# MINUTES

# of

# THE ADVISORY COMMITTEE

# on

# FEDERAL RULES OF CRIMINAL PROCEDURE

## October 11 & 12, 1993

## San Diego, California

The Advisory Committee on the Federal Rules of Criminal Procedure met in San Diego, California on October 11 and 12, 1993. These minutes reflect the actions taken at that meeting.

## CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 11, 1993 at the Le Meridian Hotel in San Diego, California. The following persons were present for all or a part of the Committee's meeting.

Hon. D. Lowell Jensen, Chair

Hon. B. Waugh Crigler

Hon. Sam A. Crow

Hon. W. Eugene Davis

Hon. Wm. Terrell Hodges

Hon. George M. Marovich

Prof. Stephen A. Saltzburg

Mr. John Doar, Esq.

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Edward Marek, Esq.

Mr. Roger Pauley, Jr., designate of Mr. John C. Keeney, Acting Assistant Attorney General

Professor David A. Schlueter

Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Mr. Bill Wilson, chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Mr. John Rabiej, Mr. Paul Zingg, and Ms. Anne Rustin of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center. Judge Rodriguez was not able to attend the meeting.

## I. INTRODUCTION AND COMMENTS

Judge Jensen, newly appointed chair of the Committee, welcomed the attendees and recognized Judge Hodges for his outstanding contributions as outgoing chair of the Committee. Following a brief response of gratitude from Judge Hodges, Judge Jensen recognized the contributions of Mr. Marek and Mr. Doar who were also leaving the Committee after many years of service. The Committee also extended its congratulations to Mr. Wilson who had recently received Senate confirmation as a federal district judge.

## II. APPROVAL OF MINUTES OF COMMITTEE'S

## APRIL 1993 MEETING

After noting a typographical error on page 14 of the minutes, concerning the date of the Committee's October 1992 meeting, Judge Marovich moved that the minutes for the April 1993 meeting be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

## III. REPORT OF SUBCOMMITTEE

## ON COMMITTEE PROCEDURES

Judge Crow reported that his subcommittee, comprised of Judge Jensen, Ms. Klieman, Mr. Marek, and Mr. Pauley, had considered two issues raised at the Committee's April 1993 meeting: (1) Whether the Committee should permit interested persons to appear and speak on proposed amendments and (2) Whether any conditions should be imposed on reconsidering a proposed rule change which has been rejected. He provided a brief background of several problems which had arisen in conjunction with proposed amendments. For example, interested parties have from time to time requested permission to address personally the Committee in an attempt to persuade the members to adopt, or reject, a particular proposal. The subcommittee recognized that although some proposals might not be susceptible to "oral testimony" from interested parties, the rule making process should be open to public scrutiny. To address this issue, the subcommittee offered three alternative proposals:

1. *Recommendation:* The Advisory Committee should adopt the subcommittee's recommendation to require all suggestions and proposals submitted by interested persons to be in writing and to limit oral testimony or

statements to public hearings only and not business meetings. This recommendation does not preclude Committee members from asking questions of proponents or opponents who are attending the business meeting.

2. *First Alternative Recommendation:* The Advisory Committee adopt the subcommittee's first alternative recommendation to require all suggestions and proposals submitted by interested persons be in writing and to allow oral testimony at business meetings in support of or in opposition to written proposals upon advance written request and cause shown.

3. *Second Alternative Recommendation:* The Advisory Committee adopt the subcommittee's second alternative recommendation to stay with the status quo but monitor closely the current practice of oral testimony at business meetings and reconsider the above recommendations when circumstances further warrant it.

Judge Crow noted that some members of the subcommittee had expressed the dissenting view that a flat prohibition on any oral presentations would be viewed as contradictory to the public policy of the keeping the Committee's work open to the public. Those members, he noted, favored leaving to the Chair the question of whether oral testimony should be presented at a particular meeting.

Judge Crow thereafter moved that the Committee adopt the subcommittee's recommendation. Judge Davis seconded the motion.

In the discussion which followed, Judge Hodges noted that there was growing pressure on proponents to appear and argue their cause before the Committee. Noting the mixed history of hearing from proponents, he observed that it is often touchy and difficult to decide who should be permitted to address the Committee. He believed that it was important to give some guidance to the Chair and that he favored the first recommendation. He stated that proponents can offer written suggestions and that to permit oral testimony might politicize the meetings.

In response to a question from Judge Crigler, Judge Stotler indicated that no other Committee has articulated any clear procedure for hearing testimony or oral presentations at business meetings. And she could not recall the issue ever arising in the Standing Committee.

The Reporter informed the Committee that he often receives telephone inquiries from individuals and organizations about the possibility of personally pleading their cause for a particular amendment and that he refers them to the Chair. Ms. Klieman noted that she had been lobbied on at least one proposal and feared that there could be a bombardment of oral testimony. Mr. Wilson spoke in favor of permitting oral arguments on particular proposals and Mr. Marek commented generally on the question of whether the public is even aware of the Committee's agenda. He was informed that information is available to the public.

Professor Saltzburg favored the first proposal which permitted the option of questions from the Committee. Judge Hodges provided a more detailed description of the need for clear guidance on who should be permitted to appear before the Committee and Judge Stotler added that the Standing Committee would be considering internal rules of procedure for conducting its business. She also suggested that it would be beneficial to prepare an annual report indicating what, if any, action had been taken on various proposals. And it was essential, she added, that the public be aware of the agenda.

The Committee voted unanimously to approve the subcommittee's first recommendation. Mr. Rabiej indicated that he would coordinate the notice of the agendas and at the suggestion of Mr. Pauley, it was decided that the

recommendation should be drafted as a bylaw of the Advisory Committee.

Thereafter, Mr. Pauley moved to forward the recommendation and action to the Standing Committee. Judge Crigler seconded the motion which carried by a unanimous vote.

Judge Crow presented the subcommittee's recommendation regarding the possibility of reviving proposed amendments which have been previously rejected by the Committee. He noted that the problem had not been encountered enough to make any judgment as to whether repeated proposals are purposeful or merely coincidental. He also noted that the subcommittee questioned whether it would be advisable to place restrictions on repeated proposals. The subcommittee, he stated, had decided to propose the following recommendation:

The Advisory Committee adopt the subcommittee's recommendation that the reporter in preparing copies and summaries of all written suggestions or proposals identify those that are similar to ones that have been rejected and, to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

Judge Crow moved that the recommendation be adopted. Professor Saltzburg seconded the motion.

In the discussion that followed the motion, Crigler expressed concern about reconsideration of rejected amendments and Mr. Marek raised the question of what would constitute "rejection" of a particular proposal. Judge Marovich expressed the view that the Committee should keep it simple, e.g., the Committee would normally not be amenable to continued discussion about a proposal which had been rejected. He also noted that the Committee procedures should not be tuned too finely.

The Committee ultimately voted unanimously in support of the motion. Professor Saltzburg moved that the recommendation be forwarded to the Standing Committee and Mr. Marek seconded the motion. The motion carried by a unanimous vote.

## IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

### A. Rules Approved by the Supreme Court

### and Pending Before Congress

The Reporter indicated that amendments to the following rules had been approved by the Supreme Court and had been forwarded to Congress:

Rule 12.1 (discovery of statements)

Rule 16(a) (discovery of experts)

Rule 26.2 (production of statements)

Rule 26.3 (mistrial)

Rule 32(f) (production of statements)

Rule 32.1 (production of statements)

Rule 40 (commitment to another district)

Rule 41 (search and seizure)

Rule 46 (production of statements)

Rule 8, Rules Governing Section 2255 Proceedings

Technical Amendments (use of term "magistrate judge") throughout the Rules

Barring any action by Congress, these amendments will go into effect on December 1, 1993.

**B. Rules Approved by the Judicial Conference**

**and Being Forwarded to the Supreme Court**

The Reporter informed the Committee that amendments to Rules 16(a)(1)(A)(statements or organizational defendants), 29(b)(delayed ruling on judgment of acquittal), 32(sentence and judgment), and 40(d)(conditional release of probationer) were approved by the Standing Committee at its June 1993 meeting and that the Judicial Conference had also approved the amendments. They will be transmitted to the Supreme Court in the near future.

**C. Rules Approved by the Standing Committee**

**for Public Comment**

The Reporter also informed the Committee that the Standing Committee in June 1993 approved for publication and comment amendments to the following rules: Rule 5 (exemption for persons arrested for unlawful flight to avoid prosecution), Rule 10 (in absentia arraignments), Rule 43 (in absentia pretrial sessions; in absentia sentencing); and Rule 53 (cameras in the courtroom). The deadline for public comments is April 15, 1994.

The Reporter indicated that the Litigation Section of the American Bar Association had requested extra time to comment on the proposed amendments, in particular Rule 53. Following a brief discussion during which it was noted that the deadline of April 15 would provide the opportunity to review any public comments at the Committee's Spring meeting. No action was taken on the letter.

**D. Other Criminal Procedure Rules Under**

**Consideration by the Committee**

**1. Rule 6, Secrecy Provisions of Rule re Reporting Requirements.**

The Reporter informed the Committee that Mr. David Cook of the Administrative Office had raised the issue of whether Rule 6 would be violated if all indictments, sealed and unsealed, were reported to the Administrative Office. Mr. Rabiej provided some background information on the request. Both Mr. Marek and Mr. Pauley expressed concern over the possible release of any information concerning sealed indictments. Mr. Pauley noted that reporting sealed indictments could be especially problematic where the public was aware that a grand jury was meeting on a big case.

Judge Crow questioned whether the Committee should even be considering the issue. His concern was echoed by Judge Jensen who noted that the Committee should not render advisory opinions on rule interpretations. Judge Marovich moved that the Committee decline to act on the issue and Mr. Doar seconded the motion, which carried by a unanimous vote.

**2. Rule 16, Disclosure of Witness Names.**

Judge Jensen provided a brief overview of a proposal before the Committee to amend Rule 16 to require the government to disclose the identity and statements of its witnesses before trial. He noted that the proposal, which had been presented by Professor Saltzburg and Mr. Wilson at the April 1993 meeting, had been deferred at the request of Attorney General Janet Reno who had requested time to study the issue. On August 4, 1993, Attorney General Reno wrote to then chair, Judge Hodges, indicating her opposition to any effort to amend Rule 16 to require such disclosure. In support of her position she attached a detailed memo prepared by Mr. Pauley; that memo critiqued a draft amendment prepared by Professor Saltzburg and Mr. Wilson. Judge Jensen noted that the Reporter had prepared an alternate draft.

Mr. Wilson offered brief comments on each of the two drafts and observed that the Department of Justice will apparently not change its views on discovery.

Addressing the draft that he had prepared, Professor Saltzburg noted that the Committee had spent a long time on this issue and that the proposed amendment was an important one. After summarizing the thrust of his draft, Professor Saltzburg noted the long-standing opposition by the Department of Justice and that they were candid enough to reject any suggested changes. He observed, however, that there is no real dispute that discovery encourages efficient trials. The Department recognizes that point, he noted, because it had itself successfully proposed amendments to rules which benefit the prosecution. Professor Saltzburg also observed that the system is more complicated and that this amendment would be a first important step toward making criminal trials more effective. He noted that the draft presented a balance between protecting witnesses and the defendant's right to prepare for trial.

Professor Saltzburg moved that the Committee approve the substance of his draft which would require the government to disclose to the defense seven days before trial the names and statements of its witnesses. Excluded from his motion was any reference to disclosure of co-conspirator statements. Mr. Karas seconded the motion.

In the lengthy discussion which followed Mr. Pauley provided an in-depth analysis of why the motion should be defeated. He agreed that the Department has agreed to a number of amendments in the past but that it felt very uncomfortable with the proposed amendment. This amendment, he said, was unacceptable to the Department and indicated that it would exert all of its energy at every stage of the rule making process to defeat the amendment. He added that the amendment potentially infringes on the Rules Enabling Act because Congress has

already spoken on the issue in the Jencks Act. The Committee, he stated, should therefore defer to Congress and avoid the appearance of an end run. If the proponents have enough political clout, they should seek an amendment through Congressional action. Mr. Pauley also took exception to any suggestion that trials are currently unfair. The Department also wants fair and efficient trials but that the current state of affairs does not present any problems worthy of an amendment. He indicated the fear that the amendment would dampen the willingness of witnesses to come forward and testify. In that regard he observed that the amendment would needlessly invade the privacy interests of the witnesses. Finally, he noted a number of technical problems with the draft, which he had explained in more detail in the memo accompanying Attorney General Reno's letter.

The Reporter briefly introduced an alternative draft noting that the draft contained no reference to production of the government witness statements and no specific procedure for government counsel declining to disclose the evidence. He noted that his draft provided that counsel could use Rule 16(d) to obtain protective orders. That draft did not include any procedure for post-trial review of a decision to not disclose the witnesses.

Mr. Pauley responded by noting that the Department was even more opposed to the Reporter's draft and that it was definitely not a compromise.

Judge Marovich expressed concern about the tone of the Department of Justice's memo and that the Committee would probably lose the battle in Congress. In very strong language, he expressed concern about suggestions that the judiciary would not be able to fairly determine whether a witness' name should be disclosed. He noted that eventually the government would have to disclose its witnesses and that if the Department has good faith reasons for not disclosing the witnesses before trial, they should be able to request an exception to the general rule of disclosure. Judge Marovich added that he is familiar with state discovery practices and that there is no real danger to government witnesses. He also observed that early disclosure does have a positive impact on trials.

Mr. Marek expressed the view that the Saltzburg/Wilson proposal was a compromise. The key, he said, would be that the Committee Note provide guidance on what constitutes "good faith" on the part of the prosecutor in not disclosing a name. He also noted that the Reporter's draft was less satisfactory because it did not make provision for disclosure of witness statements. He noted that the proper avenue for amending Rule 16 is through the Rules Enabling Act, and not going directly to Congress. Reading from pertinent provisions in the Committee Note accompanying a similar amendment forwarded to Congress in 1974, Mr. Marek noted the importance of pretrial discovery. He also reminded the Committee that the Department of Justice had sought amendments broadening government discovery in Rules 12.1 and 12.3.

Mr. Pauley responded briefly by observing that judges do have concerns about witness safety who can decide whether a sufficient showing has been made by the prosecutor, who is often in a better position to assess witness safety.

Addressing the issue of witness safety, Judge Davis commented that the issue cannot be ignored and that it is not always easy for the prosecution to articulate good cause. But the increase in the case load means that discovery will become more important. He expressed approval of the Reporter's draft amendment and the possibility of a reciprocity provision for the government. Finally, he suggested that the prosecutor's reasons for not disclosing a witness should be unreviewable.

Ms. Klieman noted that she has represented both the government and the defense and that she is not necessarily biased in favor of defendants. She stated that the danger factor is real, not only to the witness but also to the family. But the government has options available for protecting witnesses. Ms. Klieman expressed agreement with Judge Marovich's views on discovery in state practice and added that it would be false to assume that there are

more dangers to persons in the federal system. The danger is no different and the Saltzburg/Wilson proposal accounts for that. She noted that the participants should count on good faith of the prosecutor. Drawing on the fact that she has worked on both sides, she could not think of a case where discovery did not promote efficiency. She also indicated that the Reporter's draft fell short of the needed reform. The defendant needs the witness' statements before trial. Finally, she indicated support for inclusion of a reciprocity provision.

Mr. Wilson recounted a case in which a client was innocent and there was clearly no danger to the government witnesses. He noted that the issue of potential danger to witnesses is a very small part of the federal criminal system.

Mr. Doar noted his general reluctance to change the rule and that he did not agree with Judge Marovich's view that judges are better able to decide whether a witness is in danger. Finally, he questioned the need for a provision for post-trial review of the prosecutor's reasons for not disclosing a witness' name.

Professor Saltzburg responded that it would probably not be necessary to include such a provision and that his proposal was intended to include checks and balances on both sides. He added that the proposal should include a provision which recognizes the possible danger to third persons.

Judge Crow disagreed with the view that the attorneys should not be trusted. He agreed that the amendment should require disclosure of names and addresses but was not sure that it should extend to disclosure of statements. He also expressed approval of a reciprocity provision and favored deletion of a post-trial review procedure.

Judge Crigler indicated that he had mixed views on the Saltzburg/Wilson proposal. He did not believe that the Reporter's draft went far enough but was concerned about possible post-trial litigation concerning the prosecutor's decision not to disclose a witness' name. While he agreed with Judge Crow's views about trusting counsel to do the right thing, he was concerned about starting a debate with Congress on criminal discovery.

Judge Marovich stated that there will be no confrontation with Congress unless the Department of Justice wants it. He agreed with those who are opposed to including a post-trial review provision. The real deterrent to abuse of the option of not disclosing a witness is the fact that prosecutors want to maintain credibility.

Professor Saltzburg withdrew his earlier motion and made a substitute motion, with the consent of Mr. Wilson, that the Committee approve in principle an amendment which would require the prosecutor to disclose a witness' name, address, and statement but would not include a provision for post-trial review of the prosecutor's decision not to disclose. He suggested that the Committee wait on the issue of reciprocity.

Mr. Pauley expressed concern for the timing requirements, noting that in capital cases the prosecution need not disclose a witness' name until three days before trial.

The Committee voted 8 to 2 in favor of Professor Saltzburg's motion.

Following a brief adjournment, Professor Saltzburg presented a draft amendment to the Committee which covered the key points raised in the earlier discussion. Mr. Pauley again urged the Committee to shorten the time for disclosure to three days before trial. Following additional drafting and style suggestions, the Committee voted 9 to 1 to approve the draft amendment and forward it to the Standing Committee for approval and publication.

In later discussion concerning issues to be included in the accompanying Committee Note, it was suggested that

the Committee Note make clear that nothing in the amendment is intended to change the protective order provision in Rule 16(d). Mr Pauley also suggested that the Note include a reference to the fact that witnesses often testify at the risk of not only physical injury but also at the risk of economic reprisal.

**3. Rule 16, Disclosure to Defense of Information Relevant to Sentencing.**

The Reporter informed the Committee that pending amendments to the Commentary for § 6B1.2 (Policy Statement on Standards for the Acceptance of Plea Agreements) recommend that before the defendant enters a guilty plea, the government should first disclose sentencing information which is relevant to the guidelines. He indicated that although the Sentencing Commission did not intend to confer any substantive rights on the defendant through the changed policy statement, the change is apparently intended to encourage plea negotiations that realistically reflect probable outcomes. Mr. Pauley urged the Committee to reject any proposed amendments to the Rules concerning disclosure of sentencing evidence. He noted that the issue had been raised three years earlier and that the Department of Justice had also opposed it then. The Department was concerned that enormous amounts of litigation would be generated through a requirement to disclose sentencing evidence. Noting that the defense receives such information under current practice, he also expressed concern that the plea bargaining system would break down.

The Committee took no action on the issue.

**4. Rule 16, Proposal to Require Government to Identify Materials Relevant to Defendant.**

Mr. Marek recommended that the Committee consider Judge Donald E. O'Brien's proposal to amend Rule 16. The gist of the proposal is that Rule 16 be amended to require the government to provide an index, guide or some other device to assist defense counsel in sorting through and identifying documents or information relevant to the case. He noted that Judge O'Brien is a member of the Judicial Conference's budget committee and that he is very concerned about costs associated with pretrial discovery.

Judge Hodges provided background information on a proposal by Judge Donald E. O'Brien first presented to the Committee at its Fall 1992 meeting in Seattle. The proposal was inspired, at least in part, by accounts of young court-appointed lawyers being presented with a room full of documents. From a cost-efficiency standpoint, Judge O'Brien believed that the time and expense of going through massive documents only to find little or no relevant evidence was not justifiable. At the Committee's Fall 1992 meeting, Mr. Doar moved to adopt the proposal. But it failed for lack of a second.

Judge O'Brien, and several others supporting his proposal (Professor Ehrhardt, Judge William Young, and Magistrate Judge John Jarvey) made an oral presentation at the Committee's Spring 1993 meeting in Washington, D.C. urging the Committee to reconsider its position. Although no action was taken on the renewed proposal, Judge Hodges indicated to Judge O'Brien that the matter would be added to the Committee's Fall 1993 meeting agenda. In the meantime, Attorney General Reno had addressed the proposal in her letter on Rule 16 (which the Committee discussed in conjunction with proposed amendments re disclosure of government witnesses).

Judge Crigler indicated that any work product objections that the government might have would be waived when defense counsel was shown the government storage area and that under the civil rules there is no specific

authority to require production of any sort of a "roadmap" for locating the pertinent documents.

In an extensive discussion of the issue, Mr. Pauley opposed the proposal. He noted that there was ambiguity in the proposal and that the Attorney General had provided the Committee with a number of compelling reasons why the proposal was inappropriate and that the defense should not count on an organizational index. Mr. Doar indicated that presenting a chronological list of pertinent documents would be helpful.

Judge Jensen indicated that the matter would be deferred until the Committee's Spring 1994 meeting and appointed a subcommittee (Ms. Klieman, Chair, Judge Davis, Judge Marovich, and Mr. Pauley) to study the proposal more fully.

**5. Rule 40, Treating FAX Copies as Certified.**

The Committee considered a proposal filed by Magistrate Judge Wade Hampton that the rules be amended to provide that faxed certified documents of indictments, arrest warrants, or other instruments be considered as "certified." Following a brief discussion of the proposal, Judge Crigler noted that the proposal seemed to be adequately covered in the rules and moved that the Committee reject the proposal. Mr. Marek seconded the motion which carried by a unanimous vote.

**6. Rule 41, Proposed Deletion of Requirement that Warrant be Issued by Authority Within District.**

The Committee considered a proposal filed by Mr. J.C. Whitaker, a federal law enforcement employee, who recommended that Rule 41 be amended to delete the territorial limitations. He noted in his letter that such limitations create hardships for law enforcement officers who must now obtain a search warrant from an authority in district where the property is located, or will be located. The Reporter informed the Committee that the territorial limitation issue had been considered by the Committee when it amended Rule 41 several years ago to cover property moving into, or out of, a district.

The proposal failed for lack of a motion.

**7. Rules Governing Section 2254 Cases; Proposed Legislation Affecting Rules.**

Mr. Rabiej informed the Committee that Congress was considering amendments to Sections 2242 and 2254 and that depending on the final draft, there could be direct impact on the Rules Governing Section 2254 cases. He added that he would keep the Committee apprised of any further developments.

**E. Rules and Projects Pending Before Standing**

**Committee and Judicial Conference**

**1. Rule 57, Materials Regarding Local Rules**.

The Reporter apprised the Committee that the Reporter for the Standing Committee, Dean Coquillette, was coordinating the drafting and publication of an amendment to Rule 57 which addresses the uniform numbering of local rules and guidance on imposing sanctions for failure to follow a local internal operating procedure or standing order. He indicated that the drafting was complete and that the rule would be published for public comment in the near future. The deadline for those comments will be April 15, 1994

**2. Rule 59, Proposed Amendments Concerning Technical Amendments by Judicial Conference**.

The Reporter also informed the Committee that the Standing Committee had approved amendments to Rule 59, and its counterparts in the other rules, and that they would be published for public comment in the near future. The amendment would permit the Judicial Conference to make technical changes to the rules without the need for Congressional action. The deadline for comments on this amendment is April 15, 1994.

**3. Report on Proposal to Implement**

**Facsimile Guidelines**.

Judge Jensen informed the Committee that the Judicial Conference was in the process of compiling guidelines on facsimile filings. He indicated that Judge Stotler, incoming chair of the Standing Committee, had requested each of the Advisory Committees to apprise her of whether it would be feasible for the each Committee to approve for publication for public comment (1) the filing guidelines, as revised by the Appellate Rules Advisory Committee, and (2) any necessary amendments to the procedure rules. Judge Stotler provided additional background information on the guidelines. The Reporter indicated that amending the criminal rules themselves was not as critical because Criminal Rule of Procedure 49(d) simply incorporates by reference any such guidelines in the Civil Rules of Procedure. Following additional discussion, the Committee authorized Judge Jensen to apprise the Standing Committee of the sense of the Committee's observations, i.e., the recommendation that the guidelines include authorization to restrict the hours during which facsimile transmissions might be received by the court.

Judge Crigler indicated that he would be opposed to any facsimile guidelines which did not include some reference to filing during business hours. Following further brief discussion, the Committee was in general agreement that no further action on the guidelines was warranted at this time.

**V. REPORT ON EVIDENCE ADVISORY COMMITTEE**

Professor Saltzburg, who serves on the Evidence Advisory Committee as a liaison with the Committee, reported that the Evidence Committee had met for three days and discussed a wide range of possible topics for amendments. He noted that the Committee had agreed that no amendments would be suggested unless there was a real problem with the current evidence rule and the amendment would clearly improve the rule. He indicated that the Committee would be considering Rule 404(b) vis a vis Rule 104, i.e., whether the judge should decide finally if there was sufficient evidence showing an extrinsic act.

He noted that the Committee would also consider Rule 410 regarding the practice of a defendant waiving the right, as part of plea bargaining, to object to use of those statements for impeachment purposes. A recent Ninth Circuit decision in *United States v. Mezzanatto* indicated that the defendant may not waive Rule 410. The Evidence Committee had requested the views of the Committee on whether any amendments would be appropriate to Rule 410 and or Rule of Criminal Procedure 11, which contains similar language.

Professor Saltzburg also reported that the Evidence Committee would be considering possible amendments to Rule 614 which would permit questioning by jurors and a possible amendment to Rule 1101(d) concerning possible application of the evidence rules at sentencing.

Following brief discussion about the Committee's role in addressing potential evidence issues impacting on the criminal rules. Professor Saltzburg moved that Rule 410 and Rule 11 be tabled until the next meeting. Judge Davis seconded the motion which carried by a unanimous vote.

Professor Saltzburg and Judge Jensen expressed the view that they believed it inappropriate to amend any criminal procedure rule to provide for juror questioning. Professor Saltzburg thereafter moved that the issue be tabled until the Spring 1994 meeting. Judge Crigler seconded the motion which carried by a unanimous vote.

Mr Wilson indicated that he believed that some provision should be made for entertaining objections to juror questions out of the presence of the jury. For example, an amendment might be made to Rule 26 which addresses the taking of testimony.

## VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Jensen announced that the next meeting of the Committee would be held in Washington, D.C. on April 18 & 19, 1994 at the Thurgood Marshall Federal Judiciary Building.

The meeting adjourned on Tuesday, October 12, 1993.