

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 15-16, 2003
Glenden Beach, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Glenden Beach, Oregon on October 15 and 16, 2003. 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 Wednesday, October 15, 2003. 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. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, 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. 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; Ms. Laural Hooper of the Federal Judicial Center; Judge John Roll and Magistrate Judge Tommy Miller, former members of Committee; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J. Prof. Nancy J. King participated by telephone.

Judge Carnes recognized Judges John M. Roll and Tommy E. Miller and thanked them for their six years of dedicated service on the Committee. He also noted that Judge Tashima's term on the Standing Committee had ended in September 2003, and welcomed

G. Rule 16. Proposal from Judge W. Wilson re Disclosure of Government Witnesses to Defense

Judge Wilson, a former member of the Standing Committee, had written to Judge Davis, the former chair of the Committee, in 1999 asking the Committee to once again address the issue of government disclosure of the names of its witnesses to the defense. The Reporter provided a brief overview of a similar amendment which had been proposed by the Criminal Rules Committee, published for comment, and approved by the Standing Committee. Judge Wilson had been one of the chief supporters of that proposal. The amendment did not receive the support of the Judicial Conference and the issue had not been revisited since then. Judge Friedman noted that there was some merit to the idea and recommended that the Committee consider the issue again. That proposal failed by a vote of 3 to 8.

H. Rule 23. Proposal from Mr. Jeremy Bell re Issue of Whether Jury Trial is Authorized

The Reporter explained that in 2000, during the comment period of the restyling project, one of Judge Miller's students at William and Mary School of Law had proposed an amendment to Rule 23 that would specifically indicate when a defendant was entitled to a jury trial. He added that the item was being carried on the docket as pending further action. Following a brief discussion, Judge Friedman moved that the proposal be rejected. The motion was seconded by Mr. Goldberg and carried by a unanimous vote.

I. Rule 32(c)(5). Proposal from Mr. Gino Agnello, Clerk of 7th Circuit re Whether Clerk is Required to File Notice of Appeal

The Reporter stated that in 2000, Judge Davis (former Chair of the Committee) received a letter from the Clerk of the Seventh Circuit Court of Appeals requesting that the Committee consider a possible amendment to Rule 32 should address the possibility that the clerk of the court would fail to file a notice of appeal, when requested to do so by the defendant. The court, in *United States v. Hirsch*, had addressed the problem in a case where the defense counsel and defendant were under the mistaken impression that the clerk had complied with the defendant's request that a notice of appeal be filed. By the time the error was discovered, all of the permissible time limits for perfecting an appeal had expired; the only real remedy at that point, according to the court, was for the defendant to file a § 2255 motion. Mr. Wroblewski said that he had contacted various United States Attorneys and had concluded that this issue was not a problem requiring an amendment to the rules. Other members noted that the same issue could arise in any rule provision that required a party or court to take a particular action, and no action is taken. Judge Carnes noted that a clear consensus had formed to not address the issue in an amendment and asked that the Administrative Office relay that information to the Appellate Rules Committee.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2002
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Washington, D.C. on April 25 and 26, 2002. 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, April 25, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. John P. Elwood, 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. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Hon. Roger Pauley of the Board of Immigration Appeals; Prof. Kate Stith, former member of the Committee; Mr. Peter McCabe, Ms. Nancy Miller, 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. Joseph Spaniol, consultant to the Standing Committee; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

Rule 12, § 2255 Proceedings. Applicability of Rules of Civil Procedure and Rules of Criminal Procedure. The Committee approved the minor style changes to Rule 11 of the § 2255 Rules.

Judge Carnes indicated that the Rules and accompanying forms would be presented to the Standing Committee with a view toward requesting that they be published for comment.

C. Other Proposed Amendments to Rules

1. Rule 12.2. Notice of Insanity Defense; Mental Examination

Judge Carnes stated that Mr. Pauley had written to the Committee suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. Following additional brief discussion, Judge Carnes indicated that the matter would be placed on the agenda for the Committee's Fall 2002 meeting and he asked the Reporter to draft appropriate language for a possible amendment to Rule 12.2.

2. Rule 16; Discovery and Inspection

The Reporter indicated that Mr. Carl Peterson, an attorney practicing in New York City, had suggested an amendment to Rule 16 that would require the government to disclose automatically the identity of any government expert, in the same manner as that provided for in the Civil Rules. The Committee briefly discussed the proposal and decided to take no further action.

3. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Judge Friedman discussed his proposed amendments to Rules 29, 33, and 34 concerning the 7-day time limit for filing motions filed under those rules, or obtaining from the court, within that same 7-day limit, a fixed deadline for filing a motion under those rules. He explained that the case might arise where the defendant files an extension of time within the 7 days but due to the judge's illness or absence, the judge does not, within the 7-day limit, extend the deadline. He noted that at least one Circuit had ruled that the 7-day limit is jurisdictional and that in those cases, through no fault of the defendant, the defendant is not permitted to file a late motion.

Mr. Elwood stated that he believed that that would be the exceptional case and Judge Trager observed that if the defendant was barred from filing a motion under one of those three rules, the defendant could still file a § 2255 motion and seek relief. Judge Bartle noted that

Judge Miller reported that he had polled fellow magistrate judges and that there was no record of this ever being an issue. He supported a possible amendment, however. Following additional discussion, Judge Miller moved that the Committee consider an amendment to the Rules; Judge Roll seconded the motion, which carried by a vote of 11 to 1. Judge Carnes indicated that the matter of the language to be used for the amendment would be placed on the agenda for the Fall 2002 meeting.

7. Miscellaneous Proposed Amendments to Rules

Judge Carnes pointed out that Mr. Pauley had written an extensive memo to the Committee setting out a variety of proposals. He indicated that although some of the issues had already been discussed, the Committee might wish to consider others.

The Reporter briefly discussed each of the proposals, or categories of proposals. First, Mr. Pauley had identified several rules that may need to be amended to address international criminal activity—Rules 4, 5, 6, and 41. The Reporter observed that the Committee had actually accomplished some of those points, especially with recent amendments to Rules 6 and 41.

Second, the Reporter pointed out that Mr. Pauley had noted that the development of DNA evidence may support another global review of the rules. For example, he raised a number of questions about whether the current rules would permit an indictment of a yet unknown defendant who can be identified only by DNA evidence, in order to toll the statute of limitations. Another example is the possible relationship between Rule 33 (New Trial) and the Innocence Protection Act.

Third, Mr. Pauley had identified lingering issues that the Committee may wish to consider, i.e., the issue of intra-Departmental access to grand jury information for purposes of civil enforcement in Rule 6 and addressing the issue of equalizing the number of peremptory challenges in Rule 24.

Fourth, the Reporter noted that Mr. Pauley had suggested that the Committee reconsider the issue of whether the court in conducting a plea colloquy under Rule 11 should be required to apprise the defendant, who is an alien, about possible adverse immigration consequences following a guilty or nolo contendere plea.

Fifth, Mr. Pauley had offered additional views in support of adopting language (or a new rule) on the subject of covert searches and suggests that the Committee may wish to visit the issue of authorizing judges to issue warrants for persons or property “within or outside” the district. The Reporter indicated that the Committee had already addressed that point, at least with regard to terrorist activities and with regard to tracking-device warrants.

Finally, Mr. Pauley had offered a list of miscellaneous matters that may deserve attention; whether to adopt a new general rule regarding waiver vis a vis consent;

clarifying language in Rule 1 concerning the ability of a “judge” to act; and in Rule 16, extending the due diligence requirement to the subsection dealing with disclosure of documents and tangible evidence. Judge Carnes observed that some of those issues had been debated at length in the past, in particular the definition of “judge” in the Rules.

Following brief discussion on these items, Judge Carnes asked for and received a consensus that the proposals be tabled and that if any member wished to formally propose any particular amendment, after further considering any of Mr. Pauley’s proposals, to contact him or the Reporter so that the proposal could be placed on the agenda for the Fall 2002 meeting.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

Judge Carnes informed the Committee that it had been requested to review model local rules concerning electronic filings in criminal cases. He indicated that last year, a subcommittee of the Committee on Court Administration and Management (CACM) developed a model local rule for accepting electronic filings in civil cases. The Judicial Conference ultimately approved that rule. Now, he said, it appeared that some courts will be able to accept electronic filings in criminal cases in the very near future and that the chair of CACM, Judge John Koeltl (S.D.N.Y) has offered suggested changes to the existing model local rule to accommodate criminal cases. The revised rule had been forwarded to Judge Fitzwater, chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure who in turn has asked the members of that subcommittee to review the attached draft and offer any comments or suggestions to Judge Koeltl.

Judge Carnes added that in the anticipation that a model local rule will be submitted, eventually, to the Judicial Conference, the Committee should review the enclosed draft and offer its views, suggestions, or comments on the proposed rule. He called on Ms. Nancy Miller, of the Administrative Office, who had been working on the issue, to provide additional background information about the proposed model rules.

The Committee held an extended discussion on what, if any, special problems might arise with electronic filings in criminal cases. Several members were of the view that anything signed by the defendant should be filed in its original form and not electronically. Others noted that a scanned document, electronically transmitted might meet that requirement. Ms. Laurel Hooper informed the Committee that some counsel are using that method to transmit documents to the courts involved in the pilot programs. That in turn lead to a discussion about what documents should be original or scanned, when they are filed.

There was also discussion about the ability of the parties themselves and the public to gain access to criminal court records. Ms. Miller pointed out that the current

**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 Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
..... pp. 2-7

2. Approve the proposed amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and new Rule 1004.1 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
..... pp. 7-13

3. Approve the proposed revisions to Official Bankruptcy Forms 1 and 15, and that the revisions take effect on December 1, 2001. pp.13-14

4. Approve the proposed amendments to Civil Rules 54, 58, and 81, and a new Rule 7.1, and Rule C of Supplemental Rules for Certain Admiralty and Maritime Claims and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 15-17

5. Approve the proposed amendments to Criminal Rules 1 through 60 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 18-24

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

Rule 12 (Pleadings and Pretrial Motions) would be amended to promote early setting of pretrial-motion deadlines by vesting the authority to set the deadlines exclusively in the judge—instead of the court by local rule.

Rule 16 (Discovery and Inspection) would be amended to require a defendant to disclose reports of examinations and tests that the defendant intends “to use”—instead of items that the defendant intends “to introduce”—at trial. The proposed change is consistent with the standard used elsewhere in the rule regarding the disclosure of other types of information.

Rule 17 (Subpoena) would be amended to conform with the recent amendment of 28 U.S.C. § 636(e), which authorizes a magistrate judge to hold in contempt a witness who disobeys a subpoena issued by that magistrate judge. The proposed amendment was not included in the amendments published for comment because the Federal Courts Improvement Act took effect after publication. The amendment conforms with the new statute and need not be published for comment in accordance with established Judicial Conference procedures.

Rule 24 (Trial Jurors) contains ambiguous language that may be construed to authorize a defendant, who is represented by counsel, to conduct voir dire of a prospective witness. The proposed amendment eliminates this ambiguity by explicitly authorizing a defendant to conduct voir dire only if the defendant is acting pro se.

The provision in **Rule 26 (Taking Testimony)**, which limits taking testimony to only “oral” testimony, would be deleted to accommodate a witness who is not able to give oral testimony, e.g., a witness needing a sign-language interpreter.

Rule 31 (Jury Verdict) would be amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(a) **Pleadings and Motions.** Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

- (1) Defenses and objections based on defects in the institution of the prosecution; or
- (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or
- (3) Motions to suppress evidence; or
- (4) Requests for discovery under Rule 16; or
- (5) Requests for a severance of charges or defendants under Rule 14.

Rule 12. Pleadings and Pretrial Motions

(a) **Pleadings.** The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) **Pretrial Motions.**

- (1) **In General.** Rule 47 applies to a pretrial motion.
- (2) **Motions That May Be Made Before Trial.** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.
- (3) **Motions That Must Be Made Before Trial.** The following must be raised before trial:
 - (A) a motion alleging a defect in instituting the prosecution;
 - (B) a motion alleging a defect in the indictment or information — but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;
 - (C) a motion to suppress evidence;
 - (D) a Rule 14 motion to sever charges or defendants; and
 - (E) a Rule 16 motion for discovery.

	<p>(4) Notice of the Government's Intent to Use Evidence.</p> <p>(A) <i>At the Government's Discretion.</i> At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).</p> <p>(B) <i>At the Defendant's Request.</i> At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.</p>
<p>(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.</p>	<p>(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.</p>
<p>(d) Notice by the Government of the Intention to Use Evidence.</p> <p>(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.</p> <p>(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.</p>	

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

- (i) any relevant written or recorded statement by the defendant if:
 - (a) the statement is within the government's possession, custody, or control; and
 - (b) the attorney for the government knows — or through due diligence could know — that the statement exists;
- (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and
- (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

	<p>(C) <i>Organizational Defendant.</i> Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:</p>
	<p>(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or</p> <p>(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.</p>
<p>(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.</p>	<p>(D) <i>Defendant's Prior Record.</i> Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.</p>
<p>(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.</p>	<p>(E) <i>Documents and Objects.</i> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:</p> <p>(i) the item is material to preparing the defense;</p> <p>(ii) the government intends to use the item in its case-in-chief at trial; or</p> <p>(iii) the item was obtained from or belongs to the defendant.</p>

<p>(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.</p>	<p>(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:</p> <ul style="list-style-type: none"> (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
<p>(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.</p>	<p>(G) Expert Testimony. Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.</p>
<p>(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.</p>	<p>(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.</p>

<p>(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.</p>	<p>(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.</p>
<p>[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)</p>	
<p>(b) The Defendant's Disclosure of Evidence. (1) Information Subject to Disclosure. (A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.</p>	<p>(b) Defendant's Disclosure. (1) Information Subject to Disclosure. (A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:</p> <ul style="list-style-type: none"> (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.
<p>(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.</p>	<p>(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:</p> <ul style="list-style-type: none"> (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

<p>(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.</p>	<p>(C) <i>Expert Testimony.</i> If a defendant requests disclosure under Rule 16(a)(1)(G) and the government complies, the defendant must give the government, upon request, a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.</p>
<p>(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.</p>	<p>(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:</p> <ul style="list-style-type: none"> (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or (B) a statement made to the defendant, or the defendant's attorney or agent, by: <ul style="list-style-type: none"> (i) the defendant; (ii) a government or defense witness; or (iii) a prospective government or defense witness.
<p>[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)</p>	
<p>(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.</p>	<p>(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:</p> <ul style="list-style-type: none"> (1) the evidence or material is subject to discovery or inspection under this rule; and (2) the other party previously requested, or the court ordered, its production.

Judge Sam A. Joyner (CR-006 (Style))
United States Magistrate Judge
Northern District of Oklahoma
January 30, 2001

Judge Joyner provides a positive endorsement for all of the rules but gives his strongest recommendation for Rules 1(b), 4, 5, 5.1, 9(b), 17(a), 32.1, 41, 43, and 55 as the most helpful.

He offers no changes to the rules.

Judge James B. Seibert (CR-007 (Style))
(Also CR-022 on the Substantive Rules)
United States Magistrate Judge
ND of West Virginia
February 7, 2001

Rule 5. Judge Seibert strongly approves the consolidation of Rules 32.1 and 40 into Rule 5.

Judge William G. Hussmann (CR-008 (Style))
(Also CR-023 on the Substantive Rules)
United States Magistrate Judge
February 5, 2001

Judge Hussmann believes that all of the rules that most directly impact his work are improvements to current practice (E.g. Rules 5, 5.1, 9, 10, 12, 41, and 43).

Judge Robert G. Doumar (CR-009 (Style))
Norfolk, VA
February 9, 2001

Judge Doumar offers style suggestions on a number of rules:

Rule 6. He suggests that in Rules 6(e)(3)(A) and 6(e)(3)(B) that the words "laws of the United States" be used instead of the "Federal criminal laws." He notes that it may be problematical on those situations where it is not clear whether the act violates the civil laws and prosecution may proceed in an indirect manner.

In Rule 6(f) he suggests that the words "federal judge" should be substituted for "magistrate judge" because it is district judges that most often receive indictments in open court.

Rule 7. In Rule 7(d) he recommends the following language, "the court may itself or on motion of any party strike surplusage from the indictment or information" instead of the proposed language.

Rule 11. He suggests substitute wording for Rule 11(b)(H): "Any maximum possible prison penalty, special assessment, criminal forfeiture, fine, term of supervised release and that restitution may be ordered as determined as a result of the commission of the offense." This wording, he notes, would eliminate other possible penalties and clarify the issue of restitution.

He also suggests that in Rule 11(b)(J) that the word "authority" should be deleted and substitute the words "that the court's ability to depart from the guidelines is severely limited." He believes that the word "authority" can create problems beyond belief.

He commends the Committee for deleting the language in Rule 11(d) concerning whether the defendant had talked with the government about a plea. He states that that portion of the inquiry has always caused problems.

In Rule 11(d)(2)(B) he recommends that it be changed to "on motion of the defendant, if the court determines good cause to have been shown, to allow withdrawal of the plea."

Rule 12.1 Rule 12.1(b)(2). He suggests adding the words, "unless the court otherwise directs." The 10-day rule may be impossible, he notes, because of the time of service of the alibi defense.

Rule 12.2 Regarding Rule 12.2(a), he recommends that the words "in the case" be added as well as Rule 12.2(b) after the words "attorney for the government."

Rule 12.3. In Rule 12.3 he would add "in the case" after the words "attorney for the government."

Rule 16. Regarding Rule 16(a)(1)(G), recommends that the experts to be disclosed be "technical or scientific" expert witnesses, not "specialized knowledge." He notes that lay witnesses sometimes have specialized knowledge and that the disclosure should be limited to technical or scientific experts.

Rule 17. He recommends that it should be a requisite to returned all served subpoenas to the clerk before trial and also those summons not served

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2000
Coral Gables, Florida

Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Coral Gables, Florida on Thursday and Friday, January 6-7, 2000. The following members were present:

Judge Anthony J. Scirica, Chair
David H. Bernick, Esquire
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Patrick F. McCartan was unable to attend the meeting. The Department of Justice was represented by Acting Associate Attorney General Daniel Marcus. Roger A. Pauley, Director (Legislation) of the Office of Policy and Legislation of the Department of Justice, also attended the meeting on behalf of the Department. In addition, the committee's former chair, Judge Alicemarie H. Stotler, and former committee members Judge Morey L. Sear and Sol Schreiber participated in the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, deputy chief of that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

FED. R. CRIM. P. 14

Judge Davis said that only stylistic changes had been made in revised Rule 14 (Relief from Prejudicial Joinder).

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 15

Professor Schlueter noted three changes in revised Rule 15 (Depositions).

First, the word “data” would be added to the list of items that the court may require the deponent to produce at a deposition. Professor Schlueter pointed out that the same change was also being made in revised Rule 17(c), dealing with subpoenas.

Second, revised Rule 15(d) would broaden the government’s responsibility to pay for depositions when the defendant is unable to bear the expenses.

Third, revised Rule 15(f), governing use of depositions as evidence, had been reorganized. Professor Schlueter pointed out that there may be no need for the provision at all, and the advisory committee might recommend at the June 2000 Standing Committee meeting that it be dropped. Nevertheless, Professor Schlueter asked the committee to approve the rule for publication as written, subject to any further recommendations that the advisory committee might make in June.

The committee approved the proposed revised rule for publication without objection.

FED. R. CRIM. P. 16

Professor Schlueter reported that Rule 16 (Discovery and Inspection) had been completely reorganized. The only change that might be considered substantive, he said, was occurred in Rule 16(b)(1)(A)(ii), where the reference to items that the defendant “intends to introduce as evidence” would be replaced by items that the defendant “intends to use.”

One participant suggested that the heading of paragraph (b)(1), “discloseable information” was inelegant and should be reconsidered.

The committee approved the proposed revised rule for publication without objection.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
October 7-8, 1996
Gleneden, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Gleneden, Oregon on October 7th and 8th, 1996. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 7, 1996. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Edward E. Carnes

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Prof. Kate Stith

Mr. Darryl W. Jackson, Esq.

Mr. Robert C. Josefsberg, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division

Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillet, Reporter to the Standing Committee; Mr. Peter McCabe and

Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. Jim Eaglin from the Federal Judicial Center, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Judge Edward E. Carnes. Judge Jensen recognized the contributions of Judge Crow, whose term on the Committee had expired.

II. APPROVAL OF MINUTES OF APRIL 1996 MEETING

Following minor changes to the minutes of the October 1995 meeting, Judge Marovich moved that they be approved. Following a second by Judge Davis, the motion carried by a unanimous vote.

III. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER ACTION BY THE COMMITTEE

The Reporter informed the Committee that the Standing Committee, at its June 1996 meeting in Washington, D.C., had approved a number of proposed amendments for publication and public comment: Rule 5.1 (Preliminary Examination; Production of Witness Statements); Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings); Rule 31 (Verdict; Individual Polling of Jurors); Rule 33 (New Trial; Time for Filing Motion); Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence). Written comments on the proposed amendments are due not later than February 15, 1997. A hearing has been scheduled in Oakland, California for witnesses who wish to present oral testimony on the proposed amendments.

IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE

Judge Jensen reported that the Standing Committee had approved and forwarded the Committee's proposed amendment to Rule 16 to the Judicial Conference. The amendment to Rule 16(a)(1)(E) and 16(b)(1)(C), which addresses reciprocal disclosure of information on expert witnesses, had originally been included in a package of proposed amendments to Rule 16 submitted to the Judicial Conference in March 1995. The Conference had generally rejected the amendments although the opposition had focused specifically on those amendments in Rule 16(a)(1)(F), addressing the pretrial disclosure of witness names. At its meeting in April 1996, the Advisory Committee considered the amendment anew and resubmitted the matter to the Standing Committee. That Committee made several minor changes to the language of the amendment and forwarded it, without further publication, to the Judicial Conference.

**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 Conference:

1. Approve proposed amendments to Bankruptcy Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035, and proposed new Rules 1020, 3017.1, 8020, and 9015 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the lawpp. 4-9
2. Approve proposed amendments to Civil Rules 9 and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 10-13
3. Approve proposed amendments to Criminal Rule 16 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the lawpp.16-17
4. Approve proposed amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), 806, and proposed new Rules 804(b)(6) and 807 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the lawpp.19-21

<p>NOTICE</p> <p>NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.</p>
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in certifying class actions, explicitly permit certification of settlement classes, and establish a discretionary interlocutory appeal of the certification decision.

Class actions involve difficult and divisive issues. The advisory committee's proposal has drawn immediate criticism from some persons and professional groups that have closely followed the rulemaking process. Although there was some disagreement on some of the substantive provisions, your committee agreed that the public airing of the proposal would provide all interested persons an opportunity to express their views as contemplated under the Rules Enabling Act. Further views and comments from academics, experienced practitioners, and judges on the proposal would be especially helpful in the committees' future deliberations.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Criminal **Rule 16** together with Committee Notes explaining their purpose and intent.

Rule 16 (*Discovery and Inspection*) would be amended to require pretrial reciprocal disclosure by the parties of expert testimony offered on the issue of the defendant's mental condition. The reciprocal disclosure provisions, parallel to similar provisions adopted in 1993, would be triggered when the government requests disclosure

concerning expert witness' information regarding the defendant's mental condition after the defendant has given notice under Rule 12.2(b).

The proposed amendments to **Rule 16** were circulated to the bench and bar for comment in September 1994, together with controversial changes that would have required the government to disclose the names of witnesses to be called at trial seven days before the trial. Although there was no controversy or discussion of the specific amendments providing reciprocal rights for the disclosure of expert witness' information, the specific proposal was subsumed by the action of the Judicial Conference at its September 1995 session rejecting the amendments to Rule 16 — which was aimed at the provision requiring government pretrial disclosure of the names of witnesses. JCUS-SEP 95, p. 96.

The advisory committee concluded that separate republication of the same proposal on disclosure of expert witness' information on the defendant's mental condition was unnecessary. It submitted the proposed amendments for approval.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in Appendix F with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 16 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The Advisory Committee on Criminal Rules decided not to proceed with proposed amendments to **Rule 24** (*Trial Jurors*) that would have provided parties with a right to

Agenda F-18 (Appendix F)
Rules
September 1996

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: May 7, 1996

I. INTRODUCTION.

At its meeting April 29, 1996, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to Rules of Criminal Procedure 5.1, 16, 26.2, 31, 33, 35, and 43. The Committee decided not to take any further action on a proposed amendment to Rule 24(a), which would have provided for attorney-conducted voir dire.

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II. ACTION ITEMS

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B. Rule 16. Discovery and Inspection; Disclosure of Expert's Testimony.

At its July 1995 meeting, the Standing Committee approved for transmittal to the Judicial Conference two key amendments to Rule 16. The first amendment would have required the government to provide the names of its witnesses to be called at trial seven days before the trial. The second, would have required the parties to disclose summaries of expert testimony offered on the issue of the defendant's mental condition. The amendment requiring pretrial disclosure of names and government witnesses was the subject of pro and con discussion and was ultimately rejected by the Judicial Conference. Although there was no controversy and no discussion concerning the expert testimony amendment, it was rejected at the same time by the Judicial Conference.

At its January 1996 meeting, in light of this history, the Standing Committee asked whether the Advisory Committee wished to reconsider the amendment governing expert testimony and during its April 1996 meeting, the Advisory Committee did reconsider this proposal and voted to resubmit it to the Standing Committee.

Recommendation: The Advisory Committee recommends that the amendments to Rule 16 regarding expert testimony be resubmitted to the Judicial Conference without further public comment.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE**

Rule 16. Discovery and Inspection¹

1 (a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

2 (1) *Information Subject to Disclosure.*

3 * * * * *

4 (E) EXPERT WITNESSES. At the defendant's
5 request, the government shall disclose to the
6 defendant a written summary of testimony that the
7 government intends to use under Rules 702, 703, or
8 705 of the Federal Rules of Evidence during its case-
9 in-chief at trial. If the government requests
10 discovery under subdivision (b)(1)(C)(ii) of this rule
11 and the defendant complies, the government shall, at
12 the defendant's request, disclose to the defendant a
13 written summary of testimony the government
14 intends to use under Rules 702, 703, or 705 as

¹ New matter is underlined and matter to be omitted is lined through.

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Federal Rules of Criminal Procedure

15 evidence at trial on the issue of the defendant's
16 mental condition. ~~This~~ The summary provided
17 under this subdivision shall ~~must~~ describe the
18 witnesses' opinions, the bases and the reasons for
19 those opinions ~~therefor~~, and the witnesses'
20 qualifications.

21 (2) *Information Not Subject to Disclosure.* Except
22 as provided in paragraphs (A), (B), (D), and (E) of
23 subdivision (a)(1), this rule does not authorize the
24 discovery or inspection of reports, memoranda, or other
25 internal government documents made by the attorney for
26 the government or any other government agent ~~agents~~ in
27 ~~connection with the investigation or prosecution of~~
28 investigating or prosecuting the case. Nor does the rule
29 authorize the discovery or inspection of statements made

30 by government witnesses or prospective government
31 witnesses except as provided in 18 U.S.C. § 3500.

32 * * * * *

33 (b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

34 (1) *Information Subject to Disclosure.*

35 * * * * *

36 (C) EXPERT WITNESSES. Under the following
37 circumstances, the defendant shall, at the
38 government's request, disclose to the government a
39 written summary of testimony that the defendant
40 intends to use under Rules 702, 703, or 705 of the
41 Federal Rules of Evidence as evidence at trial: (i) if
42 If the defendant requests disclosure under
43 subdivision (a)(1)(E) of this rule and the
44 government complies, or (ii) if the defendant has
45 given notice under Rule 12.2(b) of an intent to

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Federal Rules of Criminal Procedure

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present expert testimony on the defendant's mental

47

condition. ~~the defendant, at the government's~~

48

~~request, must disclose to the government a written~~

49

~~summary of testimony the defendant intends to use~~

50

~~under Rules 702, 703 and 705 of the Federal Rules~~

51

~~of Evidence as evidence at trial.~~ This summary

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must shall describe the witnesses' opinions of the

53

witnesses, the bases and reasons for those opinions

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therefor, and the witnesses' qualifications.

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COMMITTEE NOTE

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial. And if the government provides that information, it is entitled to reciprocal discovery under (b)(1)(C). This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the

defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: GAP REPORT: Explanation of Changes Made Subsequent to the
Circulation for Public Comment of Rules 16 and 32.

DATE: May 23, 1995

At its June 1994 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 32.

Both rules were published in September 1994, with a deadline of February 28, 1995 for any comments. At a hearing on January 27, 1995 representatives of the Committee heard the testimony of several witnesses regarding the amendments to Rule 16. At its meeting in Washington, D.C. on April 10, 1995, the Advisory Committee considered the written submissions of members of the public as well as the testimony of the witnesses.

Summaries of the any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(E) & (b)(1)(C). Disclosure of Expert Witnesses.

The Committee made only minor stylistic changes to the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C). Very few comments were received on these particular provisions in Rule 16.

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ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 16

* * * * *

II. LIST OF COMMENTATORS: Rule 16

- CR-01 Graham C. Mullen, Federal District Judge, Charlotte, N.C., 9-19-94.
CR-02 Robert L. Jones, III, Arkansas Bar Assoc., Fort Smith, Ark.,
 10-7-94.
CR-03 Prentice H. Marshall, Federal District Judge, Chicago, IL., 9-30-94.

* * * * *

- CR-10 John Witt, City of San Diego, CA., 1-6-95
CR-11 Akron Bar Assoc. (Jane Bell), Akron, OH., 1-27-95

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* * * * *

IV. COMMENTS: Rule 16

**Hon. Graham C. Mullen (CR-01)
Federal District Judge, Western District of North Carolina
Charlotte, N.C.
Sept. 19, 1994**

Judge Mullen believes the proposed new Rule 16 is long overdue.

* * * * *

**Robert L. Jones, III (CR-02)
President, Arkansas Bar Association
Fort Smith, Ark.
Oct. 7, 1994**

Mr. Jones, commenting on behalf of the Arkansas Bar Association, agrees with the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure.

**Hon. Prentice H. Marshall (CR-03)
Federal District Judge, Northern District of Illinois
Chicago, IL.
Sept. 30, 1994**

Judge Marshall urges the Committee to adopt the language of Rule 26(a)(2) of the Rules of Civil Procedure in the proposed amendment to Criminal Rule 16 relating to anticipated expert testimony.

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**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

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**John Witt (CR-10)
City of San Diego
San Diego, CA
Jan 6, 1995**

Mr. Witt thanks the Committee for an opportunity to provide input on the proposed amendments and notes that his counsel have informed him that nothing the amendments will have enough impact to justify any comments.

**Ms Jane Bell (CR-11)
Akron Bar Assoc.
Akron, Ohio
Jan. 27, 1995**

The Akron Bar Assoc. supports the proposed amendments to Rule 16 It also supports the provisions for discovery concerning experts.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of June 19-20, 1996

Washington, D.C.

Minutes

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 19-20, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General, participated in the meeting as the voting representative of the Department of Justice.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, senior attorney in the rules office, and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Professor Edward H. Cooper, Reporter

procedure for obtaining the consent of the parties to have a jury trial tried before a bankruptcy judge.

FED. R. BANKR. P. 9035

Professor Resnick explained that the proposed amendment to Rule 9035 was a technical change dealing only with the six judicial districts in North Carolina and Alabama, where there are no United States trustees. The amendment would provide that the bankruptcy rules apply generally in those states, unless they are inconsistent with "any federal statute." This is a broader term than that used in the existing rule, which refers only to titles 11 and 28 of the United States Code. The 1994 legislation had enacted certain provisions not codified in either title 11 or title 28 that relate to bankruptcy administration matters in these districts.

The committee voted without objection to approve all the proposed amendments to the bankruptcy rules and send them to the Judicial Conference.

Official Forms - Amendments for Publication

Professor Resnick stated that the advisory committee recommended several changes in the Official Forms, as set forth in Agenda Item 8-B. He added that the advisory committee, acting on a recently-received request from the Committee on the Administration of the Bankruptcy System, also recommended one further, minor change. The proposal would add another box to the statistical information section of the petition form to provide better statistical information on estimated assets of debtors in very large cases.

The committee voted without objection to approve the proposed amendments to the forms for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum and attachments of May 7, 1996. (Agenda Item 5)

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 16

Judge Jensen reported that the Judicial Conference at its March 1996 session had rejected generally the proposed amendments to Rule 16. He added, however, that the opposition voiced at the Conference had been directed exclusively to the proposed

amendments to Rule 16(a)(1)(F), which would have required the government to disclose the names of its witnesses before trial.

Following the Conference's action, the advisory committee considered anew the other proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C), requiring reciprocal disclosure of information on expert witnesses when the defense gives notice under Rule 12.2 that it intends to present expert testimony on the defendant's mental condition. The advisory committee decided to approve these amendments once again, without further publication, and forward them for approval by the Judicial Conference.

Some members pointed out that there appeared to be a stylistic inconsistency between the language in lines 17-21 ("The summary provided under this subdivision") and that in lines 53-56 ("This summary"). They pointed out that different language had been used to express the identical meaning. **Judge Parker moved to change the language in lines 17-21 to make it consistent with that in lines 53-56. The motion died for lack of a second.**

Concern was also expressed as to whether references in the amendments to the Federal Rules of Evidence were accurate. **Mr. Schreiber moved to change line 16 to state "under Article VII of the Federal Rules of Evidence," rather than "under Rules 702, 703, or 705 of the Federal Rules of Evidence." The motion died for lack of a second.**

Judge Easterbrook moved to change the word "and" to "or" in lines 16 and 43 and to send the amendments to the Conference otherwise as written. The motion carried, and the committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5.1 and 26.2

Judge Jensen stated that the proposed changes to Rules 5.1 and 26.2 would require production of a witness' statement after the witness has testified at a preliminary examination hearing. The amendments were parallel to similar changes made in 1993, requiring the production of witness statements at various other evidentiary hearings, including hearings on suppression of evidence, sentencing, detention, revocation or modification of supervised release, and section 2255 motions. He pointed out that, technically, these amendments, like the 1993 amendments, raised a Jencks Act question because the witnesses' statements would be required before trial.

Rule 26.2 would be amended to add a cross-reference to Rule 5.1. It would also be amended to correct a cross-reference to Rule 32, which had been amended recently.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: May 7, 1996

I INTRODUCTION.

At its meeting April 29, 1996, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to Rules of Criminal Procedure 5.1, 16, 26.2, 31, 33, 35, and 43. The Committee decided not to take any further action on a proposed amendment to Rule 24(a), which would have provided for attorney-conducted voir dire. This report addresses those proposals and recommendations to the Standing Committee.

Copies of the proposed rules and the accompanying committee notes are attached. A copy of the minutes of the April meeting is also attached.

II. ACTION ITEMS

A. Rule 5.1. Preliminary Examination & Rule 26.2. Production of
Witness Statements.

The proposed amendments to Rule 5.1 and Rule 26.2 would require production of a witness' statement after the witness has testified at a preliminary hearing. The amendments parallel similar changes made in 1993 to Rules 32, 32.1, 46, and Rule 8 of the Rules Governing Proceedings Under § 2255. The proposed amendments are attached.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5.1 and 26.2 be published for public comment.

B. Rule 16. Discovery and Inspection; Disclosure of Expert's Testimony.

At its July 1995 meeting, the Standing Committee approved for transmittal to the Judicial Conference two key amendments to Rule 16. The first amendment would have required the government to provide the names of its witnesses to be called at trial seven days before the trial. The second, would have required the parties to disclose summaries of expert testimony offered on the issue of the defendant's mental condition. The amendment requiring pretrial disclosure of names of government witnesses was the subject of pro and con discussion and was ultimately rejected by the Judicial Conference. Although there was no controversy and no discussion concerning the expert testimony amendment, it was rejected at the same time by the Judicial Conference.

At its January 1996, meeting, in light of this history, the Standing Committee asked whether the Advisory Committee wished to reconsider the amendment governing expert testimony and during its April 1996 meeting, the Advisory Committee did reconsider this proposal and voted to resubmit it to the Standing Committee.

The amendment, as it was forwarded to the Judicial Conference, is attached.

Recommendation: The Advisory Committee recommends that the amendments to Rule 16 regarding expert testimony be resubmitted to the Judicial Conference without further public comment.

C. Rule 31. Polling of Jurors.

The Advisory Committee has proposed an amendment to Rule 31, which would require that the jurors be polled individually whenever any polling occurs after the verdict, either at a party's request or on motion of the court. The Committee agreed with the view that there are distinct advantages to individual polling and that the practice should be required. Individual polling, for example, should reduce the likelihood of a post-trial attack on the verdict on the ground that one of the jurors disagreed with the verdict. The amendment leaves to the courts the exact method of conducting the individual polling in cases involving multiple defendants or multiple counts.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 31 be published for public comment.

1 **Rule 16. Discovery and Inspection¹**

2 (a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

3 (1) *Information Subject to Disclosure.*

4 * * * * *

5 (E) EXPERT WITNESSES. At the
6 defendant's request, the government shall disclose
7 to the defendant a written summary of testimony
8 that the government intends to use under Rules
9 702, 703, or 705 of the Federal Rules of Evidence
10 during its case-in-chief at trial. ~~If the government~~
11 requests discovery under subdivision (b)(1)(C)(ii)
12 of this rule and the defendant complies, the
13 government shall, at the defendant's request,
14 disclose to the defendant a written summary of
15 testimony the government intends to use under
16 Rules 702, 703, and 705 as evidence at trial on the
17 issue of the defendant's mental condition. ~~This-The~~
18 summary provided under this subdivision shall
19 must describe the witnesses' opinions, the bases

¹ . New matter is underlined and matter to be omitted is lined through.

20 and the reasons for those opinions therefor, and the
21 witnesses' qualifications.

22 (2) ~~Information Not Subject to Disclosure~~. Except
23 as provided in paragraphs (A), (B), (D), and (E) of
24 subdivision (a)(1), this rule does not authorize the
25 discovery or inspection of reports, memoranda, or
26 other internal government documents made by the
27 attorney for the government or any other government
28 ~~agent agents in connection with the investigation or~~
29 ~~prosecution of investigating or prosecuting~~ the case.
30 Nor does the rule authorize the discovery or inspection
31 of statements made by government witnesses or
32 prospective government witnesses except as provided
33 in 18 U.S.C. § 3500.

34 * * * * *

35 (b) THE DEFENDANT'S DISCLOSURE OF
36 EVIDENCE.

37 (1) *Information Subject to Disclosure*.

38 * * * * *

39 (C) EXPERT WITNESSES. Under the following
40 circumstances, the defendant shall, at the government's

41 request, disclose to the government a written summary
42 of testimony that the defendant intends to use under
43 Rules 702, 703, and 705 of the Federal Rules of
44 Evidence as evidence at trial: (i) if If the defendant
45 requests disclosure under subdivision (a)(1)(E) of this
46 rule and the government complies, or (ii) if the
47 defendant has given notice under Rule 12.2(b) of an
48 intent to present expert testimony on the defendant's
49 mental condition. the defendant, at the government's
50 request, must disclose to the government a written
51 summary of testimony the defendant intends to use
52 under Rules 702, 703 and 705 of the Federal Rules of
53 Evidence as evidence at trial. This summary must shall
54 describe the witnesses' opinions of the witnesses, the
55 bases and reasons for those opinions therefor, and the
56 witnesses' qualifications.

57 * * * * *

COMMITTEE NOTE

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the

government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
April 29, 1996
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 29, 1996. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:40 a.m. on Monday, April 29, 1996. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Hon. Daniel E. Wathen

Prof. Kate Stith

Mr. Robert C. Josefsberg, Esq.

Mr. Henry A. Martin, Esq.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION

BY ADVISORY COMMITTEE

A. Proposed Amendments to Rules; Report of Subcommittee on Local Rules Project.

Judge Davis provided an oral and written report of his subcommittee on the local rules project. That subcommittee, consisting of Judge Davis (chair), Judge Crow, Judge Crigler, and Mr. Pauley, had addressed the question of whether certain local rules, identified by the Local Rules Project, might be worthy of including in the national rules. The subcommittee examined local rules which addressed the following four rules:

Rule 4: In some districts, a local rule requires the arresting officer to notify other members of the court family of the arrest. The subcommittee recommended against adoption of that practice in the national rule.

Rule 16: The subcommittee noted that in some districts, the parties are required to confer on discovery matters before filing a motion. The subcommittee also recommended against adoption of that practice in the national rule.

Rule 30: In fifteen districts, the parties are required to submit proposed jury instructions sometime before trial. The subcommittee also recommended that that practice not be included in the national rule.

Rule 47. The subcommittee noted that it had been recommended that Rule 47 be amended to require the parties to confer or attempt to confer before any motion is filed. That recommendation was also rejected by the subcommittee.

The subcommittee noted in its report that the proposed amendments to the foregoing four rules address "details of practice and procedure about which courts have differing customs and traditions and that are properly the subject of local rules." The report also noted that the members of the subcommittee did not believe that any significant problems existed in any of the foregoing areas.

The proposed amendment to Rule 12, generated some discussion: Two districts require the defense to give notice of an intent to raise the entrapment defense. Although a majority of the subcommittee had opposed adoption of that practice in the national rule, they believed that the matter should be raised for evaluation by the Committee.

Mr. Pauley indicated that the Department of Justice did not necessarily believe that the proposed notice requirement had merit but thought that the issue should be raised. He recounted a case where there were multiple defendants and after the jury was selected one defendant wanted to raise the defense, which resulted in a severance.

Judge Crow noted that adoption of such an amendment might lead to additional notifications of defenses that may not actually be raised at trial. Judge Crigler added that he did not perceive that any problem existed in this area.

options available to the Committee in addressing the issue, the consensus developed that the Department should be informed of the Committee's view that the current practice should be reaffirmed. No further action was taken on the matter, with the understanding that the Department would convey its response to the Committee at a future meeting.

D. Rule 11(e). Provision Barring Court from Participation in Plea Agreement Discussions

Judge Marovich presented a written and oral report on his subcommittee's consideration of the issue of whether a judge might be permitted to participate in any fashion in plea bargaining. The issue had been discussed at the Committee's Fall 1995 meeting in response to the practice used in the Southern District of California to expedite plea agreements. Under that procedure, a judge, other than a sentencing judge, works with the parties to reach a plea agreement and recommends a particular sentence, a procedure which might be in violation of Rule 11(e) which indicates that the "court" may not participate in plea discussions. The subcommittee, consisting of Judge Marovich (chair), Mr. Martin, and Mr. Pauley recommended that no action be taken to amend the rules. It had learned that it solicited the views of both government and defense attorneys and that the prevailing view was that no change should be made to Rule 11. The subcommittee also learned that the Southern District of California had discontinued the practice which originally gave rise to the Committee's consideration of the issue.

In the ensuing discussion, the Committee focused on the question of whether some change should be made to the rules to provide for some mechanism for determining the appropriate Sentencing Guidelines before trial. Several members expressed support for such a study; Judge Dowd noted that in Alabama, for example, a guilty plea and plea bargain are presented in conjunction with a presentencing report. Judge Stotler raised the question of whether the rules could be amended to provide for what might informally be called a "criminal motion for summary judgment" which would permit the court to resolve controlling issues of law at the pretrial stage.

Judge Jensen asked the subcommittee to continue its study of the issue and added Professor Stith as a member.

Judge Dowd moved that the subcommittee's report be accepted and Judge Davis seconded the motion, which carried by a unanimous vote.

The Committee also addressed the operation of Rule 11 on the two types of plea agreements reflected in Rule 11(e)(A)(B) and (C). Following brief discussion on the problem of predicting what effect the Sentencing Guidelines might have on a particular agreement, the Reporter was instructed to study Rule 11 and how it actually operates in conjunction with those Guidelines.

E. Rule 16(a)(1)(E), (b)(1)(C). Disclosure of Expert Witnesses

Judge Jensen indicated that when the Judicial Conference had considered the Committee's proposed amendments to Rule 16 at its Fall meeting, it had apparently rejected all of the proposed amendments, including the rather noncontroversial amendment requiring disclosure of expert witness' expected testimony. At its January 1996, meeting the Standing Committee had asked the Advisory Committee to consider whether it wished to resubmit those particular amendments to Rule 16. Judge Jensen asked whether the Department of Justice, which originally proposed the amendment, cared to seek further action.

Mr. Pauley noted that the proposed amendments were minor and had passed through the proposal and comment period without opposition; but he expressed reluctance to trigger further discussion of the rejected amendments which would have required the government to disclose the names and statements of its witnesses before trial.

Judge Jensen noted that the proposed amendment might raise a conflict with the Jencks Act which seemed to concern some members of the Standing Committee. Professor Stith noted that the Jencks problem already exists in other provisions of Rule 16.

Following consultation between the representatives of the Department of Justice, Mr. Pauley moved that the Committee approve and resubmit the amendments to Rule 16(a)(1)(E) and (b)(1)(C) to the Standing Committee for transmittal to the Judicial Conference, without additional public comment. Judge Dowd seconded the motion, which carried by a vote of 10 to 1.

F. Rule 31(d). Polling of Jurors

The Reporter indicated that as a result of the Committee's action at its Fall 1995 meeting, he had drafted a proposed amendment to Rule 31(d) which would require individual polling of jurors when a polling was requested by a party, or directed by the court on its own motion.

Judge Dowd indicated that although he had no problem with the rule as drafted, he questioned whether the specifics of carrying out the individual polling might be addressed. Mr. Josefsberg observed that the proposed change would be good for both the defense and the prosecution. Following some minor drafting changes, Judge Marovich moved that the amendment be approved and forwarded to the Standing Committee for publication and comment. Judge Smith seconded the motion, which carried by a unanimous vote.

G. Rule 31(e). Forfeiture Proceedings

Mr. Pauley explained a proposal submitted by the Department of Justice which would address the procedures for criminal forfeiture. In the Department's view, there are a number of inadequacies in Rule 31 for determining whether, and to what extent, the defendant had an interest in the property; the Circuits seem split on what the role of the jury should be in making those decisions. The proposed amendment would attempt to resolve the question of the jury's role and defer determination of the extent of the defendant's interest to an ancillary proceeding. Finally, he noted that in *Libretti v. United States*, -- U.S. ---- (Nov. 7, 1995), the Court held that criminal forfeiture constitutes a part of sentencing in a criminal trial.

**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:

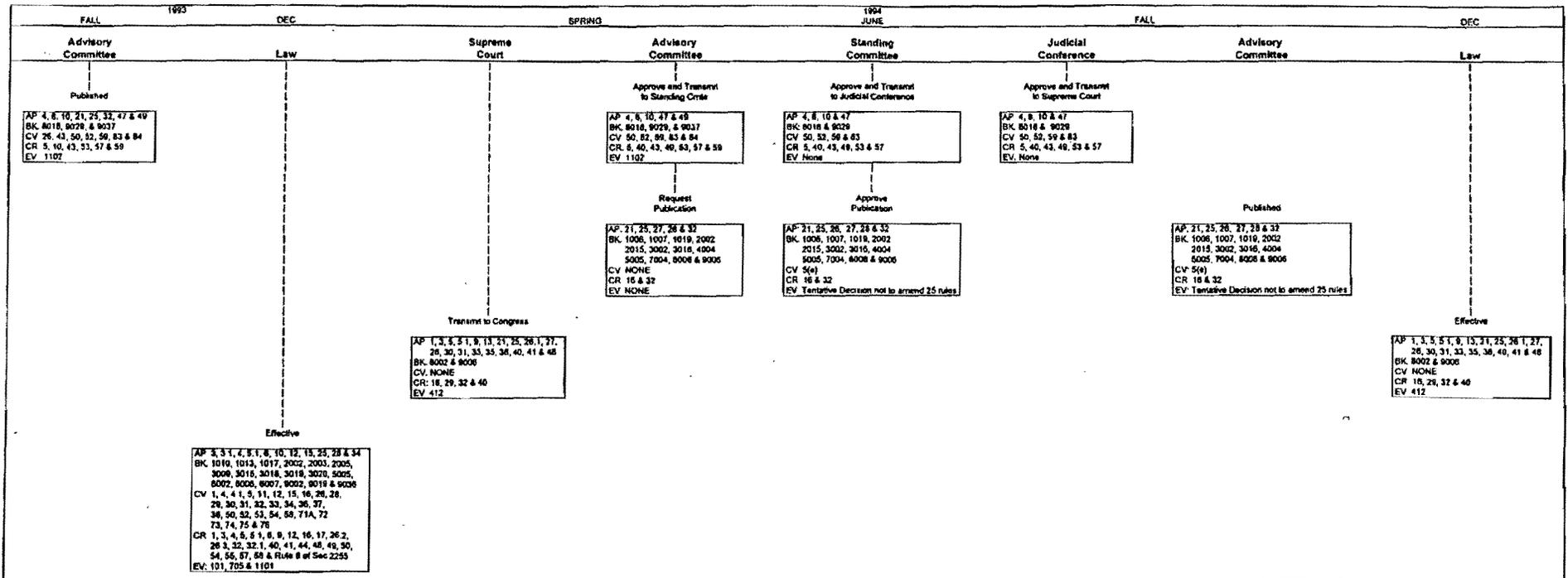
1. Resolve that on April 1, 1998, and at each 3-year interval ending on April 1 thereafter, the Official Bankruptcy Forms be amended, automatically and without further action by the Judicial Conference, to conform to any adjustment of dollar amounts made under § 104(b) of the Bankruptcy Code..... pp. 3-4
2. a. Adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure; and
b. Set April 15, 1997 as the effective date of compliance with the uniform numbering system so that courts will have sufficient time to make necessary changes to their local rules.....pp. 6-7

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

- ▶ Rules governing attorney conduct.....p. 7
- ▶ Pending legislation eliminating unanimity requirement for jury verdicts..... pp. 8-9
- ▶ Chart showing status of rules amendments.....p. 9

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

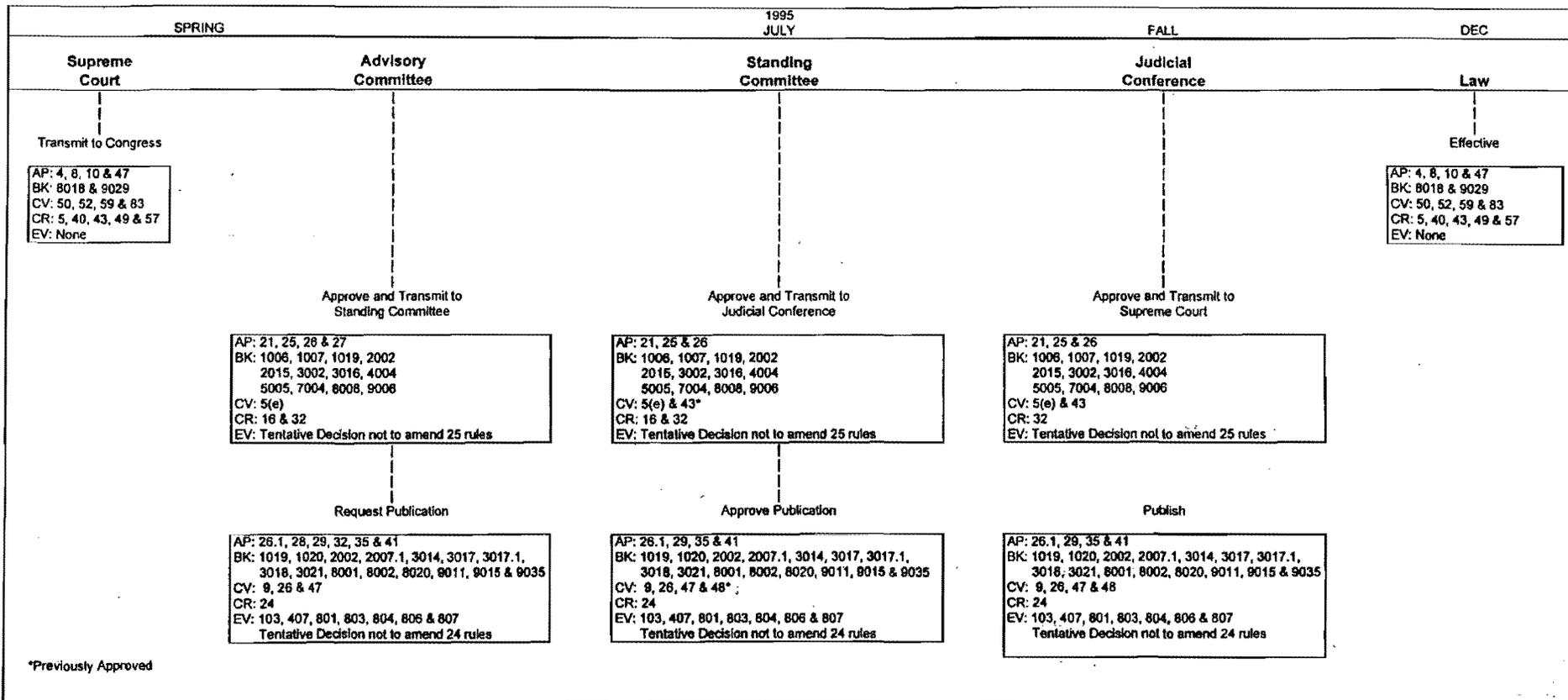
PROMULGATION OF RULES AMENDMENTS



January 29, 1996

PROMULGATION OF RULES AMENDMENTS

Page 2



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 1996
Los Angeles, California

Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Los Angeles, California on Thursday and Friday, January 12-13, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Leroy J. Contie, Jr.
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present because of weather and transportation conditions. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General, participated in the meeting as the representative of the Department of Justice.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, senior attorney in the rules office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office; and William B. Eldridge, Director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Jensen reported that he had represented the committee at the September 1995 meeting of the Judicial Conference. He stated that the committee had proposed to the Conference two changes to Rule 16 of the Federal Rules of Criminal Procedure. The first would have amended Rule 16(a)(1)(F) to require the government to disclose the names of its witnesses to the defendant seven days before trial, unless the United States attorney were to file with the court an *ex parte*, non-reviewable statement that the government believed that disclosure would threaten a person's safety or lead to an obstruction of justice. The second change would have amended Rule 16(b)(1)(C) to require the defense to disclose to the government a written summary of the testimony of its witnesses when it intended to rely on expert testimony to show the defendant's mental condition.

Judge Jensen stated that the Judicial Conference, on a close vote, had failed to approve a motion to adopt the proposed changes to Rule 16. He added that the Advisory Committee on Criminal Rules had concluded that the Conference's action must be read as a rejection of the committee's entire Rule 16 proposal, including the provision that would have amended rule 16(b)(1)(C) to require disclosure of expert testimony by the defense. He added that the Advisory Committee on Criminal Rules would be pleased to consider this latter proposal again.

Judge Jensen also reported that the Judicial Conference had rejected a motion to prevent publication of the proposed amendments to the civil and criminal rules that would require attorney participation in voir dire. Accordingly, the voir dire proposals, which had been sponsored jointly by the Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules, were published immediately following the Conference's meeting.

Some members and participants suggested that the committee's recommendations and supporting material may not have been given adequate consideration by the members of the

Judicial Conference. One participant suggested that the motion to prevent publication of the voir dire proposals was purely procedural in nature and had been made at the last minute. He stated that in the future the committees should be provided with greater advance notice of proposed objections to their reports. Some members recommended that consideration be given to changing the presentation and format of the committee's reports to the Conference to ensure that Conference members are fully informed about the materials and that the committees be given an adequate opportunity to present and defend their proposals on the merits.

Judge Stotler reported that she and Professor Coquillette had attended part of the December 1995 meeting of the Committee on Court Administration and Case Management. At the meeting, they discussed the Judicial Conference's obligations under the Civil Justice Reform Act to file a report and recommendations with the Congress by December 31, 1996. She stated that she and the reporter had emphasized that the Rules Enabling Act process is very participatory and lengthy. The RAND report, providing empirical data on the results of the CJRA pilot program, would not be ready even on a preliminary basis until the end of June 1996, and in final form by the end of September 1996. Under this schedule, there would not be enough time for the Conference and its committees to review the RAND report, make appropriate recommendations regarding the adoption of litigation principles and guidelines, and initiate proposed rules changes to implement the recommendations. The Committee on Court Administration and Case Management was urged to take the rulemaking process into account in coming to its recommendations.

Judge Higginbotham reported that the RAND Corporation and the American Bar Association were eager to obtain reactions by bench and bar to the findings and recommendations in the report. He noted that the ABA was planning to hold a national conference to consider the report, possibly in March 1997. He added that Judge Ann C. Williams, chair of the Court Administration and Case Management Committee, had been very receptive to receiving input from bench and bar and had asked to be included in the ABA conference.

Judge Stotler reported that she, Professor Coquillette, and Judge Robert E. Keeton, former chairman of the committee had met with the Chief Justice on December 13, 1995, to discuss: (1) the style revision project; (2) the appropriate length of terms for rules committee members and chairs; and (3) inviting the chairs of other Judicial Conference committees to attend the committee's January 1996 special study conference on attorney conduct. She stated that the Chief Justice was very interested in, and very knowledgeable about, the rules process. She added that he approved of the committee's proceeding with its plans for revising the Federal Rules of Appellate Procedure for style and for using the appellate rules as the bellwether for the style revision project. She added that style revision of the other federal rules of procedure should be delayed until revision of the appellate rules has concluded. Judge Stotler emphasized that attorney conduct issues cut across the jurisdictional lines of several Judicial Conference committees and had to be coordinated closely with the other committees.

For that reason, she had wanted to inform the Chief Justice directly of the committee's intention to invite other Judicial Conference chairs to the special study conference and to ascertain whether the proposal met with the Chief Justice's approval.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved unanimously the minutes of the July 6-7, 1995 meeting.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office had just installed the hardware and software for its new electronic document management system that will support the rules committees. Customization of the software and training of the staff were underway, and dual operation of the manual and automated systems would follow. Judge Stotler recommended that the office invite the committee to an on-site demonstration of the system in conjunction with the June 1996 meeting.

Mr. Rabiej stated that Senator Thurmond had introduced S. 1426, a bill that would amend the Federal Rules of Civil and Criminal Procedure to eliminate the requirement of unanimous consent for a verdict and require that a verdict in a civil or criminal case be made only by a 5/6 vote of the jury.

Several of the participants expressed objection to the legislation on the merits and recommended that the Judicial Conference be heard on the matter. Concern was also expressed that the bill would violate the Rules Enabling Act process by amending federal procedural rules directly by statute. One member recommended that work begin immediately to consider the implications of the legislation and obtain empirical data.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the chair had recently selected him to serve as chair of the style subcommittee. He stated that the role of the subcommittee would necessarily be limited because further work on revision of the civil, criminal, and bankruptcy rules would likely be held in abeyance until after completion of the revision process for the appellate rules.

Mr. Garner reported that his codification of the style conventions used by the style subcommittee was about to be published by the Administrative Office under the title *Guidelines for Drafting and Editing Court Rules*. He stated that the conventions are easy to

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
October 16-17, 1995
Manchester Village, Vermont

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Equinox Hotel in Manchester Village, Vermont on October 16 and 17, 1995. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 16, 1995. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Hon. Daniel E. Wathen

Mr. Robert C. Josefsberg, Esq.

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division

Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquille, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Paul Zing from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen, who noted that Professor Saltzburg's, whose term on the Committee had expired, had made invaluable contributions to the Committee and would be recognized at the Committee's Spring 1996 meeting.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Crow moved that the minutes of the Committee's April 1995 meeting in Washington, D.C., be approved. Following a second by Judge Marovich, the motion carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT

AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which will become effective on December 1, 1995, absent any further action by Congress: Rule 5(a) (Initial Appearance Before the Magistrate Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Reporter noted that in its consideration of the rules, the Supreme Court had changed the word "must" to "shall" in order to maintain consistency within all of the rules.

IV. RULES CONSIDERED BY THE JUDICIAL CONFERENCE AND

FORWARDED TO THE SUPREME COURT

Judge Jensen reported on the disposition of Rules 16 and 32 which had been forwarded by the Committee to the Standing Committee for action.. After considerable discussion at its July 1995 meeting, the Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement. The Standing Committee had approved, without change, the Committee's proposed amendment to Rule 32 regarding forfeiture procedures.

Although the Judicial Conference approved Rule 32 for transmittal to the Supreme Court, it rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements. Although it was not clear from the Judicial Conference's action whether they specifically intended to

reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

V. RULES APPROVED BY STANDING COMMITTEE

FOR PUBLICATION AND COMMENT

The Reporter informed the Committee that at its July 1995, meeting, the Standing Committee had approved for publication an amendment to Rule 24(a) which would provide for attorney-conducted voir dire of jurors. The final language was the result of a compromise with a provision presented by the Civil Rules Committee for amending Civil Rule 47.

Judge Jensen indicated that hearings on the proposed amendment have been set for December 15, 1995 in Oakland and February 9, 1996 in New Orleans. He added that any members of the Committee interested in attending those hearings should contact the Rules Committees Support office.

During the discussion on Rule 24, Judge Jensen raised questions about the appropriate role of the Chair and Reporter at the Standing Committee meetings when proposed amendments are offered to the Committee's proposed versions. He noted that for amendments in which the Advisory Committee has invested a great deal of debate and time, it is not always possible to know just what amendments to agree to at the Standing Committee level. That point was made clear during the discussion at that Committee's meeting regarding the proposed amendments to Rules 16 and 32. In both instances, major changes were made to the rules as the result of negotiation and compromise in an attempt to go forward with some amendment, rather than remanding the issue to the Advisory Committee for further action. During the ensuing discussion, the consensus of the Committee was that the Chair and Reporter should have some reasonable discretion to assess the Standing Committee's proposed actions and agree to changes which they believe are in accordance with the Committee's views. Several members expressed concern that if the Standing Committee makes drastic changes to a rule published for comment, there may be changed votes at the Advisory Committee level upon further consideration.

Judge Jensen also raised the related question of the appropriate role of the Committee vis a vis lobbying Congress for or against a particular amendment. Mr. Rabiej indicated that the legislative liaison office coordinates any such efforts with the chairs of the respective committees.

The discussion also raised the issue of the relationship between the Advisory Committees and the Standing Committee. Mr. Pauley noted that rarely does the Standing Committee expand on a Committee's proposed amendment; if any changes are made, they usually result in narrowing the Advisory Committee's proposal. Several members also observed that there is a difference in making changes to a rule which has been forwarded for possible publication and comment. In those instances, the Advisory Committee will have another opportunity to review the rule and may decide not to pursue any amendments to the rule. Judge Stotler noted that survey forms had been provided to the Advisory Committee to solicit its views on a wide range of issues, including the relationship between the Standing Committee and Advisory Committee.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION

BY ADVISORY COMMITTEE

**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 proposed amendments to Appellate Rules 21, 25, and 26 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 2-4
2. Approve proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court in accordance with the law pp. 7-9
3. Approve proposed amendments to Civil Rules 5 and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 12-14
4. Approve the proposed amendments to Criminal Rules 16 and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court in accordance with the law pp. 17-21

The remainder of the report is for information, and the record.

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

advantages of twelve-member juries. The advisory committee noted that many courts now routinely sit juries of eight or ten or more in all but the shortest cases.

Your committee believes that public comment would be especially helpful in assessing whether the advantages of a larger jury size, including increased minority representation and possibly moderation of unreasonable damages awards, outweigh the increased costs associated with a larger sized jury.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

IV. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Federal Rules of Criminal Procedure 16 and 32 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1994. A public hearing was held in Los Angeles in January 1995.

The proposed amendments to Rule 16 (*Discovery and Inspection*) would establish parallel reciprocal disclosure provisions for the prosecution and the defense regarding the testimony of an expert witness on the defendant's mental condition. The amendments would also require the government, seven days before trial, to disclose to the defense the names of government witnesses and their statements, unless it believes in good faith that pretrial disclosure of this information might threaten the safety of a person or risk the obstruction of justice.

In such a case, the government simply would file an ex parte, unreviewable statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists.

The comments and testimony highlighted the contrast between the ease of counsel obtaining discovery in a civil case and the difficulty of defense counsel in preparing for trial in the absence of witness disclosure in a criminal case. Although many federal prosecutors already timely disclose witnesses' names and statements, many others do not. There is no national uniform policy on disclosure. The extent of disclosure ultimately depends on the policies of local U.S. attorney offices and individual assistant U.S. attorneys, which often vary from district to district and even within an office. Other commentators stressed that the plea bargaining process would be more effective and efficient if disclosure is made timely so that the defendant understands the strength of the prosecution's case.

The proposed amendments recognize clearly that some government witnesses come forward to testify at risk to their personal safety, privacy, and economic well-being. At the same time, most cases do not involve risks to witnesses. The proposed amendments are intended to create a fairer trial by reducing the practical and inequitable hardships defendants presently face in attempting to prepare for trial without adequate discovery. Unnecessary trial delay is now incurred because once a witness is called to testify at the trial, a recess must be ordered to allow the defense time to review any previous statements made by the witness in order to effectively cross-examine the witness, which only places additional burdens on all

parties, court resources, and jurors.

Many state criminal justice systems and the military already provide pretrial disclosure of witnesses, and it is presently standard operating procedure in many federal district courts. The proposed amendments are less demanding than the amendments recommended by the Judicial Conference and approved by the Supreme Court in 1974, which required disclosure of the names and addresses of all government witnesses upon request of the defendant. If the government believed that disclosure would create an undue risk of harm to the witness it could request the court for a protective order. The amendments were rejected ultimately by Congress.

The proposed amendments, as published for comment, admittedly created a conflict with the Jencks Act in so far as they would require pretrial disclosure of witnesses' statements. But they were consistent with the Act in recognizing the importance of defense pretrial discovery while permitting the government to block it when necessary. The amendments are procedural and are similar to several other previously approved amendments that require the defense and prosecution to disclose certain information before trial.

Your committee decided to eliminate the conflict with the Jencks Act by limiting the proposed amendments to the disclosure of witnesses' names only. It also revised the time provisions by providing the court with discretion to require disclosure in less than seven days before trial to accommodate cases in which the prosecution is unable itself to prepare for the trial.

The Department of Justice continues to oppose any required pretrial

disclosure of witnesses' names. The Department believes that the proposed amendments are unnecessary because most prosecutors already disclose such information before trial. It is also concerned that the proposed amendments would: (1) impose subtle but real restraints on prosecutors who would prefer not to disclose the name of a witness based on their assessment of the potential risks, but who do not want to incur disapproval of the trial judge, (2) add new safety risks to witnesses who would otherwise never be identified in cases in which a plea was entered immediately before trial, and (3) create unnecessary satellite litigation on review. The advisory committee substantially modified earlier versions of the proposed amendments to Rule 16 over the course of several past meetings to meet the Department's concerns.

As amended, your committee voted to recommend approval of the proposed amendments with the representative of the Department of Justice and one other committee member opposed.

Rule 32 (*Sentence and Judgment*) would be amended to permit a court explicitly to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in *Appendix D* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 16 and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Agenda F-18
(Appendix D)
Rules
September 1995

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report of Advisory Committee on Rules of Criminal Procedure

DATE: May 23, 1995

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

1. Action on Proposed Amendments to Rules 16(a)(1)(E) & (b)(1)(D). Disclosure of Expert Witnesses.

Minor stylistic changes were made to the proposed amendments to Rules 16(a)(1)(E) and (b)(1)(D) which address the issue of disclosure of the names and statements of expert witnesses who may be called to testify about the defendant's mental condition.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(E) and (b)(1)(D) and forward them to the Judicial Conference for approval.

2. Action on Proposed Amendments to Rule 16(a)(1)(F) and (b)(1)(D). Pretrial Disclosure of Witness Names and Statements.

As noted in the attached GAP Report, the Committee made several minor changes to the proposed amendment and the accompanying Committee Note. The Committee considered again the view that the amendments are inconsistent with the Jencks Act; it continues to believe that forwarding the proposed changes to Congress is appropriate under the Rules Enabling Act.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 16(a)(1)(F) and (b)(1)(D) and forward them to the Judicial Conference for approval.

3. Action on Proposed Amendments to Rule 32(d). Forfeiture Proceedings Before Sentencing

The Advisory Committee made a number of changes to Rule 32(d) after publication. Those changes which are discussed more fully in the attached GAP Report, do not in the Committee's view require additional publication and comment.

The Advisory Committee recommends that the Standing Committee approve the amendments to Rule 32(d) and forward them to the Judicial Conference for approval.

* * * * *

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: GAP REPORT: Explanation of Changes Made Subsequent to the
Circulation for Public Comment of Rules 16 and 32.

DATE: May 23, 1995

At its June 1994 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 32.

Both rules were published in September 1994, with a deadline of February 28, 1995 for any comments. At a hearing on January 27, 1995 representatives of the Committee heard the testimony of several witnesses regarding the amendments to Rule 16. At its meeting in Washington, D.C. on April 10, 1995, the Advisory Committee considered the written submissions of members of the public as well as the testimony of the witnesses.

Summaries of the any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(E) & (b)(1)(C). Disclosure of Expert Witnesses.

The Committee made only minor stylistic changes to the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C). Very few comments were received on these particular provisions in Rule 16.

2. Rule 16(a)(1)(F) & (b)(1)(D). Pretrial Disclosure of Witness Names and Statements

After considering the numerous written submissions and oral testimony on the proposed amendments to Rule 16(a)(1)(F) and (b)(1)(D), the Committee made several minor amendments to the Rule and the accompanying Note. The Committee changed the Rule to limit the disclosure requirements to *felony*, non-capital cases. It also clarified language in Rule 16(a)(1)(F) concerning the content of the nonreviewable statement by the attorney for the government. As rewritten, the rule explicitly recognizes that the government may decline to disclose either the name or the statement, or both, of a particular witness. Finally, the Committee made stylistic changes consistent with Mr. Garner's suggestions at the June 1994 Standing Committee meeting.

The changes to the Committee Note accompanying Rule 16 sharpen the Committee's position that the proposed amendment is consistent with other amendments to the Rules of Criminal Procedure, already approved by Congress, which technically violate the Jencks Act. Those amendments provide for some limited *pretrial* disclosure of a government witness' statement before the witness testifies on direct examination at trial, as provided in the Jencks Act.

3. Rule 32(d). Forfeiture Proceedings.

Five commentators, including the Department of Justice, which had proposed the amendment, supported the proposed amendment to Rule 32(d) which permits the trial court to enter a forfeiture order prior to sentencing. The Department of Justice's comments suggested changes which might have been considered significant enough to require republication for public comment. Ultimately, the Committee changed the rule in the following respects: (1) the amendment now provides that the procedures in Rule 32(d) may be applied where the defendant has entered a plea of guilty subjecting property to forfeiture; (2) the Committee eliminated any reference to specific timing requirements; and (3) the Committee added the last sentence which recognizes the authority of the court to include conditions in its final order which preserve the value of the property pending any appeals.

Given the relatively minor nature of these changes and the low number of public comments on the published version, the Committee believes that republication of this amendment is unnecessary.

Attachments:

Rule 16 and Committee Note; Summary of Comments and Testimony
Rule 32 and Committee Note; Summary of Comments

**ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE**

PROPOSED AMENDMENTS TO RULE 16

I. SUMMARY OF COMMENTS: Rule 16

The Committee received 23 written submissions and heard testimony from three witnesses; two of those witnesses also supplied written comments. While several were statements filed by organizations, most of those commenting were in private practice. No current federal prosecutor filed a statement. Several were members of the judiciary.

With one exception (who declined to make any comments) all those submitting comments were in favor of the general expansion of federal criminal discovery in Rule 16. Most favored the amendments as published with one or two suggested changes. Beyond that, there were various levels of support for the key features in the amendment: One specifically favored the 7-day provision; four were opposed to it as being too short. With regard to the provision for an ex parte statement by the prosecution, 8 were opposed to it and two explicitly stated that the procedure was appropriate. Three specifically stated that the concern about danger to witnesses was overstated. One commentator stated that the Jencks Act should not be a problem. Several encouraged the Committee to extend production to FBI 302's. Three were in favor of requiring production of addresses of the witnesses. Several mentioned the issue of reciprocal discovery; one was opposed to it altogether and several indicated that the defense should have the opportunity to also refuse to disclose its witnesses under a procedure similar to that available for the prosecution.

II. LIST OF COMMENTATORS: Rule 16

- CR-01 Graham C. Mullen, Federal District Judge, Charlotte, N.C., 9-19-94.
- CR-02 Robert L. Jones, III, Arkansas Bar Assoc., Fort Smith, Ark.,
10-7-94.
- CR-03 Prentice H. Marshall, Federal District Judge, Chicago, IL., 9-30-94.
- CR-04 James E. Seibert, United States Magistrate Judge, Wheeling, W.V., 11-4-
94.
- CR-05 David A. Schwartz, Esq., San Francisco, CA, 11-8-94.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

13

- CR-06 Edward F. Marek, Esq., Cleveland, OH, 11-16-94.
- CR-07 William H. Jeffress, Jr., Esq., Wash. D.C., 12-6-94.
- CR-08 Norman Sepenuk, Esq., Portland, OR, 12-16-94.
- CR-09 Michael Leonard, Alexandria, VA, 1-18-95.
- CR-10 John Witt, City of San Diego, CA., 1-6-95
- CR-11 Akron Bar Assoc. (Jane Bell), Akron, OH., 1-27-95
- CR-12 New Jersey Bar Assoc.(Raymond Noble), 2-24-95
- CR-13 Irvin B. Nathan, Esq., Wash. D.C., 2-7-94.
- CR-14 Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.
- CR-15 Paul M. Rosenberg, United States Magistrate Judge, Baltimore, MD, 2-17-95.
- CR-16 Federal Public and Community Defenders, Chicago, IL, 2-21-95.
- CR-17 Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.
- CR-18 Federal Bar Association, Philadelphia Chapter, Philadelphia, PA, 2-27-95.
- CR-19 ABA Section of Criminal Justice, Wash., D.C., 2-27-95.
- CR-20 Maryland State Bar Association, Roger W. Titus, Rockville, MD, 2-21-95.
- CR-21 Leslie R. Weatherhead, Esq., Spokane, WA, 2-28-95.
- CR-22 Section on Courts, Lawyers and Administration of Justice of D.C. Bar, Anthony C. Epstein, Wash., D.C., 2-28-95.
- CR-23 National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95.

III. LIST OF WITNESSES (Hearing in Los Angeles, Jan. 27, 1995) -- Rule 16

1. Norman Sepenuk, Esq., Attorney at Law
2. David A. Schwartz, Esq., Attorney at Law
3. Maria E. Stratton, Esq., Federal Public Defender

IV. COMMENTS: Rule 16

**Hon. Graham C. Mullen (CR-01)
Federal District Judge, Western District of North Carolina
Charlotte, N.C.
Sept. 19, 1994**

Judge Mullen believes the proposed new Rule 16 is long overdue. His only concern is that the requirement of seven days before trial for disclosure of witnesses may be too close to trial date to benefit anyone. Additionally, Judge Mullen feels that although objections will arise concerning witness safety, the committee has correctly concluded that such is confined to the minority of cases and has provided an appropriate mechanism to afford confidentiality.

**Robert L. Jones, III (CR-02)
President, Arkansas Bar Association
Fort Smith, Ark.
Oct. 7, 1994**

Mr. Jones, commenting on behalf of the Arkansas Bar Association, agrees with the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

15

**Hon. Prentice H. Marshall (CR-03)
Federal District Judge, Northern District of Illinois
Chicago, IL.
Sept. 30, 1994**

Judge Marshall urges the Committee to adopt the language of Rule 26(a)(2) of the Rules of Civil Procedure in the proposed amendment to Criminal Rule 16 relating to anticipated expert testimony. Additionally, in addressing the amendments regarding witness disclosure, he agrees with the Committee that risk to witnesses is greatly exaggerated by prosecutors, citing one minor incident in his 41 years of criminal trial experience. He concludes that knowledge of witnesses and their pretrial statements expedites cross-examination.

**Hon. James E. Seibert (CR-04)
United States Magistrate Judge, Northern District of West Virginia
Wheeling, W.V..
Nov. 4, 1994**

Judge Seibert strongly supports the proposed amendments and believes there exists an adequate safety valve in those limited cases where a witness list would not be appropriate. He notes that for the past four years he has required witness lists seven days prior to trial and that such has come to be accepted by the practicing U.S. Attorneys and defense bar (an initial scheduling order containing the requirements for witness lists is enclosed). He comments that a witness list allows the defense some reasonable assistance in trial preparation and that until a defendant has knowledge of the witnesses against him, it is difficult to properly decide whether to plead or go to trial.

**David A. Schwartz (CR-05)
Private Practice
San Francisco, CA
Nov. 8, 1994**

Mr. Schwartz supports the proposed amendment dealing with witness statements and names and suggests several changes. First, in support of the proposed amendments, he suggests that more liberal pretrial disclosure of witness information will advance the search for truth and cause of justice. Along these lines, he adds that the present practice of revealing witness information under the *Jencks* standards is unconscionable. Second, in support of the Rule 16 proposal, Mr. Schwartz explains that such alterations to the Rule will aid in negotiating plea agreements. Third, in support of the proposed amendments, Mr.

Schwartz suggests that such will cause the entire system to run more efficiently and force prosecutors to confront weaknesses in their case. Fourth, in support, he explains that forcing the government to reveal more information is consistent with due process and fundamental fairness. Finally, in support of the amendments, Mr. Schwartz comments that the arguments made by the Department of Justice regarding witness safety are inflated. He suggest several changes to the proposed amendments. First, he suggests that the seven day rule may be of little use to the defendant and that such should be expanded to thirty or sixty days prior to trial. Second, he suggests that prosecutors should not be given unreviewable *carte blanche* to deny discovery by claiming witness intimidation. He favors judicial intervention, through hearing, to determine the validity of the claim of witness intimidation. In the alternative, absent *pro se* representation, he suggests that undisclosed information be made available to defense counsel as an officer of the court under the stipulation that the defendant will not be privy to this information absent further court order.

**Edward F. Marek (CR-06)
Private Practice
Cleveland, OH
Nov. 16, 1994**

Mr. Marek (a former member of the Advisory Committee) supports the proposed amendments to Rule 16. He argues that such amendments should not be defeated because they may conflict with the Jencks Act. Mr. Marek explains that one can point to a number of amendments enacted through the rules enactment process which conflict with the Jencks Act but which Congress has seen fit to approve. For example, Rules 412 and 413 of the Federal Rules of Evidence as contained in the Violent Crime Control and Law Enforcement Act of 1994 represent Congress' belief that in sexual assault and child molestation cases government witness disclosure prior to trial is necessary. Mr. Marek suggests that these new evidence rules clearly show that Congress believes that the Jencks Act should not stand as a barrier to more enlightened discovery in Federal Courts. Mr. Marek points out that proposed amendments to Rule 16 are modest compared to Federal Rules of Evidence 412 and 413. Finally, he adds that the proposed Advisory Committee Note is important in that it provides that the prosecutor's *ex parte* statement must contain facts concerning witness safety or evidence which relate to the individual case. This language, Mr. Marek suggests, properly represents the Committee's intention that any argument, for example, that danger to safety of witnesses exists in all drug cases, would not be sufficient showing to block production of statements.

Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995

17

William H. Jeffress, Jr. (CR-07)
Private Practice
Washington, D.C.
Dec. 6, 1994

Although Mr. Jeffress is Chair of the ABA's Criminal Justice Standards Committee, the views stated in his comments are personal. Mr. Jeffress supports the proposed amendments to Rule 16. Mr. Jeffress does believe three aspects of the amendments could be and should be improved. First, he believes that the Committee's proposed amendment to Rule 16 does not require the prosecution to disclose witnesses it may call in rebuttal at trial, yet requires the defense to disclose all witnesses even if solely to be used to impeach. To Mr. Jeffress this seems an inappropriate balance of obligations. Second, Mr. Jeffress believes the Committee's accommodation of the witness safety concern goes so far that it undermines the utility and fairness of the Rule. Third, he argues that any rule giving the government the absolute right to refuse disclosure, without incurring significant adverse consequences for so refusing, is unsound. He suggests that the prosecutor's ability to refuse pretrial disclosure of names and statements of witnesses should depend on judicial approval, based upon *ex parte* submission, in accordance with Rule 16(d)(1). Mr. Jeffress disagrees with the Committee Note suggesting a hearing on this matter requires vast judicial resources. For the Committee's information he encloses a copy of the Third Edition Discovery Standards approved by the ABA of which he makes reference to in his comments.

Norman Sepenuk (CR-08)
Private Practice
Portland, OR
Dec. 16, 1994

Mr. Sepenuk favors the proposed amendments to Rule 16. He comments that complete disclosure of the government's case prior to trial is the best tool to facilitation of case disposition and to loosening up the criminal trial dockets. Mr. Sepenuk explains that such facilitation will be in the form of plea dispositions due to knowledge of the government case and the reaching of stipulations in advance of trial. He believes that the proposed Rule 16(a)(1)(F) should be amended to provide for pretrial disclosure of names and statements no later than ten days after arraignment. He also suggests amendment to Rule 26.2(f) to expand the definition of a "statement" required to be disclosed in advance of trial. Additionally, he believes that FBI memoranda of interview and similar interview statements should be explicitly made available under the Rules, and federal agents' reports should be subject to discovery to the extent they present a factual recitation of events, much like that of expert reports, which under the rules need not be produced.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

18

**Michael Leonard (CR-09)
Military Counsel
Alexandria, VA
Jan. 18, 1995**

Mr. Leonard offers the views of someone who has been associated with the military criminal justice system for seven years and provides an overview of the discovery procedures in the military. In his experience, disclosure of the prosecution's witnesses takes place well in advance of trial, including any copies of witnesses' statements. The rules, he notes, are intended to reduce gamesmanship. Those interests, he asserts, are the same in federal practice. If the Committee is looking for a middle ground, he states, a review of the discovery rules followed by "other" federal prosecutors on a daily basis in military criminal practice may assist the Committee.

**John Witt (CR-10)
City of San Diego
San Diego, CA
Jan 6, 1995**

Mr. Witt thanks the Committee for an opportunity to provide input on the proposed amendments and notes that his counsel have informed him that nothing the amendments will have enough impact to justify any comments.

**Ms Jane Bell (CR-11)
Akron Bar Assoc.
Akron, Ohio
Jan. 27, 1995**

The Akron Bar Assoc. supports the proposed amendments to Rule 16. But it objects to the fact that the government may file an "unreviewable" statement for not providing the information. The Bar Assoc. suggests that provision be made for ex parte review of the government's reasons. No hearing would be necessary on that statement. The Assoc. also recommends substitute language for accomplishing that proposal. It also supports the provisions for discovery concerning experts.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

19

**The New Jersey Bar Assoc. (CR-12)
Raymond Noble
New Brunswick, NJ
Feb. 24, 1995**

While the New Jersey Bar Assoc. supports the amendments to Rule 16, it recommends that the word "unreviewable" be removed from the amendment.

**Mr. Irvin B. Nathan (CR-13)
Private Practice
Washington, D.C.
Feb. 7, 1995**

Mr. Nathan (former Associate Deputy Attorney General who appeared before the Standing Committee on this issue at its January 1994 meeting) supports the proposed amendments to Rule 16 and requests incorporation of his article published in the New York Times endorsing the Committee's proposal. He points to state rules of discovery such as in California as examples of the growing sentiment of legislative bodies that fairness, efficiency and elimination of trial by ambush are better served by broader criminal discovery concerning witnesses. Mr. Nathan urges that the Justice Department withdraw its opposition to the proposed amendments.

**Mr. Patrick D. Otto (CR-14)
Mohave Community College
Kingman, AZ
Feb. 15, 1995**

Mr. Otto agrees with the proposed amendments to Rule 16 concerning witness names and statements. Mr. Otto further concurs on letting the trial court rule on the amount of defense discovery and the proposals regarding witness safety and risk of obstruction of justice.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

20

**Judge Paul M. Rosenberg (CR-15)
United States Magistrate Judge
Baltimore, MD
Feb. 17, 1995**

Judge Rosenberg suggests that the proposed amendments concerning witness names and statements be modified to exclude misdemeanor and petty offenses. He explains that the requirement of supplying witness information seven days in advance of trial would be unduly burdensome in these cases especially in light of the fact that many U.S. Magistrate Judges handle large misdemeanor and petty offense dockets.

**Federal Public and Community Defenders (CR-16)
Carol A. Brook and Lee T. Lawless
Chicago, IL
Feb. 21, 1995**

The comments submitted are an expanded version of those provided the Committee prior to testifying in Los Angeles. The comments fall into two main categories. First, support is given to the proposed Rule 16 amendments as much needed and an improvement in the administration of justice. Second, comments are submitted on specific parts of the proposed amendments that the Federal Defenders feel will lead to unfair results not intended by the Committee. It is believed that disclosure of witness names and statements will enhance the ability to seek the truth, will provide information necessary to the decision of pleading guilty or going to trial, will contribute to the exercise of confrontation and compulsory process rights, and will save time and money. It is suggested that witness intimidation and perjury are exceptions to the rule and that ex parte, unreviewable proceedings are contrary to the adversary system of justice. Additionally, concern is expressed regarding the lack of reciprocity in the proposed amendment to Rule 16(b)(1)(D) which states that the court may limit the government's right to obtain disclosure if it has filed an ex parte statement. Also, concern is expressed over the requirement of defense witness disclosure prior to trial as such witnesses are not always known beforehand. Finally, it is suggested that witness addresses be disclosed.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

21

**Ms. Lee Ann Huntington (CR-17)
Chair, Committee on Federal Courts, State Bar of California
San Francisco, CA
Feb. 24, 1995**

The Committee on Federal Courts of the State Bar of California supports the proposed amendments to Rule 16 in their aim to make reciprocal prosecution and defense discovery obligations. The Committee on Federal Courts suggests one further amendment to Rule 16. It is proposed that defendants be afforded the reciprocal right to refuse disclosure of witnesses who fear testifying and their statements (i.e., because of community harassment or pressure from victims' families) and that they be allowed to file a similar nonreviewable, ex parte statement under seal.

**Criminal Law Committee, Federal Bar Association (CR-18)
James M. Becker, James A. Backstrom and Anna M. Durbin
Philadelphia Chapter
Philadelphia, PA
Feb. 27, 1995**

The Committee supports reform of Rule 16, but suggests modification to what it deems to be two unwise elements of the proposed Rule change. First, the Committee suggests that the unreviewable nature of the government's decision to withhold disclosure should be made reviewable. Second, the Committee believes there should be no reciprocal duty on the defense to disclose any witness or statements before trial because the prosecution and the defense are not in like positions vis-a-vis the burden of proof or resources for investigation. The Committee feels there is no reason to obligate defendants beyond the present Rules.

**ABA Criminal Justice Section (CR-19)
Arthur L. Burnett, Sr.
Washington, D.C.
Feb. 27, 1995**

Judge Burnett, writing on behalf of the American Bar Association, expresses the Association's strong support for the proposed amendments to Rule 16. Although, in the Association's view, the proposed amendments to Rule 16 do not go as far as the ABA approved Third Edition Criminal Discovery Standards, the Association believes the changes are a step forward in more open discovery. The Association, in addressing disclosure of defense impeachment witnesses and statements, does suggest that the Committee

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

22

commentary recognize that reciprocal obligations of disclosure must be consistent with the constitutional rights of the defendant and the differing burdens on each side in criminal cases. The Association feels that the proposed changes would not substantially conflict with the Jencks Act and that where conflict may arise, Congressional approval would act as a partial amendment of the Act.

**Criminal Law and Practice Section (CR-20)
Maryland State Bar Association
Mr. Roger Titus
Rockville, MD
Feb. 21, 1995**

The Maryland State Bar Association endorses the adoption of the proposed amendments to Rule 16. The Association does express concern over the government's veto power of defense requests for pre-trial witnesses and statement disclosure through use of an unreviewable, ex parte statement under seal of the court. Additionally, the Association believes that the language of Rule 16(b)(1)(D) should not be discretionary. Where the government has avoided discovery by resort to the ex parte statement, it should thereby lose its right of reciprocal discovery.

**Leslie R. Weatherhead (CR-21)
Witherspoon, Kelley, Davenport and Toole
Spokane, WA
Feb. 28, 1995**

Ms. Weatherhead applauds the proposed amendments to Rule 16 as a small step in the right direction. Ms. Weatherhead strongly opposes the provision allowing for government refusal to disclose certain witnesses and statements through an unreviewable, ex parte statement.

**Section on Courts, Lawyers and the Administration of Justice (CR-22)
District of Columbia Bar
Anthony C. Epstein, Cochair
Washington, D.C.
Feb. 28, 1995**

The Section agrees with the basic premise of the proposed amendments to Rule 16. In general, these amendments make trials fairer and more efficient and facilitate appropriate

resolutions before trial. Specifically, the Section agrees with the Committee's decision to recommend the unreviewable, ex parte statement method of government non-disclosure. The Section believes it is appropriate to try this approach and to determine how it works in practice. Additionally, the Section seeks clarification on the Committee's "good faith" requirement for refusal to disclose and suggests that the defense be required to provide reciprocal discovery no more than three days prior to trial.

**National Association of Criminal Defense Lawyers (CR-23)
Gerald H. Goldstein, William J. Genego & Peter Goldberger
Washington, D.C.
Feb. 28, 1995**

Citing its long standing support of extensive broadening of the scope of criminal discovery, the NACDL supports what it terms the Committee's modest step in this direction. The NACDL suggests several changes to expand the Committee's movement towards more liberal discover. First, the NACDL believes that addresses of witnesses should be included in the disclosure. Second, the NACDL suggests that the seven day requirement does not afford enough time and that the three day rule for capital defendants is inadequate. Third, the NACDL believes that the definition of statement in Rule 26.1(f) must be amended to include such reports as DEA 6's and FBI 302's. Such amendment would also require modification to Rule 16(a)(2). Fourth, The NACDL expresses concern over the unreviewable, ex parte statement veto power of the government. Fifth, the NACDL suggests that no reciprocal disclosure requirement should be placed in the defendant and that if any duty is to exist that the time limit should be no earlier than when the government informs the defense that it is calling its final witness. In any event, the NACDL feels that the wording of Rule 16(b)(1)(D) should be amended to alleviate the discretionary language and should impose no duty on defense disclosure where the government withholds.

V. TESTIMONY

Three witnesses testified at a public hearing on the proposed amendments to Rule 16 at the Federal Courthouse in Los Angeles, California on January 27, 1995. Present were Hon. D. Lowell Jensen, Chair, Mr. Henry Martin, member, Professor Dave Schlueter, Reporter, and Mr. John Rabiej, Administrative Office.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

24

**Norman Sepenuk, Esq.
Attorney at Law
Portland, Oregon**

Mr Sepenuk (who also submitted written comments which are summarized supra) indicated that as a former federal prosecutor he believed in an open file system, which in his view, expedited plea bargains and stipulations and provided for cleaner and crisper trials.. He stated that the 7-day provision is too short and proposes that the Committee change the amendment to provide for disclosure 10 days before trial. He pointed out that the prosecutors should be pushing for full and early disclosure to encourage plea bargaining. In return the defense should be required to turn over its names well before trial. He added that the definition of statement should include a specific reference to "302's" and require production of the witness's address. He would also require the government to show good faith for its belief that disclosure would harm an individual. Mr. Sepenuk also stated that he did not believe that it would be necessary to differentiate between types of cases vis a vis threats to witnesses; he believes that the prosecution and defense should be able to work it out. He noted that he had personal experience with delays resulting from failure of the government to make timely disclosure of a witness.

**Mr. David A. Schwartz, Esq.
Attorney at Law
San Francisco, California**

Mr. Schwartz (who had submitted written comments summarized, supra) testified that in his opinion the amendment does not coddle defendants. Nor does it have any effect on victims' rights. In his experience he often received witness statements the day before they testified. He is also aware of office policy to turn witness statements over on the Friday before the trial begins. In his experience, the public is aghast that federal criminal defendants do not receive more discovery. While he recognizes that there is a problem with witness intimidation and harassment, he has heard from friends who are prosecutors that they do not want to turn over too much information which may give the defense something to work with in the case. He does not believe that the Jencks act is reasonable and is unsure whether seven days is sufficient time. He noted that in his experience with white collar crime cases that the defendants often knew who the witnesses were but did not know what they would say. Mr. Schwartz also testified that he had some witnesses tell him that government investigators had discouraged them from talking to the defense. He stated that he was opposed to the provision for ex parte reasons being filed by the prosecutor; he stated that in California, defense counsel are precluded from disclosing the names and addresses of the government witnesses to the defendant. He proposes some sort of evidentiary hearing to determine the propriety of disclosure -- or at least to have the opportunity to refute the

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

25

government's reasons for nondisclosure. In his experience, he did know of cases which had been postponed because of delays in disclosing witnesses to the defense. It was also his experience in various state courts that the defense was provided an open file and that that often induced plea bargaining at an early stage. He does not object to reciprocal discovery although he does believe that there may be self-incrimination problems. And while he could live with an amendment which deleted reference to witness statements, he would want as much as he could get in discovery.

**Ms. Maria Elena Stratton, Esq.
Federal Public Defender
Los Angeles, California**

Ms. Statton testified that she works in a district with the second largest US Attorney's Office -- 170 assistants in the criminal division -- and that there is no uniform discovery policy. She noted that there are three areas of problems: First, the rogue agents and rogue prosecutors who operate in bad faith. Because these seem to be rare the amendment should not be geared to those situations. Second, there are inexperienced investigators and prosecutors who make uninformed decisions. Third, there are situations where the cases are weak and the prosecutors do not want to turn over information helpful to the defense. In her view, a real problem with the amendment is the lack of review of the prosecutor's ex parte statements. She noted that similar problems arise with regard to disclosing informants and that that procedure should work. She also suggested that the defense should also be permitted to decline to produce its witness' names. Just as there are dangers that the defendant may harass the government witness, she has experience the reverse situation; agents were harassing defense witnesses. Ms Stratton noted that there may be a problem with a note on page 124 of the booklet which indicates that the amendment does not address discovery of memoranda and other documents. She also expresses concern about the seven day requirement; she would move up the time to 14 or 21 days. She testified that she has had experience with continuances being granted because of last minute discovery. Ms. Stratton also stated that she has heard US attorneys candidly admit that the amendment is a good amendment; in that regard she indicated that she did not believe that the folks in Washington were really aware of what was happening in the field. With regard to the Jencks Act issue, she noted that in the Los Angeles federal courthouse there were no judges who enforces that Act. At arraignments, the judges indicate to the prosecutors indirectly that they would like to see the information disclosed. She also expressed some concern about the fact that the judge who sees the ex parte statement by the prosecutor may also sentence the defendant -- and the defense may not know what was in that statement which might otherwise affect the sentence.

**Advisory Committee on Criminal Rules
GAP REPORT
Rules 16 and 32
May 1995**

30

**Mr. Roger Pauley
Department of Justice
Washington, D.C.
March 3, 1995**

Finally, Mr. Roger Pauley has indicated that the Justice Department has modified its proposed changes to Rule 32(d) and wishes to have that change considered as a comment. The submitted revision would make three changes to the rule. The first is the elimination of the 8-day time limit in the published version. The Department believes that there may well be cases where courts will have made up their minds that they will not grant new trials, etc. and they should be permitted to begin the proceedings as soon as possible after the verdict. Second, the new draft eliminates the absolute requirement for notice and a hearing as to the timing and form of the order of forfeiture. While a court would clearly have the discretion to hold a hearing, the very narrowness of the contemplated hearing that is contemplated indicates that a hearing is not necessary in every case and will normally serve no purpose. Third, the newer version seems to place greater emphasis on the fact that the court should enter the order. The Department, Mr. Pauley notes, believes that the newer version is simplified.

19 must describe the witnesses' opinions, the bases
20 and the reasons for those opinions therefor, and the
21 witnesses' qualifications.

22 (F) NAMES OF WITNESSES. At the
23 defendant's request in a noncapital felony case, the
24 government shall, no later than seven days before
25 trial unless the court orders a time closer to trial,
26 disclose to the defendant the names of the
27 witnesses that the government intends to call
28 during its case-in-chief. But disclosure of that
29 information is not required if the attorney for the
30 government believes in good faith that pretrial
31 disclosure of this information might threaten the
32 safety of any person or might lead to an
33 obstruction of justice. If the attorney for the
34 government submits to the court, ex parte and
35 under seal, a written statement indicating why the
36 government believes in good faith that the name of
37 a witness cannot be disclosed, then the witness's

57 (C) EXPERT WITNESSES. Under the following
 58 circumstances, the defendant shall, at the government's
 59 request, disclose to the government a written summary
 60 of testimony that the defendant intends to use under
 61 Rules 702, 703, and 705 of the Federal Rules of
 62 Evidence as evidence at trial: (i) if If the defendant
 63 requests disclosure under subdivision (a)(1)(E) of this
 64 rule and the government complies, or (ii) if the
 65 defendant has given notice under Rule 12.2(b) of an
 66 intent to present expert testimony on the defendant's
 67 mental condition. the defendant, at the government's
 68 request, must disclose to the government a written
 69 summary of testimony the defendant intends to use
 70 under Rules 702, 703 and 705 of the Federal Rules of
 71 Evidence as evidence at trial. This summary must shall
 72 describe the witnesses' opinions of the witnesses, the
 73 bases and reasons for those opinions therefor, and the
 74 witnesses' qualifications.

75 (D) NAMES OF WITNESSES. If the defendant
 76 requests disclosure under subdivision (a)(1)(F) of this

5 FEDERAL RULES OF CRIMINAL PROCEDURE

77 rule, and the government complies, the defendant shall,
78 at the government's request, disclose to the
79 government before trial the names of witnesses that the
80 defense intends to call during its case-in-chief. The
81 court may limit the government's right to obtain
82 disclosure from the defendant if the government has
83 filed an ex parte statement under subdivision (a)(1)(F).

84 * * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment provides for pretrial disclosure of witness names.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several

amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding pretrial disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. See D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10-4(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are much greater than that in the federal system. See generally Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices). Moreover, the vast majority of cases involving charges of violence against persons are tried in State courts.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the following three assumptions. First, the government will act in good faith, and there

will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why this information cannot be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital felony cases. Currently, in capital cases the government is required to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases. The rule also recognizes, however, that the trial court may permit the government to disclose the names of its witnesses at a time closer to trial.

The amendment provides that the government's *ex parte* submission of reasons for not disclosing the requested information

will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. Although it is true that under the rule the government could refuse to disclose a witness' name even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders or sanctions from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to

respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

1 **Rule 32. Sentence and Judgment**

2 (d) JUDGMENT.

3 * * * * *

4 (2) *Criminal Forfeiture.* ~~When a verdict contains a~~
5 ~~finding of criminal forfeiture, the judgment must authorize~~
6 ~~the Attorney General to seize the interest or property~~
7 ~~subject to forfeiture on terms that the court considers~~
8 ~~proper. If a verdict contains a finding that property is~~
9 ~~subject to a criminal forfeiture, or if a defendant enters a~~
10 ~~guilty plea subjecting property to such forfeiture, the court~~
11 ~~may enter a preliminary order of forfeiture after providing~~
12 ~~notice to the defendant and a reasonable opportunity to be~~

PROPOSED RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

At its meeting on July 5-7, 1995, the Committee on Rules of Practice and Procedure (Standing Committee) reviewed the proposed amendments submitted by the five advisory committees, and with a few exceptions voted unanimously to recommend their adoption. A summary of the proposals generating substantial controversy is set forth below.

I. Federal Rules of Criminal Procedure

The proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure (*Discovery and Inspection*) generated substantial controversy.

The proposed amendments, as revised, would require the government, seven days before trial (unless the court orders a shorter period), to disclose to the defense the names of the government's witnesses, unless it believes in good faith that pretrial disclosure of this information might threaten the safety of a person or risk obstruction of justice. In such a case, the government simply would file a nonreviewable, *ex parte* statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendments would require reciprocal pretrial disclosure by the defense to the government.

The comments and testimony highlighted the contrast between the ease of counsel obtaining discovery in a civil case and the difficulty of defense counsel in preparing for trial in the absence of witness disclosure in a criminal case. Although many prosecutors already disclose witnesses' names and statements, many others do not. There is no national uniform policy on disclosure. The extent of disclosure ultimately depends on the policies of local U.S. attorney offices and individual assistant U.S. attorneys, which vary from district to district and even within an office. Other commentators stressed that the plea bargaining process would be more efficient and effective if disclosure were made before trial so that the defendant understands the strength of the prosecution's case.

The proposed amendments clearly recognize that government witnesses come forward to testify at risk to their personal safety, privacy, and economic well-being. But at the same time, most cases in federal court do not involve risks to witnesses.

The proposed amendments are intended to create a fairer trial by reducing the present practical and inequitable hardships defendants face in attempting to prepare for trial without adequate discovery. They are also intended to eliminate unnecessary trial delay and expense - which is now incurred because once a witness is called to testify at the trial a recess must be ordered to allow the defense time to review any previous statements made by the witness in order to effectively cross-examine the witness. The delay only places additional burdens on all parties, court resources, and jurors.

Many state criminal justice systems and the military already provide pretrial disclosure of witnesses' names and statements, and it is presently standard operating procedures in many federal district courts. Moreover, the proposed amendments are less demanding than the amendments prescribed by the Supreme Court in 1974, which required disclosure of the names and addresses of all government witnesses upon request of the defendant. If the government believed that disclosure would create an undue risk of harm to the witness it could request the court for a protective order. The amendments were ultimately rejected by the Congress.

The published version of the proposed amendments had also required pretrial disclosure of witnesses' statements, which admittedly created a conflict with the *Jencks Act*. The advisory committee noted, however, that the amendments were similar to several other previously approved amendments that require the defense and prosecution to disclose certain information before trial. The advisory committee had already substantially modified earlier versions of the proposed amendment to Rule 16 over the course of several past meetings to meet other concerns expressed by the Department of Justice. The Department opposed publication of those proposed amendments, as drafted, for public comment.

The Standing Committee decided to eliminate the conflict with the *Jencks Act* by limiting the scope of disclosure under the proposed amendments to witnesses' names. In addition, the Committee approved the revision of the published version so as to limit the disclosure to felony, noncapital cases.

The Standing Committee voted to send the proposed amendments to the Judicial Conference. The Department of Justice and one other member of the committee voted to oppose it. Although the report of the committee to the Judicial Conference accurately summarizes the Department's position, for the sake of completeness, a copy of a letter from the Department is attached setting forth their opposition.

II. Federal Rules of Appellate Procedure

A. Proposed Amendments to Rule 21

The proposed amendments to Rule 21 (*Writs of Mandamus*) of the Federal Rules

of Appellate Procedure generated substantial controversy. The primary issue was whether a trial judge should be named as a respondent in every petition for a writ of mandamus. In most instances, a petition for the writ represents an adversary proceeding only between the parties. In a small number of cases, however, a trial judge may have a personal interest in the outcome of the matter or be privy to certain facts known only to the trial judge.

Two versions of the proposed amendments to Rule 21 were published for public comment. Under an earlier version, a trial judge would be entitled to respond to the petition. The proposal was strongly opposed in the comments, primarily because the trial judge's neutrality and objectivity might be challenged if the judge later continued to adjudicate the same case. In addition, naming the judge as a respondent mischaracterized the action in the majority of petitions.

Under the later version, Rule 21 would be amended so that the trial judge is not named in the petition for a writ of mandamus and is not treated as a respondent. The trial judge would be permitted to appear and oppose issuance of the writ only if the appellate court ordered the judge to do so.

After the second comment period, the advisory committee made several changes to the proposed amendments, including requiring the party petitioning for mandamus to file a copy of the petition with the clerk of the trial court. This change was made because the advisory committee wanted to accommodate the trial judge who wished to respond to the petition in the small number of cases where it seemed necessary. A new subdivision was also added to require the circuit clerk to notify the clerk of the trial court of the disposition of the petition.

To ensure that the trial judge is informed of the pending petition for the writ of mandamus the amendments were revised later by the Standing Committee to require that a copy of the petition be sent directly to the trial judge. Likewise, the circuit clerk must notify the trial judge of the disposition of the petition. The proposed amendments were also changed to state explicitly that the trial judge may request permission to respond to the petition. The trial judge must still be invited or ordered to participate by the appellate court.

One committee member opposed the proposed amendments and believed that the trial judge should be entitled to respond to the petition. This right would be important in situations where both parties file a joint petition and oppose the actions of the trial judge (e.g. setting time limits for trial). If the trial judge does not respond, the petition could go uncontested.

The committee believed, however, that an appellate court would recognize that in the few cases where it was necessary for the trial judge to respond, the appellate

court would invite the trial judge to do so. Moreover, the changes made by the Standing Committee requiring direct notice to the trial judge of the petition and providing an opportunity to request permission to respond to it should go far in allaying concerns that facts known only to the trial judge would remain unknown.

The Standing Committee voted 11-1 to send the proposed amendments to the Judicial Conference.

B. Style Project

In March 1992, the Standing Committee established a Style Subcommittee to review all the Federal Rules of Practice and Procedure for consistency and clarity. Over the years, the Federal Rules of Practice and Procedure have been revised periodically by various drafters using different style conventions and different words intended to mean the same thing. As a result, there are many individual rules that could be significantly improved.

As part of the style undertaking, the Standing Committee appointed a consultant who prepared specific guidelines for good drafting. The guidelines rely on modern drafting principles and word usages. The advisory committees have used the drafting guidelines in recommending proposed amendments to individual rules, while at the same time undertaking separate projects to restylyze each complete set of rules.

Under the guidelines, the word "must" is preferable to the word "shall," because of the multiple meanings associated with "shall." Accordingly, the word "must" was used in the proposed amendments to the Appellate Rules, which were transmitted to the Supreme Court in April 1995. The Court eliminated the use of "must" and reinstated "shall," noting "that terminology changes in the Federal Rules [should] be implemented in a thoroughgoing, rather than a piecemeal, way." In accordance with the Court's action, all references to "must" have been changed to "shall" in the proposed amendments to the Appellate Rules now submitted for approval to the Judicial Conference.

The Advisory Committee on Appellate Rules is planning to complete its comprehensive restylyzing of the Appellate Rules at its Fall 1995 meeting and hopes to transmit the revised rules to the Standing Committee at its January 1996 meeting. The other advisory committees are in various stages of completing their respective restylyzing.



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

July 17, 1995

The Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, CA 92701

re: Proposed Amendments to Rule 16

Dear Judge Stotler:

As a member of the Judicial Conference's Committee on Rules of Practice and Procedure, I am writing to present the views of the Department of Justice concerning the amendments to Rule 16 of the Federal Rules of Criminal Procedure that have been forwarded to the Judicial Conference for approval. As you know, with one exception,¹ the Department strongly opposes the proposed amendments.

The Department's principal concerns fall into three broad categories: First, we believe the proposed amendments will interfere with our law enforcement responsibilities. Second, we believe they will lead to an increase in collateral litigation and will otherwise delay trials. Finally, we believe these amendments are unnecessary, insofar as there is no systemic problem with criminal discovery in the federal courts.

First, the Department believes these amendments will undermine its law enforcement mission and frustrate its ability to protect the interests of witnesses and victims of crime.

• If we could know with certainty whenever a witness' safety is likely to be threatened or that an obstruction of justice will occur, we would have greater confidence in the procedures provided for in the proposed amendment. But prosecutors are fallible, and we do not always know or even have what could be called a "good faith" belief that the disclosure might threaten someone's safety or lead to an obstruction of justice sufficient to justify the ex parte

¹The Department supports the amendments to Rule 16(a)(1)(E) and 16(b)(1)(C) governing the disclosure of a written summary of expert testimony on the issue of the defendant's mental condition.

filing. The costs to witnesses and to victims if we misapprehend the nature of the threat are simply too high.²

- In addition, witness names will be disclosed needlessly. The vast majority of federal criminal defendants plead guilty, and many of them do so within a week of the scheduled trial date. The proposal's requirement that witness names be provided no later than 7 days before trial (unless a court orders a shorter period) will mean that many witnesses will be exposed even though they will never be called to testify, yet may be subjected to a range of repercussions that are wholly unjustified, reducing the likelihood of cooperation.

- Finally, the exceptions for withholding witness names are too narrow to capture many of the legitimate concerns of reluctant witnesses. Witnesses are often unwilling to cooperate with the government for reasons that fall short of physical safety concerns. The proposal will, we believe, lead to a greater reluctance on the part of many witnesses to cooperate with the government, with significant effect on the Department's law enforcement efforts.

Second, we believe these amendments will increase collateral litigation. One of the avowed purposes of the proposed amendments is to expedite trials by avoiding the recesses that are occasionally necessary to provide defense counsel with an opportunity to prepare for cross-examination. But these amendments will likely slow trials down. Although the rule provides that the prosecutor's ex parte filing is not reviewable, disputes will inevitably arise concerning the nature of these filings, and courts will have to devote resources to resolving them. For example, because prosecutors often learn of a witness' identity within 7 days of trial, they will not be able to submit their filing as the rule requires. Even though there may be a valid explanation for the delay, courts will be forced to resolve claims that prosecutors deliberately avoided the terms of the rule. Every occasion could give rise to such a challenge by defendants seeking to keep a particular witness from testifying.

² Furthermore, although under the proposed amendment the ex parte statement will not be reviewable, and therefore district judges may not properly second-guess the prosecutor's determinations, the Department is concerned that some judges will conclude that -- if the requirement of a statement is imposed for a reason -- it is their responsibility to act on it; prosecutors may be urged to reveal names that ought to be protected.

The Honorable Alicemarie H. Stotler
Page 3

Third, as we have previously pointed out, there is no systemic problem with criminal discovery in federal court. All of our surveys and discussions with U.S. Attorneys' Offices throughout the country reveal that the general practice in most districts is to disclose witness names in advance of trial. We also do not resist disclosure in advance of that required by the Jencks Act, unless there is reason to do so in a particular case. While there may be particular prosecutors who, without justification, withhold all discovery until the last possible moment, everyone agrees that these are exceptions to the general rule. As we have said to the Advisory Committee and to the Standing Committee, we are committed to addressing any problems in particular districts, and both the Attorney General and I have asked judges around the country to contact us or their U.S. Attorneys when discovery problems arise. Rather than proceed with a general rule change, the Department continues to believe that the most effective means of resolving the few problems that may exist is to address those problems directly. We are committed to working with the judiciary toward that end.

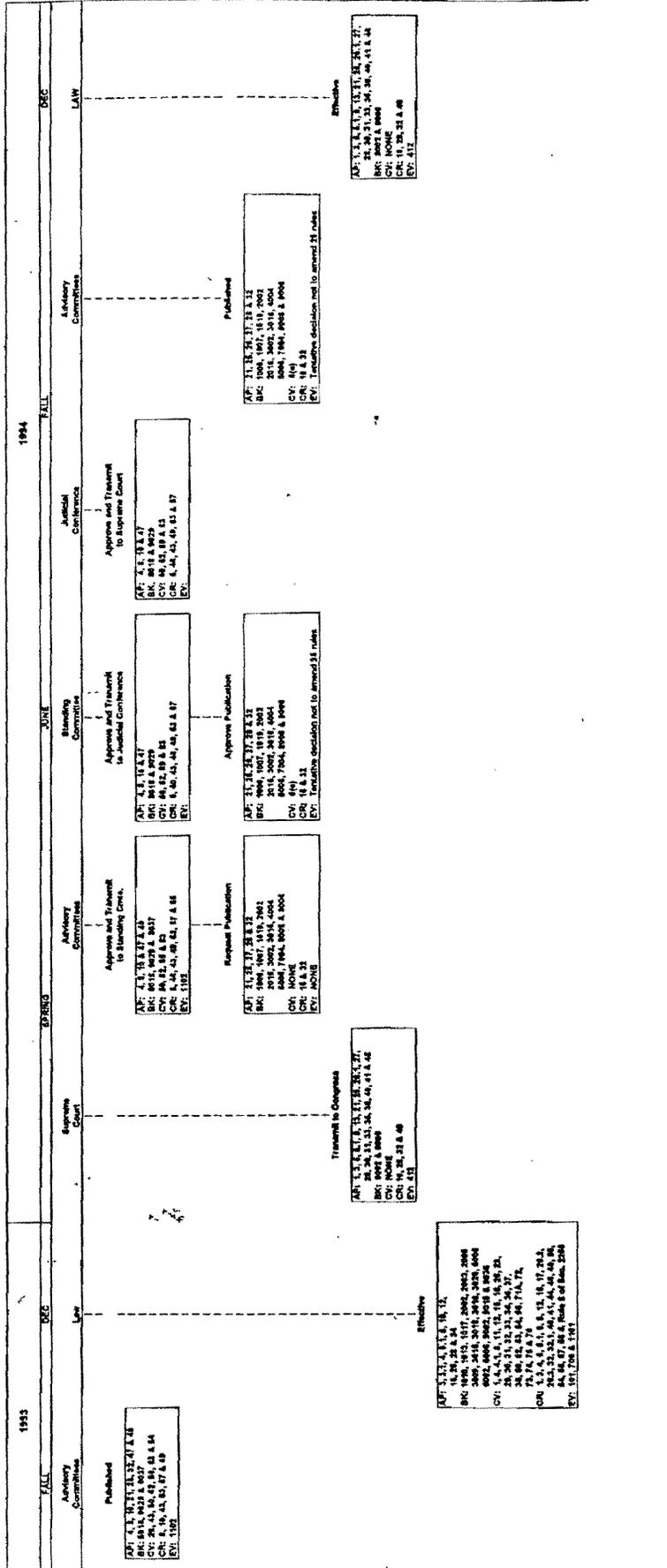
For the foregoing reasons, I will urge the Judicial Conference to oppose the Standing Committee's recommendation to approve the proposed amendments.

Sincerely,



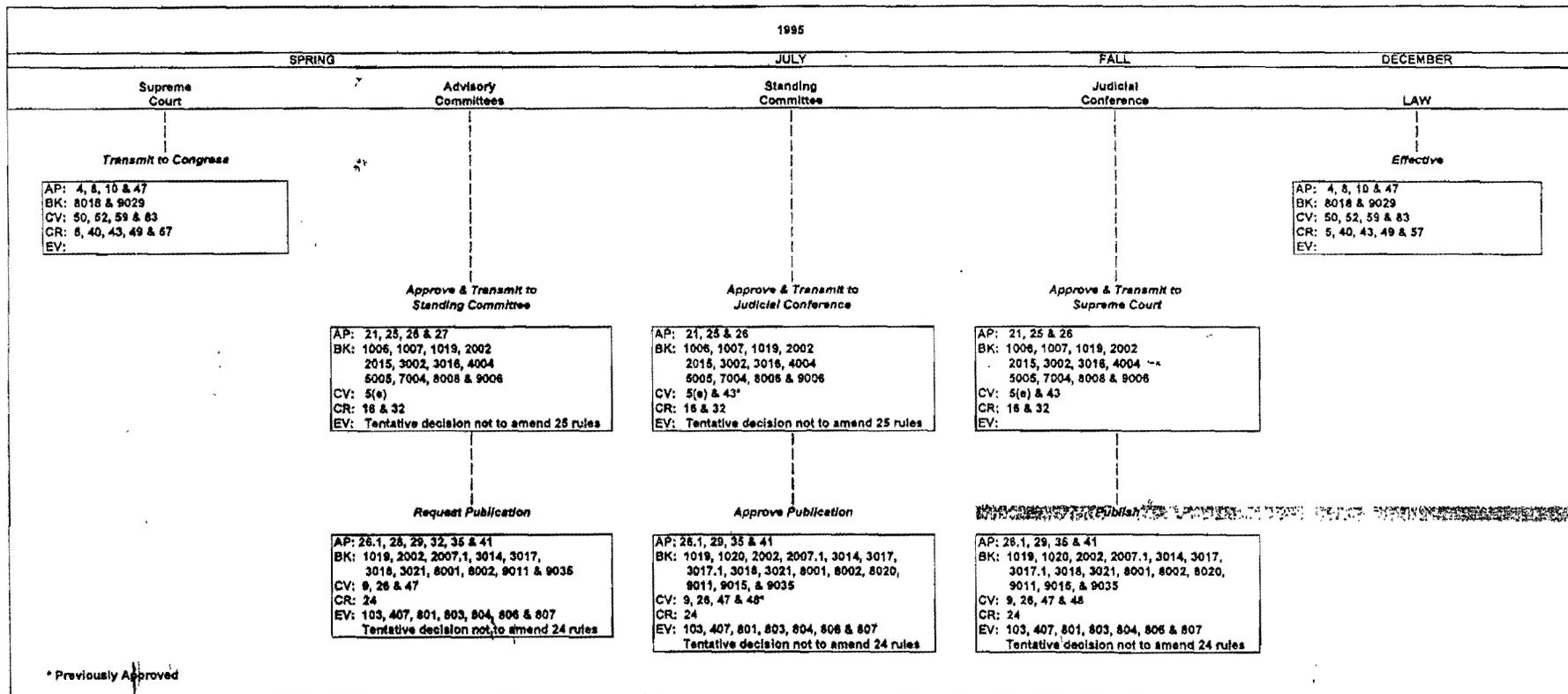
Jamie S. Gorelick
Deputy Attorney General

PROMULGATION OF RULES AMENDMENTS



Agenda F-18
(Appendix F)
Rules
September 1995

PROMULGATION OF RULES AMENDMENTS



(REV. 08-17-95)

PROMULGATION OF RULES AMENDMENTS

Page 3

August 14, 1996

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<p>Advisory Committee</p> <p>Approve & Transmit to Standing Committee</p> <div style="border: 1px solid black; padding: 5px; width: fit-content;"> <p>AP: 21, 22, 31 & 41 BK: 1019, 1020, 2002, 2007, 3, 3014, 3017, 3017.1, 3018, 3021, 600-1, 6002, 6020, 9011, 9018, & 9038 CV: 9, 26, 47 & 48 CR: 24 EV: 103, 407, 801, 803, 804, 806 & 807 Tentative decision not to amend 24 rules</p> </div>	<p>Standing Committee</p> <p>Approve & Transmit to Supreme Court</p> <div style="border: 1px solid black; padding: 5px; width: fit-content;"> <p>AP: 21, 22, 31 & 41 BK: 1019, 1020, 2002, 2007, 3, 3014, 3017, 3017.1, 3018, 3021, 600-1, 6002, 6020, 9011, 9018, & 9038 CV: 9, 26, 47 & 48 CR: 24 EV: 103, 407, 801, 803, 804, 806 & 807 Tentative decision not to amend 24 rules</p> </div>
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of July 6-7, 1995
Washington, D.C.

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, July 6-7, 1995. All the members were present:

Judge Alicemarie H. Stotler, Chair
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Jamie S. Gorelick, Esquire
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Judge James A. Parker
Alan W. Perry, Esquire
George C. Pratt, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Judge Wilson attended only the Friday portion of the meeting. In addition to Deputy Attorney General Gorelick, the Department of Justice was represented by Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General. Roger A. Pauley of the Department attended the meeting on Friday.

Supporting the committee were Professor Daniel R. Coquillette, Reporter to the committee, Peter G. McCabe, Secretary to the committee, John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, and Mark D. Shapiro, senior attorney in the rules office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter

1. Amendments for Judicial Conference Approval

Judge Jensen reported that the advisory committee had published proposed amendments to FED. R. CRIM. P. 16 and 32 and had held public hearings on them. The advisory committee had considered the public comments, made several changes in the proposed amendments, and voted to recommend their approval by the Judicial Conference.

FED. R. CRIM. P. 16

a. *Disclosure of Expert Witnesses*

The proposed amendments to Rule 16(a)(1)(E) and Rule 16(b)(1)(C) had been requested by the Department of Justice. They would require the defendant, on request, to provide pretrial disclosure of information concerning its expert witnesses on the defendant's mental condition. The government would be required to make reciprocal disclosure.

The committee voted without objection to approve the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C).

b. *Pretrial Disclosure of Witness Names and Statements*

The proposed amendments to Rule 16(a)(1)(F) and Rule 16(b)(1)(D) would require the government to disclose 7 days before trial the names and statements of witnesses that it intends to call during its case-in-chief. Disclosure would not be required, however, if the attorney for the government: (1) believes in good faith that pretrial disclosure of this information would threaten the safety of any person or lead to an obstruction of justice, and (2) files under seal an ex parte, unreviewable written statement to that effect. The amendments would apply reciprocal discovery requirements on the defense.

Judge Jensen reported that at the suggestion of magistrate judges, the advisory committee had restricted application of the rule to felony cases. It had also clarified the rule to provide explicitly that the attorney for the government may decline to disclose either the witness' name or statement, or both.

Judge Jensen asserted that reasonable pretrial disclosure was sound public policy and that the rule would further good trial management. Among other things, it would eliminate the need for a court to stop a case in the middle of a trial. He recognized that the rule presented a potential conflict with the Jencks Act, but argued that it was appropriate to proceed, using the Rules Enabling Act process to bring these important policy matters to the attention of the Congress.

Ms. Gorelick stated that the Department of Justice was strongly opposed to the proposed amendments. She argued that their disclosure requirements were different from, and more extensive than, those required in the Jencks Act. She added that the Department had worked hard to avoid problems of delay and disruption of trial management. It had also engaged in extensive training of prosecutors and cooperation with judges to resolve discovery problems. She stated that the Department instructed its prosecutors to provide the names and statements of witnesses wherever possible, when there is no danger to witnesses.

She emphasized that the requirement in the proposed rule that the United States attorney certify that a witness is endangered was both excessively burdensome and impractical. If a prosecutor were insufficiently sure of a potential threat, he or she might not in good faith be able to file an affidavit. The Department simply did not have the resources to investigate every case before filing a certification. The proposal, in her opinion, would increase the threat of danger to witnesses and would result in less witness cooperation.

She stated that she and the Attorney General had been following the proposal closely and did not believe that there was a systemic problem with disclosure of pretrial information. The Department had received few complaints from judges about pretrial disclosure. She added that when a court ordered pretrial discovery, the Department complied with the order.

Ms. Gorelick concluded that if the proposed rule were approved, the Department would fight it in the Congress because of its concern over the safety of witnesses, especially in violent crime cases. She also stated that victim groups would oppose the proposal.

Professor Schlueter stated that the advisory committee had heard and considered all these concerns in the past and had delayed publishing the draft on several occasions as a courtesy to the Department of Justice. The committee had made several concessions in the draft, including giving the United States attorney the right to avoid pretrial disclosure simply by filing a confidential, unreviewable certification with the court.

Professor Schlueter pointed out that several amendments had already been enacted to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence that require the government to disclose the names and statements of witnesses before trial. He also stated that most state courts and the military courts routinely provide defendants with the names, addresses, and statements of witnesses before trial.

He concluded that the public comments on the proposed rule were overwhelmingly favorable. Ms. Gorelick responded, however, that the United States attorneys were strongly opposed to the amendments, but they had not chosen to submit comments.

Judge Bertelsman suggested and Judge Ellis moved that the court be given

discretion in the rule to set a time for disclosure shorter than 7 days before trial. **The committee approved the motion with one objection (Ms. Gorelick).**

Judge Easterbrook stated that the committee note was not very clear in stating that the proposed amendment was in conflict with the Jencks Act. He stated that he did not believe a good enough case had been made to take the unusual step of relying on the supersession mechanism in the Rules Enabling Act.

After a number of drafting improvements had been accepted, the committee voted 7-6 to approve the rule and send it to the Judicial Conference.

Judge Stotler stated that a minority report should be drafted, and Ms. Gorelick agreed to prepare the report.

Judge Bertelsman then asked to change his vote and have the committee reconsider the rule. He stated that, even though he believed that the amendments were beneficial on the merits, they had no chance of succeeding unless they enjoyed near-unanimous support on the committee.

The committee voted 11-2 to reconsider its vote approving the amendments. It then voted 9-5 against sending the proposal to the Judicial Conference.

Mr. Schreiber moved to avoid a possible conflict with the Jencks Act by revising the proposed amendments to limit pretrial disclosure to the names of witnesses. All references to statements of witnesses would be eliminated. Judge Jensen responded that the advisory committee would probably this proposed revision, although it would be less than the committee had proposed.

Several members suggested that the proposed revision would eliminate any conflict with the Jencks Act. Ms. Gorelick replied that even if the statutory conflict were removed, the Department's policy concerns with the amendment remained.

The committee voted 12-2 to redraft the proposed amendment and limit pretrial disclosure to the names of witnesses. Ms. Gorelick and Professor Hazard were in opposition.

The committee then considered a clean draft of the amendment prepared by Professor Schlueter and Mr. Garner, reflecting the vote of the committee to limit pretrial disclosure to the names of witnesses. The revised draft committee note would eliminate any reference to the Jencks Act. Mr. Pauley stated that the proposed redraft was defective, in that it appeared to allow the courts and defense counsel to challenge the good faith of the United States attorney. He suggested that the courts could expect routine

challenges and satellite litigation. He and several members of the committee suggested substitute language for the text of the rule and the committee note.

Judge Wilson moved to adopt substitute language drafted by Judge Easterbrook. The committee approved the language with one objection.

The committee then voted 9-2 to approve the proposed amendments to the rule and send them to the Judicial Conference. (Mr. Klineberg and Professor Hazard dissented.)

FED. R. CRIM. P. 32

The amendment to Rule 32(d) had been proposed by the Department of Justice. The present rule has been interpreted as not authorizing a court to enter an order of forfeiture before sentencing. The amendment would permit a court to enter a preliminary forfeiture order at any time before sentencing.

No unfavorable comments had been received on the rule during the public comment period. The advisory committee, however, made a number of minor improvements in the rule as a result of the comments.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

2. Amendments for Publication

Judge Stotler suggested that the committee address as part of a single discussion the proposed amendments that would require attorney participation in voir dire in both criminal and civil cases. (FED. R. CRIM. P. 24 and FED. R. CIV. P. 47).

FED. R. CRIM. P. 24

Judge Jensen reported that the proposed change to Rule 24 would give attorneys a right to engage in voir dire after there has been a preliminary voir dire by the judge. He stated that the advisory committee was of the view that voir dire is better when the attorneys participate in it. Moreover, he said, attorney participation helps the court in dealing with challenges to jurors, and it promotes the goal of a fair jury. He reported that the proposed amendments had been approved by the advisory committee on a 9-2 vote.

He pointed out that the text of the rule drafted by the advisory committee differed in some respects from that prepared by the Advisory Committee on Civil Rules. Under

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
April 10, 1995
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Administrative Office of the United States Courts in Washington, D.C. on April 10, 1995. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 10, 1995. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Hon. Daniel E. Wathen

Prof. Stephen A. Saltzburg

Mr. Robert C. Josefsberg, Esq.

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General

Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Josefsberg. Judge Jensen also noted that he had asked Judge Crow to serve as the Committee's liaison to a subcommittee of the Court Administration and Case Management Committee; that subcommittee is studying the issue of management of criminal cases. At this point, he noted, no action was required by the Advisory Committee.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Marovich moved that the minutes of the Committee's October 1994 meeting in Santa Fe, New Mexico, be approved. Following a second, the motion carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which became effective on December 1, 1994: Rule 16(a)(1)(A) (statements of organization defendants); Rule 29(b) (Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). The final version of the amendments to Rule 32 included a victim allocution provision inserted by Congress.

IV. RULES APPROVED BY JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

The Reporter informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: Rule 5(a) (Initial Appearance Before the Magistrate); Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). As of the date of the Committee's meeting, the Supreme Court had not acted on the proposed amendments.

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that written comments and testimony had been submitted on the two rules which the Standing Committee had approved publication and comment: Rule 16(a)(1)

(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). He informed the Committee that the deadline for submitting written comments on the proposed amendments was February 28, 1995 and that a public hearing on the proposed amendments was held on January 27, 1995 in Los Angeles, California.

A. Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts);

Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements)

The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text. No commentator expressed disagreement with the provision governing discovery of experts in Rule 16(a)(1)(E) and 16(b)(1)(C)..

Following a brief summary of the written comments and testimony, Judge Crigler raised the question of whether the provision addressing disclosure of witness names and statements should apply to misdemeanor cases. He noted that the trial of petty offense and misdemeanor cases does not lend itself to the notification provision proposed in the rule. Other members agreed with Judge Crigler, who ultimately moved that the rule be limited to felony trials. Judge Davis seconded the motion. Following additional brief discussion, which focused on the issue of whether the disclosure provision would ever be practicable in misdemeanor cases, because of the highly abbreviated pretrial processing times, the Committee adopted the proposed change to the amendment by a unanimous vote.

Regarding the seven-day provision in the proposed amendment, Mr. Pauley urged the Committee to reduce the time to three days. He noted that United States attorneys often do not know for sure who their witnesses will be within seven days of trial. In those cases, he stated, the defense will argue that the government has not complied with the rule. He recommended that preclusion of testimony should only take place where the government has intentionally failed to disclose the information. In response to a comment from Professor Saltzburg, Mr. Pauley stated that the Department of Justice's proposed changes were not being offered as a compromise, but rather to improve the rule. Even if all of the amendments were adopted, he said, the Department's opposition to the rule would remain.

Judge Marovich expressed concern about any further delays in considering DOJ proposed changes. The question, he said, is whether the federal courts should adopt a system which is widely used and accepted in the state courts and in most federal trials. In his view, the current draft of the amendment gives the government absolute control over disclosure. The timing issue, he said, was simply a red herring.

Judge Smith echoed the concerns expressed by Professor Saltzburg and Judge Marovich but observed that the Department of Justice had a right to be heard on the issues being discussed. Judge Wilson responded that the Department was making a political issue out of the proposed amendment.

Judge Dowd indicated that perhaps the rule should be amended to extend the time to a period of 14 days before trial. Judge Jensen noted that other rules include a 10-day notice provision. Judge Marovich indicated that at worst, a late disclosure would delay the trial. Mr. Pauley reminded the Committee that Congress has adopted a three-day notice provision in capital cases. Judge Jensen observed that the Department had supported 15-day notice provisions in newly enacted rules of evidence governing use of propensity evidence in sexual assault cases -- Rules 413-415.

Professor Saltzburg observed that the Department of Justice did not oppose the seven-day notice provision in the amendments to Rule 32 dealing with sentencing and he encouraged the Committee to reject any amendment which would focus on the willfulness of delayed notification. Mr. Pauley responded that the Department was not as concerned about losing discovery motions as it was about the practicality of the seven-day provision. Justice Wathen observed that in his experience the parties deal with a more realistic list of witnesses. Judge Marovich added that the hallmark of a federal prosecution should be a good witness list.

Mr. Pauley moved that the rule be amended to reflect a three-day notice provision. The motion failed for lack of a second.

Responding to several commentators who urged the Committee to include provision for disclosure of government witnesses' addresses, Judge Jensen reminded the Committee that the provision had been in an original draft but removed at the urging of the Department of Justice. Judge Crigler expressed serious reservations about requiring the government to produce the witnesses for defense interviews. And Mr. Martin indicated that the Committee Note is silent regarding the Department's assurance that it would assist the defense in speaking to witnesses.

In the absence of any motion to change the draft with regard to disclosure of witness addresses, the discussion turned to the question of whether the rule or the accompanying note should specifically include reference to FBI 302's which may include witness statements. Several members questioned whether such documents were statements within the meaning of Rule 26.2. Judge Jensen pointed out that including such reports within the definition at this point might be considered a major change to the proposed amendment which would probably require re-publication for public comment. Following further discussion, the consensus was that the matter should not be included in the current amendment.

Judge Jensen advised the Committee that several commentators had raised the issue of what was meant by "unreviewable" in the proposed amendment; a number expressed concern that that language placed too much power in the hands of the prosecutor. Judge Wilson responded that the current language was a workable package which would be acceptable to Congress. Judge Marovich noted that the current language was a major compromise. Mr. Martin raised the question of whether a judge might see nondisclosed evidence in such nonreviewable statements which might later be considered on sentencing. Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense.

Following a discussion on how much information the prosecutor should disclose under the amendment, the Reporter suggested a minor amendment in the language. The Committee ultimately voted 9 to 0, with two abstentions, to substitute the following language: "an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness cannot be disclosed."

Mr. Pauley expressed concern that in certain types of cases, such as in civil rights cases, a witness may fear economic reprisals, which is not a reason under the proposed amendment for not disclosing the witness' name or statement. Professor Saltzburg pointed out that the Department's position would swallow the rule because the exception proposed would be entirely too large. Judge Marovich noted that the names will become known when the witnesses are called so at the most, the witness may receive some pretrial protection from disclosure. Judge Crigler noted that the Department should protect its witnesses and Judge Smith noted that the same potential problem exists with regard to disclosing the names of jurors. Mr. Jackson observed that the defendant has a strong interest in being presumed

innocent.

In the absence of any motion to amend the proposal, Mr. Pauley commented on his continuing concern with the potential conflict with the Jencks Act. He stated that the Advisory Committee had not yet tested the supersession clause in the Rules Enabling Act and argued that the judiciary should pursue the legislative process for seeking a change. Mr. Martin responded by pointing out that the Department's argument had been implicitly rejected in the procedures for establishing and amending the sentencing guidelines. Professor Saltzburg added that the Standing Committee's amendment several years ago to Federal Rule of Evidence 609 was clearly an example of offering an amendment to rules specifically promulgated by Congress.

Judge Dowd raised again the question of whether FBI 302's would be covered under the proposed amendment to Rule 16. Judge Jensen suggested that the matter should be considered at the Committee's next meeting as a possible amendment to Rule 26.2(f). Judge Dowd moved that the Rule 16 be amended to substitute the words, "a brief summary of the witness' testimony." The motion failed for lack of a second. The Reporter indicated that the issue could be addressed in the Committee's report to the Standing Committee.

The discussion turned to the issue of reciprocal discovery under the proposed amendment. The consensus was that the proposed language presented a workable compromise. Mr. Martin moved that the amendment requiring reciprocal defense discovery be revised to make an exception for "impeachment witnesses." The motion failed for lack of a second. Judge Dowd noted that the defense may not always know who its witnesses will be and Professor Saltzburg responded that both sides have a continuing duty to disclose.

Judge Marovich moved that the amendments to Rule 16 be forwarded to the Standing Committee with a recommendation to approve and forward them to the Judicial Conference. Judge Crow seconded the motion which carried by a vote of 11 to 1.

C. Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing)

The Reporter summarized the few comments which had been received on the proposed amendment to Rule 32, including a number of proposed changes from the Department of Justice. Mr. Pauley noted the Department's changes focused on three areas. First the newer version of the rule would permit the forfeiture proceedings to begin earlier in the process; second, the newer version of the amendment would remove the requirement of a hearing; and third, the rule would require the judge to enter an order as soon as practicable. He explained that the newer version tracked a version sent to Congress by the Department.

Professor Saltzburg raised the question about the political reality of the Department's proposal. Mr. Pauley responded that he was not sure what Congress would do with the Department's proposed amendment.

Judge Dowd noted that the question about forfeiture proceedings only arises if the indictment raises the issue; the Ninth Circuit has ruled that if the forfeiture proceeding is conducted separately it violates double jeopardy. Following brief discussion about whether the proposed changes by the Department of Justice amounted to major changes, Judge Crigler moved that the amendment, as changed, be forwarded to the Standing Committee. Judge Davis seconded the motion, which carried by a vote of 11 to 0, with

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: November 29, 1994

I. INTRODUCTION.

At its meeting October 6-7, 1994, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting are attached.

There are no items affecting the Rules of Criminal Procedure which require action by the Standing Committee at its January 1995 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

There are currently two proposed amendments to the Rules of Criminal Procedure which are pending public comment. The first, is an amendment to Rule 16 which would affect pretrial discovery of expert testimony and the names and addresses of government witnesses. Originally two dates were set aside for hearings on the proposals. Due to a lack of interest, the hearing scheduled for New York city on December 12, 1994 has been canceled. It appears that several witnesses will appear at the scheduled hearing in Los

Angeles on January 27, 1995. To date, five written comments have been received on the proposed amendments.

III. RULES PENDING BEFORE THE ADVISORY COMMITTEE

The Committee has considered proposed amendments to Rule 5 (disposition of defendants not in custody), Rule 10 (entry of guilty plea at arraignment), Rule 16 (which would require the parties to confer on discovery), Rule 24(attorney conducted voir dire), Rule 35(c) (correction of sentence), Rule 40(a)(commitment to another district) and Rule 46 (release from custody).

Although the Criminal Rules Committee has no proposed amendments to present to the Standing Committee at this time, the Committee decided to consider amendments to Rules 10, 24, and 35(c) at its April 1995 meeting.

IV. EVIDENCE RULES CONSIDERED BY THE ADVISORY COMMITTEE.

At its meeting in Santa Fe, New Mexico, the Committee carefully studied the rules of evidence adopted by Congress as part of the Crime Control Act. Rather than offer specific objections or language to the Evidence Advisory Committee, the Committee focused on a number of general policy considerations and passed it views along to the Evidence Committee. The attached minutes reflect the positions suggested by the Criminal Rules Committee.

Attachment: Minutes of Committee Meeting

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
October 6 & 7, 1994
Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at the New Mexico State Supreme Court in Santa Fe, New Mexico on October 6 and 7, 1994. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, October 6, 1994. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General

Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Ms. Mary Harkenrider, from the Department of Justice; Mr. John Rabiej and Mr. Paul Zingg from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

Professor Stephen A. Saltzburg and Mr. Robert C. Josefsberg, Esq. were not able to attend the meeting although Professor Saltzburg did participate in a portion of the meeting by conference call.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Jackson. Judge Jensen noted that two outgoing members of the Committee, Mr. Tom Karas and Ms. Rikki Klieman were not able to attend; Mr. Karas' term had expired and Ms. Klieman had resigned from the Committee in conjunction with acceptance of full-time employment by Court TV, as a commentator. On behalf of the Committee Judge Jensen expressed the Committee's profound thanks for their excellent and tireless efforts over the last years.

II. APPROVAL OF MINUTES OF APRIL 1994 MEETING.

Judge Marovich moved that the minutes of the Committee's April 1994 meeting in Washington, D.C. be approved. Mr. Martin seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT

AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules: Rule 16(a)(1)(A)(statements of organization defendants); Rule 29 (b)(Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). He noted that although the Committee had rejected any proposed amendments to Rule 32 regarding victim allocution, Congress had included the provision. Mr. Pauley indicated that he believed that United States Attorneys would coordinate implementation of the amendment through existing victim assistance programs. All of these amendments, including the Congressional addition to Rule 32, will become effective on December 1, 1994.

IV. RULES APPROVED BY JUDICIAL CONFERENCE AND

FORWARDED TO THE SUPREME COURT

The Reporter also informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: Rule 5(a)(Initial Appearance Before the Magistrate); Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Conference declined to approve a proposed amendment to Rule 53 which would have authorized cameras in federal criminal trials under guidelines promulgated by the Judicial Conference. And because of a Congressional correction of a typographical error in Rule 46, no further action was taken by the Judicial Conference to correct the error through the Rules Enabling Act process.

**V. RULES APPROVED BY STANDING COMMITTEE
FOR PUBLICATION AND COMMENT**

The Committee was informed by the Reporter that the Standing Committee had approved three amendments for publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). The deadline for submitting written comments on the proposed amendments is February 28, 1995. Public hearings on the proposed amendments have been scheduled for December 12, 1994 in New York and January 27, 1995 in Los Angeles.

**VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION
BY ADVISORY COMMITTEE**

A. Rule 5(c). Offenses Not Triable by the United States Magistrate: Proposal to Amend Rule to Address Issue of Defendant Not in Custody.

The Reporter informed the Committee that Magistrate Judge Robert B. Collings from Boston had recommended that Rule 5(c) be amended. He had pointed out what he believed was a conflict between Rules 5 and 58. Read together, he asserted that it is not clear whether a defendant who is charged with a misdemeanor, but is not in custody, is entitled to a preliminary examination. Rule 5(c), he maintained, seems to indicate that the defendant is entitled to a hearing while Rule 58(b)(2)(G) indicates to the contrary.

The sense of the Committee discussion was that there are very few cases where the conflict, if it exists, would arise. Magistrate Judge Crigler noted that this issue might be viewed as largely academic and noted that in his experience he rarely encounters a defendant held in custody on a misdemeanor charge. Agreeing with that point, Professor Coquillette observed that the public should not be deluged with minor amendments; Mr. Pauley suggested that the amendment be deferred and considered in conjunction with possible restylizing efforts of the Rules.

B. Rule 6. Grand Jury Disclosure.

The Committee was informed that a provision in the Administration's Health Care Act (S. 1757 and H.R. 3600) would amend Title 18 to permit the Department of Justice to share grand jury information with other attorneys in the Department who are charged with civil enforcement purposes. Following a very brief discussion on the issue, no action was taken by the Committee.

C. Rule 16. Discovery and Inspection; Proposal to Include Provision Requiring Parties to Confer on Discovery.

In a letter to the Committee, Magistrate Judge Robert Collings of Boston recommended that Rule 16 be

amended to require that the parties confer on discovery before asking the court to compel discovery. He noted that such a provision now exists in the civil rules and that it would make sense to require counsel in both civil and criminal trials to confer on the issue of discovery before submitting it to the court. Judge Crow noted that normally counsel may be required to confer on a wide range of issues and that the record may be protected by including a statement on the record as to that conference. Mr. Pauley indicated that substantively the Department of Justice had no objections to the proposal but indicated that it would be helpful to have more information about the current practices. He believed that in a majority of the districts local rules already covered the issue. Professor Coquillette indicated that Professor May Squires was currently compiling the local rules governing criminal cases and several members of the Committee volunteered to submit sample local rules or forms for the Committee's consideration. Mr. Pauley noted that the proposed amendment would presumably include sanctions for failure to confer and Judge Dowd raised the question of whether the amendment would affect reciprocal discovery provisions.

Judge Crow observed that a procedure of requiring a conference before filing pretrial motions need not include a penalty; it still has a positive effect. The defense counsel is protected from allegations of ineffectiveness by showing on the record that a particular motion was not necessary because the parties had conferred on the matter. Judge Wilson concurred that conferences seem to work but Judge Davis noted that there may be a problem with practitioners who practice in different districts.

Judge Jensen indicated that the proposed amendment would be deferred until a future meeting when the Committee would have before it the compiled local rules governing criminal cases.

D. Rule 24(a). Trial Jurors; Proposal Re Voir Dire by Counsel.

The Reporter pointed out Judge Bill Wilson, of the Standing Committee, had encouraged the Committee to consider amendments to Rule 24 which would increase counsel's role in voir dire and that the issue was being considered by the Civil Rules Committee at its Fall meeting. The Reporter also informed the Committee that the possibility of permitting greater participation by counsel in voir dire had not been directly considered by the Committee in many years; the topic had only been tangentially considered in connection with proposed amendments to equalize peremptory challenges. Since 1943 the Judicial Conference has opposed legislative attempts to increase the role of greater participation by counsel.

Judge Jensen observed that conditions and practices may have changed to the point where it might be appropriate to consider a change to Rule 24(a). Mr. Pauley noted that the Department of Justice considered the present rule and practices to be adequate and that any discussion should distinguish between permitting and requiring counsel participation in voir dire. Mr. Jackson indicated that there seems to be connection between the time permitted to counsel to conduct voir dire and the likelihood of being upheld on appeal. He agreed with Judge Wilson that counsel's role should be expanded but that counsel have abused the opportunity to do so; the trial judge should have the discretion to limit voir dire.

Judge Wilson stated that the courts have uniformly upheld limits placed on counsel's role at trial and Ms. Harkenrider indicated that the Department of Justice takes the position that the trial judge may permit counsel voir dire on a case by case basis. Noting that he favored an amendment to Rule 24, Judge Davis observed that the "school" advice is to keep the lawyers out of the voir dire process. Judge Dowd expressed deep concern over the need for speed records; the real issue is whether counsel will be permitted to talk to individual jurors. He added that an unlimited opening up of voir dire may not be the best solution. Ms. Harkenrider indicated that experienced counsel are able to build rapport with the

**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 Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2-4
2. Approve the proposed amendments to Bankruptcy Rules 8018 and 9029 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 5-6
3. Approve proposed amendments to Civil Rules 50, 52, 59, and 83 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the court and transmitted to Congress in accordance with the law.....pp. 9-10
4. Approve the proposed amendments to Criminal Rules 5, 40, 43, 46, 49, 53, and 57 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 11-14

[The proposed amendment to Criminal Rule 46 is withdrawn.]
5. Refer the proposal in the Report on the Federal Defender Program (March 1993) to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.....pp. 14-15
6. Continue the existing policy on facsimile filing and take no action to permit facsimile filing on a routine basis.....pp. 18-20

The remainder of the report is for information and the record.

<p>NOTICE NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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The Advisory Committee on Criminal Rules considered the proposal. It noted that the government now often provides the defense with access to photocopying machines for purposes of discovery. In any event, the advisory committee concluded that a requirement to allocate discovery costs among the parties is a subject more appropriately handled by statutory authorization. Your committee concurs with its advisory committee's conclusion.

RECOMMENDATION: That the Judicial Conference refer the proposal in the Report on the Federal Defender Program to allocate certain discovery costs between the government and the defense in criminal cases to the Committee on Defender Services for further consideration.

C. Rules Approved for Publication and Comment

The Advisory Committee recommended publication of proposed amendments to Rules 16 and 32 for public comment.

The proposed amendments to Rule 16 (Discovery and Inspection) would provide limited disclosure by the prosecution of the names and statements of witnesses at least seven days before trial. Under the proposed amendments, the government may refuse to disclose the information if it believes in good faith that pretrial disclosure of this information would threaten the safety of a person or risk the obstruction of justice. In such a case, the government simply would file a *nonreviewable, ex parte* statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendment also would provide reciprocal discovery by the defense.

The Department of Justice traditionally has opposed any liberalization in the rules on the disclosure of this information prior to trial. It noted that many

prosecutors already follow open file disclosure, but acknowledged that some prosecutors follow a more restrictive disclosure policy. The Department indicated that it has been working internally to reach a more liberal disclosure policy. And it strongly recommended that it should be given more time to resolve the matter by policy directive, rather than by mandatory rules.

At the request of the Department of Justice, your committee delayed publishing the proposed amendments to the rule at its January 1994 meeting to allow the Department to reach a resolution internally. Your committee was also concerned with possible Jencks Act inconsistencies with the draft amendments. The advisory committee had already delayed consideration of the proposal to publish the amendments at its April 1993 meeting to provide the newly appointed Attorney General with an opportunity to study it.

Your committee considered the Department's renewed request for additional delay in seeking an in-house resolution of the discovery issue. It also addressed the Jencks Act issue and noted that other amendments to the Criminal Rules, which mandated pretrial disclosure of information by the defendant - presumably also inconsistent with the Jencks Act - were adopted without objections and put into effect. After considerable discussion, your committee concluded that additional delay in publishing the proposed amendments was unwarranted and determined that publication of the proposed amendments would be useful in eliciting comment from the bench and bar on the Jencks Act issue and on the overall merits of the proposal. The advisory committee chair accepted the recommendation of your committee to revise the

Note to the amendments to highlight the Jencks Act issue before publishing it for public comment.

The proposed amendment to Rule 32 (Sentence and Judgment) would explicitly permit the trial court, in its discretion, to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

V. Amendments to the Federal Rules of Evidence.

A. **No Rules Recommended for Approval and Transmission**

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Evidence Rule 412 and 1102.

The proposed amendments to Rule 412 (Sex Offense Cases; Relevance of Victim's Past Behavior) would reinstate the provisions approved by the Judicial Conference in September 1993, but withheld by the Supreme Court and not transmitted to Congress in April 1994. The provisions were returned to the advisory committee for further consideration in light of concerns expressed by some members of the Court. The same provisions are now included in legislation pending in Congress and would extend the privacy protection under the rule to alleged victims in civil case proceedings. In light of the likelihood of Congressional passage of the provision, your committee with the concurrence of the advisory committee's chairman decided to defer taking action on the proposed amendments until its next meeting to await the outcome of the pending legislation.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of June 23-24, 1994
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Thurgood Marshall Federal Judicial Building in Washington, D.C. on Thursday and Friday, June 23-24, 1994. The following members were present:

Judge Alicemarie H. Stotler, Chair
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge James A. Parker
Alan W. Perry, Esquire
Judge George C. Pratt
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Judge William R. Wilson

Representing the Department of Justice was Deputy Attorney General Jamie S. Gorelick, who attended part of the meeting on Thursday. Also participating in the meeting on behalf of the Department of Justice were Robert E. Kopp, Roger A. Pauley, Esquire, and Mary Harkenrider. Chief Justice E. Norman Veasey was unable to attend because of illness.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
 Judge James K. Logan, Chair
 Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
 Judge Paul Mannes, Chair
 Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
 Judge Patrick E. Higginbotham, Chair
 Dean Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules -
 Judge D. Lowell Jensen, Chair
 Professor David A. Schlueter, Reporter

FED. R. APP. P. 49

Professor Coquillette stated that serious policy concerns were raised by proposed new Rule 49, the appellate version of the proposed uniform rule giving the Judicial Conference authority to amend the federal rules to make technical and conforming amendments. He noted that Professor Baker had distributed a fine memorandum arguing that if the proposal were to be approved at all, it would have to be enacted by legislation, rather than through the Rules Enabling Act process.

He noted that: (1) the Advisory Committee on Bankruptcy Rules was opposed to the proposal in any form; (2) the Advisory Committee on Criminal Rules had found the proposed rule acceptable; and (3) the Advisory Committee on Civil Rules believed that the provision could only be effectuated through legislation. Judge Higginbotham added that he was personally opposed to the amendment on the merits and that it would be a political mistake to pursue the matter. Judge Logan stated that the Advisory Committee on Appellate rules had approved the proposed rule, but with reservations and without extensive debate.

Mr. Kopp pointed out that the Department of Justice had opposed the proposal in the past because its scope was uncertain.

Some members of the committee argued on the merits that the Judicial Conference should have the authority to make technical and conforming amendments, while others saw no need for the proposal. There was general agreement, however, that it would not be advisable to forward the proposed rule to the Congress.

Judge Easterbrook suggested that reliance on the supersession clause in the Rules Enabling Act to amend the Act itself was highly problematic. Legislation would be necessary to effect the change. He noted that the same issue would arise again later in the meeting in connection with the proposed amendments to FED. R. CRIM. P. 16 and their impact on the Jencks Act.

Judge Bertelsman moved to table the proposed uniform rule on technical and conforming amendments in all sets of the rules (FED. R. APP. P. 49, FED. R. BANKR. P. 9037, FED. R. CIV. P. 84, and FED. R. CRIM. P. 59). He then amended his motion to disapprove, rather than table, the proposed amendments. His motion on the amendment was approved 11-1, and the amended motion to disapprove the proposal was approved unanimously.

Professor Coquillette explained that the action just taken would include the changes to both FED. R. CIV. P. 83(a) and 83(b), since they are essentially similar.

The committee voted 7-6, with the chair breaking the tie, to send the proposed amendment to Rule 53 to the Judicial Conference for approval.

Judge Jensen added that the proposal should be accompanied by notes suggesting that the Advisory Committee on Criminal Rules wanted to be actively involved in drafting the Conference guidelines implementing the rule.

Mr. Perry moved to delete from the committee note paragraphs 2 and 4, which stated that the debate over cameras in the courtroom had subsided. He accepted an amendment to his motion from Judge Easterbrook to add a sentence to the third paragraph of the note to say that: "This gives the Judicial Conference equal authority over civil and criminal cases."

The committee approved without objection the amended motion to delete paragraphs 2 and 4 and add a sentence to paragraph 3 of the committee note.

2. Rules for Publication

FED. R. CRIM. P. 16

Judge Jensen stated that the advisory committee was proposing two amendments to Rule 16—one minor and one major. The first, initiated by the Department of Justice, would require reciprocal discovery for the government when the defendant makes a motion under Rule 12.2, based on a defense of mental condition.

The committee voted without objection to approve the proposed amendment for publication.

The second proposed amendment would require the government to disclose information about government witnesses to the defendant seven days before trial. Judge Jensen stated that the amendment had been approved by the advisory committee in the fall of 1993, but had been delayed at the express request of the attorney general. It had been deferred again in January 1994 at the request of the Department of Justice. At the April 1994 meeting of the advisory committee, the Department had asked once again that it be delayed for further consideration.

Judge Jensen pointed out that the advisory committee had made several changes in the proposed amendment since last presented to the Standing Committee. At the request of the Department of Justice, the advisory committee had eliminated the requirement that the government disclose the addresses of witnesses. Accordingly, only names and statements of government witnesses must be disclosed to the defendant before trial.

The rule also was changed by the advisory committee to give the court discretion to determine the amount of reciprocal disclosure the defendant must provide when there has been a partial refusal to disclose by the government.

Judge Jensen recognized that the amendment presented a facial conflict with the Jencks Act. He argued, though, that the rule was not really inconsistent with the legislation. The Act did not bar disclosure: it governed only the timing of disclosure. He pointed out that there had been a number of other changes in the criminal rules, many initiated by the Department of Justice, requiring disclosure of government witness information before trial, such as at suppression hearings and detention hearings.

Deputy Attorney General Gorelick stated that it was necessary to balance the fairness of court proceedings against the deep concern of the Department of Justice over danger to government witnesses. She pointed out that the danger had been increasing, and the government had been forced to withdraw charges in a growing number of cases because of the fear of injury or death to witnesses.

Ms. Gorelick stated that the attorney general was more committed to openness than any of her predecessors and wanted the opportunity to ensure enforcement of the highest standards of prosecution conduct—but through internal Executive Branch mechanisms, rather than court rules.

She argued that there were substantive problems with the rule as drafted, which would lead to a greatly enhanced incidence of litigation over discovery obligations. She pointed to the following:

1. The rule would require that names and statements of witnesses be disclosed seven days before trial, while in capital cases they have to be turned over only three days before trial.
2. Plea bargaining efforts would be undermined by the proposal.
3. The rule, as drafted, would permit the United States attorney to refuse disclosure only for two designated reasons. It would not allow nondisclosure for other, valid reasons—such as economic hardship to witnesses or pressure on witnesses.
4. Sanctions for failure to comply would be left to the discretion of the court. The court, however, should not sanction government counsel unless the failure were intentional.
5. The rule was silent as to the timing of the defendant's reciprocal disclosure to the government. Yet it was inflexible in providing that the government must disclose witness information seven days before trial.

Ms. Gorelick emphasized that the proposed amendment was in conflict with the Jencks Act. Moreover, it would be inappropriate to rely on the supersession provision of the Rules Enabling Act to overrule the Jencks Act.

She reported that since the last meeting of the Standing Committee, the Department of Justice had conducted a survey of all United States attorney offices to determine their disclosure practices. The vast majority routinely provide discovery well in advance of trial. Although some offices may not be making appropriate disclosure, the Department would address their procedures through internal guidelines. The Department was working to develop uniformity in prosecution policies and was receiving positive feedback from judges regarding their efforts to ensure compliance by prosecutors.

In summary, Ms. Gorelick argued against publishing the proposed amendment to Rule 16 for public comment so the Department could obtain further information and manage problems internally. She added that if the rule went forward there would be a very strong reaction from the prosecution community, which was very much opposed to the proposed amendment. The Congress, moreover, would not be expected to approve the rule.

Some members of the committee agreed with Ms. Gorelick that there were no significant problems in their districts and that prosecutors were responsible in providing discovery to the defendant. Others argued, however, that there were in fact problems caused by prosecutors and that the rule was necessary to ensure fundamental fairness.

Some members suggested that the rule should be published for public comment, but that a more convincing explanation was needed to deal with the problem of the amendment's apparent conflict with the Jencks Act.

Four members stated that the proposal was in direct conflict with the Jencks Act and could only become law by reliance on the supersession clause. Three members suggested that the supersession clause itself was probably unconstitutional. One member stated that the conflict with the Jencks Act should be highlighted in the document distributed to bench and bar. The public should be invited specifically to comment on both the conflict and the supersession clause and its constitutionality. One member argued, however, that the committee should not publish a rule whose legality it questioned, just to obtain public views.

The committee voted 7-2 to approve the proposed amendment for publication. It voted 8-1 to approve the committee note.

FED. R. CRIM. P. 32

Judge Jensen explained that the proposed amendment to the rule, giving a court authority to order forfeiture before judgment, had been approved by the advisory committee at the request of the Department of Justice.

The committee voted unanimously to approve the proposed amendment for publication.

3. Other Rules Issues

FED. R. CRIM. P. 10 and 43

The proposed amendments would allow video conferencing of arraignments and other pretrial sessions. Judge Diamond, chairman of the Defender Services Committee of the Judicial Conference, had responded during the public comment period requesting the advisory committee to defer approval of the amendments pending completion of a pilot program testing video conference.

Judge Jensen reported that the advisory committee had decided, at Judge Diamond's request, not to seek Judicial Conference approval of the amendments at this time.

FED. R. CRIM. P. 16

Judge Jensen stated that the Judicial Conference's March 1993 report on the federal defender program had recommended that an amendment be considered to Rule 16 to provide copies of certain discoverable materials to the defense and allocate discovery costs between the government and the defendant. He reported that the advisory committee had decided that the proposal should be handled by statute, rather than rule. Accordingly, the advisory committee did not approve a proposed change in the rule.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes's memorandum of May 16, 1994. (Agenda Item 6)

1. Rules for Judicial Conference Approval

Professor Resnick pointed out that the proposed amendments to Rules 8018 and 9029—the bankruptcy version of the proposed uniform rule on local rules of court—had been adopted by the committee earlier in the meeting, during its discussion of Federal Rule of Appellate Procedure 47.

2. Rules for Publication

Professor Resnick stated that the advisory committee was seeking authority to publish amendments to 12 rules.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: May 17, 1994

I. INTRODUCTION.

At its meeting April 18 & 19, 1994, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals and recommendations to the Standing Committee. A GAP Report and copies of the rules and the accompanying Committee Notes are attached along with a copy of the minutes of the April meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules were published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59. Effective Date; Technical Amendments. A hearing on these amendments was held on April 18, 1994 in Washington, D.C. in conjunction with the Committee's meeting. In addition to the three witnesses who testified at that hearing (which was televised by C-Span), the Committee also carefully considered written comments on the proposed amendments.

The attached GAP Report provides more detailed discussion of the changes

G. Rule 57. Rules by District Courts

The proposed amendment to Rule 57 mirrors similar amendments in the other procedural rules. Although the Committee was informed that the Bankruptcy Committee had recommended substitution of the word "nonwillful" for "negligent failure," the Committee unanimously approved the amendment to Rule 57 as published. Following brief discussion of the issue, the Committee did delete a brief reference in the Committee Note which referred to untimely requests for trial as being an example of a "negligent failure."

Recommendation: The Committee recommends that Rule 57 be approved and forwarded to the Judicial Conference.

H. Rule 59. Effective Date; Technical Amendments.

The proposed amendment to Rule 59, which also mirrors similar amendments in the other rules, was noncontroversial. The Committee voted unanimously to approve the amendment as published.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 59 be approved and forwarded to the Judicial Conference.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

The Advisory Committee at its April 1994 meeting considered amendments to Rules 16 and 32. It recommends that the following amendments be approved for publication and comment by the bench and the bar. Copies of the proposed amendments and Committee Notes are attached.

**B. Rule 16(a)(1)(E), (b)(1)(C).
Discovery of Experts**

The Committee has proposed an amendment to Rule 16 which modifies slightly the provisions dealing with discovery of defense experts. As amended December 1, 1993, Rule 16 requires the government, upon request by the defense, to disclose certain information about its expert witnesses. If the government discloses its experts, it is entitled to reciprocal discovery. At the suggestion of the Department of Justice, the Advisory Committee recommends that Rule 16 be further amended to take into account those cases where the defense, under Rule 12.2 has indicated an intent to present expert testimony on the mental condition of the defendant. Under the proposed amendment to Rule 16(b)(1)(C), once the defense has given notice in accordance with Rule 12.2, the government is entitled to request the defense to disclose additional information about its experts. If the defense complies, it is entitled under Rule 16(a)(1)(F) to reciprocal discovery.

The proposed amendment, and Committee Note are attached to this report.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 16 regarding government requested discovery of defense expert testimony be approved for publication and comment by the bench and bar.

**C. Rule 16(a)(1)(F), (b)(1)(D).
Disclosure of Witness Names and Statements**

At its Fall 1993 meeting, the Advisory Committee approved (by a vote of 9 to 1) a proposed amendment to Rule 16 which would require the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial. As discussed in the Committee Note accompanying the proposed amendment, in 1974 Congress rejected a similar amendment proposed by the Supreme Court after a vigorous protest from the Department of Justice. In the intervening years, similar amendments have been proposed, debated, and rejected by the Advisory Committee. Thus, no amendment addressing the production of witness names has been published for public comment in almost two decades.

At its January 1994 meeting, the Standing Committee considered the Advisory Committee's proposed amendment to Rule 16. Mr. Irvin Nathan from the Department of Justice reiterated the Department's general opposition to the amendment but asked the Standing Committee to defer action on the proposal so that the Department could attempt to reach a compromise on the amendment. Following extensive discussion, the Standing Committee referred the amendment back to the Advisory Committee for additional discussion with the Department of Justice. During the discussion, the view was expressed that referring the matter back to the Advisory Committee would not delay publication and comment. A number of possible changes to the amendment and the Committee Note were also suggested for consideration by the Advisory Committee, including the issue of whether the amendment would be inconsistent with the Jencks Act.

Speaking on behalf of the Department of Justice at the Advisory Committee's April 1994 meeting, Ms. Jo Ann Harris, Assistant Attorney General, Criminal Division, urged the Committee to further defer action on the amendment. As noted in the Committee's minutes, Ms. Harris indicated that the Department was prepared to conduct a thorough study of pretrial discovery of witnesses in an attempt to gather "hard data" on the issue and possibly promulgate internal guidelines for disclosure. She also expressed the view that the proposed amendment did not sufficiently recognize the privacy interests of government witnesses.

The Advisory Committee ultimately voted by a margin of 9 to 1 to approve the amendment, with some minor changes, and recommend to the Standing Committee that the amendment be published for public comment without any further delay.

In summary, the proposed amendment to Rule 16 creates a presumption that the defense is entitled to discovery of the government's witnesses and their statements. The rule recognizes, however, that the government may refuse to disclose that information, in whole, or in part, by filing a nonreviewable, *ex parte*, statement with

the court stating why it believes, under the facts of the particular case, that disclosing the information will threaten the safety of a person or risk the obstruction of justice. The amendment also includes a provision for reciprocal pretrial witness disclosure by the defense.

The current proposed amendment and Committee Note contain several changes from the version originally presented to the Standing Committee. First, the rule no longer contains any requirement that the government disclose the addresses of its witnesses. The Department of Justice persuaded the Committee that disclosing the address of a witness would pose special risks and that assured the Committee that it would, upon request, make the witness available for defense pretrial interviews.

Second, the amendment contains a reciprocal discovery provision; the version presented to the Standing Committee meeting in January 1994 included what amounted to an all or nothing approach. As modified, the amendment now provides that if the government has filed an ex parte statement refusing to disclose some, or all, of the information specified in the rule, the trial court in its discretion may decide how much, if any, reciprocal discovery will be available to the government.

Third, the Committee Note has been expanded to address the concerns raised by the Standing Committee at its January 1994 meeting. In particular, the Note addresses the supercession clause in the Rules Enabling Act and the split in the circuits over whether the Jencks Act forbids pretrial disclosure of witness statements. The Committee anticipates that opponents of the amendment will continue to argue that the provision for pretrial disclosure of witness statements is at odds with the Jencks Act, 18 U.S.C. § 3500 et seq., and therefore is in conflict with Congress' view that disclosure of a witness' statements may not be disclosed prior to that witness testifying at trial. As pointed out in the Committee's Note, Congress has approved a number of amendments expanding federal criminal discovery -- including broadened pretrial discovery for the government. For example, recent amendments to Rule 16 permit defense and government discovery of the identity of expert witnesses and summaries of their expected testimony, even though they potentially provide for pretrial disclosure of what amount to "statements" of witnesses. The proposed amendment to Rule 16 is clearly consistent with that trend.

It is also important to note that although the Jencks Act limits defense pretrial access to certain "statements," *Palermo v. United States*, 360 U.S. 343 (1959), the Supreme Court has concluded that the statute is consistent with the "fair and just administration of criminal justice." *Campbell v. United States*, 365 U.S. 85, 92 (1961). In *Campbell* the Court concluded that to the extent the trial court is required under the statute to disclose the statements after the government witness has testified, the statute "reaffirms" the Court's holding in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for purposes of impeachment.

In promulgating the Jencks Act, Congress recognized the potential danger of witness tampering and safety and in an attempt to strike a balance set time limits on disclosure of their statements. The proposed amendment to Rule 16 is consistent with that approach; it permits the government to block pretrial disclosure where there is a danger to a person's safety or a risk of obstruction of justice.

As discussed in its Note accompanying the amendment, the Advisory Committee is sensitive to following the Rules Enabling Act process and recognizes that ultimately, Congress can accept or reject the amendment.

The Committee continues to believe that the amendment is necessary and appropriate and that it strikes the appropriate balance between assuring witness safety and the need for defense pretrial discovery. The Committee also continues to believe that the amendment will result in more efficient operation of criminal trials.

Recommendation: The Advisory Committee recommends that the proposed amendments to Rule 16 concerning pretrial disclosure of witness names and statements be published for public comment by the bench and bar.

D. Rule 32(d). Sentence and Judgment; Forfeiture Proceedings Before Sentencing

The Committee has proposed that Rule 32, which is currently before Congress, be further amended to provide for forfeiture proceedings before sentencing. The current language of proposed Rule 32(d) simply provides that the sentence may include an order of forfeiture. The proposed amendment would explicitly permit the trial court, in its discretion, to conduct forfeiture proceedings *before* sentencing. As noted in the accompanying Committee Note, the amendment is intended to protect the interests of the government and third parties.

Recommendation: The Advisory Committee recommends that the proposed amendment to Rule 32 be published for public comment by the bench and bar.

Attachments

Gap Report (Rules 5, 40, 43, 53, 57, and 59)
Minutes from April 1994 Meeting
Proposed Amendments (Rules 16 and 32)

1 **Rule 16. Discovery and Inspection¹**

2 (a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

3 (1) *Information Subject to*
4 *Disclosure.*

5 * * * * *

6 (E) EXPERT WITNESSES. At the
7 defendant's request, the
8 government ~~shall~~ must disclose to
9 the defendant a written summary of
10 testimony the government intends
11 to use under Rules 702, 703, or
12 705 of the Federal Rules of
13 Evidence during its case in chief
14 at trial. If the government
15 requests discovery under
16 subdivision (b)(1)(C)(ii) of this
17 rule and the defendant complies,
18 the government, at the defendant's

1. New matter is underlined and matter
to be omitted is lined through.

19 request must disclose to the
20 defendant a written summary of
21 testimony the government intends
22 to use under Rules 702, 703, and
23 705 as evidence at trial on the
24 issue of the defendant's mental
25 condition. This--The summary
26 provided under this subdivision
27 must describe the witnesses'
28 opinions, the bases and the
29 reasons therefor, and the
30 witnesses' qualifications.

31 (F) NAMES AND STATEMENTS OF
32 WITNESSES. At the defendant's
33 request in a non-capital case, the
34 government, no later than seven
35 days before trial, must disclose
36 to the defendant:

37 (1) the names of the witnesses
38 the government intends to call
39 during its case in chief; and

Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 3

40 (2) any statements, as defined
41 in Rule 26.2(f), made by those
42 witnesses.

43 If the attorney for the government
44 believes in good faith that
45 pretrial disclosure of this
46 information will threaten the
47 safety of any person or will lead
48 to an obstruction of justice,
49 disclosure of that information is
50 not required if the attorney for
51 the government submits to the
52 court, ex parte and under seal, an
53 unreviewable written statement
54 containing the names of the
55 witnesses and stating why the
56 government believes that the
57 specified information cannot
58 safely be disclosed.

59 * * * * *

60 (2) *Information Not Subject to*

Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 6

103 ~~use under Rules 702, 703, and 705 of~~
104 ~~the Federal Rules of Evidence as~~
105 ~~evidence at trial.~~ This summary must
106 describe the opinions of the
107 witnesses, the bases and reasons
108 therefor, and the witnesses'
109 qualifications.

110 (D) NAMES AND STATEMENTS OF
111 WITNESSES. If the defendant requests
112 disclosure under subdivision
113 (a)(1)(F) of this rule, and the
114 government complies, the defendant,
115 at the request of the government,
116 must disclose to the government
117 before trial the names and statements
118 of witnesses -- as defined in Rule
119 26.2(f) -- the defense intends to
120 call during its case in chief. The
121 court may limit the government's
122 right to obtain disclosure from the
123 defendant if the government has filed

Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 7

124 an ex parte statement under

125 subdivision (a)(1)(F).

126 * * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to request the defense to disclose information concerning its expert witnesses on the issue of the defendant's mental condition. The second provides for pretrial disclosure of witness names and addresses.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government may call during the trial. The amendment is a reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has engendered more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent

Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 8

years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to struggle with the issue of whether the Rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. See *United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in

Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 9

which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. See D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system. See generally Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing state practices).

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a

defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the addition of Rule 16(a)(1)(F) as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses and their statements unless the attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an

Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 11

approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such ex parte statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name and statement even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the

part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment creates a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its witnesses' statements at trial, after they have testified. *Palermo v. United States*, 360 U.S. 343 (1959). But the amendment is consistent with the Act to the extent that it reflects the importance of defense discovery in criminal cases. In *Campbell v. United States*, 365 U.S. 85, 92 (1961) the Court stated that to the extent the Act requires disclosure of any statements by government witnesses after they have testified, the statute "reaffirms" the Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for the purposes of impeachment. In promulgating the Jencks Act, Congress recognized the potential dangers of witness tampering and safety and obstruction of justice and attempted to strike a balance between those concerns and the value of

**Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 13**

discovery to the defense. The amendment to Rule 16 is consistent with that approach; it permits the government to block pretrial disclosure where there is a danger to a person's safety or there is a risk of obstruction of justice.

The amendment is clearly consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend defense discovery of statements at some pretrial proceedings. See, e.g., 26.2(g) and pretrial discovery of expert witness testimony.

In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act, 28 U.S.C. §§ 2072 and 2075. The Committee views the amendment as a purely procedural change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit the it to supercede any conflicting statutory provision, under 28 U.S.C. § 2072(b). See Carrington, "Substance" and "Procedure" In the Rules Enabling Act, 1989 Duke L.J. 281, 323 (1989) ("In authorizing supercession and assuming responsibility for a view of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information about both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense make such requests and complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. While Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the expected testimony or qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names and statements, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If

**Criminal Rules Advisory Committee
Rule 16 Draft
May 1994
Page 15**

the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
April 18 & 19, 1994
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. April 18 and 19, 1994. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 18. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Prof. Stephen A. Saltzburg

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Henry A. Martin, Esq.

Ms. Jo Ann Harris, Assistant Attorney General &

Mr. Roger A. Pauley, designate of Ms. Jo Ann Harris

Professor David A. Schlueter, Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Judge William R. Wilson, Jr., chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe, Mr. John Rabiej, Mr. Paul Zingg, and Mr. David Adair of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center.

I. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The attendees were welcomed by the chair, Judge Jensen, who introduced the three new members to the Committee, Judges Dowd and Smith and Mr. Henry Martin.

The Committee's business meeting was preceded by a public comment hearing, taped by C-Span for broadcasting, during which the Committee heard from three witnesses who offered comments on proposed amendments to Rules 10, 43, and 53: Mr. Steven Brill (Rule 53); Mr. Tim Dyk (Rule 53) and Ms. Elizabeth Manton and Mr. Alan DuBois (Rules 10 and 43). Those proposed amendments are discussed, *infra*.

II. APPROVAL OF MINUTES OF FALL 1993 MEETING

Mr. Karas moved that the minutes for the October 1993 meeting in San Diego, be approved and Judge Marovich seconded the motion. Following corrections suggested by Mr. Wilson and Mr. Pauley, concerning their positions on witness safety, the motion carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rule Amendments Effective December 1, 1993

The Reporter indicated that a number of amendments had taken effect on December 1, 1993:

1. Rule 12.1, Discovery of Statements;
2. Rule 16(a), Discovery of Experts;
3. Rule 26.2, Production of Statements;
4. Rule 26.3, Mistrial;

5. Rule 57, Rules by District Courts

The Reporter informed the Committee that the proposed amendments to Rule 57 were being coordinated by the Standing Committee which hoped to maintain consistency in all of the rules addressing this particular topic. He noted that the Bankruptcy Advisory Committee had suggested using the term "nonwillful" instead on "negligent failure" in Rule 57(a)(2). Professor Saltzburg moved that Rule 57 be approved as published. Mr. Pauley seconded the motion. Following brief discussion of the issue, the Committee agreed with Judge Stotler's suggestion that the reference in the Advisory Committee's note to waiving a jury trial be deleted. The motion to approve the amendment and forward it to the Standing Committee carried by a unanimous vote.

6. Rule 59, Effective Date; Technical Amendments

Following a brief description concerning the proposed amendment to Rule 59 which would permit the Judicial Conference to make minor, technical changes to the Rules, Mr. Karas moved that the amendment be approved and forwarded to the Standing Committee. Judge Crigler seconded the motion, which carried by a unanimous vote.

D. Rules Under Consideration by Advisory Committee

1. Rule 6; Amendment to Permit Disclosure of Grand Jury Materials to State Judicial and Discipline Agencies.

The Reporter informed the Committee that Mr. Barry Miller of Chicago had suggested to the Committee that Rule 6(e) be amended to permit disclosure of grand jury testimony to state judicial and attorney discipline regulatory agencies. He also briefly reviewed the Committee's prior positions on grand jury secrecy and its rejection of earlier proposals to expand the disclosure of grand jury proceedings. Judge Jensen noted that the proposal apparently arose from situations where federal grand juries had heard testimony or information which implicate rules of professional responsibility and possible discipline by state agencies.

Mr. Pauley noted that the Seventh Circuit had addressed the question and had concluded that disclosure might be permitted under Rule 6(e)(3)(C)(i) where a state judicial body is seeking disclosure. Judge Jensen and Judge Crigler noted that if there is question about possible violation of state criminal laws, disclosure might be possible under subdivision (e)(3)(C)(iv).

Mr. Karas questioned what the standard would be for disclosure and raised the possibility that there might be a conflict of interest if the government disclosed grand jury information which it knew at the time, might support an indictment. Judge Crow expressed concern that the grand jury might become a discovery tool for civil proceedings. Mr. Pauley responded that the test is one of "particularized need" and that disclosure cannot be made under the rule simply because an entity wants the information. Judge Jensen observed that grand juries might typically hear evidence involving professions other than attorneys and judges and that the proposed amendment would probably only address those situations where neither state nor federal criminal proceedings were involved.

Mr. Pauley moved that the Committee draft an amendment to Rule 6(e) to implement the suggestion from Mr. Miller. Professor Saltzburg seconded the motion, which failed by a vote of 1 to 10.

2. Rule 16. Discovery and Inspection

a. Report of Subcommittee on O'Brien Proposals

Ms. Klieman, chair of a subcommittee to study proposed changes to Rule 16 suggested by Judge Donald O'Brien, reported the subcommittee's findings and recommendations. She noted the background of the proposals and the Committee's prior positions on the issue. The proposed amendments would authorize trial courts to order the government to produce any directory, index or inventory which might assist the defense in reviewing massive documents and materials under Rule 16. She noted that the subcommittee had thoroughly reviewed the materials submitted in support of the amendments and the

opposing views of the Department of Justice and had concluded that no amendment should be made to Rule 16 for several reasons. First, there was concern about cluttering the discovery rules to meet what does not appear to be a major problem with criminal discovery. Second, most of the members of the subcommittee believed that trial judges currently have sufficient authority to order such production under the rules. Nothing in the rule currently forbids such discovery and the 1974 Advisory Committee Note indicates that the provisions of Rule 16 are intended to provide the minimum discovery available in criminal trials.

Ms. Klieman also indicated that the Reporter had supplied the subcommittee with a memo indicating a lack of any dispositive caselaw on the subject and suggesting that a minor amendment to Rule 16 might be appropriate. She noted that she had informally spoken with a number of defense counsel who were not in favor of the amendment because it might encourage laziness on the part of young or inexperienced defense counsel who would not conduct meaningful discovery on behalf of their clients.

Judges Davis and Marovich agreed with that assessment and in particular, the fact that Rule 16 sets out only the minimum standards and that judges have the authority to order such discovery in a particular case. Mr. Pauley, while arguing against a rule change, nevertheless disagreed with that conclusion. He noted that if read literally, the 1974 Committee Note would eliminate the necessity of any additional discovery amendments in Rule 16, including a proposed amendment to require the government to disclose the names of its witnesses before trial. Judge Jensen observed that a trial court's order to the government to produce what amounts to its work product in a major case would be unwarranted.

Ms. Klieman indicated that what the defense really wants is an indication from the government as to what information it will be introducing at trial. Professor Saltzburg agreed, noting that under Rule 16, as written, there are clear differences between various documents and materials and that the problem often arises where defense counsel do not clearly articulate just what they want from the government.

Following additional brief discussion on whether any special action should be taken with regard to accepting formally the subcommittee's report, Judge Jensen indicated that no action would be necessary on the report itself and that if there was interest in amending Rule 16, a motion to do so would be in order. There was no such motion.

b. Prado Report Re Allocation of Costs of Discovery

The Reporter indicated that portions of the Report of the Judicial Conference of the United States on the Federal Defender Program, i.e., the Prado Report had been referred to the Committee for its consideration. The Report recommended consideration of amendments to the rules which would address the issue of assessing or allocating discovery costs between the defense and government. Judge Crigler questioned whether any amendment was appropriate. Mr. Martin gave examples of how the government currently provides defense access to photocopying machines for purposes of discovery. Following additional brief discussion of the issue, a consensus emerged that the matter was more appropriately a question for statutory amendments. Judge Marovich moved that no amendment be made to the criminal rules. Judge Crigler seconded the motion, which carried by a vote of 10 to 1.

c. Production of Witnesses' Names

The Reporter provided background information on a proposal to amend Rule 16 which would require the prosecution to disclose to the defense seven days before trial, the names, addresses and statements of the witnesses it intended to call at trial. (2) He noted that a proposal approved by the Advisory Committee at its Fall 1993 meeting in San Diego had been presented to the Standing Committee at its January 1994 meeting in Tucson, Arizona. At that meeting, a representative from the Justice Department, Mr. Nathan, urged the Committee to defer action on the amendment until the Department had had an opportunity to work on a compromise provision with the Advisory Committee. Although the Standing Committee was in general agreement with the intent of the amendment, it referred the proposal back to the Advisory Committee for further consideration of any additional proposals from the Department of Justice. The Advisory Committee was also asked to address possible concerns about whether the amendment would conflict with the Jencks Act. The Standing Committee took special note of the fact that referring the matter back to the April 1994 meeting of the Advisory Committee would not delay the process of seeking public comments.

The Reporter indicated that in response to suggestions from members of the Standing Committee, he had made minor changes to both the Rule and the Advisory Committee Note.

Ms. Jo Ann Harris, Assistant Attorney General, urged the Committee to defer any further action the proposed amendment pending the development of hard data which would show whether any problems might exist with disclosing witness names. She noted that the information driving the proposed amendment seems to be largely anecdotal and that proposed amendments to the rules should not be based on anecdotes. She assured the Committee that the Department of Justice was working in good faith toward obtaining "hard data" on this issue and developing internal guidelines but that there was concern among United States Attorneys about codifying what they generally do -- provide open disclosure to the defense. Ms. Harris added that the Department was willing to work toward a uniform policy of discovery and asked for time to conduct a thorough survey of current practices. In response to a comments from Judge Jensen and Judge Smith that the comment period would not interfere with the Department's proposed survey, Ms Harris noted that the results of the survey might affect even the initial draft sent out for public comment.

Professor Saltzburg noted that the issue before the Committee was not new and that there is a real policy question at issue. He added that the draft amendment provided more than adequate protection for government witnesses who were in danger. Mr. Wilson noted that open file discovery was often inversely proportional to the strength of the government's case.

Judge Marovich indicated that a system of informal discovery practices often depended on the trial judge. He also cited his experience in state courts, which often involve questions of witness safety and yet discovery is provided.

The Reporter commented on the history of the present amendment and that the Department of Justice had assured the Committee several years earlier that it would consider internal policy changes to provide broader pretrial discovery and that the Department had worked actively to stem any formal amendments. He also indicated that the Department had assured the Standing Committee that it would work in good faith to reach an accommodation on this particular amendment and that it had not indicated that it would seek further delay in the amendment process.

Ms. Harris indicated that the Department was simply recommending that the Committee have the benefit of a formal survey of United States Attorneys before moving forward with the amendment. She also noted that the present draft did not give sufficient attention to the privacy interests of the witnesses.

Concerning specific comments on the proposed amendment, Ms. Harris and Mr. Pauley noted that there were problems with the Jencks Act, which they believed was clearly at odds with the amendment. Mr. Pauley also stated that there might be potential separation of powers issues.

Professor Saltzburg agreed with the view that the amendment is inconsistent with Jencks but that that argument is merely a screen for not addressing the merits of the amendment. He also indicated that in his view there is no constitutional law issue and that in enacting the Rules Enabling Act, including a supersession clause, Congress recognized that the courts have special expertise in drafting proposed rules and that amendments might be necessary from time to time. The process of amending the rules is special because it is not adversarial.

Judge Stotler indicated that the litigation battles over discovery are being fought today and that trial judges are capable of applying any amendment to Rule 16.

Ms. Klieman moved that the proposed amendment be sent forward to the Standing Committee, as changed by the Reporter. Mr. Martin seconded the motion.

Ms. Harris and Judge Dowd raised questions about including the witness's address in the amendment. Ms. Klieman responded that in other discovery rules, in particular Rule 12.1 requires the defense to provide the names and addresses of its witnesses to the government. Ms. Harris responded by noting that there is a difference in alibi witnesses and other witnesses and that alibi witnesses are seldom encountered in federal cases. She added that if the defense counsel wishes to talk to the government witness, the Department will always make arrangements for such interviews. Judge Marovich agreed that that procedure seemed to be satisfactory. Professor Saltzburg indicated that he could accept deletion of the requirement to give the witness' address. Judge Jensen indicated that removal of the references to addresses from the rule should not be interpreted to frustrate the defense's attempts to actually speak with the government witness.

Judge Dowd moved to amend the proposal by deleting references to a witness' address. Judge Marovich seconded the motion, which carried by a vote of 8 to 1. Judge Jensen suggested that the Advisory Committee Note reflect the fact that the deletion

of references to witnesses' addresses was not intended to frustrate the ability of the defense to attempt to speak with the witness before trial.

Ms. Harris expressed concern that the proposed amendment is too narrow in stating the reasons which could be relied upon by the prosecution to refuse to disclose information about a witness. She indicated that the list of reasons should include recognition that witnesses often face hardships, intimidation, and economic or social disadvantage by agreeing to testify for the government. Mr. Pauley indicated that excellent examples of intimidation have arisen in the civil rights cases where witnesses have faced what amounts to a form of excommunication. He believed that on balance, in those cases the harm to society would exceed the interests of the defense in discovering the witness' identity. Many witnesses are aware that most cases will not go to trial, but will have been needlessly identified. Judge Davis indicated that he could support an amendment to the rule to cover a separate class of witnesses who fear intimidation and that the trial court could review the government's reasons for not disclosing those witnesses. The Reporter indicated that the Committee Note recognizes that other provisions of Rule 16 might be invoked by the prosecution to protect its witnesses and those provisions might be relied upon to protect witnesses not otherwise covered by the proposed amendment. There was no motion to further amend the Rule or the Committee Note regarding the possibility of additional criteria for withholding disclosure.

Ms. Harris stated that the Department of Justice was concerned about the seven day period envisioned by the rule. She would favor a shorter time frame. Mr. Pauley indicated that the seven-day provision was inconsistent with the three-day disclosure provision in capital cases. Mr. Wilson urged the Committee to retain the seven-day provision and Judge Jensen noted that in actual practice, 10 days is a typical time frame. Mr. Pauley responded that the proposal did not take into account long trials. Professor Saltzburg stated that it would be important to keep the seven day provision because the defense needs to know early in the trial who the government intends to call. There was no formal motion to change the time period envisioned in the proposal.

Turning to the question of whether the rule envisioned an all or nothing approach to reciprocal discovery, Judge Davis moved to amend the proposal to reflect the fact that the court has the discretion to limit the government's reciprocal discovery rights if the government has filed an ex parte affidavit indicating its refusal to disclose information. Judge Dowd seconded the motion. Following additional brief discussion on the motion, the Committee voted 5 to 3 to amend the proposal.

On the main motion, the Committee voted 9 to 1 to send the amendment to the Standing Committee for public comment.

d. Defense Disclosure to Government of Summary of Expert Testimony on Defendant's Mental Condition

Mr. Pauley indicated that the Department of Justice had proposed an amendment to Rule 16, which would require the defense to disclose, upon a triggering request from the government, information about its expert witnesses who would testify on an insanity defense. He noted that amendments to Rule 16, which were effective on December 1, 1993, provided for defense discovery of a government's witness's expected testimony and qualifications. The proposed amendment, he explained, would afford the government the limited right to initiate discovery where the defense has given notice under Rule 12.2 of an intent to rely on the insanity defense. In offering the amendment, he indicated that the amendment would reduce surprise to the government and possible delays in the trial.

Professor Saltzburg voiced agreement with the proposed amendment, and the Department of Justice's recognition that reduction of surprise and delay were valid reasons for expanding federal criminal discovery. He also expressed hope that the Department would not oppose attempts to expand defense discovery, in particular, the proposed amendment to provide the defense with the names and statements of government witnesses before trial.

Mr. Pauley moved that Rule 16 be amended to incorporate the Department's suggested change. Professor Saltzburg seconded the motion which carried by a unanimous vote.

3. Rule 26; Proposal to Permit Questioning by Jurors

The Reporter indicated that the Committee at its Fall 1993 meeting had deferred any action on a possible amendment to Rule 26 which would address the issue of questioning of witnesses by the jury. Following brief discussion, no action was taken on the issue.

Agenda F-19 (Summary)
Rules
March 1994

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

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

Reconsider its September 1993 position supporting in principle the offer-of-judgment proposal contained in S. 585, the "Civil Justice Reform Act of 1993," and take no position on the legislation at this time. . . . pp. 2-3

The remainder of the report is for information and the record.

NOTICE

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

actual practices of the courts and changes to Rule 68, which are discussed above. The Advisory Committee is generally studying protective orders and their use in the courts. Finally, the Advisory Committee is continuing its refinement of the "stylized" civil rules, which materially clarify and make more understandable the present rules. It is also considering the best method of circulating the draft for critical comment.

Criminal Rules:

The Advisory Committee on Criminal Rules recommended publication of proposed amendments to Rule 16, which would provide limited disclosure by the prosecution of the names, addresses, and statements of witnesses at least seven days before trial. The amendment also would provide reciprocal discovery by the defense. The recommendation represented the culmination of many years of consideration by the Advisory Committee. The Department of Justice traditionally has opposed any liberalization in the disclosure of this information prior to trial. The new Justice policymakers are reviewing the proposal afresh to determine whether an accommodation with the proponents of the rule amendment can be made.

With the concurrence of the chair of the Advisory Committee, your Committee deferred consideration of whether to publish the proposed amendments to Rule 16 until its summer meeting to allow the Department of Justice an additional opportunity to seek an accommodation with the proponents of the rule change. In addition, your Committee was concerned with possible Jencks Act inconsistencies and possible technical problems with the draft.

The six-month delay in the publication of the amendments will allow time to consider further refinements to the draft and to study the Jencks Act issue, but it will not effectively delay the implementation of any amendments.

Evidence Rules:

After completing its work on Rule 412, which required immediate attention because of Congressional interest, the Advisory Committee on Evidence Rules began its overall examination of the Evidence Rules. The study is intended to identify rules that have posed problems and require further study. No specific language for rule changes was approved.

Respectfully submitted,



Alicemarie H. Stotler, Chair
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Frank H. Easterbrook
William O. Bertelsman
Thomas S. Ellis, III
William R. Wilson, Jr.
James A. Parker
E. Norman Veasey
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Sol Schreiber
Philip B. Heymann

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of January 12-14, 1994
Tucson, Arizona

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona on Wednesday, Thursday, and Friday, January 12-14, 1994. The following members were present:

Judge Alicemarie H. Stotler (chair)
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Irving B. Nathan, Esquire (for Deputy Attorney
General Philip Heymann)
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Judge George C. Pratt was unable to reach the meeting because of transportation problems caused by inclement weather.

At the invitation of the chair, former members Judge Robert E. Keeton and Professor Charles Alan Wright participated in the meeting.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules:
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules:
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules:
Judge Patrick E. Higginbotham, Chair
Dean Edward H. Cooper, Reporter

the clerk" were also added in model local rule --.1. Judge Easterbrook added a provision that additional copies of the papers must be mailed or delivered to the clerk before the end of the next business day. The local rules were also clarified regarding service by elimination of model rule --.8 and including a provision in model rule --.6 that all applicable rules governing service must be followed.

The committee then approved the proposed guidelines and model rules, as amended, and voted to send them to the Court Administration and Case Management Committee and the Automation and Technology Committee.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of December 9, 1993. (Agenda Item XI)

Fed.R.Crim.P. 16

Judge Jensen reported that the advisory committee had approved a proposed amendment to Fed.R.Crim.P. 16 requiring the government, on request of the defendant, to disclose the names, addresses, and statements of witnesses at least seven days before trial. He noted that a similar proposed rule change had been approved by the Supreme Court in 1974, but had been rejected by the Congress as a result of vigorous opposition from the Department of Justice.

Judge Jensen stated that there was a natural tension between the need for a fair trial and the need to protect government witnesses. The draft rule approved by the advisory committee presented a good balance between these two principles. The rule provided a presumption of disclosure, but allowed exceptions freely in the unreviewable discretion of the United States attorney where there could be danger to witnesses or obstruction of justice.

He added that a series of changes had been made in the criminal rules over the years to require disclosure of information before trial, all with the theme of eliminating surprise, including Fed.R.Crim.P. 12.1 (notice of alibi), 12.2 (notice of insanity defense or expert testimony of defendant's mental condition), and 12.3 (notice of a defense based on police authority). He pointed out that the changes had been promoted by the Department of Justice to prevent surprise to the government at trial. He added that surprises occurring during a trial lead to interruptions in the process in order to obtain additional information.

Judge Jensen noted that in the state courts there was a clear movement towards greater disclosure. State systems generally provide for open disclosure, with exceptions made for security reasons. In most federal prosecutions, too, open file discovery prevailed. So, as a practical matter, disclosure of witnesses and other information already occurred in most cases.

He explained that the 1974 rule proposal had contained a provision for protective orders. The current rule, however, went much further to protect the government. It recognized the good faith of the prosecutor and made the prosecutor's determination unreviewable. This would avoid collateral litigation. It would also require reciprocal discovery, for the defendant must disclose witnesses when the government must.

Judge Jensen stated that the advisory committee had discussed a potential conflict between the proposed rule and the Jencks Act. Nevertheless, the committee saw Jencks as just a timing issue. Moreover, Congress always has the prerogative to reject the proposal, just as they did in 1974.

In summary, Judge Jensen concluded that the thrust of the rule was to prevent surprise at trial and to strike a proper balance between competing considerations.

Professor Schlueter stated that the vote in the advisory committee to approve the amendments to Rule 16 was overwhelming, at 9-1. The matter had been discussed by the committee at two previous meetings and had been considered by a subcommittee consisting of Professor Saltzburg and Judge Wilson. Action had been deferred by the committee expressly to allow Attorney General Reno an opportunity to study and comment on the proposal. Yet, the Department of Justice returned to the committee with a very hard position against any change.

Mr. Nathan stated that he had read in the advisory committee reports criticism of the Department of Justice for being too partisan. This, he stated, was clearly not Attorney General Reno's wish. He pointed out that the department wore two hats: (1) to work for the good of the justice system, and (2) to prosecute criminal offenses. It had an obligation to protect the second interest.

Mr. Nathan complimented Judge Jensen for a great job on the proposal, stating that the current draft was far superior to the 1974 proposal. It was well balanced, but the Department still had problems with it and would like to work with the committee to address these problems. He requested that the proposed amendments be deferred for one more meeting and not be published in their current form.

Mr. Nathan stated that the Department saw a direct conflict with the Jencks Act. The proposal effectively would amend the Act by rule.

Mr. Nathan pointed out that the reason for the Department's delay in responding to the committee's proposal was that it did not have an Assistant Attorney General for the Criminal Division. The new Administration would like to take a fresh look, particularly at local disclosure practices in the federal courts. The Department was sincere on the matter, wished to obtain additional information, and wanted to reach an accommodation with the committee, if possible.

He emphasized that if the committee and the Department were able to work out their differences, the proposal would have much more credibility in the Congress since it would have Department of Justice support. He concluded, though, that if the proposal as presently written were to be published, the Department would have to oppose it. Moreover, publication would harden positions.

Judge Wilson stated that he recognized that there was a danger to witnesses in some criminal cases. But in white collar crimes, the idea of going to trial without pretrial disclosure of the names of witnesses was ludicrous. He argued that the proposal of the Advisory Committee on Criminal Rules was very modest and promoted fundamental fairness. He asserted that he was extremely skeptical that the Department of Justice would change its position at the next meeting.

Chief Justice Veasey stated that he came from an open disclosure state and had found the issue to be controversial only as to its inconsistency with the Jencks Act.

Several other members expressed their support for the proposed amendment on its merits, but were also concerned about the Jencks Act problem. Professor Wright pointed out that 28 U.S.C. § 2072(b) provided that the amended rule would supersede the Act in any event.

Judges Ellis and Easterbrook stated that they were troubled about the supersession clause in the Rules Enabling Act and suggested that it might be unconstitutional. Judge Easterbrook added that the advisory committee note was not completely candid. He suggested that the issue was whether the committee should openly confront the Jencks Act problem and rely on the supersession mechanism.

Judge Ellis moved to defer publication of the amendments to Fed.R.Crim.P. 16 until the next meeting of the committee, subject to the Department of Justice's planned study of current practices and problems.

The motion was approved without objection.

Internal Operating Procedures

Judge Jensen reported that the advisory committee had adopted two internal operating procedures:

- (1) In discussing proposals for rules amendments, the burden would be placed on the reporter to provide a history of prior, similar proposals for consideration of the members. Issues may be raised anew, but the members should be made aware of past actions of the committee on similar suggestions.
- (2) The appropriate place for people to make oral presentations to the advisory committee was at the scheduled public hearings, rather than at committee business

meetings. Yet, if people are present at the meetings, they may be asked, in the committee's discretion, to participate in discussions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 10, 1993. (Agenda Item VIII)

Professor Resnick reported that the advisory committee had no recommendations for action by the standing committee. He pointed out that the advisory committee had deferred seeking authority to publish additional rules amendments because it was sensitive to the perception that there had been too many recent changes in the rules. He added that the committee was anticipating a busy meeting in February 1994 and had an active subcommittee on technology. The subcommittee was in the process of examining the state of technology in the courts and the legal profession and exploring the need for future rules amendments to accommodate improvements in technology.

REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Dean Berger presented the report of the advisory committee, as set forth in Agenda Item IX. She stated that the committee had no action matters for the standing committee.

Dean Berger commented that Congress was considering several rules amendments to deal with sexual violence issues. The advisory committee had published a revised Evidence Rule 412 that would address these issues comprehensively in both civil and criminal cases.

She stated that the advisory committee was concerned about restyling the Federal Rules of Evidence because it would require lawyers to make adjustments. She added, however, that the committee might have to revisit the issue.

Professor Wright noted that on pages 14 and 15 of the minutes of the advisory committee's last meeting it was reported that a majority of the committee had been opposed to updating a committee note in the absence of a revision to the pertinent rule. He stated that while the practice had been followed many years ago, it was clearly undesirable to change a note without a specific rule amendment. Changing the notes, he explained, was a form of changing the rule without action by the Supreme Court and Congress.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

AGENDA ITEM - 11
Tucson, Arizona
January 12-15, 1994

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Hon. D. Lowell Jensen, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal
Procedure

DATE: December 9, 1993

I. INTRODUCTION.

At its meeting in October 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to several Rules of Criminal Procedure. The Committee also adopted two internal operating procedures for reconsidering previously rejected amendments and for entertaining oral comments on proposed amendments from members of the public. This report addresses those proposals and recommendations to the Standing Committee. A copy of the minutes of that meeting are attached along with a copy of the proposed rule amendments.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules have been published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59. Effective Date; Technical Amendments. A hearing on these amendments has been set for April 4, 1994 in Los Angeles; the deadline for comments is April 15, 1994.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

After years of debate, the Advisory Committee has approved a proposed amendment to Rule 16 which requires the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial. As discussed in the minutes and the Committee Note accompanying the proposed amendment, in 1974 Congress rejected a similar amendment proposed by the Supreme Court after a vigorous protest from the Department of Justice. In the intervening years, similar amendments have been proposed, debated, and rejected by the Advisory Committee. The attached amendment was approved by an overwhelming vote of the Committee members (9 to 1). The Committee believes that the amendment is appropriate and that it strikes the appropriate balance between assuring witness safety and the need for defense pretrial discovery. The Committee also believes that the amendment will result in more efficient operation of criminal trials.

In summary, the proposed amendment to Rule 16 creates a presumption that the defense is entitled to discovery of the government's witnesses, their addresses, and their statements. The rule recognizes, however, that the government may refuse to disclose that information, in whole, or in part, by filing a nonreviewable, *ex parte*, statement with the court stating why it believes, under the facts of the particular case, that disclosing the information will threaten the safety of a person or risk the obstruction of justice. The amendment also includes a provision for reciprocal pretrial witness disclosure by the defense.

The Committee anticipates that some may argue that the amendment is at odds with the Jencks Act, 18 U.S.C. § 3600 et seq., and therefore is in conflict with Congress' view that disclosure of a witness' statements should not be disclosed prior to that witness testifying at trial. As pointed out in the Committee's Note, over the years Congress has approved a number of amendments expanding federal criminal discovery -- including broadened pretrial discovery for the prosecutor. The Committee believes that the proposed amendment is in harmony with the rationale of the Jencks Act. At the same time, the Committee is sensitive to following the Rules Enabling Act process and recognizes that ultimately, Congress can accept or reject the amendment.

The Advisory Committee recommends that the Standing Committee approve the publication of the proposed amendment for public comment.

IV. REPORT ON PROPOSAL TO IMPLEMENT FACSIMILE GUIDELINES

The Advisory Committee also considered the Judicial Conference's proposed facsimile guidelines. The Committee concluded that no amendments to the Federal Rules of Criminal Procedure were needed at this time because Criminal Rule 49(d) incorporates by reference any such guidelines in the Civil Rules. Although the Committee determined that no further action on the guidelines was needed at this time, it did reach a consensus that the proposed guidelines should include authorization to restrict the hours during which facsimile transmissions might be received by the court, e.g., regular business hours.

V. CONSIDERATION OF INTERNAL OPERATING RULES.

In response to several earlier discussions, the Advisory Committee acted on the recommendations of a subcommittee which had been tasked with considering two issues, internal to committee operations: (1) Whether the Advisory Committee should permit interested persons to appear and speak on proposed amendments and (2) Whether any conditions should be imposed on reconsidering a proposed rule change which has been rejected.

With regard to the first issue, the Committee adopted the subcommittee's proposal that:

All suggestions and proposals are to be submitted in writing by interested persons and oral testimony and statements are limited to public hearings only, and not business meetings. This does not preclude Committee members from asking questions of proponents or opponents who are attending the business meeting.

With regard to the second issue, the Committee adopted the following recommendation:

The reporter, in preparing copies and summaries of all written suggestions or proposals, identify those that are similar to ones that have been rejected and to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

The consensus of the Committee was that as part of its task of continuously reviewing the rules of criminal procedure, the same or similar proposal might be repeatedly offered over the course of several meetings or years and that changes in the law or Committee composition might result in a proposal finally being adopted. Rather than adopting a strict limit on resubmissions of proposed amendments, the reporter is tasked with providing a summary to the members indicating what, if any, reasons were given for prior rejections.

Attachments:

Proposed Amendments to Rule 16
Minutes of the October 1993 Meeting

FEDERAL RULES OF CRIMINAL PROCEDURE 1

1 Rule 16. Discovery and Inspection¹

2 (a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

3 (1) Information Subject to
4 Disclosure.

5 * * * * *

6 (F) NAMES, ADDRESSES AND
7 STATEMENTS OF WITNESSES. At the
8 defendant's request in a non-
9 capital case, the government, no
10 later than seven days before
11 trial, must disclose to the
12 defendant, the names and addresses
13 of the witnesses the government
14 intends to call during its case in
15 chief, together with any
16 statements of such witnesses as
17 defined in Rule 26.2(f). Such
18 disclosure need not be made if (i)

1. New matter is underlined and matter to be omitted is lined through.

2

FEDERAL RULES OF CRIMINAL PROCEDURE

19

the attorney for the government

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has a good faith belief that

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pretrial disclosure of some or all

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of this information will threaten

23

the safety of a person or lead to

24

an obstruction of justice, and

25

(ii) submits to the court, ex

26

parte and under seal, an

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unreviewable statement setting

28

forth the names of the witnesses

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and the reasons why the government

30

believes that the information

31

cannot safely be disclosed.

32

* * * * *

33

(2) *Information Not Subject to*

34

Disclosure. Except as provided in

35

paragraphs (A), (B), (D), and (E),

36

and (F) of subdivision (a)(1), this

37

rule does not authorize the discovery

38

of inspection of reports, memoranda,

FEDERAL RULES OF CRIMINAL PROCEDURE 3

39 or other internal government
40 documents made by the attorney for
41 the government or other government
42 agents in connection with the
43 investigation or prosecution of the
44 case.

45 * * * * *

46 (b) THE DEFENDANT'S DISCLOSURE OF
47 EVIDENCE.

48 (1) *Information Subject to*
49 *Disclosure.*

50 * * * * *

51 (D) NAMES, ADDRESSES, AND
52 STATEMENTS OF WITNESSES. If the
53 defendant requests disclosure under
54 subdivision (a)(1)(F) of this rule,
55 and the government complies, the
56 defendant, at the request of the
57 government, must disclose to the
58 government prior to trial the names,

4 FEDERAL RULES OF CRIMINAL PROCEDURE

59 addresses, and statements of
60 witnesses -- as defined in Rule
61 26.2(f) -- the defense intends to
62 call during its case in chief. The
63 government may not make such a
64 request if it has filed an ex parte
65 statement under subdivision
66 (a)(1)(F).

67 * * * * *

COMMITTEE NOTE

No subject has engendered more controversy in the Rules Enabling Act process over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal

FEDERAL RULES OF CRIMINAL PROCEDURE 5

enterprises, and other crimes committed by criminal organizations.

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. See D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10(4)(A) (3d ed. 1992) (discussing automatic prosecution disclosure of government witnesses and

statements). Similarly, pretrial disclosure of witnesses is provided for in most State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the evidence available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons

FEDERAL RULES OF CRIMINAL PROCEDURE 7

in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

Subdivision (a)(1)(F). The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names and addresses of witnesses and their statements unless the attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or lead to an obstruction of justice.

The provision that the government provide the names, addresses, and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would

be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such ex parte statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name, address, and statements even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government is required to disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment appears to create a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its

FEDERAL RULES OF CRIMINAL PROCEDURE 9

witnesses' statements at trial, *after* they have testified. But in fact the amendment is entirely consistent with the Jencks Act which recognizes the value of discovery. It is also consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend the spirit of the Jencks Act to defense discovery of statements at some pretrial proceedings. See, e.g., 26.2(g) and pretrial discovery of expert witness testimony. In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, addresses, and statements, is triggered by full compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, it may not take advantage of the reciprocal discovery provision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
October 11 & 12, 1993
San Diego, California

The Advisory Committee on the Federal Rules of Criminal Procedure met in San Diego, California on October 11 and 12, 1993. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 11, 1993 at the Le Meridian Hotel in San Diego, California. The following persons were present for all or a part of the Committee's meeting.

Hon. D. Lowell Jensen, Chair

Hon. B. Waugh Crigler

Hon. Sam A. Crow

Hon. W. Eugene Davis

Hon. Wm. Terrell Hodges

Hon. George M. Marovich

Prof. Stephen A. Saltzburg

Mr. John Doar, Esq.

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Edward Marek, Esq.

recommendation should be drafted as a bylaw of the Advisory Committee.

Thereafter, Mr. Pauley moved to forward the recommendation and action to the Standing Committee. Judge Crigler seconded the motion which carried by a unanimous vote.

Judge Crow presented the subcommittee's recommendation regarding the possibility of reviving proposed amendments which have been previously rejected by the Committee. He noted that the problem had not been encountered enough to make any judgment as to whether repeated proposals are purposeful or merely coincidental. He also noted that the subcommittee questioned whether it would be advisable to place restrictions on repeated proposals. The subcommittee, he stated, had decided to propose the following recommendation:

The Advisory Committee adopt the subcommittee's recommendation that the reporter in preparing copies and summaries of all written suggestions or proposals identify those that are similar to ones that have been rejected and, to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

Judge Crow moved that the recommendation be adopted. Professor Saltzburg seconded the motion.

In the discussion that followed the motion, Crigler expressed concern about reconsideration of rejected amendments and Mr. Marek raised the question of what would constitute "rejection" of a particular proposal. Judge Marovich expressed the view that the Committee should keep it simple, e.g., the Committee would normally not be amenable to continued discussion about a proposal which had been rejected. He also noted that the Committee procedures should not be tuned too finely.

The Committee ultimately voted unanimously in support of the motion. Professor Saltzburg moved that the recommendation be forwarded to the Standing Committee and Mr. Marek seconded the motion. The motion carried by a unanimous vote.

IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court

and Pending Before Congress

The Reporter indicated that amendments to the following rules had been approved by the Supreme Court and had been forwarded to Congress:

Rule 12.1 (discovery of statements)

Rule 16(a) (discovery of experts)

Rule 26.2 (production of statements)

Rule 26.3 (mistrial)

Rule 32(f) (production of statements)

Rule 32.1 (production of statements)

Rule 40 (commitment to another district)

Rule 41 (search and seizure)

Rule 46 (production of statements)

Rule 8, Rules Governing Section 2255 Proceedings

Technical Amendments (use of term "magistrate judge") throughout the Rules

Barring any action by Congress, these amendments will go into effect on December 1, 1993.

B. Rules Approved by the Judicial Conference

and Being Forwarded to the Supreme Court

The Reporter informed the Committee that amendments to Rules 16(a)(1)(A)(statements or organizational defendants), 29(b)(delayed ruling on judgment of acquittal), 32(sentence and judgment), and 40(d)(conditional release of probationer) were approved by the Standing Committee at its June 1993 meeting and that the Judicial Conference had also approved the amendments. They will be transmitted to the Supreme Court in the near future.

C. Rules Approved by the Standing Committee

for Public Comment

The Reporter also informed the Committee that the Standing Committee in June 1993 approved for publication and comment amendments to the following rules: Rule 5 (exemption for persons arrested for unlawful flight to avoid prosecution), Rule 10 (in absentia arraignments), Rule 43 (in absentia pretrial sessions; in absentia sentencing); and Rule 53 (cameras in the courtroom). The deadline for public comments is April 15, 1994.

The Reporter indicated that the Litigation Section of the American Bar Association had requested extra time to comment on the proposed amendments, in particular Rule 53. Following a brief discussion during which it was noted that the deadline of April 15 would provide the opportunity to review any public comments at the Committee's Spring meeting. No action was taken on the letter.

D. Other Criminal Procedure Rules Under

Consideration by the Committee

1. Rule 6, Secrecy Provisions of Rule re Reporting Requirements.

The Reporter informed the Committee that Mr. David Cook of the Administrative Office had raised the issue of whether Rule 6 would be violated if all indictments, sealed and unsealed, were reported to the Administrative Office. Mr. Rabiej provided some background information on the request. Both Mr. Marek and Mr. Pauley expressed concern over the possible release of any information concerning sealed indictments. Mr. Pauley noted that reporting sealed indictments could be especially problematic where the public was aware that a grand jury was meeting on a big case.

Judge Crow questioned whether the Committee should even be considering the issue. His concern was echoed by Judge Jensen who noted that the Committee should not render advisory opinions on rule interpretations. Judge Marovich moved that the Committee decline to act on the issue and Mr. Doar seconded the motion, which carried by a unanimous vote.

2. Rule 16, Disclosure of Witness Names.

Judge Jensen provided a brief overview of a proposal before the Committee to amend Rule 16 to require the government to disclose the identity and statements of its witnesses before trial. He noted that the proposal, which had been presented by Professor Saltzburg and Mr. Wilson at the April 1993 meeting, had been deferred at the request of Attorney General Janet Reno who had requested time to study the issue. On August 4, 1993, Attorney General Reno wrote to then chair, Judge Hodges, indicating her opposition to any effort to amend Rule 16 to require such disclosure. In support of her position she attached a detailed memo prepared by Mr. Pauley; that memo critiqued a draft amendment prepared by Professor Saltzburg and Mr. Wilson. Judge Jensen noted that the Reporter had prepared an alternate draft.

Mr. Wilson offered brief comments on each of the two drafts and observed that the Department of Justice will apparently not change its views on discovery.

Addressing the draft that he had prepared, Professor Saltzburg noted that the Committee had spent a long time on this issue and that the proposed amendment was an important one. After summarizing the thrust of his draft, Professor Saltzburg noted the long-standing opposition by the Department of Justice and that they were candid enough to reject any suggested changes. He observed, however, that there is no real dispute that discovery encourages efficient trials. The Department recognizes that point, he noted, because it had itself successfully proposed amendments to rules which benefit the prosecution. Professor Saltzburg also observed that the system is more complicated and that this amendment would be a first important step toward making criminal trials more effective. He noted that the draft presented a balance between protecting witnesses and the defendant's right to prepare for trial.

Professor Saltzburg moved that the Committee approve the substance of his draft which would require the government to disclose to the defense seven days before trial the names and statements of its witnesses. Excluded from his motion was any reference to disclosure of co-conspirator statements. Mr. Karas seconded the motion.

In the lengthy discussion which followed Mr. Pauley provided an in-depth analysis of why the motion should be defeated. He agreed that the Department has agreed to a number of amendments in the past but that it felt very uncomfortable with the proposed amendment. This amendment, he said, was unacceptable to the Department and indicated that it would exert all of its energy at every stage of the rule making process to defeat the amendment. He added that the amendment potentially infringes on the Rules Enabling Act because Congress has

already spoken on the issue in the Jencks Act. The Committee, he stated, should therefore defer to Congress and avoid the appearance of an end run. If the proponents have enough political clout, they should seek an amendment through Congressional action. Mr. Pauley also took exception to any suggestion that trials are currently unfair. The Department also wants fair and efficient trials but that the current state of affairs does not present any problems worthy of an amendment. He indicated the fear that the amendment would dampen the willingness of witnesses to come forward and testify. In that regard he observed that the amendment would needlessly invade the privacy interests of the witnesses. Finally, he noted a number of technical problems with the draft, which he had explained in more detail in the memo accompanying Attorney General Reno's letter.

The Reporter briefly introduced an alternative draft noting that the draft contained no reference to production of the government witness statements and no specific procedure for government counsel declining to disclose the evidence. He noted that his draft provided that counsel could use Rule 16(d) to obtain protective orders. That draft did not include any procedure for post-trial review of a decision to not disclose the witnesses.

Mr. Pauley responded by noting that the Department was even more opposed to the Reporter's draft and that it was definitely not a compromise.

Judge Marovich expressed concern about the tone of the Department of Justice's memo and that the Committee would probably lose the battle in Congress. In very strong language, he expressed concern about suggestions that the judiciary would not be able to fairly determine whether a witness' name should be disclosed. He noted that eventually the government would have to disclose its witnesses and that if the Department has good faith reasons for not disclosing the witnesses before trial, they should be able to request an exception to the general rule of disclosure. Judge Marovich added that he is familiar with state discovery practices and that there is no real danger to government witnesses. He also observed that early disclosure does have a positive impact on trials.

Mr. Marek expressed the view that the Saltzburg/Wilson proposal was a compromise. The key, he said, would be that the Committee Note provide guidance on what constitutes "good faith" on the part of the prosecutor in not disclosing a name. He also noted that the Reporter's draft was less satisfactory because it did not make provision for disclosure of witness statements. He noted that the proper avenue for amending Rule 16 is through the Rules Enabling Act, and not going directly to Congress. Reading from pertinent provisions in the Committee Note accompanying a similar amendment forwarded to Congress in 1974, Mr. Marek noted the importance of pretrial discovery. He also reminded the Committee that the Department of Justice had sought amendments broadening government discovery in Rules 12.1 and 12.3.

Mr. Pauley responded briefly by observing that judges do have concerns about witness safety who can decide whether a sufficient showing has been made by the prosecutor, who is often in a better position to assess witness safety.

Addressing the issue of witness safety, Judge Davis commented that the issue cannot be ignored and that it is not always easy for the prosecution to articulate good cause. But the increase in the case load means that discovery will become more important. He expressed approval of the Reporter's draft amendment and the possibility of a reciprocity provision for the government. Finally, he suggested that the prosecutor's reasons for not disclosing a witness should be unreviewable.

Ms. Klieman noted that she has represented both the government and the defense and that she is not necessarily biased in favor of defendants. She stated that the danger factor is real, not only to the witness but also to the family. But the government has options available for protecting witnesses. Ms. Klieman expressed agreement with Judge Marovich's views on discovery in state practice and added that it would be false to assume that there are

more dangers to persons in the federal system. The danger is no different and the Saltzburg/Wilson proposal accounts for that. She noted that the participants should count on good faith of the prosecutor. Drawing on the fact that she has worked on both sides, she could not think of a case where discovery did not promote efficiency. She also indicated that the Reporter's draft fell short of the needed reform. The defendant needs the witness' statements before trial. Finally, she indicated support for inclusion of a reciprocity provision.

Mr. Wilson recounted a case in which a client was innocent and there was clearly no danger to the government witnesses. He noted that the issue of potential danger to witnesses is a very small part of the federal criminal system.

Mr. Doar noted his general reluctance to change the rule and that he did not agree with Judge Marovich's view that judges are better able to decide whether a witness is in danger. Finally, he questioned the need for a provision for post-trial review of the prosecutor's reasons for not disclosing a witness' name.

Professor Saltzburg responded that it would probably not be necessary to include such a provision and that his proposal was intended to include checks and balances on both sides. He added that the proposal should include a provision which recognizes the possible danger to third persons.

Judge Crow disagreed with the view that the attorneys should not be trusted. He agreed that the amendment should require disclosure of names and addresses but was not sure that it should extend to disclosure of statements. He also expressed approval of a reciprocity provision and favored deletion of a post-trial review procedure.

Judge Crigler indicated that he had mixed views on the Saltzburg/Wilson proposal. He did not believe that the Reporter's draft went far enough but was concerned about possible post-trial litigation concerning the prosecutor's decision not to disclose a witness' name. While he agreed with Judge Crow's views about trusting counsel to do the right thing, he was concerned about starting a debate with Congress on criminal discovery.

Judge Marovich stated that there will be no confrontation with Congress unless the Department of Justice wants it. He agreed with those who are opposed to including a post-trial review provision. The real deterrent to abuse of the option of not disclosing a witness is the fact that prosecutors want to maintain credibility.

Professor Saltzburg withdrew his earlier motion and made a substitute motion, with the consent of Mr. Wilson, that the Committee approve in principle an amendment which would require the prosecutor to disclose a witness' name, address, and statement but would not include a provision for post-trial review of the prosecutor's decision not to disclose. He suggested that the Committee wait on the issue of reciprocity.

Mr. Pauley expressed concern for the timing requirements, noting that in capital cases the prosecution need not disclose a witness' name until three days before trial.

The Committee voted 8 to 2 in favor of Professor Saltzburg's motion.

Following a brief adjournment, Professor Saltzburg presented a draft amendment to the Committee which covered the key points raised in the earlier discussion. Mr. Pauley again urged the Committee to shorten the time for disclosure to three days before trial. Following additional drafting and style suggestions, the Committee voted 9 to 1 to approve the draft amendment and forward it to the Standing Committee for approval and publication.

In later discussion concerning issues to be included in the accompanying Committee Note, it was suggested that

the Committee Note make clear that nothing in the amendment is intended to change the protective order provision in Rule 16(d). Mr Pauley also suggested that the Note include a reference to the fact that witnesses often testify at the risk of not only physical injury but also at the risk of economic reprisal.

3. Rule 16, Disclosure to Defense of Information Relevant to Sentencing.

The Reporter informed the Committee that pending amendments to the Commentary for § 6B1.2 (Policy Statement on Standards for the Acceptance of Plea Agreements) recommend that before the defendant enters a guilty plea, the government should first disclose sentencing information which is relevant to the guidelines. He indicated that although the Sentencing Commission did not intend to confer any substantive rights on the defendant through the changed policy statement, the change is apparently intended to encourage plea negotiations that realistically reflect probable outcomes. Mr. Pauley urged the Committee to reject any proposed amendments to the Rules concerning disclosure of sentencing evidence. He noted that the issue had been raised three years earlier and that the Department of Justice had also opposed it then. The Department was concerned that enormous amounts of litigation would be generated through a requirement to disclose sentencing evidence. Noting that the defense receives such information under current practice, he also expressed concern that the plea bargaining system would break down.

The Committee took no action on the issue.

4. Rule 16, Proposal to Require Government to Identify Materials Relevant to Defendant.

Mr. Marek recommended that the Committee consider Judge Donald E. O'Brien's proposal to amend Rule 16. The gist of the proposal is that Rule 16 be amended to require the government to provide an index, guide or some other device to assist defense counsel in sorting through and identifying documents or information relevant to the case. He noted that Judge O'Brien is a member of the Judicial Conference's budget committee and that he is very concerned about costs associated with pretrial discovery.

Judge Hodges provided background information on a proposal by Judge Donald E. O'Brien first presented to the Committee at its Fall 1992 meeting in Seattle. The proposal was inspired, at least in part, by accounts of young court-appointed lawyers being presented with a room full of documents. From a cost-efficiency standpoint, Judge O'Brien believed that the time and expense of going through massive documents only to find little or no relevant evidence was not justifiable. At the Committee's Fall 1992 meeting, Mr. Doar moved to adopt the proposal. But it failed for lack of a second.

Judge O'Brien, and several others supporting his proposal (Professor Ehrhardt, Judge William Young, and Magistrate Judge John Jarvey) made an oral presentation at the Committee's Spring 1993 meeting in Washington, D.C. urging the Committee to reconsider its position. Although no action was taken on the renewed proposal, Judge Hodges indicated to Judge O'Brien that the matter would be added to the Committee's Fall 1993 meeting agenda. In the meantime, Attorney General Reno had addressed the proposal in her letter on Rule 16 (which the Committee discussed in conjunction with proposed amendments re disclosure of government witnesses).

Judge Crigler indicated that any work product objections that the government might have would be waived when defense counsel was shown the government storage area and that under the civil rules there is no specific

authority to require production of any sort of a "roadmap" for locating the pertinent documents.

In an extensive discussion of the issue, Mr. Pauley opposed the proposal. He noted that there was ambiguity in the proposal and that the Attorney General had provided the Committee with a number of compelling reasons why the proposal was inappropriate and that the defense should not count on an organizational index. Mr. Doar indicated that presenting a chronological list of pertinent documents would be helpful.

Judge Jensen indicated that the matter would be deferred until the Committee's Spring 1994 meeting and appointed a subcommittee (Ms. Klieman, Chair, Judge Davis, Judge Marovich, and Mr. Pauley) to study the proposal more fully.

5. Rule 40, Treating FAX Copies as Certified.

The Committee considered a proposal filed by Magistrate Judge Wade Hampton that the rules be amended to provide that faxed certified documents of indictments, arrest warrants, or other instruments be considered as "certified." Following a brief discussion of the proposal, Judge Crigler noted that the proposal seemed to be adequately covered in the rules and moved that the Committee reject the proposal. Mr. Marek seconded the motion which carried by a unanimous vote.

6. Rule 41, Proposed Deletion of Requirement that Warrant be Issued by Authority Within District.

The Committee considered a proposal filed by Mr. J.C. Whitaker, a federal law enforcement employee, who recommended that Rule 41 be amended to delete the territorial limitations. He noted in his letter that such limitations create hardships for law enforcement officers who must now obtain a search warrant from an authority in district where the property is located, or will be located. The Reporter informed the Committee that the territorial limitation issue had been considered by the Committee when it amended Rule 41 several years ago to cover property moving into, or out of, a district.

The proposal failed for lack of a motion.

7. Rules Governing Section 2254 Cases; Proposed Legislation Affecting Rules.

Mr. Rabiej informed the Committee that Congress was considering amendments to Sections 2242 and 2254 and that depending on the final draft, there could be direct impact on the Rules Governing Section 2254 cases. He added that he would keep the Committee apprised of any further developments.

E. Rules and Projects Pending Before Standing

Committee and Judicial Conference

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

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

1. Approve the proposed amendments to Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 of the Federal Rules of Appellate Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....pp. 2-5
2. Approve the proposed amendments to Rules 8002 and 8006 of the Federal Rules of Bankruptcy Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....p. 6
3. Approve the proposed amendments to Rules 16, 29, 32, and 40 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmit to Congress pursuant to law.....pp. 6-9
4. Approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.....pp. 10-11
5. Not approve the adoption of proposed Guidelines for Filing by Facsimile in their present form.....pp. 13-14

The remainder of the report is for information and the record.

NOTICE

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

III. Amendments to the Federal Rules of Bankruptcy Procedure.

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 8002 and 8006 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. The scheduled public hearing on the amendments was canceled because no one requested to testify.

The proposed amendments to Rules 8002 and 8006, along with conforming changes to the Appellate and Civil Rules, are intended to designate a single event that initiates tolling periods in the Appellate, Bankruptcy, and Civil Rules for certain post-trial motions. Your Committee voted to make several stylistic changes to the proposed amendments. An excerpt from the Advisory Committee report and the proposed amendments, as amended, are set forth in Appendix B.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8002 and 8006 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on Criminal Rules submitted to your Committee proposed amendments to Criminal Rules 16, 29, 32, and 40 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated for public comment in late December 1992 on an expedited four-month timetable to coincide with the timetable for amendments to Evidence Rule 412. A public

hearing on the proposed amendments was held in Washington, D.C. on April 22, 1993.

The Advisory Committee received a substantial number of comments on the proposed amendments to Criminal Rule 32, particularly from probation officers who were concerned about the time deadlines imposed on the completion of presentence reports. In light of these concerns, the Advisory Committee eliminated the reference to the specific time set for the completion of a presentence report and substituted the existing provision, which requires the report to be completed before the sentence is imposed "without unreasonable delay." Specific time periods regulating other stages of the sentencing process, however, were retained in the proposed amendments. The Advisory Committee also retained the proposed amendment's presumption that a probation officer's sentencing recommendation be disclosed to the parties, despite the recommendation of the Committee on Criminal Law to retain the current rule's presumption against disclosure.

The Advisory Committee made several other changes to the original draft regarding the responsibilities and authority of probation officers during the sentencing process. Among other things, the changes would provide defendant's counsel with a reasonable opportunity, instead of an entitlement, to attend any interview with a probation officer, and they would authorize a probation officer to arrange, rather than to require, meetings with defendant's counsel. In addition, your Committee made stylistic changes to the proposed amendments.

Your Committee agreed with the Advisory Committee's conclusion that a victim allocution provision in Rule 32 was unnecessary because a court now has the discretion to permit a victim to speak at sentencing. Mandating victim allocution might lead to greater victim frustration because of the sentencing guidelines restrictions, which limit the impact of a victim's statement. Your Committee, however, eliminated as unnecessary several sections of the Committee Note, which would have explained in detail these and other reasons for not including the victim allocution provision in the Rule.

The proposed changes to Rules 16, 29, and 40 are relatively minor. The proposed change to Rule 16 would explicitly extend the discovery and disclosure requirements of the rule to organizational defendants. The changes to Rule 29 would permit the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all the evidence. Changes to Rule 40 would clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, appear in Appendix C together with an excerpt from the Advisory Committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Criminal Rules 16, 29, 32, and 40 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Criminal Rules 5, 10, 43, and 53, and recommended that they be published for public comment. The proposed amendment to Rule 5 would exempt from the Rule's requirements prosecutions initiated under the Unlawful Flight to Avoid Prosecution (UFAP) statute, because a United States attorney rarely prosecutes defendants under the statute. UFAP is used primarily to assist state law enforcement officers in apprehending and holding alleged state law offenders. Rules 10 and 43 would be amended to allow video teleconferencing of certain pretrial proceedings with the approval of the court. The proposed changes to Rule 43 would also allow the court to sentence a defendant in absentia who flees after the trial has begun. Finally, the proposed amendment to Rule 53 would permit broadcasting of proceedings under guidelines to be adopted by the Judicial Conference. A Conference approved pilot program permitting broadcasts of proceedings in civil cases is presently underway.

Your Committee made stylistic changes and voted to circulate the proposed amendments to the bench and bar for comment. In order to establish an orderly time for publication, your Committee also authorized the Advisory Committee to consult with the other advisory committees and determine the time to distribute the proposed amendments for public comment.

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

Agenda F-19
(Appendix C)
Rules
September 1993

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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: May 14, 1993

I. INTRODUCTION

At its meeting in April 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1993 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General

In July 1992, the Standing Committee approved amendments to Rules 16 and 29 but directed publication for public comment be deferred pending a relocation of the Rules Committee Support Office. In December 1992, the Standing Committee approved amendments to Rules 32 and 40 and directed that all four rules (16, 29, 32, and 40) be published on an expedited basis with the comment period to end on April 15, 1993. Comments were received on the proposed amendments and were carefully considered by the

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

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

SUBJECT: GAP Report: Explanation of Changes Made Subsequent
to the Circulation for Public Comment of Rules
16, 29, 32 and 40

DATE: May 15, 1993

At its July 1992 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 29 and at its meeting in December 1992 approved the circulation for public comment of proposed amendments to Rules 32 and 40.

All four rules were published on an expedited basis in January 1993 with a deadline of April 15, 1993 for any comments. At its meeting on April 22, 1993 in Washington, D.C., two witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the two witnesses. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. As originally published, and as reflected in the original Committee Note, the rule did not address the question of what showing the defense would have to make to demonstrate that the requested statements were made by a person associated with an organizational defendant. After additional discussion on that point, the Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

2. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

1 Rule 16. Discovery and Inspection

2 (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

3 (1) Information Subject to Disclosure.

4 (A) STATEMENT OF DEFENDANT. Upon request of a
 5 defendant the government must ~~shall~~ disclose to the
 6 defendant and make available for inspection, copying,
 7 or photographing: any relevant written or recorded
 8 statements made by the defendant, or copies thereof,
 9 within the possession, custody, or control of the
 10 government, the existence of which is known, or by the
 11 exercise of due diligence may become known, to the
 12 attorney for the government; that portion of any
 13 written record containing the substance of any relevant
 14 oral statement made by the defendant whether before or
 15 after arrest in response to interrogation by any person
 16 then known to the defendant to be a government agent;
 17 and recorded testimony of the defendant before a grand
 18 jury which relates to the offense charged. The
 19 government must ~~shall~~ also disclose to the defendant
 20 the substance of any other relevant oral statement made
 21 by the defendant whether before or after arrest in
 22 response to interrogation by any person then known by
 23 the defendant to be a government agent if the
 24 government intends to use that statement at trial.
 25 Upon request of a Where the defendant which is an

FEDERAL RULES OF CRIMINAL PROCEDURE

26 organization such as a corporation, partnership,
27 association or labor union, ~~the government must~~
28 disclose to the defendant any of the foregoing
29 statements made by a person ~~the court may grant the~~
30 defendant, upon its motion, ~~discovery of relevant~~
31 recorded testimony of any witness before a grand jury
32 who ~~the government contends~~ (1) was, at the time of
33 making the statement ~~that testimony~~, so situated as a
34 an ~~director, officer, or~~ employee, or agent as to have
35 been able legally to bind the defendant in respect to
36 the subject of the statement ~~conduct constituting the~~
37 offense, or (2) was, at the time of offense, personally
38 involved in the alleged conduct constituting the
39 offense and so situated as a ~~an~~ director, officer, or
40 employee, or agent as to have been able legally to bind
41 the defendant in respect to that alleged conduct in
42 which the ~~witness~~ person was involved.

43 * * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See *In re United States*, 918 F.2d 138 (11th Cir. 1990) (rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also *United States v. Hughes*, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970) (prosecution of corporations "often resembles the most

complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

1 Rule 29. Motion for Judgment of Acquittal

2 * * * * *

3 (b) RESERVATION OF DECISION ON MOTION. ~~If a motion for~~
 4 ~~judgment of acquittal is made at the close of all the~~
 5 ~~evidence, t~~ The court may reserve decision on the a motion
 6 for judgment of acquittal, proceed with the trial (where the
 7 motion is made before the close of all the evidence), submit
 8 the case to the jury and decide the motion either before the
 9 jury returns a verdict or after it returns a verdict of
 10 guilty or is discharged without having returned a verdict.
 11 If the court reserves decision, it must decide the motion on
 12 the basis of the evidence at the time the ruling was
 13 reserved.

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., *United States v. Bruno*, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989);

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of June 17-19, 1993
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in the Thurgood Marshall Federal Judicial Building in Washington, D.C. on Thursday, Friday, and Saturday, June 17-19, 1993. The following members were present:

Judge Robert E. Keeton (chairman)
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Chief Justice Edwin J. Peterson
Alan W. Perry, Esquire
Judge George C. Pratt
Judge Dolores K. Sloviter
Judge Alicemarie H. Stotler
Alan C. Sundberg, Esquire
William R. Wilson, Esquire
Professor Charles Alan Wright

The Department of Justice was represented by Deputy Attorney General Philip B. Heymann (on Friday), Roger Pauley (Thursday and Friday), and Dennis G. Linder (Friday and Saturday).

Supporting the committee were Dean Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules - Judge Kenneth F. Ripple, chair, and Professor Carol Ann Mooney, reporter;

Advisory Committee on Bankruptcy Rules - Judge Edward Leavy, chair, and Professor Alan N. Resnick, reporter;

Advisory Committee on Civil Rules - Judge Sam C. Pointer, Jr., chair, and Dean Edward H. Cooper, reporter;

Advisory Committee on Criminal Rules - Judge William Terrell Hodges, chair, and Professor David A. Schlueter, reporter; and

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Hodges presented the report of the advisory committee, as set forth in his memorandum of May 14, 1993. (Agenda Item VI) He stated that the advisory committee was presenting two sets of amendments. The first had been published for public comments and was now being presented by the committee for submission to the Judicial Conference. The second set of proposals was new, and the advisory committee was seeking the standing committee's approval to publish them for comments.

I. Amendments for adoption by the Judicial Conference

Fed.R.Crim.P. 16

Judge Hodges stated that the comments received from the public had been favorable to the proposed amendments to Rule 16(a)(1)(A), but some commentators had complained that the revisions to Rule 16 simply did not go far enough in permitting discovery in criminal cases.

The committee approved the amendments to Rule 16 without change.

Fed.R.Crim.P. 29

The committee approved the amendments to the rule, which would allow a district judge to reserve judgment on a motion for judgment of acquittal.

Fed.R.Crim.P. 32

Judge Hodges reported that the advisory committee had received a substantial number of comments on the proposed amendments to Rule 32 and had given careful consideration to a letter submitted by the chairman of the Criminal Law Committee opposing a number of provisions in the proposed amendments. He stated that the advisory committee had made several changes in the rules as a result of the letter, but had rejected some of its suggestions.

Judge Hodges summarized each of the advisory committee's changes made as a result of the public comments, as set forth at pages 2-4 of his memorandum of May 14, 1993. Most significantly, the advisory committee had agreed to eliminate the 70-day time limit between a finding of guilt and the imposition of sentence. This action was taken largely to accommodate the concerns probation officers, who had complained that the proposed period is too restrictive for their offices. Accordingly, the advisory committee revised the rule after the public comment period to specify simply that sentence should be imposed "without unnecessary delay."

Judge Hodges pointed out that the Criminal Law Committee and other commentators had objected to the new presumption that a probation office's recommendations on sentencing must be

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

AGENDA VI
Washington, D.C.
June 17-19, 1993

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

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: May 14, 1993

I. INTRODUCTION

At its meeting in April 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1993 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General

In July 1992, the Standing Committee approved amendments to Rules 16 and 29 but directed publication for public comment be deferred pending a relocation of the Rules Committee Support Office. In December 1992, the Standing Committee approved amendments to Rules 32 and 40 and directed that all four rules (16, 29, 32, and 40) be published on an expedited basis with the comment period to end on April 15, 1993. Comments were received on the proposed amendments and were carefully considered by the

**Advisory Committee on Criminal Rules
Report to Standing Committee
May 14, 1993**

Advisory Committee at its April 1993 meeting in Washington, D.C. In addition, the Committee received the testimony of two witnesses at that same meeting.

The GAP Report provides a more detailed discussion of the changes made to the Rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

B. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. The Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

The Committee recommends that Rule 16(a)(1)(A), as amended be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

C. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

Although the Committee made no changes to the rule, it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

The Advisory Committee recommends that the Standing Committee approve Rule 29 and forward it to the Judicial Conference for its approval.

D. Rule 32. Sentence and Judgment.

The Advisory Committee has made several changes to the rule and the Committee Note. They are as follows:

1. Time Limits:

The Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to

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

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

SUBJECT: GAP Report: Explanation of Changes Made Subsequent
to the Circulation for Public Comment of Rules
16, 29, 32 and 40

DATE: May 15, 1993

At its July 1992 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 29 and at its meeting in December 1992 approved the circulation for public comment of proposed amendments to Rules 32 and 40.

All four rules were published on an expedited basis in January 1993 with a deadline of April 15, 1993 for any comments. At its meeting on April 22, 1993 in Washington, D.C., two witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the two witnesses. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. As originally published, and as reflected in the original Committee Note, the rule did not address the question of what showing the defense would have to make to demonstrate that the requested statements were made by a person associated with an organizational defendant. After additional discussion on that point, the Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, *whom the government contends*, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

2. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

Advisory Committee on Criminal Rules
Proposed Rule 16(a)(1)(A)

Rule 16. Discovery and Inspection

1 (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

2 (1) Information Subject to Disclosure.

3 (A) STATEMENT OF DEFENDANT. Upon request of a
4 defendant the government must ~~shall~~ disclose to the
5 defendant and make available for inspection, copying or
6 photographing: any relevant written or recorded
7 statements made by the defendant, or copies thereof,
8 within the possession, custody or control of the
9 government, the existence of which is known, or by the
10 exercise of due diligence may become known, to the
11 attorney for the government; that portion of any
12 written record containing the substance of any relevant
13 oral statement made by the defendant whether before or
14 after arrest in response to interrogation by any person
15 then known to the defendant to be a government agent;
16 and recorded testimony of the defendant before a grand
17 jury which relates to the offense charged. The
18 government must ~~shall~~ also disclose to the defendant
19 the substance of any other relevant oral statement made
20 by the defendant whether before or after arrest in
21 response to interrogation by any person then known by
22 the defendant to be a government agent if the
23 government intends to use that statement at trial.
24 Upon request of a Where the defendant which is an

Advisory Committee on Criminal Rules
Proposed Rule 16(a)(1)(A)

RULES OF CRIMINAL PROCEDURE*

25 organization such as a corporation, partnership,
26 association, or labor union, the government must
27 disclose to the defendant any of the foregoing
28 statements made by a person the court may grant the
29 defendant, upon its motion, discovery of relevant
30 recorded testimony of any witness before a grand jury
31 who the Government contends (1) was, at the time of
32 making the statement that testimony, so situated as a
33 an director, officer, or employee, or agent as to have
34 been able legally to bind the defendant in respect to
35 the subject of the statement ~~conduct-constituting the~~
36 offense, or (2) was, at the time of offense, personally
37 involved in the alleged conduct constituting the
38 offense and so situated as a an director, officer, or
39 employee, or agent as to have been able legally to bind
40 the defendant in respect to that alleged conduct in
41 which the witness person was involved.

42

* * * * *

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United States, 918 F.2d 138 (11th Cir. 1990) (rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense,

Advisory Committee on Criminal Rules
Proposed Rule 16(a)(1)(A)

RULES OF CRIMINAL PROCEDURE*

it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970) (prosecution of corporations "often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

**ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE
PROPOSED AMENDMENT TO RULE 16(a)(1)(A)**

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(A)

The Committee has received three written (3) comments on the proposed amendment to Rule 16(a)(1)(A) (statements by organizational defendants). All three commentators support the amendment but focus on the issue of what showing, if any, the defendant organization must make in order to obtain disclosure. One suggests a change in the Committee Note to the effect that the organizational defendant should not be required to show that an individual was able to legally bind the defendant. Another advocates an automatic disclosure provision. And the third indicates that the disclosure should also extend to those who the government contends were in a position to bind the defendant organization.

II. LIST OF COMMENTATORS: Rule 16(a)(1)(A)

1. David P. Bancroft, Esq., San Francisco, CA,
4-2-93
2. William J. Genego & Peter Goldberger, NADCL,
Wash., D.C., 4-14-93.
3. Myrna Raeder, Prof., Los Angeles, CA, 4-12-93.

III. COMMENTS: Rule 16(a)(1)(A)

David P. Bancroft, Esq.
Private Practice
San Francisco, CA,
April 2, 1993

Mr. Bancroft states that the reference in the Committee Note to the process of showing that a particular individual had the ability to bind the organizational defendant is not practical; an entity often does not know which agents the government believes can bind it. He advocates an automatic disclosure provision -- based on the government's claim that an individual was in a position to bind the entity.

**Advisory Committee on Criminal Rules
Proposed Amendments to Rule 16(a)(1)(A)
May 1993**

William J. Genego, Esq.
Peter Goldberger, Esq.
National Assoc. of Crim. Defense Lawyers
Washington, D.C.
April 14, 1993

Mr. Genego and Mr. Goldberger, on behalf of the National Association of Criminal Defense Lawyers, endorses the amendment to Rule 16. But they suggest that the rule be further modified to require disclosure for statements by persons who the government contends were in a position to bind the defendant organization. They note that in some cases the organization may disclaim that the person was in such a position but the government will take the opposite position; the entity, they suggest, should be able to obtain the statement even if it disagrees with the government's position.

Myrna Raeder
Professor of Law
Southwestern Univ. School of Law
Los Angeles, CA
April 12, 1993

Professor Raeder, on behalf of the American Bar Association, supports the amendment to Rule 16, noting that in February 1992, the ABA approved a similar amendment. She believes, however, that the Committee Note should be changed to reflect what, if any, burden might rest on the organizational defendant to show that the requested statements were made by a person able to bind the organization. The Note as currently written does not specifically address that question but instead leaves it for the court and the parties to determine that issue. Professor Raeder indicates that the comment is entirely too ambiguous to ensure that organizational defendants will routinely receive the statements. She recommends that the Note reflect that upon request, the government should routinely produce statements and testimony of individuals who it may contend at trial bind the organizational defendant. This change, she suggests would be simple to apply and avoid interpretive issues.

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE
April 22 & 23, 1993
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 22 and 23, 1993. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges, Chair of the Committee, called the meeting to order at 9:00 a.m. on Thursday, April 22, 1993 at the Federal Judiciary Building in Washington, D.C. The following persons were present for all or a part of the Committee's meeting.

Hon. Wm. Terrell Hodges, Chair

Hon. Sam A. Crow

Hon. W. Eugene Davis

Hon. John F. Keenan

Hon. George M. Marovich

Hon. Joseph H. Rodriguez

Hon. Harvey E. Schlesinger

Hon. D. Lowell Jensen

Prof. Stephen A. Saltzburg

Mr. John Doar, Esq.

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Edward Marek, Esq.

Mr. Roger Pauley, Jr., designate of Mr. John Keeney, Acting Assistant Attorney General

Professor David A. Schlueter

Reporter

Also present at the meeting were Judge Robert Keeton and Mr. Bill Wilson, chairman and member respectively of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe, Mr. David Adair, and Mr. John Rabiej of the Administrative Office of the United States Courts. Magistrate Judge Crigler was not able to attend.

I. INTRODUCTION AND COMMENTS

Judge Hodges welcomed the attendees and noted that Judges Keenan and Schlesinger were attending their last meeting and thanked them for their many years of faithful service to the Committee. He also introduced the new members of the Committee: Judges Davis, Marovich, and Rodriguez, and Ms. Klieman.

II. HEARING ON PROPOSED AMENDMENTS

The Chair also noted that a number of Criminal Rules had been published for public comment and that originally, a hearing on those proposed amendments had been set for March 29th in San Francisco and May 6, 1993 in Washington. Due to lack of witnesses, the San Francisco hearing had been cancelled. In order to consolidate travel, the May 6th hearing had been moved forward to coincide with the Committee's meeting. The Committee heard testimony from two witnesses: Mr. Thomas W. Hillier, Jr., a Federal Public Defender from Seattle, Washington and Hon. Frederick N. Smalkin,⁽¹⁾

from the United States District Court in Baltimore, Maryland. Mr. Hillier addressed the proposed amendments to Rules 16 and 32 and Judge Smalkin addressed the proposed amendments to Rule 32.

III. SPECIAL ORDER OF BUSINESS

As a special order of business the Chair recognized four persons who had indicated an interest in testifying about proposed amendments to Rule 16: Hon. Donald E. O'Brien, Hon. William G. Young, Hon. John A. Jarvey, and Professor Charles W. Ehrhardt. Each presented testimony to the Committee on the need for an amendment to Rule 16 which would either require the government to identify written materials which directly name the defendant, or in the alternative, require the government to make available to the defendant any existing index or cross referencing system or program which would assist the defense in identifying materials relating to the defendant. The witnesses offered the two options in language drafted by Professor Ehrhardt. They pointed out that there is a compelling financial need to save defense counsel time in sorting through massive amounts of material in preparing for trial. In response to questions from the Committee they recognized that the government might have an interest in protecting its work product but that some system should be devised to expedite criminal discovery, where time and resources are becoming more scarce.

Judge Hodges thanked the witnesses for their insights and indicated that in the due course of discussing possible amendments to Rule 16, the proposal would again be considered.

IV. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's October 1992 meeting in Seattle be approved. Mr. Karas seconded the motion which carried unanimously.

V. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress

The Reporter informed the Committee that the Supreme Court was in the process of approving a number of proposed amendments to the Criminal Rules and forwarding them to Congress for action under the Rules Enabling Act. The Rules amended by the Court are as follows:

1. Rule 12.1, Production of Statements.
2. Rule 16(a), Discovery of Experts.
3. Rule 26.2, Production of Statements.
4. Rule 26.3, Mistrial.
5. Rule 32(f), Production of Statements.
6. Rule 32.1, Production of Statements.
7. Rule 40, Commitment to Another District.
8. Rule 41, Search and Seizure.
9. Rule 46, Production of Statements.
10. Rule 8, Rules Governing § 2255 Proceedings.
11. Technical Amendments to other Rules.

B. Rules Approved by the Standing Committee and Circulated for Public Comment

on an Expedited Basis

The Reporter informed the Committee that at its December 1992 meeting the Standing Committee approved for public comment proposed amendments to Rules 32 and 40(d), two amendments approved by the Committee at its Seattle meeting in October 1992. In addition, the Standing Committee authorized publication and comment on two Rules it had earlier approved: Rules 16(a)(1)(discovery of experts) and Rule 29(b)(delayed rulings on motions for judgment of acquittal). All four rules were approved for expedited consideration; the comment period ended on April 15, 1993.

1. Rule 16(a)(1(A)), Disclosure of Statements by Organizational Defendants

Judge Hodges provided a brief background on the proposed amendment to Rule 16 which would require the government to disclose to the defense certain statements by individuals associated with organizational defendants.

Mr. Karas moved that the proposed amendment be sent forward to the Standing Committee with the recommendation that it be approved. Mr. Marek seconded the motion.

Judge Hodges noted that several written comments had been received on the proposed change and that he thought that there was merit in recognizing in the rule and the accompanying note the fact that the parties may disagree as to whether a particular person was in a position to bind the organizational defendant. Following comments by Judge Marovich concerning that problem, Judge Keeton recommended that the rule be changed slightly to require the government to disclose the statements of persons "the government contends" were in a position to bind the organizational defendant. Judge Hodges in turn suggested appropriate language for the note which would recognize that the defense would not be required to stipulate or admit that a particular individual was in a position to bind the defendant.

Judge Keenan moved that the amending language be added to the rule. Judge Rodriguez seconded the motion which carried by a vote of 10 to 0 with one abstention. The main motion to forward the amendment to the Standing Committee carried by a vote of 10 to 0 with one abstention.

2. Rule 29(b), Delayed Ruling on

Judgment of Acquittal

The Reporter briefly reviewed the background of the proposed amendment to Rule 29(b) and noted that one commentator, Mr. Weinberg, had suggested that the rule or the note reflect that on appeal of a delayed ruling of a motion for judgment of acquittal the court is not free to consider any evidence submitted after the motion was made at trial. Following additional brief discussion during which several members indicated that that position was clear from the wording of the rule itself, Mr. Pauley moved that the rule be forwarded to the Standing Committee. Judge Crow seconded the motion which carried by vote of 10 to 0 with two abstentions.

3. Rule 32, Sentence and Judgment

by a vote of 6 to 7. Judge Keenan thereafter moved that Rule 10 be amended to permit video teleconferencing if the defendant waived personal appearance. Professor Saltzburg seconded the motion which carried by a vote of 10 to 3.

Turning to Rule 43, Judge Jensen noted that the issue of waiver would also be a key point in any change to the rule. Mr. Marek expressed concern that any counsel who recommended that a defendant waive personal appearance might be guilty of ineffective assistance of counsel.

Judge Keenan moved that Rule 43 be amended to permit teleconferencing of pretrial sessions if the defendant waives personal appearance. Judge Crow seconded the motion which carried by a vote of 9 to 3 with one abstention.

3. Appointment of Subcommittee to Consider Problems Associated with Proposals to Amend Rules

Judge Hodges noted the problems often associated with unsuccessful proposals to amend rules. He queried what response, if any, the Committee should give to individuals or groups who request permission to appear personally before the Committee to propose rule changes or to address the Committee before it votes on a particular amendment. He appointed a subcommittee consisting of Judge Crow (Chair), Judge Jensen, Mr. Marek, Ms. Klieman, and Mr. Pauley to consider the issue and whether the Committee should adopt any policies or standard procedures for dealing with those issues. Later in the meeting, at the suggestion of Mr. Pauley, Judge Hodges asked the subcommittee to consider the issue of whether a particular proposal should be considered indefinitely tabled if it is rejected by the Committee.

4. Rule 12: Proposal to Amend Rule to Require Defense

to Raise Entrapment Defense as Motion

Judge Hodges indicated that Judge M. Real had proposed that Rule 12 be amended to require defendants to raise the entrapment defense as a pretrial motion and drew the Committee's attention to materials in the agenda book supporting that proposal. No motion was made regarding the proposal.

5. Rule 16: Proposal to Require Government

Disclosure of Witnesses

The Chair indicated that at its October 1992 meeting the Committee had indicated an interest in revisiting possible amendments to Rule 16 which would require the government to disclose its witnesses to the defense. Mr. Wilson and Professor Saltzburg had agreed to draft a possible amendment, and had done so. But he added that Attorney General Reno had sent a letter to the Committee asking it to defer consideration of that amendment until she had a chance to review it.

Judge Schlesinger then moved to defer consideration of the amendment. Judge Keenan seconded the motion.

Judge Keenan indicated that it would be important to respect the request of the new Attorney General and give the Department of Justice an opportunity to consider more fully the proposed amendment. Judge Hodges indicated that there has been almost continuous consideration of amendments to Rule 16 and that the heart of that rule rested in the proposal from Mr. Wilson and Professor Saltzburg.

Mr. Wilson acknowledged the request of the Attorney General but was concerned about continued delays in addressing what is a vital issue in federal criminal discovery. Professor Saltzburg acknowledged that the issue raised political questions and that if the Committee did not defer it might be viewed as a snub to the Attorney General. He suggested a middle ground -- the Committee could defer the matter but continue to pursue the amendment. Mr. Pauley indicated that after reviewing the proposal, the Attorney General might be in a position to suggest an alternative solution or amendment.

Following additional brief discussion of possible solutions, the Committee vote unanimously to defer the proposed amendment to Rule 16 until its next meeting.

There was also a brief discussion about the proposal from Judge O'Brien that Rule 16 be amended to require the government to identify the materials implicating the defendant. Several members expressed concern about the process of reconsidering proposals which had already been rejected; this proposal in particular had been considered and rejected by the Committee at its October 1993 meeting. Judge Hodges recommended that the subcommittee on procedures consider the issue. Any further action on Judge O'Brien's proposal was deferred.

6. Rule 24(b): Proposal to Reduce Number

of Peremptory Challenges

The Chair pointed out a proposal from several individuals that the Committee consider amending Rule 24 to reduce or equalize peremptory challenges -- in an effort to reduce court costs. He provided background information on the Committee's past attempts to amend Rule 24(b) to equalize the number of peremptory challenges and observed that perhaps Congressional interest in the matter might spur the Committee to reconsider that issue. No motion was made to amend Rule 24.

7. Rule 43: Proposal to Permit

In Absentia Sentencing

The Reporter provided a brief introduction to the Department of Justice's proposal to amend Rule 43 to permit in absentia sentencing. Mr. Pauley moved that Rule 43 be so amended and Judge Davis seconded that motion.

Mr. Pauley provided additional background information and reasons for the amendment. He pointed out that caselaw recognizes that the government can be prejudiced by the absence of a defendant. Judge Hodges questioned what would happen to the right of appeal if the defendant was sentenced in absentia. Judge Marovich indicated that it is a matter of waiver. He noted that in Illinois there is considerable caselaw indicating that if the defendant leaves after being admonished about the consequences of doing so, he or she has waived whatever

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of December 17-19, 1992
Asheville, North Carolina

The winter 1992 meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Asheville, North Carolina on Thursday, Friday, and Saturday, December 17-19, 1992. The following members were present:

Judge Robert E. Keeton (chairman)
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Alan W. Perry, Esquire
Chief Justice Edwin J. Peterson
Judge George C. Pratt
Judge Dolores K. Sloviter
Judge Alicemarie H. Stotler
William R. Wilson, Esquire

Also present were Dean Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office. Judge Thomas S. Ellis, III, Professor Charles Alan Wright and Deputy Attorney General George J. Terwilliger, III, were unable to attend. Paul Cappuccio attended the meeting to represent the Department of Justice in the absence of Paul Terwilliger.

Representing the advisory committees in attendance were:

Advisory Committee on Appellate Rules - Judge Kenneth F. Ripple, chairman, and Professor Carol Ann Mooney, reporter;

Advisory Committee on Bankruptcy Rules - Judge Edward Leavy, chairman, and Professor Alan N. Resnick, reporter;

Advisory Committee on Civil Rules - Judge Sam C. Pointer, Jr., chairman, and Dean Edward H. Cooper, reporter; and

Advisory Committee on Criminal Rules - Judge William Terrell Hodges, chairman, and Professor David A. Schlueter, reporter.

Also participating in the meeting were Joseph F. Spaniol, Jr. and Brian R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, and William B. Eldridge, director of the Research Division of the Federal Judicial Center.

Judge Easterbrook expressed concern that subdivisions (b)(3) and (b)(4) of the distributed draft, when read together, might create an implication that one may violate constitutional rights in civil cases, but not in criminal cases. He suggested that (3) and (4) could be merged to provide that evidence be admitted in both civil and criminal cases if essential to a fair and accurate determination. Judge Pointer responded that this solution would be politically unacceptable to the supporters of the pending legislation. He added that the constitutional standard found in (3) could be added to (4), but the advisory committee consciously decided to adopt a more lenient standard of admissibility in civil cases.

Judge Ripple echoed Judge Easterbrook's concern about the different standards that would apply in civil and criminal cases. He suggested that the public comments might well be enlightening on this point and expressed concern that the comment period would be less than the usual six months. Judge Keeton agreed that the short period was a problem, but he stated that the Judicial Conference had made a clear representation to the Congress that the rules committees would consider evidence rule 412 on a fast track basis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Hodges noted that the proposed amendments to rules 16 and 29 had been approved previously by the standing committee for publication. He directed the committee's attention to proposed amendments to evidence rule 412 and criminal rules 32 and 40. (Agenda Item X)

Fed.R.Evid. 412

Professor Schlueter stated that a subcommittee of the advisory committee had been working on potential changes in the evidence rules for a year and a half. The proposed reformulation of rule 412 had been prepared as an alternative to pending Congressional proposals. It was superseded by later drafts, prepared in consultation with the Advisory Committee on Civil Rules. Professor Schlueter informed the committee that his remarks would be directed to the "Fall 1992 Draft" version of rule 412 circulated to the committee earlier in the meeting.

He reiterated Judge Pointer's observation that the two advisory committee drafts before the standing committee were virtually identical except for style. The criminal committee's version contained separate subdivisions (a) and (b) in order to emphasize the strong policy of excluding evidence of sexual behavior. In this respect, the criminal committee draft was closer to the Congressional intent, although it took more words to say the same thing as the civil committee draft.

In consultation with Judge Hodges, Professor Schlueter agreed to adopt the civil committee's use of the word "offered," rather than "admitted" on line 50 of the draft, since it would strengthen the general policy of exclusion. The committee agreed to the change.

The committee then approved publishing all four proposed rules (16, 29, 32, and 40) on an accelerated basis in a package with the other proposed rule amendments.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Leavy presented the report of the advisory committee, as set out in his memorandum of November 16, 1992. (Agenda Item IX) He proposed amendments to rules 8002 and 8006.

The changes in Rule 8002 would permit a post-trial motion for relief from a judgment or order to toll the time for appeal. (Bankruptcy rule 9024 generally incorporates civil rule 60.) The changes were intended by the advisory committee to conform to the 1993 amendments to appellate rules 4(a)(4) and 6(b)(2)(ii) and eliminate the "trap" of rule 4, which requires appellants to file a new notice of appeal if certain post-trial motions are filed.

The change in rule 8006 would suspend the 10-day period to designate the record if a timely post-judgment motion is made and the notice of appeal is superseded by operation of rule 8002.

Professor Resnick pointed out that the bankruptcy rules specify a short 10-day appeal period, compared to the 30-day appeal period of the civil rules. He stated that in appeals from the district court to the court of appeals there is little practical difference between filing and service. In bankruptcy, however, the appealing party must act quickly and be certain as to whether a post-trial motion has been filed. He added that the Advisory Committee on Bankruptcy Rules would consider amending rule 9023 at its February 1993 meeting.

Judge Keeton expressed concern over having to amend the rules piecemeal and asked whether there was a way to take care of the problem of the notice of appeal "trap" at one time. Professor Resnick responded that the better way to solve the problem would be to amend civil rule 59 and not amend the bankruptcy rules at all.

The members then noted several inconsistencies in current usage in the civil rules, *e.g.*, rules 50, 59, and 60, a number of which are incorporated by the bankruptcy rules. Some refer to motions being "made," while others speak in terms of service, or filing, or both. Accordingly, the standing committee decided to ask the Advisory Committee on Civil Rules to conduct a general review of the inconsistent usage of these terms in the current rules.

The committee then approved bankruptcy rules 8002 and 8006 and voted to include them in the same package as the other rules, with an accelerated public comment period to end April 15, 1993. The committee further agreed that the proposed changes in the bankruptcy official forms be made without public comment because they consist merely of conforming amendments required by a recent statute, clarification of instructions to the forms, and changes to facilitate the processing of cases.