# ADVISORY COMMITTEE ON CRIMINAL RULES

# MINUTES

**October 20-21, 2008**
**Phoenix, Arizona**

## I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Phoenix, Arizona, on October 20-21, 2008. The following members participated:

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

Judge Mark L. Wolf, whose term expired last month, also attended. Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Judge Rosenthal's law clerk, Andrea Kuperman, was also present. Supporting the Committee were:

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

Also attending were two officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — and two officials from the U.S. Sentencing Commission, General Counsel Kenneth P. Cohen and Assistant General Counsel Tobias A. Dorsey.

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

The Committee welcomed its newest member, Judge England, from the Eastern District of California, appointed by the Chief Justice to succeed Judge Wolf, whose term just expired.

### B. Review and Approval of the Minutes

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

***The Committee unanimously approved the minutes.***

## II. CRIMINAL RULES UNDER CONSIDERATION

### A. Proposed Amendments Approved by the Supreme Court, Pending Before Congress, and Set to Take Effect on December 1, 2008

Mr. Rabiej noted that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, are set to take effect, absent Congressional intervention, on December 1, 2008.

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

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

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

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

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

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

administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa.

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

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

### B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej observed that the Judicial Conference had approved the following proposed rule amendments, which the Rules Committee Support Office was proofreading for eventual submission to the Supreme Court:

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

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

Rule 32.2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Rule 41. Search and Seizure. The proposed amendment specifies procedure for executing warrants to search for or seize electronically stored information.

Rule 45. Computing and Extending Time. The proposed amendment simplifies time-computation methods. Related proposed amendments involve the time periods in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and Rule 8 of § 2254/§ 2255 Rules.

Rule 11 of the Rules Governing § 2254 Cases. The proposed amendment clarifies requirements for certificates of appealability.

Rule 11 of the Rules Governing § 2255 Cases. The proposed amendment clarifies requirements for certificates of appealability.

### C. Other Recent Developments

It was noted that the Judicial Conference had also approved the two dozen or so proposed statutory changes that Congress is being asked to enact to account for the effect of the rule changes on certain statutory time periods. Congressional staff are reportedly optimistic about the

legislation's eventual prospects. Judge Rosenthal noted that chief judges will be alerted, probably in January 2009, about the need for conforming local rule adjustments. The Department of Justice offered to send Congress a letter supporting the statutory changes. Judge Tallman suggested that a similar letter from the Public Defenders would be helpful, so that the non-controversial nature of the proposed time changes is clear.

Judge Tallman noted that the proposed Rule 6 amendment on the use of video conference for the return of a grand jury indictment had not yet been forwarded to the Judicial Conference. It was felt that the Supreme Court should be given an opportunity first to weigh in on the proposed Rule 15 amendments permitting overseas depositions.

The Committee was informed that Congress had enacted Evidence Rule 502 as drafted — a significant accomplishment affecting white-collar criminal law cases, among others.

Professor Beale notified the Committee that Senator Jeff Sessions has requested committee background materials on the proposed amendment of Rule 29 permitting a judgment of acquittal to be appealed. She noted that the Committee had rejected the proposed amendment only after careful study and after weighing the public comments opposing it. Judge Tallman mentioned the Judicial Conference's long-standing policy against legislative efforts to bypass the Rules Enabling Act process. A participant suggested that the issue may involve substantive law outside the rulemaking process, which might call for further examination.

### D. Proposed Amendments Approved by the Standing Committee for Publication

Judge Tallman noted that the following amendments were published in August 2008. Public hearings have tentatively been scheduled to take place on January 16 in Los Angeles, California, and on February 9 in Dallas, Texas.

> Rule 5. Initial Appearance. This proposed amendment implements the Crime Victims' Rights Act (CVRA) by directing a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant.
>
> Rule 12.3. Notice of Public-Authority Defense. The proposed amendment implements the CVRA by providing that a victim's address and telephone number should not be automatically provided to the defense. Courts remain free to authorize disclosure for good cause shown.
>
> Rule 15. Depositions. The proposed amendment authorizes a deposition outside the defendant's presence in limited circumstances if the court makes case-specific findings.

Rule 21. Transfer for Trial. The proposed amendment implements the CVRA by requiring that the convenience of victims be considered in determining whether to transfer the proceedings to another district for trial.

Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the evidentiary standard and burden of proof for releasing or detaining a person on probation or supervised release.

## III. SUBCOMMITTEE REPORTS

### A. Rule 32(h), Procedural Rules for Sentencing

Judge Molloy reported that the majority view of the Rule 32(h) subcommittee, which he chairs, was that the rule should be amended to require notice of a contemplated "variance" and the grounds for a variance from the U.S. Sentencing Guidelines similar to notification requirements governing sentencing "departures." He suggested, however, that the Committee first consult with the Sentencing Commission to learn how the rule has operated in the wake of the Supreme Court's decision in *Irizarry v. United States*, 553 U.S. ___ (June 2008), which held that Rule 32(h) does not apply to a variance from a recommended Guidelines range.

Mr. Wroblewski said that this was the rare situation when prosecutors and defense counsel are on the same side of an issue. Both parties in a criminal case are seeing surprises at sentencing and dislike the lack of predictability. Prior to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Reform Act provided litigants with transparency and an opportunity to be heard on all aspects of sentencing. Post-*Booker*, judges are free to impose sentences either longer or shorter than recommended by the guidelines based on grounds contemplated by neither party. Mr. McNamara agreed that this was a concern.

There was discussion about whether amending Rule 32(h) to *require* notice of a variance would create frivolous grounds for appeal, inviting claims that the notice was insufficiently specific or no notice was given about a given detail. Being specific regarding a Guidelines departure is much easier than regarding a variance. Ms. Felton pointed out that a technical failure of notice can be harmless error, reducing the problem of frivolous appeals. One member stated that lack of notice may be infrequent, but when it does happen, it has severe consequences. She raised concern about a broader issue, that in preparing the presentence report (PSR), probation officers too often rely on one-sided information.

Mr. Cohen from the Sentencing Commission observed that the Commission had sent a letter supporting the proposed expansion of Rule 32(h) to cover variances and would be trying to collect data relevant to the issue. Mr. McNamara expressed support for a rule amendment to increase the flow of information. Currently, he said, probation officers receive information that never makes it to the other side. Other participants at the meeting contended that a rule amendment was unnecessary, that the problem occurs infrequently, and that it had just been addressed by the Supreme Court. District judges almost always handle problems that arise

effectively on a case-by-case basis by granting additional time to respond or a continuance. One member suggested that the Committee continue to study the issue and obtain more data before taking action.

Professor Beale directed the Committee's attention to the related question whether the Committee can, and should, draft a disclosure provision similar to what has been proposed by the American Bar Association (see ABA report at p. 198 of the agenda book). Mr. Wroblewski reported that the Department of Justice was asking the ABA to consider modifying its proposal to include greater reciprocity. Judge Tallman explained that the ABA proposes giving access not only to the presentence report itself, but also to all the underlying documents and oral conversations that the probation officer relies on to prepare the report. The proposal would turn the drafting of the presentence report into an adversary discovery process. Mr. Wroblewski agreed, expressing concern that it would result in disclosure to the defense of confidential witness information in the Department's files, to which probation officers now have access.

One member said that the probation officer often injects the PSR with a lot of information that the defense has never seen. Mr. McNamara agreed, reporting that many times the prosecutor later apologizes and says, "We should have given you that." One member reported that, unlike the ABA proposal itself, none of the local rules cited by the ABA provide for disclosure of information provided to the probation officer by *third-parties*. Mr. McNamara said that probation officers do not share with the defense any information obtained from probation officers in other districts regarding prior crimes and charges against the accused. Ms. Brill added that, although the defense could ask the court to order its probation officer to share the information or could go to another court and read the record of any charges there, this is not an easy process.

Judge Raggi defended the present system, warning that the ABA proposal could turn preparation of a PSR into even more of an adversary proceeding, each party objecting to anything that it might disagree with. If the Committee did decide to adopt something akin to the ABA proposal, Judge Raggi recommended requiring the probation officer to attach the source documents directly to the PSR, thereby giving all parties access to the raw information. Judge Rosenthal recommended that the Committee obtain data to learn how the various local rules have played out in practice.

Further discussion focused on the effects of the proposed amendment. Mr. McNamara suggested that requiring probation officers to disclose all their information sources directly to the parties would obviate the need for judges to get involved in wrangling over the text of the PSR or having to deal with these issues at the sentencing hearing. Judge Wolf reported that First Circuit Judge Michael Boudin had wondered in a recent opinion whether Rule 32(h) should be rescinded completely post-*Booker*. Judge Tallman commented that if the ABA proposal is adopted, then there would be no need for Rule 32(h). The parties would already have all the information they could possibly obtain other than what is in the judge's mind.

Professor King reported that there was debate when the presentence report system was first instituted whether the parties should have access to it, given concerns about chilling the judge's access to all the data needed to make sound sentencing decisions. The Committee should consider whether a requirement that the probation officer disclose every source of information obtained in preparing the PSR would chill the provision of information to the probation officer or create other problems — for instance, in cases where information has been provided upon a promise of confidentiality. Professor Beale observed that some version of this ABA proposal is now being road-tested in a number of districts. Mr. Cunningham reiterated that advocates on both sides have made it clear that they do not want surprises at sentencing, and they want to have the opportunity to address all of the evidence and issues that will determine the sentence.

Judge Wolf suggested that further study is necessary, recognizing that the Rule 32(h) issue is part of a broader set of issues. It was suggested that the Criminal Law Committee be consulted to determine how the proposed Rule 32(h) amendment might change the way probation officers do their work and that input be sought from probation officers themselves. Judge Tallman agreed that the issue requires further study. He asked the subcommittee to work with AO staff, Andrea Kuperman, and Laural Hooper at the FJC to contact and research the districts cited by the ABA, and any other district courts with similar rules. Meanwhile, he will contact Judge Julie E. Carnes, chair of the Criminal Law Committee, for additional input. After further discussion, Judge Tallman thanked the subcommittee for its substantial work.

### B. Rule 12(b) Challenges for Failure to State an Offense; Rule 34

Judge Wolf presented the Rule 12(b) Subcommittee report. Under Rule 12(b)(3), certain pretrial motions must be raised before trial. All but one subcommittee member agreed with the Department of Justice to add the motion to dismiss for failure to state an offense to the pretrial motions listed in Rule 12(b)(3), particularly given that the Supreme Court has ruled that the defect is non-jurisdictional. However, additional considerations complicate the issue. "Good cause" under Rule 12(e) is generally defined in the case law as both "cause" and "prejudice." In other words, in addition to showing prejudice from being precluded from raising the issue at or after trial, the defendant must also show good cause for not having raised the matter earlier. As a result, a defendant who was prejudiced by errors of counsel might have no redress.

Judge Wolf observed that the bracketed language in the proposed Committee Note (pages 177-78 of the agenda book) says "Good cause may include injury to the substantial rights of the defendant." Preventing a party from raising a tardy motion to dismiss the case for failure to state an offense presumably affects the defendant's substantial rights, satisfying the good-cause requirement and vitiating any waiver. This could affect the definition of "good cause" in *other* Rule 12 contexts.

Judge Wolf also noted that there is a circuit split on whether failure to raise the claim that the indictment fails to state an element of the offense is a "forfeiture" of the issue, subject to

plain-error appellate review, or a "waiver" of the issue, not subject to appellate review. The subcommittee proposes leaving this matter to the case law, as explained in the draft Note.

Judge Tallman suggested that the bracketed language modifies the "good cause" requirement of "cause" *and* "prejudice" adopted in circuit case law by changing the conjunctive to the disjunctive. Instead of *both* cause and prejudice being required, only a showing of "prejudice" would be required. Another member agreed, suggesting that the Committee may want to omit the bracketed language and entrust the definition of "good cause" to case law.

One member asked whether the proposed rule amendment would prohibit a defendant from challenging at trial an indictment that failed, for instance, to charge a nexus with interstate commerce on the ground that this constitutes failure to invoke the court's jurisdiction. Failure to allege an element of the offense is covered by the proposed amendment, which would require the motion to dismiss to be filed *pretrial*, but this would also constitute a failure to allege the court's jurisdiction. Could the rule disallow a motion to dismiss filed during or after trial alleging that the indictment did not establish the court's jurisdiction? Another member agreed, suggesting that, if a charge fails to allege a crime, it must be dismissible even during or after trial.

Judge Wolf indicated that, if the standard for raising the issue during trial were to be "good cause equals 'cause' plus 'prejudice'," then he would oppose the rule amendment. Defendants should not lose rights simply because their lawyers dropped the ball. If the judge doesn't have discretion to fix a defective indictment where the defendant suffers prejudice, then the amendment is ill-advised.

Another member suggested that the proposed rule change would create a host of new issues while purporting to "solve" what is a rare occurrence, which he has never seen in his career and which the Department of Justice had relatively few reports of, namely, a defendant filing a motion to dismiss for failure to allege an element *during trial*. It was noted that the committee lacked empirical data on how often the issue is raised at trial and on what the defendant's reasons have been when it is raised at trial.

Another member suggested that, in the wake of *United States v. Cotton*, 535 U.S. 625 (2002), there is no reason to treat the failure to include an element of the offense differently from any other Rule 12 issue. If the Committee concludes, however, that it is necessary to recast the cause and prejudice standard to accomplish that objective, the proposed amendment could do more harm than good, all in an effort to solve a relatively small problem. The Department of Justice agreed that the cause and prejudice standard is all over the map and that the Committee should perhaps fix that someday. This amendment, however, tries only to bring consistency, in light of *Cotton*, to how different Rule 12 motions are handled.

Professor Coquillette suggested that the draft Committee Note might not want to refer to the current circuit split, as the split could change, whereas the Note could not unless the rule were subsequently amended and could easily become archaic and misleading.

One member objected that removal of the Note's bracketed language at page 178 would cause the rule to do what the Department of Justice said that it did not want, namely, force a defendant to lose substantial rights because of a bad attorney. Mr. Wroblewski disagreed, stating that in circuits where mistakes are analyzed as to whether they constitute substantial error, the proposed rule amendment might not alter much. Professor Beale observed that the Note could follow the format of the time computation notes and discuss the effect of the amendment in sample fact situations — which she considered a better option than redefining the good cause standard. Judge Tallman suggested that a vote on whether to amend the rule should precede a discussion about the Note.

Judge Jones moved to adopt the amendment as printed on page 176, conditioned upon a rewriting of the draft Committee Note. Judge Tallman said that the Note would be revised for presentation at the Committee's next meeting. One member argued against amending the rule if it requires both cause *and* prejudice to permit this issue to be raised at trial. Another member recommended leaving that question to the courts of appeals and suggested that the Committee need not resolve that question as a precondition to the rule change.

Concern was raised that, absent resolution of the Note's wording, it was unclear what the Committee was voting on. Judge Tallman clarified that this was a vote on whether, *in principle*, the rule needs amending. He expressed reluctance about creating a new definition of "good cause" strictly for one subsection of Rule 12, which would create a significant potential for mischief, and he warned against attempting to resolve a circuit split in a Committee Note. He then clarified that an affirmative vote would simply indicate a desire to continue the effort to fix the Note, not necessarily a commitment to amending Rule 12. The entire amendment, including the revised Note, would then become the subject of a new vote at the Committee Spring 2009 meeting.

***The Committee voted 7 to 5 to continue working on the proposed Rule 12 amendment and accompanying Committee Note.***

Judge Tallman appointed Judge England to chair the subcommittee, taking over for Judge Wolf, whose term expired. He welcomed further discussion of the good cause issue. After further discussion about the Note, Judge Tallman thanked Judge Wolf for his leadership on this issue and remarked that unless the subcommittee was able to address the circuit split and the other issues raised in a satisfactory manner, the rule amendment proposal could be rejected altogether.

### C. Use of Technology

Judge Battaglia delivered the report of the Technology Subcommittee, which was tasked not only with reviewing the Rule 41 amendment proposal, authorizing law enforcement to apply for search warrants electronically, but also with reviewing the rules more broadly to determine which ones might be in need of amendments to reflect technological advances. The subcommittee came up with a list of 16 rules that it believed fit that description (page 2 of Tab

3C of the agenda book). Each subcommittee member has been asked to prepare an analysis of several of these rules, and a full subcommittee report will be presented to the Committee in April 2009.

Asked whether the CVRA might affect any of this — for instance, victims' right to participate at various stages, Judge Battaglia responded that the subcommittee would consider that. Asked how the appellate courts could review the existence of probable cause, when the warrant was applied for telephonically, Judge Battaglia responded that a written document would have to be produced at that time, which could then be read over the phone to the judge. The law enforcement agent could not obtain telephone approval and then subsequently draft an application.

## IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

### A. Letter from Judge Carnes on Amending Rule 41 to Authorize Pretrial Service and Probation Officers to Seek and Execute Search Warrants

Judge Battaglia noted that the Criminal Law Committee proposes authorizing probation officers to seek and execute search warrants and suggests conforming changes to Rule 41 (see Tab 4A-B of agenda book). Current policy requires probation officers, in the absence of consent, to withdraw and refer suspicions of illegal activity to a law enforcement officer, complicating their jobs. It was suggested that "probation officers" and "pretrial services officers" could be added to the Rule 41 list of employees authorized to seek search warrants.

John Rabiej stated that the Criminal Law Committee is surveying probation officers and has yet to develop new probation officer guidelines. Judge Tallman explained that there is consequently no action item on this yet. The Criminal Law Committee meets in December and hopes to be in a position to propose a Rule 41 amendment by this Committee's next meeting.

Mr. Friedrich of the Department of Justice expressed concern over what appeared to be a major policy change. Judge Tallman reported that the Criminal Law Committee shared those concerns and expressed initial reluctance. Probation officers, however, made the case by pointing out that if judges continue to order supervision conditions that require search, then probation officers must have the authority to enforce those conditions on the spot, without having to retreat and ask a law enforcement officer to apply for a warrant and return to the scene at some later time. It was noted that officers would need appropriate training to do this.

Noting that Rule 41 now refers to search warrants being sought by "officers authorized by the Attorney General," Professor King asked why the Attorney General could not simply add probation officers and pretrial service officers to the list, obviating the need for a rule change. Professor Beale suggested that further changes to Rule 41 would nevertheless be required; because the proposal expands the type of material subject to search and seizure, as well as the standard for suppression.

One member suggested that authorizing judiciary officers to apply to judges for warrants raised Separation of Powers concerns. Another member questioned the wisdom of having probation officers, who try to cultivate a rehabilitative relationship with the people they supervise, applying for search warrants themselves. Judge Rosenthal recommended waiting until the Criminal Law Committee had issued its new guidelines, which might assuage some concerns. Judge Tallman emphasized that the Criminal Law Committee had primary jurisdiction over the policy question. Mr. Rabiej observed that the Judicial Conference was the ultimate policymaker and that the Conference would likely take any concerns expressed by this Committee into account in evaluating the Criminal Law Committee's recommendation. Judge Tallman suggested that Judge Carnes, chair of the Criminal Law Committee, be invited to the next meeting.

Mr. Friedrich remarked that the Department of Justice has occasionally authorized officers not under its authority to apply for search warrants, but only executive branch officers. The Criminal Law Committee proposal could raise potential conflicts. For instance, a probation officer conducting a search could undermine an undercover investigation that the probation officer knows nothing about. Probation officers are *not* law enforcement officers, at least not in the way that FBI agents are, and searches can become dangerous in short order.

One member noted that probation officers in his district did not want to do searches. Mr. Rabiej said he believed the Criminal Law Committee's guidelines would be narrowly tailored, opposing broad search authority. Judge Tallman suggested that it was *judges* who were creating the problem at sentencing by tasking probation officers with enforcement of search conditions. It was noted that the guidelines could be written very narrowly, authorizing a probation officer to apply for a search warrant where he or she has first-hand information, for instance, but tasking someone else to execute it. Judge Tallman promised to relay the concerns to Judge Carnes.

### B. Letter from Judge Weinstein on Amending Rule 11 to Authorize Discovery by Defendants

Judge Tallman invited discussion of the letter from Judge Jack B. Weinstein (NY-E), at page 230 of the agenda book, suggesting that Rule 11 be amended to include a reference to the defendant's right to compel the production of documents. He expressed reluctance to initiate the proposed rule change, suggesting instead a change to the Federal Judicial Center's Bench Book that would recommend a statement in the guilty-plea colloquy like, "You have the right to use the power of this court to bring in evidence and witnesses on your behalf." Judge Raggi agreed, warning that if this is in the rule, a guilty plea may not be considered voluntary if those words are not said. Judge Tallman said that he would respond to Judge Weinstein's letter.

## V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, AND OTHER COMMITTEES

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

John Rabiej reported that the bail bond bill had died in this Congress, although he predicted that it would be introduced again, as it has been in every Congress for years.

### B. Update on Implementation of Crime Victims' Rights Act and Issues Arising Under the Act

Judge Jones provided an update on implementation of the Crime Victims' Rights Act (CVRA). He reported that no action had been taken in Congress on Senator Kyl's proposal to amend the rules by statute to incorporate various provisions implementing the CVRA that the Committee did not adopt. John Rabiej observed that, following a lengthy investigation that included a survey of judges, victims, and prosecutors, the U.S. Government Accountability Office (GAO) had issued a draft report on how the Act has been implemented. The draft report included no criticism of the courts and agreed that the CVRA's 72-hour provision was too short.

A few other issues were discussed. Judge Tallman asked whether courts were complying with the 72-hour limit. He said he thought all the parties usually sought extensions anyway, because no one — neither the court nor the parties — can do it in 72 hours. Mr. Wroblewski observed that the Department of Justice meets regularly with victims' rights groups, and could raise these questions with them. Professor Beale said that it would be helpful if the Department sent the Committee letters summarizing those meetings. Judge Tallman agreed, adding that it would be good for the Committee to have such feedback. Mr. Wroblewski agreed to do that. Judge Jones observed that the Committee could also meet with victims' representatives itself to discuss these matters.

### C. Revision of the Search and Seizure Warrant Forms

Mr. McCabe requested the Committee's input on a proposed substantive change to national search warrant forms. As part of a recent revision of national forms to reflect the new privacy rules and to restyle the language in simple, modern English, AO staff and the Forms Working Group discovered that search warrant forms have long required law enforcement agents to swear before a judge to the warrant inventory even though this is not required in the rules. Agents have traveled 200 miles to appear before a judge and swear to the inventory. It appears that this form language is a holdover from a 1917 statute abrogated decades ago when the Federal Rules of Criminal Procedure were first adopted.

Judge Battaglia reported that his subcommittee is looking at whether this can all be done electronically, in which case it would be clear that the return of a warrant need not be presented to the judge in person. Referring to the warrant form on page 243 of the agenda book, Judge

Tallman suggested that nothing in Rule 41 prevents ending the form with the officer's sworn signature declaring under penalty of perjury that the inventory is correct. Although Rule 41(f)(1)(D) requires the agent to return the warrant and inventory to the magistrate judge, it was noted that the rule does not require that it be sworn before the judge, whether in person or by video.

Judge Tallman asked Mr. McCabe to convey the Committee's consensus to the Forms Working Group that the "sworn before me" signature section can be eliminated from forms AO 93, AO 93A, and AO 109. If the Forms Working Group or the AO has any additional questions involving national criminal forms, those can be transmitted to the Committee's reporter.

### D. Proposed Amendment of Rule 12.4

The Committee discussed a request by Judge Gordon J. Quist on behalf of the Committee on Codes of Conduct that consideration be given to amending Rule 12.4 to require greater victim information disclosure. Rule 12.4, added in 2000, requires the Department of Justice to submit a disclosure statement on the holdings of organizational victims.

It was agreed that the central issue was whether a new provision should be added to Rule 12.4 that would require the government to disclose all victims, not just organizational victims and whether the rule should require all organizational victims asserting rights to disclose their affiliates. The present rule requires disclosure of information only by the government and non-governmental *parties*. And, the government must disclose only as to *organizational* victims. The government must do so at the defendant's initial appearance, and must supplement. So, if an organizational victim exercises CVRA rights, the organizational victim itself — as distinguished from the government — has no disclosure obligation. Requiring *individual* victims to disclose could raise privacy concerns, unless the disclosure was done to the judge under seal, strictly for recusal purposes. Judge Tallman noted that the rules now include a definition of "victim," drawn from the CVRA.

It was noted that, practically speaking, judges often do not know the identity of victims in a case until trial or even sentencing. Mr. Wroblewski said that he perceives no problem with respect to *individual* victims, since the judge would likely be aware of the conflict if a victim is a family member or the like, where recusal is required. And if the victim was not as closely related, recusal would not be required. The main problem was judges' stockholdings in organizational victims. One member agreed, but observed that if a non-organizational victim was the judge's neighbor or friend, the judge might not be aware of that fact, but would want to be promptly alerted to it. Another member pointed out that under the current rule, the government must do the disclosing even if it does not know a victim's affiliates. If the victim is asserting rights, the rules could instead require the victim to make the disclosure.

Judge Tallman observed that the Committee should only concern itself with whether the information needs to be disclosed to the judge, not whether or not the judge must recuse, which was not this Committee's concern. He suggested that the subcommittee begin drafting a Rule

12.4(a)(3) proposal for review at the April 2009 meeting. He said he saw no reason why the rule should exclude non-organizational victims. Where appropriate, disclosure could be made under seal so that the information is not made public. Mr. Rabiej reported that the Committee on Codes of Conduct is drafting a follow-up letter on this. Judge Tallman indicated that he would contact Judge Margaret McKeown, who has succeeded Judge Quist as chair of that committee.

### E. Use of Subcommittees

Judge Tallman drew the Committee's attention to the memorandum from Judge Anthony J. Scirica, chair of the Executive Committee, requesting input from each committee chair on the use of subcommittees by Judicial Conference committees. Judge Tallman observed that he has pared down the Committee's list of standing subcommittees. His draft response is reproduced in the agenda book, although obsolete language about Rule 49.1 in the next-to-last paragraph on page 232 of the agenda book would be removed. Judge Tallman expressed doubt that anyone could seriously contend that the use of subcommittees by rules committees represents an inefficient use of resources, noting that the Committee as a whole could not possibly wordsmith every single proposed word change. The Committee would continue making appropriate use of subcommittees, he said.

Judge Rosenthal suggested that Judge Scirica's memorandum reflected concerns not applicable to the rules committees. In some committees, too much of the work is being done by staff and subcommittees with little committee supervision — which is not true of the rules committees. The rules committees need subcommittees to study specific issues in detail and to draft rule amendment language, a practice that would be threatened if the Executive Committee were to promulgate poorly designed rules that were then misapplied to the rules committees. For instance, the proposed requirement that subcommittee chairs communicate with outsiders only through the committee chair would not work in the context of mini-conferences, where the subcommittee chair must communicate directly with outsiders. Judge Rosenthal asked that each advisory rules committee send its responsive memo to her. She would then forward them to Judge Scirica with a cover memorandum.

## VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman advised the group that the next meeting had been tentatively scheduled for April 6-7, 2009, in Washington, D.C., although April 27-28, 2009, had been identified as alternative dates. After thanking Judge Wolf for his years of service and contribution to the Committee, Judge Tallman adjourned the meeting.