar on the proposed rule.

Judge Levi reported with great sadness the death of Mark Kasanin, a distinguished San Francisco attorney and member of the Advisory Committee on Civil Rules from 1993 to 2002. He pointed to Mr. Kasanin's unrivaled expertise in admiralty law, his great insight and judgment, and his broad connections with the practicing bar. Judge Levi noted that Mr. Kasanin had brought to the committee's attention the difficult practical issues faced by the bar with regard to discovery of information stored in electronic form. Indeed, he had been instrumental in getting the advisory committee to initiate the project that eventually produced the package of "electronic discovery" amendments to the civil rules that took effect on December 1, 2006. Judge Levi said that Mark's wife, Anne, had come to all the committee meetings and was well loved by all. He asked the committee to send its condolences to her.

Judge Levi reported that the Chief Justice had named Judge Rosenthal to replace him as chair of the Standing Committee. He said that she would be an absolutely superb chair. He also reported that the Chief Justice had named: (1) Judge Kravitz to replace Judge Rosenthal as chair of the Advisory Committee on Civil Rules; (2) Judge Tallman (9th Circuit) to replace Judge Bucklew as chair of the Advisory Committee on Criminal Rules; (3) Judge Hinkle (N. D. Fla.) to replace Judge Smith as chair of the Advisory Committee on Evidence Rules; and (4) Judge Swain (S. D. N.Y.) to replace Judge Zilly as chair of the Advisory Committee on Bankruptcy Rules.

Judge Levi thanked Judge Kravitz for his enormous contributions to the Standing Committee, and most especially for his work in drafting and coordinating the package of time-computation rules to be considered by the committee later in the meeting. He expressed his delight that Judge Kravitz would soon take over as chair of the Advisory Committee on Civil Rules.

Judge Levi noted that Judge Bucklew had been in the eye of the storm during her term as chair of the Advisory Committee on Criminal Rules, as the committee considered several very controversial proposals of public importance that generated sharply divided views. He noted that it is extremely difficult to achieve common ground, but Judge Bucklew had been masterful in achieving it wherever possible.

Judge Levi pointed out that the Advisory Committee on Evidence Rules, under the leadership of Judge Smith, had worked hard to produce the proposed new FED. R. EVID. 502 (waiver of attorney-client privilege and work product protection), which should be of enormous benefit to the American legal system. He thanked Judge Smith for his exceptional leadership in producing a top-quality product.

Judge Levi pointed out that Judge Zilly had served as chair of the bankruptcy advisory committee during a period of extraordinary rules activity in the wake of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that the committee had been amazingly productive in implementing the massive legislation in a very short period. He thanked Judge Zilly for his grace and good humor under pressure.

Judge Levi noted with regret that the terms on the Standing Committee of Judge Fitzwater and Judge Thrash were about to end and that they would attend their last meeting in January 2008. He said that they had been sensational committee members. Judge Fitzwater, he said, was exceptionally bright and a great problem-solver. Among other things, he noted, Judge Fitzwater had produced the template privacy rule used by the advisory committees to implement the E-Government Act of 2002.

Judge Thrash, he said, had been a member of the style subcommittee and had been instrumental in developing the electronic-discovery and class-action civil rules amendments. In addition, he pointed out, Judge Thrash had played a vital role in shaping the way that committee notes are written, believing that they should normally be short and to the point. He also praised Judge Thrash for his great wit and good heart.

Judge Levi also expressed appreciation for the superb support that he and the six rules committees have enjoyed from the staff of the Administrative Office. He noted that Judy Krivit had just announced her retirement after 16 years with the rules office, and he asked that the minutes reflect the committee's heartfelt thanks and gratitude for her dedicated service.

Judge Levi reported briefly on the rules changes approved by the Supreme Court in April 2007 that would take effect on December 1, 2007. He noted particularly the milestone achievement of restyling the entire Federal Rules of Civil Procedure. The restyled civil rules will also take effect on December 1, 2007.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on January 11-12, 2007.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters of interest to the committee. First, he said, a subcommittee of the Judiciary Committee of the House of Representatives had just held a hearing on the proposed Bail Bond Fairness Act. The legislation would directly amend FED. R. CRIM. P. 46 (release from custody) to limit a

judge's authority to forfeit a bond for violation of any condition of release other than failure of the defendant to appear at a court proceeding. He reported that Judge Tommy Miller, a former member of the Advisory Committee on Criminal Rules, had testified at the hearing to express the opposition of the Judicial Conference to the legislation. He noted that the Department of Justice was also opposed to the measure. The bill had been reported out of the House Judiciary Committee in the last Congress and was expected to be reported out again this year. But, he said, the prospects for ultimate enactment in this Congress were not favorable.

Mr. Rabiej reported that a draft response had been prepared to a letter from Senator Kyl, which expressed concerns about the limited nature of the changes proposed by the advisory committee to the criminal rules to accommodate the Crime Victims Rights Act. He said that the draft was still being reviewed, but would be sent shortly.

Finally, Mr. Rabiej reported that the privacy amendments to the rules required by the E-Government Act of 2002 will take effect on December 1, 2007. He noted that the amendments essentially codify, with some adjustments, the Judicial Conference's existing privacy policy developed originally by its Court Administration and Case Management Committee.

He said that the Court Administration and Case Management Committee was in the process of updating the privacy policy and was exploring three issues that might have a future impact on the federal rules. First, he said, the committee would encourage the courts not to place certain types of documents in the public case file because they contain personal information that would have to be redacted. Second, the committee was examining a number of problems raised by the posting of transcripts on the Internet. He said that the new policy will likely state that transcripts should not be posted until 90 days after the transcript is delivered to the clerk of court.

The problem remains, though, as to who will be responsible for redacting personal information from the transcripts before they are posted. Under the new federal rules, responsibility falls on the person filing a document, but it is not reasonable to expect the court reporter to be responsible for redaction. Thus, he said, the Court Administration and Case Management Committee was considering requiring the parties to redact personal information and give their edits to the reporter. Finally, Mr. Rabiej said that the Court Administration and Case Management Committee was concerned about persons who surf the web in order to obtain embarrassing or sensitive information about individuals.

Mr. McCabe reported that the rules office was in the process of posting the rules committees' agenda books on the Internet. He noted that the staff was also continuing its efforts to locate and post historic rules committee documents.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center (Agenda Item 4). He directed the committee's attention specifically to a preliminary report by the Center on the processing of capital habeas corpus petitions in the federal courts. The research, he said, shows great variation among the courts as to the speed at which they handle and terminate these cases. He noted, too, that a great deal of the time charged against the federal courts really consists of the time that cases are pending on remand in the state courts.

Judge Levi thanked the Center for its work in compiling and analyzing the local district court rules, orders, and policies dealing with *Brady v. Maryland* requirements. He said that the Center would be prepared to conduct further research on how the rules, orders, and policies actually work in practice, if the committee requests it. Mr. Cecil also reported that the Center was in the process of studying the local rules and procedures of the federal courts in implementing the Crime Victims' Rights Act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in their memorandum of May 9, 2007 (Agenda Item 5).

Judge Kravitz said that he and Professor Struve would address the time-computation template rule and substantive issues, and then each advisory committee would address its own specific rules. He noted that the template had been exceedingly difficult to perfect, but it had improved substantially over time due to many refinements suggested by the advisory committees and their reporters. He highlighted two changes that had been added to the template since the January 2007 meeting.

First, he explained that a number of statutes provide an explicit method for counting time, such as by specifying "business days" only. The template, he said, had been amended to apply only to statutes that do not themselves specify a method. Second, he said, the drafters of the template had struggled with how to count backwards when the clerk's office is inaccessible on the last day of a deadline. He thanked Judge Hartz for recommending that the inaccessibility provision be placed in a separate section. In addition, the committee note will emphasize that although a judge may set a different time by order in a specific case, a district court may not overrule the provisions of the national rule through a local rule or standing order.

Professor Struve added that the template had been amended to add a definition of "state" that includes the District of Columbia and the commonwealths, territories, and possessions of the United States. She noted that the Advisory Committee on Appellate

Rules was still considering the definition and whether to extend it to become a global definition for the appellate rules as a whole. She noted, too, that the template had been adjusted to take account of the fact that some circuits and districts span more than one time zone. She said that the advisory committees were still considering making that adjustment in their own rules.

Judge Kravitz pointed out that the committee was planning to seek legislation to change some short time periods set forth in statutes. The public comments, he said, should be helpful in identifying any statutes that need to be changed. Professor Struve added that the advisory committees had been working hard at identifying any statutes impacted by the proposed rules, and the Department of Justice should complete a comprehensive review of statutes by the end of June. She suggested that the rules web page could provide a link to the list of all the statutes that the committees discover.

Judge Kravitz said that consideration had been given to including language in the template authorizing a judge to alter statutory deadlines for a variety of circumstances, but the idea was not pursued. With regard to legal holidays, he said, the text of the rule will not be changed, but the committee note will include a new sentence addressing ad hoc legal holidays declared by the President, such as the holiday to honor the late President Gerald F. Ford. In addition, individual courts will have to coordinate all their local rules by December 1, 2009, to adjust to the new time-computation method. Finally, Judge Kravitz announced his appreciation that Judge Zilly and the Advisory Committee on Bankruptcy Rules had extended themselves to prepare a complete package of time-computation amendments to the bankruptcy rules so that they can be published at the same time as the time-computation amendments to the other rules.

Judge Kravitz reported that each of the advisory committees would publish its version of the time-computation amendments in August 2007. He said that careful consideration needed to be given to the format of the publication. He suggested that it would be best to include a covering memorandum from Professor Struve explaining what the committees are trying to do on a global basis, and also to put the bar at ease that the net result will be that existing deadlines will not be shortened. But, he said, each advisory committee will be publishing other rules amendments having nothing to do with time computation. So, it would be advisable to have a single time-computation package that stands out from any other proposed rule changes. It might also include a list of all the specific time periods and rules being changed and alert the district courts to begin the process of making conforming changes in their local rules.

APPELLATE RULES TIME COMPUTATION

Judge Stewart reported that the Advisory Committee on Appellate Rules had adopted the template as a revision of FED. R. APP. P. 26. Professor Struve noted that the

advisory committee had modified the template to add subparts to Rule 26(a)(4) to recognize that a court of appeals may span more than one time zone. This, she said, is more likely with the courts of appeals than the district courts. She also noted that the proposed definition of a "state" in the appellate rules is slightly different from the template version.

Professor Struve said that the advisory committee generally had increased the 7-day time periods in the rules to 14 days. But, she noted, the proposed change from 7 days to 14 days in Rule 4(a)(6) would require a statutory change to 28 U.S.C. § 2107 to make the rule and the statute consistent. In a couple of places, she added, the advisory committee had increased the time period from 7 days only to 10 days, rather than 14, based on policy considerations involving the need for prompt responses.

In addition, Professor Struve said that the advisory committee had compiled a list of statutory time limits that should be lengthened. But the list does not include various 10-day statutory periods for taking an appeal, *e.g.*, 28 U.S.C. §§ 1292(b), 1292(d)(1), and 1292(d)(2), which the new time-computation method would effectively shorten to 10 calendar days. She noted that before the 2002 amendments to FED. R. APP. P. 26, litigators had lived with 10 calendar days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

BANKRUPTCY RULES TIME COMPUTATION

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had agreed to publish its time-computation changes to the bankruptcy rules on the same schedule as the other rules. The advisory committee, he said, agreed with the text of the template rule and accompanying committee note, including the most recent modifications. The template would appear as FED. R. BANKR. P. 9006(a). In addition, specific time changes would be made in 39 separate bankruptcy rules. The advisory committee, he said, had agreed with all the proposed conventions adopted by the other advisory committees – such as increasing periods of fewer than 7 days to 7 days and increasing 10-day periods to 14 days – except in the case of two rules.

The committee concluded that two very short deadlines in the current rules should remain unchanged. First, under FED. R. BANKR. P. 1007(d) (list of 20 largest creditors), a debtor in a Chapter 9 case or Chapter 11 case has two days after filing the petition to file a list of its 20 largest unsecured creditors. Second, under FED. R. BANKR. P. 4001(a)(2) (ex parte relief from the automatic stay), after a party has obtained an ex parte lifting of the automatic stay, the other party has two days to seek reinstatement of the stay. The committee would retain both deadlines at two days.

Judge Zilly reported that the biggest controversy faced by the advisory committee was whether to change the current 10-day period for filing a notice of appeal under FED. R. BANKR. P. 8002. In the end, the committee decided to extend the deadline to appeal to 14 days, consistent with the general convention of increasing 10-day periods to 14 days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CIVIL RULES TIME COMPUTATION

Judge Rosenthal reported that the civil version of the template rule appeared as proposed FED. R. CIV. P. 6(a). She noted that the definition of a "state" had been bracketed in proposed Rule 6(a)(6)(B), and it was also included as a proposed amendment to FED. R. CIV. P. 81 (applicability of rules in general) as a global definition that would apply throughout the civil rules. The current Rule 81, she explained, includes the District of Columbia. It would be amended to include any commonwealth, territory, or possession of the United States.

She explained that in recommending changes to rules that contain specific time limits, the advisory committee had followed the convention of increasing periods of fewer than 7 days to 7-day periods and increasing 10-day periods to 14 days. But Rule 6(b) precludes a court from extending the current 10-day period for filing certain post-trial relief motions. Rather than follow the normal course of extending 10-day time periods to 14 days, the advisory committee had decided to fix the period for filing post-trial motions at 30 days, which is a more realistic period for the bar.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CRIMINAL RULES TIME COMPUTATION

Judge Bucklew reported that the Advisory Committee on Criminal Rules had adopted the template as FED. R. CRIM. P. 45(a). She said that it had not had the opportunity to review the most recent changes in the text of the template, but she did not expect that it would have any problem in accepting them. She explained that the current criminal rule governing time computation, unlike the counterpart provisions in the civil, appellate, and bankruptcy rules, does not specify that the rule applies to computing time periods set forth in statutes. Some courts nonetheless have applied the rule when computing various statutory periods.

Professor Beale explained that it is not clear whether courts in general apply existing FED. R. CRIM. P. 45(a) to criminal statutes. Before the restyling of the criminal rules in 2002, Rule 45(a) had explicitly applied to computing time periods set forth in statutes. Deletion of the reference to statutes apparently was an unintentional oversight occurring during the restyling process. Nevertheless, some attorneys and courts still apply Rule 45 in computing statutory deadlines, as they did before the restyling changes.

Judge Bucklew referred to a few changes in individual time periods. With regard to FED. R. CRIM. P. 5.1 (preliminary examination), she said that the advisory committee would increase the 10-day time period to 14 days and the 20-day period to 21 days, which will require conforming changes in the underlying statute. The committee as a matter of policy decided to increase from 7 days to 14 days the deadlines specified in FED. R. CRIM. P. 29 (motion for a judgment of acquittal), FED. R. CRIM. P. 33 (motion for a new trial), and FED. R. CRIM. P. 34(b) (motion to arrest judgment) in order to give counsel more time to prepare a satisfactory motion. The advisory committee lengthened from 10 days to 14 days the maximum time in FED. R. CRIM. P. 41 (search warrant) to execute a warrant, but there was some sentiment among the committee members not to extend the period.

Professor Beale added that magistrate judges commonly require the government to execute a search warrant in less than the maximum 10 days specified in the current rule. Accordingly, the advisory committee did not believe that it was necessary to retain the 10-day period, rather than extend it to 14 days. She noted, too, that there had been some concern among committee members over extending the time to file a motion for a new trial, but the Federal Rules of Appellate Procedure expressly allow the district court to retain jurisdiction in this circumstance. She said that the advisory committee was of the view that the short time period in the current rules frequently leads parties to file bare-bones motions.

Judge Bucklew reported that the advisory committee was also recommending increasing from 10 days to 14 days the time limits in Rule 8 of the §§ 2254 and 2255 Rules for filing objections to a magistrate judge's report.

Professor Beale added that the advisory committee would make additional, minor changes in the text and note to take account of last-minute changes to the template suggested by the other advisory committees.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

EVIDENCE RULES TIME COMPUTATION

Judge Smith pointed out that the Federal Rules of Evidence do not lend themselves to a time-computation rule, and there is no need for one. Professor Capra added that there are no short time periods in the evidence rules, and a review of the case law had revealed no problems with the current rules. Accordingly, the Advisory Committee on Evidence Rules voted unanimously not to draft a time-computation rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of May 25, 2007 (Agenda Item 10).

Amendments for Publication

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on page 8, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 12.1

Judge Stewart reported that his committee had been asked by the Advisory Committee on Civil Rules to consider adopting a new appellate rule to conform with the proposed new FED. R. CIV. P. 62.1 (indicative rulings). Several circuits, he said, have local rules or internal operating procedures recognizing the practice of issuing indicative rulings. Under the practice, a district court – after an appeal has been docketed and is still pending – may entertain a post-trial motion, such as a motion for relief from a judgment, and either deny it, defer it, or "indicate" that it might or would grant the motion if the court of appeals were to remand the action.

The proposal to formalize the indicative ruling practice in the national rules, he said, had been pending for several years, but had not aroused much enthusiasm in the appellate advisory committee. Some members simply saw no need for a rule. Nevertheless, the committee voted 5-3 to recommend a new appellate rule in order to conform with the new civil rule proposed by the civil advisory committee.

Judge Stewart noted that the original proposal from the Advisory Committee on Civil Rules had contained alternative language choices. One would authorize a district court to state that it "would" grant the motion if the court of appeals were to remand.

The other would authorize the district court to state that it "might" grant the motion if remanded.

He said that the appellate advisory committee was of the view that the second formulation was too weak to justify a remand by the court of appeals, and the first formulation was too restrictive. After consulting with the other committees and their reporters, substitute language was agreed upon that allows the district court to "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." He added that even if the district judge decides to rule on the matter, the court of appeals still has discretion to decide whether to remand.

Judge Stewart noted that the proposed FED. R. APP. P. 12.1 states that the moving party in the district court must provide prompt notice to the clerk of the court of appeals, but only after the district court states that it would grant the motion or that it raises a substantial issue. He noted that the clerks of the courts of appeals had stated strongly that they did not want to be notified at the time a motion is filed in the district court.

Judge Stewart pointed out that the proposed appellate rule covers rulings in both civil and criminal cases. The accompanying committee note explains that FED. R. APP. P. 12.1 could be used, for example, with motions for a new trial under FED. R. CRIM. P. 33. In addition, he said, the text sets the default in favor of the court of appeals retaining jurisdiction. It states that the appellate court may remand for further proceedings in the district court, but retains jurisdiction unless it expressly dismisses the appeal.

Judge Rosenthal explained that the proposed new FED. R. CIV. P. 62.1 had been presented to the Standing Committee at the January 2007 meeting. At that time, several suggestions were made regarding the text of the rule and the need to coordinate closely with the appellate advisory committee. That coordination, she said, had been very productive, and the resulting civil and appellate rules provide an intelligent way to frame precisely what the district court must do. Professor Cooper added that there are a few places in which the committee notes need to be modified further.

Several members said that the proposed rules would promote efficiency. One asked whether the appellate rule would govern bankruptcy appeals. Professor Struve replied that, as written, it would cover bankruptcy appeals, although they are not mentioned specifically in the text. She added that if the Federal Rules of Bankruptcy Procedure were amended to address indicative rulings, the proposed appellate rule would accommodate the change.

The committee without objection by voice vote approved both proposed new rules – FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1 – for publication.

FED. R. APP. P. 4(a)(4)(A) and 22(b)

Judge Stewart reported that the proposed amendments to Rules 4(a)(4)(A) (time to file an appeal) and 22(b) (certificate of appealability) were designed to conform the Federal Rules of Appellate Procedure to changes proposed by the Advisory Committee on Criminal Rules to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255.

The committee without objection by voice vote approved the proposed amendments for publication. But later in the meeting, the committee voted to publish only the proposed amendment to Rule 22(b), which dealt just with the certificate of appealability. See page 41.

FED. R. APP. P. 4(a)(4)(B)(ii)

Judge Stewart explained that the proposed amendment would eliminate an ambiguity created as a result of the 1998 restyling of the Federal Rules of Appellate Procedure. The current, restyled rule might be read to require an appellant to amend its prior notice of appeal if the district court amends the judgment after the notice of appeal is filed – even if the amendment is insignificant or in the appellant's favor. The advisory committee, he explained, would amend the rule to return it to its original meaning. Thus, a new or amended notice of appeal would be required only when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or an alteration or amendment of a judgment on such a motion.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. APP. P. 4(a)(1)(B) and 40(a)(1)

Judge Stewart reported that the advisory committee had approved amendments to Rule 4(a)(1)(B) (time for filing a notice of appeal) and Rule 40(a)(1) (time to file a petition for a panel rehearing) to make clear that they apply to cases in which a federal officer or employee is sued in his or her individual capacity. The committee decided, however, to batch the proposals and await a time to present them with other amendments to the Standing Committee.

Judge Stewart added that the advisory committee also has under study the broader question of whether to treat state government officials and agencies the same as federal officers and agencies in providing them with additional time. The study, though, is unrelated to these proposed amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. APP. P. 26(c)

Judge Stewart reported that the proposed amendment to Rule 26(c) (computing and extending time – additional time after service) would clarify the operation of the "three-day rule." The three-day rule gives a party an additional three days to act after being served with a paper unless the paper is delivered on the date of service stated in the proof of service. The proposal, he said, would bring FED. R. APP. P. 26 into line with the approach taken in FED. R. CIV. P. 6 by specifying that the three days are added after the period would otherwise expire under Rule 26(a). He noted that the amendment had been approved by the advisory committee in 2003, but batched for submission to the Standing Committee at a later time as part of a larger package of amendments.

Professor Struve explained that the advisory committee recommended publishing the amendment with two alternative versions of the committee note. Option A would be used if the time-computation amendments are adopted. Option B would be used if they are not. Judge Kravitz recommended that the rule be published with Option A of the note only, and Judge Stewart concurred.

The committee without objection by voice vote approved the proposed amendment and Option A of the accompanying committee note for publication.

FED. R. APP. P. 29(c)

Judge Stewart reported that the proposed amendment to Rule 29 (amicus curiae brief) would add a new paragraph (c)(7) to require an amicus brief to state whether counsel for a party authored the brief in whole or in part and list every person or entity contributing to the brief. Government entities, though, would be excepted. The proposed amendment, he said, tracked the Supreme Court's Rule 37.6 on amicus briefs.

Judge Stewart added that the matter became more complicated after the advisory committee's April 2007 meeting, when the Supreme Court published a proposed amendment to its rule that would require additional disclosures. The Court's proposal, he said, has produced some controversy and opposition both on constitutional and policy grounds. Therefore, the advisory committee was uncertain whether the Court would adopt the pending amendment to Rule 37.6.

As a result, the committee considered the matter by e-mail after the April meeting and proposed two alternative formulations of proposed FED. R. APP. P. 29. Option A would be published for public comment if the Supreme Court were to reject the proposed amendment to its Rule 37.6, and Option B would be published if the Court were to

approve the amendment. The difference between the two lies in paragraph (c)(7) of Option B, which adds a requirement that the amicus brief indicate whether a party or a party's counsel is a member of the amicus or contributed money toward the brief.

Judge Stewart pointed out that the August 2007 publication date for the proposed amendment to FED. R. APP. P. 29(c) will arise after the Supreme Court is expected to act on its own rule. Accordingly, the advisory committee suggested that the Standing Committee approve both options. If the Court were to drop the amendment to its rule, Option A would be published. But if it were to proceed with the amendment, Option B would be published. In any event, he said, the rule does not present an emergency.

One member expressed concern about the substance of the proposal, especially its requirement that membership be disclosed. Others suggested that it would make sense to await final Supreme Court action before proceeding with a proposed change to the appellate rules. Judge Thrash moved to defer the proposed amendment.

The committee without objection by voice vote agreed to defer action on publication of the proposed amendment to Rule 29(c).

Informational Item

Judge Stewart reported that the advisory committee was continuing to hear from the chief judges of the circuits regarding the briefing requirements set forth in their local rules. He added that the committee was working with the attorneys general of the states on the advisability of giving them the same additional time that the appellate rules give to the federal government. And, he said, the committee would continue to examine the definition of a "state" in the appellate rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 8, 2007 (Agenda Item 8).

Amendments for Final Approval by the Judicial Conference

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT PACKAGE

Amendments to Existing Rules
FED. R. BANKR. P. 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009

New Rules
FED. R. BANKR. P. 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011

Judge Zilly noted that most of the amendments presented for final approval had already been seen by the Standing Committee at earlier meetings and are part of a package of 32 rule amendments and 7 new rules necessary to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He explained that most of the amendments had been issued initially in October 2005 as interim rules. All the courts adopted them as local rules and have been operating under them since that time with very little difficulty.

He pointed out that the advisory committee had made some minor changes in the interim rules, added other rules not included in the interim rules, and published the whole package for public comment in August 2006. In addition, since the advisory committee did not have time to publish the proposed revisions in the Official Forms before they took effect in October 2005, the package also included all the forms for public comment.

Judge Zilly reported that the advisory committee had received 38 comments before publication and another 60 following publication. Several public comments addressed many different rules. He said that the advisory committee had not conducted the scheduled public hearing because there were no requests for in-person testimony. Nevertheless, there had been a great deal of written comment on the proposed rules, which are the product of a long process that began in 2005 with the interim rules.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7012, 7022, 7023.1, and 9024

Judge Zilly reported that the proposed amendments to Rules 7012 (defenses and objections), 7022 (interpleader), 7023.1 (derivative proceedings by shareholders), and 9024 (relief from judgment or order) were necessary to conform the Federal Rules of Bankruptcy Procedure to the restyling of the Federal Rules of Civil Procedure effective December 1, 2007. He added that the proposed changes to the bankruptcy rules were purely technical, and there was no need to publish them for public comment.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments to the Forms for Final Approval by the Judicial Conference

OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24

Judge Zilly explained that the advisory committee had published for public comment all Official Forms in which any change was being recommended, even though the forms have been in general use since September 2005. As a result of the public comments, he said, the advisory committee had made some minor and stylistic changes in the forms.

He noted that Official Forms 19A and 19B, both dealing with the declaration of a bankruptcy petition preparer, would be consolidated. He said that new Official Form 22, the means test, had been extremely difficult to draft and had attracted a good deal of comment. He pointed out that the governing statutory provisions were unclear, and the public comments had raised 24 different categories of issues regarding the contents of the form. He explained that the committee had designed the form to capture all potentially relevant information from the debtor, but in some instances had left it up to individual courts to determine whether particular information is needed and how it should be used.

Professor Morris added that several of the changes in Form 22 made after the public comment period were designed to bring the text of the form closer to the text of the statute. He also explained that the advisory committee had added new language to the signature box on Form 1 (the petition) warning that the signature of the debtor's attorney constitutes a certification that the attorney has no knowledge after an inquiry that the information filed with the petition is incorrect.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2007.

OFFICIAL FORMS 25A, 25B, 25C, and 26

Judge Zilly explained that new Official Forms 25A (reorganization plan) and 25B (disclosure statement) implement § 433 of the 2005 bankruptcy legislation, which specifies that the Judicial Conference should prescribe a form for a reorganization plan and a disclosure statement in a small business Chapter 11 case. New Official Form 25C (small business monthly operating report) implements §§ 434 and 435 of the legislation and provides a standard form to assist small business debtors in Chapter 11 cases to fulfill their financial reporting responsibilities under the Code. New Official Form 26 (periodic report concerning related entities) implements § 419 of the legislation, which requires every Chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. He added that the advisory committee recommended that these four new forms be approved by the Judicial Conference effective December 1, 2008.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2008.

OFFICIAL FORM 1, EXHIBIT D

Judge Zilly explained that the proposed amendment of Exhibit D to Official Form 1 (individual debtor's statement of compliance with credit counseling requirement) would provide a mechanism for a debtor to claim an exigent-circumstances exemption from the pre-petition credit counseling requirements of the 2005 legislation. By using the form, the debtor would not have to file a motion to obtain an order postponing the credit counseling requirement. The revised Exhibit D would implement proposed new FED. R. BANKR. P. 1017.1, described below, which is being published for comment and would take effect on December 1, 2009.

The committee without objection by voice vote approved the proposed revision of Exhibit D for final approval by the Judicial Conference, to take effect on December 1, 2009.

Amendments to the Rules for Publication

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 8-9, the committee approved the proposed time-computation changes in the Federal Rules of Bankruptcy Procedure for publication.

OTHER RULES

FED. R. BANKR. P. 1017.1

Judge Zilly noted that the new Rule 1017.1 (exemption from pre-petition credit counseling requirement) would provide a procedure for the court to consider a debtor's request to defer the pre-petition credit counseling requirement of the 2005 statute because of exigent circumstances. It states that a debtor's certification seeking an exemption from the counseling requirement will be deemed satisfactory unless the bankruptcy court finds within 21 days after the certification is filed that it is not satisfactory. He added that Exhibit D, described above, was being added to Form 1 (the petition) to implement the proposed amendment.

FED. R. BANKR. P. 4008

Judge Zilly reported that the proposed amendment to Rule 4008 (filing of a reaffirmation agreement) would require that a reaffirmation agreement be accompanied by a cover sheet, as prescribed by a new official form. The new Official Form 27, he said, would gather in one place all the information a judge needs to determine whether the reaffirmation rises to the level of a hardship under the Bankruptcy Code.

FED. R. BANKR. P. 7052, 7058, and 9021

Judge Zilly reported that the proposed amendments to Rules 7052 (findings by the court) and 9021 (entry of judgment) and new Rule 7058 (entering judgment in an adversary proceeding) deal with the requirement that a judgment be set forth on a separate document. He noted that the Standing Committee at its January 2007 meeting had approved the advisory committee's recommendation that the separate document requirement be required for adversary proceedings, but not for contested matters. He added that the advisory committee had made some changes in the language of the proposed rules at its last meeting.

The committee without objection by voice vote approved the proposed amendments and new rule for publication.

New Official Forms for Publication

OFFICIAL FORM 8

Judge Zilly reported that the proposed amendment to Official Form 8 (individual debtor's statement of intention) would implement the 2005 legislation by expanding the information that the debtor must provide regarding leased personal property and property subject to security interests. The form had been published for comment in August 2006 and rewritten by the advisory committee as a result of the comments. The committee recommended that the revised version be published for comment.

OFFICIAL FORM 27

Judge Zilly explained that proposed new Official Form 27 (reaffirmation agreement cover sheet), which is tied to the proposed amendment to Rule 4008, noted above, would provide the key information to enable a judge to determine whether the reaffirmation agreement creates a presumption of undue hardship for the debtor under § 524(m) of the Code.

The committee without objection by voice vote approved the proposed amendments to Official Form 8 and the proposed new Official Form 27 for publication.

Informational Items

Judge Zilly reported that the advisory committee had considered correspondence from Senators Grassley and Sessions regarding implementation of an uncodified provision in the 2005 bankruptcy legislation. The legislation includes a provision stating the sense of Congress that FED. R. BANKR. P. 9011 (signing of papers – representations and sanctions) should be amended to require a certification by debtors' attorneys that the schedules and statements of the debtor are well grounded in fact and warranted by existing law. The committee, he said, had spent a great deal of time on the issue and concluded after thorough examination that the suggested rule amendment would have an adverse impact on the management of bankruptcy cases and set a different standard for debtors' lawyers than for creditors' lawyers. Accordingly, the committee decided not to recommend amending Rule 9011.

Judge Zilly added that a separate requirement in the Act itself, 11 U.S.C. § 707(b)(4)(C) and (D), imposes a higher standard of review and accountability for attorneys filing Chapter 7 consumer cases. But it deals only with the schedules filed with

the petition. The advisory committee, he said, had explored whether: (1) to expand the requirement to include schedules and amended schedules filed after the petition is filed; (2) to apply the requirement to other chapters of the Code; and (3) to apply it to creditor attorney filings as well as those of debtor attorneys. In the end, he said, the advisory committee decided to make none of the changes. It did, however, add a statement to the signature box of the petition reminding the attorney of the statutory requirements.

Judge Zilly added that the committee had received a letter from Representatives Conyers and Sanchez of the House Judiciary Committee commending it for the interim rules and its ongoing efforts to implement the 2005 bankruptcy legislation. The letter, he said, made three observations. First, it complimented the committee for its proposed Official Form 22 (the means test) and its instruction that debtors who fall below the statutory threshold income levels do not have to complete the entire form. Second, it agreed with the advisory committee's proposed amendment to Rule 1017(b) (dismissal or conversion of a case), which requires that a motion to dismiss a case for abuse under 11 U.S.C. § 707(b) or (c) state with particularly the circumstances alleged to constitute the abuse by the debtor. Third, it suggested that Rule 4002(b) (duty of the debtor to provide documentation) places too high a burden on a consumer debtor to provide documentation to the U.S. trustee. Judge Zilly explained that the U.S. trustees had wanted debtors to provide substantially more materials than the proposed rule requires. The advisory committee, he said, had worked on the matter for a long time and was sensitive to the burdens imposed on debtors. But it concluded that the documents required in the rule were either required by the statute or are important in a case.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 25, 2007 (Agenda Item 9).

Amendments for Publication

TIME COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 59, 62, 65, 68, 71.1, 72, and 81 SUPPLEMENTAL RULES B, C, and G

As noted above on page 9, the committee approved the proposed time-computation changes in the Federal Rules of Civil Procedure for publication.

FED. R. CIV. P. 62.1

As noted above on pages 12-13, the committee approved the proposed new Rule 62.1 (indicative rulings) for publication.

Informational Items

EXPERT-WITNESS DISCOVERY

Judge Rosenthal reported that the advisory committee was examining the experience of the bench and bar with the 1993 amendment to FED. R. CIV. P. 26 (a)(2)(B) (expert witness testimony). In particular, the committee was considering the extent to which communications between an attorney and an expert witness need be disclosed. The American Bar Association, she said, had urged that restrictions be placed on discovery of those communications, such as by limiting it to communications that convey facts only, and not opinion or strategy.

The advisory committee, she added, had thought that it would be very difficult to draw bright lines to guide attorneys in this area, but it had been encouraged by a recent mini-conference held with a group of experienced New Jersey lawyers. The state court rule in New Jersey limits discovery of conversations between attorneys and expert witnesses. The lawyers at the mini-conference uniformly expressed enthusiasm for the state rule and said that the rule minimizes satellite litigation over non-essential matters and improves professional collegiality. Judge Rosenthal added that the advisory committee was continuing to explore the issue and might come back at the next Standing Committee meeting with a request to publish a proposed amendment to Rule 26.

SUMMARY JUDGMENT

Judge Rosenthal reported that the advisory committee had approved a thorough revision of FED. R. CIV. P. 56 (summary judgment) at its April 2007 meeting, but had decided to defer publishing a proposal in order to engage in further dialogue with the bar.

She noted that Rule 56 had not been amended significantly since 1963. In 1992, there had been an unsuccessful attempt by the advisory committee to rewrite the rule thoroughly. That effort had produced a proposed rule that, among other things, would have codified the standard for granting summary judgment announced by the Supreme Court in its 1986 "trilogy" of landmark summary judgment cases.

By contrast, she emphasized, the current proposal does not address the standard. Rather, it focuses only on procedure. It is, moreover, a default rule that will apply only if a judge does not issue a specific order addressing summary judgment in a particular case. The proposed rule, she said, had been drawn largely from the best practices currently used in the district courts. She thanked the staff of the Federal Judicial Center and James Ishida and Jeffrey Barr of the Administrative Office for their comprehensive work in gathering and analyzing all the local rules of the district courts.

The proposed rule would require a party moving for summary judgment to set forth in separately numbered paragraphs the pertinent facts that are not in dispute and that entitle it to summary judgment as a matter of law. The opposing party, in turn, would have to set out in the same manner the facts that it claims are genuinely in dispute. The parties would also have to make appropriate references to the record and file a separate brief as to the law.

She explained that lawyers had told the advisory committee that it would be extremely helpful to require these statements of undisputed facts. She added that under current practice in some courts, the dueling statements of the parties are akin to ships passing in the night. They are often very lengthy and simply do not address each other. As a result, the advisory committee had attempted to draft the proposed rule in a manner that emphasizes that the parties must specify only those facts that are critical and relied on for, or against, summary judgment. She emphasized the importance of drafting a clear rule. To that end, it would be very beneficial to continue working with the bar to refine the text.

Judge Rosenthal pointed out that the advisory committee was concerned about what to do when an opposing party fails to respond to a summary judgment motion. She said that the case law of the circuits holds that a trial judge may not simply grant the summary judgment motion by default without a response. The local rules of some courts, she said, specify that any facts not responded to are deemed admitted, and judges in those courts say that they find these local rules helpful.

The advisory committee, she explained, had tried to set out in a clear way the steps that the court must follow under these circumstances. Accordingly, the proposed

rule authorizes a trial judge to grant a motion for summary judgment, but only after following specific procedural steps and being convinced that the record supports granting the motion. Among other things, the judge could give the non-moving party another opportunity to respond before deeming facts admitted.

Judge Rosenthal said that the advisory committee's proposed rule did not address the substantive standard for granting summary judgment. But it would require the judge to state reasons for his or her decision on the motion. In addition, the rule mentions "partial summary judgment" by name for the first time.

A member noted that the draft proposed rule specifies the default procedures that must be followed unless the judge orders otherwise in a specific case. He asked whether the rule would also allow variation from the national rule by issuance of a local rule of court. He pointed out that the local rules of the court in which he practices most often differ substantially from the proposed national rule.

Judge Rosenthal responded that the rule would indeed allow judges to vary from the national default rule by orders in individual cases. But the national rule could not be overridden by local rules of court. In short, it would discourage blanket local court variations, but would allow case-specific variations. Professor Cooper added that the issue of local rules was addressed in the draft committee note to the rule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 19, 2007 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

CRIME VICTIMS' RIGHTS ACT AMENDMENTS
FED. R. CRIM. P. 1, 12.1, 17, 18, 32, 60, and 61

Judge Bucklew reported that the package of rules changes to implement the Crime Victims' Rights Act, 18 U.S.C. § 3771, consisted of: (1) amendments to five existing rules; (2) a new stand-alone Rule 60 (victim's rights); and (3) renumbering current Rule 60 (title) as new Rule 61. The advisory committee, she said, had begun work on the package soon after passage of the Crime Victims' Rights Act in 2004, and it had reached two key policy decisions: (1) not to create new rights beyond those that Congress had specified in the Act; and (2) to place the bulk of the victims' rights provisions in a single new rule to make it easier for judges and lawyers to apply. She said that additional rule amendments beyond this initial package might be recommended in the future, but the

advisory committee had decided to defer making more extensive changes in order to monitor practical experience in the courts and case law development under the Act.

The proposed amendments, she said, had generated a good deal of controversy during the public comment period and had attracted criticism from both sides. The defense side expressed the fear that the proposed rules would tip the adversarial balance too far against criminal defendants. Victims' rights groups, on the other hand, objected that the proposals did not go far enough to enhance the rights of victims. A letter from Sen. Jon Kyl, she said, had stressed the latter point.

FED. R. CRIM. P. 1

Judge Bucklew explained that proposed Rule 1(b)(11) (scope and definitions) would incorporate the Act's definition of a crime victim. In response to the public comments, she noted, the advisory committee had added language to proposed Rule 60(b)(2) to specify that a victim's lawful rights may be asserted by the victim's lawful representative. In addition, the committee note had been revised to make it clear that a victim or the victim's lawful representative may participate through counsel, and the victim's rights may be asserted by any other person authorized by 18 U.S.C. § 3771(d) and (e). The committee note had also been amended to state that the court has the power to decide any dispute over who is a victim.

Professor Beale reported that one objection raised in several public comments was that the proposed rules do not define precisely who may be a victim. She suggested that if it turns out that the lack of a comprehensive definition causes any problems in actual practice, the advisory committee could come back later and propose a clarifying amendment.

FED. R. CRIM. P. 12.1

Judge Bucklew reported that the proposed amendments to FED. R. CRIM. P. 12.1 (notice of alibi defense) specify that a victim's address and telephone number will not be provided to the defendant automatically. The victim's address and telephone number will be provided only if the defendant establishes a need for them, such as in a case where the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense. Moreover, even if the defendant establishes the need for the information, the victim may still file an objection.

Professor Beale pointed out that the federal defenders had commented that the proposed rule would upset the constitutional balance between prosecution and defense. Moreover, they argued that its requirement that a defendant establish a need for such basic information is unconstitutional because it is not a reciprocal obligation. She replied, though, that the rule does not violate the principle of reciprocal discovery. Rather, it is

merely a procedural device, requiring the defendant to state that he or she has a need for the information and then giving the court a chance to decide the matter.

A member questioned the language that would require the defendant to establish a "need" for a victim's address and telephone number. He suggested that the word "need" was misleading and asked what showing of need the defendant would have to make beyond merely asking for the information. He noted that if the advisory committee had intended for the term "need" to mean only that the defendant *wants* the information, a different word should be used. Judge Levi replied that removing the requirement that the defendant show a "need" for the information would be seen as a big step backwards by victims' rights groups. Moreover, it would require that the rule be sent back to the advisory committee.

The member responded that he understood the highly politicized context of the rule. Nevertheless, he said that the proposed amendment as written simply does not say what the advisory committee apparently intended for it to say. He suggested that it might be rephrased to state simply that if the defendant "seeks" the information, the court may fashion an appropriate remedy. Judge Bucklew added that the advisory committee had something more than "seeks" in mind, but it had intended that the standard for the defendant's showing be relatively low. Professor Beale added that the advisory committee had rejected several alternative formulations because of the delicate balance of interests at stake. She said that the advisory committee did not want to turn the defendant's request into an automatic entitlement.

Another participant added that the proposed committee note explains that the defendant is not automatically entitled to a victim's address and phone number. Thus, the rule and the note together clearly suggest that "need" means something more than just a naked request from the defendant.

FED. R. CRIM. P. 17

Judge Bucklew stated that the proposed amendment to FED. R. CRIM. P. 17 (subpoena) would provide a protective device for third-party subpoenas. It would allow a subpoena requiring the production of personal or confidential information about a victim to be served on a third party only by court order. It also contains a provision allowing a court to dispense with notice to a victim in "exceptional circumstances."

She noted that the advisory committee had modified the rule after publication to make it clear that a victim may object by means other than a motion to quash the subpoena, such as by writing a letter to the court. In addition, based on public comments, the committee had eliminated language explicitly authorizing ex parte issuance of a subpoena to a third party for private or confidential information about a victim. Instead, a

reference had been added to the committee note explaining that the decision on whether to permit ex parte consideration is left to the judgment of the court.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require a court to consider the convenience of any victim when setting the place of trial in the district. She added that no changes had been made in the text of the rule after publication, but some unnecessary language had been deleted from the committee note. In addition, language had been added to the note emphasizing the court's discretion to balance competing interests.

FED. R. CRIM. P. 32

Judge Bucklew said that the proposed revisions to Rule 32 (sentencing and judgment) would eliminate the entire current subdivision (a) – which defines a victim of a crime of violence or sexual abuse – because Rule 1 (scope and definitions) would now incorporate the broader, statutory definition of a crime victim.

Rule 32(c)(1) would be amended to require that the probation office investigate and report to the court whenever a statute "permits," rather than requires, restitution. In Rule 32(d)(2)(B), the advisory committee would delete the language of the current rule requiring that information about victims in the presentence investigation report be set forth in a "nonargumentative style." As amended, the rule would treat this information like all other information in the presentence report. Professor Beale added that some public comments had argued that all information in the presentence investigation report should also be verified. She added that some of the comments suggested additional changes that went beyond the scope of the current amendments, and these suggestions would be placed on the committee's future agenda.

Judge Bucklew reported that Rule 32(i)(4) (opportunity to speak) contained a number of proposed language changes. She said that the language of the current rule authorizing a victim to "speak or submit any information about the sentence" would be changed to require that a judge permit the victim to "be reasonably heard" because that is the precise term adopted by Congress in the statute.

FED. R. CRIM. P. 60

Judge Bucklew stated that proposed new Rule 60 (victim's rights) was the principal rule dealing with victims' rights. It would implement several different provisions of the Act and specify the rights of victims to notice of proceedings, to attendance at proceedings, and to be reasonably heard. It would also govern the procedure for enforcing those rights and specify who may assert the rights.

Paragraph (a)(1) would require the government to use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime. Paragraph (a)(2) would provide that a victim may not be excluded from a public court proceeding unless the court finds that the victim's testimony would be materially altered.

Paragraph (a)(3) would specify that a victim has a right to be reasonably heard at any public proceeding involving release, plea, or sentencing. Professor Beale explained that the advisory committee had limited the proposed rule to those specific proceedings. Victims' rights advocates, she said, had argued to expand the rule beyond the statute and give victims the right to be heard at other stages of a case. She added that it is possible that case law over time may expand the right to additional proceedings.

Judge Bucklew said that subdivision (d) of the proposed rule would implement several different sections of the Crime Victims' Rights Act. It would: (1) require the court to decide promptly any motion asserting a victim's rights under the rules; (2) specify who may assert a victim's rights; (3) allow the court to fashion a reasonable procedure when there are multiple victims in order to protect their rights without unduly prolonging the proceedings; (4) require that victims' rights be asserted in the district in which the defendant is being prosecuted; (5) specify what the victim must do to move to reopen a plea or sentence; and (6) make it clear that failure to accord a victim any right cannot be the basis for a new trial. She said that the primary criticism from victims' rights groups was that the new rule did not go far enough to expand the rights of victims.

Professor Beale added that, after publication, language addressing who may assert a victim's rights had been moved from Rule 1 to Rule 60. In addition, Rule 60 had been amended because the published version could have been read to require the court to pay the costs of a victim to travel to the trial – a right not required by statute. In addition, language had been added to clarify the procedure a court should follow "in considering whether to exclude the victim."

Professor Beale emphasized that questions had been raised throughout the rules process as to how far the limited, general rights specified in the statute should be repeated or elaborated upon in the rules. Judge Bucklew explained that victims' advocates had

argued that the basic statutory right that victims be treated with "fairness and dignity" should be the basis for providing a greater array of more specific rights in the rules.

FED. R. CRIM. P. 61

Judge Bucklew reported that the final change in the package was purely technical in nature – to renumber the current Rule 60 (title) as Rule 61. The rule states merely that the rules may be known and cited as the Federal Rules of Criminal Procedure. She said that structurally it should remain the last rule in the criminal rules.

Professor Meltzer moved that the package of crime victims' proposals be approved, but that proposed Rule 12.1 be remanded to the advisory committee for further consideration.

The committee by a vote of 6 to 3 rejected the motion to remand Rule 12.1. Then, with one objection, it voted by voice vote to approve the package of proposed amendments for final approval by the Judicial Conference.

Judge Bucklew noted that the package of victims' rights amendments had required a great deal of time and effort by the advisory committee. She thanked Judge Levi and John Rabiej for their invaluable assistance. Judge Teilborg added that he had been the Standing Committee's liaison to the advisory committee on the project, and he complimented both the advisory committee and Judge Bucklew personally for the superb way that they had navigated the package of rules in light of powerful forces and competing interests.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee's proposed amendment to Rule 41 (search and seizure) would provide a procedure for issuing search warrants to assist criminal investigations in U.S. embassies, consulates, and possessions around the world. She said that the proposal had originated with the Department of Justice, based on practical problems that it had encountered in investigating crimes occurring in overseas possessions and embassies. Under the proposal, jurisdiction to issue warrants for execution overseas would be vested in the district where the investigation occurs or – as a default – in the U.S. District Court for the District of Columbia.

Judge Bucklew explained that the Judicial Conference had forwarded a proposed rule amendment on the same topic to the Supreme Court in 1990, but the Court had rejected it. She explained, however, that the current proposal was much more limited than the 1990 proposal, which would have applied beyond U.S. embassy and consular properties.

Judge Bucklew stated that the primary issue raised about the current proposal concerned its inclusion of American Samoa. The Pacific Islands Committee of the Ninth Circuit had suggested that if an amendment were to be made, it should be reviewed first by the judiciary of the territory and have the support of the Chief Justice of the High Court of American Samoa. This course of action would be consistent with long-standing practice based on the original treaties between the United States and American Samoa. Therefore, for purposes of public comment, the advisory committee had included American Samoa in brackets in the published text. Nevertheless, she said, the only comment responding to the issue had been made by the Federal Magistrate Judges Association, which saw no need to exclude American Samoa. In addition, the Department of Justice continued to express support for the proposal, noting that the current status was adversely affecting its law-enforcement efforts.

Judge Bucklew reported that the advisory committee had contacted the Pacific Islands Committee of the Ninth Circuit and explained that American Samoa would need to comment on the proposal if it wished to be excluded from the rule. But no communication had been received. Therefore, the advisory committee approved the rule without excluding American Samoa.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 45

Judge Bucklew reported that the proposed amendment to Rule 45 (computing time) was purely technical in nature. As part of the recent restyling of the Federal Rules of Civil Procedure, some subdivisions of the civil rules governing service had been re-numbered. As a result, cross-references in FED. R. CRIM. P. 45(c) to various provisions of the civil rules will become incorrect when the restyled civil rules take effect on December 1, 2007. Therefore, the advisory committee recommended amending Rule 45(c) to reflect the re-numbered civil rules provisions. Because the amendment is purely technical, she said, the advisory committee suggested that there would be no need for publication.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had voted to recommend publishing a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeaching evidence favorable to the defendant. She traced the history of the proposal, beginning with a position paper submitted by the American College of Trial Lawyers in 2003. The College argued that unlawful convictions and unlawful sentencing have occurred because prosecutors have withheld exculpatory and impeaching evidence.

Judge Bucklew emphasized that the advisory committee had devoted four years of intensive study to refining the substance and language of the proposed amendment. She pointed out that the rule eventually approved by the advisory committee was considerably more modest than the changes recommended by the College, which had called for more extensive amendments both to Rule 16 and Rule 11 (pleas). The committee, she said, had debated and rejected proceeding with any amendments to Rule 11.

Judge Bucklew noted that the Federal Judicial Center had prepared an extensive report for the advisory committee in 2004 surveying all the local rules and standing orders of the district courts in this area. At the committee's request, the Center then updated the document on short notice in 2007. The report revealed that 37 of the 94 federal judicial districts currently have a local rule or district-wide standing order governing disclosure of *Brady* materials. She explained, however, that the Center had not searched beyond local rules and standing orders to identify the orders of individual district judges, which may be numerous. In addition, she said, most states have statutes or court rules governing disclosure.

The advisory committee, she said, had also reviewed a wealth of other background information, including a summary of the case law addressing *Brady v. Maryland* issues, pertinent articles on the subject, the American Bar Association's model rules of professional conduct governing the duty of prosecutors to divulge exculpatory information, and correspondence from the federal defenders.

Judge Bucklew reported that the Department of Justice strongly opposed the proposed amendment. In light of that opposition, she noted, former committee member Robert Fiske had suggested that in lieu of pursuing a rule amendment, it might be more practical for the committee to encourage the Department to make meaningful revisions in the U.S. Attorneys' Manual to give prosecutors more affirmative direction regarding their *Brady* obligations.

As a result of the suggestion, she said, the Department did in fact amend the manual to elaborate on the government's disclosure obligations. Judge Bucklew thanked the Department on behalf of the advisory committee for its excellent efforts in this respect. She gave special recognition to Assistant Attorney General Alice Fisher for leading the efforts and emphasized that the entire advisory committee believed that the changes had improved the manual substantially.

Nevertheless, she added, the advisory committee ultimately decided for two reasons that the manual changes alone could not take the place of a rule change. First, as a practical matter, the committee would have no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases. Second, the U.S. Attorneys' Manual is a purely internal document of the Department of Justice and not judicially enforceable.

Judge Bucklew added that the reported case law does not provide a true measure of the scope of possible *Brady* problems because defendants and courts generally are not made aware of information improperly withheld. She said that the advisory committee had received a letter from one of its judge members strongly supporting the proposed amendment. In the letter, the judge claimed that in a recent case before him the prosecutor had improperly failed to disclose exculpatory material and, despite the judge's prodding, the Department of Justice failed to discipline the attorney appropriately for the breach of *Brady* obligations.

Judge Bucklew stated that there are numerous cases in which courts have found that the prosecution had failed to disclose exculpatory material – if one includes cases in which the failure to disclose did not rise to constitutional dimensions and therefore did not technically violate the constitutional requirements of *Brady v. Maryland.* Beyond that, she said, it is simply impossible to know how many failures actually occur because only the prosecution itself knows what information has not been disclosed.

Judge Bucklew observed that the local rules and orders of many district courts address disclosure obligations, but they vary in defining disclosure obligations and specifying the timing for turning over materials to the defense. Some rules, for example, impose a "due diligence" requirement on prosecutors, while others do not. She added that the sheer number of local rules, together with the lack of consistency among them, argue for a national rule to provide uniformity. Moreover, just publishing a proposed rule for comment, she added, could produce meaningful information as to the magnitude of the non-disclosure problem. If the public comments were to demonstrate that the problems are not serious, the advisory committee could withdraw the amendment.

Professor Beale observed that two central trends currently prevail in the criminal justice system: (1) to recognize and enhance the rights of crime victims; and (2) to reduce the incidence of wrongful convictions. The proposed rule, she said, would advance the

second goal. It would also promote judicial efficiency by regulating the timing and nature of the materials to be disclosed.

The proposed amendment, she said, would require the government to disclose not just "evidence," but "information" that could lead to evidence. It also would require a defendant to make a request for the information. It speaks of information "known" to the prosecution, including information known by the government's investigative team. She noted that this provision was consistent with a line of *Brady* cases requiring disclosure of matters known not just to attorneys but also to law enforcement agents. She added that the Department of Justice was deeply concerned about the breadth of this particular formulation.

Professor Beale reported that a great deal of the advisory committee's discussion had focused on the need to have *Brady* materials disclosed during the pretrial period, rather than on the eve of trial. So, for purposes of timing, the proposed rule distinguishes between exculpatory and impeaching information. Impeaching evidence generally relates to testimony, and the Department is concerned that early disclosure increases potential dangers to witnesses. Therefore, the proposed amendment specifies that a court may not order disclosure of impeaching information earlier than 14 days before trial. That particular timing, she said, is more favorable to the prosecution than the current limits imposed by many local court rules. Moreover, the government has the option of asking a judge to issue a protective order in a particular case when it has specific concerns about disclosure.

Professor Beale reported that the Department had argued that the proposed rule is inconsistent with *Brady v. Maryland.* But, she said, the advisory committee was well aware that the proposed amendment is not compelled by *Brady*. Rather, *Brady* and related cases set forth only the minimal constitutional requirements that the government must follow. The proposed amendment, by contrast, goes beyond what the Supreme Court has said is the minimum that must be turned over. Moreover, it would provide consistent procedural standards for the turnover of exculpatory information.

Professor Beale explained that the advisory committee saw no need to include in the rule a definition of "exculpatory" or "impeaching" evidence. The amendment also does not require that the information to be turned over be "material" to guilt in the constitutional sense, such that withholding it would necessitate reversal under *Brady*. Professor Beale explained that the advisory committee did not want to use the word "material" because it might be read to imply all the familiar constitutional standards. She noted that other parts of Rule 16 use the term "material" in a different sense, referring to information "material" to the preparation of the defense.

Professor Beale stated that the proposed amendment would establish a consistent national procedure and bring the federal rules more in line with state court rules and the

rules of professional responsibility. It would also introduce a judicial arbiter to make the final decision as to what must be disclosed. Accordingly, she said, the key dispute over the proposed amendment is whether the policy and practice it seeks to promote should be enforced through the U.S. Attorneys' Manual or a federal rule of criminal procedure.

Deputy Attorney General McNulty thanked Judge Bucklew and the advisory committee for working cooperatively and openly with the Department of Justice on the proposed rule. He pointed out that the Department had set forth its position in considerable detail in a memorandum recently submitted to the committee.

He emphasized the central importance of Rule 16 to prosecutors, and he pointed to the recent revisions in the U.S. Attorneys' Manual as tangible evidence of the Department's willingness to address the concerns expressed by the advisory committee and others and to ensure compliance with constitutional standards. He said, though, that the proposed amendment was deeply disturbing and would fundamentally change the way that the Department does business.

Mr. McNulty argued that there was simply no need for the amendment because the Constitution, Congress, and the Supreme Court have all specified the requirements of fairness and the obligations of prosecutors. All recognize the balance of competing interests. But the proposed rule, he said, goes well beyond what is required by the Constitution and federal statutes, and it would upset the careful balance that Congress and the courts have established.

The disclosure obligations proposed in the amendment, he said, also conflict with the rights of victims. The rule would move the Department of Justice towards an open file policy and make virtually everything in the prosecution's files subject to review by the defense, including information sensitive to victims, witnesses, and the police. In cases involving a federal-state task force, moreover, it might require that state information be turned over to the defense, in violation of state law. The amendment, also, he said, is inconsistent with the Jencks Act, with the rest of Rule 16, and with other criminal rules limiting disclosure and the timing of disclosure.

The proposed amendment, he added, would inevitably generate a substantial amount of litigation on such matters as whether exculpatory or impeachment information is "material." There is some question, he said, whether the rule removes "materiality" as a disclosure standard or whether it contains some sort of back-door materiality standard. At the very least, he said, the rule has not been thought through or studied adequately. In the final analysis, moreover, the rule will not achieve the goal of its proponents to prevent abuses and miscarriages of justice because an unethical prosecutor determined to withhold specific information will find a way to avoid any rule.

Mr. McNulty concluded his presentation by emphasizing that the case for a rule change had not been made, and the proposed amendment should be rejected. Moreover, the significant revisions just made to the U.S. Attorneys' Manual should be given time to work. In the alternative, he said, the rule could be sent back to the advisory committee to work through the many difficult issues that have not yet been resolved.

Assistant Attorney General Fisher added that the advisory committee had made a conscious decision not to include a materiality standard in the amendment. In that respect, she said, the proposal is inconsistent with current local court rules, very few of which have eliminated the materiality requirement. It would also be inconsistent with the rest of Rule 16 in that respect. And it would undercut the rights of victims and their ability to rely on prosecutors to protect them. The proposal, in short, would create major instability and insecurity among witnesses, who will be less willing to come forward.

The committee chair suggested that the proposed amendment was not yet ready for publication, and he observed that the changes in the U.S. Attorneys' Manual were a very important achievement that should be given time to work Another member added that his district has an open file system that works very well. But, he said, it would be very helpful to obtain reliable empirical evidence to support the need for a change. The Department of Justice, he said, had done an excellent job in producing a detailed set of revisions to the prosecutors' manual. In the face of that achievement, he said, the committee should give the Department the courtesy of seeing whether or not the manual changes make a difference before going forward with a rule amendment that contains a major change in policy. He noted that there may well be problems in monitoring the impact of the manual changes but suggested that the committee work with the Department to explore practical ways to measure the impact of the manual changes.

Another member agreed and added that the essential impact of the proposed amendment will be to change the standard of review for failure to disclose – a very significant change. Professor Beale responded that the purpose of the amendment was not to change the standard of review, but to change pretrial behavior and provide clear guidance on what needs to be disclosed. She explained that in civil cases the parties are entitled to a great deal of discovery early in a case. In federal criminal cases, however, defendants often have to wait until trial before obtaining certain essential information. That, she said, is a glaring difference. She added that a court is more likely to require government disclosure at trial if it is required by Rule 16, and not just by the constitutional case law.

Another member stated that the proposed amendment would do far more than change the standard of review. It would, he said, radically expand the defendant's rights to pretrial discovery – a fundamentally bad idea. As drafted, he said, the rule has major flaws, and if published, the public comments will be completely predictable. The defense

side will strongly favor an amendment that radically expands its pretrial discovery. The Department of Justice, on the other hand, will vigorously oppose the change.

He predicted that if the amendment were forwarded by the committee to the Judicial Conference, it would likely be rejected by that body. And if it were to reach the Supreme Court, it might well be rejected by the justices. Proceeding further with the proposed amendment, he said, would do irreparable damage to the reputation of the Standing Committee as a body that proceeds with caution and moderation. He added that there is nothing wrong with controversy *per se*, but the proposed rule is both controversial and wrong.

The amendment, he argued, takes a constitutional-fairness standard and converts it into a pretrial discovery procedure that gives the defense new trial-preparation rights. The case, he said, had not been made that the rule is necessary or that violations of disclosure obligations by prosecutors cannot be handled adequately by existing processes. He added that the most radical effect of the rule is found not in the text of the rule itself, but in the committee note asserting that the current requirement of materiality would be eliminated and that all exculpatory and impeachment information will have to be turned over to the defense, whether or not material to the outcome of a case.

Another member concurred and explained that when the Standing Committee agrees to publish a rule, there is an understanding that it has been vetted thoroughly. Publication, moreover, carries a rebuttable presumption that the proposal enjoys the committee's tentative approval on the merits. But, he said, the proposed amendment to Rule 16 does not meet that standard. The Rules Enabling Act process is structured to ensure that the Executive Branch has an opportunity to be heard. In this instance, he argued, the Executive Branch has expressed serious opposition to the proposal. Thus, with controversial proposals such as this, he argued, the committee owes it to the Judicial Conference, the Supreme Court, Congress, and the bench and bar generally that the rule is substantially ready when published.

One of the judges pointed out that his court's local rules require that information be disclosed before trial if it is material. He emphasized that if the committee were to approve an amendment, it should include a materiality standard. Without it, he said, courts will be inundated with essentially meaningless disputes over whether immaterial information must be turned over. The proposed rule, he argued, would also conflict with the Jencks Act and with constitutionally sound principles. He urged the committee to reject the amendment. Alternatively, he suggested that if the committee believes it necessary to produce a rule to codify *Brady*, it should at least incorporate a materiality requirement.

Another member agreed with the criticisms expressed, but suggested it would be useful to have a uniform rule for the federal courts to provide greater guidance on B*rady*

issues. The *Brady* standard, he said, applies after the fact. It is not really a discovery standard, but a sort of harmless error standard on appeal.

He said that the proposed amendment would represent a radical change for the federal courts. But, on the other hand, it would bring federal practice closer to that of the state courts. He noted that many believe that the state courts strike a fairer balance between giving defendants access to information and protecting witnesses and victims against harmful disclosures. He said that additional review of state and local practices might be useful.

Another member concurred in the criticisms of the amendment but said that the central issue before the Standing Committee was whether to publish the rule for public comment. Comments, he suggested, could be very useful. He noted that the proposal had been approved by the advisory committee on an 8-4 vote, demonstrating substantial support for it and arguing for publication. Moreover, he said, empirical research is very difficult to obtain in this area because the defense never finds out about material improperly withheld by prosecutors. He added that current practice under *Brady* is self-serving because it is only natural for a prosecutor in the middle of a case to convince himself or herself that a particular statement is not material. He concluded that disclosure of exculpatory and impeaching information is a matter that needs to be addressed, and the public comment period should be helpful in shedding light on current practices.

He expressed some skepticism regarding revisions to the U.S. Attorneys' Manual. For decades, he said, the Department of Justice has insisted that the manual is not binding, but it is now characterizing the recent changes on *Brady* materials as crucial. He was concerned, too, that the manual could be changed further at any time in the future.

Another participant concurred that quantitative information is difficult to obtain and suggested that the committee could gather a good deal more anecdotal information through interviews with judges, lawyers, and former prosecutors. If that were done, he said, it would be important to identify the nature of the criminal offense involved because it may turn out that disclosure is not handled the same way in different types of cases.

The committee's reporter stressed the importance of protecting the integrity and credibility of the Rules Enabling Act process. He said that the committee should proceed with caution and not risk its credibility by publishing a proposed amendment that is very controversial and not supported by sufficient research. He suggested that the rule be deferred and the committee consider asking the Federal Judicial Center to conduct additional research.

Judge Hartz moved to reject the amendment outright and not to send it back to the advisory committee for further review. He suggested that the debate appeared to come down to an ideological difference of opinion over what information should be

disclosed by prosecutors to defendants. The dispute, he said, is not subject to meaningful empirical investigation, and it would not be a good use of resources to return the matter to the advisory committee or to ask the Federal Judicial Center for further study.

Judge Bucklew said that the advisory committee had spent four years on the proposal and had discussed it at every committee meeting. A majority of the committee, she explained, believed strongly that the proposal was the right and fair thing to do. She agreed, though, that it was hard to see what good additional research, including anecdotal information, would produce. Therefore, she said, if the Standing Committee were to disagree with the merits of the proposal, it should simply reject the rule and not send it back to the advisory committee nor keep it on the agenda.

Professor Beale added that the advisory committee could continue to work on refining the proposal or conduct additional research, if that would help. But, she said, if the Standing Committee were to conclude that the amendment is fundamentally a bad idea in principle, it would ultimately be a waste of time to attempt to obtain more information.

She noted that conditions and prosecution policies vary enormously among judicial districts. In some districts, disclosure seems not to be a problem, but in others there may have been improper withholding of information. A study could be crafted to examine the differences among the districts and ascertain why there are disclosure problems in some districts, but not others. In the final analysis, though, if it appears that the Standing Committee will still oppose any amendment – even after additional research and tweaking – it would be wise just to end the matter and not expend additional time and resources on it.

One member suggested that it would be helpful to survey lawyers and judges on disclosure in practice. He pointed to the influential and outcome-determinative research conducted for the committee by the Federal Judicial Center in connection with FED. R. APP. P. 32.1, governing unpublished opinions. By analogy to that successful research effort, he recommended that more research be conducted – unless the committee concludes as a matter of policy that no amendment to Rule 16 would be acceptable.

Another member stated that he worried about the message the committee would send the bar by rejecting an amendment to Rule 16 out of hand. He noted that the bar is concerned that prosecutors do not always disclose information that they should. He commended the Department of Justice for its good faith efforts to work with the committee and recommended that, rather than rejecting the proposed amendment outright, the matter be returned to the advisory committee to monitor the impact of the recent changes in the U.S. Attorneys' Manual.

The committee chair noted that there are many different local rules governing disclosure of exculpatory and impeachment information. With regard to the Federal Rules

of Civil Procedure, he explained that the committee had found the lack of uniformity among districts to be intolerable. Consistency, he said, is very important to the unity of the federal judicial system. A defendant's right to exculpatory information should not vary greatly from court to court. Thus, if there is to be a national rule to codify *Brady* obligations, it should contain a clear standard. There is, he said, little support for a national open-file rule, but achieving consensus on the right balance would be very complex and difficult.

The chair suggested that there are various ways to elicit meaningful information from the legal community other than by publishing a rule or asking the Federal Judicial Center for additional research. He noted, for example, that the Advisory Committee on Civil Rules had conducted a number of conferences with the bar on specific subjects, and the committee's reporter had sent memoranda to the bar seeking views on discrete matters. He concluded that the Standing Committee should not tell the advisory committee that criminal discovery is off the table. It is, he said, a topic that needs further study. But the advisory committee should proceed slowly and methodically with any study.

Two members agreed that there is room for continuing study and input from bench and bar regarding pretrial discovery, the conduct of prosecutors, and uniformity among the districts. Nevertheless, they recommended that all work cease on the pending amendment to Rule 16 because it is too radical and cannot be fixed. Another member agreed that the proposed amendment is not the right rule, but suggested that the issues it raises are very important and need to be considered further. He said that there is room for further research and analysis to see whether a consensus can be developed on a uniform rule for the entire federal system. Thus, he recommended that the proposal be returned to the advisory committee, but not rejected outright.

Deputy Attorney General McNulty observed that even if the Standing Committee rejects the proposal, the advisory committee could still continue to explore the issues on its own in a slow and methodical manner. Slowing down the process, he said, was important to the Department, which has been concerned that it must continue to stay on the alert because the proposed amendment could resurface in revised form.

Judge Thrash observed that a consensus appeared to have emerged not to publish the proposed amendment, but to defer further consideration of it indefinitely, with the understanding that the advisory committee will be free to study the topic matter further and take such further action as it deems appropriate at some future date. **He offered this course of action as a substitute motion for Judge Hartz's motion, with Judge Hartz's agreement.**

Deputy Attorney General McNulty agreed and added that the advisory committee would not be proceeding under any expectation as to when, if ever, the issue should come back to the Standing Committee.

The committee with one objection voted by voice vote to adopt Judge Thrash's substitute motion.

FED. R. CRIM. P. 7, 32, and 32.2

Professor Beale reported that the proposed amendments to Rules 7 (indictment and information), 32 (sentence and judgment) and 32.2 (criminal forfeiture) would clarify and improve the rules governing criminal forfeiture. She noted that the amendments were not controversial, and they had been approved unanimously by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee recommended publishing proposed amendments to Rule 41 (search and seizure) to govern searches for information stored in electronic form. The amendments would acknowledge explicitly the need for a two-step process – first, to seize or copy the entire storage medium on which the information is said to be contained, and, second, to review the seized medium to determine what electronically stored information contained on it falls within the scope of the warrant.

Judge Bucklew explained that the search frequently occurs off-site after the computer or other storage medium has been seized or copied by law enforcement officers. She added that the revised rule specifies that in the case of seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

RULE 11 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

Professor Beale explained that the proposed companion amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings (certificate of appealability and motion for reconsideration) would provide the procedure for a litigant to seek reconsideration of a district court's ruling in a habeas corpus case. They would specify that a petitioner may not seek review through FED. R. CIV. P. 60(b) (relief from judgment or order).

She reported that the advisory committee had considered a much broader proposal by the Department of Justice to eliminate coram nobis and other ancient writs, but it had decided on fundamental policy grounds against the change. Instead, the committee's proposal specifies that the only procedure for obtaining relief in the district court from a final order will be through a motion for reconsideration filed within 30 days after the district court's order is entered.

A member observed that the proposed amendment may narrow the scope of reconsideration in a way that the advisory committee did not intend. He noted that proposed Rule 11(b) may preclude the use of FED. R. CIV. P. 60(a) to seek reconsideration based on a clerical error – relief most often sought by the government. He suggested that the proposed rule may not be needed, and the stated justification for it was confusing. He also questioned whether the proposed rule did what it was intended to do, namely codify the Supreme Court's decision in *Gonzalez v. Crosby*. And he objected to the proposed 30-day time limit on the grounds that an unrepresented pro se litigant should not face a shorter time-limit than others.

Judge Levi asked whether, given these concerns, the advisory committee would be willing to hold the proposal for possible publication at a later time. Judge Bucklew agreed to recommend that only the proposed amendment to Rule 11(a) be published for public comment, and that the remainder of the rule be deferred for further consideration by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments to Rule 11(a) of both sets of rules for publication and to defer consideration publishing the proposed amendments to Rule 11(b) of both sets of rules.

Professor Struve noted that if the proposed amendment to Rule 11(b) did not go forward for publication, the Standing Committee should also not publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A), which makes reference to the proposed new Rule 11(b). **Accordingly, the committee voted unanimously by voice vote not to publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A).**

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59
RULE 8 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

As noted above on pages 10-11, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Criminal Procedure.

Informational Items

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee had decided not to submit to the Standing Committee any proposed amendments to FED. R. CRIM. P. 29 (motion for a judgment of acquittal). The proposal published by the committee would have required a judge to wait until after a jury verdict to direct a verdict of acquittal unless the defendant were to waive his or her double jeopardy rights and give the government an opportunity to appeal the pre-verdict acquittal.

She noted that there had been a good deal of public comment on the proposal, most of it in opposition. Several different grounds had been offered for the objections – most noticeably that the amendments would exceed the committee's authority under the Rules Enabling Act, impose an unconstitutional waiver requirement, fail to provide needed flexibility to sever multiple defendants and multiple counts when necessary, and intrude on judicial independence. Several comments added that the proposed amendments were simply not needed because directed acquittals are rare in practice.

Judge Bucklew reported that the advisory committee first had voted 9 to 3 to reject the proposed rule, and then it voted 7 to 5 to table it indefinitely and not continue working on it. She added that most members of the advisory committee had simply not been convinced that a sufficient showing of need had been made to justify moving forward a proposal in the face of the many different objections raised.

A member explained that the Department of Justice had cited as a need for the rule several examples of pre-verdict acquittals that the Department considered improper. But, he said, research set forth in the committee materials suggested that the acquittals in those particular cases, upon closer examination, appear to have been justified. Professor Beale explained that the materials included a letter from the federal defenders containing detailed transcript quotations and references to demonstrate the reasons for the pre-verdict acquittals in those cases. This letter, she said, had had a large impact on the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2007 (Agenda Item 6).

Amendment for Final Approval of the Judicial Conference

FED. R. EVID. 502

Judge Smith reported that the advisory committee's primary impetus in proposing new Rule 502 (waiver of attorney-client privilege and work-product protection) was to address the high costs of discovery in civil cases. He explained that if the rules governing waiver were made more uniform, predictable, and relaxed, attorneys could reduce the substantial efforts they now expend on privilege review and decrease the discovery costs for their clients. Lawyers today, he said, must guard against the most draconian federal or state waiver rule in order to protect their clients fully against the danger of inadvertent subject-matter waiver.

Judge Smith added that national uniformity is greatly needed in this area. The bar, he said, has been strongly supportive of the proposed new rule, and their comments have been very useful in improving the text. He explained that proposed Rule 502(b) specifies that an inadvertent disclosure will not constitute a waiver if the holder of the privilege or protection acts reasonably to prevent disclosure and takes reasonably prompt measures to rectify an error. Subject-matter waiver will occur only when one side acts unfairly and offensively in attempting to use a privilege waiver as to a particular document or communication.

Professor Capra added that the bar believes strongly that the rule will be very beneficial. It would provide national uniformity and liberalize the current waiver standard in the federal courts. He noted that the text had been refined further since the April 2007 advisory committee meeting in response to suggestions from a Standing Committee member and the Style Subcommittee.

Professor Capra noted that Rule 502(c) deals with disclosure and waiver in state-court proceedings. He pointed out that the advisory committee had been very sensitive to federal-state comity concerns and had revised the rule to take account of comments made by the Federal-State Jurisdiction Committee of the Judicial Conference and state chief justices.

He emphasized that the rule will provide protection in state proceedings and, indeed, must do so in order to have any real meaning. But, he said, the rule does not explicitly address disclosures first made in the course of state-court proceedings. Thus, if a party seeks to use in a federal proceeding a disclosure made in a state proceeding, the

federal rule will not necessarily govern. Rather, the most protective rule would apply, *i.e.*, the one most protective of the privilege.

Professor Capra explained that Rule 502(d) is the heart of the new rule. It specifies that a federal court's order holding that a privilege or protection has not been waived in the litigation before it will be binding on all persons and entities in all other proceedings – federal or state – whether or not they were parties to the federal litigation. Rule 502(e) provides that parties must seek a court order if they want their agreement on the effect of disclosure to be binding on third parties.

Professor Capra reported that the Department of Justice had expressed concern over the committee's decision to extend Rule 502(b) to inadvertent disclosures made "to a federal office or agency," as well as "in a federal proceeding." He noted that members of the bar had argued that the cost of pre-production review of materials disclosed to a federal agency can be just as great as that before a court.

He explained that the Department of Justice was concerned that an Executive Branch officer does not generally know whether there has been a waiver. A matter before an agency is not yet a "proceeding," and there is no judge to whom the agency can go for a ruling on waiver. As a practical matter, then, an agency may get whip-sawed later if a party claims that it did not intend to waive protection or privilege. That scenario may occur now, but the Department believes that it is likely to happen more often under the proposed rule. He noted that the advisory committee was aware of the Department's concerns, but it was willing to accept that risk in return for the benefits of reducing the costs of discovery before government agencies.

Professor Capra reported that, as published, the rule had set forth in brackets a provision governing "selective waiver." The bracketed selective waiver provision had specified that disclosure of protected information to a federal government agency exercising regulatory, investigative, or enforcement authority does not constitute a waiver of attorney-client privilege or work-product protection as to non-governmental persons or entities, whether in federal or state court.

Professor Capra pointed out that the advisory committee had not voted affirmatively for the provision, but had included it for public comment at the request of the former chairman of the House Judiciary Committee. During the comment period, he said, the provision had evoked uniform and strong opposition from the bar, largely on the grounds that it would further encourage a "culture of waiver" and weaken the attorney-client privilege. On the other hand, he said, representatives of government regulatory agencies supported the selective waiver provision.

Professor Capra said that, as a result of the public comments, the advisory committee had decided that selective waiver was essentially a political question and

should be removed from the rule. Instead, it agreed to prepare a separate report for Congress containing appropriate statutory language that Congress could use if it wanted to enact a selective waiver provision. The draft letter, he said, would state that the committee's report on selective waiver is available on request if Congress wants it. Professor Capra emphasized that the advisory committee did not want to let a controversial issue like selective waiver detract from, or interfere in any way with, enactment of the rest of the proposed new rule, which is non-controversial and will have enormous benefits in reducing discovery costs.

A member asked what good it does, once a disclosure in a state proceeding has been found to have waived the privilege in that state proceeding, for the privilege to be found protected in a later federal proceeding. As a practical matter, the disclosed information is already out. Professor Capra responded that the advisory committee had discussed these issues with the Conference of Chief Justices and had reached an agreement that the federal rule would apply if more protective of the privilege than the applicable state rule. In fact, though, most states have a rule on inadvertent disclosure similar to the proposed new federal rule, and the rule of some states is more protective of the privilege. Given those circumstances, he said, the concern may be largely theoretical. He added that it would be very complex to apply a state law of waiver that is *less* protective of the privilege than the federal rule. The proposed new rule would avoid that situation.

A member pointed out that even though the advisory committee had decided that the proposed new rule would not address the matter, selective waiver is still present. As a practical matter, once there is a federal judicial proceeding involving the federal government, proposed Rule 502(d) may function as a mechanism for a selective waiver. For example, a party may permit a document to be disclosed to its federal government opponent. Even if the privilege is found waived as to that document, there will not be a subject-matter waiver unless the exacting requirements of Rule 502(a) are met. If the court rules that there is no subject-matter waiver, the ruling will be binding in later proceedings under Rule 502(d). Thus, the new rule will give the government an incentive to initiate a judicial proceeding in the hope of extracting what would amount to a selective waiver.

Mr. Tenpas observed, regarding selective waiver, that the Department has been told for years by parties under investigation that they would like to turn over specific documents to the government, but could not afford to do so for fear of waiving the privilege as to everybody else. Ironically, he said, the same people now say that they are strongly opposed to a selective waiver rule.

He added that the Department would prefer that the rule proceed to Congress with a selective waiver provision included. He wanted to make sure that the issue is preserved

and that the Department's support for sending the rest of the rule forward is not interpreted as a lack of support for selective waiver.

A member stated that he was distressed by the length of the proposed committee note. He said that it reads like a law review article and should be cut substantially. Professor Capra responded that a longer note was needed in this particular instance because it will become important legislative history when the rule is enacted by Congress. Another member pointed out that committee notes help to explain the rationale for a rule during the public comment process. But once the rule is promulgated, it might be better to have a shorter note on the books. He suggested that the note might be made shorter and some of its points transferred to a covering letter to Congress.

Professor Capra observed that when Congress enacted FED. R. EVID. 412 (relevance of alleged victim's past sexual behavior or predisposition) it had declared that the committee note prepared by the rules committees would constitute the legislative history of the statute. Congress, he said, could do the same thing with the proposed new Rule 502. That possibility, he said, would argue for a relatively lengthy note. He further commented that the signals the advisory committee reporters receive from the Standing Committee are not uniform as to what the committee notes are supposed to do. In any event, he said that he would cut back the length of the note in response to the members' comments.

Professor Coquillette added that committee notes often become fossilized over time. Statements that are very useful at the time a rule is adopted can, several years later, become unnecessary, disconnected, or wrong. The rules committees, however, cannot change a note without changing the rule. Also, he said, some lawyers only use the text of the rule, and they do not have ready access to committee notes and the treatises.

A member questioned the language of proposed Rule 502(b)(2) that the holder of a privilege must take "reasonable steps" to prevent disclosure. The whole point of the rule, he said, is that in a big document-production case an attorney need not search each and every document to uncover embedded privilege issues. But what, in fact, constitutes the "reasonable steps" that the attorney must take? He pointed out that he personally would avoid problems by reaching an early agreement in every case with his opponent to address inadvertent waiver. Professor Capra responded, however, that not every party can obtain such an agreement. Moreover, an attorney cannot know for certain in advance that he or she will reach an agreement with the opponent or be able to obtain a court order. He predicted that in time, few issues will arise under the language of Rule 502(b).

Mr. Tenpas explained further the Department of Justice's concern over extending the inadvertent waiver provision to documents turned over "to a federal office or agency." He explained that the Department was well aware that it is very expensive for a party to conduct privilege review of documents given to a federal agency, just as it is in litigation

before a court. The proposed new rule, therefore, is designed to change parties' conduct in this regard, and reduce the costs of privilege review.

The problem for the government, though, is that the federal office or agency does not know whether a disclosure will constitute a waiver until it can obtain a ruling from a judge in some future litigation. He recognized that that is also the case now. But he argued that no one knows how many more privileged documents will slip through under the new rule, as compared to the current regime. The Department, he said, was concerned that it will occur more frequently under the proposed rule.

He suggested that it would make sense at this point to limit the new rule to federal court proceedings only. The committee could at a later date consider whether to extend it to documents disclosed to federal regulators.

Mr. Tenpas moved to amend proposed Rule 502(b) by striking from line 18 the words "or to a federal office or agency."

A member noted that consideration of proposed Rule 502 is different from the committee's usual rulemaking process because any rule pertaining to privileges must be affirmatively enacted by Congress. This circumstance creates practical problems if the committee wants to make additional changes later in light of experience under the rule. The committee could not then merely make changes through the rulemaking process, but would have to return to Congress for a further statutory amendment. This, he said, is an argument against making the change that the Department of Justice urges, i.e., deleting "or to a federal office or agency."

Judge Smith stated that the issue of including "a federal office or agency" in the inadvertent disclosure provision was not a deal-breaker for the advisory committee. The public comments, he said, had made it clear that something needs to be done as soon as possible to reduce the costs of privilege review in discovery. Thus, getting a new Rule 502 enacted by Congress is the main goal. Beyond that, he said, the rule should cover as many contexts as possible.

Mr. Tenpas stated that the main focus of the proposed rule is on litigation in court, not on dealings with federal agencies. Productions of documents to federal agencies outside litigation, he argued, do not entail huge document productions nearly so often as in litigation.

The committee voted by voice vote, with two objections, to deny the motion to strike the words "or to a federal office or agency."

Judge Hartz moved to approve Rule 502, subject to possible further refinements in the language regarding state proceedings.

Judge Levi stated that the proposed new rule is extremely important and will reduce the cost of litigation in a significant way. He recognized that the Department of Justice has had concerns about applying the rule's inadvertent waiver principles to documents disclosed "to a federal office or agency." Nevertheless, he implored the Department not to allow its opposition to that particular provision to be interpreted by Congress in any way as opposition to the rule. He said that Congress must not be sent signals that the rule is either complicated or controversial. To the contrary, he said, the public comments had demonstrated that the rule is universally supported, very important, and urgently needed. Mr. Tenpas responded that the Department of Justice would vote in favor of the proposed new rule.

The committee without objection by voice vote agreed to send the proposed new rule to the Judicial Conference for final approval.

ADAM WALSH CHILD PROTECTION ACT

Professor Capra reported that the Adam Walsh Child Protection and Safety Act of 2006 directed the committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse; or (2) a child under the custody or control of either spouse."

Professor Capra pointed out that the Congressional reference had been generated by concern over a 2005 decision in the Tenth Circuit. The court in that case had refused to apply a harm-to-child exception to the adverse testimonial privilege. The defendant had been charged with abusing his granddaughter, and the court upheld his wife's refusal to testify against him based on the privilege protecting a witness from being compelled to testify against her spouse.

Professor Capra explained that the decision is the only reported case reaching that conclusion, and it does not even appear to be controlling authority in the Tenth Circuit. Moreover, there are a number of cases from the other circuits that reached the opposite conclusion. He said that the advisory committee had decided that there was no need to propose an amendment to the evidence rules to respond to a single case that appears to have been wrongly decided. He added that that the committee had been unanimous in its decision not to recommend a rule, although the Department of Justice saw the enactment of a statute at the initiative of Congress as raising a different question.

Professor Capra reported that the advisory committee had prepared a draft report for the Standing Committee to send to Congress concluding that an amendment to the evidence rules is neither necessary nor desirable. At the request of the Department, however, the report also included suggested language for a statutory amendment should

Congress decide to proceed by way of legislation. Mr. Tenpas added that cases involving harm to children are a growing part of the Department's activity, and the Department likely would not oppose a member of Congress introducing the draft rule language as a statute.

The committee without objection by voice vote approved the report for submission to Congress.

Informational items

Professor Capra reported that the advisory committee would begin the process of restyling the evidence rules in earnest at its November 2007 meeting. He noted that Professor Kimble, the committee's style consultant, was already at work on an initial draft of some rules.

Professor Capra said that the advisory committee had decided to defer considering any amendments to the evidence rules that deal with hearsay in order to monitor case law development following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). He noted that earlier in the current term, the Court had ruled that if a hearsay statement is not testimonial in nature, there are no constitutional problems with admitting it. As a result, the advisory committee might begin to look again at possible hearsay exceptions.

REPORT ON STANDING ORDERS

Professor Capra said that Judge Levi had asked him to prepare a preliminary report on the proliferation of standing orders and how and whether it might be possible to regulate standing orders. He thanked Jeffrey Barr and others at the Administrative Office for gathering extensive materials on the subject for him.

He noted that standing orders are general orders of the district courts. But the term is also used to include the orders of individual judges. In addition, the difference between local rules and standing orders is not clear, as subject matter appearing in one court's local rules appears in another's standing orders. In some instances, standing orders abrogate a local court rule, and some standing orders conflict with national rules.

Standing orders, unlike local rules, do not receive public input. They are easier to change but are not subject to the same review by the court or the circuit council. They are also harder for practitioners to find, as they are located in different places on courts' local web sites. Some courts, moreover, do not post standing orders, and many judges do not post their own individual orders. And the courts' web sites do not have an effective search function.

Professor Capra suggested that one question for the Standing Committee was to decide what can, or should, be done about the current situation. A few districts, he said, had made some attempt to delineate the proper use of standing orders, such as by limiting them to administrative matters and to temporary matters where it is difficult to keep up with changes, such as electronic filing procedures. He suggested that another approach would be to include basic principles in a local court rule and supplement them with a more detailed local practice manual.

Professor Capra pointed out that his preliminary report had set forth some suggestions as to the role that the Standing Committee might assume vis a vis standing orders. One possibility would be to initiate an effort akin to the local-rules project to inform the district courts of problems with their standing orders. But, he said, that course would require a massive undertaking. Another approach would be to focus only on those orders that conflict with a rule. Alternatively, the committee could list the topics that should be included in local rules and those that belong in standing orders. In addition, the committee might address best practices for local court web sites.

Members said that Professor Capra's report was excellent and could be very helpful to judges and courts. One suggested that the Judicial Conference should distribute the report to the courts and adopt a resolution on standing orders. Judge Levi added that the report was not likely to encounter much resistance because it does not tell courts what to do, but just recommends where information might be placed in rules or orders. He suggested that the report be presented at upcoming meetings of chief district judges and the district-judge representatives to the Judicial Conference. Finally, Judge Levi recommended that his successor as committee chair consider the best way to make use of the report.

REPORT ON SEALING CASES

Mr. Rabiej reported that the Executive Committee of the Judicial Conference had asked the rules committees, in consultation with other Conference committees, to address the request of the Court of Appeals for the Seventh Circuit that standards be developed for regulating and limiting the sealing of entire cases. He noted that there had been problems in a handful of courts regarding the docketing of sealed cases. The electronic dockets in those courts had indicated that no case existed, and gaps were left in the sequential case-numbering system. This led some to criticize the judiciary and accuse it of concealing cases. Corrective action has been taken, in that the electronic docket now states that a case has been filed, but sealed by order of the court.

Mr. Rabiej said that a complete solution to the problems of sealed cases may require a statute. Judge Levi decided to appoint a subcommittee, chaired by Judge Hartz and including members of other Conference committees, to study the matter and respond to the request of the Seventh Circuit. He said that a representative from each of the advisory committees should be included on the new subcommittee, as well as a representative from the Department of Justice.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held on January 14-15, 2008, in Pasadena, California.

Respectfully submitted,

Peter G. McCabe,
Secretary