

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 1-2, 2007

Park City, Utah

I. ATTENDANCE AND PRELIMINARY MATTERS

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

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and its Reporter, Professor Daniel R. Coquillette. Also present were Judge Susan C. Bucklew, former chair of the advisory committee, and Professor Nancy J. King, a former member and now a consultant to the advisory committee. Also supporting the committee were:

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

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

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

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

III. PROPOSALS FOR COMMITTEE CONSIDERATION

A. Report on June 2007 Meeting of the Standing Committee

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

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

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

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Bankruptcy Rules 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, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024 and new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law p. 17
2. Approve the proposed revisions to Bankruptcy Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24 to take effect on December 1, 2007 p. 17
3. Approve the proposed new Bankruptcy Official Forms 25A, 25B, 25C, and 26 to take effect on December 1, 2008 p. 17
4. Approve the proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41(b), 60, and new Rule 61, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law p. 27
5. Approve proposed new Evidence Rule 502, and transmit it to Congress with a recommendation that it be adopted by Congress in accordance with the law . p. 32
6. Approve sending the report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a “Harm to Child” Exception to the Marital Privileges to Congress in accordance with the law p. 34

<p>NOTICE</p> <p>NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.</p>

stored information may be limited to a description of the physical storage media seized or copied.

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

The Committee approved the advisory committee's recommendation to publish the proposed amendments to rules for public comment.

Informational Items

The Committee declined to approve the advisory committee's recommendation that Rule 16 be amended to codify and expand the *Brady* requirements that prosecutors disclose exculpatory information to the defense. Several Committee members expressed concern about the breadth and consequences of the proposed amendment. Some of the concerns were that it could impose broad new obligations on the prosecution to disclose potential impeachment materials and create uncertainty about the standards and burdens for setting aside convictions. The Committee recommended that additional empirical data and study be obtained about the potential impact of the proposal, including study into districts' local rules that state *Brady* obligations. In addition, the Committee wanted to obtain information about the experience with the Department of Justice's recent revisions to its *U.S. Attorneys' Manual* expanding the statement of prosecutors' obligations to provide potentially exculpatory information to defendants.

The advisory committee declined to move forward with a proposed amendment to Rule 29, which would have prohibited a judge from entering a nonreviewable judgment of acquittal before the jury verdict. Though the Department of Justice urged amendment of the rule to

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.

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 *Brady*

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.



Office of the Deputy Attorney General
Washington, D.C. 20530

June 5, 2007

The Honorable David F. Levi
Chair, Committee on Rules of
Practice and Procedure
United States District Court
for the Eastern District of California
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Dear Chief Judge Levi:

This letter sets out the Department's deep concerns with the Rule 16 proposal that will be considered by the Standing Committee next week. While the proposal suffers from a number of practical defects that this letter will address in significant detail, it is worth emphasizing certain broad points at the outset. The objective of the criminal justice system is to produce just results. This includes ensuring that the process we use does not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – i.e., victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice. Over the past several decades, a careful reconciliation of these interests, as they relate to disclosure of exculpatory and impeachment information, has been achieved through the interweaving of constitutional doctrine (i.e., Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419, 439 (1995)), statutory directive (i.e., Jencks Act and Crime Victims' Rights Act), and Rules (i.e., Rule 16). The Advisory Committee on Criminal Rules, Practice and Procedure ("Advisory Committee") now proposes a dramatic reworking of that balancing, one the Committee itself recognizes will extend far-beyond current Brady and Rule 16 obligations and would be a significant change in the current adversary system. Given the breadth of this proposal, it would be reasonable to expect there to be a well-documented case that this proposal is necessary to solve a fundamental problem of regular false conviction of the innocent. That is not the case. Instead, what the Advisory Committee offers is reference to a relatively small number of Brady cases (which needs to be put in the context of the more than 70,000 federal defendants convicted each year) and the general supposition of "highly respected practitioners" that change is needed.

In the same way that there is an absence of a compelling justification for such a significant change, the Committee's report also ignores the very substantial costs additional

disclosure will impose – costs to the reputational and privacy interests of witnesses, costs in additional litigation, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. These are real costs and ones that both the Supreme Court and Congress have taken pains to avoid. The Committee offers the proposed rule and its rejection of a materiality requirement for the disclosure of exculpatory information despite the fact that the Supreme Court has observed that failure to limit the scope of Brady to material evidence “would entirely alter the character and balance of our present systems of criminal justice.” United States v. Bagley, 473 U.S. 667, 675 n.7 (1985) (quotation omitted). Similarly, the Bagley Court declared that a rule eliminating materiality “would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.” Id. Fundamental changes of this magnitude, which contemplate a departure from over forty years of Supreme Court precedent as well as established statutes and procedural rules, should not be entered into without significant pause and a corresponding and well-documented need. Because no such need has been demonstrated, the proposal should not move forward.

It is not simply the lack of an empirical case for change which should give pause, but also the fact that the Department’s new modifications to the United States Attorney’s Manual, (“USAM”) which address many of the Advisory Committee’s concerns regarding the disclosure of exculpatory and impeachment information, have not yet been given an opportunity to take full effect. The Department released this new USAM provision only after giving extensive and serious consideration to the rule amendments circulating in the Committee. In fact, the provision represents an unprecedented effort on the part of the Department to collaborate with Rule 16 subcommittee members to address their concerns while still preserving the balanced discovery system sought by Congress.¹ The new USAM provision did not merely codify a prosecutor’s constitutional disclosure obligations under the pre-existing Supreme Court precedent but went further – by expanding the disclosure obligations both in substance and process.² This new

¹ As stated in the Committee’s report, the Committee “applauded” the Department’s efforts to create a new USAM policy that required broad disclosure. In fact, during the drafting process, the Department obtained the approval of Committee members with respect to the USAM’s coverage of exculpatory information. Although sections of the Committee’s report focus almost exclusively on exculpatory information (see “The need to address the issue in Rule 16” discussion in Committee report), it is the Department’s understanding that the Committee moved forward with the proposed amendment in large part because it disagreed with the USAM’s coverage of impeachment information.

² It deserves mention that violating the USAM has serious repercussions: an attorney can be investigated by the Office of Professional Responsibility (“OPR”), disciplined or dismissed from the Department, and reported to his or her licensing Bar. A review of OPR investigations closed on or after January 1, 2002, through the present revealed that seventy investigations led to a finding of misconduct and the Department taking disciplinary action based on the misconduct. In addition, there are an additional twenty-one investigations pending before the Department in

provision is still in its infancy – having only taken effect on October 19, 2006 – and has not yet been given an opportunity to prove its effectiveness.

These factors are not the sole reasons to counsel against approving the proposal. Indeed, there are numerous problems with the Advisory Committee’s proposed modification to Rule 16. They include:

- As noted above, the proposed amendment is inconsistent with forty years of Supreme Court precedent as it seeks to obliterate any materiality requirement for both the disclosure of exculpatory and impeachment material. As the Court stated in United States v. Agurs, 427 U.S. 97, 112 n. 20 (1976), any effort to focus the impact of government disclosures on “the defendant’s ability to prepare for trial” deviates from the holding of Brady, which addresses the Court’s “overriding concern” with the justice and accuracy of the finding of guilt. Id. at 112. In reaching these decisions, the Court has recognized that eliminating the materiality requirement would “impose an impossible burden on the prosecutor and undermine the interest in the finality of judgements.” Bagley, 473 U.S. at 675 n. 7.
- The proposed amendment clashes with other provisions of the Rules of Criminal Procedure, including other portions of *Rule 16 itself*. For example, the government’s disclosure obligations under both Rule 16(a)(1)(E) and 16(a)(1)(F) are triggered by items that are “material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E)-(F). Likewise, Rules 16(a)(2) and 16(a)(3) leave the timing of the disclosure of non-expert witness statements to the provisions of the Jencks Act, as does Rule 26.2. The proposed amendment, however, does not even discuss how it should be reconciled with these provisions, passed by the Advisory Committee’s predecessors and codified by years of federal practice.
- The proposed amendment disregards the statutory requirements of the Jencks Act, 18 U.S.C. § 3500, which governs the disclosure of witness statements. This statute, which has been law for decades, represents the congressional balancing of the competing interests of witness security and privacy with the defendant’s interest in disclosure, and was intended to prevent defendants from rummaging through government files for helpful information. United States v. Palermo, 360 U.S. 353, 354 (1958). The proposed rule, however, utterly disregards that balance and consigns the statute, and the concomitant congressional balancing of interests contained in the Act, to a distant memory.
- The proposed amendment is inconsistent with discovery procedures which are

which OPR found misconduct and recommended disciplinary action.

applied every day in most of the federal courts in the United States where the materiality provisions of the Brady line of cases are applied routinely and effectively. Moreover, the Advisory Committee overstates the effect of local rules and practices in district courts across the country, a subject that augurs at a minimum for further study before enacting such a sweeping modification.

- There is no demonstrated need for such a significant change. The Advisory Committee relies principally on anecdotal evidence and the premise that, given the nature of the problem, the full scope of disclosure will never be known – an assertion that is virtually impossible for the government to refute. In contrast to the Advisory Committee’s position, our assessment of the Brady cases raised in the materials presented by the Committee³ suggests that on average there are less than two reported federal cases each year that find a Brady violation. This is hardly evidence of a substantial problem warranting such a fundamental change to existing practice.
- The proposal would sow confusion through the federal legal system by creating confusion in application, remedy and review. The rule contains little or no guidance on how it should be applied. For example, the Advisory Committee makes no effort to define “impeaching,” thus subjecting courts and practitioners to contend with multiple interpretations and leading to virtually unlimited disclosure obligations on the government to turn over innuendo, hearsay, and rumor, no matter how remote or speculative. Moreover, the proposal would create further confusion as to how courts should view violations that are disclosed before trial, after conviction, on appeal and on collateral review. For instance, the simple question of what is the proper remedy if a trial judge discovers before trial that a disclosure is incomplete remains unanswered. What if that discovery is made after the witness has testified? What if it occurs after a verdict? Should that verdict be set aside, or does a harmless error analysis apply? If so, what does that mean for the intended aim to dispense with a materiality requirement? What standard should be applied on appeal to allegations of a failure to comply with Rule 16? Does that change if the case is on collateral review? These questions – and many more – are left unanswered.
- The proposal risks treading on the current policy balance between disclosure and privacy interests and witness protection, while it also clashes with statutes, such as the Crime Victims’ Rights Act (“CVRA”) and federal and state rape shield laws, that are intended to safeguard the rights of crime victims. Congress enacted the CVRA, for example, to make crime victims full participants in the criminal justice

³ Our evaluation is based on the cases summarized in an excerpt from the Habeas Assistance Training Project.

system by providing them a procedural mechanism to enforce a number of rights and protections, including the right to have their privacy protected. Similarly, Congress has also made it a federal priority to help states combat child abuse and to promote the reporting and prosecution of rape and sexual assault through the enactment of rape shield laws and statutes protecting the confidentiality of child abuse investigative records. These statutes serve the compelling interest of protecting victims by making it easier for them to report such heinous crimes. The proposed rule, however, would require disclosure of such information regardless of its relevance, admissibility or materiality. Likewise, the new rule conflicts with state statutes, such those in California, that govern the disclosure of the personnel files of state and local law enforcement officials, as well as federal practices regarding the release of such information.

- The proposal disregards the legitimate interests of the federal government in protecting the safety and integrity of witnesses, many of whom are private citizens. The prospect of testifying in a federal criminal trial – regardless of the type of crime involved – can be frightening and intimidating, and it is difficult and challenging to secure the cooperation of the victims and witnesses of crime. It is a sad reality that many witnesses are threatened, harassed or, in some instances, assaulted or killed by those against whom they are asked to testify. The proposed rule, however, further threatens these witnesses by requiring the government to turn over all potential impeaching information, without limits to its admissibility, materiality or relevance, and then puts the burden upon the government to prove that witness safety is at risk – a burden that can be difficult to discharge before any harassment actually takes place. Thus, the proposed rule would ask victims and witnesses to shoulder an even heavier burden and would detract from effective law enforcement, all in the absence of a demonstrated need for such a radical change.

The Department of Justice strongly urges the Standing Committee to reject the Advisory Committee's proposal in its entirety as there is no justification for such a fundamental change to existing law. Should the Standing Committee decline to reject this proposal outright, the Department requests that it send the matter back to the Advisory Committee and direct it to study this issue further over several years. If, after a careful and studied review of the USAM's impact on the practice of discovery, the Advisory Committee determines that the USAM provision is not working, empirical evidence supports the need for a fundamental change, and a rule is required for achieving the desired results, then, and only then, the Standing Committee should ask the Advisory Committee to draft a new proposal – one that is consistent with existing law and Supreme Court precedent, properly balances the policy interests at stake, uses definitive and

precise language, answers the unanswered questions and addresses the concerns raised in this letter.⁴

I. The Proposal Upsets the Purpose, Operation, and Balance of the Current Law

A. The Proposal Is Inconsistent with Supreme Court Precedent

The rule announced in Brady is a constitutional right. Its purpose is to guarantee defendants the right to a fair trial and sentencing. It ensures that the factfinder can be made aware of any evidence that is exculpatory or impeaching and material to the factfinder's decision. Like many other constitutional guarantees under the Fourth, Fifth, and Sixth Amendments, it has never been codified. Like other constitutional protections, Brady provides no remedy unless the defendant shows that the Constitution has been violated. Unlike Rule 16, Brady's purpose is not to provide discovery – either for trial preparation or plea negotiations. Rule 16 serves that purpose and does so in a manner that is parallel and reciprocal for both parties. This distinction between Brady and Rule 16 discovery – reaffirmed in forty years of case law – is fundamental to the purpose and operation of the rules.

It is axiomatic that “[t]here is no general constitutional right to discovery in a criminal case.” Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Nevertheless, the Supreme Court has held that the disclosure of certain information is necessary to protect a defendant's right to a fair trial under the Due Process Clause of the Fifth Amendment.

In Brady, the Court granted a criminal defendant a new sentencing hearing because the prosecutor had withheld evidence of a co-defendant's confession. The Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due

⁴ The procedural history begins in October 2003, when the American College of Trial Lawyers (“ACTL”) first submitted a proposal to the Judicial Conference's Advisory Committee on the Rules of Criminal Procedure (“Advisory Committee”) to codify and dramatically expand the Government's disclosure obligations as set forth in Brady and Giglio. The Advisory Committee formed an initial subcommittee to consider the proposal. After its May 2004 meeting, the Advisory Committee agreed to continue its study of the proposal and formed a second subcommittee. The Department of Justice expressed its opposition to the ACTL proposal in written and oral submissions to both subcommittees. Despite numerous conference calls, a series of opposition memoranda, and the government-initiated creation of a policy in the United States Attorneys' Manual (“USAM”) requiring disclosure beyond the constitutionally required minimum, the subcommittee, over the Department's objection, voted to submit a draft amendment of Rule 16 to the Advisory Committee which greatly expanded the Government's disclosure obligations. After a series of revisions, the Advisory Committee, in turn, now presents new draft amendment language along the same lines to the Standing Committee and requests that it be published for public comment.

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. The principle supporting that holding, the Court explained, is “avoidance of an unfair trial to the accused.” Id.

In Giglio, the Court extended Brady to impeachment evidence, holding that the prosecution violated due process when it failed to disclose that it had promised its key witness that he would not be prosecuted if he testified at the defendant’s trial. The Court reasoned that “[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the Brady] rule.” Giglio, 405 U.S. at 154 (citation and internal quotation marks omitted).

In subsequent cases, the Court has consistently limited Brady to the nondisclosure of exculpatory and impeachment information that results in the denial of a fair trial by undermining confidence in the reliability of the jury’s finding of guilt or of the resulting sentence. In United States v. Agurs, 427 U.S. 97 (1976), for instance, the Court emphasized as “a critical point” that “the prosecutor will not have violated his constitutional duty of disclosure [under Brady] unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” Id. at 108. The Court further explained that, because “[t]he proper standard of materiality must reflect *our overriding concern with the justice of the finding of guilt*,” a prosecutor’s failure to disclose exculpatory evidence violates the Constitution only “if the omitted evidence creates a reasonable doubt that did not otherwise exist.” Id. at 112 (emphasis added). Notably, the Court rejected as inconsistent with Brady a standard that would instead “focus on the impact of the undisclosed evidence on the defendant’s ability to prepare for trial.” Id. at 112 n.20.

Similarly, in Bagley, the Court considered and rejected the expansion of Brady to reach nonmaterial, inadmissible information. The Court explained that the purpose of the Brady rule “is not to displace the adversary system . . . but to ensure that a miscarriage of justice does not occur.” Bagley, 473 U.S. at 675. For that reason, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.” Id. (footnote omitted). The Court explained that failure to limit the scope of Brady to evidence that is material “would entirely alter the character and balance of our present system of criminal justice.” Id. at 675 n.7 (quotation omitted). Such a rule “would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.” Id. The Court then reiterated that “[c]onsistent with our overriding concern with the justice of the finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.” Id. at 678 (citation and internal quotation marks omitted).

Subsequently, in Kyles, the Court explained that “the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” 514 U.S. at 436-37 (citing Bagley, 473 U.S. at 675 n.7). A constitutional violation

occurs only “when the government’s evidentiary suppression undermines confidence in the outcome of the trial.” *Id.* at 434 (citation and internal quotation marks omitted). And in *Strickler v. Greene*, 527 U.S. 263, 281 (1999), the Court observed that, while the phrase “‘*Brady* violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Id.* (footnote omitted).

In contrast with this established precedent, the Committee’s proposal requires disclosure of “all information . . . that is either exculpatory or impeaching,” without regard to whether its suppression would deprive the defendant of the benefit of a fair trial. The proposal intentionally eviscerates *Brady*’s “materiality” requirement and transforms *Brady* – which is intended to protect the fairness of trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence – into a trial preparation right by providing the defense with what inevitably will be, under the proposed rule, open file discovery. The Supreme Court has rejected earlier calls for expanding *Brady* in this manner, *see Agurs*, 427 U.S. at 112 n. 20; *Weatherford*, 429 U.S. at 557, and so should the Standing Committee.

As the case law uniformly recognizes, the purpose of the Supreme Court’s *Brady* line of cases is to protect the fairness of criminal trials, not to provide defendants with an additional discovery tool for assisting in trial preparation. Rule 16 – *which already overlaps with Brady in areas other than witness statements* – serves this latter purpose. As the Court explained, any broader right – such as the one currently proposed – would fundamentally alter the character and balance of our present systems of criminal justice. *Bagley*, 473 U.S. at 675 n.7 (quotation omitted).

B. The Proposal Is Inconsistent with Rule 16

The concept of materiality is a fundamental part of Rule 16 which governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly state that in revising Rule 16 “to give greater discovery to both the prosecution and the defense,” the Committee had “decided not to codify the *Brady* Rule.” Fed. R. Crim. P. 16 advisory committee’s note. The Committee noted, however, that “the requirement that the government disclose documents and tangible objects ‘*material* to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.” *Id.*

The elimination of the materiality requirement is contrary to the Committee’s existing discovery policy, the tenants of the other provisions of Rule 16, and the discovery practice occurring every day in courts throughout the country. For example, current Rule 16(a)(1)(E) requires disclosure of books, papers, documents, data, etc. if “the item is *material* to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E)(I) (emphasis added). Similarly, Rule 16(a)(1)(F) requires disclosure of reports of scientific tests or experiments if “the item is *material* to

preparing the defense” Fed. R. Crim. P. 16(a)(1)(F)(iii) (emphasis added). The proposed rule ignores the fact that Rule 16 already provides for significant discovery. It ignores the fact that Rule 16 already overlaps with Brady by requiring the Government to disclose documents, objects, and reports that are “material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E)(I). It ignores the fact that the Committee recognized this overlap and intentionally decided not to go further. Fed. R. Crim. P. 16 advisory committee’s notes. It ignores the fact that Rule 16 explicitly *excludes* non-expert witness statements from its scope – a protection granted to both parties – and, instead, recognizes that their disclosure and the timing of their disclosure is entrusted to the Jencks Act. See Fed. R. Crim. P. 16(a)(2)-(3) (reaffirming that the Jencks Act is the exclusive means for compelling the disclosure of statements of government witnesses for impeachment purposes). It ignores the policy underlying these rules – the unfortunate but real world fact that the premature disclosure of witness statements increases the risk of witness intimidation and creates opportunity for the opposing party to script the testimony of their witnesses in response – all of which taints the integrity of the trial itself.

The notion, suggested in Committee meetings and materials and by the ACTL in its original submission to the Committee, that the materiality requirement of Brady and Giglio is appropriate only in the context of appellate review or “cannot realistically be applied by a trial court facing a pre-trial discovery request” is simply false. The plain language of Rule 16, coupled with existing policy and practice demonstrates that not only is it possible to assess materiality accurately before trial but it is in fact done on a daily basis and has been codified in the current rules. The Committee’s report also incorrectly suggests that the decision not to require disclosure of exculpatory evidence within Rule 16 creates an “anomaly” within the Rules of Criminal Procedure. It is the proposal that would create an anomaly within the rules because it threatens to change Rule 16’s status as a limited rule requiring disclosure of material evidence and aims to drastically alter the provisions so that the government is effectively turned into an investigative agent for the defense.

C. The Proposal Is Inconsistent with the Jencks Act and Rule 26.2

The Jencks Act and Federal Rule of Criminal Procedure 26.2⁵ control the disclosure of non-expert witness statements and reports. The Jencks Act provides:

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United

⁵ Rule 26.2 was drafted to include the substance of the Jencks Act within the Criminal Rules. This Rule applies equally to the prosecution and defense as it allows either party to move for the production of any statement of a witness, other than the defendant, who has testified, that is in the possession of the non-moving party and that relates to the subject matter of the witness’s testimony. Fed. R. Crim. P. 26.2.

States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b). The Jencks Act balances the importance of disclosure in contributing to accurate determinations regarding guilt and punishment against the costs of offering open access to defendants of the government's investigative files. Compare Goldberg v. United States, 425 U.S. 94, 104 (1976) (noting that "[t]he House committee expressed its goal as that of preventing defendants from 'rummag[ing] through confidential information containing matters of public interest, safety, welfare, and national security.'" (quoting H.R. Rep. No. 700, at 4), with id. at 107 (describing the Jencks Act as "'designed to further the fair and just administration of criminal justice'" by requiring disclosure of certain witness statements) (quoting Campbell v. United States, 365 U.S. 85, 92 (1961)). The Act and the procedural rule designed to implement it achieve this balance by requiring the disclosure of only those witness statements that fall within their relatively narrow definition and only after the witness testifies.

In a Supreme Court case decided shortly after the enactment of the Jencks Act, the Court stated: "The Act's major concern is with *limiting and regulating defense access to government papers*, and it is designed to deny such access to those statements which do not satisfy [the definition of statement], or do not relate to the subject matter of the witness' testimony." Palermo v. United States, 360 U.S. 343, 354 (1959) (emphasis added). In keeping with these concerns, the Palermo Court described how certain materials if disclosed as impeachment information would defeat the purpose of the Act:

One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of Jencks would compel the indiscriminating production of agent's summaries or interviews . . . [It would be] grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations.

Id. at 350.

The Committee's proposal is inconsistent with the stated purpose of the Jencks Act – limiting and regulating defense access to government papers – in that its enactment essentially mandates disclosure akin to open file discovery. Requiring disclosure of all impeachment information, without regard to its evidentiary value or significance, is so sweeping that prosecutors will have little choice but to provide open file discovery. See infra pp. 15-16 (discussion of breadth of rule). The proposal also threatens to disrupt the delicate balance of interests achieved in the Act – the defendant's right to disclosure versus the government's interest in protecting against unfettered access to government files. In addition, the proposal contradicts the Court's reasoning in Palermo – to protect witnesses from improper impeachment. Moreover, the Committee's proposal contains no mention of Rule 26.2, which contains the current procedures for witness statement disclosures. Thus, the proposal creates yet another

inconsistency within the Rules without any attempt to reconcile these provisions.

Moreover, Congress recognized the risks and difficulties involved in testifying against a criminal defendant when it adopted the policy embodied in the Jencks Act that as a matter of law protects government witnesses, their identities, and their statements until they testify. This protection against premature disclosure of identifying information exists without the government carrying any additional burden of proving that the safety of a witness is endangered. The Committee's proposal would reverse that policy and expand the government's obligation to disclose information to a defendant to such a degree that the identity of government witnesses would have to be disclosed weeks before trial is scheduled to begin and potentially months before the witness testifies unless a court concludes that the prosecutor has met her burden to show that safety concerns exist. This would, without question, put witnesses and their families at greater risk – in direct contravention of the stated policy objective of the Jencks Act.

D. The Proposal Is Inconsistent with Criminal Discovery Practices in Most Federal Courts

In July 2004, the Advisory Committee requested that the Federal Judicial Center ("FJC") study and report on the local rules of the U.S. district courts, state laws, and state court rules that address the disclosure principles contained in Brady. What the FJC report⁶ revealed was that most federal districts did not codify any aspect of Brady in local rules, orders, or even in customary procedures before the court. Nevertheless, the Advisory Committee points to the existence of some local rules, orders, and procedures to augment its argument for an amendment to Rule 16. According to the Committee, the local rules that govern Brady disclosures vary widely from one district to another; thus, the Committee argues, the proposed changes to Rule 16 will create consistent prosecutorial obligations throughout the federal system.

What the Committee fails to recognize is that while some⁷ district courts have adopted local rules or some other prevailing standard to address Brady disclosures, none of those local

⁶ This report is titled, "Treatment of Brady v. Maryland Material in United States District and State Courts Rules, Orders and Policies." Although the Advisory Committee notes that FJC will release an updated report in 2007, at the time of writing this letter we had available to us only the 2004 FJC report and 2005 supplement data.

⁷ The FJC Report notes that thirty, or approximately one-third, of the ninety-four district courts have some form of a local rule, order or procedure addressing the disclosure of Brady material. In a memorandum from John K. Rabiej to the Brady subcommittee containing supplemental data to the FJC Report, the District of the Northern Mariana Islands is cited as another example of a district court with a local rule addressing Brady obligations. Memorandum from the Rules Comm. Support Office of the Admin. Office of the U.S. Courts to the Brady Subcomm. 1 (Mar. 2, 2005).

rules accomplish this task with the breadth that the proposed revisions to Rule 16 seek to implement. The three orders⁸ that require disclosure, “without regard to materiality,” of all evidence “within the scope of Brady” have separate provisions for disclosure of Giglio information⁹ that do not expressly waive the materiality requirement. None of the other local rules come even remotely close to the proposed amendment’s breadth. Thus, with respect to exculpatory evidence, the proposed rule, which does away with the materiality requirement, is broader than local rules or orders in 97% (91 out of 94) of federal districts; and with respect to impeachment evidence, the proposed rule is broader than any of the local rules or orders in all 94 federal districts.

In addition, the Committee appears to overstate the impact of the local rules, orders, and procedures that currently are in effect. First, the report examined any rule or order addressing the disclosure of favorable evidence. Many of these orders appear to apply only to the practice before a particular magistrate or judge, and thus, do not have the force and effect of a local rule applying to all of the criminal cases in a district.¹⁰ Second, many of the orders refer to disclosure of “Brady” information, which necessarily includes a materiality requirement unless it states otherwise.¹¹ Others contain express language indicating that the evidence must be material.¹²

⁸ These orders include: M.D. Ala., S.D. Ala., and N.D. Fla.

⁹ For instance, the local rules for the Southern District of Alabama provide for the disclosure of Giglio material defined as “[t]he existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of United States v. Giglio.” S.D. Ala. R. 16.13(b)(1)(c). The Middle District of Alabama has a standing order on criminal discovery with identical language, which can be found at: <http://www.almd.uscourts.gov/Web%20Orders%20&%20Info/Criminal%20Discovery%20General%20Order.htm> (last visited Feb. 23, 2007). The Northern District of Florida employs the same language in its Rule 26.3(D)(2). N.D. Fla. R. 26.3(D)(2) (West 2004).

¹⁰ For example, the report lists: D. Idaho, Magistrate Procedural Order; E.D. Tenn., Magistrate Criminal Scheduling Order; W.D. Mo., Magistrate Judge Procedural Order; N.D. Ga., Magistrate Judge Order; M.D. Ga., Standard Pretrial Order; W.D. Ky., Magistrate Arraignment Order; D. Nev., Joint Discovery Statement; S.D. W. Va., Arraignment Order and Standard Discovery Request. The District of Nevada’s Joint Discovery Statement is only customary, however, and not required of the parties.

¹¹ These orders include: D. Neb., W.D. Mo., E.D. Tenn., W.D. Tex., M.D. Ga., N.D. Ga., S.D. Fla., D. Conn., D. Vt., N.D. W. Va., M.D. Tenn., D. N.M., N.D. N.Y., and W.D. Okla.

¹² D. Nev., Joint Discovery Statement (“suppression by the prosecution of evidence favorable to an accused, . . . violates due process where the evidence is *material* either to guilt of punishment.”); D. Idaho Procedural Order (“[d]isclose all *material* evidence within the scope of

While there may be a legitimate reason to regularize the practice of how the government handles disclosures of impeaching and exculpatory information, the proposed revisions to Rule 16 do not offer a workable solution. In essence, the Committee wants a prosecutor to disclose any impeachment material regardless of materiality – a standard vastly different from each district that has addressed the Brady disclosure requirements within its local rules.

Moreover, while the FJC studied and reported on which federal district and state courts adopted formal rules or standards for guiding prosecutors' disclosure obligations under Brady, the FJC report did not assess local compliance with or the success of these rules or the consequences for violating them. Before the Standing Committee publishes for public comment a rule that is broader than any of the local rules and threatens to disrupt the adversarial balance in the federal criminal justice system, it should ask the Advisory Committee to conduct thorough research on the effectiveness of these local rules in practice.

E. The Proposal Is Unnecessary

The proposed amendment would not only be a fundamental deviation from current law, precedent and practice, but it is also entirely unnecessary. The Supreme Court has issued a series of rulings over the four decades since Brady was decided that clearly define the scope of the Brady rule. Accordingly, no further clarification or codification of those responsibilities is warranted.

Moreover, contrary to the Committee's position, there is no demonstrated need to change the rules. The Committee cites anecdotal evidence from the ACTL and the College's Federal Criminal Procedure Committee to suggest that the lack of guidance to prosecutors in the form of a rule results in the improper restriction of or outright refusal to disclose exculpatory information. In addition, the Committee points to cases summarized in its materials where Brady evidence was not disclosed as evidence of a significant problem. The Committee cites this small number of federal cases as proof that a substantial problem exists and then, presumably recognizing the weakness of the empirical support for its argument, suggests that "a true measure of the scope of the problem" cannot be known because "[t]he defense is, by definition, unaware of exculpatory information that has not been provided by the government." (See "The need to address the issue in Rule 16" discussion in Committee's report).

In essence, the Committee's position is that there is no possible way to measure the scope of the problem and thus there is no possible way to know whether anything other than its proposed rule is sufficient to remedy the problem. This puts the Government in the impossible position of trying to argue against an irrefutable point because if there is no possible way to know

Brady . . .); W.D. Wash. ("provide . . . evidence favorable to the defendant and *material* to the defendant's guilt or punishment."); and D. N.H. ("[t]he government shall disclose any evidence *material* to issues of guilt or punishment . . .").

whether sufficient cause exists for the dramatic remedy suggested by the Committee's proposed rule amendment, then there is equally no way to argue against the Committee's declaration.

Fortunately, there is hard data, and it does not mesh with the Committee's account of Brady violations in the federal criminal justice system. The government has studied and evaluated the list of cases set forth in the Habeas Assistance Training Project's "Successful Cases Under *Brady v. Maryland*" (circulated by the Advisory Committee) and determined that it does not demonstrate a need to change the federal rules. The majority of these cases are based upon state prosecutions.¹³ Specifically, 58 of the 106 cases listed under the Court of Appeals section are based upon state prosecutions that do not provide a basis for a change to the federal rules. The remaining 48 cases are federal prosecutions which span 40 years – an average of less than two cases per year. Even recognizing that this list is not comprehensive, it is hardly overwhelming. If there were a systemic Brady problem in the federal system, one would expect the list to include many more cases.

Further the majority of the cases listed involve impeachment Brady evidence, rather than exculpatory Brady evidence. Most impeachment information is covered by the Jencks Act. As with all witness statements, the proposal requiring the disclosure of this information "[no] earlier than 14 days before trial" directly conflicts with the Jencks Act. And it does so without any reason to believe that it would solve the "problem" it claims to address.

There is also no reason to believe that the proposal will be a more effective rule than the combined force of Brady and the Jencks Act – which already requires material impeachment and exculpatory evidence to be disclosed, just later. The errors described in the cases are regretful, however it is not at all clear that they would have been less likely to occur under the proposal. In short, the best way to address Brady error is to reverse any conviction tainted by it and to grant a new trial. The Constitution already provides this remedy and proposed amendment to Rule 16 cannot improve upon it.

II. The Proposed Rule Would Create Confusion

A. Widely Broad and Undefined Language Creates Confusion for Application and Will Lead to Open File Discovery

The proposed rule states that: "Upon a defendant's request, the government must make

¹³ Considering that this proposed rule of federal procedure would only have effect in the federal system, the extent of a problem with state prosecutors' failure to disclose exculpatory information is irrelevant. Moreover, as the Committee notes in its report, while most states have statutes and rules governing disclosure, the states nonetheless appear to shoulder the vast majority of violations.

available *all information*¹⁴ that is known to the attorney for the government . . . that is either exculpatory or *impeaching*” (emphasis added). The proposed committee notes make clear that disclosure is not limited to “material” information, but rather prosecutors must disclose “*all* exculpatory or impeaching information.” The sweeping language contained in the proposed rule is designed to eliminate any prosecutorial decision-making in the disclosure of evidence. It is the Departments’s firm belief that some prosecutorial filtering is not only necessary in the pursuit of justice, but also consistent with volumes of history and precedent supporting the proposition that prosecutors are in the proper position to make these evaluations of materiality. See Fed. R. Crim. P. 16(a)(1)(E)-(F) (entrusting prosecutors to disclose certain documents, papers, books, scientific reports or tests when the item is “material to preparing the defense”); Kyles, 514 U.S. at 439 (noting that the prosecutor at “some point [has] to determine when [he/she] must act” by making “judgment calls about what would count as favorable evidence” in light of the “existing or potential evidentiary record”); United States v. Causey, 356 F. Supp. 2d 681, 689-90 (S.D. Tex. 2005) (“[P]rosecutor is duty bound to become informed about available information and to evaluate the cumulative effect of all the evidence withheld from the defendants.”); see also Strickler 527 U.S. at 283 n.23 (noting that the defense counsel may “reasonably rely” on the prosecutor’s representation that disclosure included all relevant exculpatory materials); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969) (“[T]he assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies denial of a motion for inspection that does not make some particularized showing of materiality and usefulness.”).

Also notably absent from the proposed rule and committee notes is any attempt to define the term “impeaching.”¹⁵ The problem with the expansive language chosen by the Committee is that it is subject to multiple interpretations and is broad enough to encompass virtually any information that might be used to challenge a witness’ testimony. Without substantial guidance on what information is considered “impeaching,” a prosecutor’s disclosure obligations will have no bounds.

A review of how federal courts have defined impeachment makes clear that in the absence of a precise or narrowed definition, the proposed language will generate confusion, inconsistency, and limitless disclosure. In federal courts, impeachment has been defined as that which contradicts, see Klonski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998), attacks a witness’

¹⁴ The Rules Committee voted 7-4 in favor of stating the rule in terms of “information” rather than “evidence.” The Department of Justice and some members of the subcommittee continue to favor the term “evidence” in the rule and the committee note.

¹⁵ The Committee report expressly states that it has made no attempt in the rule or committee notes to define the term “impeachment.” (See “Scope of required disclosure” discussion in Committee Report).

credibility, see United States v. Conroy, 424 F.3d 833, 837 (8th Cir. 2005), reveals the bias or interest of a witness, see Berry v. Oswalt, 143 F.3d 1127, 1132 (8th Cir. 1998), and provides a reason to disbelieve all or some of a witness' testimony, see United States v. Leary, 378 F. Supp. 2d 482, 491 (D. Del. 2005). Black's Law Dictionary defines "impeachment of [a] witness" as the calling into "question the veracity of a witness . . . or the adducing of proof that a witness is unworthy of belief." See Black's Law Dictionary 753 (6th ed. 1990). In the absence of additional guidance, prosecutors considering these varied definitions of impeachment will feel compelled to disclose anything that casts any doubt on anything that any witness has to say.¹⁶ Essentially, the rule requires limitless, open-file disclosure, including a prosecutor's own thoughts about a witness as explained in a prosecution memo or email.

The rule would require the government to disclose not only evidence but all hearsay, innuendo, and rumor no matter how remote or speculative. As the proposed committee note indicates, "[t]he rule contains no requirement that the information be 'material' to guilt . . . [but rather] requires prosecutors to disclose to the defense all exculpatory or impeaching information . . . without further speculation as to whether this information will ultimately be material to guilt." While the Supreme Court has held that information that would not be admissible at trial is not covered by the requirements of Brady and need not be disclosed unless it would lead to the discovery of admissible evidence, Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995) (per curiam) (noting that the state was not required by Giglio to disclose to defendant inadmissible polygraph evidence concerning a key prosecution witness), the proposed rule eliminates this consideration.

Without a well-defined materiality requirement limiting the required disclosure, prosecutors will be compelled to provide the defense with their entire investigative file for fear that a conviction would be reversed if immaterial impeachment information goes undisclosed. Instead of assuming this risk, prosecutors will operate as they almost always do – erring on the side of disclosure – and will quickly learn that the only way to ensure compliance with the proposed rule is to turn everything over. The proposed rule, therefore, essentially codifies the fishing expedition that courts consistently have warned against. See generally Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951) (invalidating a "catch-all provision" in defendant's Rule 17 subpoena on the basis that it was "not intended to produce evidentiary materials" but instead was "merely a fishing expedition"); United States v. Cuthbertson, 630 F.2d 139, 144 (3d Cir. 1980) (citation omitted) (stating that under Rule 17 "[t]he test for enforcement is whether the [Rule 17] subpoena constitutes a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device") (citations omitted); United States v. White, 450 F.2d 264, 268 (5th Cir. 1971) (noting

¹⁶ For instance, under the current Giglio rubric, prosecutors need not turn over impeachment information for unimportant government witnesses when their "reliability . . . [is not] determinative of guilt or innocence." 405 U.S. at 154. Under the proposed rule, this all changes as prosecutors will now need to disclose *any* impeaching information regardless of its insignificance. A failure to do so may result in a new trial.

that while Rule 16 does not require the defendant to designate the materials sought, “it would seem that the defendant should not be allowed to conduct a fishing expedition”); United States v. Sermon, 218 F. Supp. 871, 872-73 (D. Mo. 1963) (stating that although fishing expeditions are the standard in a civil action, they are not allowed in criminal actions where only limited discovery is permissible).

The breadth of the proposed rule will also raise national security and foreign policy concerns in some cases. This can be demonstrated by considering a prosecution of an alleged terrorist suspect. The government may have cooperating witnesses that apply to the particular prosecution and also to ongoing intelligence gathering. Moreover, multiple foreign law enforcement agencies may be involved in the investigation of the case. Under the proposed rule, the government may have to disclose the identities of all the cooperating witnesses and foreign witnesses interviewed by foreign law enforcement agencies, even if the government ultimately makes the decision not to use the testimony at trial for national security, foreign relations, or other reasons. Under the proposed rule, the government may have to disclose information on these witnesses from any foreign law enforcement source regardless of whether the information is material to preparing the defense. It is evident from this one example that the government’s attempt to meet this increased burden would implicate serious national security and foreign policy concerns, a topic about which the Committee’s proposal says virtually nothing.

B. Disparity and Confusion for Review and Remedy

The proposed rule creates confusion for both trial and appellate courts in determining the proper standard on review and the appropriate remedy for violations. This confusion occurs regardless of when, in the course of the proceedings, a prosecutor’s failure to disclose impeachment material manifests itself. The questions raised by the proposal encompass every stage of the judicial proceedings. For instance, if in the middle of trial, the trial judge determines that impeachment material was withheld for a witness that already testified, what is the proper remedy? Should the trial judge recall the witness to afford the defendant an opportunity to use the impeachment material? Or should the trial judge assess whether the withholding of the impeachment material was harmless error? If so, how is the harmless error analysis different than a review for materiality? What if the withheld impeachment material was discovered after a jury reached a guilty verdict but before sentencing? Should the unanimous verdict of twelve jurors be overturned even when the impeachment information was not material? What if the rules violation is first discovered when the case is on direct appeal or on a petition for habeas review – what is the proper standard to apply then?

Under the proposal, additional questions surface when evaluating the importance of the withheld information with respect to the proper remedy. Would a new trial be required when the testimony of a witness, who would have been impeached but for the prosecutor’s failure to disclose impeaching information, was corroborated by additional testimony? What if the

suppressed impeachment evidence merely furnished an additional basis on which to impeach a witness whose credibility was already greatly diminished on cross examination? In the case of a rules violation, when, if ever, is the materiality of the undisclosed information relevant?

1. Harmless Error Under Rule 52 Versus Review for Materiality¹⁷ on Direct Appeal

The proposed rule creates confusion (not to mention, disparity) in the way government suppression of impeachment information will be reviewed on direct appeal. The standard of review for appeals raising Brady violations – materiality review – is not the same as the standard contained in Rule 52 applicable to rules violations, which is harmless error review.

Different standards of appellate review apply to Brady claims and claims under Rule 16. Courts of appeals generally review Brady claims de novo. See, e.g., United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004); United States v. Wooten, 377 F.3d 1134, 1141-42 (10th Cir. 2004); United States v. Tarwater, 308 F.3d 494, 515 (6th Cir. 2002); United States v. Kates, 174 F.3d 580, 583 (5th Cir. 1999) (per curiam).¹⁸ However, courts of appeals review Rule 16 decisions for abuse of discretion. United States v. Lanoue, 71 F.3d 966, 973 (1st Cir. 1995) (noting that under Rule 16, defendant must show that the trial court abused its discretion), abrogated on other grounds by United States v. Watts, 519 U.S. 148 (1997); accord, e.g., United States v. Duvall, 272 F.3d 825, 828 (7th Cir. 2001); United States v. Clark, 957 F.2d 248, 251 (6th Cir. 1992).

Under Brady, due process is violated if the *defendant* can meet his burden to show that the government suppressed “material” favorable evidence. “[T]he materiality standard for Brady claims is met when ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” Banks v. Dretke, 540 U.S. 668, 698 (2004) (citation omitted). That is, the defendant must demonstrate a reasonable probability that had the information been properly disclosed, the result of the proceeding would have been different. Kyles, 514 U.S. at 433-34; see also United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995) (“[T]he defendant is required to show more than just that the error was not harmless

¹⁷ The Committee prepared and presented research on the different standards of review used to assess Brady violations and rules violations on direct appeal.

¹⁸ Some circuits review motions for new trial, including those raising Brady claims, for an abuse of discretion. See, e.g., United States v. Garcia-Torres, 341 F.3d 61, 70 (1st Cir. 2003); United States v. Chorin, 322 F.3d 274, 277, 282 (3d Cir. 2003); United States v. Gary, 341 F.3d 829, 832 (8th Cir. 2003); United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002); United States v. Bender, 290 F.3d 1279, 1284 (11th Cir. 2002); United States v. Ross, 245 F.3d 577, 584 (6th Cir. 2001); United States v. Wilson, 237 F.3d 827, 831-32 (7th Cir. 2001).

beyond a reasonable doubt.”). Once the defendant meets his burden of showing that a due process violation has occurred, reversal is appropriate and there is no further harmless error analysis. Kyles, 514 U.S. at 435 (“[O]nce a reviewing court * * * has found constitutional error [under the materiality standard] there is no need for further harmless-error review.”).

In contrast to the well-established standard of review for Brady claims, Federal Rule of Criminal Procedure 52(a) provides for harmless error review for a properly preserved claim of a rules violation and plain error review for those that are not.¹⁹ Fed. R. Crim. P. 52(a). For properly preserved claims, after the defendant establishes that a rules violation occurred, the *government* bears the burden of proving that the error was harmless – that is, that any error did not affect the defendant’s substantial rights.²⁰ See United States v. Vonn, 535 U.S. 55, 62 (2002). Reversal is not required where the Government meets this burden. United States v. Phillip, 948 F.2d 241, 250 (6th Cir. 1991). Moreover, because Rule 16 error is non-constitutional, the government only has to prove that a Rule 16 violation is harmless by a preponderance of the evidence. United States v. Hicks, 103 F.3d 837, 842 (9th Cir. 1996).²¹

¹⁹ Claims of rules violations that are not properly preserved in the trial court are reviewed on appeal for plain error. Fed. R. Crim. P. 52(b). When rules violations are reviewed for plain error, the *defendant* carries the burden of establishing that the error affected his substantial rights. United States v. Vonn, 535 U.S. 55, 62-63 (2002) (citations omitted) (“[T]he defendant who sat silent at his trial has the burden to show that his ‘substantial rights’ were affected.”); United States v. Olano, 507 U.S. 725, 733 (1993). Moreover, because relief on plain error review is discretionary, the defendant bears the additional burden of convincing the court that the error “seriously affected the fairness, integrity or public reputation of judicial proceedings.” Vonn, 535 U.S. at 63 (quotation marks, brackets, and citations omitted).

²⁰ With respect to whether the proposed rule would alter the standard of review, the Committee admitted in its report that there is “sufficient variation in law at the circuit level that the picture is not entirely clear.” In fact, the report continues stating that “[m]any circuit decisions . . . hold that the defendant seeking relief on appeal from a discovery violation must always show prejudice.” (See “Effect on appellate review and collateral attack” discussion in Committee report). Thus, for the defendants in those circuits, a prosecutor’s violation of the proposed rule requiring disclosure will require the defendant to meet the same burden of proof as a Brady violation.

²¹ If the defendant failed to object in the district court to the suppression of evidence, the analysis on appeal will be the same under Brady and Rule 16. In this instance, the defendant must prove that there was plain error under Federal Rule of Criminal Procedure 52(b). Rule 52(b) requires defendants to show that the error was plain, that it “affected the defendant’s substantial rights,” and that it “seriously affected the fairness, integrity or public reputation of [judicial proceedings].” Compare United States v. Quiroz, 374 F.3d 682, 684 (8th Cir. 2004) (Brady claim); United States v. Crayton, 357 F.3d 560, 569 (6th Cir. 2004) (same); and United

Assuming, then, that the government suppressed impeachment information and that the defendant properly raised the issue before the district court, the question raised by the proposal is whether a failure to disclose impeachment information would be reviewed on appeal for harmless error under Rule 52 or whether it would be reviewed for materiality using a Brady analysis. Take for instance, the government's failure to disclose portions of a prosecution memorandum that contain initial skepticism about a key government witness' credibility – how should an appellate court evaluate a properly preserved claim that the prosecutor failed to disclose this impeachment information? Should the burden rest with the defendant to show that the information regarding the witness' credibility was material or should it rest with government to show that any resulting prejudice was more probably than not harmless? Notwithstanding the different language used in these different standards, it is hard to fathom an occasion where failure to disclose nonmaterial impeaching information would be grounds for reversal under the harmless error standard. What if the withheld impeachment information was that a key prosecution witness in a domestic violence case received anger-management counseling ten years earlier? Would an appellate court ever have the occasion to reverse a case such as this where the information withheld was not material? When, if ever, would the withholding of nonmaterial impeaching information affect a defendant's substantial rights? The rule fails to address these questions and raises the specter of a risk of creating substantial confusion in district and appellate courts.

2. Questions for Collateral Review

The harmless error standard used for determining whether a petitioner is entitled to habeas corpus relief is whether the trial error “had substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quotation omitted). The Supreme Court has defined trial errors as constitutional violations that “occur [] during presentation of the case to the jury” and are amenable to harmless error analysis because they “may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial.]” Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).

As an initial matter, rule violations generally cannot be the basis for habeas relief because they are not constitutional violations.²² While this is generally the case, the Committee fails to

States v. Vinyard, 266 F.3d 320, 331 (4th Cir. 2001) (same), with United States v. Navarro, 90 F.3d 1245, 1259 (7th Cir. 1996) (Rule 16).

²² The Committee initially argued that changes to Rule 16 will not create confusion for collateral review because a violation of the proposed Rule 16 amendment is not constitutional and therefore cannot be the basis for habeas relief. The Committee's most recent report, however, states that nonconstitutional claims, such as a Rule 16 violation, can be raised if “the error is a ‘fundamental defect which inherently results in a complete miscarriage of justice [or]

contemplate the quasi-constitutional position that the proposed Rule 16 amendment occupies. At the very least, defense attorneys will craft arguments that the Rule 16 amendment is grounded in a defendant's constitutional right to a fair trial – after all, the initial ACTL proposal sought to codify the constitutional rule of Brady – and, thus, habeas review would be proper when a prosecutor fails to deliver impeaching information.

As is evident from the above series of unanswered questions, the proposal raises substantial questions that have the potential to cause a great impact on cases in all phases of adjudication and review. Before a proposal of this magnitude should be published, these questions, at the very least, should be raised and considered, with definitive answers provided so that the public can understand the precise implications of the proposal being offered.

III. The Proposal Destabilizes the Current Policy Balance in Relation to Privacy Interests and Witness Protection

A. Legitimate Privacy Concerns

Proponents of the proposal have not adequately considered how the proposal will interact with the underlying policies of other laws and established rules in the federal system. Specifically, they have failed to reconcile the proposal with policies that have at their core the protection of individuals' privacy interests. The broad and far-reaching language contained in the proposal ensures an unmanageable divide between the competing policy interests of privacy rights and a defendant's right to a fair trial. This section will cover four such policies: (1) the Crime Victims' Rights Act; (2) child protection laws; (3) rape shield laws; and (4) police officer protection laws. These listed items are not intended to be exhaustive of all the privacy interests potentially compromised by the proposal, but rather are mere examples of the important conflicts that will arise if the proposal were enacted in its current form.

1. Protection of Victims' Rights

The Crime Victims' Rights Act ("CVRA"), codified at 18 U.S.C. § 3771, provides that a crime victim has "[t]he right to be treated with fairness and with respect for the victim's dignity and *privacy*." 18 U.S.C. § 3771(a)(8). The objective behind the eight victims' rights delineated in the CVRA is to balance the rights provided to the accused and make crime victims independent participants in the criminal justice system. H.R. Rep. No. 108-711, at 3-4, reprinted in 2004

an omission inconsistent with the rudimentary demands of fair procedure.'" (See "Effect of appellate review and collateral attack" discussion in Committee report (quoting Hill v. United States, 368 U.S. 424, 428 (1962))). The Committee report then summarily states that these standards *should be "similar" to* the principles the Court articulated in the Brady line of cases (emphasis added). Based on this assumption, the Committee report concludes that the adoption of the amendment would have no effect on collateral proceedings. (See "Effect of appellate review and collateral attack" discussion in Committee report). There is confusion already.

U.S.C.C.A.N. 2274, 2276-77; 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) at S4265 (statement of Sen. Kyl) (“We are not trying to take one single right away from any defendant. That would be wrong under our system. But we do think it is time to balance the scales of justice.”); see also Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006) (noting that “[t]he statute was enacted to make crime victims full participants in the criminal justice system”). The CVRA provides victims with a new set of statutory rights²³ that are enforceable in court by either the government or the victim, see 18 U.S.C. § 3771(d) (permitting victims to petition the court of appeals for a writ of mandamus when the district court denies the relief sought), and also imposes on the judiciary an affirmative obligation to “ensure” that those rights are “afforded.” Id. § 3771(b).

While the text of the statute and the legislative history are silent as to what specifically Congress intended to require or prohibit with the inclusion of this right, the Senate sponsors made clear that they expected a liberal reading of the statute to result in interpretations that promote victims’ interests in fairness, respect, dignity, and privacy. See 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) at S4269 (statement of Sen. Kyl); see also United States v. Turner, 367 F. Supp. 2d 319, 335 (E.D.N.Y. 2005) (noting that “[t]he provision’s broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom”).

The Committee’s proposal – advocating for the disclosure of all impeachment information – fails to take into account the victim-privacy protection policy contained in the CVRA. Under the proposal, all information (not merely admissible evidence) that might be used to impeach a victim-witness must be provided to the defense, regardless of materiality. This means that any information that might possibly be used to disparage, discredit, or dispute a victim’s testimony will be disclosed to the defense, without any regard to whether such information would increase confidence in the outcome of the trial or even be admissible at trial.

For example, under the proposed rule, prosecutors would be required to disclose the existence of any mental health treatment undertaken by a victim regardless of how minor, any financial issues no matter how tangential, and familial interactions with law enforcement no matter how insignificant. Moreover, because the proposed rule makes no effort to balance a victims’ interests with any limit to the required disclosure, courts can expect victims to readily exercise their new right to petition courts for writs of mandamus each time the district court permits disclosure of nonmaterial evidence that treads on their privacy interests. The result will be increased litigation which will likely burden the courts. The broad nature of this proposed disclosure requirement will, without question, directly conflict with a liberal reading of the

²³ Many of the rights contained in the CVRA already existed in Title 42, however, there was no independent enforcement mechanism. The right we are concerned with – the right to be treated with fairness and respect for the victim’s dignity and privacy – was part of the original statutory language. See 42 U.S.C. § 10606 (repealed Oct. 30, 2004).

CVRA's policy to protect a victim's privacy and with its stated purpose of affording victims' rights comparable to those afforded to the defendant.

2. Child Protection Laws

Since the mid-1970's, Congress has made it a federal priority to help states combat the problem of child abuse. See S. Rep. No. 108-12, at 5 (2003) ("The first Federal programs specifically designed to address concerns regarding child abuse and neglect in this country were authorized under the Child Abuse Prevention and Treatment Act of 1974."). To that end, Congress has made funds available to states for creating, enacting, and supporting child abuse and neglect prevention and treatment programs. See 42 U.S.C. § 5106a. In order to be eligible for this funding, Congress requires states to have a law or a program that includes "methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians." *Id.* § 5106a(b)(2)(A)(viii). Nonetheless, there are exceptions for disclosure to "a grand jury or court, upon a finding that information in the record is *necessary* for the determination of an issue before the court or grand jury" and to federal, state, or local government entities "that ha[ve] a *need* for such information in order to carry out [their] responsibilities under law to protect children from abuse and neglect." *Id.* § 5106a(b)(2)(A)(viii)(V) & (b)(2)(A)(ix) (emphasis added). All fifty states and the District of Columbia have enacted state statutes that protect the confidentiality of state child abuse investigative records. See Pennsylvania v. Ritchie, 480 U.S. 39, 61 n.17 (1987) (citing Brief for State of California ex rel. John K. Van de Kamp, et al. as Amici Supporting Petitioner, Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (No. 85-1347)).

Confidentiality protects the privacy rights of the victim, encourages reports of abuse, enhances the reliability of investigations, and assists families in seeking treatment. In a case deciding whether a defendant accused of child abuse had a due process right to review the state's child abuse investigative file concerning the child-victim, the Supreme Court recognized the strong public interest in protecting such sensitive information:

Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth – like all other States – has made a commendable effort to assure victims and witnesses that they may speak to [Child Protection Services] counselors without fear of general disclosure.

Ritchie, 480 U.S. at 60-61 (footnote omitted). Notwithstanding the state's compelling interest in

confidentiality, the Court affirmed the Pennsylvania Supreme Court decision to remand the case for an *in camera* review of the confidential child protective services records. The Court stated that if the lower court's review revealed information that "probably would have changed the outcome of [the defendant's] trial" – i.e., information that is *material* – then the grant of a new trial would be the appropriate remedy. *Id.* at 58. Notably, the Court did not accept the defendant's argument that he was entitled to view the entire file so that he might uncover statements inconsistent with the victim's trial testimony or tending to show her improper motive. *Id.* at 52-53 (stating, in the context of a Confrontation Clause challenge, that "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony"). The Court noted that a broad reading, such as that articulated by the defendant, would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." *Id.* at 52.

Under the proposal advanced by the Committee, however, this substantial privacy interest is threatened. In a case involving criminal charges against a defendant for child abuse, it is hardly likely that *immaterial* impeachment information on the child-victim would be *necessary* for the determination of an issue before the court. See generally, 42 U.S.C. § 5106a (b)(2)(A)(viii)(V). Nonetheless, under the proposal, immaterial impeachment information would need to be disclosed without regard to the substantial policy interests in keeping this information confidential and private. For example, a child advocate's impressions of the credibility of the abused child during his initial interview would need to be disclosed as impeachment material. This disclosure of immaterial impeachment evidence is required even if evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. Because the child advocate's initial impressions could be used to discredit, disparage, or dispute the victim's testimony, the Rule 16 proposal anticipates its disclosure. The Committee has not adequately considered the consequences of such a broad rule of disclosure or squared the proposal with the dictates of the Supreme Court.

3. Rape Shield Laws

The proposal does not adequately consider how it will interact with other established rules in the federal system and state laws enacted to protect sexual assault victims. Rule 412 of the Federal Rules of Evidence provides that "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" or "to prove any alleged victim's sexual predisposition" is not generally admissible in a criminal case.²⁴ Detailing the purpose of the rule, the Advisory Committee notes state that:

²⁴ Exceptions exist for evidence of "specific instances of sexual behavior . . . offered to prove that a person other than the accused was the source of the semen, injury or other physical evidence;" "evidence of specific instances of sexual behavior . . . offered . . . to prove consent;" and evidence that if excluded would violate the defendant's constitutional rights. Fed. R. Evid. 412(b).

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Fed. R. Evid. 412, advisory committee's notes.

“Rape shield laws are evidentiary measures that aim to protect rape complainants’ privacy and dignity by preventing the disclosure of damaging and irrelevant information about their sexual history at trial.” Richard I. Haddad, Shield or Sieve? People v. Bryant and the Rape Shield Law in High Profile Cases, 39 Colum. J.L. & Soc. Probs. 185, 187 (2005). As a result of the dogged defending of these “privacy interests,” advancements are made in the reporting and successful prosecution of these cases. Forty-nine states, the District of Columbia, and the federal government have enacted rape shield statutes (or the equivalent) that prohibit the disclosure of identifying information on victims of sex crimes. See generally, Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 81 (2002) (noting that Arizona is the only state without a rape shield law).

The Committee’s proposal requires disclosure of “all *information* that is . . . impeaching,” without regard to materiality or whether it would be admissible as evidence. Under a reasonable interpretation of the rule, information about a sex-crime victim’s sexual history, partners, and sexual predisposition would need to be disclosed to the defense even though it may not be admissible as evidence at trial.²⁵ But irrespective of whether the potential impeachment evidence is properly excluded at trial, it would be too late to remedy the problem because the damage to the witness’s privacy rights that the legislature sought to protect against happens upon disclosure of the information. Thus, a subsequent motion *in limine* decision to bar use of the disclosed information at trial does little to protect privacy rights and chills victims from reporting these serious crimes. Disclosure of this type of impeachment information cuts against the very policy aims of rape shield laws – protection of a rape victim’s privacy and dignity.

4. Police Officer Protection Laws

Under current Department policy,²⁶ law enforcement agents used as witnesses for the

²⁵ While Rule 412 provides for only specific exceptions, the defense might attempt to use the existence of the amended Rule 16 (an expanded codification of the constitutional obligation of Brady and its progeny) to advocate for the position that failure to allow this evidence for impeachment purposes would deny the defendant his due process right to a fair trial.

²⁶ This provision is titled “Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses (Giglio Policy).”

prosecution are protected from open file disclosure of their personnel file. The policy's purpose, contained in USAM 9-5.100, makes clear that the provision aims to protect the "legitimate privacy rights of Government employees" while also ensuring that prosecutors meet their obligations under Giglio so that defendants receive fair trials. USAM 9-5.100.²⁷ While the policy specifically notes that "[t]he exact parameters of potential impeachment are not easily determined," it goes on to state that potential impeachment information is generally defined as that "which is material to the defense," "information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged" or that which "might have a significant bearing on the admissibility of prosecution evidence." Id. Bearing in mind these definitions of impeachment information, the Department's policy makes clear that law enforcement agencies must provide a requesting prosecutor with "any finding of misconduct that reflects upon the truthfulness or possible bias" of the law enforcement agency witness, "any past or pending criminal charge" brought against the witness, and "any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the [witness] that is the subject of the pending investigation." Id.

It is common knowledge that law enforcement agents are in regular contact with the criminals in their communities – be it through surveillance, investigation, or arrest. It is this close contact that causes law enforcement agents to be the target of numerous fabricated allegations of misconduct. These allegations range from serious misconduct, such as the use of excessive force, to less-than-serious misconduct, such as exhibiting rude behavior. After a complaint is filed, the allegations typically are investigated by a police department's Internal Affairs Section (or the equivalent) and ultimately resolved. In most instances, the investigation determines that the allegation is unfounded and paperwork to that effect is submitted to the law enforcement agent's file.

While the USAM provision requires disclosure of material impeachment information,²⁸ it goes on to exclude from disclosure those allegations which are unsubstantiated, not credible or have resulted in exoneration of the witness.²⁹ This Department policy makes practical sense because the damage is done to the police officer's privacy interests when the information is turned over – privacy interests are compromised once the nonmaterial information leaves the officer's

²⁷ With the enactment of USAM 9-5.001, USAM 9-5.100 was amended to be consistent with the policy of more expansive disclosure.

²⁸ The policy reads: "potential impeachment information, however, has been generally defined as impeaching information which is *material* to the defense." USAM 9-5.100 (emphasis added).

²⁹ Under certain specific circumstances where allegations which are unsubstantiated, not credible, or result in exoneration of the witness contain information which reflects upon the truthfulness or bias of the witness, they can also be disclosed upon request.

file and enters the public realm. Moreover, without this protection of their privacy interests, case agents testifying for the prosecution will be subject to the embarrassment and harassment implicit in any disclosure of ill-founded allegations as well as the additional risk of public exposure of matters with no relevance to their credibility, bias or the testimony at hand. This can occur even when a court refuses to allow defense counsel to extensively develop a line of cross examination as for example, in the instance where the government is required to file pre-trial motions *in limine* to preclude more extensive use at trial. Under the broad view of impeachment information advocated by the proposed rule, a prosecutor would be required to turn over anything that casts any doubt on anything that any witness has to say. For instance, under the proposed rule's sweeping treatment of impeachment information, the government would be required to disclose an allegation in the testifying officer's file that he planted a handgun on a habitual drug-offender even when the subsequent investigation revealed that this allegation was completely unfounded. This remains true even if the investigation of the allegation has revealed the "planted" handgun was registered to the drug-offender, had the offender's fingerprints, and eyewitnesses state that the testifying officers retrieved it from the offender's waistband.

Moreover, protective policies for law enforcement agency witnesses are not limited to the federal government. States also embody these principles of privacy in their state laws regarding disclosure. Because it is not uncommon for state law enforcement to team up with federal law enforcement in forming joint task forces to combat issues impacting both state and federal laws, the existence of state policies prohibiting certain disclosures needs to be considered before moving forward with the rule. Take, for instance, section 832.7 of the California Penal Code, which provides that peace officers' and custodial officers' personnel files³⁰ "are confidential and shall not be disclosed in any criminal . . . proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Cal. Penal Code § 832.7(a) (West 2007). These discovery provisions authorize disclosure upon written motion which must contain "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the *materiality* thereof to the subject matter involved in the pending litigation . . ." Cal. Evid. Code § 1043(3) (West 2007). The conflict between the proposal's requirement for "all [impeachment] information" and California's law requiring a showing of "materiality" in order to obtain the protected material highlights one of the problems that will ensue if the proposal, in its current form, were to become law. When a state law enforcement officer is called as a witness in a federal case, it is unclear whether state protection laws automatically would be trumped by the proposed federal policy of complete disclosure. In all likelihood, this federal/state policy conflict will become an area of contention and will generate extensive litigation over the conflict of law, and, at the very least, create disparities amongst the district courts faced with the question of elevating federal policy over state policy. See generally, In re Grand Jury, John Doe No. G.J. 2005-2, 478 F.3d 581 (4th

³⁰ Citizen complaints against officers can be maintained in the officer's general personnel file or in a separate file designated by the agency. However, citizen complaints that are determined to be unfounded, frivolous, or that result in the exoneration of the officer cannot be maintained in the officer's general personnel file but must be maintained in other separate files.

Cir. 2007) (upholding a district court's order quashing a federal subpoena for state police officer statements from an internal investigation based on the state's interest in maintaining confidentiality in internal investigations).

Under the theory of the proposed rule and the overly broad and undefined "impeachment information" language contained therein, federal prosecutors would be required to obtain the testifying agent's personnel file and turn it over in its entirety to the defense – including every unsubstantiated, unfounded and even ridiculous allegation previously made against the testifying officer. This is so because any allegation of misconduct, even one unsubstantiated by a single shred of evidence, will be considered impeachment material and thus discoverable – even if the material is inadmissible or the material's impeachment value is a mere fraction of a percent. This complication highlights the problem of language that is overly broad to achieve its purpose. The Advisory Committee should be required to find an alternative that at least attempts to preserve the interest in the privacy rights of law enforcement agents before releasing any rule for public comment.

B. Legitimate Government Witness Protection Concerns

The proposed rule will impose a substantial cost on the criminal justice system in that it provides for the disclosure of witness information weeks prior to trial and therefore, in some cases, prior to a final decision even to call a witness and perhaps, in a long trial, months prior to a witness's actual testimony. This is a dramatic departure from current law, which mandates no such disclosure prior to trial. Apart from discovery orders, prosecutors often do not disclose impeachment information until just before trial³¹ because doing so would reveal the identities of

³¹ The Department of Justice recognizes and acknowledges that in many cases, the identities of witnesses can be and in fact are disclosed well in advance of trial without putting them at risk. Prosecutors routinely disclose the identities of law enforcement and expert witnesses – witnesses who are paid to testify either as part of their job or are specifically hired to testify in the case – prior to trial to expedite trial proceedings. Yet current law recognizes that the United States is under no obligation to disclose any witness before trial. The law requires disclosure of impeachment material only after the witness testifies. See 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2. If a defendant requires additional time to review and make use of the impeachment material – in other words, if the timing of the disclosure is insufficient to satisfy the defendant's right to due process of law – the remedy is a continuance. This remedy is rarely necessary, however, precisely because the government regularly turns over more than what is required to satisfy due process and does so earlier than mandated. Moreover, if, as the Committee's report suggests, defendants regularly find themselves presented with information that requires time to investigate (see "Timing" discussion in Committee report) – a claim that has no empirical support – the answer is to address the law of continuance.

cooperating witnesses, undercover investigators, or other prospective witnesses.³² That practice is based on the well-grounded fear that such information could disrupt ongoing investigations and expose prospective witnesses to harassment, intimidation, injury, or even death. United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting that the “careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both Congress and the Federal Rules Committees that such concerns are valid”) (citing 18 U.S.C. §§ 3422 & 3500; Fed. R. Crim. P. 16(a)(2)).

Testifying against an accused in a federal criminal trial is difficult and intimidating, even for the most worldly and experienced person. When the defendant is the chief executive officer of the witness’s company or a member of an international terrorist organization, testifying against the defendant as a witness for the United States becomes an act of genuine courage. In terrorism cases, the United States often needs to shield the identities of witnesses until trial either because there are risks to them and their families (especially if the witness is from a country where the terrorist organization is based), or because their cooperation is particularly sensitive and may have an impact on our relationship with another country or, even more importantly, our ability to gather intelligence and protect national security interests. Under the proposed amendment, the government is expected to carry a burden of proving that witness safety is put at risk by the disclosure in order to delay disclosure until the witness testifies. The problem with requiring this proof of a safety risk is that, in most cases, it is simply unattainable in advance of any intimidation and harassment. Obtaining proof of intent to intimidate, before any intimidation occurs, would require undercover surveillance or informant cooperation, neither of which can be pursued on a regular basis. Moreover, the proposed amendment makes it difficult for the government to offer the necessary assurances to obtain the testimony of witnesses or the continuing cooperation of other countries, thereby seriously undermining our ability to investigate terrorists, and other criminals, and bring them to justice. The fact that a court might, in its discretion, enter an order of protection *if* the prosecution makes a sufficient showing will be of no comfort to a witness and, consequently, will discourage them from coming forward. As a result, if the proposal to amend Rule 16 is approved and becomes law, there will be more witness intimidation, more witness harassment, and, over time, less witness cooperation in the reporting, investigation and prosecution of crime.

The Committee has offered no compelling reason to hasten and expand impeachment information disclosure and thereby expose cooperating witnesses, jeopardize ongoing investigations, or subject victims or witnesses to an increased risk of harassment, intimidation, retaliation or coercion.

³² It deserves mention that 97% of all criminal cases are resolved without trial. The proposal’s broad approach to impeachment information, however, appears to be aimed more at issues arising in the small percentage of cases that go to trial, and it neglects to square the competing interests of witness security, victims’ interest and privacy rights in a plea environment.

IV. The United States Attorneys' Manual Policy on Disclosure Is a Workable Solution

As discussed in its report, the Advisory Committee had concerns that a prosecutor's constitutional disclosure obligations under the Brady line of cases and the remedy of a new trial for violations were not enough to ensure that the necessary information would be disclosed and the defendant would receive a fair trial. While not conceding that current practice produced any fundamental unfairness, the Department nevertheless responded by creating a new provision in the USAM which obligates a prosecutor well-beyond the disclosure requirements in existing law. This amendment to the USAM – entitled “Policy Regarding Disclosure of Exculpatory and Impeachment Information” – was precipitated by the Advisory Committee's interest in there being a clear pronouncement to all prosecutors about their obligations on disclosure. In fact, the Department worked assiduously with members of the subcommittee to formulate a USAM amendment that would address the concerns raised by the Committee³³ while still preserving the system of discovery contemplated by existing case law and the Federal Rules of Criminal Procedure.

A. The USAM Provision – Designed To Expand a Prosecutor's Disclosure Obligations

In a memorandum sent to all holders of Title 9 of the United States Attorneys' Manual, the amendment's stated purpose reads as follows:

The purposes of this amendment to the U.S. Attorneys' Manual are to ensure that all federal prosecutors are fully aware of their constitutional obligation to disclose exculpatory and impeachment evidence, and to further develop the Department's guidance to federal prosecutors in relation to disclosure of information favorable to a defendant.

See Memorandum from the Deputy Attorney General of the U.S. Dep't of Justice to the Holders of the U.S. Attorneys' Manual, Title 9 (Oct. 19, 2006). The memorandum goes on to state that the policy “requires prosecutors to *go beyond* the minimum obligations required by the Constitution and establishes broader standards for the disclosure of exculpatory and impeachment information,” while also recognizing “the need to safeguard witnesses from harassment, assault, and intimidation and to make disclosure at a time and in a manner consistent with the needs of national security.” Id. (emphasis added).

³³ The consensus from the Committee was that while the USAM provision requires disclosure of exculpatory information that is inconsistent with any element of the crime (thereby severely limiting any independent prosecutorial analysis), the impeachment disclosure language contained in the new USAM policy continues to permit prosecutors to evaluate the information's materiality prior to disclosure.

The USAM amendment restates a prosecutor's constitutional obligations under the Brady line of cases to disclose "material exculpatory and impeachment evidence." USAM 9-5.001(B). "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial," the amendment affirmatively encourages prosecutors to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM 9-5.001(B)(1). Moreover, the policy encourages prosecutors to err on the side of caution by disclosing exculpatory or impeaching information that may not be admissible in court if its admissibility is a "close question." Id.

The amendment then goes further by requiring "disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles and Strickler." USAM 9-5.001(C) (citations omitted). The amendment stresses that this requirement is grounded in the fact that a fair trial often includes "examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, . . . make the difference between guilt and innocence." Id. At the same time, the amendment warns that information "which is irrelevant or not significantly probative of the issues before the court" is not subject to disclosure. Id. The policy specifically references the expansion of disclosure, stating that a prosecutor must now disclose: (1) exculpatory information that is inconsistent with any element of the crime or that establishes a recognized affirmative defense; (2) impeachment information that either casts a substantial doubt upon the accuracy of any evidence the prosecutor intends to rely on to prove an element of the offense or that might have a significant bearing on the admissibility of certain prosecution evidence; and (3) exculpatory or impeachment information meeting this definition regardless of whether the information would itself constitute admissible evidence. USAM 9-5.001(C)(1)-(3). Finally, the policy reminds prosecutors to look at the information cumulatively to determine if it meets the expanded standards of disclosure. USAM 9-5.001(C)(4).

The policy also covers the timing of disclosure for both exculpatory and impeachment information. The policy provides that exculpatory information must be disclosed "reasonably promptly after it is discovered." USAM 9-5.001(D)(1). This standard accelerates the timing of disclosure from the due process standard of in sufficient time to permit the defendant to make effective use of that information at trial. See, e.g., Weatherford, 429 U.S. at 559. The policy's timing of impeachment disclosure is more flexible because it recognizes that a prosecutor might have to balance the goals of early disclosure against significant interests such as witness and national security. Thus, impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." USAM 9-5.001(D)(2).

B. The USAM Provision Strikes a Proper Balance of Interests

This newly-enacted USAM provision strikes a better balance than that proposed by the Rule 16 amendment. The USAM provision properly accounts for the myriad interests affected by criminal discovery policy. While the USAM provision requires prosecutors to make broader

disclosures than that which are constitutionally mandated under Brady and its progeny, it expressly balances the scope of exculpatory and impeachment disclosures against other interests such as national security and witness protection to name a few. USAM 9-5.001 (A). Moreover, even though the provision requires more liberal disclosure, it does not encourage (or require) limitless disclosure. In its statement that disclosure under the USAM is not limited to information that is “material” to guilt, the provision reminds prosecutors that broader disclosure does not include “irrelevant” information, information that is “not significantly probative of the issues before the court,” or information involving “spurious issues” which improperly divert the court’s attention. USAM 9-5.001(C). These pronouncements, alone, make significant headway in addressing the legitimate privacy and witness safety concerns raised by breadth of the proposed amendment.

In an effort to promote regularity and consistency in disclosure practices, the provision contains clear statements on what additional exculpatory or impeachment information must be disclosed. Instead of employing vague and undefined language designed to eliminate any prosecutorial discretion, the USAM embraces the reality (and desirability) of prosecutorial discretion while providing eminently clear guidance on what must be disclosed. For exculpatory information, a prosecutor “must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense.” USAM 9-5.001(C)(1). For impeachment information, a prosecutor “must disclose information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.” USAM 9-5.001(C)(2).

Moreover, the USAM provision does not generate additional confusion on review because the policy, unlike the proposed amendment to Rule 16, does not “provide defendants with any additional rights or remedies.” USAM 9-5.001(E). Defendants could, of course, still challenge disclosure violations under the Brady line of cases, but a prosecutor’s failure to disclose the additional information required in the USAM would not be grounds for review.³⁴

Finally, the USAM provision remains loyal to the standards developed in forty years of Brady case law, Rule 16, and the Jencks Act. At the outset, USAM 9-5.001’s stated purpose reminds prosecutors of their role to “seek a just result in every case.” USAM 9-5.001(A); cf. Agurs, 427 U.S. at 112 (footnote omitted) (noting that “[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt”). Although the policy expands required disclosures, the provision does not create additional defense discovery rights.

³⁴ However, the lack of any rights or remedies for a defendant should not lead to the conclusion that the USAM provision lacks enforcement teeth. As stated above, a prosecutor who violates the USAM could be investigated by the Office of Professional Responsibility, disciplined or dismissed from the Department, and reported to their licensing Bar.

The Honorable David F. Levi
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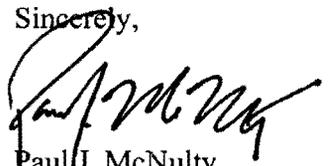
See generally Bagley, 473 U.S. at 675 n.7 (quotation omitted) (noting that any broader right of discovery “would entirely alter the character and balance of our present systems of criminal justice”). Likewise, the provision does not create internal inconsistencies in Rule 16’s “materiality” requirements nor does it disrupt Rule 16’s parallel and reciprocal discovery objective. The USAM provision also gives proper deference to the policies underlying the Jencks Act by: (1) expressly excluding from disclosure “irrelevant” information and information that is “not significantly probative of the issues before the court,” or that which involves “spurious issues;” and (2) allowing flexibility in the timing of impeachment disclosures. USAM 9-5.001(C) & (D)(2).

V. Conclusion

The proposed amendment to Rule 16 is completely unwarranted and entirely inconsistent with existing law. A fundamental change of this nature should only be considered where corresponding and compelling justifications exist. The Committee has not made a case for the need to expand so drastically a discovery process that has been working effectively over the past forty years. If the Standing Committee wishes to study this issue further, the government requests that the Standing Committee eliminate the existing proposed rule from consideration and assess the USAM’s productivity over the next several years. Although the new USAM policy requires prosecutors to make broader disclosures than that which are constitutionally mandated, it also preserves the balanced discovery system sought by Congress and adheres to the congressionally-stated policy interests of protecting victim and witness privacy interests and ensuring witness safety. The proposal’s language is clear, concise, and consistent with the language and standards developed in existing case law, Rule 16, and the Jencks Act. While the provision requires more liberal disclosure, it does not encourage (or require) limitless disclosure. Instead, it remains loyal to the clearly defined purpose and scope of the Brady rule, and, yet expands upon its reach to ensure consistency and reliability in what is (and is not) discoverable. Moreover, the USAM proposal does not create confusion for courts reviewing and assessing remedies for impeachment or exculpatory information disclosure violations.

Based on the foregoing, the Department respectfully requests that the Standing Committee reject the proposed amendment to Rule 16.

Sincerely,



Paul J. McNulty
Deputy Attorney General

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

**April 16-17, 2007
Brooklyn, New York**

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the “committee”) met in Brooklyn, New York, on April 16-17, 2007. All members participated during all or part of the meeting:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King (by telephone)
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee at the meeting was Judge Mark R. Kravitz. Also supporting the committee were:

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

The following officials from the Department’s Criminal Division also participated:

William A. Burck, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Acting Director, Office of Policy and Legislation
Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering
Section

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors in 18 U.S.C. § 3553(a).
3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker's* holding that the Sentencing Guidelines are advisory rather than mandatory.
4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).
5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.”

B. Proposed Amendment Approved by the Criminal Rules Committee for Consideration by the Standing Committee

Judge Bucklew noted that the committee had voted in October 2006 to forward to the Standing Committee for publication the proposed amendment to Rule 16 obligating prosecutors to disclose exculpatory or impeaching evidence without regard to its materiality. She said that Mr. Rabiej had advised Federal Judicial Center staff that the committee would like an update of its October 2004 study of local rules and how they treat a prosecutor’s obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Bucklew reported that the proposed rule amendment would be presented to the Standing Committee at its June 2007 meeting. Professor Beale noted that she was preparing a memorandum in support of the amendment.

C. Proposed Amendments Related to the Crime Victims’ Rights Act Published for Public Comment

Judge Bucklew noted that the following published rule amendment proposals, relating to the Crime Victims’ Rights Act (CVRA), had been the subject of significant public comment, including substantial testimony at the public hearing held on January 26, 2007, a letter from Senator Jon Kyl, and a law review article by Judge Paul Cassell:

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

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendment to Supplemental Rule C(6)(a) and transmit this change to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. p. 5

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- ▶ Federal Rules of Appellate Procedure p. 2
- ▶ Federal Rules of Bankruptcy Procedure pp. 3-4
- ▶ Federal Rules of Civil Procedure pp. 5-7
- ▶ Federal Rules of Criminal Procedure pp. 7-10
- ▶ Federal Rules of Evidence pp. 10-11
- ▶ Vanishing Trials Presentation pp. 11-12
- ▶ Time-Computation Project pp. 12-13
- ▶ Committee Self-Evaluation and Access to Information p. 13
- ▶ Long-Range Planning p. 13

<p>NOTICE</p> <p>NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.</p>

a threat against a petit or grand juror during a four-year period. The records of threats or inappropriate contacts did not distinguish between petit and grand jurors nor identify grand jury forepersons. One incident was reported in FY 2003, two in FY 2004, and none in FY 2005. There were 18 incidents reported in FY 2006, but 16 of them involved a single case in Nevada. The advisory committee concluded that the available data did not support an amendment to the rule. Moreover, an amended rule would have little practical effect, because it could not prevent the defendant, presumably the main source of threats to juries, from acquiring access to the grand jury foreperson's name. Furthermore, the present rule authorizes a court to redact the grand jury foreperson's name in individual cases if the court concludes that the foreperson's safety might otherwise be jeopardized.

The advisory committee continues to study the CACM Committee's suggestion to redact personal identifying information from arrest and search warrants. Several members expressed concerns about restricting the public's right to this information, and the Department of Justice asserted that the addresses of premises to be searched in a warrant are essential to law enforcement officers.

The advisory committee approved a proposed amendment to Rule 16, codifying and expanding *Brady* obligations imposed on prosecutors to disclose exculpatory information to the defense. The Department of Justice revised its *U.S. Attorneys' Manual* to accomplish much the same goals, in lieu of a rule change. Nonetheless, the advisory committee concluded that a rule change was necessary because the *Manual* is not judicially enforceable and provides only internal guidance. The advisory committee expects to submit the proposed amendment to Rule 16 with a recommendation to publish it along with a comprehensive report explaining its reasons for the Committee's consideration at its June 2007 meeting. The Committee chair noted concerns that the proposed amendment's expansive wording would impose an unmanageable burden on the

prosecution to disclose potentially relevant impeachment materials. Also, the proposed amendments could lead to uncertainty involving the standards and burdens for setting aside convictions on appeal. He urged the advisory committee to reexamine the proposed amendments and simultaneously to review the experiences of the courts who have local rules on the same subject.

The advisory committee is considering a new Rule 37 to regularize collateral review procedures, including: (1) providing that the writ of coram nobis is available only to persons not in custody; (2) subjecting coram nobis to timing limitations similar to those applicable to habeas corpus actions; and (3) providing that the other ancient writs (coram vobis, audita querela, bills of review, and the bills in the nature of bills of review) are not available in criminal proceedings. Concerns were raised about limiting some of the ancient writs, and the advisory committee continues to study whether any substantive rights might be lost if any of the ancient writs were limited.

The advisory committee is also studying possible amendments to Rule 41 to clarify procedures governing the search and seizure of electronically stored information.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Informational Items

A proposed new Rule 502, dealing with waiver of evidentiary privileges, was circulated to the bench and bar for comment in August 2006. Unlike other proposed rule changes, an amendment affecting an evidentiary privilege requires the affirmative approval of Congress under the Rules Enabling Act rulemaking process (28 U.S.C. § 2074(b)). The advisory committee proposed Rule 502 after Congressman F. James Sensenbrenner, then chairman of the

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 11-12, 2007
Phoenix, Arizona
Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 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
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

Judge Bucklew reported that the Standing Committee had approved new Rule 49.1 (privacy protections for filings made with the court), but it had asked the advisory committee to give further consideration to two concerns raised by the Court Administration and Case Management Committee. First, that committee had suggested that the new criminal rule require redaction of the grand jury foreperson's name from indictments filed with the court. Second, it had suggested that personal information be redacted from search and arrest warrants filed with the court.

Judge Bucklew said that the advisory committee had decided not to require redaction of the grand jury foreperson's name because the indictment is the formal charging document that initiates the prosecution, and other rules require that it be signed by the foreperson, be returned in open court, and be given to the defendant. Moreover, she pointed out, a recent survey of U.S. attorneys' offices and the U.S. Marshals Service had demonstrated that disclosure of the names of jurors has not created security difficulties. Professor Beale added that the survey had revealed no more than two instances of juror-related threats or inappropriate contacts in any recent year. Fear of juror intimidation, moreover, is most likely to center on the defendant himself or herself – who is entitled to a copy of the indictment in any event – and not from persons discovering a juror's name through an electronic posting by the court.

Judge Bucklew said that the advisory committee was continuing to study whether personal information should be redacted from warrants. She noted that there was strong sentiment among committee members to retain the information in the public file because the public has a right to be aware of government activities and to know who has been arrested and what property has been searched. She added that warrants are not generally filed until they are executed, and the committee was considering the feasibility of redaction once a warrant has been executed. In any event, there may be no need to require redaction in the rule because relief is always available on a case-by-case basis.

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had met by teleconference on September 5, 2006, to continue work on a proposed amendment to Rule 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeachment evidence favorable to the defendant. The proposal, she noted, had come from the American College of Trial Lawyers in 2003, had been drafted by an ad hoc subcommittee of the advisory committee, and had been discussed at every recent meeting of the advisory committee. She pointed out that the Department of Justice was strongly opposed to the proposal, but had been very helpful in drafting changes to the U.S. Attorneys' Manual to elaborate on the government's disclosure obligations. It had been suggested, she said, that the manual revisions might serve as an alternative to an amendment to FED. R. CRIM. P. 16.

Judge Bucklew explained that the advisory committee had before it at the teleconference a nearly final revision of the U.S. Attorneys' Manual, as well as a nearly final version of the proposed amendment to Rule 16 and an accompanying committee note. The key question for the committee, therefore, was whether to proceed with the proposed rule or accept the revised text of the manual as a substitute. In the end, she said, the committee voted to go forward with the rule, partly because the revised text of the manual continued to give prosecutors discretion and was not a complete substitute for the proposed rule and also because advice in the manual is entirely internal to the Department of Justice and not judicially enforceable.

Judge Bucklew and Professor Beale said that the revisions to the U.S. Attorneys' Manual were a major achievement, and the Department of Justice deserved a great deal of credit for its efforts. Judge Bucklew added that the advisory committee would likely return to the Standing Committee in June 2007 with a proposed amendment to Rule 16, and the Department of Justice would likely offer its strong objections to the rule.

One member suggested that it was important for the advisory committee to develop sound empirical information to support its proposal. He suggested that the Standing Committee needs to know how serious and widespread the problems of nondisclosure may be in order to justify the rule. Judge Bucklew responded that members of the defense bar can describe individual examples of improper withholding of information, but hard empirical data is very difficult to compile.

Professor Beale added that there is no way to quantify all the cases in which disclosure is not made. The obligations of prosecutors are subjective and depend on the particular facts of a case. Individual acts of nondisclosure are difficult to document because the defense usually has no knowledge of the exculpatory information, which is in the hands solely of the government. The few cases that are litigated are brought after conviction. She explained that the proposed rule goes beyond simply codifying existing *Brady* obligations, and the advisory committee will compare it to the rules of the state courts, the standards of the American Bar Association, and the rules of local federal district courts.

One member pointed out that there are great variations among the rules of the district courts, especially as to the timing of disclosures. He said that one good argument for the proposed rule is the need for national uniformity in the face of the current cacophony in local rules. Another suggested that although the revisions in the U.S. Attorneys' Manual are not judicially enforceable, they are being noticed by the defense bar, as well as by prosecutors, and more issues related to disclosure will be raised.

Judge Levi urged caution. He noted that with an issue as highly contentious as this, the committee's work will be placed under a microscope. The stakes in the matter, he said, are very high, and any proposed rule presented to the Judicial Conference needs

to be fully justified. He pointed out that the proposed rule raises issues that will have to be decided by case law, such as what constitutes impeachment information and how the rule affects the burden of proof on appeal. It is predictable, he said, that some members of the committee, and the Judicial Conference, will see the proposal as a policy shift that needs to be justified clearly. He suggested that the committee might want to monitor experience with the revisions in the U.S. Attorneys' Manual before going forward with the rule.

FED. R. CRIM. P. 37

Judge Bucklew reported that the advisory committee was considering proposals by the Department of Justice for a new FED. R. CRIM. P. 37 (review of the judgment) to restrict the use of ancient writs, and changes in the §§ 2254 and 2255 rules to prescribe deadlines for filing motions for reconsideration. She noted that the committee had appointed a Writs Subcommittee, chaired by Professor Nancy King, that is considering whether it is advisable – or even possible under the Rules Enabling Act – to propose a rule, modeled on FED. R. CIV. P. 60(b), that would abolish all the ancient writs other than *coram nobis*.

Some participants urged caution and questioned whether there was authority to abolish the writs through the rules process. They also suggested that the writs may have Article III constitutional dimensions. Members also discussed the extent to which the ancient writs, especially *coram nobis*, are still used in federal and state courts.

FED. R. CRIM. P. 32.2

Judge Bucklew reported that the advisory committee was considering amendments to Rule 32.2 (criminal forfeiture), with the help of a subcommittee chaired by Judge Mark Wolf. She noted that the subcommittee was considering the advice of the Department of Justice, the federal defenders, and the National Association of Criminal Defense Lawyers in this very difficult area.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee was considering proposed amendments to Rule 41 (search and seizure) to deal with search warrants for information in electronic form. She noted that the members of the committee had attended a full-day tutorial presented by the Department of Justice walking them through the mechanics of how electronic materials may be stored, copied, and searched.

Judge Bucklew noted that the advisory committee was working on implementing the proposed new time-computation rule and considering proposals by the Department of Justice to permit the examination of a witness outside the presence of the court and by the

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 26-27, 2006
Amelia Island, Florida

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the “committee”) met in Amelia Island, Florida, on October 26-27, 2006. All members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Benton J. Campbell, Acting Chief of Staff and Principal Deputy Assistant
Attorney General (ex officio)
Professor Sara Sun Beale, Reporter

Also participating for some or all of the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and
Procedure
Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules
Committee (by telephone)
Judge Harvey E. Schlesinger, Chair of the District Court Forms Working Group
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
Jonathan J. Wroblewski, Counsel, United States Department of Justice
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

including whether the rule should address when a Bill of Particulars is presumptively required, the applicability of the Rules of Evidence to forfeiture proceedings, the question of third-party participation, and the extent, if any, that a jury should be involved in adjudicating forfeiture matters. The committee then discussed some of these issues. Professor Beale mentioned that the subcommittee hoped to have a bifurcated list of proposals for the committee's review at the next meeting, which would distinguish clarifications from policy-level changes.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information

For the benefit of the committee's two new members, Judge Bucklew briefly recounted the history of the effort to amend Rule 16. In 2003, the American College of Trial Lawyers first proposed requiring disclosure of exculpatory and impeaching evidence without regard to its materiality. The Department had consistently opposed the proposed rule amendment. At its April 2006 meeting, the committee had initially voted to table consideration of the proposed amendment until the next meeting in light of the Department's proposal to amend the U.S. Attorneys' Manual ("Manual") to address a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In response to concerns that the terms of two committee members who had worked hard on the proposal were set to expire on September 30, 2006, though, the committee had decided to convene a special session before then to review the final version of the Manual and to determine whether to proceed with the proposed Rule 16 amendment. In a September 5, 2006 teleconference, the committee voted to send the Rule 16 amendment proposal to the Standing Committee with a recommendation that it be published for public comment.

Mr. Wroblewski reported that Deputy Attorney General Paul J. McNulty had signed the bluesheet approving the Manual amendment on October 19, 2006, and that the amendment had been posted on the internet and sent to all U.S. attorneys, assistant U.S. attorneys, and litigation divisions. Although the new Manual provision did not go as far as the proposed Rule 16 amendment, it did require greater disclosure of material and exculpatory evidence than constitutionally required, he said. Mr. Wroblewski reported receiving numerous phone calls from the field with questions concerning the Manual's new directive, including what was meant by "substantial doubt" and "information . . . that establishes a recognized affirmative defense." Judge Bucklew praised the Department for having followed through with the Manual amendment independent of the committee's decision to amend Rule 16. Mr. Campbell noted that it was unprecedented for the Department to seek input from the Criminal Rules Committee in drafting a new provision for the U.S. Attorneys' Manual, but he said that he thought that the discussions had been very helpful to the Department. Judge Wolf stressed that the committee and the Department had a common interest in the fairness and finality of proceedings, and he encouraged the Department to go beyond formally publishing the new policy and to actively help law enforcement agencies internalize the policy and incorporate it into their practices.

The committee discussed whether the committee note accompanying the proposed Rule 16 amendment should address the provision's effect on direct appeals or collateral motions. Judge Bucklew said that it probably would shift the burden in direct appeals in some circuits, but have no effect on collateral motions. The question, though, was whether a statement to this effect should be added to the committee note. Professor Beale said that the circuit split made it difficult to sum up the amendment's impact on direct appeals. Professor King said that she opposed adding the proposed language on the amendment's impact on collateral proceedings, because § 2255 proceedings do occasionally consider non-constitutional issues such as fundamental statutory provisions. Judge Bucklew commented that, unless there was a desire to change the note, it would be sent to the Standing Committee in its current form.

Judge Trager objected to the reference to "fundamental fairness" in the first line of the committee note, but noted that he had been on the losing side of the vote approving the proposed amendment. Judge Wolf asked, as a procedural matter, whether the committee should be revisiting its September 5 decision to approve the proposed Rule 16 amendment, given that Mr. Fiske and Mr. Goldberg were no longer present. Judge Bucklew agreed that the only issue pending was whether to add language to the note to clarify the amendment's effect on direct appeals or collateral motions. Judge Wolf said that he would consider it a positive development if the amendment made it more difficult at the appellate level for the government to defend inadvertent and intentional prosecutorial violations of their disclosure obligations in district court, because fear of causing a guilty person to go free would foster compliance among prosecutors far more effectively than a provision in the U.S. Attorneys' Manual.

B. Rule 49.1. Redaction of the Grand Jury Foreperson's Name on the Indictment; Redaction of Arrest and Search Warrants

The committee discussed the new criminal privacy rule. Judge Bucklew noted that, during the public comment period, the Judicial Conference Committee on Court Administration and Case Management (CACM) had recommended that proposed Rule 49.1 require redaction of grand jury forepersons' names from case filings. Judge Bucklew said that CACM's suggestion was complicated by the Rule 7 requirement that indictments be returned in open court and by the Rule 10 requirement that the defendant be given a copy. The committee decided not to hold up Rule 49.1, but rather to consider these other issues separately, at a later time.

Since then, Judge Bucklew noted, the Department had reviewed its statistical database and surveyed U.S. attorneys' offices and U.S. marshals offices to ascertain whether public disclosure of jury foreperson signatures was a significant problem. Professor Beale said that the Department's data indicated that threats to jurors' security were not a national problem either in severity or frequency. Specifically, Mr. Wroblewski noted, the U.S. Marshals Service, which has responsibility for juror security, knew of only 18 reports of juror-related "threats or inappropriate contacts" in the entire country in FY 2006, 16 of which were in a single case in Nevada. Moreover, the Marshals knew of only one incident nationwide in FY 2003, two in FY 2004, and none in FY 2005. Judge Jones noted that the main source of threats to jurors was the defendant, whose knowledge of the jury foreperson's identity was in no way enhanced by

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure met on June 22-23, 2006. The Deputy Attorney General, Paul J. McNulty, attended part of the meeting along with Robert D. McCallum, Associate Attorney General; Ronald J. Tenpas, Associate Deputy Attorney General; Alice S. Fisher, Assistant Attorney General for the Criminal Division; and Elizabeth U. Shapiro, Assistant Director, Federal Programs Branch, Civil Division, Department of Justice. All the other members attended. Chief Justice John G. Roberts, Jr., and Associate Justice Samuel A. Alito, Jr., former member and former chair of the Advisory Committee on Appellate Rules, respectively, also attended part of the meeting.

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Thomas S. Zilly, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Susan C. Bucklew, chair, and Professor Sara Sun Beale, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

NOTICE

NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL
CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

At its January 2005 meeting, the Committee requested that the advisory committee continue studying a proposed amendment to Rule 29 that would permit a judge to enter a judgment of acquittal before a verdict only if the defendant waives Double Jeopardy rights so that the government's ability to appeal is preserved. It also requested that the advisory committee draft such a rule and submit it to the Committee with a recommendation to either publish or not publish it for public comment. The advisory committee submitted a proposed amendment with a recommendation that it be published for public comment in August 2006.

Rule 41 would be amended to provide procedures for issuing a search warrant for property located in territories and possessions outside the United States. It is intended to address the growing incidences of visa and passport thefts occurring primarily in embassies and premises of consular missions. Public comment is especially sought on the proposed language to exclude American Samoa because of its unique status and separate independent judiciary.

The Committee approved the recommendation of the advisory committee to circulate the proposed amendments to the bench and bar for comment.

Informational Item

The advisory committee is considering a proposed amendment to Criminal Rule 16 that would clarify when and what type of exculpatory evidence and impeachment evidence must be disclosed before trial consistent with *Brady* requirements. The Department of Justice submitted a draft revision of its *U.S. Attorneys' Manual* to accomplish the same goals, in lieu of a rule change. The Department agreed to further modify the *Manual* to respond to specific concerns raised by the advisory committee. The advisory committee expects to review the revised *Manual* in August 2006 and determine whether a rule change is necessary.

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

**September 5, 2006 - Special Session
Teleconference**

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the “committee”) met in special session by teleconference on September 5, 2006. The following members participated:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating were:

Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules
Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

Judge Bucklew began by noting that this special session was convened strictly to discuss the Department of Justice’s proposed revision to the United States Attorneys’ Manual on disclosure of exculpatory and impeaching information and to decide whether, given the proposal, the committee should still forward the draft Rule 16 amendment to the Standing Committee for

publication. She recalled that the advisory committee had voted last April to postpone further consideration of the matter to afford the Department time to finish revising the Manual, but to revisit the issue in a special session sometime before September 30, 2006, to allow two members who had spent considerable time on this issue to participate before the end of their tenures. After describing the written materials distributed electronically in advance of the meeting, Judge Bucklew invited the Department to make an opening oral statement, to be followed by questions, comments, and, finally, a committee vote.

II. DISCUSSION AND VOTE

Ms. Fisher reported that the Department had worked to improve the proposed Manual revision since the April meeting. She said that Mr. Fiske had met with her, Mr. Campbell, and Mr. Wroblewski to explore ways of addressing the concerns raised, and the Department was able to accommodate many, though not all, of them. Ms. Fisher said that the Manual revision had received final approval from all relevant Department officials, including Deputy Attorney General Paul McNulty, and would go into effect. She called the new Manual section real progress, noting that it exceeded the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Section D.4. was added, she said, to require supervisory approval before prosecutors could delay for any reason the disclosure of impeachment or exculpatory information. Also, following such supervisory approval, the defendant had to be notified. Ms. Fisher noted that the policy applied to the sentencing as well as the guilt-innocence phases. Although the Manual revision might not be everything that Mr. Fiske and others wanted, she said, it constituted a substantial step in the right direction.

Judge Wolf requested clarification of the current status of the Manual revision. Ms. Fisher replied that it had been fully approved, would be implemented, and could be added to the Manual as soon as tomorrow. The reason that it had not already been added, she said, was in case some last-minute wording adjustments were needed because of the telephone conference with the Committee. Judge Wolf inquired whether the Department saw any substantive differences between the proposed Manual revision and the draft Rule 16 amendment. Ms. Fisher replied that certain language differences obviously remained, particularly with respect to disclosure of impeachment evidence. Judge Wolf said that, even if the proposed provisions were identical, the fundamental question was whether the policy on disclosure of exculpatory and impeaching information should be solely an internal Department matter or should also be included in a rule.

Mr. Goldberg inquired whether the Manual revision was still being offered strictly as an alternative to the proposed Rule 16 amendment or whether it would go into effect regardless. Ms. Fisher stated that it was both her understanding and the Deputy Attorney General's intention that the Manual revision on exculpatory and impeaching information would go into effect following the current telephone call even if the proposed rule change were voted out of committee. She added, though, that if that occurred, the Department would continue its opposition to the Rule 16 amendment when the issue is taken up by the Standing Committee.

Returning to an earlier topic, Mr. McNamara inquired whether there were not differences between the Manual revision and the draft rule amendment with respect to materiality. Mr. Campbell said that materiality had been “eliminated as the construct,” but acknowledged that differences between the two provisions remained. Judge Wolf voiced concern that prosecutors might find the phrase “make the difference between guilt and innocence” in part C of the Manual provision confusing, as it appeared to be stricter than the materiality requirement in *Brady and Kyles v. Whitley*, 514 U.S. 419 (1995). Ms. Fisher said that she considered the comment helpful.

Judge Jones inquired whether proposed Manual descriptions of prosecutorial obligations using the term “must” differed in meaning from instances where “should” appeared instead. Ms. Fisher said that this was merely a style issue involving how obligations are described elsewhere in the Manual, but that if this issue proved significant enough to change the committee dynamic, the Department could look at it more closely, because no difference in meaning was intended.

Following the questions period, Judge Bucklew offered each member in turn an opportunity to comment, beginning with either Mr. Fiske or Mr. Goldberg.

Mr. Fiske reported having had several conversations with Ms. Fisher, Mr. Campbell, and Mr. Wroblewski in search of an acceptable solution, and he applauded their conscientious efforts in pursuing what he considered an extremely worthwhile and productive process. The Department had significantly improved the language of the proposed Manual revision, he said, particularly with respect to the obligation to disclose exculpatory information. The revised language would eliminate any subjective analysis by the prosecutor and require prosecutors to disclose any information — bar none — that was inconsistent with any element of a crime. The biggest remaining problem, though, he said, was the proposed inclusion of the qualifier “substantial” and “significant” in the Manual section on disclosure of impeaching information, which creates the same kind of issue as the materiality element by calling for a subjective assessment by the prosecutor. Also, unlike a rule, a Manual provision would be unenforceable, Mr. Fiske noted.

Following the committee’s April 2006 meeting, Mr. Fiske said, he had commented to Mr. Campbell that the Manual provision could only serve as an acceptable substitute for a Rule 16 amendment if it were made as effective as a rule. In other words, he explained, it could not allow any subjective assessment by the prosecutor, and it would have to be functionally enforceable by, for instance, possibly requiring prosecutors to affirm to the court at some point during the discovery stage that they had fully complied with their Manual obligations to disclose exculpatory or impeaching information. Mr. Fiske said that the latest draft of the Manual provision fell short of satisfying those two requirements and was therefore not an adequate substitute for the draft Rule 16 amendment. Consequently, he would vote to go ahead with the Rule 16 amendment.

Mr. Goldberg agreed. He characterized the Manual proposal as a noble effort, but said that it would defeat what the draft Rule 16 amendment was designed to achieve. He noted that

the proposed Manual revision disclaims supersession of those sections of the Manual that discuss *Giglio*, thereby retaining the materiality element. He said that prosecutorial subjectivity also lived on in the “substantial doubt” and “significant bearing” phrases used in the Manual revision.

Judge Tallman said that he favored an incremental approach. He applauded the Department’s recent changes to the proposed Manual revision. As a former criminal defense attorney, he said, he understood the points made in support of the rule. But he recommended that the committee defer consideration of a Rule 16 amendment until the impact of the Department’s proposed revision to the Manual could be assessed. He added that he would not vote for the rule amendment if the Department intended to oppose it at the Standing Committee.

Judge Bartle said he had no comments.

Judge Wolf said that, although the recent changes to the proposed Manual revision represented great progress, he still favored a judicially enforceable rule. He said that he shared the concerns regarding the persistence of the subjective materiality test on disclosing impeaching information, adding that his main concern was that revising the Manual would not alter current practices, at least not for long. Judge Wolf said that he was amazed that only now was a discussion of prosecutors’ constitutional duty under *Brady* and *Giglio* being added to a multi-volume policy guide for U.S. Attorneys. Nevertheless, only the rule, he said, would provide an effective remedy for violations and actually reduce the number of problems in this area.

Judge Trager said that he agreed with Judge Tallman. His concern was that convictions might be overturned on appeal under the draft Rule 16 amendment simply because prosecutors or law enforcement agents had mishandled exonerating or impeaching evidence. Judge Jones replied that the rule amendment was never intended to change the substantive requirement for reversing a conviction. As long as the exonerating or impeaching material that should have been disclosed would not have affected the outcome, the conviction would stand, he said. What the rule *would* do, however, is subject the prosecutor to sanctions in the event of an unexplained violation of a rule, thereby promoting compliance with the policy, Judge Jones said. Judge Trager said that he did not recall reading any statement to that effect in the draft committee note.

Judge Jones said that, although he appreciated and applauded the Department’s efforts, he continued to believe that it was best to proceed with amending Rule 16.

Judge Battaglia said that he had nothing to add to the points already made.

Justice Edmunds said that he tended to favor Judge Tallman’s point of view.

Professor King requested clarification from the Department on the relationship between sections D.2. and D.4. of the Manual revision proposal. She asked whether supervisory approval and notice to the defendant would also be required where information was not promptly disclosed for reasons other than the classified nature of the material, such as witness security.

Ms. Fisher said that yes, both provisions were intended to be parallel and that if a comma had to be moved to make that clear, the Department would do so. Professor King also requested clarification on whether or not the Department had agreed, in response to Judge Jones' inquiry, to change all instances of "should" to "must" and to convert advisory language such as "this policy encourages" in section B.1 to "this policy requires" or a comparable phrase more suggestive of a compulsory policy. Ms. Fisher replied that the Department intended to do so, as it saw no difference in meaning between "should" and "must" in the context of the U.S. Attorney's Manual. Professor King asked what the Department intended to do with respect to the supersession language in section A that caused Mr. Goldberg concern. Ms. Fisher said the Department would change the other Manual provision dealing with *Giglio* to make it consistent with this new provision. Mr. Campbell added that the Department would be reviewing all other provisions in the Manual to see where changes were required to ensure consistency with this new provision. Judge Bartle inquired whether that meant that the Department would be deleting the sentence beginning, "Additionally, this policy does not alter or supersede the *Giglio* policy adopted in 1996[.]" Ms. Fisher said that was correct.

Mr. McNamara said that the failure of prosecutors to disclose exculpatory or impeaching evidence is a daily problem for public defenders. He applauded the proposed Manual revision, but suggested that the policy needed enforcement teeth that only a rule could provide. For that reason, he supported sending the Rule 16 amendment to the Standing Committee.

Mr. Rabiej noted that the committee's decision was subject to review by both the Standing Committee and the Judicial Conference, the latter of which in the past had indicated strong reluctance to making changes in this area. Mr. Fiske responded that he was unaware that either the Standing Committee or the Judicial Conference had ever considered this particular issue. Moreover, Mr. Fiske added, the committee should do whatever it believes is right without concern for whether others further up the line might disagree. Mr. Fiske suggested addressing the concerns regarding conviction reversal by adding a committee note clarifying that the rule is not intended to create a new standard for review of a conviction, but is simply designed to put teeth into the requirement that prosecutors turn over any exculpatory and impeaching information without subjective reflections on whether non-disclosure would alter the outcome. Mr. Fiske expressed concern regarding Judge Tallman's recommendation to postpone consideration of the draft Rule 16 amendment until the committee could determine whether or not the Manual revision had succeeded in improving prosecutorial practices. Given the nature of the problem, Mr. Fiske warned, even two years from now, there would be no data or other means of making such a determination for 90% of cases. He noted that several years of effort had gone into amending Rule 16 and suggested that the rule change was ripe for an up or down vote.

Judge Tallman predicted that, notwithstanding Mr. Fiske's point, at least some jurisdictions would interpret the Rule 16 amendment in a way that would affect the scope of review, particularly in habeas cases, and would affect the sustainability of convictions. Mr. Goldberg disagreed, reporting that he and Professor King had spent a great deal of time studying whether the draft rule amendment would affect the law of reversal and had concluded that it

would not. To prevent any misinterpretation, he said, a statement could be added to the note, as Mr. Fiske had suggested.

Professor King explained that a rule amendment should have no effect on collateral review because it would not change the *constitutional* standard for reversal, which is the only type of issue reviewable in the habeas context. On direct appeal, a rule violation would be reviewed for harmless error and, although some courts of appeals currently place the burden of disproving prejudice on the government, others require the defendant to show prejudice from a rule violation to obtain relief on direct appeal. Consequently, revising the rule should have *no* effect on collateral review, and even on direct appeal it would not necessarily shift the burden in all circuits, she said. Judge Tallman remarked that the appellate standard was already difficult to apply and that a rule change would not ease that task. Judge Wolf commented that the only thing that *would* ease the job of appellate courts would be to reduce the number of these types of cases by promoting greater fairness and integrity at the trial level in what has proven to be a very problematic area. That was why, he added, he supported amending Rule 16 and providing a judicial role. Judge Wolf asked the Department whether it had given any consideration to how the Manual revision would be taught and implemented. Ms. Fisher responded that regular training programs were in place to educate prosecutors on changes to the Manual, but that the Department's focus in recent months had been on getting the new provision approved.

Judge Bucklew invited any final comments from the Department. Ms. Fisher said that the Manual revision represented a significant change and that its provisions were not that different from the draft Rule 16 amendment. She added that the Department was strongly opposed to amending Rule 16 and believed that these changes should be made incrementally.

Justice Edmunds inquired whether the problem prompting the Rule 16 amendment in the federal courts was limited to a few renegade prosecutors or whether it was, as Mr. McNamara suggested, widespread. Mr. McNamara said that the problems were across the board, and he predicted that the Manual revision would result in no appreciable improvement in compliance. Ms. Fisher disagreed, stressing the importance of the proposed Manual revision. The problem, she said, was limited to a few bad actors. Mr. Campbell suggested that bad actors who would violate a Manual provision would also disregard a rule. He stressed the seriousness of violating Manual policy, noting that it would subject a prosecutor to an Office of Professional Responsibility (OPR) investigation, possible dismissal, and even, as occurred in Detroit recently, criminal prosecution. Judge Wolf agreed that someone who wanted to disregard the policy would succeed. But he was skeptical of the effectiveness of OPR investigations, describing an "egregious" non-disclosure case he had in which an OPR investigation has still not concluded more than three years after it was initiated. What is worse, the subject of the investigation was just assigned to prosecution of police corruption cases, generating significant cynicism in Boston, he said. As someone who had worked for the Attorney General and served as a former prosecutor, Judge Wolf said he can appreciate the belief that a Manual revision will make a difference. But he has a principled view that there should be judicial review in this area and that,

in the interest of the administration of justice, a rule was needed to sharply diminish the number of arguable violations of constitutional rights.

Judge Bartle said that he was convinced that the committee should send the draft Rule 16 amendment to the Standing Committee. Having an effective, objective prophylactic rule would be in everyone's long-term best interest, including the Justice Department's. He agreed with Mr. Fiske that now was the time to amend Rule 16 and that no consideration should be paid to what others in the rulemaking process may or may not do.

Judge Trager warned the committee that defense counsel would try to use the draft Rule 16 amendment to try the prosecutor whenever they lacked a true defense, and that it would inevitably have implications for overturning convictions. He therefore recommended against going forward with the amendment. Mr. Goldberg recalled that, when the Rule 16 amendment had first been proposed, the Department denied that failure to disclose exculpatory and impeaching information was a big problem. Subsequent research, though, disclosed hundreds of cases that made clear that this was actually a huge problem, he said, and a "festering sore." Judge Trager said that the cases to which Mr. Goldberg referred were largely state cases and that there was no comparable problem in federal court.

Professor Beale said that she thought that the arguments had been well-stated both for and against proceeding with the Rule 16 amendment. However, she saw an inherent problem in the use of subjective standards and predicted that the inclusion of such qualifiers as "substantial" and "significant" in the Manual provision could lead to problems. She added that, at least in some circuits, the rule amendment could shift the burden to the government.

Judge Bucklew personally thanked Ms. Fisher for having successfully added a *Brady* provision to the Manual, something others before her had tried and failed to do.

Judge Jones moved to forward the draft Rule 16 amendment to the Standing Committee.

The committee voted 8-4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.

Mr. Fiske noted his support for adding a statement to the committee note clarifying that the rule amendment was not intended to affect the substantive rights of defendants during review of their convictions. The session was adjourned.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 22-23, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that

while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a

conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the regular rulemaking process. *i.e.*, approval by the committee and forwarding to the Supreme Court and Congress.

The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.

Informational Items

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

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, 2006 (Agenda Item 8).

New Rule for Publication

FED. R. EVID. 502

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

**To: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure**

**From: Hon. Susan C. Bucklew, Chair
Advisory Committee on Federal Rules of Criminal Procedure**

Subject: Report of the Advisory Committee on Criminal Rules

Date: May 20, 2006

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure (“the Committee”) met on April 3-4, 2006 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items: approval of published Rules 11, 32, 35, 45, and 49.1 for transmission to the Judicial Conference; approval of proposed amendments to Rules 29 and 41 for publication and comment; and approval of the time computation template for eventual publication. In addition, the Committee has several information items to bring to the attention of the Standing Committee, most notably continued discussion of a draft amendment to Rule 16.

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

1. ACTION ITEM—Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial. With these provisions excised, the Sentencing Reform Act “makes the Guidelines effectively advisory,” and “requires a sentencing court to consider Guidelines

or a telephone conference, so the Committee was asked to vote on the Committee Note by e-mail. All members of the Committee approved the Note by e-mail.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41(b) be published for public comment.

3. Time-Computation Template

Judge Kravitz briefed the Committee on the time-computation template, which abolishes the “10 day rule” and adopts the “days are days” principle. He also described in more detail the principles governing the template, and the issues still under consideration by his subcommittee. He explained that the Time-Computation Subcommittee hoped that all of the advisory committees would approve the template at their spring meetings, paving the way for the template to be presented to the Standing Committee at its June meeting. Then each of the advisory committees could begin to adapt the template to their own deadlines.

Following that briefing, the Committee approved the time-computation template for eventual publication in tandem with proposed amendments to the relevant rules of procedure.

Recommendation—The Advisory Committee recommends that the proposed time-computation template be approved for later publication.

V. Information Items

Four subjects discussed at the April 2006 meeting will be major items on the Committee’s future agenda, and may eventually reach the Standing Committee.

A. Information Item—Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

Since October 2003, the Committee has been considering a proposal to codify and expand the Government’s disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The Department of Justice has consistently opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. This proposal has been discussed at length by a subcommittee and at six meetings of the full Committee. At the Committee’s April 2005 meeting, the Committee first voted 8 to 3 in favor of proceeding with an amendment to Rule 16 and then returned the matter to the subcommittee for additional work on the language of the proposed amendment.

While participating fully in efforts to draft the language of a proposed amendment, the Department of Justice also undertook efforts to develop a revision of the United States Attorneys’

Manual (USAM) regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16. The Department presented a first draft of a proposed revision to the Rule 16 subcommittee in early 2006, received comments, and submitted a revised draft for discussion at the Committee's April 2006 meeting.

The Committee discussed at length the draft amendment to the USAM and the Department's suggestion that it be could be adopted as an alternative to a rule change. Some of the comments were directed to the wording of the proposed revision of the USAM, which some committee members felt were vague, hortatory, and subject to many exceptions. It was also noted that there would be no way, under the proposal, to determine in a given case whether the government had made the broad disclosure envisioned by the hortatory language of the rule. Other comments addressed the question whether a revision of the USAM could be a satisfactory substitute for a rules change. More fundamentally, proponents of a rules change noted that the provisions of the USAM are not judicially enforceable, and they also stressed the importance of having a judge, rather than a prosecutor, determine whether disclosure of exculpatory or impeaching material is warranted in a given case.

On the other hand, Department of Justice stressed that an amendment to the USAM could encourage the early disclosure to the defense of exculpatory and impeachment evidence and promote prosecutorial uniformity and regularity nationwide. The exceptions to disclosure were necessary to protect witnesses and national security. The Department of Justice will vigorously oppose the proposed amendment to Rule 16 at the Standing Committee and beyond.

Some members felt that the Committee should welcome the proposed amendment of the USAM and afford it time to work, recognizing that an amendment to Rule 16 could be pursued, if necessary, at a later date. Others felt that the Committee should not lose the benefit of the three years of work that have gone into the proposed amendment, which they viewed as both vitally important and ready for submission to the Standing Committee. One member of the Committee noted that he would be prepared to support the proposal that a revision of the USAM serve as an alternative to a rule change, but only if the draft USAM amendment were revised to eliminate the materiality test and to provide notice in each case of the degree of disclosure afforded.

On a motion to table the proposed amendment to Rule 16 until the October 2006 meeting, the Committee's original vote was split 6 to 6. As chair, Judge Bucklew broke the tie, voting in favor of tabling the amendment. It was noted, however, that two key subcommittee members who had worked on the proposed amendment for three years would complete their terms and be unable to participate in the Committee's next meeting in October 2006. Accordingly, after further discussion, the Committee agreed to table the proposed Rule 16 amendment until a special session of the Committee could be convened on or before September 30, 2006.

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

April 3 & 4, 2006
Washington, D.C.

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the “committee”) met in Washington, D.C., on April 3-4, 2006. The following members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating in all or part of the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee
Judge Paul L. Friedman, Former Committee Member
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Paul J. McNulty, Deputy Attorney General
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
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

The committee without objection approved the change proposed by Judge Bartle and granted the chair and the reporter authority to work with the chairs and the reporters of the other rules committees to resolve any last-minute wording issues in the interest of uniformity.

Professor Beale noted that the committee had given early approval to the redaction exemptions in paragraphs (b)(8), (b)(9), and (b)(10), as requested by the Department of Justice. Mr. Campbell stressed the importance of particularity and identification in such documents as arrest or search warrants and said that the public has a right to know with some specificity who was arrested or charged with a crime and where a search was executed. Judge Bucklew noted that CACM had expressed concern with the breadth of the exemptions. Judge Jones moved to retain the exemptions.

The committee without objection decided to retain the exemptions in proposed Rule 49.1(b) (8), (9), and (10).

Judge Bartle moved that the committee approve the entire text of Rule 49.1 as revised.

The committee without objection approved the revised draft of Rule 49.1.

B. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information

Deputy Attorney General Paul McNulty attended the meeting for the committee's discussion of the proposed Rule 16 amendment. Judge Bucklew noted that, since the committee's last meeting, the Department of Justice had circulated two drafts of a proposed revision to the United States Attorneys' Manual (USAM) as an alternative to amending Rule 16. Ms. Fisher explained that the proposal was designed to address some of the concerns prompting the effort to amend the rule. She said that the revision of the Manual would promote prosecutorial uniformity and regularity nationwide, would allow for early disclosure of exculpatory and impeaching evidence, and would encourage prosecutors in most cases to exceed the disclosure requirements mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

Mr. Fiske raised several concerns with the Department's proposed USAM revision and asked whether the USAM revision would require a disclosure regardless of materiality. Ms. Fisher noted that subsection B of the proposed revision to the Manual "encourages prosecutors to take an expansive view of its disclosure obligations and err on the side of broad disclosure without engaging in speculation as to whether the evidence will be material to guilt or the outcome of a trial." Mr. Goldberg pointed out, however, that the proposed revision is merely hortatory and includes broadly defined exceptions. Under the proposal, it would be impossible to determine in a given case whether the government's disclosure of exculpatory and impeaching information was broad or narrow. Mr. Goldberg asked whether the USAM proposal was simply an alternative to a Rule 16 amendment or would be implemented regardless of how the committee chose to proceed.

Ms. Fisher responded that the USAM revision was proposed as an alternative to a rule change. Under its proposed revision standard, prosecutors would continue to weigh materiality before disclosing exculpatory or impeaching evidence, but would be encouraged to construe materiality broadly. She added that exceptions were important to protect witnesses and the national security. Judge Wolf suggested that, where witness safety or national security considerations required an exception, the Department could simply request a protective order. Ms. Fisher replied that Judge Wolf's concerns could largely be addressed in a further revision of the USAM draft. Mr. Goldberg suggested that a judge rather than a prosecutor should determine whether non-disclosure of exculpatory or impeaching information is warranted in a particular case. He warned that, without the rule amendment, which the committee had been working on for nearly three years, conflicting local rules would emerge. Ms. Fisher suggested that the USAM revision would promote national uniformity and regularity of practice. Mr. McNamara replied that only a rule could accomplish that.

Because the committee voted at the Spring 2005 meeting to amend the rule in concept, Judge Bucklew said that the issue could be revisited only upon the motion of a member who had previously voted to approve the amendment. She noted that the Department had invested significant time in drafting a new USAM section to address some of the committee's concerns and that the Department had indicated that it would vigorously oppose the proposed Rule 16 amendment at the Standing Committee and beyond, if necessary. Judge Tallman recommended against approving a rule that might well be rejected later in the rulemaking process. Rather, he suggested that the committee welcome the proposed USAM addition as incremental progress and afford it some time to work, with the understanding that if it did not, Rule 16 could be amended at some later date.

Mr. Fiske announced that, if the Department were willing to make the two main changes urged by members of the committee — eliminating the materiality test and providing notice of which disclosure standard is being used in each case — he was prepared to support the USAM proposal. It was moved that the proposed rule amendment be tabled until the following meeting. The committee's initial vote was split 6 to 6. As committee chair, Judge Bucklew broke the tie by voting in favor of the motion to table the proposed amendment.

The committee voted 7-6 to table the proposed Rule 16 amendment until the next meeting.

Concern was raised that the terms of Mr. Fiske and Mr. Goldberg, two Rule 16 Subcommittee members who had worked hard on the proposed rule amendment, would expire before the next committee meeting. It was suggested that the committee reconvene again before the expiration of their terms, perhaps by teleconference, to determine (1) whether the Department had added a new U.S. Attorneys' Manual section on disclosure of exculpatory and impeaching information, and (2) whether its wording adequately addressed the main concerns raised by Mr. Fiske and others. Judge Bucklew suggested resolving any wording questions so that the only issue left for the teleconference would be whether to send the proposed rule amendment to the Standing Committee. Following discussion of the changes made to the Rule 16 amendment since the October

2005 meeting, Mr. Fiske moved to table consideration of the Rule 16 amendment proposal until a special session of the committee could be convened on or before September 30, 2006.

The committee without objection decided to table the proposed Rule 16 amendment until a special session of the committee could be convened on or before September 30, 2006.

Mr. Fiske was unable to attend the remainder of the meeting.

C. Rule 29. Proposed Amendment Regarding Motion for a Judgment of Acquittal

Professor Beale reported that the Rule 29 Subcommittee had addressed the concerns raised at the previous committee meeting. The changes clarified the defendant's waiver of double jeopardy rights, permitted courts either to deny or defer a mid-trial motion for a judgment of acquittal, and made the rule more user-friendly overall. Judge Bucklew noted that a majority of the committee had expressed support for the proposed amendment in a straw vote taken in a previous meeting.

Judge Friedman reported significant concern among judges with whom he had discussed the provision on the waiver of double jeopardy rights. Judge Tallman said that he welcomed the proposed amendment, which, in his view, would have positively altered the outcome of a recent Ninth Circuit *en banc* decision. Judge Jones said he opposed the proposal because erroneous preverdict judgments of acquittal were not a major problem, and the change would undermine the public policy underlying the double jeopardy clause. He predicted that it would also inadvertently create other problems, such as potentially depriving the district court of jurisdiction in an ongoing trial if, after the court granted a judgment of acquittal on fewer than all counts or to fewer than all co-defendants, the government appealed the ruling.

Mr. Campbell said that the Department had conducted an internal survey among U.S. attorney's offices nationwide to determine whether erroneous preverdict judgments of acquittal represented a major problem. The results, he said, showed that the problem is "more widespread than we thought," occurring in a significant number of cases. Mr. Campbell stressed the voluntary nature of the waiver of double jeopardy rights and predicted that Judge Jones's concerns about loss of jurisdiction during a partial appeal would not prove problematic in practice.

At Judge Trager's suggestion, the committee decided first to vote on the revised wording of the proposed amendment, then to vote as a policy matter whether to endorse the proposal for publication. Judge Trager moved to accept the current wording of the proposed amendment.

The committee without objection approved the wording of the Rule 29 amendment.

Judge Tallman moved to approve the amendment for publication. Judge Wolf expressed concern that the proposal took power away from judges. Judge Jones noted that many judges would

**SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

This report is submitted for the record, and includes the following items for the information of the Conference:

- ▶ Federal Rules of Appellate Procedure p. 2
- ▶ Federal Rules of Bankruptcy Procedure pp. 2-4
- ▶ Federal Rules of Civil Procedure pp. 4-6
- ▶ Federal Rules of Criminal Procedure pp. 6-8
- ▶ Federal Rules of Evidence p. 8
- ▶ Bankruptcy Law Presentation pp. 8-9
- ▶ Time-Computation Project p. 9
- ▶ Report on Class Action Fairness Act pp. 9-10
- ▶ Long-Range Planning p. 10
- ▶ Remembrances of the Late Chief Justice William H. Rehnquist p. 10

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL
CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

The advisory committee also is considering a proposed amendment to Rule 16 that would clarify when and what type of exculpatory evidence and impeachment evidence must be disclosed before trial consistent with *Brady* requirements. The Department of Justice submitted a draft revision of its *U.S. Attorneys' Manual* to accomplish the same goals, in lieu of a rule change. The advisory committee expects to make a recommendation on this issue at its April 2006 meeting.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Informational Item

The advisory committee continues its work on a possible rule to be submitted to Congress on waiver of privileges. Unlike other proposed rule changes, an amendment affecting an evidentiary privilege requires the affirmative approval of Congress under the Rules Enabling Act rulemaking process (28 U.S.C. § 2074(b)). The burden and cost of preserving the privileged status of attorney-client information and trial preparation materials can be enormous without deriving any countervailing benefit. Lawyers and firms must thoroughly review every item produced in discovery. Otherwise they risk waiving the privileged status not only of the individual document disclosed but of all other documents dealing with the same subject matter. The advisory committee plans to hold a special meeting and invite experienced lawyers and academics expert in the area to advise it on the extent of the problem and comment on possible solutions.

BANKRUPTCY LAW PRESENTATION

Professor Alan N. Resnick provided a historical account of the development of bankruptcy law and implementing procedural rules, leading up to the enactment of the 2005

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2006
Phoenix, Arizona

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Friday and Saturday, January 6-7, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L. Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Associate Attorney General Robert D. McCallum, Jr.
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

impeachment of a witness by evidence of a prior conviction involving dishonesty or false statement).

Judge Levi explained that a great many changes were needed in the bankruptcy rules to comply with the provisions of the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed to the enormous effort of the Advisory Committee on Bankruptcy Rules in producing a comprehensive package of revised official forms and interim bankruptcy rules. The advisory committee, he said, had effectively completed several years of rules work in just six months. Even organizing the advisory committee into subcommittees to write so many different rules, he said, had been difficult. He noted, too, that the new legislation was very complex and had given rise to many problems of interpretation, making it difficult to draft rules and forms.

He added that he had asked Professor Alan Resnick to attend the meeting and give the members a perspective on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and what it means for the rules process. Finally, he noted that Congress was likely to conduct oversight hearings on implementation of the legislation, and the revised bankruptcy rules will be examined closely by Congress.

Judge Levi reported that the Judicial Conference had placed one proposed rule on its discussion calendar for the September 2005 session – new FED. R. APP. P. 32.1, governing citation of judicial dispositions. The rule, he said, was controversial and had encountered opposition from a number of circuit judges. He explained that he and Judge Alito had made a joint presentation on the new rule to the Conference. Judge Levi spoke first about the thorough procedures followed by the rules committees in considering the new rule, and then Judge Alito addressed the substance of the rule.

Judge Levi noted that one chief circuit judge spoke against the rule, arguing that each circuit is different and there is no need for national uniformity on citation policy. The chief judge also objected to having the rule made retroactive. In the end, Judge Levi noted, the Conference approved the rule, but made it prospective only. He said that the new rule was a great achievement, and the work of the Advisory Committee on Appellate Rules had been truly exceptional. The thoroughness of the committee's work, he said, had been very persuasive to the Conference.

Judge Levi reported that the Advisory Committee on Criminal Rules was in the process of considering controversial amendments to two criminal rules – Rule 29 (judgment of acquittal) and Rule 16 (disclosure of information). Under the proposed revision to Rule 29, he explained, a trial judge would normally have to defer entering a judgment of acquittal until after the jury returns a verdict. But the judge could enter a judgment of acquittal before a jury verdict if the defendant waives his or her double jeopardy rights. The revised rule, thus, would allow the Department of Justice to appeal the trial judge's granting of a judgment of acquittal. He noted that the advisory

committee is considering amendments to Rule 16 that would address the recommendation of the American College of Trial Lawyers that the rule specify the government's obligations to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

Judge Levi reported that the Advisory Committee on the Rules of Evidence had under active consideration a new rule governing privilege waiver. He explained that the Advisory Committee on Civil Rules had been concerned for many years that reviewing documents for privilege waiver as part of the discovery process adds substantially to the cost and complexity of civil litigation without real benefit. He said that the new electronic discovery rules just approved by the Judicial Conference contain a "clawback" provision, allowing a party to recover privileged or protected material inadvertently disclosed during the discovery process, and a "quick peek" provision, recognizing agreements between the parties to allow an initial examination of discovery materials without waiving any privilege or protection.

But, he said, the new rules do not address the substantive question of whether a privilege or protection has been waived or forfeited. Nor do they address whether an agreement of the parties or an order of the court protecting against waiver of privilege or protection in a specific case can bind later actions or third parties.

Judge Levi noted that it is very unusual for the rules committees to consider a rule invoking substance because the Rules Enabling Act specifies that the rules may not abridge, enlarge, or modify any substantive right. The Act, moreover, states that any rule creating, abolishing, or modifying an evidentiary privilege can only go into effect if approved by an act of Congress. He reported that he had discussed the problems of privilege and protection waiver with the chairman of the House Judiciary Committee, who responded that the matter was one of great interest to the Congress. The chairman stated that he will send a letter asking the committee to develop a privilege-waiver rule that could eventually be enacted as a statute. Thus, Judge Levi explained, the Advisory Committee on the Rules of Evidence would develop a rule through the regular rulemaking process. After the Judicial Conference and the Supreme Court approve the rule, it would be submitted to Congress for enactment as a statute.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 15-16, 2005.

requirements, and the interplay between the pleading rule and the discovery rules had arisen several times during the advisory committee's deliberations on the discovery rules. She added that if the advisory committee decides to change Rule 56, the pleading rule will necessarily be implicated.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Earlier in the morning, before the meeting began, Judge Bucklew presided over a hearing to listen to the testimony of Federal Public Defender Jon M. Sands, on behalf of the Federal Defenders Sentencing Guidelines Committee, regarding the advisory committee's proposed amendments to FED. R. CRIM. P. 11 (pleas), 32 (sentencing and judgment), and 35 (correcting or reducing a sentence), published in August 2005. The proposed amendments would conform the criminal rules with *United States v. Booker*, 543 U.S. 220 (2005).

Following the committee's lunch break, Judge Bucklew presided over a hearing of the testimony of Mike Sankey, on behalf of the National Association of Professional Background Screeners, regarding proposed new FED. R. CRIM. P. 49.1 (privacy protection for filings made with the court), published for public comment in August 2005.

Judge Bucklew and Professor Beale then presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 8, 2005 (Agenda Item 8).

Judge Bucklew reported that the advisory committee had spent most of its October 2005 meeting on three issues: (1) rule amendments to implement the Crime Victims' Rights Act (part of the Justice for All Act of 2004); (2) a proposed amendment to FED. R. CRIM. P. 29 (judgment of acquittal); and (3) a proposed amendment to FED. R. CRIM. P. 16 requiring the disclosure of *Brady* information before trial.

Amendments for Publication

Judge Bucklew said that the advisory committee was seeking authority from the Standing Committee to publish amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act. The amendments consist of one new rule and changes to five existing rules. She added that the advisory committee had incorporated Judge Levi's suggested improvements in the text of the rules and committee notes.

best possible rule. Judge Levi added that when a final draft is presented to the Standing Committee in June 2006, the advisory committee should make it clear whether or not it endorses the rule as a matter of policy.

Judge Bucklew described the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection), which would require the government to turn over exculpatory evidence to the defendant 14 days before trial. She said that the advisory committee did not have actual rule language yet, but it had taken a straw vote, and a majority of the members favored continuing work on a rule. She noted, though, that the Department of Justice was firmly opposed to the rule.

Professor Beale added that the proposal submitted by the American College of Trial Lawyers would go beyond the Supreme Court's substantive requirements in *Brady v. Maryland* and related cases. It would also specify the procedures for the government to follow in turning over specified types of information to the defendant before trial.

One participant emphasized that the rule would be very controversial, and he said that it would be essential for the advisory committee to prepare a complete background memorandum on the applicable law if it decides to present a rule to the Standing Committee. Judge Bucklew added that the advisory committee had also discussed the desirability of the Department of Justice making appropriate revisions to the U.S. attorneys' manual.

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 December 1, 2005 (Agenda Item 9).

Judge Smith reported that the advisory committee had no action items to present.

Informational Items

Judge Smith noted that the advisory committee had continued its work on a rule governing waiver of privileges for submission to Congress. He said that the advisory committee was considering holding a special meeting or conference to complete work on a rule that could be submitted to the Standing Committee in June 2006.

Judge Smith reported that the advisory committee was continuing to monitor case law developments following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which limits the admission of "testimonial" hearsay. He said that because of the uncertainty raised by *Crawford*, the advisory committee would not move

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

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BANKRUPTCY RULES

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CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: The Honorable David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

From: The Honorable Susan C. Bucklew
Advisory Committee on Federal Rules of Criminal Procedure

Subject: Report of the Advisory Committee on Criminal Rules

Date: December 8, 2005

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure met on October 24-25 in Santa Rosa, California, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are an attachment to this Report.

At that meeting, the Advisory Committee approved a package of proposed amendments to Rules 1, 12.1, 17, 18, 32, as well as new Rule 43.1, which implement the Crime Victims Rights Act. Part II of this report summarizes the Committee's consideration of these rules, which it recommends be published for public comment. Part III of this report briefly summarizes two information items, the Committee's continuing work on draft amendments to Rules 16 and 29.

II. Action Items—Recommendations to Publish Amendments to the Rules

The following amendments are part of a package of proposals to implement the Crime Victims Rights Act (CVRA), codified as 18 U.S.C. § 3771. Although the Advisory Committee had earlier proposed an amendment to Rule 32 to enhance victims' rights, the enactment of the CVRA prompted the Committee to withdraw its earlier proposal and develop a more comprehensive package of rules.

The question of an amendment that would permit the Department of Justice to appeal erroneous judgments of acquittal has been under consideration since 2003. Although the Advisory Committee at one point concluded that there had not been a sufficient showing of the need for an amendment, the Department of Justice developed additional information supporting an amendment, which it presented to the Standing Committee in January 2005. The Standing Committee then referred the matter back to the Advisory Committee. Working from a draft prepared by a Subcommittee, the Advisory Committee devoted a substantial portion of its October 2005 meeting to discussion of the wording of a proposed amendment. After making several changes, the Advisory Committee referred the draft back to the Subcommittee for additional work on the waiver provisions, which it wished to simplify. The Advisory Committee requested that the Subcommittee present a final draft at the Committee's April 2006 meeting, so that a proposed rule may be presented to the Standing Committee in June of 2006. The Subcommittee has met by conference call, continuing to refine the draft amendment and accompanying committee note.

The Subcommittee's current draft is attached as an information item.

2. Information Item—Consideration of an Amendment to Rule 16, Concerning Disclosure of Exculpatory and Impeachment Information.

This amendment also has a lengthy history. It has been under consideration since 2003, when the Advisory Committee received a proposal from the American College of Trial Lawyers to require the government to disclose exculpatory and impeaching evidence 14 days before trial. Two Subcommittees have considered the issue. The Department of Justice has opposed the amendment. At its April 2005 meeting, the Committee voted in favor of amending Rule 16, but referred the matter back to the subcommittee to address several of the Justice Department's concerns. At its October 2005 meeting, the Committee devoted a substantial part of its agenda to discussion of the most recent Subcommittee draft, and it made several changes in the language of the proposed rule. It then referred the proposal back to the Subcommittee for final refinement of the language, with the intention of taking final action on the proposal at its meeting in April 2006. That timetable would permit the Advisory Committee to bring a proposed rule to the Standing Committee at its June 2006 meeting.

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 24 & 25, 2005
Santa Rosa, California

I. ATTENDANCE AND OPENING REMARKS

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

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Michael J. Elston, Counselor to the Assistant Attorney General
Professor Sara Sun Beale, Reporter

Also participating in the meeting were:

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

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

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

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

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

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

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

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

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

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

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

The committee discussed the proposed amendment to Rule 16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 15-16, 2005
Boston, Massachusetts
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Boston, Massachusetts, on Wednesday and Thursday, June 15-16, 2005. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Deputy Attorney General James B. Comey
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L. Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

guidelines effectively advisory. She added that the advisory committee had made only those changes deemed absolutely necessary in light of *Booker*.

FED. R. CRIM. P. 11

Judge Bucklew stated that the proposed amendment to Rule 11 (pleas) is consistent with the sentencing practice followed by most district judges after *Booker*. It would impose an obligation on a sentencing judge to calculate the applicable sentencing guideline range and to consider that range, possible departures under the guidelines, and the other sentencing factors set out in 18 U.S.C. § 3553(a).

Judge Levi stated that the amendment is consistent with his reading of the remedy section of *Booker*. He noted that if a sentencing judge does not actually calculate the guidelines sentence, the Sentencing Commission will report the case to Congress as a non-guidelines sentence. One participant added that if the sentencing judge does not calculate the guidelines sentence, the judge does not know what the guidelines would dictate and therefore cannot be said to have “considered” the guidelines.

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

FED. R. CRIM. P. 32

Judge Bucklew explained that the amendments to Rule 32 (sentencing and judgment) reflect the urging of the Committee on Criminal Law that district judges use a uniform statement of reasons form to explain their sentencing decisions, so that reliable statistics can be presented to the Sentencing Commission and Congress. It also makes clear that a judge may instruct the probation office to gather and include in the presentence report any information relevant to the sentencing factors articulated in 18 U.S.C. § 3553(a). And it requires the court to give the parties notice if it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence.

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

FED. R. CRIM. P. 35

Judge Bucklew noted that the proposed amendment to Rule 35 (correcting or reducing a sentence) is needed to avoid the present implication in the rule that a guidelines sentence is mandatory.

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

FED. R. CRIM. P. 45

Judge Bucklew stated that the proposed amendment to Rule 45 (computing and extending time) would adjust the time-counting provision of the rule to conform more closely with the equivalent provision in the civil rules, FED. R. CIV. P. 6(e) (additional time after service). It would remove any doubt about how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, by electronic means, or by other means consented to by the party served.

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

FED. R. CRIM. P. 49.1

As noted above on pages 4-7, the committee approved for publication a new FED. R. CRIM. P. 49.1 (privacy protection for court filings) to protect privacy and security concerns relating to documents filed with the court electronically. The amendment fulfills a requirement of the E-Government Act of 2002 and tracks the template rule used by all the advisory committees.

Informational Items

Judge Bucklew described a proposed amendment to FED. R. CRIM. P. 29 (motion for a judgment of acquittal), urged by the Department of Justice, that would require a court to defer ruling on a motion for judgment of acquittal until after the jury returns a verdict. She noted that the Department had submitted additional materials recently, and the advisory committee had considered a revised draft rule at its April 2005 meeting. The current version follows a proposal suggested by Judge Levi that would allow a defendant to consent to an appealable pre-verdict ruling conditioned upon waiving double jeopardy rights.

Judge Bucklew said that a majority of the committee at the April meeting had voted in favor of making some change in the rule. But drafting a rule had been very difficult, particularly with regard to hung juries and waiver of double jeopardy rights. She added that a subcommittee was working on polishing a rule and a committee note that would be considered at the committee's October 2005 meeting.

She pointed out that the Crime Victims' Rights Act had been signed into law in October 2004. The advisory committee, she reported, was in the process of reviewing the

full body of criminal rules to determine which might be affected by the statute and have to be amended.

Judge Bucklew reported that the American College of Trial Lawyers (ACTL) had submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and other Supreme Court cases. The committee had reviewed all the local district court rules on the subject, some of which attempt to codify *Brady* and define the government's disclosure obligations. She said that a majority of the committee had voted in favor of proceeding with some amendment to FED. R. CRIM. P. 16 (discovery and inspection).

Deputy Attorney General Comey stated that the Department of Justice was very strongly opposed to the proposal. He said that prosecutors already are required to disclose exculpatory evidence under *Brady*, and they err on the side of production. The Department instructs prosecutors that they have a firm obligation to disclose. Prosecutors, he emphasized, act properly, and the defendant's right to a fair trial is protected.

Most of the suggestions, he said, go well beyond constitutional requirements and would create new rights that the courts have refused to recognize. One likely result of the proposed rule would be unnecessary pretrial disclosure of the identity of government witnesses. The change could create unintended consequences that everyone, not just prosecutors, will regret. Under the ACTL proposal, he pointed out, the government would have to bear the burden in every case of showing that it has turned over all evidence that "tends" to be exculpatory. This, he said, is an impossible burden.

He observed that ACTL had catalogued a number of successful *Brady* challenges, but most of them had occurred in the state courts. There is no point in changing a federal criminal rule in order to address reported lapses by state prosecutors. He admitted that the few errors committed by federal prosecutors were not enough to justify a rule change. If there were a problem, the Department of Justice could place more specific guidance for prosecutors in the U.S. Attorneys' Manual.

In short, he concluded, the current system is not broken, and no rule amendment is justified. Moreover, the proponents of the rule have not carried the burden of establishing that a problem exists to justify such a fundamental change.

On that point, one member inquired as to whether any actual empirical data existed, beyond case decisions, as to how significant the problem of non-disclosure might be. Without a sounder empirical basis, the rationale for the proposed rule is weak. But another participant responded that the *Brady* case decisions arise in circumstances where

the exculpatory evidence, one way or another, ultimately is revealed. On the other hand, there is little information available regarding the instances in which relevant exculpatory information never comes to light. Those cases are not litigated and cannot be detected.

Another member observed that the proposed national rule is more modest than the local rules that currently exist in about a third of the federal district courts. Accordingly, if the local court rules have not caused problems, there should be no problem with a national rule.

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 attachment of May 16, 2005. (Agenda Item 11)

Amendments for Final Approval

FED. R. EVID. 404(a)

Judge Smith stated that there has been a long-standing conflict among the circuits as to whether character evidence may be used to prove conduct in a civil case. The proposed amendment to Rule 404(a) (general inadmissibility of character evidence) would make it clear that character evidence should not be admitted for this purpose in a civil case.

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

FED. R. EVID. 408

Judge Smith stated that the proposed amendment to Rule 408 (compromise and offers to compromise) would allow conduct or statements made in compromise negotiations to be admitted in later criminal cases under certain limited circumstances. He pointed out that the Department of Justice had sought the amendment.

Professor Capra observed that the current case law is in disarray, and there is no certainty for an attorney as to what will be disclosable and useable in this area. The amendment, he said, is a compromise that should provide some certainty by making a limited exception for statements made to civil regulatory agencies to settle claims brought by them.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

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CRIMINAL RULES

JERRY E SMITH
EVIDENCE RULES

**To: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure**

**From: Hon. Susan C. Bucklew, Chair
Advisory Committee on Federal Rules of Criminal Procedure**

Subject: Report of the Advisory Committee on Criminal Rules

Date: May 17, 2005

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure met on April 4-5, 2005 in Charleston, South Carolina and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are included at Appendix P.

This report addresses a number of action items: approval of published Rules 5, 32.1, 40, 41, and 58 for transmission to the Judicial Conference; approval of technical and conforming amendments to Rule 6 for transmission to the Judicial Conference; and approval for publication and comment on proposed amendments to Rules 11, 32, 35, 45, and 49.1. In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, most notably draft amendments to Rules 16 and 29.

II. Action Items – Overview

First, the Committee considered two public comments to the following rules:

- Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that it would be necessary to substantially redraft several provisions, and expressed concern that there was little time before the Standing Committee meeting to perfect the language. There was a consensus that if a final version of the proposed rule was not yet available, a draft rule would be presented to the Standing Committee at its June 2005 meeting for informational purposes.

Appendix O contains a draft rule that takes account of the discussion at the April meeting of the Advisory Committee. The Department of Justice and other members of the Advisory Committee have not yet had a chance to comment on this version. The draft will be further refined by the subcommittee and presented at the Advisory Committee's October 2005 meeting.

2. Information Item—Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

In October 2003, the American College of Trial Lawyers submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The issue has been under consideration by the Advisory Committee since that time. It has been the subject of review at the subcommittee level and extensive discussions at meetings of the full committee. Additionally, the Department of Justice and the Federal Judicial Center prepared materials to assist the Committee. At the Advisory Committee's April 2005 meeting, the discussion culminated in a vote of 8 to 3 in favor of proceeding with an amendment to Rule 16. The Department of Justice opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. Addressing this concern, proponents of the proposal noted that the Jencks Act, 18 U.S.C. § 3500 will continue to govern prior statements by prosecution witnesses, deferring disclosure until the witness has testified. It is anticipated that a draft amendment to Rule 16 will be presented at the Advisory Committee's October 2005 meeting.

3. Information Item—Consideration of Rules Affected by Crime Victims' Rights Act

**MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE**

**April 4 & 5, 2005
Charleston, South Carolina**

The Advisory Committee on the Federal Rules of Criminal Procedure met at Charleston, South Carolina on April 4 and 5, 2005. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Bucklew, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 4, 2005. The following persons were present for all or a part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Robert H. Edmunds, Jr.
Prof. Nancy J. King
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal
Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee, Mr. Christopher Wray, Assistant Attorney General of the Department of Justice; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Sara Sun Beale, Duke University School of Law, Consultant to the Committee and Reporter Designate; Mr. Bob McCallum, Department of Justice; and Ms. Laurel Hooper, Federal Judicial Center. Professor Dan Capra, Reporter to the Evidence Rules Committee, participated for a portion of the meeting by telephone.

4. Rule 32(k). Judgment.

Judge Friedman explained that the Subcommittee believed it was appropriate to amend Rule 32(k) to provide that when entering a judgment, the court should use whatever forms had been approved by the Judicial Conference. The purpose of the amendment is to standardize the collection of data on federal sentences. Following a brief discussion, Judge Friedman moved that the amendment be approved and published for comment. Professor King seconded the motion, which carried by a unanimous vote.

5. Rule 35(b). Reducing a Sentence for Substantial Assistance.

Judge Friedman and Professor Beale explained that the proposed amendment to Rule 35, which would delete (b)(1)(A) and (B) because those provisions assume that the sentencing guidelines are mandatory — a principle rejected by the Supreme Court in *Booker*. Judge Friedman moved that the amendment be approved and published for comment. Judge Trager seconded the motion, which carried by a vote of 10 to 1.

B. Rules 11 and 16; Proposed Amendment Regarding Disclosure of Brady Information;

Mr. Goldberg, chair of the Rule 16 Subcommittee, reported that the Subcommittee had continued its study of the proposal from the American College of Trial Lawyers, to the effect that Rule 16 should be amended to require the government to disclose to the defense evidence that could be favorable to the defendant. The issue had been initially discussed at the Committee's May 2004 meeting and then again at the Committee's October 2004 meeting. As a result of those discussions, the Subcommittee had continued its study of the proposal and had considered a study conducted by the Federal Judicial Center and a report from the Rules Committee Support Staff, which detailed the various local rules that already addressed the issue. He reported that following additional discussion, the Subcommittee had decided to delete the "materiality" requirement from any proposed rule. He added that Ms. Rhodes had provided a memo detailing the Department of Justice's opposition to an amendment to Rule 16.

He emphasized that the amendment would not codify *Brady* and that the proposed amendment would not address the issue in *Ruiz*, regarding disclosure of information before entering a guilty plea.

A majority of the Subcommittee, he said, supported some sort of amendment to Rule 16. He noted that the Subcommittee had decided not to propose a 14-day requirement in the amendment.

Professor Beale commented that the Committee was faced with a policy decision — whether more evidence should be disclosed pre-trial. Mr. Fiske stated that because

prior inconsistent statements and other impeachment evidence could be important, it was critical to have that information soon enough in the process to use it effectively.

Judge Edmunds noted that people have been taken off of death row because prosecutors failed to disclose evidence and that the issue before the Committee was an important one.

Ms. Rhodes expressed two key concerns about the proposal; timing and materiality. She pointed out that on multiple occasions the Committee had considered amendments to Rule 16, and that each time the Committee had considered reciprocal discovery provisions. She also stated that the Committee had considered the so-called Brady proposal on several previous occasions and had decided, for a variety of reasons, not to tackle the problem through a rule amendment. She pointed out that it is often difficult to distinguish between inculpatory and exculpatory evidence and that Rule 16 already provides adequate discovery in several significant respects, for example, with regard to documents and test results. She also raised concerns about the potential impact of the proposed amendment on the Jencks Act requirements.

Mr. Fiske agreed that if there is a conflict between disclosure of favorable information and the Jencks Act that the latter controls.

Ms. Rhodes explained that currently the Department has not reached any decision about whether to address this problem in the U.S. Attorneys' Manual and that any amendment to Rule 16 should contain a materiality requirement.

Professor Schlueter pointed out that the Committee had consider the topic in the past, but that it had never really studied the issue to the extent it had been studied in this instance. He also observed that although there were instances of reciprocal discovery in Rule 16, that was not part of a long-range plan and that it had occurred on a case by case basis. In some instances, he noted, the Department had agreed to a change in Rule 16 if the defense was also required to disclose information.

There was also some discussion about whether an amendment to Rule 16 would require the government to shoulder the burden of proof on appeal if the defendant alleged a violation of the discovery requirement. Judge Friedman observed that the Subcommittee had apparently addressed the three main issues — Jencks, timing, and materiality.

Following additional brief discussion about the particular language of an amendment to Rule 16, Mr. Goldberg moved that the Committee proceed with the amendment to Rule 16. Mr. Fiske seconded the motion, which carried by a vote of 8 to 3.

tabled until the Committee's next meeting. Judge Battaglia seconded the motion, which carried by a unanimous vote.

B. Rule 6. Grand Jury; Technical Amendments

Judge Bucklew informed the Committee that as a result of congressional action on Rule 6, the question had been raised whether those amendments should be restyled to conform to the Committee's earlier proposed amendments to the same rule. Mr. Rabiej explained that the proposed amendments were strictly technical and conforming in nature that it would normally not be necessary to publish the proposed changes for public comment. Following brief discussion, Judge Battaglia moved that the amendments be made and forwarded to the Standing Committee with a recommendation that they be sent to the Judicial Conference, without being published for comment. Professor King seconded the motion, which carried by a unanimous vote.

C. Rule 10. Arraignment; Proposal to Amend Rule to Permit Defendant to Waive Arraignment.

Judge Bucklew informed the Committee that Judge James McClure had written to the Committee, recommending an amendment to Rule 10 that would permit the defendant to waive the arraignment. Several members noted that during the recent restyling project the Committee had considered a similar proposal but had decided not to permit a waiver of the arraignment itself, because several rules make the arraignment a triggering event. Following a brief discussion, Professor King moved that the proposal be tabled until the next meeting. Judge Battaglia seconded the motion, which carried by a unanimous vote.

D. Rule 16. Discovery and Inspection and Rule 32. Sentencing; Proposal to Amend.

Judge Bucklew informed the Committee that Mr. James Felman had proposed that Rules 16 and 32 be amended. Specifically, he recommended that Rule 32 be amended to require that a party providing information to the court regarding sentencing, should be required to provide the opposing party with the same information. With regard to Rule 16, he recommended that the rule require the government and defendant to produce all documents, tangible materials, etc. that it intends to use at sentencing. During the ensuing discussion, there was a consensus that no amendments should be made to Rule 16 and that there are already adequate discovery mechanisms and requirements in Rule 32. The Committee decided not to pursue the proposals any further.

E. Rule 29. Motion for Judgment of Acquittal; Proposal to Amend Rule to Require Deferral of Ruling.

Judge Bucklew provided an overview of the status of a proposal from the Department of Justice to amend Rule 29, to require that in all cases, that court would be required to defer a ruling on a motion for a judgment of acquittal until after verdict. She

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 13-14, 2005
San Francisco, California
Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 13 and 14, 2005. The following members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L. Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

several states imposing the same notice requirement has shown that no undue burdens are placed on the challenging party.

Judge Rosenthal pointed out that, as published, the rule would have required the court to set a time not less than 60 days for the government to intervene. Following the comment period, though, the advisory committee modified the provision to state that unless the court sets a later time, the attorney general may intervene within 60 days after notice is filed or the court certifies the challenge, whichever is earlier. The court, moreover, may extend the time on its own motion.

In addition, the committee moved language up from the committee note to the text of the rule to make it clear that before the time to intervene expires, the court may reject the constitutional challenge, but it may not enter a final judgment holding the statute unconstitutional. Thus, the court can reject unsound challenges quickly, grant interlocutory relief, continue pretrial activities, and conduct other proceedings to avoid delay.

Judge Rosenthal explained that the rule also provides for service on the attorney general by certified or registered mail or by electronic notice to an address designated by the attorney general. She said that no such addresses are currently in place, but they would likely be established by the Department of Justice in the near future. Finally, she pointed out, the rule clarifies that if a party fails to give notice, it does not forfeit a challenge to a constitutional right.

One member noted that the new rule is broader than the statute and the current rule, which govern challenges only to statutes “affecting the public interest.” Judge Rosenthal replied that the advisory committee had deliberately broadened the scope of the reporting requirement to make sure that notice is given in every case in which a challenge is made to a statute. She noted that the expansion tracked the language of the counterpart provision in the appellate rules, FED. R. APP. P. 44.

One member expressed concern that the rule did not provide for a sanction against a party who fails to notify the attorney general. It was pointed out, though, that judges have adequate authority under the rules to deal with non-compliance. In addition, it was noted that a party challenging the constitutionality of a statute cannot effectively obtain the relief requested until the government enters the case. Another member expressed concern as to the internal consistency of the language of the proposed rule and asked the advisory committee to take another look at it before it is published.

Judge Small added that the new rule had implications for the bankruptcy rules because the current FED. R. CIV. P. 24 is incorporated in adversary proceedings by virtue of FED. R. BANKR. P. 7024. He said that the bankruptcy advisory committee would

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 30, 2004
Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Fe, New Mexico on October 30, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Bucklew, Chair of the Committee, called the meeting to order at 8:00 a.m. on Saturday, October 30, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Richard C. Tallman
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Prof. Nancy J. King
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal
Division, Department of Justice
Prof. David A. Schlueter, Reporter

Mr. Robert Fiske participated by telephone conference call. Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee, Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Dan Capra, Reporter to the Evidence Rules Committee; Hon. Edward E. Carnes, past chair of the Criminal Rules Committee; Mr. Jonathan Wroblewski of the Department of Justice; Professor Sara Sun Beale, Duke University School of Law, and Ms. Brooke Coleman, law clerk to Judge Levi.

Professor Schlueter informed the Committee that it had been asked to consider whether to amend Rule 49 to provide that courts could require electronic filings. He noted that the Committee on Court Administration and Management had recommended that each of the Committees consider the issue, draft amending language, and publish those rules for public comment on an expedited basis.

Mr. Rabiej provided background information on the proposal, noting that the intent was to provide a means of critical cost-savings for the courts. He noted that the Civil and Bankruptcy Committees had already decided to publish proposed amendments on an expedited basis. Mr. Rabiej and Judge Bucklew noted that some issue had been raised about whether any proposed amendment should exempt pro se filers.

Judge Levi noted that roughly one-half of the courts are already requiring parties to use electronic filing, even though the rules do not explicitly provide for that. He added that the proposed amendments would authorize the courts to require mandatory electronic filing.

Professor Schlueter pointed out that Rule 49(d) already provides that filing in criminal cases is determined by the Civil Rules and that he had drafted a new provision that would explicitly address the ability of courts to require electronic filing. Following a discussion on whether the Criminal Rule should be amended, Professor King moved that the proposed language be amended to provide an exemption for pro se filers. Judge Friedman seconded the motion, which failed by a vote of 4 to 6. Judge Jones then moved that no amendment be made to Rule 49 and that the rule continue to rely on an amendment to the Civil Rules. Judge Battaglia seconded the motion which carried by a vote of 6 to 3.

C. Rule 11; Proposed Amendment to Provide that Judge May Question Defendant Regarding Proposed Plea Agreement.

Judge Bucklew pointed out that Judge David Dowd, a former member of the Committee, had proposed an amendment to Rule 11 that would permit a judge to inquire of the defense counsel and defendant during a plea inquiry as to whether all plea offers from the prosecution had been conveyed to the defendant. She stated that he had offered similar amendments to Rule 11 in the past and that on those occasions, following discussion, the Committee had decided not to amend the rule. Following a brief discussion, a consensus emerged that there was insufficient need to pursue the proposed amendment.

D. Rules 11 & Rule 16; Proposed Amendment Regarding Disclosure of Brady Information; Report of Subcommittee.

Judge Bucklew called on Mr. Goldberg, Chair of the *Brady* Subcommittee to report on the Subcommittee's findings and recommendations. Mr. Goldberg informed

the Committee that the Subcommittee had reviewed the materials included in the agenda book and had reached a consensus that the Committee should proceed with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence.

Judge Carnes observed that on earlier occasions the Committee had not recommended other amendments to the Criminal Rules because there was insufficient statistical data to support the need for an amendment. That problem, he noted, could also exist with regard to any amendment concerning *Brady* information.

Ms. Rhodes spoke in opposition to proceeding further with an amendment. She pointed out that the amendment would be a tough sell to the Department of Justice because in its view, Rule 16 and *Brady* are working and there is no need to further amend Rule 16. Even assuming there was a problem, she added, the proposed language in the amendment would not fix the problem. Assistant United States Attorneys, she stated, are trained to treat *Brady* material liberally and that in her 20 years of experience at the DOJ, she can say that it is not the culture of the DOJ to withhold important information from the defense. She recognized that in this area of the law, the courts are necessarily required to apply hindsight for purposes of determining whether a violation occurred, and if so, what the remedy should be. But prudent prosecutors, she added, will not push the issue. If prosecutors do violate *Brady*, there are remedies, including the possibility of a new trial, and serious consequences for the prosecutors involved.

She continued by observing that it would be important for the Committee to consider the impact of the amendment on the Courts of Appeals. Furthermore, there has been no showing that a problem exists, and an ABA survey shows that 70% of prosecutors already turn over more than they are required to. She added that according to the statistics, only 1.7 federal cases per year involve a potential *Brady* issue.

Ms. Rhodes acknowledged that in a recent terrorist trial in Detroit, the prosecutor had withheld important information, but pointed out that it was the Department that had come forward, presented the problem to the trial court, and had recommended corrective action. The Department, she said, is committed to recognizing and addressing the problems associated with discovery. In her view, the proposed rule would only reflect the current status of discovery practices in federal criminal courts and it would not fix any particular problem.

Judge Bucklew observed that this is really the flip side of the Rule 29 problem that had been discussed at earlier meetings where there was insufficient data to support an amendment.

Mr. Goldberg stated that every defense counsel would support the proposed rule and that he did not understand why the Department opposes a simple rule that only requires the prosecution to do what the case law already requires. He provided examples

of cases where important information was not disclosed and added that in his view, the amendment was very important for the system.

Mr. Fiske questioned whether the Department could include the proposed requirement in its United States Attorneys' manual.

Judge Battaglia pointed out that 30 districts had developed local rules addressing this very issue and that those rules had taken various approaches in dealing with the *Brady* issue. That in turn, he noted, might lead to a lack of uniformity and provide more reason for an amendment to Rule 16.

Ms. Rhodes indicated that she would attempt to review those rules. Mr. Wroblewski observed that it is a myth that there is a national, uniform, practice in criminal cases and that it is not essential that there be absolute uniformity. In response, Professor Coquillette reminded the Committee that § 1273 requires that the local rules be consistent with the national rules.

Judge Jones observed that if there was a national rule on this issue, the Department would ultimately benefit.

Judge Bartle expressed interest in pursuing discussion of the amendment. If the Department has already addressed the issue, why not adopt a rule to that effect?

Judge Friedman provided extensive comments on the proposed amendment, observing that he believes that prosecutors are acting in good faith, but that a lot of mistakes do not get any attention. He added that there may be a difference between the Department's policy and what is happening in the field. Judge Friedman said that there was some appeal to uniformity.

Judge Tallman stated that in his view the proposed amendment provided for more discovery than *Brady* required. He noted that California has had an open file policy and that it seems to work well. He stated that he believed Congress should address the issue and indicated that he was generally not supportive of the proposal. He added that as an appellate judge, there is a problem in deciding whether the failure to disclose had an impact on the case.

Judge Trager stated that the fact that 30 districts had addressed the problem was not in itself reason to amend Rule 16. He observed, however, that there do not seem to be many complaints from the prosecutors about how the local rules work and that he was not unhappy with the proposal.

Mr. Campbell stated that the Jencks Act and *Brady* could be harmonized but that the cases demonstrate how perilous this area can be for prosecutors. In his view, the matter should be studied further.

In a straw poll on whether to proceed, nine members indicated that they believed that the matter should be considered further. One member voted not to proceed with an amendment and one member abstained.

Judge Kravitz suggested that the Committee consider the possibility of unintended consequences and Ms. Rhodes added that she believed that the real issue in the amendment is the timing requirement.

E. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal.

Judge Bucklew provided background information on the Department of Justice's proposal to amend Rule 29 to require the court to defer any ruling on a motion for a judgment of acquittal until after the jury has returned its verdict; the amendment would protect the government's right to appeal an adverse ruling on the motion. Although the Committee at its Fall 2003 meeting had initially approved the amendment in concept, at the May 2004 meeting the Committee, following extensive discussion, voted to reject the proposed amendment.

Ms. Rhodes reported that at the Standing Committee's meeting in June 2004, Judge Carnes had explained the Committee's action on the proposed amendment and pointed out the lack of data showing that an amendment was needed. At the same meeting, the Department informed the Standing Committee that it would present the proposal directly to the Standing Committee at its January 2005 meeting.

Ms. Rhodes indicated that because the Department feels so strongly about the proposal it anticipates presenting additional data to the Standing Committee. But that process, she added, has taken much time because it involves reviewing transcripts in the cases in which the court granted the motion on what the Department believed were impermissible grounds. She said that she expected that the information would be ready for the January meeting of the Standing Committee.

Judge Levi noted that if the Department presented additional data and the Standing Committee believed that it was appropriate to consider the amendment further, that the Standing Committee would be very deferential to the Criminal Rules Committee.

F. Rule 41, Status of Amendments Concerning Tracking Device Warrants.

Judge Levi and Professor Schlueter provided background information on a proposal to amend Rule 41 to provide for tracking-device warrants. Professor Schlueter stated that in June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-device warrants. That proposal had been generated during the restyling project several years ago and was driven in large part by magistrate judges who believed it would be very helpful to have some guidance on

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

May 6-7, 2004
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on May 6 and 7, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, May 6, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal
Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Jonathan Wroblewski of the Department of Justice; Ms. Laural Hooper of the Federal Judicial Center; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J.

Professor Schlueter reported that the Subcommittee had met in Scottsdale Arizona in January 2004, to discuss the approach and scheduling for drafting uniform privacy rules. The Subcommittee had asked each of the Rules Committees for their input on what information should be deleted from filings. Another Subcommittee Meeting is scheduled for June 2004. He indicated that it would be important at this stage for the Committee to provide guidance to Judge Carnes, Judge Strubhar, or himself on what the Criminal version of the rule might look like.

He further stated that he had drafted proposed amendments to Rule 49, Serving and Filing Papers, using Professor Capra's original template.

During the ensuing discussion, the Committee indicated that any privacy filing provisions should be listed in a separate new rule, Rule 49.1. Later in the meeting, Judge Carnes appointed an E-Government Subcommittee consisting of Judge Strubhar (chair), Judge Bartle, and Ms. Rhodes.

D. Other Proposed Amendments to Rules.

1. Rule 11(c)(1); Proposed Amendment Regarding Provision Barring Court from Participating in Plea Agreements.

Judge Carnes informed the Committee that Judge David Dowd, a former member of the Committee, had written to the Committee again urging it to address the problems arising in those cases where a defendant pleading guilty has not been informed of a plea offer from the government. In his proposal, Judge Dowd included several decisions from the Sixth Circuit evidencing the problem. Judge Carnes noted that in his most recent proposal, Judge Dowd recommended that Rule 11 include a provision to the effect that a court may inquire of the defendant about whether the defendant has been fully apprised of any offered plea agreements, without violating the provision barring the court from taking part in the plea discussions.

Judges Trager and Bartle expressed the view that this has not been a problem in their courts. Judge Bucklew indicated that she does question the parties but does not view that as engaging in the plea discussions herself. Judge Friedman agreed that making the inquiry is not a violation of the provision in Rule 11 that prevents the court from taking part in the plea discussions, and added that he did not see a need for an amendment to that rule. Judges Jones and Battaglia also stated that they did not see the need for any amendments to Rule 11. Following additional discussion, a consensus emerged that no change should be made to the rule.

2. Rule 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee.

Judge Carnes stated that after the last meeting, the Committee had received a proposal from the American College of Trial Lawyers to amend Rules 11 and 16 to require prosecutors to disclose favorable information, similar to that required by *Brady v. Maryland*. He informed the Committee that he had appointed a Subcommittee consisting of Judge Bucklew (chair), Judge Trager, Mr. Campbell, Mr. Goldberg, and Mr. Wroblewski to study the proposal and report to the Committee.

Judge Bucklew reviewed the extensive written proposal from the College and stated that the Committee had met once and had been divided on whether to proceed with proposing any amendments to either Rule 11 or Rule 16. She indicated that one of the first issues that would have to be addressed is the definition of “favorable” evidence, noting that at this point, there is a large amount of case law that has interpreted *Brady*.

Judge Carnes noted briefly, the case law subsequent to *Brady*, which also includes an apparent change in the meaning of the term “materiality” and identified several potential problems of attempting to codify *Brady*. Mr. Fiske explained his role in the College’s proposal; he indicated that as a past president of that organization he had spoken in favor of the proposal at the meeting during which it was considered. He also identified a number of issues that would have to be considered if the Committee was inclined to amend either Rule 11 or 16. Mr. Goldberg questioned the need for the rule, noting that he agreed with the Department of Justice’s view that *Brady* is really a post-trial rule. He noted that prosecutors and judges apply a variety of timing requirements, and that perhaps it would be beneficial to adopt some sort of bright line rule for the time to disclose the information.

Mr. Campbell stated that the proposal was worth pursuing and that it would be possible for the Committee to draft an amendment that addressed the core obligations. Mr. Goldberg questioned whether any states had such rules; if not, he noted, a federal rule could serve as a helpful model. Ms. Rhodes stated that the government takes its *Brady* obligations seriously. These obligations have been set out under forty years of case law that provides a complete remedy, reversal and new trial, if an error occurs. She added that there had been no showing that the current law or practice is inadequate such that Rule 16 needs amendment. Further, the proposed amendment is inconsistent with the case law and would transform a trial right into a discovery right, which conflicts with the Jencks Act.

Judge Jones questioned what the Department’s response might be to a proposed amendment that required the prosecution to state on the record that it had used due diligence in attempting to discover favorable information. Ms. Rhodes responded that she was not sure that including that in a rule would add any weight to the existing obligations. In the following discussion, several members focused on the question of whether government attorneys are ever disciplined for withholding information favorable to the defense and the underlying problem of attempting to define what information must be disclosed.

Mr. Goldberg expressed the hope that any consideration of an amendment would not flounder on the specifics of the rule itself. Judge Jones observed that the Committee could draft a rule that granted greater protections than *Brady*. Other members noted that attempts to codify the *Jencks* obligations in a rule had been unsuccessful.

Judge Friedman believed that it would be helpful to consider the issue further and that it might be time for an amendment to the rules. Other members agreed with that view, noting however that it would be important to address those issues that could be included in a rule. Mr. Goldberg moved that the Committee consider the College's proposal further. Mr. Fiske seconded the motion, which carried by a vote of 9 to 3. Judge Carnes appointed a subcommittee to give further consideration to the proposal: Mr. Goldberg (chair); Mr. Fiske, Mr. Campbell, Professor King, and Ms. Rhodes.

3. Rule 15; Discussion of Variance in Rule and Committee Note Regarding Payment of Costs.

Professor Schlueter informed the Committee that the Rules Committee Support Office had received information that there appeared to be an inconsistency between the text of Rule 15(d) and the Committee Note. The rule states that "if the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court *must*—order the government to pay..." (emphasis added). On the other hand, the Note states in relevant part: "Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay..." (emphasis in original). Professor Schlueter indicated that the general policy is to not amend only the Committee Note and that in the absence of an amendment to the rule itself, it would probably not be appropriate to change the language of the Note to conform to the clear text of the rule itself. Following additional discussion, Mr. Rabiej offered to contact the publisher and point out the issue, with the thought that some sort of notation could be added, noting the inconsistency.

4. Rule 16(a)(1)(B)(ii); Proposed Amendment Regarding Defendant's Oral Statements.

Judge Carnes indicated that the Committee had a proposal from Magistrate Judge Robert Collings concerning a possible amendment to Rule 16. Judge Collings had recently decided a case involving interpretation of Rule 16 vis a vis the obligation of the government to give to the defense an agent's rough notes of an interview with the defendant. Judge Carnes continued by stating that Judge Collings believed that Rule 16 could be clarified by placing all of the provisions dealing with a defendant's oral statements under one subdivision. Several members of the Committee observed that the law concerning disclosure of an agent's notes seemed settled, that revising Rule 16 would not change the substance of the law, and that there appeared to be no need for the change. Following additional discussion, a consensus emerged that no further action was required on the proposed amendment.

Meeting of January 15-16, 2004
Phoenix, Arizona
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 15-16, 2004. The following members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Assistant Attorney General Robert D. McCallum
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L. Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Class Action Legislation

Judge Rosenthal reported that the controversial Class Action Fairness Act might be enacted during the current session of Congress. The legislation, she noted, contained complicated “minimal-diversity” provisions giving the federal courts jurisdiction over many multi-state class actions. She said that a compromise version of the legislation appeared to have been worked out in the Senate, but there were still a number of differences between the Senate and House bills.

She noted, among other things, that the Senate version of the legislation (S. 2062) contained a provision giving a court of appeals discretion to take an appeal from a district court’s order remanding a class action. But, she said, once the court of appeals accepts the appeal, it must render a decision within 60 days after the appeal is filed. Several participants argued that the provision was unworkable and should be opposed.

Judge Rosenthal noted that the advisory committee had worked hard on proposed amendments to FED. R. CIV. P. 23, including a provision that would authorize a court to certify a class for settlement purposes only. But, she said, the proposal had been deferred to await the outcome of Supreme Court’s decisions in the *Amchem* and *Ortiz* cases. She added that if the pending class-action legislation were not enacted, the advisory committee would likely reconsider the earlier proposals.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes’s memorandum and attachments of December 8, 2003. (Agenda Item 8)

Judge Carnes reported that the public hearing on the rules published for comment in August 2003 had been canceled. He added that the advisory committee had two controversial items on its agenda:

First, the Department of Justice had proposed that FED. R. CRIM. P. 29 be amended to require that a district judge defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. He said that the Department had claimed that some pre-verdict Rule 29 rulings were wrong, but the Department could not appeal the rulings because the Constitution’s Double Jeopardy Clause rendered them unappealable. Judge Carnes reported that the advisory committee had voted 7-4 to proceed with further consideration of amending Rule 29, but several committee members had expressed concerns about the effect of an amendment in cases involving multi-count indictments and deadlocked juries.

Second, the American College of Trial Lawyers had proposed amendments to FED. R. CRIM. P. 11 and 16 that would, in effect, supersede the Supreme Court's 2002 decision in *United States v. Ruiz*, involving application of the rule in *Brady v. Maryland* to guilty pleas. He added, though, that it would be unusual for the committee to propose an amendment to the Supreme Court that would overrule one of the Court's decisions so soon after it has been issued.

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 attachment of December 1, 2003. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present. But, he said, the committee had given tentative approval to five rule amendments that it would present to the Standing Committee in June 2004 seeking authority to publish. The proposals include amendments to: (1) FED. R. EVID. 404(a) to clarify that character evidence is never admissible to prove conduct in a civil case; (2) FED. R. EVID. 408 to limit the admissibility of evidence of compromise; (3) FED. R. EVID. 410 to protect statements and offers made by prosecutors during guilty plea negotiations to the same extent that the rule currently protects statements and offers made by defendants and their counsel; (4) FED. R. EVID. 606(b) to limit evidence about jury deliberations to the narrow issue of whether there has been a clerical mistake in reporting the verdict; and (5) FED. R. EVID. 609(a)(2) to limit automatic impeachment of a witness's character for truthfulness to convictions involving those crimes that contain a statutory element of "dishonesty or false statement." Professor Capra added that all these proposed amendments had been derived from the advisory committee's project to review conflicts in the case law interpreting the Federal Rules of Evidence.

Judge Smith added that the advisory committee was continuing to study other evidence rules for possible amendments. The committee was also continuing its study of the federal common law of privileges. He emphasized, however, that the committee would not propose amendments to the evidence rules regarding privileges.

LOCAL RULES PROJECT

Professor Coquillette noted that Congress had been concerned for many years over the number and content of local court rules. The 1988 amendments to the Rules Enabling Act, he said, had entrusted the judiciary with responsibility for monitoring local rules and abrogating those that are inappropriate. He said that the committee had accomplished a