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 M. 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.

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 35(c), Correction of Sentence.

4. Rules 32, 32.1, 46, 54(a), and 58, Technical Amendments).

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

The Reporter indicated that there were currently no Rules out for public comment by the bench and the bar.

D. Rules Considered and Rejected by the Standing Committee

Rule 24(b), Peremptory Challenges: The Committee was informed that the Standing Committee at its January 1991 meeting had considered and unanimously rejected the Committee's proposed amendment to Rule 24(b) which would have equalized the number of peremptory challenges in capital and felony cases at 10 and 6, respectively. The Reporter pointed out that Congress (Section 232 of S. 472, Women's Equal Opportunity Act of 1991) was considering an amendment to Rule 24(b) which would effect the same change. Judge Hodges noted that there did not appear to be anything more that could or should be done by the Committee. Other Committee members voiced concern about the continuing problems associated with adherence, or lack thereof, to the Rules Enabling Act process and the inclination of Congress to readily include proposed amendments in pending legislation without permitting the Judicial Conference and its Committees to review the need for such amendments. Judge Keeton noted that this could be an on-going problem given the relative ease of introducing amendments in legislation. Mr. Pauley observed that there may be different policy questions involved between amendments which have never been considered by the Judicial Conference and those which have been considered but have resulted in a negative position. In the case of the latter, the proponent of the amendment should be permitted to seek Congressional change. In the case of the amendments to Rule 24(b) the original proponent had been the American Bar Association. Mr. Adair pointed out that the Administrative Office had communicated the Standing Committee's rejection of proposed amendments to Rule 24(b) to leaders in Congress.

E. Rules Under Consideration by the Advisory Committee

a. Rules 3 et al, Use of Facsimile Machines. A subcommittee composed of Judge Schlesinger (Chair), Mr. Marek, and Mr. Pauley, reported to the Committee that it had considered the possibility of amending Rules 3, 4, 17, 40, and 41 to permit filing of necessary papers and documents by facsimile machines. Speaking for the Subcommittee, Judge Schlesinger noted that it had spent some time discussing the question of whether facsimile machines should be used at all for purposes of filing official documents. Rather than making global changes to the Rules of Procedure to permit such use, the Subcommittee was prepared to recommend that only several Rules be amended to permit such use.

a. Rule 17, Subpoena. With regard to possible amendments to Rule 17, Judge Schlesinger reported that the Subcommittee was recommending that no change be made at this time. He indicated that the Subcommittee had not been presented with any actual or practical problems which would require attention.

b. Rule 41, Search and Seizure. Judge Schlesinger observed that permitting use of a facsimile machine for obtaining warrants would be helpful, for example, where an officer was seeking an anticipatory warrant and was relying on both written affidavits and oral testimony. Mr. Marek added that permitting use of facsimile machines in obtaining search warrants would encourage officers to obtain one. Following brief discussion, Judge Schlesinger moved that Rule 41(c)(2)(A) be amended to permit use of facsimile machines. Professor Saltzburg seconded the motion which carried unanimously. In discussion which followed the Committee briefly addressed the scope of the Committee Note to the amendment and indicated that the purpose of the amendment is to expand the authority of magistrates and judges in considering electronic communications to issue search warrants. In particular, the amendment will permit supplementation of oral telephonic communications by written material transmitted by facsimile machines.

With regard to Rules 41(c)(2)(B), Application, 41(c)(2)(C), Issuance, and 41(g), Judge Schlesinger indicated that the Subcommittee was not recommending any changes because permitting use of facsimile machines under those provisions would not save time and would present problems and questions about the need to preserve the facsimile copies.

c. Rule 40, Commitment to Another District. Judge Schlesinger reported that although the Subcommittee had no specific data on whether use of facsimile transmissions would save time in removal proceedings, it believed that it

would be appropriate for the entire Committee to consider the possibility. He noted that in cases where the defendant does not waive removal it may be necessary to await production of the arrest warrant, or a certified copy of the warrant. In those instances, use of facsimile transmission could save time. Following brief discussion, Judge Schlesinger moved that the last sentence of Rule 40(a) be amended to permit the federal magistrate to consider facsimile transmissions of the arrest warrant or a certified copy of the warrant. Mr. Pauley seconded the motion which carried by a unanimous vote.

d. Rule 3, Complaint and Rule 4, Arrest Warrant or Summons Upon Complaint. Judge Schlesinger indicated that the Subcommittee by a vote of 2 to 1 had voted to oppose any changes in Rules 3 and 4 which would permit use of electronic transmission of information in obtaining arrest warrants. Judge Keenan noted that it would make sense to conform the procedures available for obtaining an arrest warrant to those which could be used for search warrants. Mr. Karas also voiced support for an amendment. Mr. Pauley responded that he could not support the change; he was concerned about defense attacks on an arrest because police had not used electronic means to obtain an arrest warrant. Professor Saltzburg noted that the Supreme Court had not required arrest warrants and noted that the opposition in the past to permitting electronic or oral requests for arrest warrants had rested on concerns about access to warrants. An alternative might be, he observed, to authorize, but not require, arrest warrants.

Mr. Marek moved that language be drafted for the Committee's November 1991 meeting which would amend Rules 3 and 4 to permit submission of complaints and requests for arrest warrants by facsimile transmission. Professor Saltzburg seconded the motion. The motion carried by a 9 to 2 vote. The Chairman appointed a subcommittee consisting of Judge Schlesinger (Chair), Mr. Pauley, and Mr. Marek to draft the necessary language.

2. Rule 6(e)(2), General Rule of Secrecy. The Reporter noted that Judge Keeton had forwarded to the Committee a letter from Judge Pratt concerning the lack of secrecy of grand jury proceedings. In his letter, Judge Pratt suggested that the Committee consider investigating compliance by prosecutors. During an extensive discussion of Judge Pratt's proposal, Mr. Pauley noted that the Attorney General believes that leaks in grand jury proceedings are abhorrent and that if a leak is identified, severe administrative sanctions will follow. He added that he had spoken with the Department of Professional

Responsibility and that that office was not aware of any systematic violation of Rule 6(e)(2). An informal poll of the Committee members tended to confirm that point. Mr. Doar indicated that some form of independent inquiry might be appropriate and that there appeared to be some ambiguities in Rule 6, a point elaborated on by Mr. Pauley. Judge Huyett indicated that regarding the focus of Judge Pratt's letter, it would be appropriate to ask the Department of Justice to explain its actual practices in dealing with potential leaks. Judge Keeton observed that although federal prosecutors are often thought to be the leaks, that in fact the leaks come from other sources, such as defense counsel or the defendant. Judge Everett observed that perhaps an addendum to the existing Committee Note for Rule 6 might be appropriate. Mr. Marek indicated that there might be a separation of powers question about the ability of the judiciary to conduct investigations of grand jury leaks. But Judge Hodges noted that if the trial judge finds a leak, it may be punished through the court's contempt powers. Professor Saltzburg ultimately moved that the Committee indicate to the Department of Justice that although it rejected any investigation of Department of Justice practices regarding grand jury leaks, it would like the Department to provide information on its interpretation of potential ambiguities in Rule 6(e)(2), specifically, the language " matters occurring before the grand jury." Judge Everett seconded the motion. Judge Keenan added that it would be appropriate to also ask for specific examples of administrative sanctions. Judge Hodges noted that the request should first ask the Department to indicate what the US Attorneys Manual says about the subject and then to request information on the enforcement history in the Department.

Judge Wiggins expressed strong reservations about investigating the executive branch and Judge Hodges responded that the Committee would not be investigating the Department. Instead, the spirit of the motion would be to ask the Department to share its policies with the Committee to see if it is conceivable that there is a need to amend Rule 6. Following additional brief discussion, Professor Saltzburg amended this motion to state that the Committee would consider this matter at its next meeting and to state that the Committee did not believe that it had the jurisdiction to investigate the Department of Justice. The motion carried by 11 to 0 with one abstention by Mr. Pauley. Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Mr. Doar, Judge Crow, and Mr. Pauley to look into the problem and report to the Committee at its November 1991 meeting.

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.

Judge Hodges noted that perhaps the time had not yet come for formal amendments and that the Committee could take a wait and see attitude. In the meantime the Federal Judicial Conference could consider pilot programs which could further study the matter. He noted that the Report to the Standing Committee should reflect the sense of the Advisory Committee that it was not inclined to propose any time limit amendments to any Criminal Rules. However, the Committee applauds the concept of adopting such amendments in civil cases in the hope that favorable experience in the those cases will ease the way for similar changes in criminal practice, notwithstanding Sixth Amendment problems.

7. Rule 26.2, et al, Production of Statements of Witnesses. Judge Huyett presented the written report of the Subcommittee which had been appointed to consider the question of amending the Rules of Criminal Procedure to provide for production of a witness's statements after the witness had testified. The Subcommittee had consisted of Judge Huyett (Chair), Mr. Karas, Mr. Marek, and Mr. Pauley. The Subcommittee had ultimately recommended amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 9 of the Rules Governing § 2255 Hearings. Judge Huyett explained that the Subcommittee had considered and rejected adding a single new rule which would accomplish the same result. He noted that the bench and the bar looked to Rule 26.2 and that it could continue to serve as a central reference for production of witness statements.

a. Rule 26.2, Production of Statements of Witnesses. The amendment to Rule 26.2 would add a subsection (g) which would note that the Rule applies to more than just trial testimony. Following brief discussion on the proposed amendment to Rule 26.2, Judge Hodges observed that Rule 26.2(d) should also be changed by dropping the words "in the trial." Mr. Pauley also requested that language be added to the proposed amendment which would recognize that the rule would not otherwise require the prosecution to disclose the name of its informants. On motion by Judge Huyett, seconded by Mr. Marek, the Committee voted unanimously to amend Rule 26.2 as suggested by the Subcommittee. The Reporter suggested that Mr. Pauley's concerns about disclosure of government informants could be addressed by adding language to Rule 26.2(c) which specifically exempts privileged information. Judge Huyett moved that the privilege language be added to Rule 26.2(c). Following a second by Mr. Marek, the Committee unanimously approved the addition of appropriate language. Following additional discussion in which it was pointed out that the "privilege" language in Rule 12(i) was probably not required, Judge Schlesinger moved that the privilege language be deleted from that Rule.

Judge Huyett seconded the motion which carried by a unanimous vote.

b. Rule 32(f), Production of Statements at Sentencing Hearing. Following very brief discussion Judge Huyett moved that Rule 32(f) be added to Rule 32 to provide that Rule 26.2(a)-(d) and (f) apply at sentencing hearings. Mr. Marek seconded the motion which carried by a unanimous vote.

c. Rule 32.1(c), Production of Statements. Judge Huyett also moved that Rule 32.1 be amended by adding subsection (c), as proposed by the Subcommittee, which would apply Rule 26.2(a)-(d) and (f) to revocation or modification of probation or supervised release. Mr. Marek seconded the motion. The Committee voted unanimously to adopt the amendment.

d. Rule 46(i), Production of Statements. Judge Huyett offered a brief explanation of the Subcommittee's proposal to amend Rule 46 by adding subsection (i) which would require production of statements by witnesses who testify at hearings to determine whether a person should be released from custody. Mr. Pauley expressed concerns about requiring production of statements at a pretrial detention hearing when files often do not include witness statements. Mr. Marek noted that the rationale supporting the foregoing amendments applied equally to pretrial hearings and that if there are no statements, there is no need to produce them. If such statements exist, it is not unduly burdensome to obtain and produce them. It was generally agreed that the problem of incomplete or missing statements should be addressed in the Committee Note. Judge Huyett moved that the proposed language from the Subcommittee be approved. Mr. Marek seconded the motion, which carried by a vote of 7 to 4.

8. Rule 31.1, Mistrial. Mr. Pauley, on behalf of the Department of Justice, requested that the Committee consider adding Rule 31.1 which would require the trial court to provide each side with an opportunity to comment on the propriety of an order declaring a mistrial. Mr. Pauley pointed out that recently two courts of appeals had concluded that the trial court abused its discretion in declaring a mistrial and that retrial was barred by the Double Jeopardy Clause. This new rule would hopefully obviate such results. Judge Keenan questioned whether the proposed new rule would be the most effective tool for solving the problem. During the ensuing discussion, it was pointed out that a defendant may otherwise wish to stand mute and not make a motion for a mistrial; the proposed

rule, according to Mr. Pauley, is to prevent double jeopardy problems. In a brief discussion which followed several minor changes were made to the proposed draft and it was suggested that perhaps the new rule would be more appropriately placed immediately after existing Rule 26.2. The Reporter indicated that the proposed rule would tentatively be designated as Rule 26.3. Judge Keenan moved that the proposed rule governing mistrials be adopted. Judge Crow seconded the motion, which carried by a unanimous vote.

9. Rule 32, Sentence and Judgment. The Reporter indicated that the President's Comprehensive Violent Crime Act of 1991 includes a proposed amendment to Rule 32(a) which would provide for a victim's right of allocution in sentencing of crimes of violence or sexual abuse. Mr. Pauley stated that the proposed amendment would not provide any general right of allocution to all victims and that in this instance there was insufficient time to go through the normal Rule Enabling Act processes. Judge Keenan noted that this proposal creates a potential slippery slope and that the proposed change arbitrarily distinguishes between victims. In the following discussion, it was pointed out that this proposal presents another instance of the need to communicate with Congress about relying upon the Rules Enabling Act. Judge Keeton suggested that the Chairman of the Executive Committee, Judge Clark, could organize and present the Judicial Conference's views to Congress on this problem. Mr. Pauley noted that the Department of Justice felt no need to apologize for the proposal; victims currently only have indirect access to trial courts during sentencing and that the proposed change would improve victims' attitudes about criminal justice. Professor Saltzburg indicated that he felt no sympathy for the emergency nature of this legislation and moved that the Committee communicate its concerns to Congress. Mr. Karas seconded the motion which carried by a vote of 10-0 with Mr. Pauley abstaining. Professor Saltzburg then moved that the Committee postpone further consideration of this issue until the next meeting. Judge Keenan seconded the motion which carried unanimously. Judge Hodges appointed a Subcommittee consisting of Judge DeAnda (Chair), Judge Everett, Professor Saltzburg, and Mr. Marek to study the proposal and report to the Committee on its findings at the Fall 1991 meeting.

10. Rules Governing Section 2254 Cases. Mr. Adair informed the Committee that the Administrative Office had received a suggestion that the current practice of including the warden's name in the caption be discontinued. According to the proposal, the presence of the warden's name on the

caption can cause resentment against the prisoner within the prison system. Mr. Adair explained that 28 U.S.C. § 2243 currently requires that the custodian of the applicant be named as the respondent on the petition. Following very brief discussion of the issue, Judge Schlesinger moved that the proposed amendment be rejected; Judge Keenan seconded the motion. The vote to reject the proposal was unanimous.

IV. EVIDENCE RULES UNDER CONSIDERATION

A. Evidence Rules Approved by the Supreme Court

1. Federal Rule of Evidence 609. The Reporter informed the Committee that the proposed amendment to Rule 609, which had been approved by the Supreme Court in the Spring, 1990, had not been changed by Congress and went into effect on December 1, 1990.

2. Federal Rule of Evidence 404(b). The Committee's proposed amendment to Rule 404(b) which would require notice of an intent to use extrinsic act evidence had been approved by the Standing Committee, the Judicial Conference, and the Supreme Court and was currently before Congress. Barring any changes to the proposed amendment, it will become effective on December 1, 1991.

3. Federal Rule of Evidence 1102. The Reporter also informed the Committee that its technical amendment to Federal Rule of Evidence 1102, which changed to reference from 28 U.S.C. 2076 to 2072, had been approved by the Supreme Court.

B. Proposed Evidence Rules Amendments

1. Federal Rules of Evidence 412, et al. The Reporter informed the Committee that Congress is currently considering the Violence Against Women Act of 1991 (S. 15) which would amend Federal Rule of Evidence 412 by adding a provision for interlocutory appeals by either the government or the defense. The legislation would also add Rule 412A which would govern the admissibility of reputation and character evidence, Rule 412B which would govern in civil cases, and Rule 413 which would bar evidence concerning the clothing worn by a victim. The Reporter also noted that the Women's Equal Opportunity Act of 1991 (S. 472) would add

Rules 413, 414, and 415, which would specifically permit introduction of a defendant's past sexual offenses in civil and criminal cases.

In a lengthy discussion, the Committee addressed the issue of communicating with Congress on the need to comply with the Rules Enabling Act.

Professor Saltzburg noted that it has been proposed that a separate committee be established to deal with the rules of evidence. Mr. Pauley responded that institutionally, a separate committee was not required and that he was concerned that because there is generally not that much need for amendments to the rules of evidence that the committee would find it necessary to create an agenda to justify its existence.

Professor Saltzburg also provided an in-depth overview of how the Rules of Evidence have been considered, noting that when Chief Justice Burger decided not to form a separate Committee, it was generally understood and agreed that the Advisory Committee on Criminal Rules would be the primary body for considering and proposing amendments to the Rules of Evidence and that where the amendments impacted on civil cases, coordination would be conducted with the Civil Rules Committee. He cited the example of the extensive role of the Committee in making the Rules of Evidence gender neutral in 1987.

Following brief discussion, Professor Saltzburg moved that the Committee postpone further discussion of the proposed Congressional amendments until the next meeting. He noted that complicated questions are raised by the proposals and deserve close attention. The motion was seconded by Mr. Marek and carried unanimously. Judge Hodges indicated that he would appoint a subcommittee to review the Congressional amendments and report to the Committee at its Fall 1991 meeting.

2. Federal Rule of Evidence 804. The Reporter indicated that he had, at the Committee's direction, drafted language which would created a hearsay exception for child abuse victims. The proposal would amend Rule 804(a) by providing for an additional ground of unavailability for child declarants and would amend Rule 804(b) by adding a new subsection for child declarants. Mr. Pauley moved that the matter be deferred in view of the fact that the Supreme Court had agreed to hear a case raising the question of the interrelationship between the Confrontation Clause and the hearsay exceptions. Mr. Marek seconded the motion which carried by a unanimous vote. Judge Hodges indicated that

the draft of the proposed rule would be sent to the Civil Rules Advisory Committee.

3. Federal Rule of Evidence 702. The Committee was informed by the Reporter that the Civil Rules Advisory Committee was considering an amendment to Rule 702 which would expand the ability of the court in both civil and criminal cases to control the presentation of expert testimony.

In a lengthy discussion of the issue, the Committee generally agreed that there has been a proliferation of expert testimony and that judges are usually reluctant to exclude opinion testimony. Judge DeAnda observed that judges currently have the authority to control such testimony. In specifically reviewing the draft being considered by the Civil Rules Committee, Mr. Pauley observed that use of the term "substantially" was amorphous but that he generally supported attempts to limit expert testimony in civil cases. Professor Saltzburg noted that the words, "If the Court finds," add nothing to the Rule because it is assumed in all of the Rules of Evidence that the court must reach certain conclusions before admitting evidence. He then moved that the Committee indicate that it was not in favor of the amendment. Judge Everett seconded the motion.

In discussing the motion, Judge Keenan noted that there would be problems with implementing the rule but that he did not agree with the intent underlying the proposal; he suggested that perhaps the substance of the proposed amendment should go into the Rules of Civil Procedure. Judge Huyett believed there was a need for the amendment. Several members observed that it would be undesirable to have a separate Rule 702 for civil and criminal cases. Professor Saltzburg added that the amendment was not necessary. The federal appellate courts have offered ample guidance on what showing a proponent of expert testimony must make. The Committee ultimately voted 9 to 1 to indicate that it was not in favor of the amendment. Judge Hodges indicated that he would pass along the Committee's views to the Civil Rules Committee.

V. MISCELLANEOUS

1. Project on Final Rulings. The Reporter drew the Committee's attention to the amendment to 28 U.S.C. § 2072 which authorizes the Judicial Conference to define what constitutes a "final judgment" for the purposes of 28 U.S.C. § 1291. The Advisory Committee on Appellate Rules will be coordinating the project to determine what district court

rulings might be considered final.

2. Changing References to Magistrates. The Reporter indicated that with the assistance of Judge Schlesinger, the Standing Committee would be asked to make technical amendments to the Rules of Criminal Procedure to change the term, "United States Magistrate" to "United States Magistrate Judge."

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Chairman announced that the next meeting of the Committee will be held in Tampa, Florida on November 7 and 8, 1991.

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(i), 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 explicity 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.

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 13-14, 1991
San Francisco, California

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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.

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 35(c), Correction of Sentence.

4. Rules 32, 32.1, 46, 54(a), and 58, (Technical Amendments).

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

The Reporter indicated that there were currently no Rules out for public comment by the bench and the bar.

D. Rules Considered and Rejected by the Standing Committee

Rule 24(b). Peremptory Challenges: The Committee was informed that the Standing Committee at its January 1991 meeting had considered and unanimously rejected the Committee's proposed amendment to Rule 24(b) which would have equalized the number of peremptory challenges in capital and felony cases at 10 and 6, respectively. The Reporter pointed out that Congress (Section 232 of S. 472, Women's Equal Opportunity Act of 1991) was considering an amendment to Rule 24(b) which would effect the same change. Judge Hodges noted that there did not appear to be anything more that could or should be done by the Committee. Other Committee members voiced concern about the continuing problems associated with adherence, or lack thereof, to the Rules Enabling Act process and the inclination of Congress to readily include proposed amendments in pending legislation without permitting the Judicial Conference and its Committees to review the need for such amendments. Judge Keeton noted that this could be an on-going problem given the relative ease of introducing amendments in legislation. Mr. Pauley observed that there may be different policy questions involved between amendments which have never been considered by the Judicial Conference and those which have been considered but have resulted in a negative position. In the case of the latter, the proponent of the amendment should be permitted to seek Congressional change. In the case of the amendments to Rule 24(b) the original proponent had been the American Bar Association. Mr. Adair pointed out that the Administrative Office had communicated the Standing Committee's rejection of proposed amendments to Rule 24(b) to leaders in Congress.

E. Rules Under Consideration by the Advisory Committee

1. Rules 3 et al, Use of Facsimile Machines. A subcommittee composed of Judge Schlesinger (Chair), Mr. Marek, and Mr. Pauley, reported to the Committee that it had considered the possibility of amending Rules 3, 4, 17, 40, and 41 to permit filing of necessary papers and documents by Facsimile machines. Speaking for the Subcommittee, Judge Schlesinger noted that it had spent some time discussing the question of whether Facsimile machines should be used at all for purposes of filing official documents. Rather than making global changes to the Rules of Procedure to permit such use, the Subcommittee was prepared to recommend that only several Rules be amended to permit such use.

a. Rule 17, Subpoena. With regard to possible amendments to Rule 17, Judge Schlesinger reported that the Subcommittee was recommending that no change be made at this time. He indicated that the Subcommittee had not been presented with any actual or practical problems which would require attention.

b. Rule 41, Search and Seizure. Judge Schlesinger observed that permitting use of a Facsimile machine for obtaining warrants would be helpful, for example, where an officer was seeking an anticipatory warrant and was relying on both written affidavits and oral testimony. Mr. Marek added that permitting use of facsimile machines in obtaining search warrants would encourage officers to obtain one. Following brief discussion, Judge Schlesinger moved that Rule 41(c)(2)(A) be amended to permit use of facsimile machines. Professor Saltzburg seconded the motion which carried unanimously. In discussion which followed the Committee briefly addressed the scope of the Committee Note to the amendment and indicated that the purpose of the amendment is to expand the authority of magistrates and judges in considering electronic communications to issue search warrants. In particular, the amendment will permit supplementation of oral telephonic communications by written material transmitted by facsimile machines.

With regard to Rules 41(c)(2)(B), Application, 41(c)(2)(C), Issuance, and 41(g), Judge Schlesinger indicated that the Subcommittee was not recommending any changes because permitting use of facsimile machines under those provisions would not save time and would present problems and questions about the need to preserve the facsimile copies.

c. Rule 40, Commitment to Another District. Judge Schlesinger reported that although the Subcommittee had no specific data on whether use of facsimile transmissions would save time in removal proceedings, it believed that it

would be appropriate for the entire Committee to consider the possibility. He noted that in cases where the defendant does not waive removal it may be necessary to await production of the arrest warrant, or a certified copy of the warrant. In those instances, use of facsimile transmission could save time. Following brief discussion, Judge Schlesinger moved that the last sentence of Rule 40(a) be amended to permit the federal magistrate to consider facsimile transmissions of the arrest warrant or a certified copy of the warrant. Mr. Pauley seconded the motion which carried by a unanimous vote.

d. Rule 3, Complaint and Rule 4, Arrest Warrant or Summons Upon Complaint. Judge Schlesinger indicated that the Subcommittee by a vote of 2 to 1 had voted to oppose any changes in Rules 3 and 4 which would permit use of electronic transmission of information in obtaining arrest warrants. Judge Keenan noted that it would make sense to conform the procedures available for obtaining an arrest warrant to those which could be used for search warrants. Mr. Karas also voiced support for an amendment. Mr. Pauley responded that he could not support the change; he was concerned about defense attacks on an arrest because police had not used electronic means to obtain an arrest warrant. Professor Saltzburg noted that the Supreme Court had not required arrest warrants and noted that the opposition in the past to permitting electronic or oral requests for arrest warrants had rested on concerns about access to warrants. An alternative might be, he observed, to authorize, but not require, arrest warrants.

Mr. Marek moved that language be drafted for the Committee's November 1991 meeting which would amend Rules 3 and 4 to permit submission of complaints and requests for arrest warrants by facsimile transmission. Professor Saltzburg seconded the motion. The motion carried by a 9 to 2 vote. The Chairman appointed a subcommittee consisting of Judge Schlesinger (Chair), Mr. Pauley, and Mr. Marek to draft the necessary language.

2. Rule 6(e)(2), General Rule of Secrecy. The Reporter noted that Judge Keeton had forwarded to the Committee a letter from Judge Pratt concerning the lack of secrecy of grand jury proceedings. In his letter, Judge Pratt suggested that the Committee consider investigating compliance by prosecutors. During an extensive discussion of Judge Pratt's proposal, Mr. Pauley noted that the Attorney General believes that leaks in grand jury proceedings are abhorrent and that if a leak is identified, severe administrative sanctions will follow. He added that he had spoken with the Department of Professional

Responsibility and that that office was not aware of any systematic violation of Rule 6(e)(2). An informal poll of the Committee members tended to confirm that point. Mr. Doar indicated that some form of independent inquiry might be appropriate and that there appeared to be some ambiguities in Rule 6, a point elaborated on by Mr. Pauley. Judge Huyett indicated that regarding the focus of Judge Pratt's letter, it would be appropriate to ask the Department of Justice to explain its actual practices in dealing with potential leaks. Judge Keeton observed that although federal prosecutors are often thought to be the leaks, that in fact the leaks come from other sources, such as defense counsel or the defendant. Judge Everett observed that perhaps an addendum to the existing Committee Note for Rule 6 might be appropriate. Mr. Marek indicated that there might be a separation of powers question about the ability of the judiciary to conduct investigations of grand jury leaks. But Judge Hodges noted that if the trial judge finds a leak, it may be punished through the court's contempt powers. Professor Saltzburg ultimately moved that the Committee indicate to the Department of Justice that although it rejected any investigation of Department of Justice practices regarding grand jury leaks, it would like the Department to provide information on its interpretation of potential ambiguities in Rule 6(e)(2), specifically, the language " matters occurring before the grand jury." Judge Everett seconded the motion. Judge Keenan added that it would be appropriate to also ask for specific examples of administrative sanctions. Judge Hodges noted that the request should first ask the Department to indicate what the US Attorneys Manual says about the subject and then to request information on the enforcement history in the Department.

Judge Wiggins expressed strong reservations about investigating the executive branch and Judge Hodges responded that the Committee would not be investigating the Department. Instead, the spirit of the motion would be to ask the Department to share its policies with the Committee to see if it is conceivable that there is a need to amend Rule 6. Following additional brief discussion, Professor Saltzburg amended this motion to state that the Committee would consider this matter at its next meeting and to state that the Committee did not believe that it had the jurisdiction to investigate the Department of Justice. The motion carried by 11 to 0 with one abstention by Mr. Pauley. Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Mr. Doar, Judge Crow, and Mr. Pauley to look into the problem and report to the Committee at its November 1991 meeting.

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.

Judge Hodges noted that perhaps the time had not yet come for formal amendments and that the Committee could take a wait and see attitude. In the meantime the Federal Judicial Conference could consider pilot programs which could further study the matter. He noted that the Report to the Standing Committee should reflect the sense of the Advisory Committee that it was not inclined to propose any time limit amendments to any Criminal Rules. However, the Committee applauds the concept of adopting such amendments in civil cases in the hope that favorable experience in the those cases will ease the way for similar changes in criminal practice, notwithstanding Sixth Amendment problems.

7. Rule 26.2, et al, Production of Statements of Witnesses. Judge Huyett presented the written report of the Subcommittee which had been appointed to consider the question of amending the Rules of Criminal Procedure to provide for production of a witness's statements after the witness had testified. The Subcommittee had consisted of Judge Huyett (Chair), Mr. Karas, Mr. Marek, and Mr. Pauley. The Subcommittee had ultimately recommended amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing § 2255 Hearings. Judge Huyett explained that the Subcommittee had considered and rejected adding a single new rule which would accomplish the same result. He noted that the bench and the bar looked to Rule 26.2 and that it could continue to serve as a central reference for production of witness statements.

a. Rule 26.2, Production of Statements of Witnesses. The amendment to Rule 26.2 would add a subsection (g) which would note that the Rule applies to more than just trial testimony. Following brief discussion on the proposed amendment to Rule 26.2, Judge Hodges observed that Rule 26.2(d) should also be changed by dropping the words "in the trial." Mr. Pauley also requested that language be added to the proposed amendment which would recognize that the rule would not otherwise require the prosecution to disclose the name of its informants. On motion by Judge Huyett, seconded by Mr. Marek, the Committee voted unanimously to amend Rule 26.2 as suggested by the Subcommittee. The Reporter suggested that Mr. Pauley's concerns about disclosure of government informants could be addressed by adding language to Rule 26.2(c) which specifically exempts privileged information. Judge Huyett moved that the privilege language be added to Rule 26.2(c). Following a second by Mr. Marek, the Committee unanimously approved the addition of appropriate language. Following additional discussion in which it was pointed out that the "privilege" language in Rule 12(i) was probably not required, Judge Schlesinger moved that the privilege language be removed from that Rule.

Judge Huyett seconded the motion which carried by a unanimous vote.

b. Rule 32(f), Production of Statements at Sentencing Hearing. Following very brief discussion Judge Huyett moved that Rule 32(f) be added to Rule 32 to provide that Rule 26.2(a)-(d) and (f) apply at sentencing hearings. Mr. Marek seconded the motion which carried by a unanimous vote.

c. Rule 32.1(c), Production of Statements. Judge Huyett also moved that Rule 32.1 be amended by adding subsection (c), as proposed by the Subcommittee, which would apply Rule 26.2(a)-(d) and (f) to revocation or modification of probation or supervised release. Mr. Marek seconded the motion. The Committee voted unanimously to adopt the amendment.

d. Rule 46(i), Production of Statements. Judge Huyett offered a brief explanation of the Subcommittee's proposal to amend Rule 46 by adding subsection (i) which would require production of statements by witnesses who testify at hearings to determine whether a person should be released from custody. Mr. Pauley expressed concerns about requiring production of statements at a pretrial detention hearing when files often do not include witness statements. Mr. Marek noted that the rationale supporting the foregoing amendments applied equally to pretrial hearings and that if there are no statements, there is no need to produce them. If such statements exist, it is not unduly burdensome to obtain and produce them. It was generally agreed that the problem of incomplete or missing statements should be addressed in the Committee Note. Judge Huyett moved that the proposed language from the Subcommittee be approved. Mr. Marek seconded the motion, which carried by a vote of 7 to 4.

8. Rule 31.1, Mistrial. Mr. Pauley, on behalf of the Department of Justice, requested that the Committee consider adding Rule 31.1 which would require the trial court to provide each side with an opportunity to comment on the propriety of an order declaring a mistrial. Mr. Pauley pointed out that recently two courts of appeals had concluded that the trial court abused its discretion in declaring a mistrial and that retrial was barred by the Double Jeopardy Clause. This new rule would hopefully obviate such results. Judge Keenan questioned whether the proposed new rule would be the most effective tool for solving the problem. During the ensuing discussion, it was pointed out that a defendant may otherwise wish to stand mute and not make a motion for a mistrial; the proposed

rule, according to Mr. Pauley, is to prevent double jeopardy problems. In a brief discussion which followed several minor changes were made to the proposed draft and it was suggested that perhaps the new rule would be more appropriately placed immediately after existing Rule 26.2. The Reporter indicated that the proposed rule would tentatively be designated as Rule 26.3. Judge Keenan moved that the proposed rule governing mistrials be adopted. Judge Crow seconded the motion, which carried by a unanimous vote.

9. Rule 32, Sentence and Judgment. The Reporter indicated that the President's Comprehensive Violent Crime Act of 1991 includes a proposed amendment to Rule 32(a) which would provide for a victim's right of allocution in sentencing of crimes of violence or sexual abuse. Mr. Pauley stated that the proposed amendment would not provide any general right of allocution to all victims and that in this instance there was insufficient time to go through the normal Rule Enabling Act processes. Judge Keenan noted that this proposal creates a potential slippery slope and that the proposed change arbitrarily distinguishes between victims. In the following discussion, it was pointed out that this proposal presents another instance of the need to communicate with Congress about relying upon the Rules Enabling Act. Judge Keeton suggested that the Chairman of the Executive Committee, Judge Clark, could organize and present the Judicial Conference's views to Congress on this problem. Mr. Pauley noted that the Department of Justice felt no need to apologize for the proposal; victims currently only have indirect access to trial courts during sentencing and that the proposed change would improve victims' attitudes about criminal justice. Professor Saltzburg indicated that he felt no sympathy for the emergency nature of this legislation and moved that the Committee communicate its concerns to Congress. Mr. Karas seconded the motion which carried by a vote of 10-0 with Mr. Pauley abstaining. Professor Saltzburg then moved that the Committee postpone further consideration of this issue until the next meeting. Judge Keenan seconded the motion which carried unanimously. Judge Hodges appointed a Subcommittee consisting of Judge DeAnda (Chair), Judge Everett, Professor Saltzburg, and Mr. Marek to study the proposal and report to the Committee on its findings at the Fall 1991 meeting.

10. Rules Governing Section 2254 Cases. Mr. Adair informed the Committee that the Administrative Office had received a suggestion that the current practice of including the warden's name in the caption be discontinued. According to the proposal, the presence of the warden's name on the

caption can cause resentment against the prisoner within the prison system. Mr. Adair explained that 28 U.S.C. § 2243 currently requires that the custodian of the applicant be named as the respondent on the petition. Following very brief discussion of the issue, Judge Schlesinger moved that the proposed amendment be rejected; Judge Keenan seconded the motion. The vote to reject the proposal was unanimous.

IV. EVIDENCE RULES UNDER CONSIDERATION

A. Evidence Rules Approved by the Supreme Court

1. Federal Rule of Evidence 609. The Reporter informed the Committee that the proposed amendment to Rule 609, which had been approved by the Supreme Court in the Spring, 1990, had not been changed by Congress and went into effect on December 1, 1990.

2. Federal Rule of Evidence 404(b). The Committee's proposed amendment to Rule 404(b) which would require notice of an intent to use extrinsic act evidence had been approved by the Standing Committee, the Judicial Conference, and the Supreme Court and was currently before Congress. Barring any changes to the proposed amendment, it will become effective on December 1, 1991.

3. Federal Rule of Evidence 1102. The Reporter also informed the Committee that its technical amendment to Federal Rule of Evidence 1102, which changed to reference from 28 U.S.C. 2076 to 2072, had been approved by the Supreme Court.

B. Proposed Evidence Rules Amendments

1. Federal Rules of Evidence 412, et al. The Reporter informed the Committee that Congress is currently considering the Violence Against Women Act of 1991 (S. 15) which would amend Federal Rule of Evidence 412 by adding a provision for interlocutory appeals by either the government or the defense. The legislation would also add Rule 412A which would govern the admissibility of reputation and character evidence, Rule 412B which would govern in civil cases, and Rule 413 which would bar evidence concerning the clothing worn by a victim. The Reporter also noted that the Women's Equal Opportunity Act of 1991 (S. 472) would add

Rules 413, 414, and 415, which would specifically permit introduction of a defendant's past sexual offenses in civil and criminal cases.

In a lengthy discussion, the Committee addressed the issue of communicating with Congress on the need to comply with the Rules Enabling Act.

Professor Saltzburg noted that it has been proposed that a separate committee be established to deal with the rules of evidence. Mr. Pauley responded that institutionally, a separate committee was not required and that he was concerned that because there is generally not that much need for amendments to the rules of evidence that the committee would find it necessary to create an agenda to justify its existence.

Professor Saltzburg also provided an in-depth overview of how the Rules of Evidence have been considered, noting that when Chief Justice Burger decided not to form a separate Committee, it was generally understood and agreed that the Advisory Committee on Criminal Rules would be the primary body for considering and proposing amendments to the Rules of Evidence and that where the amendments impacted on civil cases, coordination would be conducted with the Civil Rules Committee. He cited the example of the extensive role of the Committee in making the Rules of Evidence gender neutral in 1987.

Following brief discussion, Professor Saltzburg moved that the Committee postpone further discussion of the proposed Congressional amendments until the next meeting. He noted that complicated questions are raised by the proposals and deserve close attention. The motion was seconded by Mr. Marek and carried unanimously. Judge Hodges indicated that he would appoint a subcommittee to review the Congressional amendments and report to the Committee at its Fall 1991 meeting.

2. Federal Rule of Evidence 804. The Reporter indicated that he had, at the Committee's direction, drafted language which would created a hearsay exception for child abuse victims. The proposal would amend Rule 804(a) by providing for an additional ground of unavailability for child declarants and would amend Rule 804(b) by adding a new subsection for child declarants. Mr. Pauley moved that the matter be deferred in view of the fact that the Supreme Court had agreed to hear a case raising the question of the interrelationship between the Confrontation Clause and the hearsay exceptions. Mr. Marek seconded the motion which carried by a unanimous vote. Judge Hodges indicated that

the draft of the proposed rule would be sent to the Civil Rules Advisory Committee.

3. Federal Rule of Evidence 702. The Committee was informed by the Reporter that the Civil Rules Advisory Committee was considering an amendment to Rule 702 which would expand the ability of the court in both civil and criminal cases to control the presentation of expert testimony.

In a lengthy discussion of the issue, the Committee generally agreed that there has been a proliferation of expert testimony and that judges are usually reluctant to exclude opinion testimony. Judge DeAnda observed that judges currently have the authority to control such testimony. In specifically reviewing the draft being considered by the Civil Rules Committee, Mr. Pauley observed that use of the term "substantially" was amorphous but that he generally supported attempts to limit expert testimony in civil cases. Professor Saltzburg noted that the words, "If the Court finds," add nothing to the Rule because it is assumed in all of the Rules of Evidence that the court must reach certain conclusions before admitting evidence. He then moved that the Committee indicate that it was not in favor of the amendment. Judge Everett seconded the motion.

In discussing the motion, Judge Keenan noted that there would be problems with implementing the rule but that he did not agree with the intent underlying the proposal; he suggested that perhaps the substance of the proposed amendment should go into the Rules of Civil Procedure. Judge Huyett believed there was a need for the amendment. Several members observed that it would be undesirable to have a separate Rule 702 for civil and criminal cases. Professor Saltzburg added that the amendment was not necessary. The federal appellate courts have offered ample guidance on what showing a proponent of expert testimony must make. The Committee ultimately voted 9 to 1 to indicate that it was not in favor of the amendment. Judge Hodges indicated that he would pass along the Committee's views to the Civil Rules Committee.

V. MISCELLANEOUS

1. Project on Final Rulings. The Reporter drew the Committee's attention to the amendment to 28 U.S.C. § 2072 which authorizes the Judicial Conference to define what constitutes a "final judgment" for the purposes of 28 U.S.C. § 1291. The Advisory Committee on Appellate Rules will be coordinating the project to determine what district court

rulings might be considered final.

2. Changing References to Magistrates. The Reporter indicated that with the assistance of Judge Schlesinger, the Standing Committee would be asked to make technical amendments to the Rules of Criminal Procedure to change the term, "United States Magistrate" to "United States Magistrate Judge."

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Chairman announced that the next meeting of the Committee will be held in Tampa, Florida on November 7 and 8, 1991.