

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
October 12 & 13, 1992
Seattle, Washington

The Advisory Committee on the Federal Rules of Criminal Procedure met in Seattle, Washington on October 12 and 13, 1992. 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 Monday, October 12, 1992 at the Stouffer Madison Hotel in Seattle, Washington. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman

Hon. John F. Keenan

Hon. Sam A. Crow

Hon. Harvey E. Schlesinger

Hon. D. Lowell Jensen

Hon. B. Waugh Crigler

Prof. Stephen A. Saltzburg

Mr. John Doar, Esq.

Mr. Tom Karas, Esq.

Mr. Edward Marek, Esq.

Mr. Roger Pauley, Jr., designate of Mr. Robert S. Mueller III, 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; and Mr. William Eldridge of the Federal Judicial Center. Judge DeAnda was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted the absence of Judge DeAnda, who had expressed his disappointment at not being able to attend what would have been his last meeting as a member of the Committee, due to his retirement.

II. APPROVAL OF MINUTES

Judge Keenan moved that the minutes of the Committee's April 1992 meeting in Washington, D.C., be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court

and by Congress

The Reporter informed the Committee that there were currently no proposed amendments which had been approved by the Supreme Court and forwarded to Congress.

B. Rules Approved by the Standing Committee

and Forwarded to the Judicial Conference

The Reporter also informed the Committee that at its June 1992 meeting the Standing Committee had approved the following rules and had forwarded them to the Judicial Conference, which had in turn approved and forwarded them to the Supreme Court:

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.

C. Rules Approved by the Standing Committee

to be Circulated for Public Comment

The Committee was informed that at its June 1992 meeting in Washington, D.C., the Standing Committee had approved amendments to two rules, Rule 16(a)(1)(A) governing disclosure of statements by organization defendants, and Rule 29(b), concerning delayed ruling on judgment of acquittal. The proposed amendments had not yet been published for public comment, however, pending the move of the Rules Committee Support Office into its new quarters and the possibility of an expedited comment period on other pending rules.

The Committee generally discussed the problems associated with the delays in the Rules Enabling Act, which may account for several years from the time of the initial draft in the Advisory Committee to final enactment. Mr. Pauley observed that the necessary delays in the process had, in the past, prompted the Department of Justice to seek amendments directly from Congress. Judge Hodges observed that perhaps the problem associated with the lengthy process was worth further discussion by the Standing Committee.

D. Rules Under Consideration

by the Advisory Committee

1. Rule 5(a), Appearances for Persons Arrested for UFAP Offenses.

Judge Hodges gave a brief overview of a proposed amendment to Rule 5 concerning release of defendants arrested for violating 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Magistrate Judge Crigler had raised the issue, noting that for all practical purposes, UFAP offenses are rarely prosecuted. But Rule 5 requires federal authorities to bring an arrested defendant promptly before a federal magistrate. He noted that all of the participants need to know how to fairly handle UFAP cases and that the problem may be more practical than theoretical. Judge Hodges noted that the prevalent practice is to arrest UFAP defendants, using federal authorities, who then turn them over to state officials for prosecution for the underlying state offense.

Following some additional discussion about the background of the problem Judge Jensen moved that Rule 5 be amended to specifically exempt UFAP defendants from the prompt appearance requirement. Mr. Pauley seconded the motion.

Mr. Pauley noted that of approximately 2,800 UFAP arrests only 6 were actually prosecuted in federal court. He added that Congress enacted § 1073 knowing that most arrestees would not be prosecuted under that provision. He added that there are a variety of practices within the districts and that any proposed solution should provide some flexibility in Rules 5 and 40 for dealing with UFAPs. In response to a question from Judge Hodges, Mr. Pauley indicated that he did not know how many UFAP warrants are sought.

Magistrate Judge Crigler observed that a defendant may not even be aware of pending state charges and that Rule 5 does a good job of protecting a defendant. Mr. Karas agreed with that observation and added that state

even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote of five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations.

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had been addressed at some length in an article by David Adair and

Toby Slawsky of the Administrative Office but that the authors had not recommended any particular amendment to the rules of criminal procedure.

Judge Keenan moved that the Committee discuss the concept to amend Rule 11 to require that factual stipulations be addressed in the judge's colloquy with the defendant and that the defendant be apprised of the fact that the court would not be bound by the stipulated facts. Judge Jensen seconded the motion.

Judge Keenan indicated that he assumed that the court would be required to insure that the plea was not a sham. Mr. Adair briefly indicated that his research had indicated that several cases had equated factual stipulations with binding Rule 11(e)(1)(C) agreement regarding the sentence. Judge Keeton replied that the court has an obligation to reject a stipulation which is not true and Mr. Marek observed that the truth in the stipulation is not always easily determined. He noted that if it appears that there is a problem with an 11(e)(1)(C) agreement, the defendant should be able to withdraw the guilty plea. Judge Keeton added that some United States Attorneys are being instructed not to use 11(e)(1)(C) agreements. Following brief discussion on the use of written pretrial agreements, the motion to consider an amendment to Rule 11 was withdrawn by Judge Keenan with the consent of Judge Jensen. No further motions were made on the issue.

4. Rule 16, Disclosure of Materials Implicating Defendant.

Judge Hodges introduced a proposal from Judge O'Brien and Professor Charles Ehrhardt which would amend Rule 16. The proposed amendment would require the government to either (1) identify any documents which directly name the defendant or (2) make available to the defendant any existing indexing system which would facilitate examination of the documents. In a brief discussion of the issue, Mr. Pauley indicated that the Department of Justice was strongly opposed to any requirement which would either reveal the theory of the case or attorney work product. Mr. Doar thereafter moved that the Committee adopt the first option. That motion failed for lack of a second and there were no further motions concerning either of the proposals.

5. Rule 16, Disclosure of Witness' Identity.

Mr. Wilson proposed that the Committee consider amendments to Rule 16 which would expand federal criminal discovery. He observed that under current practice there is not any meaningful discovery under the rule and that in a complex case a defendant cannot get a fair trial. He also expressed concern that the Department of Justice continues to resist additional discovery.

Professor Saltzburg indicated that he too was concerned about Rule 16 vis a vis names of government witnesses. He noted that there are really two key issues at stake: First, he agreed that in a complex case there could not be a fair trial without more complete discovery. And second, he recognized that in some cases there may be a danger to witnesses if their identity is revealed to the defense. But he emphasized that it is not necessary to take an all or nothing approach. He suggested that some middle ground could be found and in support of that position observed that the Model Code of Arraignment requires the prosecutor to disclose the names of its witnesses unless the prosecution submits in writing reasons why doing so would present a danger to the witnesses. The court's decision on whether to disclose those witnesses is not reviewable.

Judge Hodges noted that in the past most prosecutors had provided an "open file" to the defense but that in some districts that was no longer the policy. Judge Keenan added that although the Committee had previously considered the issue, he believed it should be reviewed. Mr. Pauley responded that if the "open file" system is no longer as commonly in effect, it is probably due to the increase in drug prosecutions where there is often danger to government witnesses. He noted that the prosecution is in the best position to decide whether there is a danger to witnesses.

Mr. Marek expressed confidence that an amendment could be devised which would permit the court to decide, under all of the facts and circumstances, if production of a witness' name was required.

Judge Hodges asked Professor Saltzburg to assist Mr. Wilson in drafting language for Rule 16 which would address the disclosure of government witnesses to the defense.

6. Rule 32, Amendments to Entire Rule.

Judge Hodges provided background information on the proposed amendments to Rule 32, which had been discussed at the Committee's last meeting. He noted that at the time of the enactment of the Sentencing Guidelines, the Sentencing Commission had sketched out a some procedural guidelines for preparing presentence reports. The Probation and Criminal Law Committee of the Judicial Conference, however, prepared a more detailed model local rule for preparation and consideration of presentence reports under guideline sentencing. The chair of that Committee, Judge Tjoflat, circulated that model local rule to the district courts along with an accompanying report. In addition, the Judicial Center had begun a study of the implementation of the model rule and guideline sentencing. He believed that the time was thus ripe for considering major changes to Rule 32 which would more closely reflect actual practice. Asking for the sense of the Committee as to whether it believed that some amendments were needed, Judge Hodges determined that a majority of the members believed the amendments should be considered.

The Committee's discussion focused on a draft of an amendment proposed, and circulated, by Judge Hodges. He noted that several members had made suggested changes to that draft and that he included them for discussion and any necessary votes by the Committee at large. Turning first to the issue of timing, Judge Hodges observed that it would probably be better to set a fixed deadline for sentencing and noted that probation officers had indicated that 35 days would be necessary to complete a presentence report. Several members questioned

**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. Request that the Chief Justice reactivate an Advisory Committee on the Federal Rules of Evidence with the suggestion of some overlapping membership with the Advisory Committees on the Federal Rules of Civil and Criminal Procedure, and further that the Chief Justice appoint a reporter to serve the reactivated Evidence Rules Committee pp. 2-3
2. Approve the proposed amendments to Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 of the Federal Rules of Appellate Procedure and to Forms 1, 2, and 3 and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law pp. 3-4
3. a. Approve the proposed new Rule 26.3 and amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant law; and
b. Approve the proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings and transmit it to the Supreme Court for its consideration with the recommendation that it be approved by the Court and transmitted to Congress pursuant to law pp. 5-6

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 Criminal Procedure.

The Advisory Committee on the Federal Rules of Criminal Procedure submitted to your Committee a proposed new Rule 26.3; proposed amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58; and a proposed amendment to Rule 8 of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code. The purpose and intent of the proposed amendments are set forth in the Committee Notes accompanying the proposals.

In July, 1991 your Committee approved certain technical amendments to the criminal rules including a change in the term "magistrate" to "magistrate judge" to conform to the new statutory title of the position. Your Committee concluded that publication was not necessary.

In August, 1991 other proposed amendments were circulated for public comment. The responses were relatively few. Public hearings were scheduled and later cancelled when no one requested an opportunity to testify.

The Advisory Committee also indicated that existing subdivision (e) of Rule 32 was no longer needed and recommended that it be deleted and replaced by other language.

The proposed amendments to the Federal Rules of Criminal Procedure, and to Rule 8 of the Rules Governing Section 2255 Proceedings, as recommended by your Committee, appear in Appendix B together with an excerpt from the Advisory Committee Report.

- a. **Recommendation:** That the Judicial Conference approve the proposed new Rule 26.3 and amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

- b. **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings and transmit it to the Supreme Court for its consideration with the recommendation that it be approved by the Court and transmitted to Congress pursuant to law.

IV. Amendments to the Bankruptcy Rules and Forms.

(a) Rules. The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed new Bankruptcy Rule 9036; and amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019 together with Committee Notes explaining their purpose and intent. The proposed new rule and amendments were circulated to the bench and bar for comment in August, 1991, and public hearings were held in Pasadena, California on February 28, 1992. Thereafter the Advisory Committee made certain stylistic changes and certain other technical amendments. With the approval of your Committee the Advisory Committee withdrew the proposed amendment to Rule 3002 that had been circulated for public comment.

The proposed amendments and an excerpt from the Advisory Committee Report are set forth in Appendix C.

meeting. The following discussion briefly notes any significant changes in the language of the proposed amendment and the Committee's recommended action:

A. Rule 12(i). Production of Statements.

This amendment, which requires production of a witness's statements after he or she has testified at a pretrial suppression hearing, received no written comments. The amendment was approved by the Advisory Committee by a unanimous vote. The Committee recommends that this amendment be approved and forwarded to the Judicial Conference.

B. Rule 16(a). Disclosure of Experts.

As approved for publication, the amendment to Rule 16(a) closely tracked a similar amendment to Civil Rule 26. After considering public comments to the Rule, including strong opposition from the Department of Justice, the Committee by a vote of 6 to 5 (The Chair cast the tie-breaking vote) approved a modified amendment which requires production of a "summary" of the expected expert testimony, etc. The Advisory Committee recommends that the amendment to Rule 16(a) be forwarded to the Judicial Conference.

C. Rule 26.2. Production of Statements.

This amendment requires production of a witness's statements after the witness has testified at trial; it recognizes similar amendments in Rules 12.1, 32(f), 32.1, 46 and in Rule 8 of the Rules Governing § 2255 Hearings. Those few comments which were received on this Rule were generally supportive of the amendment. The Committee, however, ultimately deleted references in the Rule to the fact that the witness's prior statement could be ordered disclosed after the court had considered the witness's "affidavit." Now, only the witness's "testimony" triggers the disclosure requirements. The amendment was approved by a 9 to 1 vote with one abstention.

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

D. Rule 26.3 Mistrial.

Rule 26.3 is a new rule which requires the trial court to obtain the views of both sides before ruling on a mistrial motion. Only one comment was received on this amendment and it was favorable. No major changes were made

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
12, 16, 26.2, 26.3, 32, 32.1, 40, 41,
46, and Rule 8 of the Rules Governing Section
2255 Hearings.

DATE: May 15, 1992

At its July 1991 meeting, the Standing Committee approved the circulation for public comment of proposed amendments to the following Rules of Criminal Procedure and Rules Governing Section 2255 Hearings:

Rule 12(i). Production of Statements.
Rule 16(a). Disclosure of Experts.
Rule 26.2(c). Production of Statements.
Rule 26.3. Mistrial.
Rule 32(f). Production of Statements.
Rule 32.1(c). Production of Statements.
Rule 40. Commitment to Another District.
Rule 41(c). Search and Seizure.
Rule 46(i). Production of Statements.
Rule 8, Rules Governing Section 2255 Hearings.

The Advisory Committee has considered the written submissions from members of the public who responded to the request for comment as well as the recommendations of the Standing Committee's Subcommittee on Style. 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 12(i). Production of Statements.

There were no written comments on the amendment to Rule 12(i). In addition to stylistic changes, the Committee deleted the introductory, "Except as herein provided" language. The amendment deleting the last portion of the subdivision removed the necessity for that language.

2. Rule 16(a). Disclosure of Experts.

The Committee has made several substantive changes to the rule. In response to serious concerns from the Department of Justice, the Committee removed language from

the amendment which would have required a detailed statement of the testimony, etc. to be given by the expert witness. Some changes were also made in the Committee Note to reflect the fact that under the amendment, only a "summary" would be required. The Committee does not believe that the changes require republication and further comment.

3. Rule 26.2(c). Production of Statements.

In addition to changes in style, the Committee removed any reference in the amendment to "affidavits." Thus, as rewritten, a witness's prior statement need only be produced after that witness has actually testified. Similar changes were also made in the amendments to Rules 32(f), 32.1, 46, and Rule 8, Rules Governing Section 2255 Hearings.

4. Rule 26.3. Mistrial.

The Committee has made no changes in the Rule.

5. Rule 32(f). Production of Statements.

Only one comment was received on this amendment and it was favorable. As with the proposed amendment to Rule 26.2, discussed supra, the Committee has removed the reference to "affidavits" and made other suggested stylistic changes. If the Standing Committee agrees to forward this amendment and also to approve the Advisory Committee's recommendation that the current Rule 32(e) be repealed, then this amendment should be redesignated as 32(e).

6. Rule 32.1(c). Production of Statements.

The Committee removed the reference to "affidavits," as noted supra, and made several stylistic changes.

7. Rule 40(a). Commitment to Another District.

Several changes in style were made to the amendment.

8. Rule 41(c). Search and Seizure.

The Committee deleted the word "judge" which had followed the words "federal magistrate," in order to conform the rule to the definition for that term found in Rule 54. The word "judge" had apparently been inadvertently included in the proposed amendment to reflect the change in the title of United States Magistrate Judge. However, in the context of this rule, a "federal magistrate" also includes other judges in the federal judiciary. The Committee Note was

recommends that the amendment be approved and forwarded to the Judicial Conference.

I. Rule 46(i). Production of Statements.

This amendment requires disclosure of a witness's statements after the witness has testified a detention hearing. Although few comments were received on this rule, the Department of Justice strongly opposed the amendment on the grounds that the requirement at such an early stage in the case makes it extremely difficult to locate prior statements of its witnesses. After lengthy discussion, the Committee approved the amendment (with references to affidavits being removed) by a vote of 8 to 1. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

J. Rule 8, Rules Governing Section 2255 Hearings.

This amendment requires production of a witness's statements after the witness has testified a Section 2255 hearing. The one comment received on this amendment pointed out the potential difficulty of locating a witness's prior statements where the hearing is held years later. After deleting references to "affidavits," the Committee approved the amendment by a vote of 9 to 0 with one abstention.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

At its April 1992 meeting, the Advisory Committee considered proposed amendments to a several Rules. It recommends that the following amendments be approved for publication and comment from the bench and the bar. Copies of the proposed amendments and the Committee Notes are attached.

B. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants.

The proposed amendment to Rule 16 fills a perceived gap in criminal discovery: disclosure of statements by persons associated with an organizational defendant. The amendment requires government disclosure of first, statements which would be discoverable as party admissions and second, a person's statements concerning acts for which the organization would be vicariously liable. The amendment is similar to one proposed recently by the American Bar

Association. The proposed amendment was adopted by the Advisory Committee by a unanimous vote.

C. Rule 29(b). Motion for Judgment of Acquittal.

This amendment, which was suggested by the Department of Justice, would treat motions for a judgment of acquittal in the same way, regardless of whether they are made at the close of the government's case or at the close of all of the evidence. That is, it permits the trial court to defer ruling on a motion for a judgment of acquittal made at the close of the government's case either before or after the jury returns its verdict. If the decision is reserved, only that evidence presented at the time of the motion may be considered. Although this amendment will not affect a large number of cases, the Committee believes that it strikes a good balance between the defendant's interest in avoiding a second trial and the government's interest in preserving its right to appeal a Rule 29 motion. The amendment was approved by the Committee by an 8 to 2 vote.

D. Rule 57. Rules by District Courts.

The proposed amendments to Rule 57 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy Rules. The proposed amendment was approved by a unanimous vote.

E. Rule 59. Technical Amendments.

As with the proposed amendments to Rule 57, supra, the proposed amendments to Rule 59 are intended to track similar amendments in the Civil, Appellate, and Bankruptcy rules. In unanimously approving the proposed amendments, the Committee included the proviso that if the Standing Committee believed that references to statutory changes should be deleted from the proposed amendment, the Committee would concur with that view. The Committee has suggested a similar amendment to Federal Rule of Evidence 1102, infra.

IV. TECHNICAL AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that Rule 32(e) be deleted. As written, the provision no longer accurately reflects the law regarding probation. In the Committee's view, this change could be treated as a technical amendment.

12 ~~privileged matter.~~

COMMITTEE NOTE

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings, which extended Rule 26.2, Production of Witness Statements, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial court may excise privileged matter from the requested witness statements. That change rendered similar language in Rule 12(i) redundant.

Rule 16. Discovery and Inspection

1 (a) GOVERNMENTAL DISCLOSURE OF
2 EVIDENCE BY ~~THE~~ GOVERNMENT.

3 (1) *Information Subject to Disclosure.*

4 * * * * *

5 (E) EXPERT WITNESSES. At the
6 defendant's request, the government shall
7 disclose to the defendant a written
8 summary of testimony the government
9 intends to use under Rules 702, 703, or
10 705 of the Federal Rules of Evidence

11 during its case in chief at trial. This
12 summary must describe the witnesses'
13 opinions, the bases and the reasons
14 therefor, and the witnesses'
15 qualifications.

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

(b)(1)(C) expand federal criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony, what the testimony will consist of, and the bases of the testimony. The amendment is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. C. L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call during its case-in-chief. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.

With increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793

(1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts. It does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701. Nor does the amendment extend to summary witnesses who may testify under Federal Rule of Evidence 1006 unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.

Second, the requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion. In some instances, a generic description of the likely witness and that witness's

qualifications may be sufficient, e.g., where a DEA laboratory chemist will testify, but it is not clear which particular chemist will be available.

Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert's opinion. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that that provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984)(there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

The amendments are not intended to create unreasonable procedural hurdles. As

with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 17. Subpoena

1 (a) FOR ATTENDANCE OF WITNESSES; FORM;
2 ISSUANCE. A subpoena shall be issued by
3 the clerk under the seal of the court. It
4 shall state the name of the court and the
5 title, if any, of the proceeding, and
6 shall command each person to whom it is
7 directed to attend and give testimony at
8 the time and place specified therein. The
9 clerk shall issue a subpoena, signed and
10 sealed but otherwise in blank to a party
11 requesting it, who shall fill in the
12 blanks before it is served. A subpoena
13 shall be issued by a United States
14 magistrate judge in a proceeding before
15 that magistrate judge, but it need not be
16 under the seal of the court.

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
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CHAIRMEN OF ADVISORY COMMITTEES
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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY 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, 1992

I. INTRODUCTION

At its meeting in April 1992, 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 1992 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

In July 1991, the Standing Committee approved amendments in a number of Rules and directed that they be published for public comment. Comments were received on several of the proposed amendments and were carefully considered by the Advisory Committee at its April 1992

meeting. The following discussion briefly notes any significant changes in the language of the proposed amendment and the Committee's recommended action:

A. Rule 12(i). Production of Statements.

This amendment, which requires production of a witness's statements after he or she has testified at a pretrial suppression hearing, received no written comments. The amendment was approved by the Advisory Committee by a unanimous vote. The Committee recommends that this amendment be approved and forwarded to the Judicial Conference.

B. Rule 16(a). Disclosure of Experts.

As approved for publication, the amendment to Rule 16(a) closely tracked a similar amendment to Civil Rule 26. After considering public comments to the Rule, including strong opposition from the Department of Justice, the Committee by a vote of 6 to 5 (The Chair cast the tie-breaking vote) approved a modified amendment which requires production of a "summary" of the expected expert testimony, etc. The Advisory Committee recommends that the amendment to Rule 16(a) be forwarded to the Judicial Conference.

C. Rule 26.2. Production of Statements.

This amendment requires production of a witness's statements after the witness has testified at trial; it recognizes similar amendments in Rules 12.1, 32(f), 32.1, 46 and in Rule 8 of the Rules Governing § 2255 Hearings. Those few comments which were received on this Rule were generally supportive of the amendment. The Committee, however, ultimately deleted references in the Rule to the fact that the witness's prior statement could be ordered disclosed after the court had considered the witness's "affidavit." Now, only the witness's "testimony" triggers the disclosure requirements. The amendment was approved by a 9 to 1 vote with one abstention.

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

D. Rule 26.3 Mistrial.

Rule 26.3 is a new rule which requires the trial court to obtain the views of both sides before ruling on a mistrial motion. Only one comment was received on this amendment and it was favorable. No major changes were made

recommends that the amendment be approved and forwarded to the Judicial Conference.

I. Rule 46(i). Production of Statements.

This amendment requires disclosure of a witness's statements after the witness has testified a detention hearing. Although few comments were received on this rule, the Department of Justice strongly opposed the amendment on the grounds that the requirement at such an early stage in the case makes it extremely difficult to locate prior statements of its witnesses. After lengthy discussion, the Committee approved the amendment (with references to affidavits being removed) by a vote of 8 to 1. The Committee recommends that the amendment be approved and forwarded to the Judicial Conference.

J. Rule 8, Rules Governing Section 2255 Hearings.

This amendment requires production of a witness's statements after the witness has testified a Section 2255 hearing. The one comment received on this amendment pointed out the potential difficulty of locating a witness's prior statements where the hearing is held years later. After deleting references to "affidavits," the Committee approved the amendment by a vote of 9 to 0 with one abstention.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

At its April 1992 meeting, the Advisory Committee considered proposed amendments to a several Rules. It recommends that the following amendments be approved for publication and comment from the bench and the bar. Copies of the proposed amendments and the Committee Notes are attached.

B. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants.

The proposed amendment to Rule 16 fills a perceived gap in criminal discovery: disclosure of statements by persons associated with an organizational defendant. The amendment requires government disclosure of first, statements which would be discoverable as party admissions and second, a person's statements concerning acts for which the organization would be vicariously liable. The amendment is similar to one proposed recently by the American Bar

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
12, 16, 26.2, 26.3, 32, 32.1, 40, 41,
46, and Rule 8 of the Rules Governing Section
2255 Hearings.

DATE: May 15, 1992

At its July 1991 meeting, the Standing Committee approved the circulation for public comment of proposed amendments to the following Rules of Criminal Procedure and Rules Governing Section 2255 Hearings:

Rule 12(i). Production of Statements.
Rule 16(a). Disclosure of Experts.
Rule 26.2(c). Production of Statements.
Rule 26.3. Mistrial.
Rule 32(f). Production of Statements.
Rule 32.1(c). Production of Statements.
Rule 40. Commitment to Another District.
Rule 41(c). Search and Seizure.
Rule 46(i). Production of Statements.
Rule 8, Rules Governing Section 2255 Hearings.

The Advisory Committee has considered the written submissions from members of the public who responded to the request for comment as well as the recommendations of the Standing Committee's Subcommittee on Style. 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 12(i). Production of Statements.

There were no written comments on the amendment to Rule 12(i). In addition to stylistic changes, the Committee deleted the introductory, "Except as herein provided" language. The amendment deleting the last portion of the subdivision removed the necessity for that language.

2. Rule 16(a). Disclosure of Experts.

The Committee has made several substantive changes to the rule. In response to serious concerns from the Department of Justice, the Committee removed language from

the amendment which would have required a detailed statement of the testimony, etc. to be given by the expert witness. Some changes were also made in the Committee Note to reflect the fact that under the amendment, only a "summary" would be required. The Committee does not believe that the changes require republication and further comment.

3. Rule 26.2(c). Production of Statements.

In addition to changes in style, the Committee removed any reference in the amendment to "affidavits." Thus, as rewritten, a witness's prior statement need only be produced after that witness has actually testified. Similar changes were also made in the amendments to Rules 32(f), 32.1, 46, and Rule 8, Rules Governing Section 2255 Hearings.

4. Rule 26.3. Mistrial.

The Committee has made no changes in the Rule.

5. Rule 32(f). Production of Statements.

Only one comment was received on this amendment and it was favorable. As with the proposed amendment to Rule 26.2, discussed supra, the Committee has removed the reference to "affidavits" and made other suggested stylistic changes. If the Standing Committee agrees to forward this amendment and also to approve the Advisory Committee's recommendation that the current Rule 32(e) be repealed, then this amendment should be redesignated as 32(e).

6. Rule 32.1(c). Production of Statements.

The Committee removed the reference to "affidavits," as noted supra, and made several stylistic changes.

7. Rule 40(a). Commitment to Another District.

Several changes in style were made to the amendment.

8. Rule 41(c). Search and Seizure.

The Committee deleted the word "judge" which had followed the words "federal magistrate," in order to conform the rule to the definition for that term found in Rule 54. The word "judge" had apparently been inadvertently included in the proposed amendment to reflect the change in the title of United States Magistrate Judge. However, in the context of this rule, a "federal magistrate" also includes other judges in the federal judiciary. The Committee Note was

1 **Rule 16. Discovery and Inspection**

2 **(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.**

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

4 * * * * *

5 (E) EXPERT WITNESSES. At the defendant's
6 request, the government must disclose to the defendant a
7 written summary of testimony the government intends to use
8 under Rules 702, 703, or 705 of the Federal Rules of
9 Evidence as evidence-in-chief at trial. This summary must
10 describe the opinions of the witnesses, the bases and the
11 reasons therefor, and the witnesses' qualifications.

12 (2) *Information Not Subject to Disclosure.* Except as
13 provided in paragraphs (A), (B), and (D), and (E) of
14 subdivision (a)(1), this rule does not authorize the
15 discovery or inspection of reports, memoranda, or other
16 internal government documents made by the attorney for the

* New matter is underlined. Matter to be omitted is
lined through.

1 government or other government agents in connection with the
2 investigation or prosecution of the case⁷. Nor does the
3 rule authorize the discovery or inspection or of statements
4 made by government witnesses or prospective government
5 witnesses except as provided in 18 U.S.C. § 3500.

6 * * * * *

7 (b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

8 (1) *Information Subject to Disclosure.*

9 * * * * *

10 (C). EXPERT WITNESSES. If the defendant
11 requests disclosure under subdivision (a)(1)(E) of this rule
12 and the government complies, the defendant, at the
13 government's request, must disclose to the government a
14 written summary of testimony the defendant intends to use
15 under Rules 702, 703 and 705 of the Federal Rules of
16 Evidence as evidence-in-chief at trial. This summary must
17 describe the opinions of the witnesses, the bases and
18 reasons therefor, and the witnesses' qualifications.

COMMITTEE NOTE

New subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring disclosure of the intent to rely on expert opinion testimony, what the testimony will consist of, and the bases of the testimony. The amendment is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication

by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. C. L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call during its case-in-chief. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.

With increased use of both scientific and nonscientific expert testimony, one of counsel's most basic discovery needs is to learn that an expert is expected to testify. See Gianelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's qualifications which in turn will permit the requesting party to determine whether in fact the witness is an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts. It does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701. Nor does the amendment extend to summary witnesses who may testify under Federal Rule of Evidence 1006 unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.

Second, the requesting party is entitled to a summary of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion. In some instances, a generic description of the likely witness and that witness's qualifications may be sufficient, e.g., where a DEA

laboratory chemist will testify, but it is not clear which particular chemist will be available.

Third, and perhaps most important, the requesting party is to be provided with a summary of the bases of the expert's opinion. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that that provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984) (there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires a summary of the bases relied upon by the expert. That should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

The amendments are not intended to create unreasonable procedural hurdles. As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE
PROPOSED AMENDMENT TO RULE 16(a)(1)(E)

I. SUMMARY OF COMMENTS: Rule 16(a)(1)(E)

The Committee received comments from six individuals or organizations which generally supported the proposed amendments which would require pretrial disclosure of expert testimony. The Justice Department also commented on the proposed amendment and cited several reasons for strongly opposing the change. Several commentators offered suggested changes concerning the scope of the disclosure requirement and the timing requirements.

II. LIST OF COMMENTATORS: Rule 16(a)(1)(E)

1. Robert Garcia, Prof., Los Angeles, CA., 3-18-92
2. Robert L. Hess, Esq., Los Angeles, CA, 1-24-92
3. Benedict P. Kuehne, Esq., Miami, Fla., 11-18-92
4. Robert S. Mueller, Esq. & J William Roberts, Esq., Wash. D.C., 4-16-92
5. Lawrence B. Pedowitz, Esq., New York, N.Y., 2-15-92
6. Charles Pereyra-Suarez, Esq., Los Angeles, CA, 2-14-92
7. Myrna S. Raeder, Prof., Los Angeles, CA, 1-31-92

III. COMMENTS: Rule 16(a)(1)(E)

Robert Garcia
Law Professor
Los Angeles, CA
Feb. 26, 1992

Professor Garcia supports the proposed amendment but concludes that it suffers from several limitations. First, the rule should require government notice without a request from the defense. Second, the government should be required to make its disclosure a reasonable time before trial and before any suppression hearings. Third, the government should be required to provide as much discovery in criminal

as in civil cases. He believes that proposed amendments to Civil Rule 26 and Rule of Evidence 702 will provide greater notice in civil cases. He also notes that the rule should explicitly provide procedures for permitting the defense ample time to prepare its case in light of the government disclosures, including a provision for deposing expert witnesses.

Robert L. Hess
Committee Chair, Los Angeles Chapter of FBA
Los Angeles, CA
Jan. 24, 1992

Mr. Hess has submitted a report from the Los Angeles Chapter of the Federal Bar Association which questions the need for the amendment to Rule 16; the issue of disclosure of experts has not been a problem in the Central District of California. In fact, the requirement might work to the disadvantage of the defense which will normally not have the resources to compile the report required by the proposed amendment. The amendment also requires the defense to make pretrial assessments of what, if any, expert testimony will be offered -- something that it may not always be able to do in terms of cost and strategy.

Benedict P. Kuehne
Private Practice
Miami, Fla
Oct. 28, 1991

The commentator generally supports the proposed amendment to Rule 16 in that it will promote broader discovery and discourage trial by ambush.

Robert S. Mueller, III, Esq.
J. William Roberts, Esq.
US Justice Department & Advisory Committee of US Attorneys
Washington, D.C.
April 16, 1992

The Justice Department and the Attorney General's Advisory Committee of United States Attorneys is opposed to the proposed amendment to Rule 16(a)(1)(E). The commentators believe that the proposal would be "inimical to the interests of justice" and would "lead to grieved opportunities to distort the truth-seeking function of the trial." In their view, there is no major problem with the current disclosure requirements and that the current

provisions in Rule 16 strike a fair balance. The rule is also overbroad in that it would include "summary" witnesses and other nonscientific expert witnesses. Those types of witnesses may not be identified until after the trial has begun. The amendment would also permit the defense to shape its defense improperly. And it would also slow down the plea negotiation process; defendants will wait until they see who the expert witnesses are before negotiating. Finally, the amendment will burden the litigation system by fostering needless litigation.

Lawrence B. Pedowitz, Esq.
Chair, Assoc. of N.Y. Bar
New York, N.Y.
Feb. 15, 1992

Mr. Pedowitz has submitted a report from the Criminal Law Committee of the Association of the Bar of New York City. That report generally supports the proposed amendment to Rule 16 but suggests that it be expanded to parallel similar provisions in Civil Rule 26. It also questions whether the disclosure should apply to non-traditional expert witnesses and notes the problems that could arise from the prosecution's good-faith failure to supply disclosure where it decides during trial, for example, to present expert testimony.

Charles Pereyra-Suarez
Federal Courts Committee, LA County Bar Assoc.
Los Angeles, CA
Feb. 14, 1992

This commentator endorses the report filed by the Los Angeles Chapter of the Federal Bar Association, supra.

Myrna S. Raeder
Law Professor
Los Angeles, CA
Jan. 31, 1992

Professor Raeder generally supports the proposed amendment but suggests that first, the amendment be changed to reflect last minute decisions to present expert testimony and. Second, to discourage intentional delay the rule should be amended to require a specific time for compliance. Third, she is concerned about the requirement that a complete statement of all opinions be included; she perceives a potential problem with litigation over whether

the expert may be permitted to vary his or her testimony from the "script" in the disclosure. Finally, she questions the possible relationship with this amendment and Rule 16(a)(1)(D) and 16(a)(1)(B), which require disclosure of reports and examinations and tests. She suggests that the issue be, at a minimum, addressed in the accompanying commentary.

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

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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 (1) was, at the time of making the statement that
32 testimony, so situated as a ~~an~~ director, officer, or
33 employee, or agent as to have been able legally to bind
34 the defendant in respect to the subject of the
35 statement ~~conduct constituting the offense,~~ or (2) was,
36 at the time of offense, personally involved in the
37 alleged conduct constituting the offense and so
38 situated as a ~~an~~ director, officer, ~~or~~ employee, or
39 agent as to have been able legally to bind the
40 defendant in respect to that alleged conduct in which
41 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,

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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 does not address, however, the issue of what, if any, showing an organizational defendant would be required to establish that a particular person was in a position to legally bind the organizational defendant. But as with individual defendants, the organizational defendant is entitled to the statements without first seeking court approval. If disclosure is denied and the defendant seeks relief from the court, the Committee envisions that the organizational defendant might have to offer some evidence, short of a binding stipulation or judicial admission, that the person in question was able to bind legally the defendant.

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

**April 23, 24, 1992
Washington, D.C**

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 23 and 24, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Keenan, acting chair, called the meeting to order at 9:00 a.m. on Thursday, April 23, 1992 at the Administrative Office of the United States Courts. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. Joe Spaniol, Mr. Peter McCabe, Mr. David Adair, Ms. Judith Krivit, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. William Eldridge of the Federal Judicial Center. Judge Harvey Schlesinger was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Due to the temporary absence of Judge Hodges, Judge Keenan welcomed the attendees and noted that all of the members were present with the exception of Judge Hodges, who was expected shortly and Judge Schlesinger whose docket prevented him from attending the meeting. Judge Keenan extended a welcome to the two new members, Judge Jensen and Magistrate Judge Crigler. He noted that Mr. William

Wilson, Standing Committee member acting as liaison to the Advisory Committee, was not able to attend due the recent death of his wife. On behalf of the Committee, Judge Keenan extended deepest sympathies to Mr. Wilson.

II. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's November meeting in Tampa, Florida be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Special Order of Business: Request by Federal Bureau of Prisons Regarding Arraignments

Mr. J. Michael Quinlan, Director of the Federal Bureau of Prisons spoke briefly to the Committee, urging it to reconsider proposed amendments to the Federal Rules of Criminal Procedure which would permit arraignment of detainees through closed-circuit television or some similar arrangement. He noted that problems of security and the sheer numbers of arraignments involving detainees threatened to gridlock the system. He added that there are approximately 119,000 such hearings a year. In particular he asked the Committee to consider amending Rules 10 and 43 to permit arraignments without the defendant actually appearing in court. Judge Keenan and the Reporter indicated that the matter would be placed on the Fall 1992 agenda.

B. Rules Approved by the Supreme Court and by Congress

The Reporter informed the Committee that several Rules approved by the Supreme Court and sent to Congress had become effective on December 1, 1991: Rule 16(a)(1)(A) (Disclosure of Evidence by the Government), Rule 35(b) (Reduction of Sentence) and Rule 35(c) (Correction of Sentence Errors). In addition, technical amendments in Rules 32, 32.1, 46, 54(a), and 58 became effective on that date.

C. Rules Approved by the Standing Committee and Circulated for Public Comment

The Reporter indicated that a number of rules which had been approved by the Standing Committee for public comment were back before the Committee for its reconsideration. He indicated that very few written comments had been received on the proposed amendments and that most of those had been positive. The Reporter also noted that the "Style"

subcommittee of the Standing Committee had presented its suggested changes in the language to all of the Rules and that unless otherwise noted, those changes should be a part of the approved versions forwarded to the Standing Committee. Judge Keeton added that it was not the intent of the Standing Committee that the style committee make any substantive changes to the Rules themselves. The Committee then addressed each of the proposed Rules.¹

1. Rule 12(i). Production of Statements.

The Reporter indicated that no written comments had been received on the proposed amendment. After brief discussion in which it was noted that the introductory language in the Rule should refer to "these Rules," Mr. Karas moved that the Rule be forwarded to the Standing Committee. Mr. Marek seconded the motion which carried by a unanimous vote.

2. Rule 16(a). Disclosure of Experts.

The Reporter informed the Committee that the proposed amendment to Rule 16(a) had generated some comments from the public. Several had raised the issue of the scope of the rule, the lack of specific timing requirements, the relationship between this provision and others in Rule 16, and the difficulty of knowing in advance of trial which experts would be called to testify.

Mr. Karas moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Doar seconded the motion.

Mr. Pauley referred to a letter sent by the Justice Department to the Advisory Committee which expressed strong opposition to the amendment. He noted that there did not seem to be any real problems which required the amendment and that the Committee should consider the full panoply of experts that would potentially fall within this amendment. In particular, he noted that "summary" experts would be covered and that the amendment did not cover problems which would arise if the government did not know in advance of trial which witnesses it would call. Judge Hodges noted the the Department's letter in opposition to the amendment had been received by the Committee almost two months after the official comment period ended.

1. Although the rules are noted here in chronological order to facilitate referencing, they were not discussed in this exact order.

Professor Saltzburg endorsed the concept of the amendment. He indicated that the language "at the request of the defendant," should stay in and observed that if problems develop with application there will be time for any further amendments. He indicated that the problem of the parties not knowing who the witnesses would be could be addressed by extending the amendment only to those witness that a party "expected" to call. Mr. Marek echoed Professor Saltzburg's support for the amendment and disagreed with the Department's assertions that defendants are not currently being surprised by government experts.

Judge DeAnda spoke in favor of the amendment and noted that the timeliness requirements would affect both the government and the defense. Judge Jensen added that the underlying concept of the Rule was good but that he was opposed to the requirement for a written report. Mr. Pauley again expressed concern about the amendment and added that it would require the government to present its theory of the case to the defendant before trial.

After some additional discussion on the options available to the Committee, the chair called the question on the existing motion to send the amendment forward as published. That motion failed by a vote of 8 to 2.

Professor Saltzburg then moved that changes be made in the amendment which would address some of the concerns raised during the discussion:

"At the defendant's request, the government must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications."

Mr. Marek seconded the motion. Mr. Doar expressed some concern about whether the new language should leave out the reference to the underlying data relied upon by the expert witness. Mr. Pauley noted that the new language addressed some of the concerns raised by the Department of Justice but in an extended discussion of the issue, stated that the amendment and the debate it would generate were not needed because currently no problem exists. In his view, the amendment goes far beyond what is necessary and will generate needless litigation. The suggestion was made that the Committee Note to the amendment note some distinction between non-expert "summary" witnesses.

The Committee's vote on the motion was 5 to 5. But the motion ultimately carried on the tie-breaking vote by the Chair, Judge Hodges. Professor Saltzburg then moved that the Committee recommend to the Standing Committee that no further public comment be sought on the amendment. That vote as well was a tie vote (5 to 5) but ultimately carried when the Chair voted in the affirmative.

Professor Saltzburg thereafter moved that conforming changes be made in Rule 16(b)(1)(C), that they be forwarded to the Standing Committee with the recommendation that no further public comment be solicited. That motion was seconded by Mr. Marek and carried by a unanimous vote.

In further discussion on Rule 16, Judge Keenan suggested that the Committee Note should indicate the potential problems with fungible experts and the amendment is not intended to create unreasonable procedural hurdles. Mr. Marek expressed concern about disclosure of experts who are not fungible. It was noted by several members during the ensuing discussion that Rule 16(d) provides an avenue of relief for both sides.

3. Rules 26.2 and 46. Production of Statements.

The Reporter informed the Committee that the public comments on the amendment to Rule 26.2 were generally supportive of the change. One commentator suggested that similar amendments be extended to the rules addressing dismissal of indictments (Rule 12(b)(1)) and motions for new trials (Rule 33). That same commentator pointed out that there would be difficulty producing statements at pretrial detention hearings and hearings held under Section 2255. Another commentator indicated that the term "privileged information" should be defined.

Mr. Pauley referred to the letter prepared by the Department of Justice which opposed the amendment to Rule 26.2 and Rule 46 insofar as those amendments would apply to disclosure of statements at pretrial detention hearings. He had no problem with the concept of Rule 26.2 but expressed concern about the extension of production requirements to pretrial proceedings. A major problem, he noted, would be the difficulty of gathering statements at such an early stage in the prosecution. He added that there are no real problems requiring the amendment, that the amendment will simply cause additional litigation, and will pose dangers to government witnesses.

Mr. Karas responded that there can be a real problem where individuals are detained for lengthy periods of time. Further, he noted that the Supreme Court in Salerno

government used grand jury testimony, which might be a good change. Nonetheless, he favored sending the matter to the Civil Rules Committee first. Mr. Pauley strenuously objected to that suggestion.

The Committee ultimately rejected the motion by 4 to 5 with one absention.

2. Rule 11. Proposal to Require Advice Concerning Consequences of Guilty Plea

Judge Hodges informed the Committee that Mr. James Craven had suggested that Rule 11 be amended. The amendment would require that any defendant who was not a United States citizen be advised that a plea of guilty might result in deportation, exclusion from admission to the United States, or denial of naturalization. The brief discussion which followed focused on the practical problems associated with giving this, and similar advice which really focuses on the potential collateral consequences of a guilty plea. Judge Keenan moved that the proposed amendment be disapproved. Judge DeAnda seconded the motion which carried unanimously.

3. Rule 16. Proposal to Consider Amendments.

Judge Hodges indicated that Mr. Wilson had suggested that Rule 16 be considered in light of growing concerns about federal criminal discovery. But in his absence, the matter would be carried over to the Fall 1992 meeting.

4. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants

The Reporter indicated that in response to the Committee's direction at the November 1991 meeting, he had drafted proposed amendments to Rule 16 concerning disclosure of statements by organizational defendants. In a brief discussion it was noted that the Rule and the Committee Note should differentiate between statements by agents which would be discoverable as party admissions and an agent's statements concerning acts for which the organization would be vicariously liable. Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Judge Crow seconded the motion. It carried unanimously.

5. Rule 29(b). Proposal to Delay Ruling on Motion for Acquittal.

The Committee continued its discussion of an amendment to Rule 29(b) which had been suggested by the Department of Justice and addressed at the November 1991 meeting. Additional drafting of the amendment made clear that the

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 7, 1991
Tampa, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met in Tampa, Florida on November 7, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 7, 1991 at the United States Courthouse in Tampa, Florida. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. Sam A. Crow
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. Daniel J. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. David Adair, Ms. Ann Gardner, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. James Eaglin from the Federal Judicial Center. Judge D. Lowell Jensen, a newly appointed member of the Committee, was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted that all of the members were present with the exception of a new member, Judge D. Lowell Jensen, who had just been appointed to the Committee but was not able to attend due to previously scheduled commitments. Judge Hodges also noted

that Judges Everett and Huyett would be departing the Committee and on behalf of the Committee, thanked them for their diligent efforts and contributions.

II. PUBLIC HEARINGS ON PENDING AMENDMENTS

Judge Hodges gave a brief report on proposed amendments to various rules which had been approved by the Standing Committee at its July meeting: Rule 16(a) (Discovery of Expert), Rule 12.1 (Production of Statements), Rule 23.3 (Mistrial), Rule 26.2 (Production of Statements), Rule 32(f) (Production of Statements), Rule 32.1 (Production of Statements), Rule 40(a) (Appearance Before Federal Magistrate Judge), Rule 41(c) (2) (Warrant Upon Oral Testimony), Rule 46 (Production of Statements), and Rule 8 of the Rules Governing § 2255 Hearings (Production of Statements at Evidentiary Hearing).

The proposed amendments had been published and distributed for comment by the public. Although a public hearing had been scheduled, which would immediately proceed the Committee's meeting, no persons had given the requisite notice of an intention to speak at the hearing. Therefore, the hearing was not held. Judge Hodges commented further on the fact that at least one person was scheduled to appear at the Committee's January 17, 1992 hearing in Los Angeles. Thus, that hearing would apparently be held.

III. APPROVAL OF MINUTES

The Committee reviewed the minutes of its May 1991 meeting in San Francisco and several corrections were noted. On page 6, the words, "sources of" were added at the end of the 11th line. And the reference to "Judge Keeton" on page 8, line 5, was amended to reflect Judge Keenan's name. Judge DeAnda moved that the minutes be approved as amended. Judge Crow seconded the motion which carried by a unanimous vote.

IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Pending Before Congress

The Reporter informed the Committee that the Supreme Court had approved amendments to Rules 16(a)(1)(A) (Disclosure of Evidence by the Government), Rule 35(b) (Reduction of Sentence) and Rule 35(c) (Correction of Sentence Errors). The Court had also approved minor

that a potential solution might be to amend Rule 32 to require the prosecution to give notice of an intent to request an upward departure from the guidelines. Judge Hodges indicated that the Committee had previously considered the problem of timing when it considered amendments to Rule 32 several years earlier. Mr. Pauley indicated that the Department of Justice would prefer a longer notice period and a requirement that notice be filed with both parties. He added that it would be better to await further caselaw developments. Judge Keeton indicated that any notice requirements should be simply stated so as not to create a trap for the unwary.

**D. Other Rules Under Consideration
by the Advisory Committee**

1. Rule 11, Guilty Pleas before Magistrate Judges.

Judge ~~Hodges~~ explained that he had originally raised the issue of whether United States Magistrate Judges should be permitted to accept guilty pleas. He noted that the Supreme Court's decision in Peretz v. United States, 111 S.Ct. 2661 (1991) permitted magistrate judges to conduct voir dire in a felony case, if delegated to do so and if the parties consented. He observed, however, that in light of Peretz a magistrate judge could probably hear a guilty plea as long as the district court actually adjudicated guilt. Thus, there was probably no need to amend Rule 11 at this point.

2. Rule 16(a)(1)(A), Statements of Organizational Defendants.

The Reporter indicated that the Criminal Justice Section of the American Bar Association was seeking approval through the ABA House of Delegates for certain amendments to the Rules of Criminal Procedure. He noted that while the suggested amendments did not yet reflect official ABA policy, the Committee could, if it wished, treat the proposals as any other proposals which might be submitted by the public. The first proposed change was in Rule 16, which would provide for production of statements by organizational defendants.

Judge Hodges offered some additional general comments which noted some of the problems of interpreting Rule 16, as written, to apply to organizational defendants. Judge Schlesinger thereafter moved that an amendment to Rule 16 be drafted by the Reporter for the Committee's consideration at its Spring 1992 meeting. Mr. ³⁴Doar seconded the motion.

Additional discussion focused on the fact that the amendment should generally place organizational defendants in the same position as individual defendants. Mr. Pauley indicated that the Solicitor General was apparently of the view that the current Rule 16 adequately covers organization defendants. He added that some consideration should be given to reconciling any amending language in Rule 16 with Title 18 which includes a definition of "organization." Professor Saltzburg expressed the view that the amendment should cover disclosure of "vicarious admissions," such as statements by co-conspirators. Judge Keeton agreed that Rule 16 was in need of some clarification with regard to organizational defendants and that they should be placed in the same position as other defendants.

The motion carried by a 6-3 vote.

3. Rule 16(a)(1)(D), Disclosure of Expert.

The Reporter indicated that the subject of the ABA proposed amendment to Rule 16, regarding disclosure of expert witnesses, had already been the subject of a proposed amendment which was currently out for public comment. No motion was made concerning this proposal.

4. Rule 16(a)(1)(E), Codification of Brady.

The Committee was informed by the Reporter that the ABA had also proposed a codification of Brady and that the Committee had previously considered and rejected a similar proposal a year earlier. Mr. Marek indicated that the ABA's final position on this proposal would be significant and although he was not moving adoption of the proposal at this time, he believed that the matter was important. Professor Saltzburg noted that some United States Attorneys have taken the position that Brady does not extend to sentencing; Mr. Pauley responded that he has assumed that it does extend to sentencing. No motion was made on this proposal.

5. Rule 17(c), Issuance of Subpoena.

The ABA proposals also included a provision for amending Rule 17 to permit expedited delivery of materials in discovery. After briefly reviewing the proposal, no motion was forthcoming.

Agenda E-20 (Summary)
Rules
September 1991

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

This report contains no recommendations. It is submitted for informational purposes.

proposed amendments be circulated to the bench and bar for comment. The Committee reviewed the proposed amendments, made some changes, and authorized circulation of the proposals as amended. The Committee also directed that a proposal to amend Civil Rule 84 to authorize the Judicial Conference to promulgate forms, as previously recommended by the Advisory Committee, be included in the submission to the bench and bar.

The Advisory Committee also recommended technical amendments to various Civil and Evidence Rules to reflect the change in the title of United States magistrate to "magistrate judge". The Committee determined that these and other technical changes in the Rules need not be circulated for comment, but will be included among any future submission to the Conference.

III. Advisory Committee on Appellate Rules

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 3.1, 4, 5.1, 10, 25, 28, 34 and 35 of the Federal Rules of Appellate Procedure and requested they be circulated for comment. The Standing Committee made some clarifying changes and authorized circulation of the proposals to the bench and bar for comment.

IV. Advisory Committee on Criminal Rules

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12, 16, 26.2, 26.3, 32, 32.1, 40, 41 and 46 of the Federal Rules of Criminal Procedure and to Rule 8 of the Rules Governing Proceedings in the United States District Courts Under 2255 of the Title 28, United States Code. The Standing

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

ROBERT E KEETON
CHAIRMAN

JOSEPH F SPANIOL JR
SECRETARY

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

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: June 19, 1991

I. INTRODUCTION

At its May 1991, meeting the Advisory Committee on Rules of Criminal Procedure acted upon proposed amendments to ten (10) different rules. The Advisory Committee recommends that the Standing Committee approve the proposed amendments for circulation to the bench and the bar for public comment. This report briefly addresses those proposed amendments and the recommendations to the Standing Committee. The minutes of the Committee's May meeting and copies of the proposed amendments and the accompanying Committee Notes are attached.

II. RULES PENDING COMMENT BY THE BENCH AND BAR

There are currently no Rules of Criminal Procedure or Rules of Evidence pending comment by the bench and the bar.

III. PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that the following amendments be approved by the Standing Committee. The proposed amendments are attached.

Honorable Robert E. Keeton
Chairman, Standing Committee
Page 2

A. Rule 16(a)(1). Disclosure of Experts. The proposed amendments would generally parallel similar provisions in Federal Rule of Civil Procedure 26 and would expand discovery to both the defense and the government. The proposed amendment requires that upon request by the defendant, the government must disclose the identity, address, and qualifications of any expert the government intends to call as a witness. The government must also disclose the subject matter of the expected testimony and a summary of the grounds for each opinion, including other experts upon whom the witness is relying. The proposed amendment includes a reciprocal disclosure provision which would require similar disclosures by the defense.

B. Rule 26.3. Mistrial. Rule 26.3 is a new rule, recommended by the Department of Justice, which would require the trial court to permit each side to comment on the propriety of a mistrial before entering an order to that effect. In particular, it would permit each party to put on the record whether it consents or objects to a mistrial and thereby avoid double jeopardy issues which might otherwise result.

C. Rule 40(a). Appearance Before Federal Magistrate Judge. The proposed amendment to Rule 40(a) is one of two amendments being proposed by the Advisory Committee which would permit use of facsimile transmissions in presenting information to a court. The amendment to Rule 40(a) would permit a federal magistrate judge to rely upon a facsimile transmission of a warrant (or a certified copy of the warrant) in determining whether a defendant should be removed to the charging district.

D. Rule 41(c)(2). Warrant Upon Oral Testimony. The proposed amendment to Rule 41(c)(2) is intended to expand the authority of Federal magistrate judges in considering oral requests for search warrants. It would permit a federal magistrate judge to consider not only sworn oral testimony, but also facsimile transmissions. The Committee considered the possibility of expanding use of facsimile transmissions in other provisions, i.e. Rule 41(c)(2)(B), Application, Rule 41(c)(2)(C), Issuance, and Rule 41(g), Return of Papers to Clerk, but decided that permitting use of facsimile transmissions in those situations would not necessarily save time and would pose problems of preserving the transmissions.

The Committee will continue to consider possible amendments to other Rules of Criminal Procedure which would permit use of facsimile transmissions.

Rule 16. Discovery and Inspection

1 (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

2 (1) *Information Subject to Disclosure.*

3 * * * * *

4 (E) EXPERT WITNESSES. Upon request
5 of a defendant, the government shall disclose to
6 the defendant any evidence which the government may
7 present at trial under Rules 702, 703, or 705 of
8 the Federal Rules of Evidence. This disclosure
9 shall be in the form of a written report prepared
10 and signed by the witness that includes a complete
11 statement of all opinions to be expressed and the
12 basis and reasons therefor, the data or other
13 information relied upon in forming such opinions,
14 any exhibits to be used as a summary of or support
15 for such opinions, and the qualifications of the
16 witness.

17 (2) *Information Not Subject to Disclosure.*
18 Except as provided in paragraphs (A), (B), and (D),
19 and (E) of subdivision (a)(1), this rule does not
20 authorize the discovery or inspection of reports,
21 memoranda, or other internal government documents

22 made by the attorney for the government or other
23 government agents in connection with the
24 investigation or prosecution of the case, or of
25 statements made by government witnesses or
26 prospective government witnesses except as provided
27 in 18 U.S.C. § 3500.

28 * * * * *

29 (b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

30 (1) *Information Subject to Disclosure.*

31 * * * * *

32 (C). EXPERT WITNESSES. If the
33 defendant requests disclosure under subdivision
34 (a)(1)(E) of this rule, upon compliance with the
35 request by the government, the defendant, on
36 request of the government, shall provide the
37 government with a written report prepared and
38 signed by the witness that includes a complete
39 statement of all opinions to be expressed and the
40 basis and reasons therefor, the data or other
41 information relied upon in forming such opinions,
42 any exhibits to be used as a summary of or support
43 for such opinions, and the qualifications of the
44 witness.

* * * * *

COMMITTEE NOTE

The addition of subdivisions (a)(1)(E) and (b)(1)(C) expand federal criminal discovery by requiring notice and disclosure, respectively, of the identities of expert witnesses, what they are expected to testify to, and the bases of their testimony. The amendment tracks closely with similar language in Federal Rule of Civil Procedure 26 and is intended to reduce the element of surprise which often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination. See Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery, 67 N. Carolina L. Rev. 577, 622 (1989).

Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose certain information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant.

With increased use of both scientific and nonscientific expert testimony, one of the most basic discovery needs of counsel is to learn that an expert is expected to testify. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991); Symposium on Science and the Rules of Legal Procedure, 101 F.R.D. 599 (1983). This is particularly important where the expert is expected to testify on matters which touch on new or controversial techniques or opinions. The amendment is intended to meet this need by first, requiring notice of the expert's identity and qualifications which in turn will permit the requesting party to interview the prospective witness in preparation for trial and determine whether in fact the witness is

an expert within the definition of Federal Rule of Evidence 702. Like Rule 702, which generally provides a broad definition of who qualifies as an "expert," the amendment is broad in that it includes both scientific and nonscientific experts and does not distinguish between those cases where the expert will be presenting testimony on novel scientific evidence. The rule does not extend, however, to witnesses who may offer only lay opinion testimony under Federal Rule of Evidence 701.

Secondly, the requesting party is entitled to disclosure of the substance of the expected testimony. This provision is intended to permit more complete pretrial preparation by the requesting party. For example, this should inform the requesting party whether the expert will be providing only background information on a particular issue or whether the witness will actually offer an opinion.

Thirdly, and perhaps most importantly, the requesting party is to be informed of the grounds of the bases of the expert's opinion, including identification of other experts upon whom the testifying expert may be relying. Rule 16(a)(1)(D) covers disclosure and access to any results or reports of mental or physical examinations and scientific testing. But the fact that no formal written reports have been made does not necessarily mean that an expert will not testify at trial. At least one federal court has concluded that this provision did not otherwise require the government to disclose the identity of its expert witnesses where no reports had been prepared. See, e.g., United States v. Johnson, 713 F.2d 654 (11th Cir. 1983, cert. denied, 484 U.S. 956 (1984)) (there is no right to witness list and Rule 16 was not implicated because no reports were made in the case). The amendment should remedy that problem. Without regard to whether a party would be entitled to the underlying bases for expert testimony under other provisions of Rule 16, the amendment requires disclosure the bases relied upon. That would necessarily cover not only written and oral reports, tests, reports, and investigations, but any information which might be recognized as legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.

As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).

Rule 26.2. Production of Statements of Witnesses

* * * * *

1 (c) PRODUCTION OF EXCISED STATEMENT. If the
2 other party claims that the statement contains
3 privileged information or matter that does not
4 relate to the subject matter concerning which the
5 witness has testified, the court shall order that
6 it be delivered to the court in camera. Upon
7 inspection, the court shall excise the portions of
8 the statement that are privileged or that do not
9 relate to the subject matter concerning which the
10 witness has testified, and shall order that the
11 statement with such material excised, be delivered
12 to the moving party. Any portion of the statement
13 that is withheld from the defendant over the
14 defendant's objection shall be preserved by the
15 attorney for the government, and, in the event of
16 a conviction and an appeal by the defendant, shall
17 be made available to the appellate court for the

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 13-14, 1991
San Francisco, California

The Advisory Committee on the Federal Rules of Criminal Procedure met in San Francisco, California on May 13 and 14, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Monday, May 13, 1991 at the United States Courthouse in San Francisco, California. The following persons were present for all or a part of the meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. Sam A. Crow
Hon. Robinson O. Everett
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller, III, Assistant Attorney General

David A. Schlueter

Also present were Hon. Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Hon. Charles Wiggins of the Standing Committee, Mr. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. Joseph Spaniol, Secretary to the Standing Committee, Mr. David Adair, of the Administrative Office, and Mr. James Eaglin from the Federal Judicial Center.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges noted that all members were present and welcomed the guests attending the meeting. He pointed out that he had spoken with the Administrative Office about the problems associated with distributing the agenda book at least 30 days prior to the meeting and hoped that in the future, that goal would be met.

3. Rule 11, Pleas. Judge Hodges indicated that Judge Keeton had presented a question of whether a trial judge could inform a defendant pleading guilty, without the benefit of a plea agreement, of the probable sentence facing him and the perils of withdrawal of the plea if a more severe sentence was required. Judge DeAnda noted that it would be preferable to avoid a double hearing on the question of the applicable guidelines. Mr. Pauley noted that the Department of Justice was opposed to the possibility of amending the Rules to provide for such judicial advice to the defendant. First, it could result in abuses of the discovery process; defendants could rely upon this proposed procedure as simply another avenue of discovery. Second, once the initial ruling would be made by the trial judge, the judge would be less inclined at the sentencing hearing to find facts inconsistent with the initial finding. Judge Keenan noted that under Rule 32(d), judges could do now what Judge Keeton was asking; a defendant upon learning that a particular sentence guideline was or was not being used could request the court for permission to withdraw the plea. Judge Keeton generally concurred that the current rules could cover the situation and stated his belief that the sentencing guidelines have increased the number of contested cases. Judge DeAnda observed that more and more lawyers should now know generally where a defendant's sentence is likely to fall. Judge Hodges noted that Rule 32(c)(1) calls for a report by the probation officer and that it would be preferable to hold only one hearing on the appropriate sentence guideline. Judge Keenan moved to table the proposal and Judge Crow seconded the motion. In the brief discussion which followed, Judge Hodges noted that tabling the matter would not foreclose consideration of specific proposed amendments at the next meeting. The motion to table carried by a margin of 8 to 1.

4. Rule 16(a), Disclosure of Evidence by the Government. Judge Everett noted that a recent law review article had identified problems of the defense discovering the identity of nonscientific government experts, such as accountants, who would testify at trial and that in the process continuances were required. He believed that an amendment to Rule 16 would alleviate the problem. Mr. Pauley noted that the Department of Justice was not opposed to any reciprocal discovery proposals but that it could not support the proposed amendment. Professor Saltzburg voiced support for the proposal and suggested that the proposed amendment not include language which would permit the court to order the deposition of an expert. Mr. Pauley asked that any Committee Note include language that the prosecution could seek an ex parte hearing on the appropriateness of disclosing its experts, as is currently covered in Rule

16(d). It was also pointed out that any proposed amendments to Rule 16 should be circulated to the Advisory Committee on Civil Rules which has been considering amendments to Federal Rule of Evidence 702. Upon a motion by Professor Saltzburg, and a second by Judge Keeton the Committee voted unanimously to amend Rule 16 to provide for disclosure of experts.

5. Rule 24(c), Alternate Jurors. Judge Hodges presented to the Committee the question of whether Rule 24(c) could be amended to permit the trial court to mesh into one proceeding the selection of regular and alternate jurors. Following brief discussion about the benefits and problems with such a procedure, no action was taken on the matter.

6. Rule 26, Taking of Testimony. The Reporter briefly introduced a proposal from the Standing Committee that the various Advisory Committees consider amending their respective rules to set time limits on various trial proceedings. The proposal had been initiated by Judge Keeton who had presented a draft of Rules of Proof and Practice which included rules specifically setting time limits on evidentiary hearings. The Reporter noted that one rule which might be subject to an amendment would be Rule 26. He also noted that the Standing Committee had requested that if a Committee was not inclined to amend its Rules, that it should explain its rationale to the Standing Committee.

Judge Keeton explained in more detail his thoughts for amending criminal and civil rules to provide for moving along the trial process. Mr. Marek noted his opposition to such a sweeping change in criminal practice, and observed that a lot more could be done to expedite the process, such as amending Rule 16 to provide for better defense discovery before trial. He also noted that setting specific time limits could present confrontation clause problems by limiting cross-examination and encouraging narrative testimony.

Judge Huyett expressed support for such amendments but indicated that specific time limits should be tried first in civil trials. Judge Everett observed that there is already a negative perception in the public's eye that criminal cases are a rush to judgment and Judge DeAnda echoed Mr. Marek's concerns about constitutional problems. Professor Saltzburg noted that the proposals were intriguing but that amending the rules was perhaps not the best solution because that tends to limit the court's options.

MEMO TO: Advisory Committee on Criminal Rules
FROM: Dave Schlueter, Reporter
RE: Draft of Minutes and Amendments
DATE: June 7, 1991

Enclosed are copies of the Minutes of the Committee's May 1991 meeting in San Francisco and drafts of amendments to the following Rules:

Rule 12(1), Production of Statements
Rule 16(a)(1), (b)(2), Disclosure 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(a), FAX transmissions
Rule 41, FAX transmissions
Rule 46, Production of Statements
Rule 8, § 2255 Proceedings, Production of Statements

Would you please look these materials over at your earliest convenience and pass along any suggestions to either Judge Hodges or me at your earliest convenience, but not later than Monday, June 17. That will give us a few days to finalize the materials and prepare the Chairman's Report to the Standing Committee.

In doing some additional reading on the proposed amendments to Rule 16, I noted that at least one commentator has suggested that the parties should be permitted to discover the credentials or qualifications of the expert witness. See Gianelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793 (1991). And I expect that that suggestion will be made in the public comments to the Rule. I would suggest that the language in Rule 16 which currently reads, "shall provide...the name and address of any witness..." be changed to read, "shall provide...the name, address, and qualifications of any witness..." The Advisory Committee Note currently raises the issue by noting that once the requesting party has the expert's name and address, he or she can interview the expert and learn those credentials. It would, in my view, be better to explicitly set out the qualifications point in the Rule. The Advisory Committee Note could then be amended to reflect a cross-reference to Fed. R. Evid. 702.

At the suggestion of Judge Hodges, I have prepared two drafts of the proposed amendments to Rule 16. Draft A presents the version approved by the Committee at the May meeting. Draft B includes the language concerning the qualifications of the expert and a slightly different version

of the Committee Note to reflect that language.

According to Judge Hodges, the "Russian veto" will be in effect for this rule. That is, unless a majority of the Committee indicates opposition to Draft B, it will be the version forwarded to the Standing Committee.

Finally, you will notice that the last sentence of Rule 40(a) varies slightly from the version approved by the Committee. There seemed to be some consensus that the language approved at the meeting was awkward and after considering a suggestion from Mr. Wilson, and consulting with Judge Hodges, I recommend that the new language be approved as presented in the draft. It makes no substantive change in the intent of the Committee.

The Reporter noted that the rules governing Procedures for the Conduct of Business by the Judicial Conference Committees now permit the Standing Committee to implement technical changes in the Rules without the need for public comment.

The Reporter also explained that copies of the Drafting Rules for Uniform or Model Acts which is followed by the National Conference of Commissioners on Uniform State Laws had been included in the agenda book. Judge Keeton, the Chairman of the Standing Committee had distributed the rules at the Standing Committee's meeting in January 1991 and had commended them to the various Advisory Committees in drafting proposed amendments.

II. APPROVAL OF MINUTES

After the Committee had reviewed the minutes for the November 1990 meeting, Judge Keenan moved that they be approved. Mr. Karas seconded the motion which carried unanimously.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by Supreme Court (Effective Dec. 1, 1990)

1. The Reporter informed the Committee that its amendments to Rule 41(a), Authority to Issue Warrant, had not been changed or modified by Congress and had gone into effect on December 1, 1990.

2. Similarly, Congress had failed to make any changes to new Rule 58, Procedures for Misdemeanors and other Petty Offenses, and it too became effective on December 1, 1990.

B. Rules Approved by Supreme Court (Effective Dec. 1, 1991)

The Reporter informed the Committee that its proposed amendments to the following Rules had been approved by the Standing Committee at its January 1991 meeting, by the Judicial Conference at its Spring 1991 meeting and that the Supreme Court had also approved the amendments and forwarded them to Congress. Absent Congressional action, these amendments will go into effect on December 1, 1991:

1. Rule 16(a)(1)(A), Disclosure of Evidence by the Government.
2. Rule 35(b), Reduction of Sentence.

3. Rule 11, Pleas. Judge Hodges indicated that Judge Keeton had presented a question of whether a trial judge could inform a defendant pleading guilty, without the benefit of a plea agreement, of the probable sentence facing him and the permit withdrawal of the plea if a more severe sentence was required. Judge DeAnda noted that it would be preferable to avoid a double hearing on the question of the applicable guidelines. Mr. Pauley noted that the Department of Justice was opposed to the possibility of amending the Rules to provide for such judicial advice to the defendant. First, it could result in abuses of the discovery process; defendants could rely upon this proposed procedure as simply another avenue of discovery. Second, once the initial ruling would be made by the trial judge, the judge would be less inclined at the sentencing hearing to find facts inconsistent with the initial finding. Judge Keenan noted that under Rule 32(d), judges could do now what Judge Keeton was asking; a defendant upon learning that a particular sentence guideline was or was not being used could request the court for permission to withdraw the plea. Judge Keeton generally concurred that the current rules could cover the situation and stated his belief that the sentencing guidelines have increased the number of contested cases. Judge DeAnda observed that more and more lawyers should now know generally where a defendant's sentence is likely to fall. Judge Hodges noted that Rule 32(c)(1) calls for a report by the probation officer and that it would be preferable to hold only one hearing on the appropriate sentence guideline. Judge Keenan moved to table the proposal and Judge Crow seconded the motion. In the brief discussion which followed, Judge Hodges noted that tabling the matter would not foreclose consideration of specific proposed amendments at the next meeting. The motion to table carried by a margin of 8 to 1.

4. Rule 16(a), Disclosure of Evidence by the Government. Judge Everett noted that a recent law review article had identified problems of the defense discovering the identity of nonscientific government experts, such as accountants, who would testify at trial and that in the process continuances were required. He believed that an amendment to Rule 16 would alleviate the problem. Mr. Pauley noted that the Department of Justice was not opposed to any reciprocal discovery proposals but that it could not support the proposed amendment. Professor Saltzburg voiced support for the proposal and suggested that the proposed amendment not include language which would permit the court to order the deposition of an expert. Mr. Pauley asked that any Committee Note include language that the prosecution could seek an ex parte hearing on the appropriateness of disclosing its experts, as is currently covered in Rule

16(d). It was also pointed out that any proposed amendments to Rule 16 should be circulated to the Advisory Committee on Civil Rules which has been considering amendments to Federal Rule of Evidence 702. Upon a motion by Professor Saltzburg, and a second by Judge Keeton the Committee voted unanimously to amend Rule 16 to provide for disclosure of experts.

5. Rule 24(c), Alternate Jurors. Judge Hodges presented to the Committee the question of whether Rule 24(c) could be amended to permit the trial court to mesh into one proceeding the selection of regular and alternate jurors. Following brief discussion about the benefits and problems with such a procedure, no action was taken on the matter.

6. Rule 26, Taking of Testimony. The Reporter briefly introduced a proposal from the Standing Committee that the various Advisory Committees consider amending their respective rules to set time limits on various trial proceedings. The proposal had been initiated by Judge Keeton who had presented a draft of Rules of Proof and Practice which included rules specifically setting time limits on evidentiary hearings. The Reporter noted that one rule which might be subject to an amendment would be Rule 26. He also noted that the Standing Committee had requested that if a Committee was not inclined to amend its Rules, that it should explain its rationale to the Standing Committee.

Judge Keeton explained in more detail his thoughts for amending criminal and civil rules to provide for moving along the trial process. Mr. Marek noted his opposition to such a sweeping change in criminal practice, and observed that a lot more could be done to expedite the process, such as amending Rule 16 to provide for better defense discovery before trial. He also noted that setting specific time limits could present confrontation clause problems by limiting cross-examination and encouraging narrative testimony.

Judge Huyett expressed support for such amendments but indicated that specific time limits should be tried first in civil trials. Judge Everett observed that there is already a negative perception in the public's eye that criminal cases are a rush to judgment and Judge DeAnda echoed Mr. Marek's concerns about constitutional problems. Professor Saltzburg noted that the proposals were intriguing but that amending the rules was perhaps not the best solution because that tends to limit the court's options.

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:

	Page
1. Approve the amendments to Rules 16(a), 32(c), 32.1(a), 35(b), 35(c), 46(h), 54(a), 58(b) and 58(d) of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law	3
2. Approve the amendments to Rules 404(b) and 1102 of the Federal Rules of Evidence and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law	4
3. Approve amendments to Rules 5011(b) and 9027(e) of the Federal Rules of Bankruptcy Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law	5
4. Approve an amendment to paragraph 4(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure to permit the Committees to recommend technical or conforming amendments to the Rules without public notice and comment	6

Assistant Director for Program Management of the Administrative Office; William B. Eldridge, Director, and John E. Shapard, Research Division, Federal Judicial Center; Patricia S. Channon of the Bankruptcy Division of the Administrative Office; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office.

I. Amendments to the Rules of Practice and Procedure

A. Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee amendments to Criminal Rules 16(a)(1)(A), 35(b), and 35(c), as well as technical amendments to Criminal Rules 32, 32.1, 46, 54(a), and 58. The proposed amendment to Rule 16(a)(1)(A) would slightly expand the duty of the Government to disclose a defendant's oral statements.

The proposed amendment to Rule 35(b) would permit the government to move the sentencing court to reduce the defendant's sentence for substantial assistance more than one year after the imposition of sentence under certain circumstances. The proposed amendment to Rule 35(c) is based upon, but differs from, a recommendation of the Federal Courts Study Committee. It would permit the court to correct a technical error in a sentence within seven days of its imposition. If the Conference approves the proposed amendment to Rule 35(c), your Committee, at the request of the Advisory Committee, will refer to the Appellate Rules Advisory Committee a suggestion to consider an amendment to Appellate Rule 4, which would stipulate that the filing of a notice of appeal would not divest the district court of jurisdiction to act within the seven-day period provided in amended Rule 35(c).

The above-referenced amendments to the Federal Rules of Criminal Procedure have been circulated for public comment and minor changes made in the Advisory Committee Notes in response thereto.

The Advisory Committee had also submitted to your Committee on a closely divided vote, a proposed amendment to Rule 24(b) that would equalize the number of peremptory challenges in a criminal trial: 20 for each side in a capital case, six for each side in a felony case, and 3 for each side in a misdemeanor case. A similar amendment, which had provided for eight challenges in a felony case, had been proposed in Congress in the last session, but was not passed. Your Committee, after discussion, voted unanimously against recommending the amendment to the Judicial Conference.

The proposed amendments to Rules 32(c)(2)(A), 32(c)(3)(A), 32.1(a)(1), 46(h), 54(a), 58(b)(2)(A) and 58(d)(3) would correct technical errors. Because these proposed amendments are purely technical, your Committee recommends their approval without public comment.

These proposed amendments are set out in Appendix A, and are accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

Recommendation 1: That the Judicial Conference approve amendments to Rules 16(a), 32(c), 32.1(a), 35(b), 35(c), 46(h), 54(a), 58(b) and 58(d) of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.

B. Federal Rules of Evidence

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Evidence Rule 404(b) as well

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

Agenda E-21 (Appendix A)
Rules
March 1991

ROBERT E. KEETON
CHAIRMAN

JAMES E. MACKLIN, JR.
SECRETARY

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

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

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

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

DATE: December 18, 1990

I. INTRODUCTION

At its November 1990 meeting the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal procedure and one Rule of Evidence. This report addresses those proposals and the recommendations to the Standing Committee. The minutes of that meeting, *** and copies of the rules and the accompanying Committee Notes are attached. In summary, the rules and the recommended actions are as follows:

A. Rules of Criminal Procedure Circulated for Public Comment.

Four rules previously considered and approved by the Standing Committee for circulation to the bench and the bar have been reviewed by the Advisory Committee. The Committee recommends that the Rules be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Rule 16(a)(1)(A). Statement of Defendant.

* * * * *

2. Rule 35(b). Reduction of Sentence.
3. Rule 35(c). Correction of Sentence.

B. Rules of Evidence Circulated for Public Comment.

One Rule of Evidence has been circulated to the bench and the bar for comment. After considering the public comments, the Committee recommends that it be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Fed. R. Evid. 404(b). Notice Provision.

C. Proposed Technical Amendments to Rules of Criminal Procedure and Rules of Evidence.

The Advisory Committee recommends that technical amendments be made in the following Rules, as discussed infra,

1. Rule 32. Technical Amendments.
2. Rule 32.1. Technical Amendment.
3. Rule 46. Technical Amendment.
4. Rule 54(a). Technical Amendment.
5. Rule 58. Technical Amendment.

* * * * *

6. Fed. R. Evid. 1102. Technical Amendment.

II. RULES OF CRIMINAL PROCEDURE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved amendments in Rule 16(b)(A), Rule 24(b), and Rule 35(a) for circulation to the public. In July 1990, the Standing Committee approved the circulation of a new provision, Rule 35(c), on an expedited basis. Comments were received on all of these rules and considered by the Advisory Committee at its November 1990 meeting.***

The Advisory Committee recommends that the Standing Committee approve these three amendments and forward them to the Judicial Conference.

III. RULE OF EVIDENCE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved the publication of a proposed amendment to Federal Rule of Evidence 404(b) which would add a notice provision in criminal cases. At its November 1990 meeting, the Advisory Committee considered the written comments it had received.

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

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
4 of a defendant the government shall ~~permit the~~
5 ~~defendant to inspect and copy or photograph~~
6 disclose to the defendant and make available for
7 inspection, copying or photographing: any relevant
8 written or recorded statements made by the
9 defendant, or copies thereof, within the
10 possession, custody or control of the government,
11 the existence of which is known, or by the exercise
12 of due diligence may become known, to the attorney
13 for the government; that portion of any written
14 record containing the substance of any relevant
15 oral statement ~~which the government intends to~~

*New matter is underlined; matter to be omitted is lined through.

2 RULES OF CRIMINAL PROCEDURE

16 ~~offer in evidence at the trial~~ made by the
17 defendant whether before or after arrest in
18 response to interrogation by any person then known
19 to the defendant to be a government agent; and
20 recorded testimony of the defendant before a grand
21 jury which relates to the offense charged. The
22 government shall also disclose to the defendant the
23 substance of any other relevant oral statement made
24 by the defendant whether before or after arrest in
25 response to interrogation by any person then known
26 by the defendant to be a government agent if the
27 government intends to use that statement at trial.

* * * * *

COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements

made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to introduce the statement. Thus, an oral statement by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for disclosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

Rule 32. Sentence and Judgment

* * * * *

- 1 (c) PRESENTENCE INVESTIGATION.
- 2 (2) Report. The report of the presentence
- 3 investigation shall contain--
- 4 (A) information about the history and
- 5 characteristics of the defendant, including prior
- 6 criminal record, if any, financial condition, and
- 7 any circumstances affecting the defendant's behavior
- 8 that may be helpful in imposing sentence or in the
- 9 correctional treatment of the defendant;

FEDERAL RULES OF EVIDENCE

COMMITTEE NOTE

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500,

et. seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeline or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, -----U.S. -----, 108 S.Ct 1496 (1988).

Rule 1102. Amendments

- 1 Amendments in the Federal Rules of Evidence may
- 2 be made as provided in section 2076 2072 of title
- 3 28 of the United States Code.

COMMITTEE NOTE

The amendment is technical. No substantive change is necessary.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of February 4, 1991

The winter 1991 meeting of the Judicial Conference Committee on the Rules of Practice and Procedure was called to order at 8:30 a.m., February 4, at the offices of the Administrative Office of the United States Courts in Washington, D. C., by its Chairman, Judge Robert E. Keeton. All members of the Committee attended the meeting except Judge Charles E. Wiggins, Charles Alan Wright, and Gael Mahony, who were unavoidably absent.

Also present were Judge Kenneth F. Ripple, Chairman, and Assistant Dean Carol Ann Mooney, Reporter, of the Appellate Rules Advisory Committee; Judge Sam C. Pointer, Jr., Chairman, and Professor Paul D. Carrington, Reporter, of the Civil Rules Advisory Committee; Judge William Terrell Hodges, Chairman, and Professor David A. Schlueter, Reporter, of the Criminal Rules Advisory Committee; and Judge Edward Leavy, Chairman, and Professor Alan N. Resnick, Reporter, of the Bankruptcy Rules Advisory Committee. Judge Edward R. Becker attended as the liaison member of the Long-Range Planning Committee. The Reporter to your Committee, Dean Daniel R. Coquillette, attended the meeting, along with Mary P. Squiers, Esq., Project Director of the Local Rules Project. Scott Schell, who is on the staff of the Senate Judiciary Committee, attended as did two representatives of the defense bar, Benson Weintraub, Esq. of Miami, Florida, and Alan Chaset, Esq., of Alexandria, Virginia. Also present were James E. Macklin, Jr., Secretary to your Committee and Deputy Director of the Administrative Office; Peter G. McCabe,

anticipated that actions will be taken at that meeting that could be presented to the Standing Committee at its next meeting.

Finally, Judge Pointer requested that the Standing Committee approve what has been the occasional practice of the Civil Rules Advisory Committee to circulate working drafts of possible revisions to various bar groups and academicians on an informal basis prior to their submission to the Standing Committee for authorization for public circulation and comment. While this procedure has proven to be very helpful, it is arguably inconsistent with the Procedures for the Conduct of Business of the Committees on Rules of Practice and Procedure. Judge Barker moved that the request be approved. Professor Baker seconded the motion and the motion was passed with one vote against.

C. Criminal Rules - Judge William Terrell Hodges

Judge Hodges reported that the Criminal Rules Advisory Committee had proposed four amendments to the Criminal Rules, which had been circulated for public comment. The proposed amendment to Rule 16(a)(1)(A) would expand the duty of the Government to disclose certain oral statements. Judge Hodges reported that the comments received with respect to this Rule had been favorable, except for comments that the amendments should have gone further. Professor Baker asked why the proposed amendment would require a request for disclosure. Judge Hodges responded that Rule 16(b) required reciprocal disclosure and that some defendants might choose not to subject themselves to reciprocal discovery. He also suggested that the Department of Justice would have objected to discovery without request. Professor

Baker responded that the Advisory Committee should consider the idea of automatic discovery generally.

Judge Sloviter suggested that the disclosure be limited to those portions of the written record that contain relevant material. Judge Hodges indicated that the sense of the amendment was to restrict the duty to disclose the statement itself and suggested that the addition of the words "that portion" would clarify the Rule but could invite litigation. Judge Keeton agreed that the Rule as drafted appeared more expansive than intended. Judge Hodges agreed to accept an amendment that would clarify the intent of the Rule by the addition of the words "that portion." The report of the Advisory Committee recommending amendment of Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, as further amended by the Standing Committee, was treated as a motion. The Standing Committee voted unanimously to forward the amendment to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that it be approved and transmitted to Congress pursuant to law.

Judge Hodges reported that the proposed amendment to Rule 24(b) would equalize the number of peremptory challenges for both sides: twenty for each side in a capital case, six for each side in a felony case, and three each in a misdemeanor case. The Advisory Committee had discussed equalization at eight peremptory challenges on each side for a felony case but had settled on six challenges because eight would accomplish nothing to reduce the number of total challenges and would increase the number of challenges to the Government. The impetus for the

proposed amendment was a legislative initiative that would equalize the number of peremptory challenges, although the proposal had originally been made by the American Bar Association. The Advisory Committee was of the view that the Conference and the Standing Committee supported equalization. The comments received were essentially negative.

Mr. Wilson opposed the change. He asked why a change should be made since, in his view, the inclination of most people to vote for the Government has not changed since the development of the current practice in the nineteenth century. The current ten to six allocation of challenges is intended to "level the playing field" for the Government and the defense. He also opined that equalization would not save a considerable amount of time. Judge Bertelsman asked whether there was a provision to permit extra challenges for a particular reason. It was noted that the proposed amendment provided that each side was "entitled" to six challenges.

Judge Hodges noted that the principal debate in the Advisory Committee was whether the challenges should be equalized at eight or six, accepting the congressional determination that the challenges should be equalized. Professor Baker also opposed the change, noting that the ten challenges for the defense dated back to the Magna Carta and that the change would raise Batson problems. Judge Ellis asked whether voir dire should be expanded if the number of challenges was reduced. Judge Ripple pointed out that Congress should consider the actions of the Rules Committees, just as the Rules Committees consider the actions of Congress, and that the proposed amendments should not be determined by Congressional interest alone. The Advisory

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

DATE: December 18, 1990

I. INTRODUCTION

At its November 1990 meeting the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure and one Rule of Evidence. This report addresses those proposals and the recommendations to the Standing Committee. The minutes of that meeting, a GAP report and copies of the rules and the accompanying Committee Notes are attached. In summary, the rules and the recommended actions are as follows:

A. Rules of Criminal Procedure Circulated for Public Comment.

Four rules previously considered and approved by the Standing Committee for circulation to the bench and the bar have been reviewed by the Advisory Committee. The Committee recommends that they be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Rule 16(a)(1)(A). Statement of Defendant.
2. Rule 24(b). Peremptory Challenges.
3. Rule 35(b). Reduction of Sentence.
4. Rule 35(c). Correction of Sentence.

B. Rules of Evidence Circulated for Public Comment.

One Rule of Evidence has been circulated to the bench and the bar for comment. After considering the public comments, the Committee recommends that it be approved by the Standing Committee and forwarded to the Judicial Conference.

1. Fed. R. Evid. 404(b). Notice Provision.

C. Proposed Technical Amendments to Rules of Criminal Procedure and Rules of Evidence.

The Advisory Committee recommends that technical amendments be made in the following Rules, as discussed infra,

1. Rule 32 . Technical Amendments.
2. Rule 32.1. Technical Amendment.
3. Rule 46. Technical Amendment.
4. Rule 54(a). Technical Amendment.
5. Rule 58. Technical Amendment.
6. Rule 58, et al. Changing of the term "Magistrate"
7. Fed. R. Evid. 1102. Technical Amendment.

II. RULES OF CRIMINAL PROCEDURE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved amendments in Rule 16(a)(1)(A), Rule 24(b), and Rule 35(a) for circulation to the public. In July 1990, the Standing Committee approved the circulation of a new provision, Rule 35(c), on an expedited basis. Comments were received on all of these rules and considered by the Advisory Committee at its November 1990 meeting. A GAP report setting out the minor changes to either the Rules or the accompanying Committee Notes are attached to this report.

The Advisory Committee recommends that the Standing Committee approve these four amendments and forward them to the Judicial Conference.

III. RULE OF EVIDENCE CIRCULATED FOR PUBLIC COMMENT.

In January 1990, the Standing Committee approved the publication of a proposed amendment to Federal Rule of Evidence 404(b) which would add a notice provision in criminal cases. At its November 1990 meeting, the Advisory Committee considered the written comments it had received. A GAP report explaining the minor changes in the Advisory Committee Note to that Rule is attached.

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,
24, 35, and Fed. R. Evid. 404(b)

DATE: December 18, 1990

In January 1990, the Standing Committee approved the circulation for public comment of proposed amendments to Rules of Criminal Procedure 16(a)(1)(A), 24(b), Rule 35(b) and Federal Rule of Evidence 404(b). At its July 1990 meeting the Committee approved the circulation of Rule 35(c) on an expedited basis. The Advisory Committee has considered all of the written submissions from the members of the public who responded to the request for comments. The Rules, Committee Notes, and summaries of the comments on each Rule are attached.

1. Rule 16(a)(1)(A). Statement of Defendant. The proposed amendment would expand slightly the duty of the prosecution to disclose a defendant's oral statements. Almost every commentator was in favor of the change although a number of individuals encouraged the Advisory Committee to further expand federal criminal discovery. The Committee made no changes to either the Rule or the Committee Note.

2. Rule 24(b). Peremptory Challenges. The proposed amendment would equalize the number of peremptory challenges: 20 for each side in a capital case, 6 for each side in a felony case, and 3 each in a misdemeanor case. A similar provision for equalizing the number of peremptory challenges was considered by the Senate during the last session of Congress but was not included in the final 1990 Crime Control Act. The Senate version would have equalized the number of peremptory challenges in felony cases at 8 challenges for each side. The majority of those commenting on the proposed change were opposed to the amendment; most of the comments were submitted by federal public defenders. For reasons noted in the Advisory Committee Note, the Committee determined to go forward with the proposed change. At the suggestion of Judge Keeton, a minor change was made in the wording of the proposed language to break one long sentence into two shorter sentences. Language was also added to the Note to demonstrate the consistency of the Judicial Conference's position on equalization and reduction of peremptory challenges.

3. Rule 35(b). Reduction of Sentence. Almost all of those commenting on the proposed change to Rule 35(b) were in favor of it. The proposed amendment would lengthen the time during which the prosecution could move the sentencing court to reduce the defendant's sentence for substantial assistance. After considering the public's comments, the Advisory Committee made no change in the language of the rule or in the accompanying Note.

4. Rule 35(c). Correction of Sentence. The proposed addition of subsection (c) to Rule 35, which was based upon a recommendation by the 1990 Federal Courts' Study Committee, met with general public approval. Several commentators noted the potential for jurisdictional problems if a sentencing court attempted to correct a sentence after the notice of appeal had been filed. A number of commentators encouraged the Committee to go further and to adopt the Federal Courts' Study Committee's proposal to permit a defendant to seek modification of his or her sentence at any time with 120 days of sentencing. After carefully considering the issue, the Committee decided to make no changes to the rule as published. Several minor changes were made in the Note, however, to reflect the Committee's view that if the time for correcting a sentence under Rule 35(c) had elapsed, a defendant could still seek relief under § 2255.

The Committee also recommends that the Standing Committee refer to the Appellate Rules Committee the question of whether Federal Rule of Appellate Procedure 4 should be amended to provide that notice of appeal shall not divest the District Court of the jurisdiction to act within the seven (7) day period provided in Rule 35(c), and whether such a notice of appeal shall continue to be effective if the District Court does act under the rule.

5. Federal Rule of Evidence 404(b). The proposed addition of a notice requirement in Rule 404(b) for criminal cases was widely approved by those commenting on it. A number of commentators (primarily defense counsel) urged the Committee to require more specific notice. The Committee considered the suggestions and determined not to change the language of the proposed rule. Some changes were made to the Note to clarify the Committee's intent to provide for generalized notice and the ability of the trial court to require an in line showing by the prosecution of the specifics of the

offered 404(b) evidence. Language was also added to note that the notice provision does not apply to acts intrinsic to the offense charged.

Attachments:

Rule 16(a)(1)(A) and Summary of Comments
Rule 24(b) and Summary of Comments
Rule 35(b), (c) and Summary of Comments
Fed. R. Evid. 404(b) and Summary of Comments

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 shall ~~permit the defendant to~~
5 ~~inspect and copy or photograph~~ disclose to the
6 defendant and make available for inspection, copying or
7 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; any written record
13 containing the substance of any relevant oral statement
14 ~~which the government intends to offer in evidence at~~
15 ~~the trial~~ made by the defendant whether before or after
16 arrest in response to interrogation by any person then
17 known to the defendant to be a government agent; and
18 recorded testimony of the defendant before a grand jury

* New matter is underlined; matter to be omitted is
lined through.

RULES OF CRIMINAL PROCEDURE*

19 which relates to the offense charged. The government
20 shall also disclose to the defendant the substance of
21 any other relevant oral statement made by the
22 defendant whether before or after arrest in response to
23 interrogation by any person then known by the defendant
24 to be a government agent if the government intends to
25 use that statement at trial.

COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to introduce the statement. Thus, an oral statement

RULES OF CRIMINAL PROCEDURE*

by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for disclosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

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 received written comments from five individuals or organizations. Four were in favor of the proposed amendment. One, a US Attorney, was opposed to the amendment because it would give an unfair advantage to the defendant by providing the defense with an opportunity to neutralize the use of pretrial statements which could be used for impeachment. Of those favoring the amendment, several urged the Committee to expand defense discovery.

II LIST OF COMMENTATORS: Rule 16(a)(1)(A)

1. John J. Cleary, Esq., San Diego, CA, 5-23-90
2. William J. Genego & Peter Goldberger, Wash. D.C.,
8-31-90
3. Fredric F. Kay, Esq., Tucson, Ariz., 5-18-90
4. P. Raymond Lamonica, Esq., Baton Rouge LA, 8-22-90
5. Elisabeth Semel, Esq., Wash., D.C., 8-30-90

III. COMMENTS: Rule 16(a)(1)(A)

John J. Cleary
Private Practice
San Diego, California
May 23, 1990

Mr. Cleary considers the amendment to Rule 16 to be the most modest salutary change; this slight change, he says, does not address the real issue of meaningful discovery in federal criminal trials. In a footnote he suggests that the Committee forge ahead with proposing changes to federal discovery even if prosecutors threaten to take the issue to Congress -- to do otherwise would abdicate its judicial responsibility.

Advisory Committee on Criminal Rules
Proposed Amendments to Rule 16(a)(1)(A)
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William J. Genego & Peter Goldberger
NADCL
Washington, D.C.
August 31, 1990

Mr. Genego and Mr. Goldberger, who are co-chairs of the NADCL's Committee on Rules of Procedure, endorse the change to Rule 16. They believe that the slight expansion will reduce delays and confusion caused by surprise at the trial and will increase the "likelihood of non-trial disposition of the case."

Mr. Fredric F. Kay, Esq.
Federal Public Defender
Tucson, Arizona
May 18, 1990

Mr. Kay supports the amendment because it is an improvement over the present rule. He adds that federal criminal discovery is virtually non-existent and at the grace of the prosecutor and he sees no reason why "present cat and mouse games continue."

Mr. P. Raymond Lamonica, Esq.
U.S. Attorney
Baton Rouge, Louisiana
August 22, 1990

Mr. Lamonica is opposed to the amendment and states that it will take away one of the most significant methods of impeaching a defendant -- the inconsistent statement. The amendment in his view will cause a profound change in practice. Discovery in criminal practice, he asserts, should not be viewed in the abstract. In reality, if the defense has in its possession the prior statements of the defendant, it will be able to sidestep or explain the inconsistencies and thus perjury will be encouraged. The ability of the prosecution to deal with a lying defendant will be hampered, without fostering any legitimate interest of the defendant; there is no legitimate interest, he maintains, in telling the defendant about possible impeachment statements so that he can mold his testimony. Given the fundamental nature of this change, he recommends that no further steps should be taken to amend the Rule "without focused and extensive publication and study."

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Elisabeth Semel, President
California Attorneys for Criminal Justice
San Diego, California
August 30, 1990

Ms. Semel, speaking as President of the California Attorneys for Criminal Justice (CACJ)(2,500 members), supports the slight expansion of Rule 16 but urges the Committee to completely rewrite that rule, to include provisions for Rovario, Giglio and Brady material. The organization's members practice in both federal and state courts and see the trials in federal court as trial by ambush. She notes that many California prosecutors are pleased to be cross-designated to try a case in federal court because of the prosecution oriented discovery rules. She notes that pre-plea discovery of guideline sentencing factors is also important. Any concerns that the prosecution has about the safety of its witnesses could be handled by pretrial motion to limit discovery.

FEDERAL RULES OF EVIDENCE

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information, respectively, in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann. § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann. § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et. seq. nor require the prosecution to disclose, directly or indirectly, the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e. during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the

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

November 15, 1990
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on November 15, 1990. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 15, 1990 at the Administrative Office of the United States Courts. The following members were present for all or part of the meeting:

Hon. Wm. Terrell. Hodges, Chairman
Hon. James DeAnda
Hon. Sam A. Crow
Hon. Robinson O. Everett
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward F. Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller, III, acting Assistant Attorney General

David A. Schlueter, Reporter

Also present were Hon. Leland C. Nielsen, past Chairman of the Committee, Mr. James Macklin and Mr. David Adair from the Administrative Office and Mr. James Eaglin from the Federal Judicial Center.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed Judge Sam Crow as a new member of the Committee and on behalf of the Committee offered best wishes to the out-going chairman of the Committee, Judge Nielsen. The Chairman also excused the Honorable James Exum who had indicated a desire to be relieved from his membership on the Committee.

Mr. Macklin noted that he had distributed materials addressing the roles of the respective committees within the Judicial Conference and asked the Committee members to give some attention to those materials.

**B. Rules Approved by the Standing Committee
and Circulated for Public Comment**

The Reporter indicated that in January 1990, the Standing Committee had approved for circulation several amendments proposed by the Committee at its November 1989 meeting and in July 1990 it had approved for circulation an additional amendment to Rule 35. He also indicated that the comment period had expired on all of the rules and that the written comments had been distributed to the Committee.

1. Rule 16(a)(1)(A), Disclosure of Evidence by the Government. The Reporter briefly reviewed the public comments that had been received on the proposed amendment. The comments generally favored the amendment. Mr. Karas moved that the proposed amendment be forwarded to the Standing Committee with the recommendation that the amendment be adopted. Judge Keenan seconded the motion which passed by unanimous vote without further discussion. A copy of the Rule and the accompanying Committee Note are attached to these minutes.

2. Rule 24(b), Peremptory Challenges. The reporter, Mr. Macklin, and Mr. Adair provided a brief legislative update on the status of attempts by Congress to amend Rule 24(b). Although the Senate version of the Crime Bill (Senate Bill 1711) included a provision equalizing peremptory challenges at 6 in felony trials, the House version did not. Apparently the provision was deleted from the final version of the 1990 Crime Control Act during Conference discussions. The Reporter briefly related the general tone of the public's comments; although there seemed to be some support for equalization of the number of peremptory challenges, the defense bar (especially from several sections of the country) seemed greatly opposed to any reduction in the number of defense peremptory challenges.

Mr. Karas thereafter moved to amend the Rule to provide for equalized peremptory challenges with each side being entitled to 8 challenges in felony cases. Mr. Marek seconded the motion. In the discussion which followed, Professor Saltzburg indicated that he was opposed to the amendment in its entirety; the new rule would upset the balance which now exists and also expressed concern about the very limited ability of defense counsel to conduct voir dire in federal courts. Mr. Karas withdrew his motion and seconded Professor Saltzburg's subsequent motion to rescind the amendment in its entirety. Judge DeAnda stated his opposition to the motion, indicating that the proposed amendment should be submitted to the Standing Committee for its consideration. Mr. Pauley commented that carried to its

determine whether any statistics exist on the level of reliance upon oral search warrants. Following further discussion the Committee focused on proposed changes to Rule 41 which would include provisions for transmitting the necessary information by facsimile machines.

Judge Crow suggested that it would be appropriate to consider adoption of a single rule which would provide guidance on using electronic means to secure and authorize both arrest and search warrants. Judge Hodges thereafter appointed a subcommittee consisting of Judge Schlesinger, Mr. Marek, and Mr. Pauley to consider the issue with a view toward drafting a single rule to be considered at the Committee's next meeting.

2. Rule 16(a)(1)(A), Disclosure of Evidence by Government. Judge Hodges raised the issue of application of Rule 16 to corporate defendants. He noted that the matter had arisen in a case pending in the 11th Circuit and that court was currently considering the issue in a case styled Royal Buick, Inc. v. United States. Following very brief comments, the matter was tabled.

3. Rule 17, Subpoena. The Reporter indicated that at its May 1989 meeting the Committee had considered the possibility of amending Rule 17 to address the ability a third parties to seek relief from subpoenas but had deferred the matter pending similar amendments to Civil Rule of Procedure 45, which is in the approval process. Judge Keenan moved to defer any proposed amendments to Rule 17 pending approval by the Supreme Court of Civil Rule 45. Judge Huyett seconded the motion which carried by a unanimous vote.

4. Rule 32, Sentence and Judgment. Mr. Marek moved that Rule 32(f) be amended to make Rule 26.2 (application of Jencks Act) applicable to sentencing proceedings. Mr. Karas seconded the motion. Following extended discussion about whether Rule 26.2 should be applied at pretrial hearings and detention hearings as well, Mr. Pauley believed that the sanction provision in current Rule 26.2 was too heavy and that the trial judge should have more discretion. Mr. Marek responded that the sanction is appropriate if the government has deliberately withheld the statement of one of its witnesses. After making minor amendments to the proposed rule, which incorporated suggested language in a letter from Judge Keeton, the motion carried by a unanimous vote. The proposed amendment and accompanying Advisory Committee Note are attached.

On further discussion, Judge Hodges appointed a subcommittee consisting of Judge Huyett, chair, Mr. Karas,

**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 take the following action:

	Page
1. That the Judicial Conference approve amendments to Rules 5, 41(a) and 54, and new Rule 58 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law	2
2. That the Judicial Conference resolve to advise Congress that, in its view, the Rules Enabling Act is the appropriate vehicle for the amendment of Rule 24(b), Federal Rules of Criminal Procedure, and to advise Congress of the currently pending amendment of Rule 24(b) under consideration by the Advisory Committee on the Rules of Criminal Procedure	3

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

implement the President's drug control strategy, an amendment to Rule 24(b) to equalize the number of peremptory challenges available to the defense and the prosecution. This bill passed the Senate on October 5, 1989, but has not passed the House. As discussed below, the Advisory Committee has proposed a similar amendment for circulation to the bench and bar. Your Committee agrees that the use of the Rules Enabling Act should normally be the appropriate means of amending the Rules of Practice and Procedure, particularly where, as here, the Advisory Committee has responded to the congressional interest in the subject by initiating an amendment through the normal rules amendment process. Accordingly, your Committee recommends that the Conference endorse a resolution reiterating that view and advising Congress that the issue is currently under consideration by the Advisory Committee on Criminal Rules.

Recommendation:

That the Judicial Conference resolve to advise Congress that, in its view, the Rules Enabling Act is the appropriate vehicle for the amendment of Rule 24(b), Federal Rules of Criminal Procedure, and to advise Congress of the currently pending amendment of Rule 24(b) under consideration by the Advisory Committee on the Rules of Criminal Procedure.

III. Publication of Proposed Amendments to the Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposals to amend Rules 16(a)(1)(A), 24(b), and 35(a)

of the Federal Rules of Criminal Procedure and Rule 404(b) of the Federal Rules of Evidence.

The proposed amendment to Rule 16(a)(1)(A) would slightly expand the disclosure requirements of Rule 16 by directing the government to disclose to the defense any written record containing any relevant oral statements made by the defendant in response to interrogation.

The proposed amendment to Rule 24(b) would equalize the number of peremptory challenges to each side in a criminal prosecution: 20 challenges in capital cases, six challenges in felony cases, and three challenges in misdemeanor cases. The court would have discretion to permit multiple defendants to exercise additional challenges, but the number permitted the government could not exceed the total number available to the defendants.

The proposed amendment to Rule 35(a) would extend the time within which the court could consider certain government motions for reductions of sentence based on the defendant's cooperation. The government could make and the court could consider such reductions involving information not earlier available to the defendant one year or more after imposition of sentence.

The proposed amendment to Rule 404(b) of the Federal Rules of Evidence would add a requirement that the government, upon request of the defendant, give notice of the general nature of evidence of other crimes, wrongs or acts it intends to use for purposes sanctioned by that rule. Such notice would be provided in advance of trial, unless the court excuses pretrial notice for good cause shown.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting on July 17 and 18, 1989

The summer 1989 meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order at 9 a.m., July 17, at the Boston College Law School, Newton, Massachusetts, by its Chairman, Judge Joseph F. Weis, Jr. All members of the Committee were present except Gael Mahony, who was unavoidably absent.

Also attending were the Reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School; Judge Jon O. Newman, Chairman, and Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge John F. Grady, Chairman, and Paul D. Carrington, Reporter, of the Advisory Committee on Civil Rules; Judge Leland C. Nielsen, Chairman of the Advisory Committee on Criminal Rules; and Judge Lloyd D. George, Chairman, and Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules. Judge J. Frederick Motz of the District of Maryland also attended to participate in the discussion of the local rules project. Mary P. Squiers, Director of the Local Rules Project, and Professor Stephen Subrin, Consultant to the Local Rules Project, were present, as were James E. Macklin, Jr., Deputy Director of the Administrative Office and Secretary to the Committee on Rules of Practice and Procedure; Joe S. Cecil, Research Division, Federal Judicial Center; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office.

should be taken to avoid jeopardizing the project. The Committee agreed to refer the proposed Rule 84 to the Civil Advisory Committee. It was suggested that the Advisory Committee circulate the administrative manual to the circuit executives for study and comment.

D. Criminal Rules - Judge Leland C. Nielsen

Judge Nielsen asked on behalf of the Advisory Committee that the Standing Committee approve two amendments to the Criminal Rules for publication and public comment. The proposed amendment to Rule 16(a)(1)(A) would expand the prosecution's duty to notify the defense of oral statements made by the accused pursuant to an interrogation. The current rule requires only that the prosecution give notice of those oral statements which it intends to offer. The amendment would extend that requirement to any oral statements of which a written record has been made. Judge Pointer suggested that the proposed language is ambiguous with respect to what is required to be disclosed in the situation where there is no written record of an oral statement, and how the oral statement is to be disclosed. After several suggested changes were rejected by the Standing Committee, Judge Nielsen indicated that the rule would be withdrawn for redrafting in light of that concern.

Judge Nielsen advised that the Advisory Committee also requested approval of an amendment to Federal Rule of Evidence

404(b), which would require the prosecution, upon request by the defense, to give pretrial notice to the defense of its intent to use evidence of other crimes, wrongs, or acts committed by the accused. Judge Pointer asked why this notice requirement was placed in Evidence Rule 404(b), when it is actually a notice requirement of the kind generally included in Criminal Rule 16. Judge Nielsen explained that Rule 404 is more specific to the issue. Judge Wiggins expressed concern that, since the provision is a notice requirement, the sanction generally available for violation of rules of evidence, namely the exclusion of the evidence, would not always be appropriate. Judges Weis, Keeton, and Barker suggested that the provision was better placed in Criminal Rule 16. Judge Nielsen agreed to return the rule to the Advisory Committee for further consideration.

The proposed amendment to Federal Rule of Evidence 609(a) was approved by the Standing Committee in January but was held up pending the Supreme Court's decision in Green v. Bock Laundry Machine Company. Judge Nielsen asked that, since the Supreme Court had decided the case, the Standing Committee recommend to the Conference approval of the amendments for transmittal to the Supreme Court. Professor LaFave pointed out that the thrust of the rule change was actually to create three categories of evidence: evidence that a witness other than an accused has been convicted of a crime if the crime was a felony, evidence that an accused has been convicted of a felony, and evidence that a

witness has been convicted of a crime involving dishonesty or false statement. He suggested that the rule be so organized, instead of grouping these three types of evidence into only two categories. After discussion, the Standing Committee agreed to leave the language of the amendment as proposed by the Advisory Committee.

Judge Wiggins expressed concern that the definition of the term "dishonesty" in the notes should specify that larceny and other such crimes are not crimes of dishonesty. It was agreed that the note so stipulate. It was also agreed that the notes would make a stronger statement regarding decisions that take an unduly broad view of the definition of "dishonesty." The Committee voted to send the amendments to Rule 609 to the Conference with the suggestion that they be approved and sent to the Supreme Court for its consideration with a recommendation they they be approved by the Court and transmitted to Congress pursuant to law.

Judge Nielsen noted that a proposed amendment to Rule 41(a) and new Rule 58, dealing with magistrate procedures, had been circulated for comment. The comment period is over in November, and the Committee will consider any comments on these proposed changes at its meeting in November.

E. Bankruptcy Rules - Judge Lloyd D. George

Judge George advised the Standing Committee that the

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 18-19, 1989
Washington, D.C.

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

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, May 18, 1989. The following members were present for all or part of the meeting:

Hon. Leland C. Nielsen, Chairman
Hon. Robinson O. Everett
Hon. James G. Exum, Jr.
Hon. William T. Hodges
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Roger Pauley, Esq., designee of Mr. Edward Dennis,
Assistant Attorney General
Mr. Edward F. Marek, Esq.

David A. Schlueter, Reporter

Also present were Judge Joseph Weis, Chairman of the Standing Committee on Practice and Procedure, Judge Charles Wiggins, and Professor Wayne LaFave, members of the Standing Committee; Mr. James Macklin and Mr. David Adair from the Administrative Office; and Mr. William Eldridge from the Federal Judicial Center.

INTRODUCTIONS AND PRESENTATIONS

Judge Nielsen introduced and welcomed Judge Wiggins as the liason from the Standing Committee and noted that Mr. Roger Pauley had been designated by the Department of Justice as its official representative. He also recognized Mr. James Macklin who awarded Mrs. Ann Gardner a certificate and pin for 25 years of federal service.

CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

Rules Approved by the Judicial Conference
and Submitted to the Supreme Court

The Reporter noted that amendments in three rules had been approved by the Standing Committee at its January 1989 meeting

not really changed since the earlier discussion. Mr. Doar noted that any changes in Rule 6(e) would be dangerous and Mr. Pauley responded that under the amendments disclosure would not be made without the approval of the federal prosecutor and reiterated the extensive background and need for the changes. Judge Keenan expressed concern that prosecutors might use the grand jury process to work toward only a civil case. Judge Everett moved that the Committee express to Congress that confidence in the secrecy of the grand jury is so important that there are serious problems with amending Rule 6(e). The motion failed for want of a second. There was additional discussion about related problems with the proposed changes with the consensus of the Committee being that Rule 6(e) should not be amended.

2. Proposed amendments to Rule 12(b)(pretrial motions). At the suggestion of Judge Manuel Real, the Committee considered whether to amend Rule 12(b) to require litigation of entrapment defenses through a motion to suppress evidence illegally obtained. After brief discussion Judge Huyett moved to table the proposal and Mr. Karas seconded the motion. It carried unanimously.

3. Proposed Amendments to Rule 16 (Discovery). The Committee considered a number of proposed changes to Rule 16 which had been deferred from the November 1988 meeting in New Orleans.

a. Notice of "Other Offense Evidence:" Mr. Marek offered a proposed amendment to Rule 16(a)(1)(E) which would require the government to furnish the defense with particularized information about its intent to use evidence under Federal Rule of Evidence 404(b). The Committee believed that the issue would appropriately fit within that evidence rule and as noted, infra, adopted amendments to Rule of Evidence 404(b).

b. Witness Lists. The Committee considered an amendments to Rule 16 which would: first, require the prosecution to furnish to the defense a written list of names and addresses of all government witnesses; second, provide for reciprocal discovery of names and addresses of defense witnesses; third, prohibit comment upon the failure to call a witness on either list; and fourth, impose a continuing duty to disclose the names and addresses of witnesses. Mr. Marek noted that the proposed changes followed proposals approved by the Supreme Court in 1974. Mr. Pauley indicated that the Department

of Justice would strongly oppose any efforts to require the prosecution to disclose the names and addresses of its witnesses. He reiterated the dangers posed, i.e. intimidation and possible loss of life, by disclosing the names of government witnesses before trial. He noted that the Department was not questioning the ability of trial judges to decide when a witness' name should be disclosed but he observed that trial judges will inevitably err and in those cases, the life of a witness could be endangered. Mr. Karas responded that trials without adequate defense preparation cannot be fair trials. Mr. Marek moved that the proposed language be adopted and Mr. Karas seconded the motion. It failed by a 2 to 6 vote. Judge Everett subsequently moved that the Department of Justice provide the Committee with its views on a certification process which would require the prosecution to disclose a witness' name and address unless it certified to the court that doing so would pose a risk of injury or loss of life to the witness. Judge Hodges seconded the motion which carried unanimously with one absention noted.

c. Co-conspirators' Statements. Mr. Marek moved that Rule 16(a)(1) be amended to require the prosecution to disclose to the defense "any statement of a co-conspirator which the government intends to use in evidence against the defendant pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence." The motion was seconded by Mr. Karas. Mr. Pauley indicated that the Department of Justice was strongly opposed to such a requirement noting the possibility of danger to the witness. Judge Hodges noted that there are tremendous pragmatic problems with this sort of requirement because of the complicated and interwoven conspiracy statements, many of which have not been recorded. The motion failed by a vote of 2 to 6.

d. Defendant's Statements. Following some discussion on the requirement in Rule 16(a)(1) that the prosecution disclose any relevant written or recorded statement made by the defendant, Judge Hodges moved that the Rule be amended to require disclosure of any oral statements made by the defendant which the prosecution intends to offer at trial or of which a written record has been made. The motion was seconded by Mr. Karas and passed by a unanimous vote. A copy of Rule 16, as amended, and the proposed Advisory Committee Note are attached to these minutes

e. Exculpatory Evidence. Mr. Marek urged the Committee to consider amending Rule 16(a)(1) by adding a new subsection (H) which would require the prosecution to disclose all exculpatory ("Brady") material to the defense. The Committee discussed the proposal with several members noting the

practical problem of moving back the period of disclosing the exculpatory material. The Committee decided to defer this proposal until its next meeting.

f. Witness Statements. Mr. Marek offered a proposed change to Rule 16(a)(1) by adding a new subsection (G) to require the prosecution to produce, before trial, any prior Jencks Act statements made by any prosecution witness. He moved that the Committee communicate to Congress that it would be appropriate to initiate some action on amending the Jencks Act. Judges Weis and Hodges expressed the view that the Rules Enabling Act permits the Committee to initiate discussion on a particular rule by adopting amendments. Judge Weis recommended that the Committee recommend an amendment and thus give notice to Congress that the area needs some attention. Judge Hodges moved to table the proposal and Judge Huyett seconded the motion which passed.

4. Proposed Amendments to Rule 17 (Motions to Quash Subpoenas by Non-Party Witnesses). [The discussions on Rule 17 took place on the afternoon of May 18 and the morning of May 19. They are reflected here in their entirety for purposes clarity]. The Committee discussed the possibility of amending Rule 17 to reflect amendments being considered in Civil Rule 45 which permits non-party witnesses to move to quash subpoenas. The impetus for the change is apparently coming from the American Bar Association which is interested in the rights of witnesses. The Chairman suggested that the matter be deferred until the next meeting at which time the Committee could consider draft amendments prepared by the Reporter. Judge Everett suggested that the Reporter also consider problems associated with discovery of an expert's opinion. Mr. Pauley suggested that it would be prudent, in light of the differences in civil and criminal practice, to wait until amended Civil Rule 45 had been used to see how well it functions. Judge Keenan ultimately moved that the matter be deferred until the Committee's next meeting. Judge Everett seconded the motion which carried unanimously.

5. Proposed Amendments to Rule 24 (Voir Dire). The Reporter indicated that Senator Heflin had introduced legislation which would amend Rule 24(a) and Civil Rule 47(a) to provide counsel with a greater opportunity to conduct voir dire of prospective jurors. Judge Bilby, Chairman of the Judicial Improvements Committee, is taking the lead in opposing the legislation and in encouraging judges to allow questioning by attorneys. The Committee took no further action on this matter.

6. Proposed New Rule 52.1 (Child-Victim Testimony). The Committee reviewed a proposed Rule 52.1 being considered by Congress (H.R. 1303) which is part of a proposed "Federal Victim's Services and Protections Compliance Act." The new rule would provide comprehensive coverage of a number of problems which might arise when a child victim testifies. The Committee discussed the proposed rule and was generally opposed to it. Mr. Pauley indicated that the Department of Justice was preparing a memorandum on the proposed rule. Judge Everett moved that the Committee communicate its concerns about the rule to Congress. The motion was seconded by Judge Hodges and passed unanimously.

7. Report on Model Rules. Mr. William Eldridge of the Judicial Center noted that work was progressing on the model local rules and that a report on the project was being prepared.

EVIDENCE RULE AMENDMENTS UNDER CONSIDERATION

Evidence Rules Approved by the Standing Committee

Proposed Amendments to Federal Rule of Evidence 609(a)(Impeachment with Prior Conviction). The Committee was informed that the Standing Committee had approved the Committee's proposed amendments to Rule 609(a) at its January 1989 meeting but had decided to hold the proposed changes pending the Supreme Court's decision in Green v. Bock Laundry Machine Company (87-1816). [The Supreme Court decided Green on May 22, 1989, holding that Rule 609(a) requires the trial court to permit a civil litigant to impeach a witness or another party with a felony conviction without regard to possible prejudice to the witness or the party offering the testimony.]

New Matters -- Evidence Rules

1. Proposed Amendments to Federal Rule of Evidence 404(b)(Other crimes wrongs, or acts). [The discussion on proposed amendments to Rule 404(b) took place on both May 18 and 19 and is presented here in its entirety for purposes of clarity].

a. Notice Requirement. The Committee initially considered amending Rule 16 to require the prosecution to provide notice of an intent to use Rule 404(b)-type evidence but concluded after some discussion that it would be more appropriate to amend Federal Rule of Evidence 404(b). Discussion focused on whether the prosecution should be required to

describe with some particularity the evidence of uncharged misconduct which it intended to use. Mr. Pauley indicated that the Department of Justice would be opposed to imposing a particularity requirement and also requested that the Committee Note indicate that the Committee did not intend for the notice requirement to sidstep the Jencks Act. The Committee concluded that the prosecution should be required to disclose such evidence regardless of whether it intended to use the evidence during its case-in-chief, for impeachment, or for rebuttal. On motion by Judge Hodges, seconded by Mr. Doar, the Committee voted to amend Rule 404(b). The Rule, as amended, and the proposed Advisory Committee Note, are attached to these minutes.

b. Burden of Proof. The Committee considered an American Bar Association Resolution to amend Rule 404(b). The resolution urges that the rule be amended to provide that in criminal cases the questions of preliminary facts relative to extrinsic act evidence be decided by the trial judge using the preponderance of evidence standard. That proposed amendment would have the effect of overruling Huddleston v. United States, 108 S.Ct 1496 (1988). Professor Paul Rothstein, speaking on behalf of the ABA, expressed the Association's concern for prejudice to the accused and that a notice provision alone would not be satisfactory. Mr. Pauley indicated that the Department of Justice was stongly opposed to the ABA proposal and that it would be a mistake to carve out procedural rules for special categories of evidence. Judge Everett moved that Rule 404(b) be amended to reflect the ABA's proposal. The motion was seconded by Mr. Karas. During further discussion on the motion, several members raised the concern about whether the burden of proof issue was a procedural or substantive matter. Judge Hodges observed that there is a lack of empirical evidence to support the notion that Rule 404(b) evidence is being unfairly used and that there would be pragmatic problems with conducting mini trials to determine whether extrinsic act evidence was admissible. Citing the fact that Huddleston was only recently decided and in light of possible problems of incorporating a substantive burdern of proof provision in the Rules of Evidence, Judge Hodges moved to table the matter. Judge Huyett seconded the motion which carried by a vote of 5 to 4.

2. Proposed Amendments to Federal Rule of Evidence 803 (Hearsay exception for child-victim statements). [This matter was discussed on May 18 with the proposed legislation which would add new Rule 52.1, discussed supra. It is addressed here as a matter affecting the Federal Rules of Evidence]. The

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 17-18, 1988
New Orleans, LA

The Advisory Committee on the Federal Rules of Criminal Procedure met in New Orleans, Louisiana on November 17 and 18. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 AM on Thursday, November 17, 1988. The following members were present for all or part of the meeting:

Hon. Leland C. Nielsen, Chairman
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. William T. Hodges
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Mr. John Doar, Esq.
Mr. James F. Hewitt, Esq.
Mr. Tom Karas, Esq.
Mr. Edward F. Marek

David A. Schlueter, Interim Reporter

Also present were Judge Joseph Weis, Chairman of the Standing Committee on Practice and Procedure, and Professor Wayne LaFave, a member of the Standing Committee; Mr. David Adair and Mr. Tom Hnatowski from the Administrative Office; Professor Saltzburg from the Department of Justice; and Mr. William Eldridge from the Federal Judicial Center.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced and welcomed Judge Everett and Mr. Karas, new members of the committee, and then introduced the other members and visitors.

CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

Criminal Rules Approved by Standing Committee

Rule 12.3 had been previously approved by the Standing Committee for circulation, circulated for public comments,

1. Professor Saltzburg had intended to attend as the Reporter on Leave, but in the absence of Mr. Pauley who was unable to attend, agreed to speak on behalf of the Department of Justice.

New Criminal Rule Amendments Proposed

1. Proposed Amendments to Rules governing filing requirements. The Committee was informed that at the suggestion of Mr. Hewitt, a possible amendment to the civil, criminal, appellate, and bankruptcy rules, was being considered which would take into account the practice of using overnight or express courier services to file documents. Dean Carol Ann Mooney is responsible for preparing an agreed upon solution which will then be considered by the advisory committees.

2. Proposed Amendments to Rule 16 (Discovery). The Committee engaged in an extended discussion on whether to amend Rule 16 to include provisions for witness names, witness statements, reciprocal discovery, discovery for sentencing purposes, and disclosure by the prosecution of other acts of uncharged misconduct which might be introduced at trial under Fed. R. Evid. 404(b).² Professor Saltzburg, speaking on behalf of the Department of Justice, explained that any attempt to amend Rule 16 would be considered an interference with Congressional prerogatives to amend the Jencks Act and that the Department would continue to reject strongly any attempts to require prosecutors to reveal in every case witness names and statements. The Department was not opposed, he indicated, to congressional hearings on the issue of whether any changes should be made in criminal discovery. There was additional discussion on the issue of whether the Committee was the most appropriate body to initiate changes in criminal discovery practice.

Ultimately, Mr. Hewitt moved to adopt a proposed revision to Rule 16 which would track with the American Bar Association Criminal Justice Standards, Discovery and Procedure Before Trial, Chapter 11, approved August 9, 1978. The motion was seconded by Mr. Karas and passed by a 5 to 4 vote. The majority believed that in light of developments in State discovery practices and the trend to avoid trial by ambush, more discovery of information in the hands of the prosecution was appropriate. The dissenters believed that disclosure of information such as the names of prosecution witnesses would present substantial danger to those individuals and the Congress was the appropriate body for proposing any changes in criminal discovery. Thereafter, Judge Everett moved that the Chairman send a letter

2. The discussions on Rule 16 took place on the afternoon of November 17 and the morning of November 18. They are reflected here in their entirety for purposes of clarity.

to the appropriate committees within Congress notifying them of the Committee's intent to propose amendments to Rule 16. The motion was seconded by Mr. Karas, but after additional discussion on the issue of jurisdiction to consider changes in criminal discovery, the motion was withdrawn. Thereafter, Mr. Marek moved that the earlier vote on the proposed amendments to Rule 16 be reconsidered. Judge Hodges seconded the motion which carried by a narrow margin. Again, the Committee discussed the problem of addressing the sensitive topic of criminal discovery and Mr. Marek moved that proposed amendments be made regarding witness lists and disclosure of uncharged misconduct under Fed. R. Evid. 404(b). The motion was seconded by Magistrate Schlesinger who later withdrew his second. The motion failed for lack of a second. Following further discussion, Mr. Marek moved that the matter be placed on the agenda for the May 1989 meeting, and that at that time the Committee consider separately each of the possible changes to Rule 16 and also possible amendments to Fed. R. Evid. 404(b). The motion was seconded by Judge DeAnda and carried by a 7 to 2 vote. The dissenters expressed concern that delaying any action to the next meeting would effectively eliminate any real changes in the criminal discovery rules.

3. Proposed amendments to Rule 24(b) (Peremptory strikes of jurors). At the suggestion of Mr. Roger Pauley at its May 1988 meeting, the Committee considered the question of whether to proceed with proposing amendments to Rule 24(b) regarding the number of peremptory strikes available to the prosecution in a felony criminal trial. After a brief discussion Judge Hodges moved that the proposal of any amendments to Rule 24(b) be tabled. The motion was seconded by Judge Keenan. It carried unanimously.

4. Proposed amendments to Rule 25 (Unavailability of Judge). The Advisory Committee on Civil Rules has proposed changes to Fed. R. Civ. Pro. 63, the counterpart to Rule 25 to the effect that if for any reason a judge is unable to proceed with a trial, a successor judge may proceed with the trial and in the case of a bench trial, the judge may recall any witness. After some brief discussion, and at the suggestion of Judge Weis, the reporter was instructed to explore the possibility of using similar language in both Civil Rule 63 and Criminal Rule 25.

EVIDENCE RULE AMENDMENTS UNDER CONSIDERATION

Evidence Rules Approved by Standing Committee

Proposed Amendments to Federal Rule of Evidence 609(a)
(Impeachment with Prior Conviction). The Committee reviewed

**MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
MAY 7-8, 1987
Washington, D.C.**

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on May 7-8, 1987. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, May 7, 1987. The following members were present:

Hon. Leland C. Nielsen, Chair
Hon. Sherman Finesilver
Hon. William L. Hungate
Hon. William C. O'Kelley
Hon. William Weld
James F. Hewitt, Esq.
Richard A. Green, Esq.
Frederick B. Lacey, Esq.
Leon Silverman, Esq.
Stephen A. Saltzburg, Reporter

Also present were Hon. Edward T. Gignoux, Chairman of the Standing Committee on the Rules of Practice and Procedure; Roger Pauley, who was designated by Mr. Weld as the representative of the Criminal Division of the Department of Justice when Mr. Weld was away from the meeting; James E. Macklin, Jr., Deputy Director of the Administrative Office, together with Ann Gardner and David Adair; Tom Hutchison, Counsel for the Subcommittee on Criminal Justice of the House of Representatives Judiciary Committee, Ray Smietanka, Associate Counsel of the Subcommittee, and Cindy Blackburn, Staff Counsel to the Senate Judiciary Committee. Judge Gerald Tjoflat, Chair of the Committee on Probation Services, was present during the afternoon session on May 7th.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced Mr. Weld, the only new member present, and indicated that Committee member Herbert J. Miller regretted that he could not attend the meeting. Judge Nielsen explained that the Chief Justice had designated the Assistant Attorney General for the Criminal Division of the Department of Justice as a member of the Committee, so that whoever holds this position will serve on the Committee without the necessity of being appointed by

NEW CRIMINAL RULE AMENDMENTS PROPOSED

1. Proposed Amendment of Rule 5.1 (c)(1) (Local Rule Reference). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 5.1(d)(1) be amended to delete the words "by local rule." The Committee determined, however, that at some point this change might well be desirable as part of a general "cleaning up" of the rules.

2. Proposed Amendment of Rule 16 (c) (Notice of Additional Discovery). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 16 (c) be amended to require notification of the court as well as a party or his attorney. The Committee determined, however, that at some point this change might well be desirable as part of a general "cleaning up" of the rules.

3. Proposed Amendment of Rule 17 (d) (Service of Subpoenas). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 17 (d) be amended to provide that service of process should be permitted by any person authorized by law to make service. The Committee determined that the rule was sufficiently broad to cover all persons over 18 years of age and that few problems had arisen with the rule.

4. Proposed Amendments of Rule 32 (Sentencing Reform). The Committee devoted a substantial portion of the meeting on both days to consideration of possible amendments of Rule 32 in light of the guidelines sent to Congress by the Sentencing Commission. Judge Tjoflat explained the problems that the guidelines may cause district courts and the work that the Probation Committee was undertaking. A motion was made to circulate for public comment a draft amended rule prepared by the Probation Committee, but the motion failed. A second motion was made to circulate only a portion of the Probation Committee's draft, but it was withdrawn after discussion. A third motion was made to adopt a Model Local Rule and to submit it to the Standing Committee. The Committee reviewed a draft of a Model Local Rule, but ultimately rejected it. In the end, the Committee unanimously agreed that no action should be taken at this time, but the Committee should monitor what Congress does in response to the Sentencing Commission's submission and support the Probation Committee's efforts to prepare probation officers for the tasks that will be required by the guidelines.

June 14, 1986

**MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
JUNE 12, 1986**

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, June 12, 1986. The following members were present:

Hon. Leland C. Nielsen, Chair
Hon. Sherman G. Finesilver
Hon. William L. Hungate
Hon. William C. O'Kelley
Hon. Stephen Trott
James F. Hewitt, Esq.
Richard A. Green, Esq.
Frederick B. Lacey, Esq.
Herbert J. Miller, Esq.
Leon Silverman, Esq.

The only member absent was Hon. Harvey Schlesinger. He notified the Chair of his inability to attend well before the meeting and submitted his views on the issues pending before the Committee in writing.

Also present were Hon. Edward T. Gignoux, Chairman of the Standing Committee on the Rules of Practice and Procedure; Roger Pauley, who accompanied Mr. Trott; James E. Macklin, Jr., Deputy Director of the Administrative Office, who was assisted by Ann Gardner; and Tom Hutchinson, counsel to the House of Representatives' Subcommittee on Criminal Justice, who attended after the lunch break. For a brief period immediately after lunch, Mr. David Adair was present. He was introduced by Mr. Macklin as a member of the General Counsel's office who would be working in the future with the Committee.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced Judge Finesilver, the only new member present at the meeting, and indicated that the other new member, Magistrate Schlesinger, would be unable to be present.

RULE CHANGES UNDER CONSIDERATION

A. Rules Approved by Committee

Rule 6(a) (Providing for the Selection of Alternate Grand Jurors)

action on this matter.

4. Proposed Amendment of Rule 6 (e) (To Permit Justice Department to Disclose Grand Jury Information for Use in Civil Cases)

The Committee discussed the proposal by Mr. Trott which would permit a prosecutor to share information with government lawyers for use in civil cases and, with court permission, to share information with agencies to aid them in carrying out their responsibilities. Judge Nielsen expressed concern about the possibility that Congress also would want access to grand jury material, and Mr. Hewitt echoed the concern. Mr. Silverman voiced a strong opinion that no change should be made in the rule, but Mr. Green disagreed and argued that duplication of investigative effort could be wasteful. Mr. Trott defended the rule. Discussion followed in which Judge Finesilver indicated that he believed the proposal changed the traditional role of the grand jury, Mr. Miller said the problem was difficult but he opposed change, Mr. Lacey agreed with Mr. Miller, and Judge Hungate indicated that he would not change the rule. Mr. Trott moved to amend the rule and Mr. Green seconded the motion. The vote against the motion was 7-2.

5. Congressional Statement Regarding Rule 11 (c)

The Committee reached a conclusion supported by all members (except Mr. Hewitt who had reservations) that the House Subcommittee Report, which addressed the last amendment to Rule 11 and indicated that a trial judge was required to warn a defendant who wished to enter a plea of guilty of the maximum amount of restitution, was erroneous. Mr. Trott explained that restitution is not part of the penalty within the meaning of the rule, and other members agreed. Preferring to leave the question to judicial decisions, Judge Finesilver moved that the Committee take no action in response to the Report. The motion was seconded by Judge O'Kelley, and it carried unanimously.

6. Proposed Amendment of Jencks Act—Discovery Reform

The fact that Representative Conyers' Subcommittee had held hearings on a proposal to amend the Jencks Act to provide discovery of witness names and statements prior to trial was discussed. Tom Hutchison noted that the hearings were over and that the bill would be marked up, but said that the Criminal Rules Committee had not been asked to take a position on the proposed change. No member of the Committee expressed a desire to indicate views on the bill, and the matter was dropped.

AGENDA G-7
Rules of Practice & Procedure
March 1986

SUMMARY

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 take the following action:

Approve amendments to the Federal Rules of Evidence (Appendix A) and the Federal Rules of Civil Procedure (Appendix B) to eliminate gender-specific language, and transmit them to the Supreme Court with the recommendation that they be approved by the Court and transmitted to the Congress pursuant to law. (pp. 1-2).

PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF EVIDENCE*

Rule 101. Scope

1 These rules govern proceedings in the courts of the United
2 States and before United States bankruptcy judges and United States
3 magistrates, to the extent and with the exceptions stated in rule
4 1101.

COMMITTEE NOTE

United States bankruptcy judges are added to conform this rule with Rule 1101(b) and Bankruptcy Rule 9017.

Rule 104. Preliminary Questions

* * * * *

1 (c) **Hearing of jury.**--Hearings on the admissibility of
2 confessions shall in all cases be conducted out of the hearing of the
3 jury. Hearings on other preliminary matters shall be so conducted
4 when the interests of justice require, or, when an accused is a
5 witness, if he and so requests.

6 (d) **Testimony by accused.**--The accused does not, by testifying
7 upon a preliminary matter, become subject ~~himself~~ to cross-
8 examination as to other issues in the case.

* * * * *

COMMITTEE NOTE

The amendments are technical. No substantive change is intended.

*New matter is underlined; matter to be omitted is lined through.

99TH CONGRESS
1ST SESSION **H. R. 4007**

To amend section 3500 of title 18, United States Code, to provide more useful discovery rights for defendants in criminal cases.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 20 (legislative day, DECEMBER 19), 1985

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 3500 of title 18, United States Code, to provide more useful discovery rights for defendants in criminal cases.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Jencks Act Amendments
5 Act of 1985".

6 **SEC. 2. TIMING FOR AN EXCEPTIONS TO DISCOVERY.**

7 Section 3500 of title 18, United States Code, is amend-
8 ed by striking out subsection (a) and all that follows through
9 subsection (b) and inserting in lieu thereof the following.

1 “(a) In any criminal prosecution by the Government, on
2 request of a defendant, the Government shall promptly,
3 except as provided in this section, make available—

4 “(1) the name and last known address of each
5 person known by the Government to have knowledge
6 of facts relevant to the offense charged; and

7 “(2) a copy of any statement (and of any summary
8 of the substance of any statement) or report of, or re-
9 lating to, each such person that—

10 “(A) is in the possession of the Government;

11 and

12 “(B) relates to the subject matter about
13 which that person may be called by the Government
14 to testify.

15 “(b)(1) If upon motion of the Government, which may
16 be made ex parte, the court finds that a disclosure under
17 subsection (a) would—

18 “(A) constitute an imminent danger to another
19 person; or

20 “(B) constitute a threat to the integrity of the ju-
21 dicial process;

22 the Court may deny, restrict, or defer such disclosure, or
23 make such other orders as the court considers necessary to
24 assure disclosure would not have that effect.

1 “(2) After a witness called by the Government has testi-
2 fied on direct examination, the court shall, on request of the
3 defendant, order the Government to produce any statement
4 which has been subject of an order under paragraph (1) and
5 which relates to the subject matter as to which the witness
6 has testified.”.

7 SEC. 3. CONFORMING AMENDMENTS.

8 Section 3500 of title 18, United States Code, is
9 amended—

10 (1) in subsection (d), by striking out “under sub-
11 section (b)” and all that follows through “court may
12 direct” and inserting “to make available material under
13 this section” in lieu thereof;

14 (2) in subsection (e), by striking out “subsections
15 (b), (c), and (d) of”; and

16 (3) by striking out “United States” each place it
17 appears and inserting “Government” in lieu thereof.

○

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

MINUTES OF MEETING OF OCTOBER 6-7, 1972

The standing Committee on Rules of Practice and Procedure met in the Conference Room of the Administrative Office in Washington, D.C. on October 6 and 7, 1972.

Present: Judge Albert B. Maris, chairman, Judge Charles W. Joiner, Richard E. Kyle, Esq., Professor James Wm. Moore, J. Lee Rankin, Esq., Bernard G. Segal, Esq., Judge Frank W. Wilson and Judge J. Skelly Wright. Professor Charles Alan Wright was unavoidably absent. Also present during parts of the meeting were Judge Phillip Forman, chairman of the Advisory Committee on Rules of Bankruptcy, Professors Frank R. Kennedy and Vern Countryman, reporter and associate reporter, respectively, to the committee, Professor Frank J. Remington, reporter to the Advisory Committee on Criminal Rules, and G. Robert Blakey, Esq., chief counsel of the Senate Subcommittee on Criminal Laws and Procedures, William E. Foley, Esq., secretary to the committee, Ada E. Beckman, law clerk to the chairman, and Barbara A. Gray, of the rules study staff, were also present.

AGENDA ITEM III. RULES OF CIVIL PROCEDURE

Judge Maris reported that the Advisory Committee on Civil Rules met two weeks ago and is considering the various aspects of Rule 23, the class action rule, that the committee had general discussion of the subject matter and gave instructions to its reporter, Professor Bernard J. Ward, to prepare alternative rules with respect to the third category of class actions.

It was moved and seconded that the words "in writing" be inserted in the 4th sentence of Rule 15(b) after "waives" and before "the", the clause to read "unless the defendant waives in writing the right to be present".

ALL APPROVED THE AMENDMENT TO RULE 15(b) and APPROVED RULE 15 (b) AS THUS AMENDED.

Judge Wright suggested that a reference be made in the Note to the fact that if the defendant is in state custody, a writ of habeas corpus ad prosequendum might be required to secure his presence at the deposition.

With respect to Rule 15(c), Judge Wilson observed that no provision is made for the reporter's expenses. It was pointed out that the rule does not relate to such expenses.

Judge Joiner moved and Mr. Segal seconded that Rule 15 be approved as amended. ALL AGREED.

Rule 16 Professor Remington stated that the only change in this rule was an editorial one in subdivision (a)(1)(E). ALL APPROVED.

It was moved and seconded that the phrase "to agents of the government" be deleted in subdivision (a)(2), to conform with the amended statute, the phrase to read "witnesses except as provided in 18 U.S.C. § 3500.

ALL APPROVED RULE 16 AS THUS AMENDED.

RULE 17 There is no change in this rule. Judge Wilson moved approval of Rule 17. ALL APPROVED.

Rule 20 The advisory committee believed that the word "present" is better than the word "found" and "present" has been substituted. Judge Maris agreed that "found" was ambiguous. Judge Wilson inquired whether this might not encourage forum shopping. Judge Joiner thought "found"