MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

April 23, 24, 1992
Washington, D.C

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 23 and 24, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Keenan, acting chair, called the meeting to order at 9:00 a.m. on Thursday, April 23, 1992 at the Administrative Office of the United States Courts. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. Joe Spaniol, Mr. Peter McCabe, Mr. David Adair, Ms. Judith Krivit, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. William Eldridge of the Federal Judicial Center. Judge Harvey Schlesinger was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Due to the temporary absence of Judge Hodges, Judge Keenan welcomed the attendees and noted that all of the members were present with the exception of Judge Hodges, who was expected shortly and Judge Schlesinger whose docket prevented him from attending the meeting. Judge Keenan extended a welcome to the two new members, Judge Jensen and Magistrate Judge Crigler. He noted that Mr. William

Wilson, Standing Committee member acting as liaison to the Advisory Committee, was not able to attend due the recent death of his wife. On behalf of the Committee, Judge Keenan extended deepest sympathies to Mr. Wilson.

II. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's November meeting in Tampa, Florida be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Special Order of Business: Request by Federal Bureau of Prisons Regarding Arraignments

Mr. J. Michael Quinlan, Director of the Federal Bureau of Prisons spoke briefly to the Committee, urging it to reconsider proposed amendments to the Federal Rules of Criminal Procedure which would permit arraignment of detainees through closed-circuit television or some similar arrangement. He noted that problems of security and the sheer numbers of arraignments involving detainees threatened to gridlock the system. He added that there are approximately 119,000 such hearings a year. In particular he asked the Committee to consider amending Rules 10 and 43 to permit arraignments without the defendant actually appearing in court. Judge Keenan and the Reporter indicated that the matter would be placed on the Fall 1992 agenda.

B. Rules Approved by the Supreme Court and by Congress

The Reporter informed the Committee that several Rules approved by the Supreme Court and sent to Congress had become effective on December 1, 1991: Rule 16(a)(1)(A) (Disclosure of Evidence by the Government), Rule 35(b)(Reduction of Sentence) and Rule 35(c)(Correction of Sentence Errors). In addition, technical amendments in Rules 32, 32.1, 46, 54(a), and 58 became effective on that date.

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

The Reporter indicated that a number of rules which had been approved by the Standing Committee for public comment were back before the Committee for its reconsideration. He indicated that very few written comments had been received on the proposed amendments and that most of those had been positive. The Reporter also noted that the "Style"

subcommittee of the Standing Committee had presented its suggested changes in the language to all of the Rules and that unless otherwise noted, those changes should be a part of the approved versions forwarded to the Standing Committee. Judge Keeton added that it was not the intent of the Standing Committee that the style committee make any substantive changes to the Rules themselves. The Committee then addressed each of the proposed Rules.[1]

1. Rule 12(i). Production of Statements.

The Reporter indicated that no written comments had been received on the proposed amendment. After brief discussion in which it was noted that the introductory language in the Rule should refer to "these Rules," Mr. Karas moved that the Rule be forwarded to the Standing Committee. Mr. Marek seconded the motion which carried by a unanimous vote.

2. Rule 16(a). Disclosure of Experts.

The Reporter informed the Committee that the proposed amendment to Rule 16(a) had generated some comments from the public. Several had raised the issue of the scope of the rule, the lack of specific timing requirements, the relationship between this provision and others in Rule 16, and the difficulty of knowing in advance of trial which experts would be called to testify.

Mr. Karas moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Doar seconded the motion.

Mr. Pauley referred to a letter sent by the Justice Department to the Advisory Committee which expressed strong opposition to the amendment. He noted that there did not seem to be any real problems which required the amendment and that the Committee should consider the full panoply of experts that would potentially fall within this amendment. In particular, he noted that "summary" experts would be covered and that the amendment did not cover problems which would arise if the government did not know in advance of trial which witnesses it would call. Judge Hodges noted the the Department's letter in opposition to the amendment had been received by the Committee almost two months after the official comment period ended.

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1. Although the rules are noted here in chronological order to facilitate referencing, they were not discussed in this exact order.

Professor Saltzburg endorsed the concept of the amendment. He indicated that the language "at the request of the defendant," should stay in and observed that if problems develop with application there will be time for any further amendments. He indicated that the problem of the parties not knowing who the witnesses would be could be addressed by extending the amendment only to those witness that a party "expected" to call. Mr. Marek echoed Professor Saltzburg's support for the amendment and disagreed with the Department's assertions that defendants are not currently being surprised by government experts.

Judge DeAnda spoke in favor of the amendment and noted that the timeliness requirements would affect both the government and the defense. Judge Jensen added that the underlying concept of the Rule was good but that he was opposed to the requirement for a written report. Mr. Pauley again expressed concern about the amendment and added that it would require the government to present its theory of the case to the defendant before trial.

After some additional discussion on the options available to the Committee, the chair called the question on the existing motion to send the amendment forward as published. That motion failed by a vote of 8 to 2.

Professor Saltzburg then moved that changes be made in the amendment which would address some of the concerns raised during the discussion:

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

Mr. Marek seconded the motion. Mr. Doar expressed some concern about whether the new language should leave out the reference to the underlying data relied upon by the expert witness. Mr. Pauley noted that the new language addressed some of the concerns raised by the Department of Justice but in an extended discussion of the issue, stated that the amendment and the debate it would generate were not needed because currently no problem exists. In his view, the amendment goes far beyond what is necessary and will generate needless litigation. The suggestion was made that the Committee Note to the amendment note some distinction between non-expert "summary" witnesses.

The Committee's vote on the motion was 5 to 5. But the motion ultimately carried on the tie-breaking vote by the Chair, Judge Hodges. Professor Saltzburg then moved that the Committee recommend to the Standing Committee that no further public comment be sought on the amendment. That vote as well was a tie vote (5 to 5) but ultimately carried when the Chair voted in the affirmative.

Professor Saltzburg thereafter moved that conforming changes be made in Rule 16(b)(1)(C), that they be forwarded to the Standing Committee with the recommendation that no futher public comment be solicited. That motion was seconded by Mr. Marek and carried by a unanimous vote.

In further discussion on Rule 16, Judge Keenan suggested that the Committee Note should indicate the potential problems with fungible experts and the amendment is not intended to create unreasonable procedural hurdles. Mr. Marek expressed concern about disclosure of experts who are not fungible. It was noted by several members during the ensuing discussion that Rule 16(d) provides an avenue of relief for both sides.

3. Rules 26.2 and 46. Production of Statements.

The Reporter informed the Committee that the public comments on the amendment to Rule 26.2 were generally supportive of the change. One commentator suggested that similar amendments be extended to the rules addressing dimissal of indictments (Rule 12(b)(1)) and motions for new trials (Rule 33). That same commentator pointed out that there would be difficulty producing statements at pretrial detention hearings and hearings held under Section 2255. Another commentator indicated that the term "privileged information" should be defined.

Mr. Pauley referred to the letter prepared by the Department of Justice which opposed the amendment to Rule 26.2 and Rule 46 insofar as those amendments would apply to disclosure of statements at pretrial detention hearings. He had no problem with the concept of Rule 26.2 but expressed concern about the extension of production requirements to pretrial proceedings. A major problem, he noted, would be the difficulty of gathering statements at such an early stage in the prosecution. He added that there are no real problems requiring the amendment, that the amendment will simply cause additional litigation, and will pose dangers to government witnesses.

Mr. Karas responded that there can be a real problem where individuals are detained for lengthy periods of time. Further, he noted that the Supreme Court in Salerno

recognized the importance of the court receiving accurate information in deciding pretrial detention issues. Professor Saltzburg suggested that the Committee note reflect that the parties are expected to proceed in good faith and that if statements are later discovered they should be given to the court and let it decide whether to reopen the issue of detention. Mr. Marek also spoke in favor of the amendment noting that a recent report from the Judicial Conference indicated a growing crisis in pretrial detentions; in his view, there was a real need for accurate information at that stage. He emphasized that the government attorney can simply tell his or her witnesses to bring their statements with them. Subsequently discovered statements would trigger a re-opening of the issue if they demonstrated a material difference with the witness's testimony.

Magistrate Crigler raised concerns about the scope of the rule and queried whether the rule envisioned that statements of affiants and hearsay declarants would be produced. After some discussion on that point, the Reporter observed that the word "affidavit" in Rule 26.2 and other similiar rules posed some problems because Rule 26.2(a) apparently only envisions that the witness's "testimony" would trigger the disclosure requirements.

Mr. Pauley moved that any references to pretrial detention hearings be removed from the proposed amendment to Rule 26.2. Magistrate Crigler seconded the motion.

Judge Keeton, in response to the Reporter's observations regarding the use of affidavits indicated that the term should probably remain because prosecutors often produce affidavits as part of their proof. He added that in his view, the rule would not extend to hearsay declarants.

The motion was defeated by a margin of 7 to 1.

Mr. Pauley subsequently stated that the Committee Note should be revised to reflect that only testimony of a witness would trigger the rule. Judge Jensen moved that the reference to affidavits should be removed from Rule 46 itself. Mr. Karas seconded the motion which carried by a 7 to 1 vote with one abstention.

Mr. Karas moved that Rule 46, as amended, be forwarded to the Standing Committee for its approval. Professor Saltzburg seconded the motion which carried by an 8 to 1 vote.

Judge Jensen then moved that the reference to affidavits should be removed from the other pending

amendments (and accompanying Committee Notes) addressing production of witness statements: Rule 32(f), Rule 32.1, and Rule 8 in the Rules Governing § 2255 Hearings. Professor Saltzburg seconded the motion which carried by a 6 to 1 margin with two abs ntions.

Mr. Marek moved that the amended Rule 26.2 be fowarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a vote of 9 to 1 with one absention.

4. Rule 26.3. Mistrial.

The Reporter informed the Committee that only one comment had been received on the proposed change and that it was favorable. Mr. Pauley moved that the amendment be forwarded to the Standing Committee for approval. Judge DeAnda seconded the motion. The motion was approved by a unanimous vote.

5. Rule 32(f). Production of Witness Statements.

The Reporter advised the Committee that only one comment had been received on Rule 32(f) and it related to the potential problem of defining "privileged information." Mr. Marek thereafter moved that the Committee approve the amendment (with references to affidavit removed) and Judge Keenan seconded the motion. It carried by a 9 to 0 margin with one absention.

6. Rule 32.1. Production of Witness Statements.

The Committee was informed by the Reporter that no written comments were received on this proposed amendment. Mr. Marek moved that the proposed amendment (with the references to affidavits removed, supra) be fowarded to the Standing Committee for its approval. Professor Saltzburg seconded the motion which carried by a 9 to 0 vote with one absention.

7. Rule 40. Committment to Another District.

The Reporter indicated that the single comment on the proposed amendment suggested that a nonfacsimile copy be transmitted promptly so that it could be included in the court documents. There was some discussion on whether the rule should be amended to include other means of "electronic transmission," e.g., computer-modem transmissions. The consensus was that it should not because the types of documents involved in Rule 40 proceedings did present special concerns about authenticity of the original documents, as opposed to other court "papers" which would

normally not involve such issues. The suggestion was made that the Committee Note should refer to the decision not to include provision for other electronic transmissions. Magistrate Crigler moved that Rule 40 be approved and forwarded to the Standing Committee with the recommendation that it be sent to the Judicial Conference. Professor Saltzburg seconded the motion which carried by a unanimous vote.

8. Rule 41. Search and Seizure.

The Committee was informed that only one comment was received on this proposed amendment and it, as with the comment on Rule 40, supra., suggested that the rule require prompt transmission of the original documents to the court. Although no action was taken on that suggestion it was suggested that the Committee Note could observe that the issuing magistrate could require that the original written affidavit be filed. After additional discussion it was agreed that the word "judge" following the words, "Federal magistrate" should be removed. Professor Saltzburg moved that the proposed amendment be approved and fowarded to the Standing Committee for its approval. Mr. Pauley seconded the motion which carried by a unanimous vote.

9. Rule 46. Production of Statements.

[This proposed amendment was discussed, and approved, in conjunction with the proposed amendment to Rule 26.2, discussed supra].

10. Rule 8. Rules Governing Section 2255 Hearings.

The Reporter indicated that the only written comment received on this proposed amendment reflected concerns about the difficulty of obtaining statements from witnesses which had been made perhaps years earlier. Mr. Marek moved that the Rule be approved and forwarded to the Standing Committee for its approval. Mr. Karas seconded the motion which carried by a margin of 9 to 0 with one absention.

D. Reports by Subcommittees on Rules of Criminal Procedure

1. Report of Subcommittee on Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

Judge Hodges reported that after additional discussion and study the Subcommittee on Rules 3, 4, and 5 had determined that no changes should be made at this time to those rules.

2. Report of Subcommittee on Rule 32. Allocution Rights of Victims.

Judge Hodges provided background on proposed amendments to Rule 32 concerning use of a model rule to govern sentencing proceedings and that the time may have come to revisit the issue of whether Rule 32 itself should be revised. He had thus circulated to the Subcommittee a draft revision of Rule 32. Judge DeAnda noted that the Subcommittee had failed to reach any consensus on the best way to provide for victim allocution rights. There was extensive discussion on what, if any, changes should be made. Mr. Marek moved that the matter be referred back to the Subcommittee for further study. Judge Jensen seconded the motion.

Mr. Marek provided a lengthy analysis of what he perceived to be four major areas of concern: (1) the role of the probation officer (e.g. to what extent the probation officers should resolve factual and legal disputes; (2) the issue of what burden of proof should apply to sentencing evidence; (3) the problem of victim allocution rights; and (4) the question of disclosure of the probation officer's recommendation. He noted that there would also be less important issues to be addressed. Judge Hodges encouraged the Committee to offer its thoughts on those and other issues which could be addressed in any further amendments. Most of the discussion centered on the role of the probation officer. Some observed that the system seems to work well while others questioned whether using the probation officers was the more efficient method. The consensus seemed to be that there was really no viable substitute for using the probtion officers, although some attention should be given to what their roles should be.

Professor Saltzburg observed that Judge Hodges" draft was a good starting point and that the Committee should consider sending it out for public comment.

[At this point further discussion was deferred until later in the meeting]

After additional discussion on the issue, Judge Hodges indicated that he would work further on his draft and that with the assistance of the Reporter he would circulate that draft, along with a Committee Note, to members of the Subcommittee. That matter would then be placed on the Fall 1992 agenda. He also appointed Judge Keenan to the Subcommittee to replace Judge Everett, who was no longer a member of the Advisory Committee. Judge Hodges' action thus

mooted the need to vote on Mr. Marek's earlier motion to refer the matter back to the Subcommittee

3. Report of Subcommittee on the Federal Rules of Evidence.

Professor Saltzburg reported on the work of the Subcommittee and indicated that it was prepared to offer several suggested amendments to the Rules of Evidence.

a. Rule 407. Subsequent Remedial Measures.

Professor Saltzburg indicated that the Subcommittee had considered and rejected a draft amendment to Rule 407 prepared by the Reporter. That amendment would have applied the Rule's limitations to strict liability cases. He noted that there is a split in the circuits, and that commentators have targeted the Rule as a candidate for an amendment. But the Subcommittee believed that the differences in application of strict liability principles was sufficiently to pose real problems of defining strict liability for purposes of Rule 407. He thereafter moved that the Committee not approve any amendment to Rule 407 concerning strict liability cases. Judge Crow seconded the motion which carried unanimously.

At this point the Committee entered into an extensive discussion on the issue of whether an additional Advisory Committee should be formed to handle evidence amendments. Judge Hodges provided some background information on Judge Becker's proposal to create a free-standing Advisory Committee on the Rules of Evidence. Judge Keeton indicated that as part of the process of reviewing the need for the existing Advisory Committees, Judge Becker's proposal would be on the agenda for the Standing Committee's June 1992 meeting. He indicated that three options existed: First, create a new Evidence Advisory Committee. Second, create an ad hoc committee composed of some new members and members from the Criminal and Civil Rules Committee. And third, maintain the status quo with some clarification on which Committee would have primary jurisdiction. He urged the members of the Committee to consider those options and make their views known to the Standing Committee.

Professor Saltzburg provided an in-depth account of how the Criminal and Civil Rules Committees had agreed some years ago to deal with amendments to the Rules of Evidence. He indicated that the Judicial Conference had asked the Chief Justice to appoint an Evidence Advisory Committee. But when no action was taken on that proposal, the Chairs of the Criminal Rules and Civil Rules Committees had agreed that the primary responsibility for monitoring the evidence rules

would reside in the Criminal Rules Committee. The Committee, he reminded, has routinely monitored and considered proposed evidence amendments which affect both civil and criminal practice. For example, in the late 1980's the Committee undertook the major project of gender-neutralizing the Rules of Evidence.

Judge Hodges conducted an informal straw poll of the Committee. The members indicated unanimously that they did not favor establishment of a new free-standing Evidence Advisory Committee. In the extensive discussion which followed, several members noted the distinction between rules of evidence and rules of procedure; the rules of evidence which do not require the sort of close monitoring and changes that rules of procedure do. There was also concern that a new committee would be inclined to set an active agenda which would almost certainly take on a life of its own and generate unnecessary amendments. Several observed that despite suggested changes from academic commentators, the rules of evidence have worked well.

Ultimately, Professor Saltzburg moved that the Standing Committee be advised that the Criminal Rules Advisory Committee recommends that the Committee's name be changed to the "Advisory Committee for Rules of Criminal Procedure and Rules of Evidence" and that some provision be made for additional input from the Civil Rules Committee, such as the addition of several members who would be permitted to vote on proposed evidence amendments. Judge Keenan seconded the motion. The motion carried by a vote of 9 to 1.

In the following discussion, Professor Saltzburg reflected that there were several key points to be considered in deciding to continue using the Criminal Rules Committee as the primary committee for the evidence rules. First, the Committee agrees with Judge Becker's view that the rules of evidence should be monitored. Second, it is important to fix the authority for doing so. Third, the rules of evidence have worked well since they went into effect in 1975. Where changes have been necessary they have been made. For example, the Criminal Rules Committee in the last two years has recommended amendments to Rule 404 and 609 which were ultimately made. Fourth, there is some relationship between the rules of procedure and the rules of evidence and it makes sense to have one of the procedural "rules" committees involved in the process of recommending amendments to the rules of evidence. Fifth, to the extent that there may be a conflict between the civil and criminal practice, those conflicts can be addressed through coordination with the Civil Rules Committee. Finally, the Criminal Rules Committee has the background, experience, and institutional memory for dealing with the evidence rules.

He added that it would be helpful for the public to see that despite the absence of massive amendments to the rules of evidence, the Committee has been active in considering amendments which specifically and direct target a needed change. He queried whether the Committee's actions regarding the rules of evidence could be published in the Federal Rules Decisions.

b. Rule 801(d). Definition of Hearsay.

Professor Saltzburg indicated that the Reporter had also circulated to the Subcommittee a draft amendment to Rule 801(d)(2)(E) which would address, in part, the problem addressed by the Supreme Court in Bourjaily v. United States. That case indicated that in deciding whether a conspiracy existed, for purposes of admitting a co-conspirator's statement, the court could consider the statement itself. The Subcommittee believed that the time was not yet ripe for tackling that issue and moved to table the proposed amendment. Judge Crow seconded the motion and it carried unanimously.

c. Rule 412. Rape Cases; Relevance of Victim's Past Behavior

The evidence subcommittee had also considered amendments to Rule 412 which would apply that rule to all civil and criminal cases. Professor Saltzburg noted that both the Reporter and he had circulated proposed amendments. The Reporter's version tended to be narrower in scope and required fewer changes to the existing rule. His was broader in scope and amounted to a major change in text.

Mr. Pauley had no objection to extending the rule to civil cases but expressed concern about completely rewriting a rule that was drafted by Congress.

There was some discussion on what, if any, action was contemplated by Congress regarding possible amendments to Rule 412. Several commented that although the Congress had taken no action, there was still time in the current legislative session to do so.

Professor Saltzburg moved that the Committee approve the concept of the amendments to Rule 412 and recirculate a draft for the next meeting. Magistrate Crigler seconded the motion which carried by a 9 to 0 vote with one absention.

d. Rule 804. Child Hearsay Statements.

Professor Saltzburg noted that the Reporter had also circulated a draft amendment to Rule 804 which would

specifically address child hearsay statements. The Reporter's version would add an "unavailability" provision to Rule 804(a) and a specific child hearsay exception in Rule 804(b). Professor Saltzburg believed that the issue could be addressed by simply adding language to Rule 804(a)(4) to provide for declarants of tender years. That provision would cover not only children but also adults who have the mental age of children. Assuming a declarant was unavailable under that provision, the catch-all provision in Rule 804(b)(5) could be relied upon for the exception itself.

In the following discussion there was general support for the amendment although a number of members expressed concern about going too far with the exception. They believed the exception should only apply to children.

Judge DeAnda moved that Rule 804(a)(4) be amended to include declarants of tender years and that it be forwarded to the Standing Committee for public comment. Mr. Pauley seconded the motion. It carried by a 9 to 1 vote.

d. Proposal from DEA to Amend Rules of Evidence

Professor Saltzburg noted that the DEA has suggested a possible amendment to the Federal Rules of Evidence which would make DEA Form 7 as prima facie evidence. After a brief discussion, Magistrate Crigler moved that the issue be referred to the Justice Department for its views. Mr. Doar seconded that motion which carried by a unanimous vote.

e. Rules 702, 703, and 705. Expert Testimony.

Professor Saltzburg observed that there were still serious problems with the proposed amendments to Rules 702, 703, and 705. The Reporter observed that a recent poll of trial judges indicated that although there was support for limiting expert testimony, a significant number of respondents noted that they were not inclined to see the rule applied to criminal cases. Professor Saltzburg moved that the Standing Committee be apprised that the Committee still opposed the proposed amendments to Rules 702, 703 and 705 and recommended that the Standing Committee table those amendments pending resolution of the jurisdiction question. Judge Keenan seconded the motion which carried unanimously.

E. Other Rules Under Consideration by the Advisory Committee

1. Rule 6(e). Grand Jury Testimony.

Judge Hodges indicated that the Department of Justice had proposed several amendments to Rule 6. In an extensive discussion of the issue, Mr. Pauley presented the Department's reasons for the amendments. The first was an attempt to overrule the Supreme Court's decision in United States v. Sells Engineering in that it would permit the sharing of grand jury information with government attorneys investigating civil law violations or claims. Sells, he indicated, greatly restricted the ability of the civil attorneys to investigate civil law issues. The second amendment would address issues raised in United States v. Baggot which held that other government agencies could not have access to grand jury information unless litigation was pending. He cited several examples of the inconsistencies of these cases and the problems which had resulted.

Mr. Pauley moved that the requested amendments to Rule 6(3)(3)(A) be approved and forwarded to the Standing Committee. Judge Jensen seconded the motion.

Professor Saltzburg agreed with the concept in the Department's memo but stated that there is an issue of whether it should be announced that material is being shared with the civil attorneys. Judge Hodges observed that if such material would be more widely shared that there might be a move for a bill of rights for grand jury witnesses. Mr. Marek queried whether there was really a problem requiring the amendment. And Mr. Doar expressed concern about the amendments. In his view, criminal and civil cases should be kept separate. The fact that before Sells the government was able to share grand jury information does not mean that it was right to do so.

The motion was defeated by a 3 to 5 vote with 2 absentions. Professor Saltzburg thereafter moved that the the Chair solicit the views of the Civil Rules Committee on this amendment. Judge Keenan seconded the motion which carried by a 9 to 1 vote.

Regarding the second amendment, Mr. Pauley moved that Rule 6(e)(3)(C) be amended and forwarded to the Standing Committee for publication. Judge Keenan seconded the motion.

Mr. Pauley urged the Committee to view this amendment as simply efficient use of governmental resources. In the discussion which followed, several Committee members noted the role of secrecy in grand jury proceedings and the dangers posed by sharing testimony with other agencies. Those dangers, responded Mr. Pauley, could be monitored by the courts. Professor Saltzburg observed that the proposed amendment would make a major change in the way the

government used grand jury testimony, which might be a good change. Nontheless, he favored sending the matter to the Civil Rules Committee first. Mr. Pauley strenuously objected to that suggestion.

The Committee ultimately rejected the motion by 4 to 5 with one absention.

2. Rule 11. Proposal to Require Advice Concerning Consequences of Guilty Plea

Judge Hodges informed the Committee that Mr. James Craven had suggested that Rule 11 be amended. The amendment would require that any defendant who was not a United States citizen be advised that a plea of guilty might result in deportation, exclusion from admission to the United States, or denial of naturalization. The brief discussion which followed focused on the practical problems associated with giving this, and similar advice which really focuses on the potential collateral consequences of a guilty plea. Judge Keenan moved that the proposed amendment be disapproved. Judge DeAnda seconded the motion which carried unanimously.

3. Rule 16. Proposal to Consider Amendments.

Judge Hodges indicated that Mr. Wilson had suggested that Rule 16 be considered in light of growing concerns about federal criminal discovery. But in his absence, the matter would be carried over to the Fall 1992 meeting.

4. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants

The Reporter indicated that in response to the Committee's direction at the November 1991 meeting, he had drafted proposed amendments to Rule 16 concerning disclosure of statements by organizational defendants. In a brief discussion it was noted that the Rule and the Committee Note should differentiate between statements by agents which would be discoverable as party admissions and an agent's statements concerning acts for which the organization would be vicariously liable. Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Judge Crow seconded the motion. It carried unanimously.

5. Rule 29(b). Proposal to Delay Ruling on Motion for Acquittal.

The Committee continued its discussion of an amendment to Rule 29(b) which had been suggested by the Department of Justice and addressed at the November 1991 meeting. Additional drafting of the amendment made clear that the

judge could only consider evidence admitted at the time of the motion in considering whether to grant a deferred motion. Judge Crigler moved that the amendment be forwarded to the Standing Committee for public comment. Judge Keenan seconded the motion which carried by an 8 to 2 vote.

6. Rule 32(e). Proposal to Repeal.

Mr. Pauley moved that Rule 32(e), a provision addressing probation, be repealed because it no longer reflected the law and that it be treated as a technical amendment. Professor Saltzburg seconded the motion. The motion carried by a unanimous vote.

7. Rule 49. Proposal to Require Two-Sided Printing.

Judge Hodges informed the Committee that the Environment Defense Fund had recommended amendments in the various rules of procedure to require that only double-sided, unbleached paper, be used for all court documents. After a brief discussion, Judge Keenan moved that the Chair communicate with the proponent of the amendment and explain that the whole matter of using alternatives to paper filings was being considered by other committees in the Judicial Conference. Mr. Karas seconded the motion which carried unanimously.

8. Rule 57. Proposal Regarding Local Rules.

The Reporter indicated that the Standing Committee had asked the various reporters for the Committees to draft appropriate language which would provide additional guidance on the promulgation of local rules. The Reporter indicated that he had drafted suggested language for inclusion in Rule 57, which governs local rules. That language was intended to avoid unnecessary duplication between the Criminal Rules themselves and the local rules and to provide for possible uniform numbering systems by the Judicial Conference. After brief discussion, Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Professor Saltzburg seconded the motion which carried unanimously.

9. Rule 59. Technical Changes.

The Reporter informed the Committee that the Standing Committee had also directed the Reporters to explore the possibility of amending the various Rules to provide authority to the Judicial Conference to make purely technical changes to the Rules without the need for forwarding them through the Supreme Court to Congress for action. The Reporter had suggested such amendments to Rule

59 and Federal Rule of Evidence 1102. Professor Saltzburg moved that the amendments be approved and forwarded to the Standing Committee as follows:

> "The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style."

The motion carried a provisio that if the Standing Committee believed that any reference to statutory changes should be deleted, the Advisory Committee would concur. Judge Crow seconded the motion. The motion carried by a unanimous vote.

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

A. Continuation of Advisory Committee on Criminal Rules

The Committee was advised that every five years the Judicial Conference considers whether to continue in existence the individual committees, including the Advisory Committees. After a brief discussion, Judge Crow moved that the Standing Committee recommend the continuation of the Criminal Rules Committee. Judge Keenan seconded the motion. It carried by a unanimous vote.

B. Designation of Next Meeting

Judge Hodges announced that the next meeting of the Committee would be held in Seattle, Washington on October 12 and 13, 1992.

The meeting adjourned at 11:40 a.m. on Friday, April 24, 1992.