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ADVISORY COMMITTEE ON CRIMINAL RULES

Washington D.C.
April 10-11, 1995

AGENDA
CRIMINAL RULES COMMITTEE MEETING

April 10-11, 1995
Washington, D.C.

I. PRELIMINARY MATTERS

A. Administrative Announcements and Comments by Chair

B. Approval of Minutes of October 1994, Meeting in Santa Fe, New Mexico

II CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress: Effective December 1, 1994 (No Memo).

1. Rule 16(a)(1)(A), Disclosure of Statements by Organizational Defendants
2. Rule 29(b), Delayed Ruling on Judgment of Acquittal
3. Rule 32, Sentence and Judgment (Further amendment by Congress re Victim Allocution)
4. Rule 40(d), Conditional Release of Probationer

B. Rules Approved by Judicial Conference and Forwarded to Supreme Court (No Memo)

1. Rule 5(a), Initial Appearance Before the Magistrate
2. Rule 43, Presence of Defendant
3. Rule 49(e), Filing of Dangerous Offender Notice (Repeal of Provision).
4. Rule 57, Rules by District Courts

C. Rules Published for Public Comment & Pending Further Review by Advisory Committee:

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

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

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

D. Rules Under Consideration by Advisory Committee

1. Rule 11, Pleas; Questioning Defendant Re Discussions With Prosecution; Proposal to Delete (Memo).

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

3. Rule 26, Trial Testimony; Proposal to Require Advice to Defendant re Testimonial Rights (Memo).

4. Rule 35(c); Possible Amendment to Further Define "Imposition of Sentence."(Memo).

5. Rule 58, Procedure for Misdemeanors and Other Petty Offenses; Proposal to Amend Rule to Address Issue of Forfeiture of Collateral (Memo).

E. Rules and Projects Pending Before Standing Committee and Judicial Conference

1. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

2. Status Report on Crime Bill Amendments Affecting Federal Rules of Criminal Procedure

3. Status Report on Proposed Federal Rules of Evidence 413-415.

III. MISCELLANEOUS

1. ABA Proposal to Establish Liason With Committee (Memo)

2. Other Matters

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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Agenda Item I

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 6 & 7, 1994
Santa Fe, New Mexico

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

I. CALL TO ORDER & ANNOUNCEMENTS

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

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General
Professor David A. Schlueter, Reporter

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

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

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

II. APPROVAL OF MINUTES OF APRIL 1994 MEETING

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

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

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

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

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

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that the Standing Committee had approved three amendments for publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). The deadline for submitting written comments on the proposed amendments

is February 28, 1995. Public hearings on the proposed amendments have been scheduled for December 12, 1994 in New York and January 27, 1995 in Los Angeles.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

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

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

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

B. Rule 6. Grand Jury Disclosure.

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

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

In a letter to the Committee, Magistrate Judge Robert Collings of Boston recommended that Rule 16 be amended to require that the parties confer on discovery before asking the court to compel discovery. He noted that such a provision now exists in the civil rules and that it would make sense to require counsel in both civil and criminal trials to confer on the issue of discovery before submitting it to the court. Judge Crow noted that normally counsel may be required to confer on a wide range of issues and that

the record may be protected by including a statement on the record as to that conference. Mr. Pauley indicated that substantively the Department of Justice had not objections to the proposal but indicated that it would be helpful to have more information about the current practices. He believed that in a majority of the districts local rules already covered the issue. Professor Coquillette indicated that Professor May Squires was currently compiling the local rules governing criminal cases and several members of the Committee volunteered to submit sample local rules or forms for the Committee's consideration. Mr. Pauley noted that the proposed amendment would presumably include sanctions for failure to confer and Judge Dowd raised the question of whether the amendment would affect reciprocal discovery provisions.

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

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

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

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

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

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

Professor Coquillette indicated that any possible amendments to the Criminal Rules should be coordinated with the other committees and Judge Jensen indicated that there appears to be diversity in actual practice and that there has been a change in legal culture. He noted for example that in past practice in California state courts, voir dire was conducted primarily by counsel. Judge Crigler noted that he had come to the meeting opposed to counsel voir dire but that he was willing to consider a middle ground. Judge Marovich questioned whether attitudes have been changed by the trial of O.J. Simpson. He noted that the attorneys who are used to conducting voir dire are now on the stand, running the process.

Mr. Jackson observed that there seems to be fear of the adversarial process and Judge Jensen questioned whether there is a chance that Congress will act to amend the rules. He also indicated that the Supreme Court seems to assume that counsel are conducting voir dire. Judge Smith observed that the process is intended to determine the qualifications of a juror and it is possible that counsel will be able to get answers that the judge cannot get. Several other members expressed the view that judges are encouraged to keep the docket moving and conduct case management. Mr. Wilson noted that the Department of Justice is normally opposed to counsel voir dire and Judge Dowd questioned whether a rule could be drafted which would give the right to counsel to conduct voir dire unless the trial judge puts reasons on the record for denying the opportunity. Mr. Pauley indicated that the fact that Congress might consider the issue should not be sufficient reason for amending the rule.

Following a straw poll of the members (5 to 4) in favor of continued consideration of an amendment to Rule 24, the Reporter indicated that the matter could be considered at the Spring 1995 meeting and that several proposals could be considered, including an amendment which would provide counsel with the right to conduct voir dire unless specifically limited by the trial judge.

E. Rule 35(c); Correction of Sentence.

Judge Jensen informed the Committee that a recent case from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994) had addressed the applicability of Rule 35(c). In dicta the court addressed the question of whether the time for correcting a sentence runs from the oral announcement of the sentence or from the date the formal entry of judgment is entered. Noting that the language in the rule itself refers to imposition of the sentence, i.e. oral announcement, but the Advisory Committee Note seems to indicate that the time runs from formal entry of the judgment. The court expressed the hope that the Advisory Committee would clarify the point.

Following brief discussion by the Committee it was determined that the Reporter would look into the matter and place the item on the agenda for the Committee's Spring 1995 meeting.

F. Rule 40(a). Commitment to Another District; Exception for Transporting UFAP Defendants Across State Lines.

Magistrate Judge Robert Collings recommended in a letter to the Committee that Rule 40(a) be amended. As written, the rule requires that a defendant who is arrested in a district other than the district where the offense was committed is to be taken to the nearest available magistrate in the district of the arrest. Judge Collings suggested that an exception to that rule should be permitted where the nearest available magistrate happens to be in the district where the offense took place. Magistrate Judge Crigler indicated that the legislative history of Rule 40 indicates that in the 1960's the rule was amended specifically to require an appearance in the district of arrest.. Mr. Pauley added that there is little caselaw on the issue and that if the rule is properly applied there should not be any real problems. Noting that the Department of Justice has no current position on the proposed amendment he added that even if the defendant is taken to the wrong district, there appears to be no sanction.

Judge Jensen deferred any further discussion on the proposal until the next meeting, pending input from the Department of Justice.

G. Rule 46. Release From Custody; Proposal to Add Provision for Release of Persons After Arrest for Violation of Probation or Supervised Release.

The Committee considered the written proposal from Magistrate Robert Collings of Boston who suggested that Rule 46 be amended to make the rule explicitly applicable to those cases where a person has been arrested for a violation of probation or supervised release. Following a very brief discussion, the Committee decided to defer consideration of the amendment until such time as the rule might be otherwise amended or restylized.

H. Rule 53. Regulation of Conduct in Courtroom; Report of Subcommittee on Guidelines.

Judge Jensen provided a brief overview of the proposed amendments to Rule 53 which would have permitted broadcasting from federal criminal trials to the same extent provided for in civil trials. He noted that the Judicial Conference had completed a pilot program of cameras in civil court rooms and that the Criminal Rules Committee had forwarded an amendment to Rule 53 to parallel whatever guidelines might have been adopted by the Judicial Conference. To that end, a subcommittee, chaired by Ms. Rikki Klieman, had drafted suggested guidelines which were to have been considered by the full Committee. In the meantime, however, the Judicial Conference at its Fall 1994 meeting had decided not to permit any further testing of cameras in federal courtrooms, thus negating any need for an amendment to Rule 53. He raised the question of whether the Committee should take any formal action on the subcommittee's report and recommendations.

Ms. Harkenrider indicated that the Department of Justice had not taken a formal position on cameras in the courtroom but that it would be important to proceed with great caution. Judge Jensen questioned whether some action should be taken in light of the fact that some groups had expressed an intent to seek legislative changes in Congress. Judge Crigler noted that he was still opposed to cameras in the courtroom but that he had consented to the proposed amendment because it would not be inconsistent to adopt guidelines to insure that the Judicial Conference would have some say in permitting cameras. Professor Coquillette questioned how the guidelines should be drafted and whether they might be considered as "rules." Judge Marovich indicated that the issue of cameras in the courtroom was a dead issue at this point and that no further consideration of the issue would be fruitful. Following additional brief discussion, the Committee accepted the subcommittee's report as presented.

I. Rule 10. Arraignment; Proposal to Consider Amendment.

Judge Crigler suggested that the Committee consider an amendment to Rule 10 which would provide that a guilty plea may be entered at an arraignment. The Reporter indicated that he would contact Judge Crigler about possibly placing the issue on the agenda for the Spring 1995 meeting.

VII. RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE AND JUDICIAL CONFERENCE.

A. Local Rules Project for Criminal Cases.

Professor Coquillette gave a full report on the background of the local rules project, which had originally focused on civil cases. He noted that with the cooperation of the Committee, he and Mary Squires had continued the project in order to study local rules governing the trial of criminal cases. He noted that the main complaint with regard to local rules was from practitioners that out-of-state lawyers may be able to quickly locate the pertinent rule. To that end, the project would focus on the possibility of uniform number among the districts. The second point, he added, is that the project would assist the district courts in reviewing their own rules and how they related to the national rules. Following a brief discussion about what if any steps could be taken if it appeared that a local rule was in conflict with the national rule, Professor Coquillette indicated that the project would be coordinated with the Committee.

B. The 1994 Crime Bill

Mr. Rabiej briefly noted several statutory changes which had resulted from the Crime Bill.. First, a typographical error in Rule 46 had been remedied as a part of the bill. Second, Title 18 had been amended to with regard to presentence reports in death penalty cases. And finally, Title 18 was amended to reflect that in capital cases, the government is required to disclose the names of its witnesses to the defense three days before trial unless it can show by a preponderance of the evidence that doing so would endanger the witness.

VIII. EVIDENCE RULES UNDER CONSIDERATION: RULES 413, 414 & 415

Judge Jensen and the Reporter provided a brief overview of recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. They noted that those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting and that the Committee's position or comments on the proposals might be helpful. Professor Saltzburg was connected through telephone conference call to the Committee and offered

additional background discussion on the issue. During the ensuing discussion the Committee considered the rules promulgated by Congress as part of the Crime Bill, and memos from Professors Margaret Berger and Steve Saltzburg concerning possible changes to Congress' version of the rules. The Reporter suggested that rather than endorse any particular language or draft, the Committee might instead address specific policy issues and transmit its views to the Evidence Committee and indicate a willingness to assist that Committee in any way it felt appropriate.

A. Rules Enabling Act Process.

Before addressing the specifics of the evidence rules, the Committee, at the suggestion of Professor Coquillette, noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence -- a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated. The Committee was convinced that the Rules Enabling Act process is sound and that it insures that a broad cross-section of view points and suggestions will be heard on proposed amendments.

B. The Need for Rules Governing Propensity Evidence.

Several members of the Committee also expressed the view that Rule of Evidence 404(b) provides an adequate vehicle for introducing other offense evidence against a criminal defendant. Given the sensitive nature of this evidence, and the special dangers attending such information in a criminal trial, several members seriously questioned whether Rules 413-415 are worth the danger of convicting a defendant for his past, as opposed to charged, behavior. The Reporter noted that similar rules were before Congress in 1991 and at that time the Criminal Rules Committee voted by a margin of 8 to 1 to oppose such amendments. Judge Dowd moved that the Committee oppose the adoption of the rules. Judge Davis seconded the motion which carried by a vote of 8 to 1.

C. The Need for Three Separate Rules; Cross-Over Evidence.

Judge Marovich moved that the three other offense evidence rules adopted by Congress be combined into one rule which would be applicable in both civil and criminal cases. The motion was seconded by Judge Smith passed by a vote of 8 to 0 with one abstention. The Committee believed that so combining the rules would make it easier for practitioners and courts to locate and apply the applicable provision or rule. The Reporter suggested that because the rules deal with the admissibility of other offenses or extrinsic acts, it might be advisable to include the new provisions in Rule 404, which already deals with that topic, as exceptions to the general rule that extrinsic act evidence is not admissible to prove circumstantially that a person acted in conformity with those previous acts and thus committed the charged offense.

In addressing the question of whether the three rules should be combined, the Committee also noted some ambiguity on whether there could be any cross-over of other offense evidence from sexual assault cases to child molestation cases. That is, could the prosecution in a rape case offer evidence that on prior occasions the defendant had committed acts of child molestation or vice versa? The Committee expressed doubt whether there is justification for any cross-over offense propensity evidence and recommended that that particular issue should be addressed in any proposed alternatives to the Congressional versions of the rules.

E. Balancing Test.

Upon motion by Judge Marovich (seconded by Judge Crigler), the Committee voted 7 to 2 to recommend that no new balancing test be adopted for other offense evidence regarding sexual propensities. During the discussion, it was suggested that perhaps the evidence should be admissible only if the probative value of the evidence outweighed the prejudicial dangers. Although the Committee was concerned about the special dangers presented by the evidence, in the end it concluded that the balancing test in Rule 403 would suffice. In this regard, the Committee noted that any redraft should make it clear that the admissibility of any proffered evidence under the new rule must be subject to Rule 403 analysis by the court.

F. Burden of Proof.

The Committee next considered the question of whether any particular or different balancing test should be placed on the admissibility of a defendant's prior acts of sexual misconduct where there has been no conviction. Following a discussion of the current rules applicable to admitting a defendant's prior acts under Rule 404(b), Judge Davis moved that the prosecution be required to prove by clear and convincing evidence in a Rule 104 proceeding that the alleged act occurred before the evidence could be submitted to the jury. The motion was seconded by Judge Dowd and passed by a vote of 6 to 3.

G. Notice Provision.

The Congressional version of Rules 413-415 include notice provisions which require the prosecution to inform the defense of its intent to introduce extrinsic act evidence. During the discussion, the Committee considered the issue of whether such notice should be dovetailed with Rule of Criminal Procedure 16 or adopt the more generalized notice provision in Rule 404(b). Judge Crow moved that the 404(b) notice provision be adopted as a recommended notice provision. The motion was seconded by Marovich and failed by a vote of 3 to 5, with one abstention. Judge Dowd then moved that the notice provisions remain as they appear in the Congressional version of the rules. That motion, which was seconded by Judge Davis, passed by a vote of 8 to 0, with one abstention.

H. Requirement that Sexual Act Resulted in a Conviction.

The suggestion was made during the Committee's discussion that to be admissible under the proposed rules, the defendant's prior sexual conduct must have resulted in a conviction. Several members noted that Rule 404(b) permits non-conviction evidence. Ms. Harkenrider moved that the proposed rules should not be limited to prior convictions. Judge Crow seconded the motion, which carried by a vote of 7 to 2.

I. Timing Requirement.

Finally, the Committee discussed the question of whether any particular provision should be made for remote sexual conduct, in a manner currently noted in Rule of Evidence 609 for remote convictions. The Committee believed that the balancing test in Rule 403 would adequately cover the court's consideration of prior sexual misconduct. Judge Marovich moved that no specific time limits be established and Judge Crow seconded the motion. It passed by a margin of 7 to 1, with one abstention.

IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Jensen expressed the Committee's gratitude to the New Mexico Supreme Court for permitting the Committee to use its facilities. He also thanked John Rabiej and his staff for their excellent support for the meeting.

It was determined that the Committee's next meeting will be held in Washington, D.C. on April 10th and 11th.

Respectfully submitted,

David A. Schlueter
Professor of Law
Reporter

Agenda Item II A+B

ORAL PRESENTATIONS

Agenda Item II C #1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 16; Public Comments**

DATE: **March 13, 1995**

The comment period has ended for the Committee's proposed amendments to Rule 16. The following materials are attached for your information:

(1) A copy of Rule 16 as it was published for comment;

(2) A copy of Mr. Brian Garner's suggested "style" changes to the rule;

(3) A copy of my proposed revisions to Rule 16, incorporating most of Mr. Gardner's suggested changes; and

(4) A partial summary of comments which have I have received. I am assuming that each member has received copies of all of the comments received by the Administrative Office as well as a copy of the transcript of the hearing held in Los Angeles in January

I hope to provide an updated summary of the comments at the meeting in April.

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

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

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

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

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

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

* * * * *

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government ~~shall~~ must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies,

1. New matter is underlined and matter to be omitted is lined through. Rule 32 includes amendments transmitted to Congress on April 29, 1994, which will become effective December 1, 1994, unless Congress acts otherwise.

the government, at the defendant's request must disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

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

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

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

If the attorney for the government believes in good faith that pretrial disclosure of this information will threaten the safety of any person or will lead to an obstruction of justice, disclosure of that information is not required if the attorney for the government submits to the court, ex parte and under seal, an unreviewable written statement containing the names of the witnesses and stating why the government believes that the specified information cannot

safely be disclosed.

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

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(C) EXPERT WITNESSES. The defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial ~~if~~ if (i) the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) the defendant has provided notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the~~

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

(D) NAMES AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant, at the request of the government, must disclose to the government before trial the names and statements of witnesses -- as defined in Rule 26.2(f) -- the defense intends to call during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

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

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

Subdivision (a)(1)(F). No subject has

engendered more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

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

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that

the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. *See, e.g.*, Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the*

Superior Court of the District of Columbia, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices).

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

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

an unacceptable drain on judicial resources.

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

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

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

The most critical aspect of the amendment is the requirement that the government disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. The amendment creates a conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its witnesses' *statements* at trial, *after* they have testified. *Palermo v. United States*, 360 U.S. 343 (1959). But the amendment is

consistent with the Act to the extent that it reflects the importance of defense discovery in criminal cases. In *Campbell v. United States*, 365 U.S. 85, 92 (1961) the Court stated that to the extent the Act requires disclosure of any statements by government witnesses after they have testified, the statute "reaffirms" the Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957) that a defendant is entitled to relevant and competent statements for the purposes of impeachment. In promulgating the Jencks Act, Congress recognized the potential dangers of witness tampering and safety and obstruction of justice and attempted to strike a balance between those concerns and the value of discovery to the defense. Considering the ability of the prosecution to block disclosure, the amendment to Rule 16 is harmonious with that approach; it permits the government to block pretrial disclosure where there is a danger to a person's safety or there is a risk of obstruction of justice.

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

In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075. The Committee views the amendment as a purely procedural

change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit it to supercede any conflicting statutory provision, under 28 U.S.C. § 2072(b). *See* Carrington, *"Substance" and "Procedure" In the Rules Enabling Act*, 1989 Duke L.J. 281, 323 (1989)("In authorizing supercession and assuming responsibility for a view of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

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

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information about both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by

the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the expected testimony or qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

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

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the~~

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Bryans Comments

Rule 16. ~~Discovery~~ and Inspection[1]

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(1) Information Subject to Disclosure.

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(E) EXPERT WITNESSES. At the defendant's request, the government ~~shall~~ must disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under ~~subdivision~~ clause (b)(1)(C)(ii) of this rule and the defendant complies, the government must, at the defendant's

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

request, ~~must~~ disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 ~~as evidence~~ at trial on the issue of the defendant's mental condition. ~~This~~--The summary provided under this subdivision must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

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

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

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If the attorney for the government believes in good faith that pretrial disclosure of this information will threaten the safety of any person or will lead to an obstruction of justice, and

But disclosure of that information is not required under the following conditions:

(1) if the attorney for the government submits to the court, ex parte and under seal, an unreviewable written statement containing the names of the witnesses and stating why the government believes that the specified information cannot safely be disclosed.

* * * * *

(2) *Information Not Subject to*

Disclosure. Except as provided in paragraphs (A), (B), (D), ~~and~~ (E)~~,~~ and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agents ~~in connection with the investigation or prosecution of~~ investigating or prosecuting the case. ~~Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.~~

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to*

Disclosure.

* * * * *

(C) EXPERT WITNESSES. ~~The~~ Under the following circumstances, the defendant, at the government's request, must disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial ~~if~~ if (i) the defendant requests disclosure under ~~subdivision~~ subparagraph (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has ~~provided~~ given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to~~

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(D) NAMES AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under ~~subdivision~~ paragraph (a)(1)(F) of this rule, and the government complies, the defendant, ~~at the request of the government,~~ must disclose to the government before trial the names and statements of witnesses -- as defined in Rule 26.2(f) -- that the defense intends to call during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed

an ex parte statement under paragraph (a)(1)(F).

* * * * *

COMMITTEE NOTE

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

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

Rule 16. Discovery and Inspection

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

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ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 16

I. SUMMARY OF COMMENTS: Rule 16

II. LIST OF COMMENTATORS: Rule 16

CR-01 Graham C. Mullen, Federal District Judge, Charlotte, N.C., 9-19-94.

CR-02 Robert L. Jones, III, Arkansas Bar Assoc., Fort Smith, Ark., 10-7-94.

CR-03 Prentice H. Marshall, Federal District Judge, Chicago, IL., 9-30-94.

CR-04 James E. Seibert, United States Magistrate Judge, Wheeling, W.V.,11-4-94.

CR-05 David A. Schwartz, Esq., San Francisco, CA, 11-8-94.

CR-06 Edward F. Marek, Esq., Cleveland, OH, 11-16-94.

CR-07 William H. Jeffress, Jr., Esq., Wash. D.C., 12-6-94.

CR-08 Norman Sepenuk, Esq., Portland, OR, 12-16-94.

CR-09 Michael Leonard, Alexandria, VA, 1-18-95.

CR-10 John Witt, City of San Diego, CA., 1-6-95

CR-11 Akron Bar Assoc. (Jane Bell), Akron, OH., 1-27-95

CR-12 New Jersey Bar Assoc.(Raymond Noble), 2-24-95

CR-13 Irvin B. Nathan, Esq., Wash. D.C., 2-7-94.

CR-14 Patrick D. Otto, Mohave Community College, Kingman, AZ, 2-15-95.

CR-15 Paul M. Rosenberg, United States Magistrate Judge, Baltimore, MD, 2-17-95.

CR-16 Federal Public and Community Defenders, Chicago, IL, 2-21-95.

CR-17 Lee Ann Huntington, State Bar of CA, San Francisco, CA, 2-24-95.

CR-18 Federal Bar Association, Philadelphia Chapter, Philadelphia, PA, 2-27-95.

CR-19 ABA Section of Criminal Justice, Wash., D.C., 2-27-95.

CR-20 Maryland State Bar Association, Roger W. Titus, Rockville, MD, 2-21-95.

CR-21 Leslie R. Weatherhead, Esq., Spokane, WA, 2-28-95.

CR-22 Section on Courts, Lawyers and Administration of Justice of D.C. Bar, Anthony C. Epstein, Wash., D.C., 2-28-95.

CR-23 National Association of Criminal Defense Lawyers, Wash., D.C., 2-28-95.

III. COMMENTS: Rule 16

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

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

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

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

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

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

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

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

David A. Schwartz (CR-05)

Private Practice
San Francisco, CA
Nov. 8, 1994

Mr. Schwartz supports the proposed amendment dealing with witness statements and names and suggests several changes. First, in support of the proposed amendments, he suggests that more liberal pretrial disclosure of witness information will advance the search for truth and cause of justice. Along these lines, he adds that the present practice of revealing witness information under the *Jencks* standards is unconscionable. Second, in support of the Rule 16 proposal, Mr. Schwartz explains that such alterations to the Rule will aid in negotiating plea agreements. Third, in support of the proposed amendments, Mr. Schwartz suggests that such will cause the entire system to run more efficiently and force prosecutors to confront weaknesses in their case. Fourth, in support, he explains that forcing the government to reveal more information is consistent with due process and fundamental fairness. Finally, in support of the amendments, Mr. Schwartz comments that the arguments made by the Department of Justice regarding witness safety are inflated. He suggest several changes to the proposed amendments. First, he suggests that the seven day rule may be of little use to the defendant and that such should be expanded to thirty or sixty days prior to trial. Second, he suggests that prosecutors should not be given unreviewable carte blanche to deny discovery by claiming witness intimidation. He favors judicial intervention, through hearing, to determine the validity of the claim of witness intimidation. In the alternative, absent *pro se* representation, he suggests that undisclosed information be made available to defense counsel as an officer of the court under the stipulation that the defendant will not be privy to this information absent further court order.

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

Mr. Marek (a former member of the Advisory Committee) supports the proposed amendments to Rule 16. He argues that such amendments should not be defeated because they may conflict with the Jencks Act. Mr. Marek explains that one can point to a number of amendments enacted through the rules enactment process which conflict with the Jencks Act but which Congress has seen fit to approve. For example, Rules 412 and 413 of the Federal Rules of Evidence as contained in the Violent Crime Control and Law Enforcement Act of 1994 represent Congress' belief that in sexual assault and child molestation cases government witness disclosure prior to trial is necessary. Mr. Marek

suggests that these new evidence rules clearly show that Congress believes that the Jencks Act should not stand as a barrier to more enlightened discovery in Federal Courts. Mr. Marek points out that proposed amendments to Rule 16 are modest compared to Federal Rules of Evidence 412 and 413. Finally, he adds that the proposed Advisory Committee Note is important in that it provides that the prosecutor's *ex parte* statement must contain facts concerning witness safety or evidence which relate to the individual case. This language, Mr. Marek suggests, properly represents the Committee's intention that any argument, for example, that danger to safety of witnesses exists in all drug cases, would not be sufficient showing to block production of statements.

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

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

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

Mr. Sepenuk writes in favor of the proposed amendments to Rule 16. He comments that complete disclosure of the government's case prior to trial is the best tool to facilitation of case disposition and to loosening up the criminal trial dockets. Mr. Sepenuk explains that such facilitation will be in the form of plea dispositions due to knowledge of the government case and the reaching of stipulations in advance of trial. He believes that the proposed Rule 16(a)(1)(F) should be amended to provide for pretrial disclosure of names and statements no later than ten days after arraignment. He also suggests amendment to Rule 26.2(f) to expand the definition of a "statement" required to be disclosed in advance of trial. Additionally, he believes that FBI memoranda of interview and similar interview statements should be explicitly made available under the Rules, and federal agents' reports should be subject to discovery to the extent they present a factual recitation of events, much like that of expert reports, which under the rules are producible.

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

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

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

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

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

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

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

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

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

Mr. Nathan supports the proposed amendments to Rule 16 and requests incorporation of his article published in the New York Times endorsing the Committee's

proposal. He points to state rules of discovery such as in California as examples of the growing sentiment of legislative bodies that fairness, efficiency and elimination of trial by ambush are better served by broader criminal discovery concerning witnesses. Mr. Nathan urges that the Justice Department withdraw its opposition to the proposed amendments.

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

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

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

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

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

The comments submitted are an expanded version of those provided the Committee prior to testifying in Los Angeles. The comments fall into two main categories. First, support is given to the proposed Rule 16 amendments as much needed and an improvement in the administration of justice. Second, comments are submitted on specific parts of the proposed amendments that the Federal Defenders feel will lead to unfair results not intended by the Committee. It is believed that disclosure of witness

names and statements will enhance the ability to seek the truth, will provide information necessary to the decision of pleading guilty or going to trial, will contribute to the exercise of confrontation and compulsory process rights, and will save time and money. It is suggested that witness intimidation and perjury are exceptions to the rule and that ex parte, unreviewable proceedings are contrary to the adversary system of justice. Additionally, concern is expressed regarding the lack of reciprocity in the proposed amendment to Rule 16(b)(1)(D) which states that the court **may** limit the government's right to obtain disclosure if it has filed an ex parte statement. Also, concern is expressed over the requirement of defense witness disclosure prior to trial as such witnesses are not always known beforehand. Finally, it is suggested that witness addresses be disclosed.

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

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

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

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

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

Judge Burnett, writing on behalf of the American Bar Association, expresses the Association's strong support for the proposed amendments to Rule 16. Although, in the Association's view, the proposed amendments to Rule 16 do not go as far as the ABA approved Third Edition Criminal Discovery Standards, the Association believes the changes are a step forward in more open discovery. The Association, in addressing disclosure of defense impeachment witnesses and statements, does suggest that the Committee commentary recognize that reciprocal obligations of disclosure must be consistent with the constitutional rights of the defendant and the differing burdens on each side in criminal cases. The Association feels that the proposed changes would not substantially conflict with the Jencks Act and that where conflict may arise, Congressional approval would act as a partial amendment of the Act.

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

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

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

Ms. Weatherhead applauds the proposed amendments to Rule 16 as a small step in the right direction. Ms. Weatherhead strongly opposes the provision allowing for

government refusal to disclose certain witnesses and statements through an unreviewable, ex parte statement.

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

The Section agrees with the basic premise of the proposed amendments to Rule 16. In general, these amendments make trials fairer and more efficient and facilitate appropriate resolutions before trial. Specifically, the Section agrees with the Committee's decision to recommend the unreviewable, ex parte statement method of government non-disclosure. The Section believes it is appropriate to try this approach and to determine how it works in practice. Additionally, the Section seeks clarification on the Committee's "good faith" requirement for refusal to disclose and suggests that the defense be required to provide reciprocal discovery no more than three days prior to trial.

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

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

discretionary language and should impose no duty on defense disclosure where the government withholds.

Agenda Item II C # 2

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 32(d), Forfeiture; Public Comments

DATE: March 12, 1995

At this point, relatively few comments have been received on the Committee's proposed amendment to Rule 32(d), which would permit forfeiture proceedings before sentencing. Summarized, those comments are as follows:
Comments:

(1) The New Jersey Bar Association. briefly notes that the proposed amendment is a sensible response to procedural problems which have arisen.

(2) Mr. Patrick Otto of Mohave Community College registers agreement with the Committee's proposed amendment; trial courts should have jurisdiction for the third party protection weighted more for "them" than for the government.

(3) The Committee on Federal Courts, State Bar of California, endorses the proposal.

(4) The National Assoc. of Criminal Defense Lawyers (Mr. Goldstein, Mr. Genego & Mr. Goldberger) welcomes and endorse the amendment to the extent that it clarifies procedure for turning a verdict of forfeiture into an order. The commentators also are glad to see that the rule encourages judges to hold separate hearings on criminal forfeitures. But two aspects of the amendment trouble them. First, they are concerned that the early entry of an order may interfere with the trial court's duty under the Eighth Amendment to determine that the forfeiture is proportional.. And second, they have not noticed the government's ability to conduct investigations into the defendant's potential forfeitable property. They believe that the amendment should include language to show that an order of forfeiture may be modified at any time until formal entry of the judgment. Also, the rule or the note should indicate that the court has the power under Rule 38(e) to stay enforcement of the order.

Finally, Mr.Roger Pauley has indicated that the Justice Department has modified its proposal and wishes to have that change considered as a comment. Their amended version is attached. He has indicated to me over the phone that the new version contains three principal changes:

The first is the elimination of the 8-day time limit in the published version.. The Department believes that there may well be cases where courts will have made up their

minds that they will not grant new trials, etc. and they should be permitted to begin the proceedings as soon as possible after the verdict.

Second, the new draft eliminates the absolute requirement for notice and a hearing as to the timing and form of the order of forfeiture. While a court would clearly have the discretion to hold a hearing, the very narrowness of the contemplated hearing that is contemplated indicates that a hearing is not a necessity in every case and will normally serve no purpose.

Third, Mr. Pauley indicates the there is a subtle change in the newer version -- the words "may enter" in the published version have been changed to "shall....enter." He notes that although the newer version arguably places greater emphasis on the fact that the court should enter the order, as a practical matter, district courts retains discretion. The Department, he notes, believes that the newer version is simplified.

If the Advisory Committee accepts the Department's proposed changes to the rule, there is a question whether the newer version is different enough from the published version to require additional publication and comments. That decision is clearly subjective and to the best of my knowledge, we have not recently faced that issue. If the Advisory Committee approves and forwards the newer version of the rule as its recommendation, the Standing Committee will most likely raise the issue of further publication. In any event, it appears that the Department plans to include its newer version in a legislative package.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 3, 1995

Professor David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Dear David:

Pursuant to our recent telephone conversation, enclosed is a somewhat revamped version of the Rule 32(d) forfeiture amendment that was published for comment and presumably will be on the Advisory Committee's agenda for the upcoming April meeting.

The revised version has resulted from further consideration among the Department's forfeiture experts, and will be included as part of a legislative package to be submitted to Congress that proposes a major overhaul of forfeiture statutes and procedures. We would ask that you treat the revised draft as in the nature of a comment by the Justice Department on the published version, and that it be included among the agenda materials provided to all members.

Sincerely,

Roger A. Pauley

Roger A. Pauley, Director
Office of Legislation
Criminal Division

Enclosure

SEC. 202. ENTRY OF ORDER OF FORFEITURE UPON RETURN OF VERDICT IN CRIMINAL CASES.

Rule 32(d)(2) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(2) Criminal Forfeiture. When a verdict contains a finding subjecting property to criminal forfeiture, or when a defendant enters a guilty plea subjecting property to such forfeiture, the court shall enter a preliminary order of forfeiture as soon as practicable. The entry of such preliminary order shall authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the identification, location or disposition of the property, and to commence proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture shall become final as to the defendant, and shall be made a part of the sentence and included in the judgment. The court may include in the final order such conditions as may reasonably be necessary to preserve the value of the property pending any appeal."

Byan's Comments

Rule 32. Sentence and Judgment[1]

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, the court may enter an order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard ~~as to~~ on the timing and form of the order. The court may

(G)

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1. New matter is underlined; matter to be omitted is lined through. This rule includes amendments transmitted to Congress on April 29, 1994, which will become effective on December 1, 1994, unless Congress acts otherwise.

enter the order of forfeiture at any time before sentencing, but not sooner than eight days after the return of the verdict or the disposition of a motion for a new trial, a motion for judgment of acquittal, or a motion to arrest the judgment. The order of forfeiture must authorize the Attorney General to seize the property subject to forfeiture, to conduct ~~such~~ any discovery ~~as~~ that the court ~~may deem~~ considers proper to ~~facilitate the identification, location, or disposition of~~ help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements ~~pertaining to~~ for ancillary hearings and the rights of third parties. ~~At the time of~~ sentencing, the order of forfeiture must be made a part of the sentence and included in the judgment.

change. Under the Rules Enabling Act, the proposed change to Rule 16 will provide Congress with an opportunity to review the extent and application of the Jencks Act and if it agrees with the amendment, permit it to supercede any conflicting statutory provision, under 28 U.S.C. § 2072(b). *See* Carrington, *"Substance" and "Procedure" In the Rules Enabling Act*, 1989 Duke L.J. 281, 323 (1989)("In authorizing supercession and assuming responsibility for a view of promulgated rules, Congress demands that it be asked whether a proposed rule conflicts with a procedural arrangement previously made by Congress and, if so, whether the arrangement is one on which the Congress will insist.").

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

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information about both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by

the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the expected testimony or qualifications of the expert witness. The amendment provides the government with the limited right to respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

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

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the~~

~~interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, the court may enter an order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard as to the timing and form of the order. The court may enter the order of forfeiture at any time before sentencing, but not sooner than eight days after the return of the verdict or the disposition of a motion for a new trial, a motion for judgment of acquittal, or a motion to arrest the judgment. The order of forfeiture must authorize the Attorney General to seize the property subject to forfeiture, to conduct such discovery as the court may deem proper to facilitate the

identification, location, or disposition of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At the time of sentencing, the order of forfeiture must be made a part of the sentence and included in the judgment.

COMMITTEE NOTE

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F. Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. § 1963(k) and 21 U.S.C. §

53(m). If that order is delayed until entencing, valuable time may be lost in ocating assets which may have become navailable or unusable. Second, third ersons with an interest in the property ubject to forfeiture must also wait to etition the court to begin ancillary roceedings until the forfeiture order has een entered. *See* 18 U.S.C. § 1963(l) and 21 .S.C. § 853(m). And third, because the overnment cannot actually seize the property ntil an order of forfeiture is entered, it ay be necessary for the court to enter estraining orders to maintain the status uo.

The amendment to Rule 32 is intended to ldress these concerns by specifically cognizing the authority of the court to ter a forfeiture order before sentencing. try of an order of forfeiture before ntencing rests within the discretion of the urt, which may take into account ticipated delays in sentencing, the nature the property, and the interests of the fendant, the government, and third persons.

The amendment permits the court to enter s order of forfeiture at any time before ntencing, but not sooner than eight days ter the entry of the court's verdict or its sposition of a motion for new trial under le 33, a motion for judgment of acquittal der Rule 29, or a motion for arrest of the dgment under Rule 34. Nothing in the rule, wever, prevents the court and the parties om considering the issue of forfeiture in e interim. Before entering the order of rfeiture the court must provide notice to e defendant and a reasonable opportunity to heard on the question of timing and form

of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect third parties who have an interest in the property.

Agenda Item II D#1

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Dave Schlueter, Reporter**

RE: **Possible Amendment to Rule 11(d); Questioning Defendants Re Prior Discussions with Attorney for the Government**

DATE: **March 10, 1995**

Attached is a letter from Judge Sidney Fitzwater to Judge Jensen questioning the need in Rule 11(d) for an inquiry whether prior discussions have taken place between the defendant, who is pleading guilty, and an Attorney for the Government. He notes that the question consistently confuses defendants; he believes that the confusion arises because defendants believe that their willingness to plead guilty arises from their feeling that they are in fact guilty and wish to benefit from a guilty plea.

He suggests that the question should be deleted from the inquiry and offers to suggest language to accomplish the change.

As Judge Fitzwater notes, the question is apparently intended to clarify whether a defendant is pleading guilty voluntarily. If the defendant has engaged in plea discussions which may have resulted in promises not included in a formalized agreement and are thus not otherwise discussed under Rule 11(e), it is possible that the guilty plea was influenced, at least in part, by those discussions. While such "discussions" should not normally in themselves indicate any degree of coercion, the question serves as a reminder that the matter should at least be raised..

The language inquestion was apparently added by an amendment in 1974 as part of a larger effort to insure that guilty pleas are informed and voluntary. In its Committee Note, the Criminal Rules Committee cited *Santobello v. New York*, 404 U.S. 257, 261-262 (1971): "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." That Note also observes that the goals of determining voluntariness and developing a more complete record are undermined if the judge "resorts to 'assumptions' not based upon recorded responses to his inquiries."

If the Committee agrees that the question in Rule 11(d) is unnecessary, or that the language in the rule might be clarified, I will prepare an amendment and accompanying Committee Note for the Committee's next meeting.

United States District Court
NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF SIDNEY A. FITZWATER
U.S. DISTRICT JUDGE

November 4, 1994

Honorable D. Lowell Jensen
United States District Judge
P. O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Judge Jensen:

I am writing to you in your capacity as Chair of the Advisory Committee on Criminal Rules.

As you know, Fed. R. Crim. P. 11(d) requires the court to inquire during a guilty plea hearing "whether the defendant's willingness to plead guilty . . . results from prior discussions between the attorney for the government and the defendant or the defendant's attorney." I have made no attempt to ascertain the origin of or purpose for this provision in Rule 11(d). Given its placement in subdivision (d), I assume it is intended to confirm that a defendant is voluntarily pleading guilty after plea negotiations.

I have been on the federal bench over eight years and have taken hundreds of guilty pleas. This question consistently confuses defendants. Because of its placement in Rule 11(d), the inquiry usually is asked in close proximity to questions concerning whether "the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement," which are also required by Rule 11(d). I suspect the question confuses defendants because they feel they are pleading guilty because they are guilty and wish to benefit from a guilty plea. They do not think their "willingness to plead guilty . . . <u>results from</u>" discussions between the government's attorney, their attorney, and/or them.

For several years I have considered proposing that this part of Rule 11(d) be deleted or revised. If you think it a worthwhile matter to pursue, I will be happy to submit a proposal to your committee.

Respectfully,

Sidney A. Fitzwater
United States District Judge

SAF/de

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND, CALIFORNIA 94612

CHAMBERS OF
D. LOWELL JENSEN
UNITED STATES DISTRICT JUDGE

March 2, 1995

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
Northern District of Texas
1100 Commerce Street
Dallas, Texas 75242

Dear Judge Fitzwater:

Thank you for your letter regarding problems raised by the language of Federal Rules of Criminal Procedure 11(d). The issue will be considered by the Advisory Committee at its next meeting on April 10-11, 1995, in Washington, D. C.

Thank you for bringing this matter to our attention. We will keep you informed on our consideration of the issue.

Sincerely,

D. Lowell Jensen
United States District Judge

DLJ:mwj

Agenda Item II D #2

MEMO TO: Advisory Committee on Criminal Rules

FROM: Professor Dave Schlueter, Reporter

RE: Rule 24(a), Trial Jurors; Proposal Re Voir Dire by Counsel and Court

DATE: March 12, 1995

At its meeting in Santa Fe in October 1994, the Committee discussed the possibility of amending Criminal Rule 24(a) to provide counsel with some limited ability to conduct voir dire of prospective jurors. Following extended discussion, a straw poll was taken (5 to 4) and it was determined that the matter should be placed on the Spring 1995 agenda.. The consensus seemed to be that any amendment to Rule 24(a) should recognize the right of the trial court to limit counsel voir dire.

For the past year the Civil Rules Committee has been considering a similar amendment to Civil Rule 47. Their proposal, which is attached, was considered by the Standing Committee at is January 1995 meeting in San Diego. Following some discussion, the matter was tabled until the Standing Committee's meeting in July 1995, to permit the Criminal Rules Committee to develop any similar amendments to Criminal Rule 24. They will apparently be considering some further changes in their draft.

As might be expected, the reaction from federal judges to the thought of amending the Civil and Criminal Rules has been swift, strong, and mostly negative -- and no amendment to either rule has been officially published for comment. Attached are materials which you may find helpful in discussing the issue:

(a) My draft proposal for an amendment to Rule 24(a), along with brief comments which might be later incorporated into a Committee Note if an amendment goes forward to the Standing Committee.

(b) Judge Easterbrook's Letter to Judge Stotler indicating that he intends to oppose the amendment at the Standing Committee's next meeting. Judge Easterbrook polled the judges in his circuit and his letter summarizes those responses. Due to space limitations, I have not included those responses. I will bring them with me to the meeting in Washington.

(c) A memo from John Rabiej to Judges Jensen and Higginbotham which focuses on state court practices (Arizona, California & New York) with regard to attorney- conducted voir dire. Again, those materials are voluminous and will not be included in the agenda book.. As with the Easterbrook materials, they are instructive, particularly the articles on the subject, and I will bring them with me to the meeting.

(d) Letters from the Fourth Circuit indicating the results of a survey of judges within that circuit.

(e) Correspondence from Assoc. Dean Ed Cooper, Reporter for the Civil Rules Committee, and others, indicating a potential change in the proposed Civil Rule 47. The alternative language he suggests would soften the language but would nonetheless require the court to permit counsel to ask some questions.

(f) Results of a survey conducted by the Federal Judicial Center on the issue of attorney-conducted voir dire.

Criminal Rules Committee
Draft Amendment -- March 1995

Rule 24. Trial Jurors.

(a) VOIR DIRE EXAMINATION. The court will conduct the preliminary voir dire examination of the trial jurors . Following such questioning, the court must permit the defendant or the defendant's attorney and the attorney for the government to conduct a supplemental examination of prospective jurors, subject to the following:

(1). The supplemental questions may either be oral or in writing, in the discretion of the court;

(2) The court may place reasonable limits on the scope, content, and length of such supplemental questioning; and

(3) A party's supplemental questioning may be precluded altogether if the court believes that such questioning is being used for an improper purpose or that it will impair the jury's impartiality.

~~The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.~~

* * * * *

NOTES ON DRAFT

The draft recognizes the long-standing tradition in federal courts that the primary responsibility for conducting voir dire rests with the trial judge.

The amendment also recognizes, however, that particularly in criminal cases there are good reasons for permitting supplemental inquiries by counsel, without regard to whether counsel or the courts can do a better job of picking an impartial jury. The draft is

intended to avoid that debate and at the same time recognize that the defendant or defendant's counsel should have the right, even if limited, to question the potential jurors.

Although the draft reflects a right to supplemental questioning, the right is not absolute. The first two exceptions, or limits, probably reflect current practice in some courts. That is, some judges permit counsel to pose supplemental questions, either directly to the jurors, or through the court, in writing or orally. At this point, the draft does not address the issue of whether the questions must first be screened or approved by the court.

The final limit reflects the views of some members of the Committee at its Santa Fe meeting that any amendment should include the right to absolutely cut off any questioning by the parties. Several points should be addressed here. First, what reasons, if any, should be used to support an absolute prohibition: Past practices by the parties in that court, questioning which becomes more and more attenuated as it progresses, the fact that a pro se defendant will be doing the questioning, or the fact that the judge simply does not want any party ever questioning the jurors in his or her court? The draft assumes that the judge should have a reason for absolutely barring questioning by the parties.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CIRCUIT JUDGE

February 28, 1995

Hon. Alicemarie H. Stotler
Chair, Standing Committee on Practice and Procedure
United States District Court
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Alicemarie:

After the Standing Committee tabled the proposal on attorney-conducted voir dire, I sent a letter to all district judges of the seventh circuit. I enclosed the advisory committee's draft and accompanying note and asked for reactions. I also asked the district judges to tell me whether they allow attorneys to conduct some or all of the voir dire and, if so, what their experiences have been. Finally, I asked whether those who allow attorneys to participate believe that the process would remain beneficial if attorneys could participate as of right rather than at sufferance. I attach a copy of that letter.

In the month that followed, I have received replies from approximately 60% of the circuit's district judges. Many of these letters are exceptionally thoughtful. Both proponents and opponents of the proposal will find strong supporting arguments there. I send along the letters I have received. I am also transmitting them to Pat Higginbotham and Ed Cooper (and their counterparts Lowell Jensen and Dave Schlueter), who will, I hope, find them as enlightening as I did.

All of the judges conduct the bulk of the voir dire themselves, usually after receiving suggestions from counsel. Fourteen of the judges report that they allow counsel to ask follow up questions, although some say that this happens only rarely. Another fourteen relate that they never permit counsel to put questions directly to jurors. Two did not mention whether they let counsel ask questions.

Of the 30 total responses, 4 favor the proposal, 22 oppose it, and 4 do not express an opinion. As you might expect, none of the 14 judges who conduct the entire voir dire themselves favors the proposal; 11 are opposed and 3 did not express an opinion. As you might not expect, 9 of the 14 judges who permit lawyers to participate oppose the proposal; 4 favor it and 1 did not express an opinion. The two judges who did not report whether they allow counsel to participate both oppose the proposal.

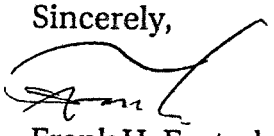
Two principal themes run through the letters. First, the district judges believe that questioning by judges and questioning by lawyers serve different purposes. The judges are trying to get unbiased juries. The lawyers, by contrast, are trying to get juries favorable to their clients—a very different objective in many cases. Second, the district judges who permit lawyers to ask questions believe

that the court's right to cut down on time, and if need be to withdraw the privilege, is essential to management of the process. If deprived of this control, the judges believe, lawyers would get out of hand. The draft rule allows for reasonable limits, but what is reasonable is a contestable issue, and judges might be inclined to allow improper (or unduly long) questioning in order to avoid a risk of reversal.

The district judges make a number of subsidiary points. (i) No one believes that civil and criminal cases should be handled differently. (ii) Many of the district judges report that they enthusiastically participated in voir dire as trial lawyers, or that they permitted it as state judges, but that since joining the federal bench they have cut off lawyers' questioning and believe that the quality of justice has improved. Judges who report having done things both ways always conclude that having the court conduct all of the questioning is superior. (iii) None of the judges mentions any dissatisfaction at the bar with the current state of affairs. (iv) None of the judges believes that questioning by lawyers is necessary to get at information in the wake of *Batson*, although two allow that it would be helpful. There are few *Batson* problems in this circuit, and several judges worry about allowing the tail to wag the dog. I add to this that lawyers vastly overestimate their prowess in digging out information that will enable them to exercise peremptory strikes against unfavorable jurors. The best studies I know of show that in criminal cases both prosecutors and defense counsel, in exercising peremptory challenges, are as likely to remove from the jury persons who favor their cause as persons who vote against it. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491 (1978). See also *Symposium on the Selection and Function of the Modern Jury*, 40 American L. Rev. (Win. 1991).

All of this leads me to conclude that we do not need a national mandate that every judge permit lawyers to ask questions of jurors. Different styles well serve different judges (and different parts of the country). Depriving district judges of their ability to control the process may make things worse for those who now permit attorneys to participate, and so far as I can tell there are few if any gains to be had. I therefore expect to oppose the proposal at the July meeting. I can see many arguments for benefits from lawyers' involvement, but they strike me as best addressed to the sound discretion of particular judges, not as foundations for national uniformity.

Sincerely,



Frank H. Easterbrook

Enclosures

cc: Hon. Patrick E. Higginbotham
Hon. D. Lowell Jensen
Edward H. Cooper
David A. Schlueter

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CIRCUIT JUDGE

January 23, 1995

All District Judges
of the Seventh Circuit

Dear Colleagues:

The Advisory Committee on Civil Rules has recommended an amendment to Fed. R. Civ. P. 47 that would give counsel a right to examine prospective jurors on voir dire. I enclose a copy of the submission. The Standing Committee on Rules of Practice and Procedure tabled this proposal at its meeting earlier this month, after learning that the Advisory Committee on Criminal Rules is likely to present a similar proposal for consideration at the Standing Committee's next meeting, this coming July.

I write in my capacity as a member of the Standing Committee to solicit your views on this proposal, which has attracted heated opposition and equally vigorous support. I am particularly interested in learning whether you let lawyers examine jurors during voir dire, and, if so, whether your experience has been favorable. I am also curious whether those who have a positive impression of the practice think that it would continue to be as useful if lawyers participated as of right, rather than by sufferance. Finally, I wonder whether the same approach should be taken in civil and criminal cases. Your thoughts on these and any related matters would be warmly appreciated.

Sincerely,

Frank H. Easterbrook

Enclosure

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination~~. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

Committee Note

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See Shapard & Johnson, Survey Concerning Voir Dire (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same across all variations between no party participation and party conduct of most or all of the voir dire. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may avoid the embarrassment of public examination or the failure to confess publicly to information that a juror would provide in response to a questionnaire. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group. Questionnaires are not required by Rule 47(a), but should be seriously considered.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

February 28, 1995

MEMORANDUM TO JUDGES D. LOWELL JENSEN AND PATRICK E. HIGGINBOTHAM

SUBJECT: Research Materials on *Voir Dire*

I requested Robert Deyling, our Judicial Fellow, to research *voir dire* practices in the state courts. He identified three state court systems that may be helpful in the committees' study of this issue. The materials referred to two law journal articles on *voir dire* practices, which are also included. The articles purport to demonstrate that more honest, accurate information is elicited from prospective jurors by attorney, instead of judge, questioning.

STATE COURT PRACTICES

The Arizona *voir dire* practice in civil cases was changed in 1991 and is very similar to the practice suggested under the proposed rules amendments. A committee of the Arizona Supreme Court now recommends extending the right of attorneys to question prospective jurors in criminal cases. "The principal reason for the committee's position is that lawyer participation in *voir dire* is more likely to result in a fair and impartial jury than is *voir dire* conducted by the judge alone." The accompanying materials include letters of support and opposition to the 1991 change in Arizona's civil rules.

New York *voir dire* is undergoing review. A pilot program is underway in four judicial departments studying various *voir dire* practices. The study will conclude on May 19, 1995. New York *voir dire* in civil cases is now done entirely by attorneys outside the presence of a judge. Among other procedures, the pilot program will study the effects of some or full judge supervision. During the sixteen-week pilot program, however, only one week was singled out to review *voir dire* where the judge is present throughout the proceeding. The remaining weeks focus on *voir dire* in which judges merely monitor the proceedings periodically or are present initially and available throughout for questions.

The *voir dire* procedures in California are provided for comparison purposes.

LAW JOURNAL ARTICLES

The two articles include the results of some empirical testing of prospective jurors' responses to questions from attorneys versus judges. The authors conclude that the "higher authority status" of judges unduly influences jurors' responses.

The role differences between an attorney and a judge are highlighted in the *Indiana Law Journal* article. The authors note that a juror is more likely to open up and disclose meaningful information to an attorney rather than a judge for several cited reasons. In addition, the authors note that unintentional, nonverbal communication from a judge during *voir dire* may prejudice a juror's response. Even the physical distances and barriers between a judge and jury versus an attorney and a jury may influence the jurors' responses.

The *Law and Human Behavior* article is more technical. It discusses the results of an experiment conducted of over 100 participants regarding judge versus attorney questioning. The results appear to be consistent with the conclusions drawn in the *Indiana Journal* article.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor David A. Schlueter
Professor Edward H. Cooper

TO: John Rabiej
Chief, Rules Committee Support Office

FROM: Robert P. Deyling
Judicial Fellow

DATE: February 23, 1995

RE: Attorney Voir Dire

I have reviewed each state's rules concerning attorney participation in juror voir dire, and have assembled information on three states that have recently changed their rules on this issue.[1] This memorandum explains recent rule changes in Arizona, New York, and California. Background information on those three states is attached. In addition, I have attached two law journal articles, both of which suggest that attorneys may be more effective than judges in eliciting information from prospective jurors.

Arizona

Before 1991, in both civil and criminal cases, Arizona attorneys were allowed to participate in voir dire at the court's discretion. Upon petition by the State Bar of Arizona, the Supreme Court of Arizona in 1991 changed the Arizona Rules of Civil Procedure to create the right to attorney voir dire in

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[1] In researching state rules on voir dire, I have relied on the compilation of rules contained in Blue and Saginaw, Jury Selection: Strategy and Science (1994).

civil cases. Arizona Rule of Civil Procedure 47(b)(2) now reads:

> The court shall conduct a preliminary oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination.

A move toward attorney voir dire in criminal cases in Arizona may be imminent. In its September 1994 report entitled Jurors: The Power of 12, the Arizona Supreme Court Committee on the More Effective Use of Juries recommends amending the rules of criminal procedure to assure the right to attorney voir dire. The committee noted its belief that "lawyer participation in voir dire is more likely to result in a fair and impartial jury than is voir dire conducted by the judge alone." In addition, the committee suggested amending the rule on both civil and criminal voir dire to state that the judge's initial examination of jurors should be "thorough" rather than "preliminary."

Attached are: 1) 1990 petition to amend Arizona Rule of Civil Procedure 47(b)(2) and comments; 2) excerpts from Jurors: The Power of 12.

New York

In New York criminal cases, the judge conducts the initial questioning of jurors. The attorneys are permitted to ask supplemental questions in the presence of the judge. Civil voir dire, in contrast, is conducted solely by the attorneys. Moreover, civil voir dire generally is conducted outside of the

courtroom and without any judicial supervision.

In October 1994, Chief Judge Judith S. Kaye announced a comprehensive program of jury reform. The program, which includes pilot programs in the civil voir dire process, implements in major part The Jury Project: Report to the Chief Judge of the State of New York (March 31, 1994).

The Jury Project committee did not recommend significant changes to the current scheme of criminal voir dire in New York. The committee concluded that the voir dire system works well in New York criminal cases. In particular, the committee considered adopting the federal system of complete judicial control over voir dire, but concluded that attorney participation helps ensure the selection of impartial juries. The committee noted, however, the numerous complaints it received concerning juror privacy, and encouraged judges to use their authority to curtail improper questioning. See The Juror Project at 47-50.

With respect to civil voir dire, the committee noted widespread dissatisfaction with the current system of almost complete attorney control. Jurors complain of mistreatment by unsupervised lawyers; voir dire often takes days or even weeks.

The committee agreed that reform is necessary, but was divided on whether voir dire should be supervised by judges. As a result, the committee recommended a pilot project to gather data on judge-supervised voir dire. The pilot project covers four New York judicial departments, and runs from January 30 to May 19, 1995. At that point the New York Office of Court

Administration will decide whether to continue the pilot project and extend it to additional courts. The project, described in the attached material, covers five areas:

1) Judicial supervision of jury selection
2) Time limits on attorney questioning of prospective jurors
3) Mandatory settlement conferences with the attorneys and the trial judge immediately prior to jury selection
4) Use of non-designated alternate jurors
5) Use of different methods of jury selection (i.e. "strike," "strike and replace," and a New York hybrid known as "White's Rules")

Attached are: 1) excerpts from The Jury Project; 2) 1/18/95 press release on the voir dire pilot project; and 3) a description of the pilot project.

California

The California rules governing voir dire have been a source of considerable controversy in recent years. In 1987, the rules were amended to provide for greater judicial involvement in the voir dire process in both civil and criminal cases. The California Trial Lawyers Association objected to greater judicial control, and introduced a bill to restore unlimited attorney participation in voir dire. Meanwhile, another bill was introduced through the California initiative process to strictly

limit attorney voir dire in criminal cases. As a result of these conflicting pressures, the rules were amended again. California attorneys now have a nearly unrestricted right to question prospective jurors in civil cases, but judges basically control voir dire in criminal cases.

The results of a two-year pilot project on judge-conducted voir dire in criminal cases suggest that overall trial time is slightly shorter if the judge controls voir dire. The Advisory Committee on Voir Dire noted, however, that the pilot project results were "inconclusive."

On the civil side, attorneys have the right to conduct "liberal and probing" examination of jurors. While the judge may impose "reasonable limits" on the scope of the examination, "specific unreasonable or arbitrary time limits shall not be imposed." In criminal cases, by contrast, the court conducts the examination and "may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper...."

Attached are: 1) California voir dire rules; 2) Annual Report of the Judicial Council of California (reporting on criminal voir dire pilot project).

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

March 2, 1995

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Survey of the Fourth Circuit on Voir Dire*

For your information, I am sending to you the attached survey of judges in the Fourth Circuit on Voir Dire.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen

SAMUEL W. PHILLIPS
CIRCUIT EXECUTIVE
UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

P.O. BOX 1820
RICHMOND, VIRGINIA 23214-1820

Voice: 804-771-2184
Fax: 804-771-8288

February 14, 1995

Honorable B. Waugh Crigler
U.S. Magistrate Judge
Western District of Virginia
225 W. Main Street, Rm. 328
Charlottesville, VA 22901

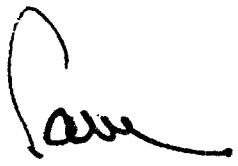
Re: Amendments to Rule 47(a), Rules of Civil Procedure

Dear Judge Crigler:

By letter dated December 1, 1994 I sent to each of the 73 U.S. District Judges in the Fourth Circuit a Voir Dire Questionnaire. I have received 55 responses, a 75.3 percent rate of return. Almost without exeption the district judges feel that direct participation by attorneys in voir dire is undesirable.

I thought you, as our representative on the Judicial Conference Committee on Criminal Rules, would like to have copies of these questionnaires.

Sincerely,



Samuel W. Phillips

dma

Enclosures

cc: Honorable Sam J. Ervin, III
Honorable W. Earl Britt

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

February 17, 1995

Honorable Patrick E. Higginbotham
United States Circuit Judge
Chair, Advisory Committee on Civil Rules
13E1 Earle Cabell Federal Bldg.
and U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242

Honorable D. Lowell Jensen
United States District Judge
Chair, Advisory Committee on Criminal Rules
U.S. Courthouse
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, CA 94102

Professor Edward H. Cooper
The University of Michigan Law School
Reporter, Advisory Committee on Civil Rules
Hutchins Hall
Ann Arbor, Michigan 48109-1215

Professor David A. Schlueter
St. Mary's University School of Law
Reporter, Advisory Committee on Criminal Rules
One Camino Santa Maria
San Antonio, Texas 78284

RE: Federal Rule of Civil Procedure 47(a) and
Federal Rule of Criminal Procedure 24(a)

Dear Judges Higginbotham and Jensen and Professors Cooper and Schlueter:

I understand that your Advisory Committees will reconsider proposed amendments to Civil Rule 47(a) and Criminal Rule 24(a) at your meetings scheduled in April, 1995.

For your convenience, I am enclosing a copy of the proposed amendment of Civil Rule 47(a) presented to the Standing Committee during its January, 1995 meeting in San Diego. I suggest that the words "may also" be substituted for the words "are entitled to" in the second sentence of the proposed amendment of Civil Rule 47(a). In other words, my recommendation is that the second sentence read: "The parties may also examine the prospective jurors to supplement

the Court's examination within reasonable limits of time, manner and subject matter set by the Court in its discretion."

The word "entitle" and its derivatives, especially "entitlement", seem to be acquiring significant negative connotations. If the word "may" is perceived to be too discretionary, as an alternative I suggest substituting the words "will be permitted" in place of the words "are entitled". This language would clearly state the right of parties to participate in examining prospective jurors within reasonable limits permitted by the Court.

Sincerely,

James A. Parker

cc: Honorable Alicemarie H. Stotler
United States District Judge
Chair, Standing Committee

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court ~~may~~ must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination~~. The parties are entitled to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

February 24, 1995

Hon. James A. Parker
United States District Judge
Post Office Box 566
Albuquerque, New Mexico 87103

Hon D. Lowell Jensen
United States District Judge
U.S. Courthouse
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, California 94102

Hon. Patrick E. Higginbotham
United States Circuit Judge
13E1 Earle Cabell Federal Bldg. &
U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242

Professor David A. Schlueter
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Re: Civil Rule 47(a), Criminal Rule 24(a): Lawyer Participation in Jury Voir Dire

Dear Judges Parker, Jensen, and Higginbotham, and Professor Schlueter:

With such a distinguished caption, there is barely enough of this page left to start a letter.

I enclose a modified draft of Civil Rule 47(a) prompted by Judge Parker's February 17 letter. As a response, it is obviously a first approximation. Let me explain briefly the concerns that led to this format, and await further reactions.

I agree that "are entitled to" is becoming something of a lightning rod, and am quite satisfied to see it go.

Bryan Garner, however, will not let us use "may also." I have heard him too many times now to have any doubts: "May" means "may or may not." Judge Parker's concern that "may also" may be "perceived to be too discretionary" reflects this view. Bryan's regular advice is to decide whether you want to create a right or not, and express the decision clearly. The tactic of using soft words and then saying in the Note that we are creating a new right of particpation may backfire, and is almost certain to cause confusion. The alternative of using a soft phrase and then leaving it to the courts to decide whether a right has been created also is not particularly attractive.

The alternative of "will be permitted" — or the Garneresque "are permitted" — may do it. This one should percolate through our ongoing consideration of the drafting problem.

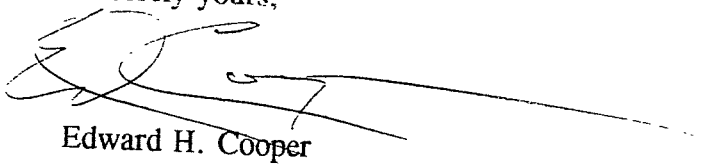
I have chosen to fall back on an earlier draft. To avoid confusion, I have not attempted to mark changes from the version of Rule 47(a) that was before the Standing Committee in January. Instead, I have put in bold the two new elements. The substitute for "parties are entitled" is that the court "must permit" the parties to examine, and so on. This may be a bit softer, but remains clear.

The second new element is in form so tentative that it almost slithers away. The Criminal Rules Committee has given much thought to creating an authority to forbid any examination in some circumstances. My recollection is that much of the concern arises from the prospect of damaging behavior by pro se defendants. The first question that arises on approaching this issue is whether a party should be allowed to misbehave before the examination is terminated, or whether the court should be able to anticipate misbehavior and preempt any examination. The first version allows the party to misbehave. The final alternative takes the other approach; it resurrects part of present Rule 47(a) by requiring consideration of supplemental party questions when the court preempts any party examination. The intermediate alternative simply substitutes a more general "misuses the right of examination" for the more focused "may impair the jury's impartiality." Each is intended to start the discussion, not to suggest much drafting happiness.

I would very much like to do all I can to help coordinate further consideration by the Civil Rules Committee with the work of the Criminal Rules Committee. The Standing Committee rightly expects us to adopt versions that are identical except to the extent that differences between the civil and criminal settings dictate different rules. We have not yet worked out a good means of doing this. What seems to happen is that one Committee creates the version it likes best, the other Committee does the same, and then everyone meets in front

of the Standing Committee and feels obliged to fight the good fight for its own Committee's version. For this purpose, the Civil Rules Committee meeting will be on Thursday, April 20; if that is — as I suspect — close to the meeting of the Criminal Rules Committee, coordination may be even more difficult. I do not know whether the need for coordination is so great as to justify one reporter attending the meeting of the other Committee, nor even whether either Committee is willing to delegate enough authority to its reporter and chair to get around the difficulty of Committee Commitment. Let's think about the question; better ideas are more than welcome.

Sincerely yours,



Edward H. Cooper

EHC/lm
encl.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~ Examining Jurors. The court may ~~must permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper~~. The court must permit the parties to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter set by the court in its discretion. The court may terminate further examination by a party whose examination may impair the jury's impartiality.

OR: The court may terminate further examination by a party who misuses the right of examination.

OR: The court may prohibit examination by the parties if it finds that the right to supplement the court's examination is outweighed by the risk that a party will misuse the examination. If examination by the parties is prohibited, the court must submit to the prospective jurors any proper additional questions of the parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 149
LITTLE ROCK, ARKANSAS 72201
(501) 324-6863
FAX (501) 324-6869

BILL WILSON
JUDGE

February 24, 1995

Re: The Honorable James A. Parker's letter of February 17, 1995 re Federal Rules of Civil Procedure 47(a) and Federal Rule of Criminal Procedure 24(a)

The Honorable Patrick E. Higginbotham
13E1 Earle Cabell Federal Building
and U. S. Courthouse
1100 Commerce Street
Dallas, TX 75242

The Honorable D. Lowell Jensen
Post Office Box 36060
San Francisco, CA 94102

Professor Edward H. Cooper
The University of Michigan Law School
Hutchins Hall
Ann Arbor, MI 48109-1215

Professor David A. Schlueter
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, TX 78284

Dear Judges and Professors:

While I am not the word merchant that Jim Parker is, I have no ojbection to substituting "will be permitted", but I am opposed to the word "may."

While I usually opt for brevity (in rules, not my letters), I am sorely afraid that "may" would be perceived as discretionary by judges who, for a reason unknown to me, are hostile to lawyer voir dire.

I have some experience with this sort of thing. As you know, Federal Rule of Criminal Procedure 11(e)(2) provides, in part, that:

> If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court...(emphasis supplied).

I had always thought that the word "shall" had some sort of mandatory connotation to it. But this was before I took this issue to the Eighth Circuit under the All Writs Act. A district judge (and a fine one too) here in the Eastern District of Arkansas refused to allow the U. S. Attorney and me "to spread of record" a plea agreement we had reached. The court categorically rejected all plea agreements.

The Eighth Circuit, in essence, held that the word "shall" really means "may." See U. S. v. Charles Griffin, Joe Chambers and Charles Yielding, 462 F.Supp. 928.

Thank you for your consideration.

Cordially,

Bill W. Wilson, Jr.

Wm. R. Wilson, Jr.

cc: The Honorable Alicemarie Stotler

Research Division
202-273-4070

memorandum

DATE: 9/26/94
TO: Advisory Committee on Civil Rules
FROM: John Shapard, Molly Johnson
SUBJECT: Survey Concerning Voir Dire

At the request of the Chairman of your Committee, the Center initiated a survey of active district judges concerning certain of their practices in conducting voir dire, as well as their opinions about counsel participation in voir dire and their impressions of the effect on voir dire of the line of cases beginning with *Batson v Kentucky*, 476 U.S. 79. A copy of the questionnaire is attached as exhibit A. This memorandum explains the results of the survey, and provides in a few instances comparisons to the results of a similar survey conducted by the Judicial Center in 1977.[1]

The survey was mailed to a randomly selected sample of 150 active district judges, with the sampling designed to achieve proportional representation of districts, chief judges, and time since appointment to the district bench. 124 Judges (83%) completed and returned the questionnaire. Because the information provided here is based on a sample, the results must be understood as estimates. The fact, for example, that 59% of respondents indicated that they ordinarily allowed counsel to ask questions during civil voir dire does not necessarily mean that 59% of all district judges allow some counsel questioning. There is a margin of error of roughly plus or minus 8% (hence somewhere between 51% and 67% of all district judges allow counsel questioning).[2]

Extent of Counsels' Participation in Voir Dire

One focus of the survey was the extent to which judges permit counsel to address prospective jurors directly—as opposed to the court asking all questions—in the course of voir dire. Asked about their "standard" practice, 59% indicated that they allowed at least some direct attorney participation in voir dire of civil trial juries, and 54% so indicated with regard to criminal juries. In the Center's 1977 study, less than 30% of district judges reported allowing any questioning by counsel during voir dire in "typical" civil or criminal cases. There was no marked difference in responses to a second question asking about practices in "exceptional" cases, the percentages being 67% (civil) and 51% (criminal). The extent of permitted counsel participation was indicated by three different responses, distinguished by unavoidably subjective terms. One response indicated that the judge allows counsel to "conduct most or all of voir dire," another

[1] See Bermant, The Conduct of Voir Dire Examination: Practices and Opinions of Federal District Judges, Federal Judicial Center, 1977.

[2] To be a bit more specific, the plus-or-minus 8% figure is the size of the 95% confidence interval, which means that with random sampling from the population of active district judges, there is at most a 5% chance that the percentage given for the sample (here 59%) would occur if in fact the percentage for the entire population of active district judges was more than 8% different (i.e., below 43% or greater than 59%).

indicated that the judge conducts a preliminary examination and then gives " counsel a fairly extended opportunity to ask additional questions", and the third indicated that after the judge's examination, counsel were given "a very limited opportunity to ask additional questions." The percentages of these answers selected by the respondents are shown in Table 1.

TABLE 1

RESPONSE	"Standard Practice" Civil	"Standard Practice" Criminal	"Exceptional Cases" Civil	"Exceptional Cases" Criminal
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	9%	7%	8%	6%
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	18%	18%	27%	26%
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	33%	29%	29%	28%
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	41%	46%	34%	38%
e. Other	2%	1%	2%	3%

Another question asked the judge to estimate the average time taken in questioning jurors during voir dire, broken down between time spent by counsel and by the court, and by civil and criminal cases. The average total time—court and counsel—reported was 1:12 for civil cases and 1:39 for criminal cases. The range of the responses is shown in Table 2, together with figures for a similar question asked in the Center's 1977 study.

TABLE 2

Total Average Time Spent Questioning Prospective Jurors	**Percent of Respondents** Current Study Civil	Current Study Criminal	1977 Study Civil	1977 Study Criminal
less than 30 minutes	4%	2%	33%	16%
30 min - 1 hour	25%	10%	49%	49%
1 - 2 hours	56%	55%	14%	28%
2 or more hours	15%	34%	1%	7%

Among judges who reported any time expended by counsel, the average was 31 minutes in civil cases and 40 in criminal cases. Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire (which is summarized above in Table 1). Table 3 shows the reported times broken down by standard voir dire practice.

TABLE 3

Standard Voir Dire Practice	Average Voir Dire Time					
	Civil			Criminal		
	Ct	Cnsl	**Tot**	Ct	Cnsl	**Tot**
a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).	0:13	0:55	**1:09**	0:20	1:08	**1:28**
b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.	0:43	0:32	**1:15**	0:57	0:42	**1:39**
c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.	0:54	0:20	**1:15**	1:19	0:25	**1:44**
d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.	1:05	0:00	**1:05**	1:32	0:00	**1:32**

Effects of *Batson*

The survey also asked questions pertaining to the influence of *Batson* and its progeny (hereafter, simply "*Batson*"). When asked what percentage of their jury trials in the last year had involved a *Batson-type* objection,[3] 36% answered "none." The average percentage reported was 7%, with a median of 2%. (15% reported that such objections occurred in more than 10% of their trials).

It can be argued that *Batson* creates a need for increased attorney participation in voir dire (or at least for more probing voir dire) to afford counsel more information on which to base their exercise of peremptories. *Batson* prohibits exercise of peremptories based simply on stereotypes of certain kinds. Hence counsel may need more information to determine, for instance, if a particular prospective juror harbors the bias that counsel suspects is common among persons of that class (e.g., that race, gender). To help illuminate this issue, we asked judges how often they though the explanation for a peremptory that is offered in response to a Batson objection was an explanation based on information that would be adduced from a routine voir dire (as opposed to information obtained only from a somewhat probing voir dire). The average answer was 84%, with a median of 90% (fully 47% of responses were 95% or greater). Hence a large majority of judges think it rare that explanations for peremptories are based on information other than that "routinely elicited in voir dire or otherwise routinely available to counsel."[4]

When asked whether *Batson* "led you to alter your practice with regard to voir dire," fewer than 20% of the judges gave any affirmative response. Of those, most noted changes regarding the method of exercising peremptories. Only about 5% indicated that they had changed their

[3] See the attached survey for the definition of "*Batson-type* objection."

[4] Of course, if the only information available to counsel is that which is "routinely elicited," then the explanation can hardly be based on anything else. It that were the basis for the answers to this questions, however, one might expect to see a correlation between the answer to this question and the extent of counsel participation in voir dire reflected in questions 1 and 3. There was no significant correlation, and the only one even suggested by the data suggests that numerically larger answers to this question are most common among judges who allow counsel to conduct all or most of the voir dire.

practices regarding voir dire questioning, all but one indicating that voir dire questioning is more probing than in the past, at least in "exceptional" cases.[5]

Asked whether *Batson* had led to changes in regard to challenges for cause, 18% indicated that counsel "have increased their efforts to excuse jurors for cause," and 16% said that they "have become more willing to excuse jurors for cause." 74% of the respondents indicated that neither change had occurred.

Others Views Regarding Questioning by Counsel in Voir Dire

Question 8 asked the judges to indicate statements with which they agreed pertaining to questioning by counsel in voir dire. The statements and the percentage indicating agreement are shown in Table 4.

TABLE 4

Questioning of prospective jurors by counsel:

a. Takes too much time.	50%
b. Is less time-consuming than voir dire conducted entirely by the judge.	4%
c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).	67%
d. Is an appropriate opportunity for counsel to introduce themselves to jurors.	31%
e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.	14%
f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.	32%
g. Is more effective because counsel know better what questions to ask.	17%
h. Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.	33%
i. Other	23%

Judges who indicated agreement with statement a in Table 4 (counsel questioning takes too much time) were asked to indicate how much more time counsel questioning would take than voir dire conducted entirely by the judge. The median response was 1.5 hours for civil cases and 2 hours for criminal cases. Compared to the total voir dire time reported by the respondents in question 2 (see tables 2 and 3 and associated text, above), these responses reflect a view that counsel questioning of jurors will more than double the time required for voir dire. This is at odds with the information presented in Table 3, above, which indicates very little difference in voir dire time regardless of whether the judges allows much, little, or no counsel questioning of jurors. The disharmony between these two aspects of the responses may also be due to either or both of two other phenomena:

1. Those judges who allow counsel questioning may manage to do so without it taking excessive time, and many of those who prohibit counsel participation may do so in part because they believe it will take too much time—a belief sometimes but not always based on personal experience.
2. At least some judges apparently interpreted the inquiry as pertaining to "unlimited" attorney voir dire (e.g. as they experienced voir dire as a state court judge), and indicated that

[5] The percentages mentioned in this paragraph pertain only to those respondents who were appointed to the bench before the *Batson* decision (86% of all respondents).

attorney participation in voir dire takes vastly more time, even though the judge routinely allows at least some questioning by counsel (the "takes too much time" response was chosen by 28% of the judges who report that they routinely allow some counsel questioning in both civil and criminal cases).

The responses to question 8 (see Table 4) can be used to gauge general attitude about counsel questioning in voir dire. Responses a, c, and h may be taken as negative views of attorney participation in voir dire, and the others (except i - other) as positive. Of those who selected any of these answers, 19% expressed only positive views, 68% expressed only negative views, and 13% expressed both positive and negative views.

Finally, we asked those judges who do allow counsel questioning to indicate how they ensure that counsel "do not use voir dire for inappropriate purposes or simply take too much time." The responses are summarized in Table 5.

TABLE 5

Response	Percent:
a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.	41%
	Percent of those answering other than a
b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.	44%
c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. (By what means:)	79%
c1. oral reminder at the bench	41%
c2. standard part of pretrial order	8%
c3. other (mostly during pretrial conference)	41%
d. I generally limit the time allowed for voir dire.	50%
Average minutes per side allowed in routine case, Civil: 22, Criminal: 25	
e. Other (most referred simply to close monitoring of counsels' questions)	10%

A number of the respondents offered explanations of their approaches to conducting voir dire that are not amenable to tabulation but that may be useful in considering either questioning by counsel during voir dire or how voir dire practices might be modified in light of *Batson*. These are listed below.

Approaches to controlling attorney questioning of prospective jurors.

1. Some judges who indicated that they permit counsel to conduct all or most of the voir dire pointed out that the oral questioning was limited to follow-up questions. The initial "voir dire" is handled by a questionnaire tailored to the specific case that jurors are asked to complete before reporting to the courtroom. An example of such a questionnaire is attached as exhibit B.
2. While many judges impose time limits on counsel questioning, others constrain the questioning by limiting the scope of questioning, sometimes by an in-chambers conference where counsel explain the questions they want to ask and the judge in turn specifies what questions will be permitted.

3. Some judges will simply take over the questioning (and thus end counsel's questioning) if counsel does not comply with the judge's rules concerning proper inquiry. Other judges employ the approach of suggesting that counsel "rephrase" a question that the court finds problematic.
4. One respondent noted following the Scheherezade rule: "if they keep me interested, they can keep asking questions."
5. Another mentioned a list of restrictions, including: (a) A question may not be directed to an individual juror if it can be addressed to the panel as a whole; (b) Prohibit using voir dire to instruct jurors; and (c) A question may not seek a juror's commitment to support a given position based on hypothetical facts.

Responses to *Batson*:

1. Some judges require that peremptories be exercised first after an initial panel (e.g. 12 jurors) have passed challenges for cause, with challenged jurors then being replaced by random draw from the pool of prospective jurors, peremptories exercised only with respect to the replacements, and so on. This approach prevents counsel from knowing who might replace a challenged juror, and so makes it more difficult to pursue a strategy prohibited by *Batson* (or any other strategy).
2. Other judges, for the same purposes, allow all peremptories to be exercised after all challenges for cause, but with the parties making their choices "blind" to the choices made by opposing parties (in contrast to alternating "strikes" from a list of the names of panel members).[6]

Observations about questioning of prospective jurors by counsel.

1. A number of respondents indicated that judges should conduct voir dire, because—as every trial lawyer knows—the lawyer's objective is to obtain a biased jury. Only the judge is in a position to foster selection of unbiased jurors.
2. A number suggested that judges simply do a better job of voir dire questioning, for one or more of several reasons: (a) counsel aren't very good at it, (b) some questions are better asked by the judge (to shield counsel from adverse responses to the asking of such questions), and (c) jurors will be more candid in responding to the judge than to counsel.

[6] A more extreme approach to the same end (not mentioned by any of the respondents but practiced in some state courts) is a procedure where jurors are individually questioned and passed for both peremptory and cause challenges one at a time—juror #1 is seated before juror #2 is questioned (or perhaps even identified). This approach imposes maximum limits on counsel's ability to employ peremptories in a strategic manner.

EXHIBIT A

Questionnaire Concerning Conduct Of Voir Dire

1. What is your **standard** practice with regard to questioning jurors during voir dire–the practice you follow in routine cases? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).
☐	☐	b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.
☐	☐	c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.
☐	☐	d. I conduct the entire examination. I permit counsel to submit to me questions they would like me to ask, but do not generally allow counsel to ask any questions directly.
☐	☐	e. Other. Please explain: _____

2. About how much time–on average–do you think is taken in your courtroom by the questioning of potential jurors in voir dire in a routine case?

Questioning by **counsel** in:
routine civil case: _____hour(s) routine criminal case: _____hour(s)
Questioning by **court** in:
routine civil case: _____hour(s) routine criminal case: _____hour(s)

3. What is your practice in **exceptional** cases, e.g., where the case has received notable publicity or where jurors may have strong emotional responses to the subject matter? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. I allow counsel to conduct most or all of voir dire. I either ask no questions or ask only very general, standard questions addressed to the entire venire (e.g., please raise your hand if you know any of the parties or attorneys).
☐	☐	b. I conduct an initial examination covering usual voir dire questions, and then give counsel a fairly extended opportunity to ask additional questions.
☐	☐	c. I conduct an initial examination covering usual voir dire questions, and then give counsel a very limited opportunity to ask additional questions.
☐	☐	d. I conduct the entire examination. I permit counsel to submit questions they would like me to ask, but do not generally allow counsel to ask questions directly.
☐	☐	e. Other. Please explain: _____

4. In approximately what percentage of jury trials you conducted in the last 12 months did counsel make a *Batson*-type objection* to opposing counsel's exercise of peremptories?

_____%

5. In your experience, when a *Batson*-type* objection is made and respondent is called upon to explain the basis for challenging jurors, about what percentage of such explanations are based on information that would be elicited routinely in voir dire or from juror information routinely provided to counsel (e.g., juror's profession, marital status, demeanor), as opposed to information gleaned only from a somewhat probing voir dire (e.g. a question designed to elicit insight about the juror's attitude toward authority, and hence toward police)?

_____ % of explanations are based on information routinely elicited in voir dire or otherwise routinely available to counsel

6. Has the advent of *Batson*-type* objections led you to alter your practice with regard to voir dire? (Please check one for civil and one for criminal cases.)

Civil cases	Criminal cases	
☐	☐	a. Not applicable. I became a judge after the *Batson* decision.
☐	☐	b. No.
☐	☐	c. Yes, my standard practice is to conduct or permit counsel to conduct a more probing voir dire now than I did before *Batson.*
☐	☐	d. Yes, in some exceptional cases I conduct or permit counsel to conduct a more probing voir dire than I did before *Batson.*
☐	☐	e. Yes, I now conduct a less-probing voir dire, or allow counsel less opportunity to conduct a probing voir dire.
☐	☐	f. Other. Please explain: _____

_____

_____

_____

7. Do you think that *Batson* and its progeny cases have resulted in an increase either in counsels' efforts to have jurors excused for cause or in your willingness to excuse jurors for cause? (You may check both yes answers, or any single answer.)

Counsel have increased their efforts to excuse jurors for cause: ☐ No. ☐ Yes.

I have become more willing to excuse jurors for cause: ☐ No. ☐ Yes.

---

* A "*Batson*-type objection" means any objection to the exercise of peremptory challenges based at least in part on a claim that the peremptories were exercised due to the race, nationality, gender, or other characteristic of the challenged jurors.

8. Do you believe that allowing counsel to question potential jurors during voir dire: (check all with which you agree)

- ☐ a. Takes too much time (about how much **more** time than voir dire conducted entirely by you:

  Civil cases:_____hour(s) Criminal cases:_____hour(s))

  b. Is less time-consuming than voir dire conducted entirely by the judge.
- ☐ c. Results in counsel using voir dire for inappropriate purposes (e.g. to argue their case, or simply to "befriend" jurors).
- ☐ d. Is an appropriate opportunity for counsel to introduce themselves to jurors.
- ☐ e. Is necessary to permit counsel and the parties to feel satisfied with the jury selection process, but is not otherwise worthwhile.
- ☐ f. Is necessary to permit counsel and the parties adequately to inform themselves of bases for challenges, whether peremptory or for cause.
- ☐ g. Is more effective because counsel know better what questions to ask.
- ☐ h Is inappropriate; it should be the judge who solicits information about the jurors' ability to properly discharge their duties as jurors.
- ☐ i. Other. Please explain: _____

  _____

  _____

  _____

9. If you allow counsel to ask questions during voir dire, how do you ensure that they do not use voir dire for inappropriate purposes or simply take too much time? (check all that apply)

- ☐ a. Not applicable. I do not permit counsel to ask questions of jurors during voir dire.
- ☐ b. I rarely find it necessary to do anything, although I may occasionally admonish an attorney to take less time or to avoid speeches or improper questions.
- ☐ c. I make clear to counsel at the outset that I do not tolerate inappropriate or time-consuming questioning. → By what means do you to this?:
  - ☐ oral reminder at the bench
  - ☐ standard part of pretrial order
  - ☐ other: _____
- ☐ d. I generally limit the time allowed for voir dire. In a routine case, I allow each side about _____ hour(s) in civil cases and _____ hour(s) in criminal cases.
- ☐ e. Other. Please explain: _____

  _____

  _____

  _____

Thank you. Please return the survey in the accompanying envelope, or to:
The Federal Judicial Center, Research Division, One Columbus Circle, N.E.
Washington D.C. 20002-8003 ATTN: Voir Dire

EXHIBIT B

[After the prospective jurors have answered the questions set out below, the judge instructs them to indicate if they have any affirmative answers to a questions in schedule A or negative answers to questions in schedule B. Jurors who so indicate are then questioned at the sidebar, with counsel afforded an opportunity to ask questions supplemental to those asked by the judge.]

SCHEDULE A

1. The defendant in this case is John Doe.

   Q. Do you know the defendant or any members of the defendant's family.

2. The defendant John Doe is represented by Attorneys W. T. and J. W.
   The government is represented by Assistant United States Attorneys S. Y. and B. S.

   Q. Do you know any of these attorneys or any members of their families?

3. Do you know any of the partners or law associates of any of the attorneys?

4. The indictment in this case charges the defendant with conspiracy to possess with intent to distribute, and distribute, cocaine in violation of the United States Code. The indictment is merely the means by which the defendant is notified that he must stand trial for the alleged criminal conduct. Neither the indictment nor the fact of the indictment is evidence, nor should it be considered as evidence. The indictment identifies other persons who allegedly participated in the conspiracy.

   A. The persons so named are:
   [list of 10 names]

   QUERY: Do you know any of these persons or members of their families?

   B. Do you know of any reason why you would not follow the Court's instruction that the indictment is not evidence and the fact of the indictment is not evidence and neither is to be considered as any proof in this case?

   C. Have you heard on the radio or read in a newspaper anything concerning the charge of conspiracy against the defendant, Mr. Doe?

   D. Do you know anything about the subject matter of this trial?

5. Have you ever served on a Grand Jury?

6. Have you been employed by:

a. Any law enforcement agency; or
b. Any other Agency or Department of the United States of America?
c. Any branch of the military?

7. Has any member of your family or close friend been employed by:
   a. Any law enforcement agency; or
   b. Any other Agency or Department of the United States of America?

8. Have you or has any member of your household been a party, either plaintiff or defendant, in a civil case that has been filed in the course of the past ten years?

9. Have you or has any member of your family been indicted by a Grand Jury?

10. Have you or has any member of your family been convicted of any crime other than a traffic offense?
    NOTE: Driving under the influence of alcohol or drugs is not to be considered for the purpose of this question as a traffic offense.

11. Have you ever been a witness in a criminal case?

12. Have you or has any member of your family ever been the victim of a crime?

13. Have you or has any member of your family ever filed a claim against the United States?

14. Do you have a hearing or sight problem that would interfere with your ability to see the witnesses or to hear the testimony in this case?

15. Are you on any medication that would impair your ability to concentrate on the testimony, the arguments of counsel and the instruction of the Court?

16. Do you have a health problem that would impair your ability to give this case your complete attention.

17. Does any member of your immediate family have a health problem that would impair your ability to fully concentrate on the testimony of this case?

18. Would you judge the credibility of law enforcement officers or government witnesses by any different standards than you would judge the credibility of any other witnesses?

19. Do you have any beliefs, personal, moral, or religious, that are of such a nature that you would not be unable or unwilling to sit in judgment of another's guilt or innocence?

20. Have you or has your close friends or relatives ever been involved in a case or dispute with the United States Government or any agency thereof in which a claim was made against the government or in which the government has made a claim against you, a close friend, or relative?

21. It is always difficult for the Court to accurately predict the length of a trial. Obviously, those who are chosen to serve on the jury will be required to be here for the entire trial and for the jury deliberation. It is the Court's plan to run this trial all five days of this week, including the federal holiday of Thursday, the 11th of November. The Court will not be in session on Wednesday, November 17, because of other duties. It is my best estimate at this time that the service we are asking you to perform will require this week and next week. I recognize that jury service of that length will be inconvenient and, in some cases, work severe hardship. If you believe that you have a good case for being excused because of severe hardship, and wish to be excused for that reason, you should so indicate by answering this question "Yes" and bringing your answer to my attention when I speak to you at the side bar.

22. This case involves allegations of drug distribution, specifically cocaine distribution.

A. Do you now, or have you in the past, or alternatively, does any member of your family now, or in the past, have a problem with the use of illegal substances such as marijuana, heroin, LSD, cocaine or crack cocaine that has resulted in:

(1) hospitalization?

(2) attendance at a drug treatment center?

(3) addiction?

B. Do you hold any beliefs or do you have any emotional reactions regarding the use or distribution of the narcotic drug controlled substance known as cocaine and marijuana that would interfere with your ability to fairly and impartially consider

the evidence in this case and render a verdict based on your determination of the facts?

23. The Court understands with respect to the government's case the following:

(1) The government's investigation included use of a court authorized wiretap of private citizens' phones.

(2) During the investigation of this case, the government paid money to certain cooperating witnesses for moving expenses.

(3) The government has entered into cooperation agreements with certain defendants whereby those defendants will receive consideration in the resolution of their cases in exchange for truthful testimony.

QUERY: Do you hold any beliefs or have any emotional reactions to the above described conduct on the part of the government that would interfere with your ability to fairly and impartially consider the evidence in this case and render a verdict based on your determination of the facts?

24. Do you know any reason why you would be biased or assert prejudice or sympathy in this case?

25. Are you personally acquainted with or know any relatives or close friends of any of the following named individuals who may appear as witnesses in this case:
[numbered list of 38 names]

26. Do you know of any reason why you cannot serve as a fair and impartial juror in this case?

SCHEDULE B

1. The laws of the United States guarantee to a defendant that he is presumed to be not guilty. Are you in sympathy with the rule of law that clothes the defendant with a presumption of innocence?

2. The law requires that the burden of proof shall be upon the government to convince you of each and every element of a crime beyond a reasonable doubt before you can return a verdict of guilty relative to said crime. Are you in sympathy with the rule of law that requires you as a juror to give a defendant the benefit of reasonable doubt?

3. The law does not require that a defendant prove that he is not guilty. Are you in sympathy with the rule of law that does not require a defendant to prove his innocence?

4. Are you willing to confine your deliberations to the evidence in this case as presented in the courtroom?

5. Are you willing to apply the Court's instructions as to the law and not substitute any ideas or notions of your own as to what you think the law should be?

6. Are you willing to wait until all the evidence has been presented and the court has instructed you on all the applicable law before coming to any conclusion with respect to charges contained in the indictment?

7. In your deliberations are you willing to abide by your convictions and not agree with other jurors solely for the sake being congenial, if you are convinced that the opinions of other jurors are not correct?

Agenda Item II D #3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 26; Proposed Amendment to Require Notification to Defendant of Right to Testify**

DATE: **3/11/95**

Attached is a letter from Mr. Robert Potter encouraging the Committee to amend the Federal Rules of Criminal Procedure to require the trial court to advise the defendant of the right to testify.

The letter is self-explanatory and includes a draft of an amendment which would in the view of Mr. Potter solve the problem of a defendant pursuing a post-conviction attack on the grounds that he or she was never apprised of the right to testify at trial.

As per our normal procedures, if the Committee believes that such an amendment is warranted, appropriate language can be drafted and considered at the Committee's next meeting.

STRASSBURGER MCKENNA
GUTNICK & POTTER
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
322 BOULEVARD OF THE ALLIES
SUITE 700
PITTSBURGH, PENNSYLVANIA 15222
412-281-5423
FAX # (412) 281-8264

PITTSBURGH, PENNSYLVANIA

GREENSBURG, PENNSYLVANIA

January 27, 1995

The Honorable D. Lowell Jensen
Chairman, Advisory Committee on the
Federal Rules of Criminal Procedure
United States District Judge
U. S. Courthouse
1301 Clay Street, 4th Floor
Oakland, CA 94012

RE: Proposed Federal Rule of Criminal Procedure: Defendant's Testimonial Rights

Dear Judge Jensen:

I have in the past few years been involved in a number of cases in which the defendant in a criminal case, convicted at trial, seeks to collaterally attack his conviction on the ground that his constitutional right to have testified on his own behalf was infringed at trial.

In every such case, the trial record is absolutely silent on the question whether the defendant knew of his right to testify on his own behalf, that this right was a right which he and he alone could decide to exploit or forego, and that his decision not to testify was a knowing and intelligent "waiver" of that constitutional right. The reason for this is simple: during a criminal trial in which the defendant is represented by counsel, there is no advice given by the court or inquiry made by the court directed to this question. The assumption is made that defense counsel will take care of such matters, will appropriately inform and advise his client, and that if the defendant does not testify, it must be because he has personally chosen not to do so.

In some jurisdictions, the post-conviction claim that the defendant was denied his constitutional right to testify on his own behalf will be rejected out of hand where the defendant was represented by counsel. In such jurisdictions, the failure of the defendant to have piped up during the trial and to have complained to the trial judge is taken as conclusive evidence that he knew he had the right to testify at trial and

voluntarily waived that right. This view, of course, while a convenient and inexpensive method of disposing of the question, is a Procrustean solution. There may well be, in fact, defendants who had no knowledge and did not voluntarily waive the right to testify.

In most jurisdictions, the allegation will require an evidentiary hearing, a hearing at which prior counsel will testify and at which the defendant will testify. I have, I regret to say, considerable experience in conducting those hearings.

Prior counsel generally appears -- usually after a briefing and prehearing interview with the prosecutor's office -- and remembers that he told the defendant that he had the right to testify, that it was a constitutional right which only the defendant could exercise and waive, that he gave advice to the defendant not to testify, and that the defendant took his advice and did not testify. I have often not found it possible personally to believe that testimony. I know from years of teaching professional responsibility courses at the School of Law of the University of Pittsburgh that many, many lawyers do not know off the top of their heads the four points at which the defendant in a criminal trial must make a decision, and that trial counsel has no right or power.

The defendant, of course, remembers things very differently. The defendant testifies that his lawyer told him he was not going to testify, and that was that. The defendant testifies that he did not understand that while his lawyer had the legal power to decide almost everything else that was done at trial and did in fact conduct the trial virtually without consultation with the defendant, that the defendant had the right to decide for himself whether to testify. And this assertion leads to some of the most mind-numbing, philosophically difficult cross-examination you will ever hear: "Q. You say your lawyer told you you were not going to testify? A. Yes, that's right. Q. So you knew you had the right to testify, correct? A. I didn't know it had to be my decision. Q. But you knew the court would let you testify, otherwise there would not have been any point in your lawyer's telling you you were not going to testify, right? A. I guess so. Q. So you knew you had the right to testify? A. Yes, I knew I could testify. Q. So if you wanted to testify, you knew you could have testified, right? A. Yes, I guess so. Q. Your lawyer did not tell you that you didn't have the right to testify, did he? A. No. Q. And your lawyer did not tell you that he was forbidding you to testify, did he? A. No. Q. He did not tell you that you did not have the right to testify, did he? A. No. Q. So let me see if I have this. You knew you had the right to testify if you wanted, didn't you? A. Yes. Q. And your lawyer did not tell you that you could not testify, that you were not allowed to testify, right? A. Right. Q. So you knew you had the right to testify and you

knew you were not prohibited from testifying, right? A. Yes. Q. So if you wanted to testify at trial, why didn't you? You had the right and you knew it, and you were not prohibited from testifying, and you knew that too? A. Uhh....."

I have discovered an amazing fact: In the entire jurisprudence of post-conviction attack on this ground, I have not found a single case in which the defendant's testimony was accepted over his prior counsel's testimony!!! Not one.

This leads me to believe that the rule actually is in all jurisdictions that the allegation by defendant that his right to testify on his own behalf was infringed at trial is a meaningless allegation. In some jurisdictions, the court will deny the allegation out of hand. In most others, the allegation will be rejected, but only after an evidentiary hearing, conducted at some expense, at which the prior attorney's testimony is accepted and the defendant's testimony is rejected. There is no difference in outcome. The only difference is in the expense of arriving at the outcome!

In cases in which the defendant alleges that his right to testify was infringed because the lawyer made the decision from him, the allegation is also usually made that the lawyer's advice (???) or decision (???) constituted ineffective assistance of counsel because no competent lawyer would have advised the defendant not to testify.

I have discovered a second amazing fact: In the entire jurisprudence of post-conviction attacks, I have not found a single case in which the defendant's argument that his counsel's advice not to testify was ineffective has been accepted. It is a very simple thing for defense counsel, after the fact and with generous help from the prosecutor's office, to recall some "reasonable" basis for having advised the defendant not to testify. I have even handled a case in which the post-conviction court solemnly accepted as "reasonable" trial counsel's assertion that he advised the defendant not to testify because he "stuttered" and would not make a good witness. The defendant had no prior criminal convictions, no prior bad acts that could be used for impeachment, no reason to fear taking the stand. And the trial counsel got away with the assertion that he advised him not to testify because he stuttered.

What I draw from all of the above is that while our jurisprudence announces with great force that the defendant has a constitutional right to testify on his own behalf, and that the defendant and only the defendant has the right to make the decision to testify or not to testify, our jurisprudence in practical fact really does not care a fig whether a defendant, represented by counsel, knew or did not know of that right, and

whether he did or did not voluntarily and personally give up the right to testify at trial.

What to do?

The answer is clear. We should stop wasting a lot of time on meaningless post-conviction hearings in which the defendant always loses and adopt a rule of criminal procedure which guarantees in every single case that the defendant knows of his testimonial rights at trial and that any decision, whether to testify or not testify, is a decision by the defendant.

I have drafted such a rule and you will find it enclosed. I can personally see no argument against its immediate adoption.

There has been a considerable amount of litigation in which the issue was presented whether the trial court, during trial, has an affirmative obligation to assure that the defendant understands his testimonial rights and that any decision is that of the defendant. The vast majority of cases rejecting this argument do so for an express reason and an implicit reason. The express reason is that any attempt by the trial judge to give such advice would unnecessarily intrude the trial judge into the delicate relationship between counsel and his client. The implicit reason is that if this argument were accepted in post-conviction litigation, as distinguished from a rule of criminal procedure, the reasoning would have to be constitutionally based (trial courts do not generally have the power to announce merely procedural rules and must find violation of constitutional rights), and any such decision, if retroactively applied, would lead to wholesale freeing of prisoners incarcerated as a result of trials in which the record does not show such advice having been given.

The implicit reason, of course, is no obstacle to adopting a rule of criminal procedure. The express reason also does not withstand analysis. My proposed rule of criminal procedure would not even cause the trial judge to discuss the matter with the defendant. It merely requires the execution of a writing and placing the writing into the original record. Discussion leading to execution of the writing need involve only defense counsel and his client, the defendant. The only intrusion on the relationship between defense counsel and his client is to assure that defense counsel does his job.

I would, of course, be most willing to answer any questions you may have. I would ask that you excuse my not having interspersed the above discussion with

citation to relevant judicial decisions. I assure you, however, that the foregoing discussion is entirely accurate and reflects the actual practice in this country.

Very truly yours,

Robert L. Potter

RLP:jlm

Enclosure:
Proposed Rule of Criminal Procedure

RULE ____. REQUIRED STATEMENT CONCERNING DEFENDANT'S TESTIMONIAL RIGHTS

(a) In all criminal trials, whether jury or non-jury, defense counsel or defendant in a case in which the defendant is proceeding without counsel shall place into the record of the case a written statement signed by the defendant and witnessed by a notary or by any employee of the court in which the defendant states that:

(1) He has been advised and understands that he has the right to testify on his own behalf in the case;

(2) He has been advised and understands that he has the right not to testify on his own behalf, and that if he does not testify, no adverse inference will be drawn or reference made to his not having testified;

(3) He has been advised and understands that he and he alone has the right to decide whether or not to testify on his own behalf, and that this decision cannot be made for him by his counsel or by anyone else;

(4) He has, in a case in which the defendant is represented by counsel, discussed with his counsel the question whether or not he should testify and he has received his counsel's advice; and

(5) He understands that once he has signed this acknowledgement, his decision to testify on his own behalf or not to testify on his own behalf will be in any subsequent proceeding conclusively presumed to have been a knowing and voluntary decision.

(b) All steps concerning compliance with this Rule will be conducted out of the hearing or knowledge of the jury.

Agenda Item II D #4

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Professor David A. Schlueter, Reporter**

RE: **Rule 35(c); Possible Amendment to Clarify "Imposition of Sentence"**

DATE: **March 5, 1995**

In *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994), the trial court corrected the defendant's sentence almost one month after announcing his sentence, but before formally entering the judgment and sentence. On appeal, the Ninth Circuit noted that the term "imposition of sentence" is a term of art generally referring to the time that the sentence is orally announced. The court noted that the district court, however, apparently read the Advisory Committee Note accompanying Rule 35(c) to mean that "imposition of sentence" actually referred to the formal entry of the judgment. Without deciding whether the correction in this case was timely, the appellate court stated: that:

> The interpretation of Rule 35 is a difficult issue, for while the intention of the drafters seems fairly clear, the language chosen doe not further it. We hope that the Advisory Committee on Criminal Rules will be able to clarify this point. 30 F.3d at 1171.

I have reviewed my notes, correspondence, etc. concerning the Rule 35(c) amendment some years ago and I cannot find any dispositive language which might shed light on this issue. The subcommittee's and Committee's focus on the amendment was the need to develop a time frame for such corrections which would not interfere with notices of appeal. Although the Ninth Circuit did not mention it, the Advisory Committee Note also contains the following statement:

> Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention *immediately after sentencing*.(emphasis mine)

That language seems to reinforce the view that the time for acting runs from the oral announcement of the sentence because under Rule 4 a defendant may file a notice of appeal after the announcement of sentence, but before the entry of the judgment. It is worth noting that at about the time Rule 35(c) was added, Appellate Rule 4(b) was amended to note specifically:

> The filing a notice of appeal under this Rule 4(b) does not divest the trial court of jurisdiction to correct a sentence under Fed. R. Crim. P.35(c) nor does the filing of a motion under Fed. R. Crim. P.35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

This matter will be on the agenda for the Committee's April meeting.

two years on a defendant who had been misinformed in this manner by the INS:

> This Court refuses to impose a sentence that grossly exceeds that which the government specifically represented to the non-citizen Defendant—and countless others—as the maximum penalty he faced upon illegal re-entry to the United States. Imposing a term of incarceration in excess of two years would be to sanction an indefensible and inexcusable example of misinformation disseminated by the United States, and would expose this defendant and others to a potential deprivation of liberty lasting seven and a half times longer than that which the government represented as the maximum term.

As an alternative ground for the sentence, the district court determined that a downward departure was warranted in light of the INS's misrepresentation.

We recently addressed the issues presented by this appeal in *United States v. Ullyses-Salazar*, 28 F.3d 932 (9th Cir.1994). In that case, we concluded that neither due process nor principles of equitable estoppel precludes imposing a prison term exceeding two years for illegal reentry on a defendant who had been advised erroneously by the INS before deportation that the maximum penalty for that offense was two years. *See id.*, at 936–937. We also concluded that such circumstances do not constitute a valid basis for a downward departure. *Id.* at 938. Accordingly, the district court erred by limiting Sanchez-Montoya's sentence to two years.

We VACATE the sentence and REMAND for resentencing in accordance with this opinion.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Miguel NAVARRO-ESPINOSA,
Defendant-Appellant.

No. 93-10484.

United States Court of Appeals,
Ninth Circuit.

Submitted June 13, 1994 *.

Decided July 26, 1994.

Defendant was convicted in the United States District Court for the Northern District of California, Barbara A. Caulfield, J., of conspiracy to distribute heroin, distribution of heroin, and aiding and abetting distribution of heroin, and he appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) district court had authority to modify sentence by including conditions of supervised release; (2) continuance to locate witness was properly denied; and (3) severing defendant's trial from codefendant was not warranted.

Affirmed.

1. Criminal Law ⇐996(2)

District court had authority to correct sentencing by adding conditions of supervised release at any time prior to expiration of term of supervised release, as provided in rule governing modification of supervised release, regardless of whether modification would have been timely under rule governing correction of sentence. Fed.Rules Cr.Proc. Rules 32.1, 35, 18 U.S.C.A.

2. Criminal Law ⇐594(3)

Request for continuance to locate witness was properly denied on ground that defendant could not show that witness could likely be obtained if continuance were granted.

* The panel finds this case appropriate for submission without argument pursuant to Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

3. Criminal Law ⇐1166(6)

District court's failure to sever defendant's trial from trial of codefendant did not entitle defendant to relief from conviction, as codefendant's counsel actually aided defendant's central defense in many respects, and any attacks on defendant's credibility were only cumulative of prosecutor's case.

Erik J. Sivesind, Law Offices of Jerrold M. Ladar, San Francisco, CA, for defendant-appellant.

Andrew M. Scoble, Asst. U.S. Atty., San Francisco, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before: HUG, SCHROEDER, and FERNANDEZ, Circuit Judges.

Opinion by Judge SCHROEDER.

SCHROEDER, Circuit Judge:

Miguel Navarro-Espinosa appeals his conviction and sentence for conspiracy to distribute heroin, 21 U.S.C. § 846; distribution of heroin, 21 U.S.C. § 841(a)(1); and aiding and abetting distribution of heroin, 18 U.S.C. § 2. His challenges to the underlying conviction are without merit and can be disposed of easily. His challenge to the district court's authority to correct his sentence pursuant to Federal Rule of Criminal Procedure 35(c) detains us longer, but we nevertheless affirm. We deal with that issue first.

Defendant's presentence report recommended a sentence of 10 years' imprisonment, followed by 4 years of supervised release. The report also detailed several recommended conditions of supervised release. Defendant did not object to any of the recommended conditions. At the sentencing hearing on June 25, 1993, the court in pronouncing sentence adopted the recommendations of the presentence report, but inadvertently neglected to mention the conditions of supervised release detailed therein. At defendant's request, the court delayed formal entry of defendant's conviction and sentence.

On July 12, 1993, the government moved to correct defendant's sentence by adding the conditions of release, and the appellant objected. The court held a hearing on July 23, at which time a judgment and sentence had still not been formally entered. The court at that hearing ordered that the sentence be corrected, pursuant to Fed.R.Crim.P. 35(c), to include the conditions of supervised release. The judgment and sentence, with the release conditions, were subsequently entered on July 29, 1993.

[1] In this appeal, appellant contends that the district court lacked the power to correct his sentence on July 23, because it was acting more than seven days after his sentence was imposed. He relies upon Rule 35(c), which provides:

> **(c) Correction of Sentence by Sentencing Court.**
> The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Appellant correctly points out that the phrase "imposition of sentence" is a term of art that generally refers to the time at which a sentence is orally pronounced. *See* Fed. R.Crim.P. 43(a) ("the defendant shall be present ... at the imposition of sentence"); *cf. United States v. Munoz-Dela Rosa*, 495 F.2d 253 (9th Cir.1974) (if oral imposition of sentence conflicts with later written judgment order, oral pronouncement controls defendant's actual sentence). Defendant therefore argues that the seven-day period in which the district court could correct his sentence in this case began to run on June 25, 1993. Were the seven days to run from that date, the court's correction of sentence on July 23 would have been untimely under Rule 35(c).

The district court recognized that "imposition of sentence" seems to refer to oral sentencing, but concluded that in the context of Rule 35(c), the phrase does not have the same meaning that it has in other rules. In reaching this conclusion, the district court relied heavily on the Advisory Committee Notes accompanying Rule 35(c), which indicate that the drafters intended that sentenc-

ing courts be empowered to correct clearly erroneous sentences within 7 days of the formal entry of judgment.

The commentary states that the committee intended to codify in large part the rules espoused by the Fourth and Second Circuits in *United States v. Cook*, 890 F.2d 672 (4th Cir.1989), and *United States v. Rico*, 902 F.2d 1065 (2d Cir.1990), *cert. denied*, 498 U.S. 943, 111 S.Ct. 352, 112 L.Ed.2d 316 (1990). Fed.R.Crim.P. 35(c) Advisory Committee's Notes (1991 amendment). In those cases, the courts had held that sentencing courts retained the power to correct clearly erroneous sentences within the period for appeal. However, the notes indicate that the committee intended to modify the *Cook* and *Rico* rule somewhat, by making the period for correction of sentence somewhat shorter than the time for appeal to reduce the likelihood of jurisdictional problems in the event of an appeal. As the commentary states:

> At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. § 3742. *See United States v. Cook*, 890 F.2d 672 (4th Cir.1989) (error in applying sentencing guidelines); *United States v. Rico*, 902 F.2d 1065 (2d Cir.1990) (failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.

Id.

The interpretation of Rule 35 is a difficult issue, for while the intention of the drafters seems fairly clear, the language chosen does not further it. We hope that the Advisory Committee on Criminal Rules will be able to clarify this point.

We need not resolve the Rule 35 issue in this case, however, for the correction before us relates to supervised release; there is an independent rule governing corrections of that nature. Congress has provided that a district court may "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release." 18 U.S.C. § 3583(e)(2). It is clear, then, that even if the district court lacked the power to correct defendant's sentence pursuant to Rule 35(c), it was authorized to modify the conditions of defendant's supervised release pursuant to § 3583(e)(2) and Federal Rule of Criminal Procedure 32.1(b). Rule 32.1(b) provides:

> **(b) Modification of Probation or Supervised Release.**
> A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

The district court in this case held a hearing before ordering the sentence modified and fully complied with the provisions of Rule 32.1. Accordingly, the sentence as eventually entered in the docket was a valid sentence, regardless of the interpretation given to Rule 35.

[2, 3] We affirm the defendant's conviction for the reasons stated in the district court's thorough order denying Navarro-Espinosa's motion for a new trial. The district court did not err in refusing to grant a continuance to permit Espinosa to locate a witness, for, as the district court pointed out, Espinosa could not show that the witness could likely be obtained if the continuance were granted. *See United States v. Sterling,*

742 F.2d 521, 527 (9th Cir.1984), *cert. denied*, 471 U.S. 1099, 105 S.Ct. 2322, 85 L.Ed.2d 840 (1985). The district court did not err in failing to sever Espinosa's trial from that of co-defendant Magallon. As the district court pointed out, Magallon's counsel actually aided Espinosa's central defense in many respects, and any attacks on Espinosa's credibility were only cumulative of the prosecutor's case. Finally, the extra-judicial statements of a co-conspirator were properly introduced into the case because the requisite showing was made. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Thomas Lavell McCLAIN, Defendant–Appellant.

No. 93–10338.

United States Court of Appeals, Ninth Circuit.

Submitted July 18, 1994 *.

Decided July 26, 1994.

Defendant was convicted in the United States District Court for the Eastern District of California, Garland E. Burrell, Jr., J., on plea of guilty to possession of cocaine hydrochloride and cocaine base with intent to distribute and use of firearms during commission of drug trafficking crime, and he appealed. The Court of Appeals held that denial of additional one-level adjustment for acceptance of responsibility under guideline allowing such adjustment if defendant notifies authorities of his intention to plead guilty early enough to allow government to avoid preparing for trial was not error where defendant's continued activity to litigate his case delayed entry of plea and led government to believe that it should prepare for trial; defendant did not satisfy timeliness component of guideline by notifying his attorney that he wanted to call prosecutor.

Affirmed.

1. Criminal Law ⇐1252

Denial of additional one-level adjustment or acceptance of responsibility under guideline allowing such adjustment if defendant notifies authorities of his intention to plead guilty early enough to allow government to avoid preparing for trial was not error where defendant's continued activity to litigate his case delayed entry of plea and led government to believe that it should prepare for trial; defendant did not satisfy timeliness component of guideline by notifying his attorney that he wanted to call prosecutor. U.S.S.G. § 3E1.1(a), (b)(2), 18 U.S.C.A.App.

2. Criminal Law ⇐1158(1)

Factual findings underlying district court's denial of acceptance of responsibility adjustment is reviewed for clear error. U.S.S.G. § 3E1.1(a), (b)(2), 18 U.S.C.A.App.

3. Criminal Law ⇐1252

Under guideline allowing one-level adjustment for acceptance of responsibility if defendant notifies authorities of his intention to plead guilty early enough to allow government to avoid government preparing for trial, government bears burden to establish to satisfaction of district court that it was engaged in meaningful trial preparation when defendant gave notice of intent to plead guilty. U.S.S.G. § 3E1.1(a), (b)(2), 18 U.S.C.A.App.

4. Criminal Law ⇐986.4(1)

District court did not violate criminal rule pertaining to alleged inaccuracy in presentence investigation report by failing to

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); 9th Cir.R. 34–4.

Agenda Item #D5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

DATE: March 11, 1995

RE: Possible Amendment to Rule 58; Clarification of Whether Forfeiture of Collateral Amounts to Conviction (94-CR-B)

Magistrate Judge Lowe in Richmond, Virginia has noted that Rule 58 does not clearly indicate that forfeiture of collateral amounts to a conviction. He also notes that at present, the Notices of Violation do not expressly warn an accused of the fact that forfeiture amounts to a conviction.

Currently, Rule 58(d)(1) permits District Courts to authorize "payment of a fixed sum" in lieu of appearance and "termination of the proceedings" through promulgation of local rules on the subject.. While it might be appropriate to clarify the language "termination of proceedings" in Rule 58 it may be that local rules currently address the subject and that no further action is required.

If the Committee believes an amendment is necessary, I will draft appropriate language for consideration by the Committee at its Fall 1995 meeting.

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

January 17, 1995

Honorable David G. Lowe
United States Magistrate Judge
United States District Court
Post Office Box 593
U.S. Courthouse Annex
Richmond, Virginia 23205

Re: Suggested Amendments to Criminal Rule 58(d)(1)

Dear Judge Lowe:

Thank you for your letter of January 6, 1995, suggesting amendments to Rule 58(d)(1) of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chair and reporter of the Judicial Conference Advisory Committee on Criminal Rules for their consideration. The Advisory Committee will hold its next regular meeting on April 10-11, 1995, in Washington, D.C.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Honorable D. Lowell Jensen
Professor David A. Schlueter
Professor Daniel R. Coquillette

UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

DAVID G. LOWE
TELEPHONE: (804) 648-1913
(804) 771-2886

POST OFFICE BOX 593
U.S. COURTHOUSE ANNEX
RICHMOND, VIRGINIA 23205

January 6, 1995

94-CR -B

Mr. Thomas C. Hnatowski
Administrative Office of
the United States Courts
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Tom:

I have recently been presented with a problem involving the forfeiture of collateral. The question is whether the forfeiture acts as a conviction. Rule 58(d)(1) authorizes the Court to accept a fixed sum in lieu of appearance and authorizes "the termination of the proceedings." As you are aware, a proceeding may be terminated by a dismissal, a finding of not guilty or a conviction. I realize common sense dictates that forfeiture should act as a conviction, but I can find no federal law to sustain the position. The matter is further complicated because our notice of violation does not advise the defendant of the consequences of payment of collateral.

In Virginia there is a specific statute addressing traffic infractions:

> When an accused tenders payment without executing a written waiver of court hearing and entry of a guilty plea, such tender of payment shall itself be deemed a waiver of court hearing and entry of guilty plea.

Va. Code Ann. § 19.2-254.1 (Michie Supp. 1994). A similar statute, Va. Code § 19.2-254.2 (Michie Supp. 1994) addresses nontraffic offenses for which a fine (collateral) schedule exists. Additionally, all Virginia Uniform Traffic Citations contain an explicit warning that payment of the collateral will be treated as a guilty plea.

My concerns are: 1) Fed. R. Crim. P. 58(d)(1) does not make clear that forfeiture of collateral will result in a conviction; and 2) that our present Notices of Violation do not explicitly warn the accused of that fact.

It may be that Rule 58 needs to be amended and our Notice of Violation forms revised. I leave both these matters in your good offices.

Very truly yours,

David G. Lowe
United States Magistrate Judge

cc: Mr. Douglas A. Lee
Mr. John K. Rabiej

Agenda Item II E

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Status of Federal Rules of Evidence 413-415**

DATE: **3/13/95**

Attached are pages from a recent issue of the Criminal Law Reporter which provide information on the Judicial Conference's action regarding Congress' versions of Federal Rules of Evidence 413-415.

reach of state disciplinary authorities for their official conduct. The Justice Department worked for years on the rules by which federal attorneys would not be subject to state discipline for one type of misconduct, ex parte contacts with represented persons; its final product was released last August, see 55 CrL 2269.

But S. 3 paints with a much broader brush. The relevant section states, in its entirety: "Notwithstanding the ethical rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States."

The same bill also addresses frivolous filings in criminal proceedings and sets up a penalty far more severe than any contemplated in civil litigation by Fed.R.Civ.P. 11 in its current or proposed versions. S. 3 states that an attorney who in a federal criminal proceeding files a signed document "that the attorney knows to contain a false statement of material fact or a false statement of law, shall be found guilty of obstruction of justice."

REPORTS AND PROPOSALS

JUDICIAL CONFERENCE SUBMITS REPORT ON NEW EVIDENCE RULES

Report responds to mandate in 1994 crime bill.

The Judicial Conference of the United States has forwarded to Congress its recommendations on the three new rules of evidence contained in the crime bill Congress passed last summer. The rules, which would allow the admission of character evidence in sexual misconduct cases, are not needed, according to the report. However, if Congress should decide to implement the changes embodied in the new rules, it should do so by amending existing evidence rules, the report recommends.

The report is reprinted in full at 56 CrL 2139.

Under Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, 55 CrL 2411, three new rules—Fed.R.Ev. 413, 414, and 415—would be added to the Federal Rules of Evidence. Rule 413 would admit evidence of a defendant's "commission of another offense or offenses of sexual assault" in a sexual assault criminal case. Rule 414 would admit analogous evidence in a child molestation criminal case. Rule 415 is the civil counterpart to the two criminal rules.

"After careful study," and following the recommendations of three of its advisory committees (the committees on evidence, criminal procedure, and civil procedure) and the Committee on Rules of Practice and Procedure, the Judicial Conference "urges Congress to reconsider its decision on the policy questions underlying the new rules." Alternatively, "if Congress does not reconsider its decision on the underlying policy questions," the Judicial Conference recommends "incorporation of the provisions of new Rules 413–415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence." Those amendments, the report observes, "would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities."

The version proposed by the Judicial Conference would add a sexual misconduct exception, Rule 404(a)(4), to the general rule against admission of character evidence to prove how a person acted on a particular occasion. The proposal would also add a conforming amendment to Rule 405, which governs methods of proving character.

COMMITTEES' REVIEW

The report of the Judicial Conference was requested by Congress in the crime bill. The Judicial Conference's input was required within 150 days of the passage of the bill, which meant by February 10. The rules passed by Congress were specifically exempted from the usual procedural hurdles set forth in the Rules Enabling Act, which would have required review by the U.S. Supreme Court before congressional review.

The advisory committees that considered the new rules found that they were unwarranted and that their drafting presented constitutional and evidentiary problems. The concerns expressed by Congress in drafting the new rules, the committees believed, are adequately addressed in the existing Federal Rules of Evidence—specifically by Rule 404(b), which allows the admission of evidence against a criminal defendant of prior crimes or bad acts under certain conditions. But recognizing that Congress would institute the changes embodied in Rules 413–415, the Advisory Committee on Evidence incorporated the substance of the changes into the proposed amendments to Rule 404(a) and made conforming changes to Rule 405. The Standing Committee on the Rules of Practice and Procedure followed the advisory committees' lead and, in January, voiced objection to Rules 413–415. The vote was nearly unanimous; only the representative from the U.S. Department of Justice expressed support for what Congress had proposed.

CONFERENCE'S REPORT

In its report to Congress, the Judicial Conference recounts the "unusual unanimity of the members of the Standing and Advisory Committees . . . taking the view that Rules 413–415 are undesirable." The report complains that Rules 413–415 would permit the introduction of "unreliable but highly prejudicial evidence that would complicate trials by causing minitrials of other alleged wrongs." Additionally, it points out that critics of the rules drafted by Congress objected to the mandatory character of the rules—the fact that the "evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test." If these critics are right, the conference report concludes, "Rules 413–415 free the prosecution from rules that apply to the defendant—including the hearsay rule and Rule 403. If so, serious constitutional questions would arise."

IN CONGRESS' LAP

Under the terms of the 1994 crime bill, Congress has 150 days to consider the Judicial Conference's Report. If it does not act within that time, Rules 413–15 as set out in the crime bill will go into effect automatically.

The CRIMINAL LAW REPORTER

Text No. 10

February 15, 1995 THE BUREAU OF NATIONAL AFFAIRS, INC. Volume 56, No. 19

REPORT OF THE JUDICIAL CONFERENCE ON ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES

Reprinted below is a report by the Judicial Conference of the United States concerning changes in the Federal Rules of Evidence. The report is a response to a mandate from Congress contained in Section 320935 of the 1994 Violent Crime Control and Law Enforcement Act, 55 CrL 2411.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

February 9, 1995

Honorable Newt Gingrich
Speaker, United States
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Judicial Conference of the United States, I am honored to transmit to you a report containing recommendations regarding the admission of character evidence in certain cases under the Federal Rules of Evidence.

This report is submitted to Congress in accordance with section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). The section adds new Evidence Rules 413, 414, and 415 to the Federal Rules of Evidence.

The Act defers the effective date of new Evidence Rules 413-415 until February 10, 1995 pending a report from the Judicial Conference. Under the Act the effective date is delayed for an additional 150 days after transmittal of the Conference report, if the Conference makes alternative recommendations to the new rules. The recommendations in the report are different from the Act's new rules. Accordingly, Rules 413-415 will take effect 150 days after the transmittal of this report, unless Congress adopts the alternative recommendations or provides otherwise by law.

Sincerely,

L. Ralph Mecham
Secretary

Enclosure

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
ON THE
ADMISSION OF CHARACTER EVIDENCE
IN
CERTAIN SEXUAL MISCONDUCT CASES

February 1995

I. INTRODUCTION

This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act invited the Judicial Conference of the United States within 150 days (February 10, 1995) to submit "a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation."

Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence. These Rules would admit evidence of a defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out in Part III below.

If Congress does not reconsider its decision on the underlying policy questions, the Judicial Conference recommends incorporation of the provisions of new Rules 413-415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence. The amendments would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities.

II. BACKGROUND

Under the Act, the Judicial Conference was provided 150 days within which to make and submit to Congress alternative recommendations to new Evidence Rules 413-415. Consideration of Rules 413-415 by the Judicial Conference was specifically excepted from the exacting review procedures set forth in the Rules Enabling Act (codified at 28 U.S.C. §§ 2071 - 2077). Although the Conference acted on these new rules on an expedited basis to meet the Act's deadlines, the review process was thorough.

The new rules would apply to both civil and criminal cases. Accordingly, the Judicial Conference's Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules reviewed the rules at separate meetings in October 1994. At the same time and in preparation for its consideration of the new rules, the Advisory Committee on Evidence Rules sent out a notice soliciting comment on new Evidence Rules 413, 414, and 415. The notice was sent to the courts, including all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations.

III. DISCUSSION

On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee's report was unanimous except for a dissenting vote by the representative of the Department of Justice. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence Rule 404(b) now allows the admission of evidence against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory -- that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test. The committee believed that this position was arguable because Rules 413-415 declare without qualification that such evidence "is admissible." In contrast, the new Rule 412, passed as part of the same legislation, provided that certain evidence "is admissible if it is otherwise admissible under these Rules." Fed. R. Evid. 412 (b) (2). If the critics are right, Rules 413-415 free the prosecution from rules that apply to the defendant -- including the hearsay rule and Rule 403. If so, serious constitutional questions would arise.

The Advisory Committees on Criminal and Civil Rules unanimously, except for representatives of the Department of Justice, also opposed the new rules. Those committees also concluded that the new rules would permit the introduction of unreliable but highly prejudicial evidence and would complicate trials by causing mini-trials of other alleged wrongs. After the advisory committees reported, the Standing Committee unanimously, again except for the representative of the Department of Justice, agreed with the view of the advisory committees.

It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.

For these reasons, the Standing Committee recommended that Congress reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415.

However, if Congress will not reconsider its decision on the policy questions, the Standing Committee recommended that Congress consider an alternative draft recommended by the Advisory Committee on Evidence Rules. That Committee drafted proposed amendments to existing Evidence Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415 yet still effectuate Congressional intent. In particular, the proposed amendments:

(1) expressly apply the other rules of evidence to evidence offered under the new rules;

(2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal;

(3) expressly enumerate the factors to be weighed by a court in making its Rule 403 determination;

(4) render the notice provisions consistent with the provisions in existing Rule 404 regarding criminal cases;

(5) eliminate the special notice provisions of Rules 413-415 in civil cases so that notice will be required as provided in the Federal Rules of Civil Procedure; and

(6) permit reputation or opinion evidence after such evidence is offered by the accused or defendant.

The Standing Committee reviewed the new rules and the alternative recommendations. It concurred with the views of the Evidence Rules Committee and recommended that the Judicial Conference adopt them.

IV. RECOMMENDATIONS

The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415. In the alternative, the attached amendments to Evidence Rules 404 and 405 are recommended, in lieu of new Evidence Rules 413, 414, and 415. The alternative amendments to Evidence Rules 404 and 405 are accompanied by the Advisory Committee Notes, which explain them in detail.

FEDERAL RULES OF EVIDENCE

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes*

* * * * *

(4) Character in sexual misconduct cases. - Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

(A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.

(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision,

(i) "sexual assault" means conduct - or an attempt or conspiracy to engage in conduct - of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim - regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(ii) "child molestation" means conduct - or an attempt or conspiracy to engage in conduct - of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person - regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a). . . .

Note to Rule 404(a)(4)

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence.* These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting

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

* Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.

ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision (a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision "if otherwise admissible under these rules" is needed to clarify the relationship between subdivision(a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4)(A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, . . . misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a State" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a)(4) must relate to a form of conduct proscribed by either chapter 109A or

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110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

FEDERAL RULES OF EVIDENCE

Rule 405. Methods of Proving Character

(a) Reputation or opinion. - In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion except as provided in subdivision (c) of this rule. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

* * * * *

(c) Proof in sexual misconduct cases. - In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

Note to Rule 405(c)

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible) as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

Agenda Item III #1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **ABA Proposal To Establish Liaison With Criminal Rules Committee**

DATE: **March 10, 1995**

Attached is correspondence from the Litigation Section of the American Bar Association inquiring into the possibility of establishing a liaison with the Committee.

As far as I know, there is no formal procedure for formally establishing such contacts with particular groups or associations which might have an interest in the Committee's work. Such participation is normally limited to inquiring about the Committee's agenda and pending amendments, attending the Committee's meetings and providing written comments on proposed amendments to rules.

This matter will be on the agenda for the April meeting.

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DARRYL W. JACKSON
DIRECT LINE: (202) 872-6810

January 27, 1995

Honorable D. Lowell Jensen
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102

Dear Judge Jensen:

I am enclosing, for your consideration, a letter from Melinda B. Thaler of the ABA Section of Litigation Task Force on the Justice System and my written response to her. In her letter, Ms. Thaler expresses the interest of the Task Force in establishing a liaison position with the Criminal Rules Advisory Committee.

I forward her letter to you so that her request may be considered by the Committee. Thank you.

Sincerely,

Darryl W. Jackson

Enclosures

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LOS ANGELES, CALIFORNIA

TOKYO, JAPAN

January 27, 1995

Melinda B. Thaler
AT&T
295 N. Maple Avenue
Room 3139B3
Basking Ridge, NJ 07920-1650

Dear Ms. Thaler:

I am writing in response to your letter of January 10, 1995, in which you discuss the desire of the ABA Section of Litigation Task Force on the Justice System to establish a liaison with the Criminal Rules Advisory Committee of the U.S. Judicial Conference.

As we discussed, I am not interested in serving in such a position. However, I would be happy to raise with the Committee the question of whether it is interested in having such a liaison. I am certain that you will receive a formal response to your inquiry from the Committee in the near future.

Sincerely,

Darryl W. Jackson

AMERICAN BAR ASSOCIATION Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5662
FAX: (312) 988-6234

Reply to: Melinda B. Thaler
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295 N. Maple Ave., Rm. 3139B3
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908-221-4324

January 10, 1995

Darryl W Jackson, Esq.
Arnold & Porter
Thurman Arnold Bldg
1200 New Hampshire Ave , N.W.
Washington, D.C 20036-6885

Dear Darryl

I am writing on behalf of the Task Force on the Justice System At the Puerto Rico meeting, the Task Force agreed to try to institutionalize a method of informing Committee Chairs of proposed Rules changes. Hopefully, this information channel will better posture the Section to be more proactive in taking formal positions or other action regarding new or changed Rules before those changes are in effect. In order to allow Section consideration early in the Rules development process, the Task Force has recently established a Section liaison position with the Federal Rules of Civil Procedure Advisory Committee. We would like to establish similar liaison positions with other Advisory Committees, and I write to you because of your current service on the Federal Rules of Criminal Procedure Advisory Committee.

The liaison position which has been established with the Civil Procedure Advisory Committee is a non-voting position and simply enables the Section designee, currently Tommy Wells, to receive all mailings from and attend all meetings of the Advisory Committee. The liaison will be responsible for forwarding all Advisory Committee mailings and providing short synopses of Advisory Committee meetings (or Reporter's minutes if available) to a contact person on the Section Staff The information received from the Advisory Committee liaisons along with information

on legislative activity affecting Rules will be forwarded periodically to Chairs of Committees covering these areas

We would like to establish similar liaison positions other Rules Advisory Committees; in particular, we would like your assistance in broaching this topic with your colleagues on the Federal Rules of Criminal Procedure Advisory Committee. While the liaison position established with the Civil Procedure Advisory Committee is non-voting, we would hope to enjoy the economy of collapsing the liaison position with that held by an existing (voting) member where a Section member serves on an Advisory Committee, such as in your case. Nevertheless, if you or others on the Advisory Committee think it best to maintain a separate non-voting Section liaison, we would be eager to set up such an arrangement as well.

Please let me know if you would be agreeable to exploring this idea with the Advisory Committee

Sincerely,

Melinda B. Thaler

Melinda B. Thaler

cc: L. Kieve, Esq
R. McMillan, Esq

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

March 17, 1995

MEMORANDUM TO MEMBERS OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Long-Range Planning Subcommittee Report*

The Standing Committee has asked that each advisory committee member review the attached report. Comments may be forwarded directly to Professor Thomas E. Baker, Texas Tech University School of Law, 18th and Hartford, Box 40004, Lubbock, Texas 79409-0004. Issues that you believe should be addressed by the advisory committee as a whole may be raised at the April 10-11 meeting.

John K. Rabiej

DRAFT

A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

January 1995

Introduction

At the June 1993 meeting, the Standing Committee authorized our Subcommittee on Long Range Planning to undertake a thorough self-study evaluation of the federal judicial rulemaking procedures to include: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was suspended, in effect, in anticipation of the January 1994 Executive Session and related discussion. At that meeting, it was decided to solicit public comments from interested parties. APPENDIX A to this Report contains a Summary of the Comments Received. In addition, the Subcommittee canvassed the secondary literature. APPENDIX B to this Report is an Annotated Bibliography. An Interim Report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The Interim Report raised several particular issues for discussion at that meeting and solicited further written comments from those in attendance.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a History of the origins of modern rulemaking; a description of Current Procedures; a discussion of Evaluative Norms; the Issues and Recommendations for reforms; and a brief Conclusion.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] However, a lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law; the procedure for actions at law remained the same while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828 when Congress passed a statute that required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory statutory system prevented the federal courts from following the lead of innovative state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress withdrew rulemaking authority from the federal courts and required that all actions in law conform with the corresponding state forum's rules and procedures.[6] Under the Conformity Act here was no national uniformity in federal procedure, because there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

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1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991).

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197 (repealed 1934).

7" [T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.'" Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

Before 1938, the federal courts followed state procedural law and federal substantive law, even in diversity cases. Of course, the substantive law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since 1842.[10]

And in the same year, after more than two decades of effort, national rules of procedure were drafted by an ad hoc Advisory Committee appointed by the Supreme Court under the provision of the Rules Enabling Act of 1934.[11] Those 1938 rules—still recognizable today desppite numerous amendments—established a single nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee was comprised of distinguished lawyers and law professors. While the ad hoc Committee members have been deservedly lionized for their accomplishment of drafting the rules themselves, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that nascent experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments with a pronounced willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee demonstrated a shared sense of responsibility to recommend to the Supreme Court the best and most workable rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these two traditions have endured.

This positive early experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process took a few more years to evolve. A year after the new rules went into effect, the Supreme Court called upon the ad hoc Advisory Committee to submit amendments which the Court accepted and sent to Congress and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the

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9 304 U.S. 64 (1938).

10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

12 Wright & Miller, supra note 7, §1005.

13 Id.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

1940s and early 1950s.[15] In 1955, the continuing Advisory Committee submitted an extensive report to the Supreme Court with numerous suggested amendments. The Court rather mysteriously took no action on the Report. Instead, the Justices ordered the Committee "discharged with thanks" and revoked the Committee's authority as a continuing body.[16]

The resulting void in rulemaking procedure was an object of concern expressed by the American Bar Association, the Judicial Conference and other groups.[17] At the time, there was no small controversy over whether the Court should designate a new continuing committee and how the members might be selected. Dissatisfaction was expressed that the Supreme Court was merely rubber-stamping the recommendations from the previous Advisory Committee and several of the Justices were heard to agree with that criticism, dissenting from orders, from time to time, to complain that the proposals were not actually the work of the Court.[18] Apparently, there were misgivings expressed behind the scenes about the tenure and influence of the members of the continuing Advisory Committee, who served indeterminate terms until they resigned or died. This discrete Third Branch discussion took place alongside the perennial separation of powers debate between the Judiciary and Congress over which institution should make rules and how.

A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker, of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Later, Justice Clark recalled, "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of `Chief Justice Committees.'"[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking

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15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

17 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

18 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the particular rules dealing with evidentiary privileges. Congress ended up mandating, by statute, that the evidence rules would not take effect until expressly approved by legislation. Then Congress reviewed the proposed rules and made substantial revisions in the Federal Rules of Evidence before enacting them into law, effective in 1975.[22] The legislative veto provision that attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved by Congress.[23] After a twenty year hiatus the Judicial Conference re-established an Advisory Committee on the Rules of Evidence in 1990. This committee has embarked on a comprehensive review.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice and longer periods for public commentary on proposed rules.[24] These amendments were designed to increase attention to rules initiatives and public participation. Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any

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21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

23 28 U.S.C. §2074(b).

24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31 and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure — A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar). Thomas E. Baker, Recent Developments in the Federal Rules of Procedure: The 1993 Changes and Beyond, 11 Fifth Cir. Reptr. 531 (June 1994).

judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States (Chair), the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference holds plenary meetings twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. The chair of each committee appoints a reporter, usually a prominent professor of law, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes

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26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

29Id.

30 Id.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

"as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.[33]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.[34]

By delegation from the Judicial Conference, authorized by the relevant statute, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure" in its particular field.[35] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and other relevant legal commentary. In fact, "[p]roposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."[36] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the FEDERAL REGISTER, and meetings are open to the public.[37] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion

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322 8 U.S.C. §2073(b).

33Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office.

A Summary for Bench and Bar, supra note 7.

34 A Summary for Bench and Bar, supra note 7.

35 28 U.S.C. §2073(b).

36 A Summary for Bench and Bar, supra note 7.

37 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[38]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Reporter, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[39] A notice is published in the FEDERAL REGISTER, and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of SUPREME COURT REPORTER, FEDERAL REPORTER-THIRD SERIES, and FEDERAL SUPPLEMENT.[40] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

The comment period runs six months from the FEDERAL REGISTER notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

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38 Id.

39 A Summary for Bench and Bar, supra note 7.

40 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are generally open to the public and are preceded by public notice in the FEDERAL REGISTER.[41] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of the Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record their separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[42] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[43] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the enabling statutes,[44] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no adverse action.[45]

Since 1958 this rulemaking procedure has been followed regularly, almost biennially.[46] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments.

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41 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

42 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

43 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990).

44 28 U.S.C. §§2071-77.

45 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

46 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the last package of wholesale changes to the discovery provisions in the Civil Rules drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House, but did not reach the floor of the Senate. Controversy akin to the separation of powers doctrine often surrounds exercises of the legislative prerogative to pass a statute to effectuate a change in the federal rules of procedure. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[47] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[48]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This normative vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined," as it were. If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court procedures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they seem to beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every

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47 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994).

48 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert to the point of extinction the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in every case, not just the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces.

A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts.

Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. The organization to be followed will take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress.[49]

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the diversity of the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be much larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not "bar" committees. The notion of representativeness, i.e., that there ought to be a seat on the Advisory Committee for each identifiable faction of the bar contravenes the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or bar polls.

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49 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the expertise and time to act in the best interest of the public those courts serve. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention within the present appointment process and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[50]

To help achieve these goal, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The present practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a rather Byzantine process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve

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50 28 U.S.C. §478(b).

indefinitely; making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed; and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled, *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar,* is a good example of the ongoing effort to correct misconceptions about federal rulemaking.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The 10,000+ mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, now appearing in print media, can be made available electronically on the Internet promptly. The judiciary could establish a Gopher or World Wide Web server at minimal cost. These servers could be the source of rapid dissemination through services such as Westlaw, LEXIS, and COUNSEL–CONNECT. If the committees operate their own server, persons with connecting should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. E-mail availability networked internally within the Advisory Committee might be feasible, once the judiciary-wide network is operational.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals and receipt of comments.

The need for research: It is frequently asserted, most often by academic critics,[51] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[52] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from demonstration projects rather than controlled experiments—which are rare indeed.

We cannot expect members of the rules committees to be experts in empirical research techniques, although over the years a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and writings in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should be expected to notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field-studies and pilot programs—although, as we have observed, these are not a source of reliable data. Advisory Committees must

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51 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

52 Id. at 335 n.66.

take advantage of these possibilities. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available.

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[53] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[54]

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to

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53 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

54 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving then *de jure* the roles that many have assumed *de facto* in recent years, participating in the discussion of subjects of Advisory Committees other than their own and exercising substantial influence (but not voting). We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonate more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is altogether fitting and proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[55] that present choices of different resolution procedures for different kinds of

55 Baker, supra note 1, at 334.

disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee of the Standing Committee to recommend a once-and-for-all "solution" to these variables—though we have already suggested taking a good hard look at the consequences. Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

Redrafting proposals. The main task of drafting proposed rules is assigned to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Them meetings of the Standing Committee can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the considered opinion of the Standing Committee a proposal requires substantial changes for either style or substance, the proposal ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the opinion of the Standing Committee a proposal requires substantial changes, the Standing Committee return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair and Liaison Members: The Standing Committee recommends the continuation of the practice of appointing liaison members from the Standing Committee to the various Advisory Committees.

Subcommittee on Style. The immediate past Chair of the Standing Committee established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Reporter who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules. The Federal Rules of Civil Procedure have gone through several drafts of complete restyling; the Appellate Rules are halfway through. What remains undetermined, however, is what to do with the sets of restyled rules. The Standing Committee needs to decide what should become of the work product of the restyling effort.

[14] Recommendation to the Standing Committee: The Standing Committee should decide what is to become of the restyled sets of federal rules.

Subcommittee on Numerical and Substantive Integration: In 1992 the Standing Committee created a Subcommittee on Numerical and Substantive Integration. As its name suggests, the Subcommittee is charged with two tasks: (1) explore the feasibility of integrating subjects common to the different sets of rules and dealing with them in a single rule that would then be considered part of all the other sets of rules and (2) develop a single numbering system that includes all the different sets of federal rules. This Subcommittee has lapsed into desuetude. We do not make a recommendation concerning it—beyond wishing that our own Subcommittee suffer the same fate (on which see the next recommendation).

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In the two years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.) The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It recommended and performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired; his vacancy on the Subcommittee has not been filled. The two remaining members unanimously and enthusiastically recommend that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. What long range issues remain can be handled by the member of the Standing Committee appointed as liaison with the Judicial Conference Committee on Long Range Planning. That member, who is the present chair of this Subcommittee, ought to be expected to become more involved in the ongoing work of the Judicial Conference's Committee. This will include participating in the ongoing process of refining the PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (NOV. 1994 DRAFT). Another option is to reassign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Any issues regarding long range planning in the rules process ought to be reassigned to the individual member of the Standing Committee who serves as liaison to the Committee on Long Range Planning of the Judicial Conference and to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee—except for the obvious implication that a

change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the six months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends legitimacy and authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[56] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are in place and operating properly and that the particular proposals before the Court are the careful products of that rulemaking process. The transmittal letters from the Chief Justice since then have made the same point. Admittedly, over the years different Justices have had different views of their role in judicial rulemaking, but a majority of the Court has never questioned the appropriateness of its participation. We accordingly leave to the Justices themselves the question whether there should be any change in their role.

There is one possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may want to consider whether it wishes to invite public comments on the rules in the wake of these transmissions—for there is no other opportunity for public comment after the Advisory Committees hold hearings.

[16] Recommendation to the Judicial Conference and the Supreme Court: The Conference and the Justices should consider whether it is advisable to establish a

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56 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

procedure for a period of public notice and written comment during the Supreme Court's evaluation of proposed rules.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a legislative power delegated to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."[57] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[58] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has of the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules.

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

[17] Recommendation to the Standing Committee: The Standing Committee must be vigilant and alert to rulemaking initiatives in Congress and must be prepared to assist the Judicial Conference in the Conference's efforts to protect the integrity of the Rules Enabling Act procedures.

F. Miscellaneous

The rulemaking calendar/cycle: The debate among those involved in federal rulemaking and observers is whether the rulemaking cycle is too long and cumbersome; critics of the status quo described above insist that we should rethink the relative roles of the Advisory Committees, the Standing Committee, the Judicial Conference, the Supreme Court, and Congress in order to streamline the process.

****[To be written]****

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57 28 U.S.C. §2072 (a) & (b).

58 U.S. Const. art. III, §1.

Conclusion

The Subcommittee's overall impression of federal rulemaking echoes the hackneyed phrase, "If it ain't broke, don't fix it." There is nothing "broken" about the procedures for amending the federal rules. Federal court practices and procedures "continue to be the outstanding system of procedure in the world,"[59] admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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59 Charles Alan Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 555 (1954).