MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 18 & 19, 1994

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. April 18 and 19, 1994. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 18. 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

Prof. Stephen A. Saltzburg

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Henry A. Martin, Esq.

Ms. Jo Ann Harris, Assistant Attorney General &

Mr. Roger A. Pauley, designate of Ms. Jo Ann Harris

Professor David A. Schlueter, Reporter

Also present at the meeting were Judge Alicemarie H. Stotler and Judge William R. Wilson, Jr., chair and member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe, Mr. John Rabiej, Mr. Paul Zingg, and Mr. David Adair of the Administrative Office of the United States Courts and Mr. James Eaglin from the Federal Judicial Center.

I. HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The attendees were welcomed by the chair, Judge Jensen, who introduced the three new members to the Committee, Judges Dowd and Smith and Mr. Henry Martin.

The Committee's business meeting was preceded by a public comment hearing, taped by C-Span for broadcasting, during which the Committee heard from three witnesses who offered comments on proposed amendments to Rules 10, 43, and 53: Mr. Steven Brill (Rule 53); Mr. Tim Dyk (Rule 53) and Ms. Elizabeth Manton and Mr. Alan DuBois (Rules 10 and 43). Those proposed amendments are discussed, *infra*.

II. APPROVAL OF MINUTES OF FALL 1993 MEETING

Mr. Karas moved that the minutes for the October 1993 meeting in San Diego, be approved and Judge Marovich seconded the motion. Following corrections suggested by Mr. Wilson and Mr. Pauley, concerning their positions on witness safety, the motion carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rule Amendments Effective December 1, 1993

The Reporter indicated that a number of amendments had taken effect on December 1, 1993:

1. Rule 12.1, Discovery of Statements;

2. Rule 16(a), Discovery of Experts;

3. Rule 26.2, Production of Statements;

4. Rule 26.3, Mistrial;

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

6. Rule 32.1, Production of Statements;

7. Rule 40, Commitment to Another District;

8. Rule 41, Search and Seizure;

9. Rule 46, Production of Statements;

10. Rule 8, Rules Governing Section 2255 Hearings; and

11. Technical Amendments to other rules.

B. Rules Approved by the Supreme Court and

Pending Before Congress

The Reporter also indicated that the Supreme Court was in the process of approving a number of amendments for transmittal to Congress. If Congress takes no action on the proposals, the amendments would be effective on December 1, 1994:

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; and

4. Rule 40(d), Conditional Release of Probationer

C. Rules Approved by the Standing Committee

for Public Comment

The Committee was also informed that comments had been received on amendments which had been approved for public comment by the Standing Committee at its June 1993 meeting.

1. Rule 5(a), Initial Appearance Before the Magistrate; Exception for UFAP Defendants

The Reporter summarized the few comments received on the proposed amendment to Rule 5, which would create an exception for the prompt appearance requirement in those cases where the defendant is charged only with the offense of unlawful flight to avoid prosecution. One commentator raised the question of whether there should be a cross-reference to the proposed amendment in Rule 40 as well and another commentator writing on behalf of the American Bar Association indicated that the proposed amendment was in conflict with Section 10-4.1 of the ABA Standards for Criminal Justice. The proposed amendment was endorsed by the National Association of Criminal Defense Lawyers. Following brief discussion of the comments, Professor Saltzburg moved that the amendment be forwarded without change to the Standing Committee. Mr. Pauley seconded the motion, which carried by a vote of 9 to 2.

Mr. Pauley moved that Rule 40 be amended to reflect a cross-reference to the change in Rule 5 and Professor Saltzburg seconded the motion. The motion carried by a vote of 9 to 0 with two abstentions.

2. Rule 10, Arraignment; Video Teleconferencing.

The Reporter and Chair informed the Committee that several written comments had been received on the proposed amendment to Rule 10 which would permit arraignments by video teleconferencing, with the consent of the defendant. The American Bar Association and National Association of Criminal Defense Lawyers were opposed to the proposal, as were two witnesses who had appeared before the Committee. The Committee was also informed that Judge Diamond of the Committee on Defender Services had requested deferral of action on the proposed amendment pending completion of a pilot program on use of video teleconferencing technology in federal courts. The United States Marshals Service expressed strong support for the amendment.

Observing that the amendment would dehumanize the trial, Professor Saltzburg moved that the Committee withdraw the amendment from further consideration. Mr. Karas seconded the motion. Several of the members of the Committee expressed concern about the fact that permitting video arraignments would probably simply shift the costs and time associated with transporting the defendant to the courthouse to the defense counsel, who would in all likelihood feel compelled to stand with his or her client. Mr. Pauley noted that approximately 80 percent of the defendants would opt to remain in the penal institution rather than being transported to court for an arraignment and that there are legitimate security concerns in moving defendants to and from court. Judge Marovich echoed that point. Judge Dowd questioned the mechanics of obtaining a waiver from the defendant and Mr. Karas expressed concern about starting down the slippery slope of permitting trial of defendants in absentia. Following additional discussion about the role of arraignments and the question of possible pilot programs which might address the Committee's concerns, Professor Saltzburg modified his motion to reflect that the Committee would defer the proposed amendment to the Committee's Spring 1995 meeting, after completion of those pilot programs. The motion to defer carried by a vote of 10 to 0 with 1 abstention.

3. Rule 43, Presence of Defendant; Video Teleconferencing

In light of the Committee's action on Rule 10, Professor Saltzburg moved that Rule 43 be approved and forwarded to the Standing Committee with the provision permitting video teleconferencing deleted. Judge Davis seconded the motion.

Mr. Pauley briefly addressed the issue of in absentia sentencing and noted that United States Attorneys have reported problems with fugitivity. He also noted a possible ambiguity in the proposed revision of Rule 43(b) and suggested language which would make it clear that in absentia proceedings may be conducted after jeopardy has attached by entry of a plea of guilty or nolo contendere. The Committee agreed with his suggestion and in a brief discussion concluded that Mr. Pauley's suggested language did not require additional public comment. The motion carried by a vote of 9 to 1 with one member abstaining.

4. Rule 53, Regulation of Conduct in the Court Room; **Permitting Cameras and Broadcasting**[(1)]

In addressing the proposed amendment to Rule 53 which would permit broadcasting from, and cameras in, federal criminal trials, Professor Saltzburg observed that although the proposed amendment seemed an easy rule to implement, he was concerned about simply deferring to the Judicial Conference to promulgate guidelines for implementing the rule. Instead, the Committee should consider drafting a rule which included such standards.

Judge Stotler informed the Committee that the Judicial Conference's Committee on Court Administration and Case Management was very interested in the proposed amendment and its potential implications for federal criminal trials. She emphasized that the amendment would definitely require coordination between a number of entities and committees. She noted that the Judicial Conference had voted to extend the pilot program for civil trials until December 31, 1994.

The Reporter indicated that as proposed, the amendment would clearly authorize the Judicial Conference to determine whether to conduct a pilot program for criminal trials or to implement guidelines or standards. If that language were removed, the Standing Committee might question the potential role of the Judicial Conference and put the language back in.

Judge Jensen observed that unless Rule 53 is amended in some way, there is no authority to conduct any pilot programs like those conducted by the Judicial Conference for federal civil trials. In response, Judge Crigler raised the possibility of amending Rule 53 simply to provide for pilot programs in criminal trials. But Judge Wilson questioned whether there was any need to proceed with any pilot programs.

Mr. Rabiej indicated that the Standing Committee could transmit the Committee's desire to be actively

involved in drafting any guidelines, or suggesting any pilot programs. Judge Jensen added that the Committee's report to the Standing Committee could emphasize the difference in civil and criminal trials. He also noted that the report could include a statement that the Committee would remain available to assist in establishing a pilot program and any pertinent guidelines.

Judge Marovich moved that the proposed amendment to Rule 53 be approved, as it was published for public comment, and forwarded to the Standing Committee along with comments that the Committee would hope to remain actively involved in promulgating standards or guidelines. Judge Davis seconded the motion.

Mr. Karas expressed concern about the negative impact of cameras in the courtroom and noted that several commentators had expressed similar concerns. He thereafter moved to amend the amendment by including language which would permit cameras and broadcasting only if both the government and defense consented. Judge Smith seconded the amendment. In the brief discussion which followed, there was a consensus that the amendment would in effect kill the possibility of cameras and broadcasting and any pilot programs. Mr. Karas stated that in his experience in the Arizona courts, there are tremendous problems with broadcasting trials. Ms. Klieman disagreed, noting that in her experience as a defense counsel, cameras and broadcasting are not distracting and that most defense counsel she has spoken to recognize there are certain benefits from giving the public greater access to what goes on in criminal trials. The motion to amend failed by a vote of 2 to 8, with one abstention.

Mr. Karas questioned whether the Committee could recommend to the Judicial Conference that in any pilot program should include the option for either party to veto the use of cameras in the courtroom. In a brief discussion Judge Jensen indicated that in his report to the Standing Committee he would indicate that the proposal had been raised in the Committee's discussion.

Following some discussion about rephrasing the amendment to make it more neutral in tone, the Committee voted to approve the amendment, as published, by a vote of 9 to 1.

Judge Jensen indicated that his report to the Standing Committee would note the Committee's strong interest in drafting the guidelines and assisting in conducting any pilot programs. Judge Stotler agreed that the Committee's input would be invaluable, especially in those areas which are unique to criminal trials. At the suggestion of Professor Saltzburg, Judge Jensen appointed a subcommittee to begin the process of drafting suggested guidelines and report to the Committee at its Fall 1994 meeting. The subcommittee consists of Ms. Klieman (chair), Judge Dowd, Professor Saltzburg, Mr. Martin, and Mr. Pauley.

5. Rule 57, Rules by District Courts

The Reporter informed the Committee that the proposed amendments to Rule 57 were being coordinated by the Standing Committee which hoped to maintain consistency in all of the rules addressing this particular topic. He noted that the Bankruptcy Advisory Committee had suggested using the term

"nonwillful" instead on "negligent failure" in Rule 57(a)(2). Professor Saltzburg moved that Rule 57 be approved as published. Mr. Pauley seconded the motion. Following brief discussion of the issue, the Committee agreed with Judge Stotler's suggestion that the reference in the Advisory Committee's note to waiving a jury trial be deleted. The motion to approve the amendment and forward it to the Standing Committee carried by a unanimous vote.

6. Rule 59, Effective Date; Technical Amendments

Following a brief description concerning the proposed amendment to Rule 59 which would permit the Judicial Conference to make minor, technical changes to the Rules, Mr. Karas moved that the amendment be approved and forwarded to the Standing Committee. Judge Crigler seconded the motion, which carried by a unanimous vote.

D. Rules Under Consideration by Advisory Committee

1. Rule 6; Amendment to Permit Disclosure of Grand Jury Materials to State Judicial and Discipline Agencies.

The Reporter informed the Committee that Mr. Barry Miller of Chicago had suggested to the Committee that Rule 6(e) be amended to permit disclosure of grand jury testimony to state judicial and attorney discipline regulatory agencies. He also briefly reviewed the Committee's prior positions on grand jury secrecy and its rejection of earlier proposals to expand the disclosure of grand jury proceedings. Judge Jensen noted that the proposal apparently arose from situations where federal grand juries had heard testimony or information which implicate rules of professional responsibility and possible discipline by state agencies.

Mr. Pauley noted that the Seventh Circuit had addressed the question and had concluded that disclosure might be permitted under Rule 6(e)(3)(C)(i) where a state judicial body is seeking disclosure. Judge Jensen and Judge Crigler noted that if there is question about possible violation of state criminal laws, disclosure might be possible under subdivision (e)(3)(C)(iv).

Mr. Karas questioned what the standard would be for disclosure and raised the possibility that there might be a conflict of interest if the government disclosed grand jury information which it knew at the time, might support an indictment. Judge Crow expressed concern that the grand jury might become a discovery tool for civil proceedings. Mr. Pauley responded that the test is one of "particularized need" and that disclosure cannot be made under the rule simply because an entity wants the information. Judge Jensen observed that grand juries might typically hear evidence involving professions other than attorneys and judges and that the proposed amendment would probably only address those situations where neither state nor federal criminal proceedings were involved.

Mr. Pauley moved that the Committee draft an amendment to Rule 6(e) to implement the suggestion from Mr. Miller. Professor Saltzburg seconded the motion, which failed by a vote of 1 to 10.

2. Rule 16. Discovery and Inspection

a. Report of Subcommittee on O'Brien Proposals

Ms. Klieman, chair of a subcommittee to study proposed changes to Rule 16 suggested by Judge Donald O'Brien, reported the subcommittee's findings and recommendations. She noted the background of the proposals and the Committee's prior positions on the issue. The proposed amendments would authorize trial courts to order the government to produce any directory, index or inventory which might assist the defense in reviewing massive documents and materials under Rule 16. She noted that the subcommittee had thoroughly reviewed the materials submitted in support of the amendments and the opposing views of the Department of Justice and had concluded that no amendment should be made to Rule 16 for several reasons. First, there was concern about cluttering the discovery rules to meet what does not appear to be a major problem with criminal discovery. Second, most of the members of the subcommittee believed that trial judges currently have sufficient authority to order such production under the rules. Nothing in the rule currently forbids such discovery and the 1974 Advisory Committee Note indicates that the provisions of Rule 16 are intended to provide the minimum discovery available in criminal trials.

Ms. Klieman also indicated that the Reporter had supplied the subcommittee with a memo indicating a lack of any dispositive caselaw on the subject and suggesting that a minor amendment to Rule 16 might be appropriate. She noted that she had informally spoken with a number of defense counsel who were not in favor of the amendment because it might encourage laziness on the part of young or inexperienced defense counsel who would not conduct meaningful discovery on behalf of their clients.

Judges Davis and Marovich agreed with that assessment and in particular, the fact that Rule 16 sets out only the minimum standards and that judges have the authority to order such discovery in a particular case. Mr. Pauley, while arguing against a rule change, nevertheless disagreed with that conclusion. He noted that if read literally, the 1974 Committee Note would eliminate the necessity of any additional discovery amendments in Rule 16, including a proposed amendment to require the government to disclose the names of its witnesses before trial. Judge Jensen observed that a trial court's order to the government to produce what amounts to its work product in a major case would be unwarranted.

Ms. Klieman indicated that what the defense really wants is an indication from the government as to what information it will be introducing at trial. Professor Saltzburg agreed, noting that under Rule 16, as written, there are clear differences between various documents and materials and that the problem often arises where defense counsel do not clearly articulate just what they want from the government.

Following additional brief discussion on whether any special action should be taken with regard to accepting formally the subcommittee's report, Judge Jensen indicated that no action would be necessary on the report itself and that if there was interest in amending Rule 16, a motion to do so would be in

order. There was no such motion.

b. Prado Report Re Allocation of Costs of Discovery

The Reporter indicated that portions of the Report of the Judicial Conference of the United States on the Federal Defender Program, i.e., the Prado Report had been referred to the Committee for its consideration. The Report recommended consideration of amendments to the rules which would address the issue of assessing or allocating discovery costs between the defense and government. Judge Crigler questioned whether any amendment was appropriate. Mr. Martin gave examples of how the government currently provides defense access to photocopying machines for purposes of discovery. Following additional brief discussion of the issue, a consensus emerged that the matter was more appropriately a question for statutory amendments. Judge Marovich moved that no amendment be made to the criminal rules. Judge Crigler seconded the motion, which carried by a vote of 10 to 1.

c. Production of Witnesses' Names

The Reporter provided background information on a proposal to amend Rule 16 which would require the prosecution to disclose to the defense seven days before trial, the names, addresses and statements of the witnesses it intended to call at trial.(2) He noted that a proposal approved by the Advisory Committee at its Fall 1993 meeting in San Diego had been presented to the Standing Committee at its January 1994 meeting in Tucson, Arizona. At that meeting, a representative from the Justice Department, Mr. Nathan, urged the Committee to defer action on the amendment until the Department had had an opportunity to work on a compromise provision with the Advisory Committee. Although the Standing Committee was in general agreement with the intent of the amendment, it referred the proposal back to the Advisory Committee for further consideration of any additional proposals from the Department of Justice. The Advisory Committee was also asked to address possible concerns about whether the amendment would conflict with the Jencks Act. The Standing Committee took special note of the fact that referring the matter back to the April 1994 meeting of the Advisory Committee would not delay the process of seeking public comments.

The Reporter indicated that in response to suggestions from members of the Standing Committee, he had made minor changes to both the Rule and the Advisory Committee Note.

Ms. Jo Ann Harris, Assistant Attorney General, urged the Committee to defer any further action the proposed amendment pending the development of hard data which would show whether any problems might exist with disclosing witness names. She noted that the information driving the proposed amendment seems to be largely anecdotal and that proposed amendments to the rules should not be based on anecdotes. She assured the Committee that the Department of Justice was working in good faith toward obtaining "hard data" on this issue and developing internal guidelines but that there was concern among United States Attorneys about codifying what they generally do -- provide open disclosure to the defense. Ms. Harris added that the Department was willing to work toward a uniform policy of discovery

and asked for time to conduct a thorough survey of current practices. In response to a comments from Judge Jensen and Judge Smith that the comment period would not interfere with the Department's proposed survey, Ms Harris noted that the results of the survey might affect even the initial draft sent out for public comment.

Professor Saltzburg noted that the issue before the Committee was not new and that there is a real policy question at issue. He added that the draft amendment provided more than adequate protection for government witnesses who were in danger. Mr. Wilson noted that open file discovery was often inversely proportional to the strength of the government's case.

Judge Marovich indicated that a system of informal discovery practices often depended on the trial judge. He also cited his experience in state courts, which often involve questions of witness safety and yet discovery is provided.

The Reporter commented on the history of the present amendment and that the Department of Justice had assured the Committee several years earlier that it would consider internal policy changes to provide broader pretrial discovery and that the Department had worked actively to stem any formal amendments. He also indicated that the Department had assured the Standing Committee that it would work in good faith to reach an accommodation on this particular amendment and that it had not indicated that it would seek further delay in the amendment process.

Ms. Harris indicated that the Department was simply recommending that the Committee have the benefit of a formal survey of United States Attorneys before moving forward with the amendment. She also noted that the present draft did not give sufficient attention to the privacy interests of the witnesses.

Concerning specific comments on the proposed amendment, Ms. Harris and Mr. Pauley noted that there were problems with the Jencks Act, which they believed was clearly at odds with the amendment. Mr. Pauley also stated that there might be potential separation of powers issues.

Professor Saltzburg agreed with the view that the amendment is inconsistent with Jencks but that that argument is merely a screen for not addressing the merits of the amendment. He also indicated that in his view there is no constitutional law issue and that in enacting the Rules Enabling Act, including a supersession clause, Congress recognized that the courts have special expertise in drafting proposed rules and that amendments might be necessary from time to time. The process of amending the rules is special because it is not adversarial.

Judge Stotler indicated that the litigation battles over discovery are being fought today and that trial judges are capable of applying any amendment to Rule 16.

Ms. Klieman moved that the proposed amendment be sent forward to the Standing Committee, as changed by the Reporter. Mr. Martin seconded the motion.

Ms. Harris and Judge Dowd raised questions about including the witness's address in the amendment. Ms. Klieman responded that in other discovery rules, in particular Rule 12.1 requires the defense to provide the names and addresses of its witnesses to the government. Ms. Harris responded by noting that there is a difference in alibi witnesses and other witnesses and that alibi witnesses are seldom encountered in federal cases. She added that if the defense counsel wishes to talk to the government witness, the Department will always make arrangements for such interviews. Judge Marovich agreed that that procedure seemed to be satisfactory. Professor Saltzburg indicated that he could accept deletion of the requirement to give the witness' address. Judge Jensen indicated that removal of the references to addresses from the rule should not be interpreted to frustrate the defense's attempts to actually speak with the government witness.

Judge Dowd moved to amend the proposal by deleting references to a witness' address. Judge Marovich seconded the motion, which carried by a vote of 8 to 1. Judge Jensen suggested that the Advisory Committee Note reflect the fact that the deletion of references to witnesses' addresses was not intended to frustrate the ability of the defense to attempt to speak with the witness before trial.

Ms. Harris expressed concern that the proposed amendment is too narrow in stating the reasons which could be relied upon by the prosecution to refuse to disclose information about a witness. She indicated that the list of reasons should include recognition that witnesses often face hardships, intimidation, and economic or social disadvantage by agreeing to testify for the government. Mr. Pauley indicated that excellent examples of intimidation have arisen in the civil rights cases where witnesses have faced what amounts to a form of excommunication. He believed that on balance, in those cases the harm to society would exceed the interests of the defense in discovering the witness' identity. Many witnesses are aware that most cases will not go to trial, but will have been needlessly identified. Judge Davis indicated that he could support an amendment to the rule to cover a separate class of witnesses who fear intimidation and that the trial court could review the government's reasons for not disclosing those witnesses. The Reporter indicated that the Committee Note recognizes that other provisions of Rule 16 might be invoked by the prosecution to protect its witnesses and those provisions might be relied upon to protect witnesses not otherwise covered by the proposed amendment. There was no motion to further amend the Rule or the Committee Note regarding the possibility of additional criteria for withholding disclosure.

Ms. Harris stated that the Department of Justice was concerned about the seven day period envisioned by the rule. She would favor a shorter time frame. Mr. Pauley indicated that the seven-day provision was inconsistent with the three-day disclosure provision in capital cases. Mr. Wilson urged the Committee to retain the seven-day provision and Judge Jensen noted that in actual practice, 10 days is a typical time frame. Mr. Pauley responded that the proposal did not take into account long trials. Professor Saltzburg stated that it would be important to keep the seven day provision because the defense needs to know early in the trial who the government intends to call. There was no formal motion to change the time period envisioned in the proposal.

Turning to the question of whether the rule envisioned an all or nothing approach to reciprocal discovery, Judge Davis moved to amend the proposal to reflect the fact that the court has the discretion to limit the government's reciprocal discovery rights if the government has filed an ex parte affidavit indicating its refusal to disclose information. Judge Dowd seconded the motion. Following additional brief discussion on the motion, the Committee voted 5 to 3 to amend the proposal.

On the main motion, the Committee voted 9 to 1 to send the amendment to the Standing Committee for public comment.

d. Defense Disclosure to Government of Summary of Expert Testimony on Defendant's Mental Condition

Mr. Pauley indicated that the Department of Justice had proposed an amendment to Rule 16, which would require the defense to disclose, upon a triggering request from the government, information about its expert witnesses who would testify on an insanity defense. He noted that amendments to Rule 16, which were effective on December 1, 1993, provided for defense discovery of a government's witness's expected testimony and qualifications. The proposed amendment, he explained, would afford the government the limited right to initiate discovery where the defense has given notice under Rule 12.2 of an intent to rely on the insanity defense. In offering the amendment, he indicated that the amendment would reduce surprise to the government and possible delays in the trial.

Professor Saltzburg voiced agreement with the proposed amendment, and the Department of Justice's recognition that reduction of surprise and delay were valid reasons for expanding federal criminal discovery. He also expressed hope that the Department would not oppose attempts to expand defense discovery, in particular, the proposed amendment to provide the defense with the names and statements of government witnesses before trial.

Mr. Pauley moved that Rule 16 be amended to incorporate the Department's suggested change. Professor Saltzburg seconded the motion which carried by a unanimous vote.

3. Rule 26; Proposal to Permit Questioning by Jurors

The Reporter indicated that the Committee at its Fall 1993 meeting had deferred any action on a possible amendment to Rule 26 which would address the issue of questioning of witnesses by the jury. Following brief discussion, no action was taken on the issue.

4. Rule 32; Amendment Permitting Criminal Forfeiture Before Sentencing

Mr. Pauley noted that as presently written, Rule 32 envisions that forfeiture proceedings are part of the sentence. The Department of Justice's view, he said, is that any delays in sentencing, and thus forfeiture, can make it difficult to seize the property and protect the government's interest and interest of third parties, e.g. lien holders. He indicated that there are examples of defendants who have ruined the property in question while awaiting sentencing. Under an amendment proposed by the Department, the

trial court would have the discretion to order forfeiture before sentencing.

Mr. Pauley moved to adopt the written proposal from the Department of Justice and Judge Dowd seconded the motion.

Judge Jensen queried whether the trial court has any authority to impose forfeiture notwithstanding the sentence. Mr. Pauley indicated that while a court may freeze assets, there is no authority to actually proceed with forfeiture and protect third party interests. Professor Saltzburg expressed concern that the amendment would actually prevent destruction of the property and stated that in his view, the All Writs Act provided authority to the trial court. Other members raised questions about the practical aspects of entering a forfeiture order and then incorporating that order as part of the judgment in the case. Mr. Pauley indicated that the Department's proposal paralleled part of a larger legislative package on forfeiture and that the amendment could be made a part of that legislative package instead of proceeding through the rules enabling act.

The Reporter expressed concern about the timing of the proposed amendment to Rule 32 in light of the fact that Congress would be considering the massive amendments to that rule, at the same time the proposed amendment would be out for public comment. Several members indicated in response that if the Standing Committee views that as a legitimate issue, it could delay publication of the proposal pending any final action by Congress on Rule 32.

The Committee voted 6 to 4 to amend Rule 32 as recommended by the Department of Justice in its letter to the Committee.

5. Rule 46; Typographical Error

The Reporter informed the Committee that a typographical error had been discovered in Rule 46(i), an amendment which went into effect on December 1, 1993. That new provision addresses the issue of disclosing statements by witnesses who testify at pretrial detention proceedings. The rule, however, cites 18 U.S.C. § 3144 instead of § 3142, which governs pretrial detention hearings. Apparently, several magistrate judges are reading the rule literally although it is clear in the Advisory Committee Note and in other amendments to the rules that the Committee intended the rule to apply at detention hearings. Mr. Pauley indicated that the United States Attorneys have been instructed to not argue for literal application of the provision. The Reporter indicated that Judge Jensen had requested the Administrative Office to initiate any necessary legislative action to correct the provision.

6. Rule 49(e); Repeal of Provision

The Reporter noted that the statutory provisions cited in Rule 49(e) concerning filing notice of dangerous

offender status had been abrogated, thus removing the necessity for the rule. Upon motion by Judge Marovich, seconded by Judge Dowd, the Committee voted unanimously to recommend that the provision be deleted.

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

The Reporter informed the Committee that the Local Rules Project, which had compiled helpful information on local rules governing civil cases, would be conducting a similar study for criminal cases. That project is being coordinated by Professor Daniel Coquillette and Professor Mary Squires of Boston College School of Law.

2. Status Report on Proposal to Implement Guidelines for Filing by Facsimile

The Committee was informed by the Reporter that the Standing Committee had given considerable time and effort at its January 1994 meeting toward redrafting and clarifying some uniform guidelines for facsimile filing and had forwarded them to the Judicial Conference for action.

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

The Committee was also informed that pending legislation in the Crime Bill might affect rules of criminal procedure and evidence. In particular, Congress is considering an amendment to Rule 32 which would provide for victim allocution at sentencing. The Administrative Office and Judicial Conference are monitoring the legislation and have urged the Congressional leadership to follow the procedures set out in the Rules Enabling Act.

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

After brief discussion the Committee decided to hold its next meeting in Santa Fe, New Mexico on October 6 & 7, 1994. Alternate dates are October 13 & 14, 1994.

The meeting adjourned at 10:30 a.m. on April 19, 1994.

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter

1. [1]. The Committee's discussion of the amendment to Rule 53 took place on the first day of the meeting, April 18 and on the second day, April 19. It is presented in its entirety here to provide continuity.

2. [2]. The proposed amendment to Rule 16 dealing with disclosure of witness names was discussed first on April 18 and concluded on April 19. It it is presented here in its entirety for purposes of continuity.