TO: Hon. David F. Levi, Chair
             Standing Committee on Rules of Practice and Procedure

FROM: Edward E. Carnes, Chair
             Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **December 8, 2003**

I.   Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 15-16, 2003, in Gleneden Beach, Oregon, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix A.

This Report addresses several informational items. The Committee has no items requiring action by the Standing Committee.

II.   Information Item—Public Comment Period on Proposed Amendments to Rules

At its June 2003 meeting, the Standing Committee approved publication of proposed amendments to the following rules. The comment period expires on February 16, 2004. The Criminal Rules Committee has scheduled a hearing on those proposed amendments for January 23, 2004 in Atlanta, Georgia.

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

A proposed amendment to Rule 12.2 would include a new provision for sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

B. Rules 29, 33, 34 and 46; Proposed Amendments re Rulings by Court

Rules 29, 33, and 34 require that certain motions be filed within 7 days of the times specified in those rules. In the alternative the moving party may obtain an extension of time for filing the motions, but the court must grant the extension and fix a new due date within the original 7-day period specified in each rule. The published amendments to those three rules address the problem when a motion for an extension of time is filed in a timely fashion, but the court fails to rule on that request within the seven days. Under the proposed amendments, the court could grant the motion for an extension at any time after the seven-day period has expired, as long as that motion is filed within the seven-day period.

The Committee has also proposed a conforming amendment to Rule 46 concerning timely filings.

C. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Currently, there is no provision in Rule 32.1 for the defendant's right to allocution when probation or supervised release is being revoked. The proposed amendment to to Rule 32.1 would provide for the right of allocution.

D. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

A proposed new rule, Rule 59, would parallel Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive and dispositive matters.

III. Information Item—Rules Under Consideration by Criminal Rules Committee

At its meeting in October, 2003, the Criminal Rules Committee considered proposed amendments to several rules. Those proposals are being actively researched and prepared for further discussion at the Committee's May 2004 meeting.

A. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal

The Committee is considering, at the request of the Department of Justice, an amendment to Rule 29 that would require a judge to defer ruling on a motion for a judgment for acquittal until after the jury has returned a verdict. The Committee first discussed the issue at its Spring 2003, meeting and it continued that discussion at the October 2003 meeting where the Committee considered information supplied by the Federal Judicial Center concerning the practice in the States and numerical summaries.

The Department's position is that the amendment is necessary because some of the rulings granting Rule 29 motions before verdict are erroneous, and they all are rendered unappealable by the Double Jeopardy Clause. By allowing a judge to enter a judgment of acquittal before the jury has returned a verdict, and thereby insulating that ruling from any further review, Rule 29 is the only rule that permits a dispositive ruling that is not appealable. Nothing else in the criminal or civil rules is like it in that respect.

Originally, Rule 29 did not permit a judge to defer until after verdict the ruling on a motion for judgment of acquittal that was made at the close of the government's case. The rule was amended in 1994 to permit a judge to defer ruling until after verdict, but deferral is not required. If a judge declines to defer ruling and grants an acquittal before verdict, that ruling ends the case regardless of how erroneous the ruling may be. The Department of Justice presented the Committee with a number of examples of cases in which it appears a judge entered a pre-verdict judgment of acquittal that was clearly wrong.

The Committee fully discussed the Department's proposal, the implications of the Double Jeopardy Clause, and special problems that would arise under a proposed amendment in multi-count situations and in cases where there is a deadlocked jury. Ultimately, the proposal was approved in concept by a vote of 7 to 4, subject to further work on the special problems that were identified. The matter will be on the agenda for the Committee's May 2004 meeting.

B.   Proposed Amendments to Rules 3, 4, 32.1, and 40 Regarding Use of Facsimile Copies and Production of Original Documents

The Committee is considering amendments to a number of rules that would authorize the parties and the court to use facsimile copies of various documents. A subcommittee has been appointed to review Rules 3, 4, 32.1 and 40, to conduct a poll of Magistrate Judges, and to prepare a report for the May 2004 meeting.

IV.   Information Item—Consideration of Pending Items on the Criminal Rules Committee Docket.

Finally, at its October 2004 meeting, the Committee considered and discussed a number of miscellaneous proposals about amending the rules that had been carried

forward on the Committee's docket for the last several years, but for a variety of reasons, had not been finally resolved. They were resolved and removed from the docket.

Attachment:

      A.   Minutes of October 2003 Meeting