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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

December 19, 1991

MEMORANDUM TO CRIMINAL RULES COMMITTEE MEMBERS

SUBJECT: Report of activities of Criminal Rules Committee for the January Standing Committee Meeting

At the request of Professor Schlueter, I am sending you herewith Judge Hodges' report to Judge Keeton on the activities of the Criminal Rules Committee for the January Standing Committee meeting.

Joe

Joseph F. Spaniol, Jr.
Secretary

Attachment

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December 12, 1991

Dear Judy:

Enclosed is Judge Hodges' report to Judge Keeton on the activities of Criminal Rules Committee, for the January Standing Committee meeting.

Would you also make sure that the members of the Criminal Rules Committee receive a copy of the Report and its attachments? Thank you.

Dave Schlueter

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure and Rules of Evidence

DATE: December 12, 1991

I. INTRODUCTION

The Advisory Committee on the Rules of Criminal Procedure met in Tampa, Florida on November 7 and considered a number of proposed amendments to both the Rules of Criminal Procedure and the Rules of Evidence. This report addresses those matters and the recommendations to the Standing Committee. The minutes of that meeting and a recommendation from the American Bar Association regarding "megatrials" are attached.

II. RULES OF CRIMINAL PROCEDURE.

A. Rules Published for Public Comment.

At its July 1991 meeting the Standing Committee approved proposed amendments in a number of rules for publication and comment:

Rule 12.1. Production of Statements.
Rule 16(a). Discovery of Expert
Rule 23.3. Mistrial
Rule 26.2. Production of Statements.
Rule 32(f). Production of Statements.
Rule 32.1. Production of Statements.
Rule 40(a). Appearance Before Magistrate.
Rule 41(c). Warrant Upon Oral Testimony.
Rule 46. Production of Statements.
Rule 8, Rules Governing § 2255 Hearings
(Production of Statements)

The deadline for comments on those amendments is February 15, 1992. The first of two public hearings on these proposed amendments was scheduled for Thursday, November 7, 1991. But no speakers indicated an intent to appear. The second scheduled hearing is set for Los Angeles, California on January 17, 1992. Any comments to the foregoing rules will be reviewed at the Committee's April 1992 meeting.

B. Proposed Amendments.

Although the Committee considered a number of proposed amendments to the Rules of Criminal Procedure at its November meeting, it is not recommending any substantive amendments at this time.

C. Technical Amendments.

Several "technical" amendments have been brought to the attention of the Advisory Committee. They are as follows:

> Rule 32.1(a)(1): The word "probably" should be "probable." And the word "the" preceding the words, "authority pursuant to 28 U.S.C. § 636..." should be deleted.
>
> Rule 35: The word "government" should not be capitalized. The word "subsection" should be "subdivision."
>
> Rule 40(f): The word "therefore" should be changed to "therefor."
>
> Rule 54: The reference to "Canal Zone Code" should be deleted. And the word "Court" should be inserted before the words "of Guam."

While some of these changes are typographical errors, it is the understanding of the Committee that these changes must nonetheless be processed through the normal Rules Enabling Act process (without publication for public comment). The Committee therefor recommends that the foregoing changes be approved and forwarded to the Judicial Conference at an appropriate time.

D. ABA Recommendation on Megatrials.

This past summer the American Bar Association House of Delegates passed a resolution which recommends that the Advisory Committee "encourage the United States District Courts to fashion remedies in appropriate individual cases..." regarding megatrials. The report which accompanies the resolution spells out the various legal problems posed by such cases. After some discussion on this matter, the Committee concluded that the specific request made by the resolution was probably outside its jurisdiction and that the existing rules already afford district judges a

number of techniques for appropriately managing megatrials. Rather than attempting to amend any particular rules of criminal procedure, the Committee believed that it would be more appropriate to refer the matter to the Standing Committee for its consideration. The ABA resolution and report are attached to this report.

E. Proposed Congressional Amendments.

During this latest legislative session, Congress considered a number of amendments to both the Rules of Criminal Procedure and the Rules of Evidence. Although leaders in Congress have been apprised of the Judicial Conference's view that these matters are more appropriate for the Rules Enabling Act process, the Committee has continued to monitor the proposals and has offered its views on the appropriateness of the amendments. As reflected in the minutes of the Committee's November 1991 meeting, considerable time and effort has been expended in reviewing and critiquing the Congressional proposals. In several instances the Committee has decided to draft appropriate several possible amendments for consideration at its April 1992, meeting. Nonetheless, the Committee continues to express concern that the Rules Enabling Act not be frustrated.

III. RULES OF EVIDENCE

A. Pending Rules of Evidence Amendments.

There are currently no pending Rules of Evidence amendments which have been proposed by the Committee on Criminal Rules. An amendment to Federal Rule of Evidence 404(b), which was proposed by the Committee, became effective on December 1, 1991.

B. Proposed Rules of Evidence Amendments; Formation of Subcommittee.

In the past year there has been an increased interest, especially in the academic community, for a thorough review of the Rules of Evidence. Since at least 1984, the Advisory Committee on Criminal Rules has been charged with primary responsibility for recommending any amendments to the Rules of Evidence, in lieu of creating a separate evidence committee. To that end, the Chair appointed an evidence subcommittee at the Committee's November 1991 meeting. That subcommittee is to conduct a review of the Federal Rules of

Evidence and draft any appropriate amendments to be considered by the Committee at its April 1992 meeting. Any proposed amendments will be circulated to the Civil Rules Committee for its comments.

Attach.