MINUTES

ADVISORY COMMITTEE

FEDERAL RULES OF CRIMINAL PROCEDURE

October 12 & 13, 1992

Seattle, Washington

The Advisory Committee on the Federal Rules of Criminal Procedure met in Seattle, Washington on October 12 and 13, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 12, 1992 at the Stouffer Madison Hotel in Seattle, Washington. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman

Hon. John F. Keenan

Hon. Sam A. Crow

Hon. Harvey E. Schlesinger

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., designate of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter

Reporter

Also present at the meeting were: Judge Robert Keeton and Mr. Bill Wilson, chairman and member respectively,

of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe, Mr. David Adair, and Mr. John Rabiej of the Administrative Office of the United States Courts; and Mr. William Eldridge of the Federal Judicial Center. Judge DeAnda was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted the absence of Judge DeAnda, who had expressed his disappointment at not being able to attend what would have been his last meeting as a member of the Committee, due to his retirement.

II. APPROVAL OF MINUTES

Judge Keenan moved that the minutes of the Committee's April 1992 meeting in Washington, D.C., be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court

and by Congress

The Reporter informed the Committee that there were currently no proposed amendments which had been approved by the Supreme Court and forwarded to Congress.

B. Rules Approved by the Standing Committee

and Forwarded to the Judicial Conference

The Reporter also informed the Committee that at its June 1992 meeting the Standing Committee had approved the following rules and had forwarded them to the Judicial Conference, which had in turn approved and forwarded them to the Supreme Court:

1. Rule 12.1, Production 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 § 2255 Proceedings.

11 Technical Amendments to other rules.

C. Rules Approved by the Standing Committee

to be Circulated for Public Comment

The Committee was informed that at its June 1992 meeting in Washington, D.C., the Standing Committee had approved amendments to two rules, Rule 16(a)(1)(A) governing disclosure of statements by organization defendants, and Rule 29(b), concerning delayed ruling on judgment of acquittal. The proposed amendments had not yet been published for public comment, however, pending the move of the Rules Committee Support Office into its new quarters and the possibility of an expedited comment period on other pending rules.

The Committee generally discussed the problems associated with the delays in the Rules Enabling Act, which may account for several years from the time of the initial draft in the Advisory Committee to final enactment. Mr. Pauley observed that the necessary delays in the process had, in the past, prompted the Department of Justice to seek amendments directly from Congress. Judge Hodges observed that perhaps the problem associated with the lengthy process was worth further discussion by the Standing Committee.

D. Rules Under Consideration

by the Advisory Committee

1. Rule 5(a), Appearances for Persons Arrested for UFAP Offenses.

Judge Hodges gave a brief overview of a proposed amendment to Rule 5 concerning release of defendants arrested for violating 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Magistrate Judge Crigler had raised the issue, noting that for all practical purposes, UFAP offenses are rarely prosecuted. But Rule 5 requires federal authorities to bring an arrested defendant promptly before a federal magistrate. He noted that all of the participants need to know how to fairly handle UFAP cases and that the problem may be more practical than theoretical. Judge Hodges noted that the prevalent practice is to arrest UFAP defendants, using federal authorities, who then turn them over to state officials for prosecution for the underlying state offense.

Following some additional discussion about the background of the problem Judge Jensen moved that Rule 5 be amended to specifically exempt UFAP defendants from the prompt appearance requirement. Mr. Pauley seconded the motion.

Mr. Pauley noted that of approximately 2,800 UFAP arrests only 6 were actually prosecuted in federal court. He added that Congress enacted § 1073 knowing that most arrestees would not be prosecuted under that provision. He added that there are a variety of practices within the districts and that any proposed solution should provide some flexibility in Rules 5 and 40 for dealing with UFAPs. In response to a question from Judge Hodges, Mr. Pauley indicated that he did not know how many UFAP warrants are sought.

Magistrate Judge Crigler observed that a defendant may not even be aware of pending state charges and that Rule 5 does a good job of protecting a defendant. Mr. Karas agreed with that observation and added that state

public defenders may not be permitted to represent Ufos. Mr. Marek echoed Mr. Karas' statements and noted that there is a real danger that a UFAP defendant could be turned over to state authorities and nothing would happen in the case. Mr. Pauley responded that the defendant's interests would be protected by *Riverside*'s requirements of a prompt appearance before a magistrate to determine if probable cause exists for pretrial confinement.

In the ensuing discussion, the Committee noted a variety of potential problems with amending Rule 5 to meet the UFAP problem. Judge Keeton noted that it might be easier to simply amend the statute to permit federal authorities to arrest a state defendant without relying upon a separate, rarely prosecuted, substantive federal crime. Several members raised the issue of jurisdiction to arrest a UFAP defendant and the most appropriate forum for complying with Rule 5. Judge Hodges thereafter appointed a subcommittee consisting of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley, to consider the proposed amendment and report to the Committee at its next meeting. No vote was taken on the motion to amend.

2. Rules 10 and 43, In Absentia Arraignments.

Judge Hodges provided a brief overview of a proposal from the Federal Bureau of Prisons to provide for teleconferencing arraignments and recognized the presence of Mr. Phillip S. Wise from the Bureau who would be available to answer questions from the Committee. He noted that the gist of the proposal was to provide some contact between the defendant, counsel, and the court without the necessity of the defendant's actual appearance before the court.

Judge Jensen moved to amend Rules 10 and 43 to provide for teleconferencing of arraignments. Mr. Pauley seconded the motion.

Judge Hodges observed that the proposal had been previously considered and rejected by the Committee and Mr. Marek questioned whether the proposed amendments would be limited to arraignments. Mr. Wise answered that the Bureau's preference would be that as many pretrial proceedings as possible, e.g., pretrial detention hearings, be covered. He further explained the two-way technology used in some state courts; the defendant can see the judge and the witness box and the judge can see the defendant. The defense counsel may or may not be with the defendant. Professor Saltzburg indicated that although he favored teleconferencing for arraignment, he would be opposed to such a procedure wherever evidence would be considered.

Mr. Marek expressed concern that the amendment would lead to a slippery slope and that he opposed any teleconferencing, even for arraignments. He noted that there was a false assumption that nothing happens at an arraignment; the defendant should see the dynamics of the situation. There are significant issues to be decided at pretrial sessions, such as setting bail and determining competency of the defendant. He noted that although the Bureau of Prisons might save money by not transporting defendants to court, the court would incur additional expenses in terms of equipment and operating costs. In his view, the proponents had not made a case for overriding the important interests associated with personal appearances.

Judge Hodges indicated that it might be beneficial to treat Rules 10 and 43 separately and raised the question of whether it would make a difference if the defendant had the option of deciding to waive a personal appearance. Mr. Marek indicated that the right should not be waivable and Mr. Karas added that if a waiver provision were added, only those who could afford counsel, would appear.

A brief discussion ensued on the problems associated with prison overcrowding and the logistical problems associated with transporting defendants to court, especially in larger metropolitan areas. Judge Jensen noted that

even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote if five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations.

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had been addressed at some length in an article by David Adair and

Toby Slawsky of the Administrative Office but that the authors had not recommended any particular amendment to the rules of criminal procedure.

Judge Keenan moved that the Committee discuss the concept to amend Rule 11 to require that factual stipulations be addressed in the judge's colloquy with the defendant and that the defendant be apprised of the fact that the court would not be bound by the stipulated facts. Judge Jensen seconded the motion.

Judge Keenan indicated that he assumed that the court would be required to insure that the plea was not a sham. Mr. Adair briefly indicated that his research had indicated that several cases had equated factual stipulations with binding Rule 11(e)(1)(C) agreement regarding the sentence. Judge Keeton replied that the court has an obligation to reject a stipulation which is not true and Mr. Marek observed that the truth in the stipulation is not always easily determined. He noted that if it appears that there is a problem with an 11(e)(1)(C) agreement, the defendant should be able to withdraw the guilty plea. Judge Keeton added that some United States Attorneys are being instructed not to use 11(e)(1)(C) agreements. Following brief discussion on the use of written pretrial agreements, the motion to consider an amendment to Rule 11 was withdrawn by Judge Keenan with the consent of Judge Jensen. No further motions were made on the issue.

4. Rule 16, Disclosure of Materials Implicating Defendant.

Judge Hodges introduced a proposal from Judge O'Brien and Professor Charles Ehrhardt which would amend Rule 16. The proposed amendment would require the government to either (1) identify any documents which directly name the defendant or (2) make available to the defendant any existing indexing system which would facilitate examination of the documents. In a brief discussion of the issue, Mr. Pauley indicated that the Department of Justice was strongly opposed to any requirement which would either reveal the theory of the case or attorney work product. Mr. Doar thereafter moved that the Committee adopt the first option. That motion failed for lack of a second and there were no further motions concerning either of the proposals.

5. Rule 16, Disclosure of Witness' Identity.

Mr. Wilson proposed that the Committee consider amendments to Rule 16 which would expand federal criminal discovery. He observed that under current practice there is not any meaningful discovery under the rule and that in a complex case a defendant cannot get a fair trial. He also expressed concern that the Department of Justice continues to resist additional discovery.

Professor Saltzburg indicated that he too was concerned about Rule 16 vis a vis names of government witnesses. He noted that there are really two key issues at stake: First, he agreed that in a complex case there could not be a fair trial without more complete discovery. And second, he recognized that in some cases there may be a danger to witnesses if their identity is revealed to the defense. But he emphasized that it is not necessary to take an all or nothing approach. He suggested that some middle ground could be found and in support of that position observed that the Model Code of Arraignment requires the prosecutor to disclose the names of its witnesses unless the prosecution submits in writing reasons why doing so would present a danger to the witnesses. The court's decision on whether to disclose those witnesses is not reviewable.

Judge Hodges noted that in the past most prosecutors had provided an "open file" to the defense but that in some districts that was no longer the policy. Judge Keenan added that although the Committee had previously considered the issue, he believed it should be reviewed. Mr. Pauley responded that if the "open file" system is no longer as commonly in effect, it is probably due to the increase in drug prosecutions where there is often danger to government witnesses. He noted that the prosecution is in the best position to decide whether there is a danger to witnesses.

Mr. Marek expressed confidence that an amendment could be devised which would permit the court to decide, under all of the facts and circumstances, if production of a witness' name was required.

Judge Hodges asked Professor Saltzburg to assist Mr. Wilson in drafting language for Rule 16 which would address the disclosure of government witnesses to the defense.

6. Rule 32, Amendments to Entire Rule.

Judge Hodges provided background information on the proposed amendments to Rule 32, which had been discussed at the Committee's last meeting. He noted that at the time of the enactment of the Sentencing Guidelines, the Sentencing Commission had sketched out a some procedural guidelines for preparing presentence reports. The Probation and Criminal Law Committee of the Judicial Conference, however, prepared a more detailed model local rule for preparation and consideration of presentence reports under guideline sentencing. The chair of that Committee, Judge Tjoflat, circulated that model local rule to the district courts along with an accompanying report. In addition, the Judicial Center had begun a study of the implementation of the model rule and guideline sentencing. He believed that the time was thus ripe for considering major changes to Rule 32 which would more closely reflect actual practice. Asking for the sense of the Committee as to whether it believed that some amendments were needed, Judge Hodges determined that a majority of the members believed the amendments should be considered.

The Committee's discussion focused on a draft of an amendment proposed, and circulated, by Judge Hodges. He noted that several members had made suggested changes to that draft and that he included them for discussion and any necessary votes by the Committee at large. Turning first to the issue of timing, Judge Hodges observed that it would probably be better to set a fixed deadline for sentencing and noted that probation officers had indicated that 35 days would be necessary to complete a presentence report. Several members questioned

whether it might not be better to simply leave the language as general as possible and leave it to the court to accelerate or delay the proceedings. Following comments from Judge Keeton that it would be preferable to state any specific time limits in the rule in 7-day increments, Mr. Pauley moved that Rule 32 be amended to provide that (1) the sentence be imposed within 70 days; (2) the probation officer provide a copy of the presentence report to the parties at least 35 days before sentencing; (3) the parties must provide any objections to the report to the probation officer within 14 days of receipt; and (4) not less than 7 days before the sentencing hearing, the probation officer must submit the report to the court (thereby allowing 14 days after receipt of the objections by the probation officer for the probation officer to attempt to resolve them). Judge Schlesinger seconded the motion which carried by a vote of 8 to 0, with two abstentions.

In response to comments by Judge Jensen, Judge Hodges suggested a slight revision to the proposed amendment which would permit the court to accept the presentence report as its findings of fact, except for any objection to the report which had not been resolved. The Committee agreed with the change.

Judge Hodges indicated that the proposed amendments included, at Mr. Marek's suggestion, a provision for defense counsel's presence at any interview of the defendant conducted by the probation officer. Mr. Adair indicated that at least in the Ninth Circuit, that was already in practice. The proposed language was approved by a vote of 8 to 0 with 2 abstentions.

Following a brief discussion on the issue of disclosing certain information in the presentence report (e.g., confidential information), Judge Schlesinger moved that the proposed amendment be changed to reflect language suggested by Mr. Marek which would permit the court to disclose, pursuant to local rule or in its discretion, the probation officer's recommendation concerning a sentence and other specified information; any matter not disclosed, but relied upon in sentencing, would have to be summarized. Professor Saltzburg seconded the motion. Mr. Pauley indicated disagreement with the proposed language and Judge Hodges noted that as a practical matter a court would not consider evidence not disclosed. Following a discussion on the benefits and costs of disclosing information in the report, especially the recommendation concerning sentence, the motion was withdrawn. Thereafter, Judge Keenan moved to adopt the language in Judge Hodges' draft; the motion was seconded by Judge Crow and carried by a vote of 6 to 4. Following additional brief discussion on the matter, the Committee agreed with Judge Hodges' proposal that the rule provide that certain information not be disclosed but that the court, either by local rule or in individual cases could withhold any recommendation concerning the sentence. The Committee agreed to that change.

Mr. Marek moved to delete the provision which would permit the probation officer to require the defendant, the defendant's counsel, and the attorney for the government to meet with the probation officer to discuss objections to the report. Magistrate Judge Crigler seconded the motion. In a very brief discussion about the benefits of the proposal, it was noted that it seems to work in those districts which have implemented it. The motion was withdrawn.

On the issue of proposed victim allocution at sentencing in Judge Hodges' draft, Judge Keenan expressed opposition to the idea. He noted that under guideline sentencing the victim's testimony would have little, if any, impact on the sentence and that victims could thus become even more frustrated with the criminal justice system. Judge Hodges noted the political pressure on Congress to permit victims to personally appear in sentencing hearings. Mr. Pauley observed that the proposed language in the rule would strike a good compromise; it would be limited to a very narrow class of victims and that that step would provide valuable experience in determining whether victim allocution is feasible. Mr. Wilson noted that the amendment would provide some comfort to victims and would not unnecessarily impede the sentencing procedures. Both Judge Jensen and Mr. Karas believed that the right of allocution should be extended to any victim.

The Committee voted by a margin of 8 to 2 to exclude any reference in the amendments to victim allocution.

Judge Jensen then moved to amend existing language in the rule which requires the probation office to "verify" victim impact evidence and to present it in "nonargumentative style." Mr. Doar seconded the motion which carried by a unanimous vote. Professor Saltzburg moved to amend the rule by giving victims an opportunity to see the presentence report. That motion failed for lack of a second.

Following a few brief comments, the Committee voted unanimously to approve the amendments to Rule 32 and to forward them to the Standing Committee for publication and comment by the public. Judge Hodges noted that the Reporter had suggested the possibility of using these major amendments to reorganize Rule 32. Through the years, the rule had become a hodge podge of provisions; for example, the provision for presentence reports currently follows provisions dealing with the sentencing hearing. Judge Hodges indicated that once the Committee's changes had been incorporated into the proposed amendment, he and the Reporter would work on a possible reorganization of the rule and circulate it to the Committee.

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

The Reporter briefly introduced a proposal from Magistrate Judge Robert Collings that Rule 40(d) be amended to permit explicitly a magistrate to set terms of release for probationers or supervised releasees who are arrested in a district other than the one imposing the probation or supervised release. Mr. Pauley indicated that the proposed amendment might create jurisdictional problems if the originating district is not inclined to transfer jurisdiction to the district where the arrest occurred. Magistrate Judge Crigler expressed agreement with the proposal, noting that there is a real question about the ability of a magistrate to set conditions for release of a probationer in the circumstances outlined by Magistrate Judge Collings. Magistrate Judge Crigler thereafter moved that the proposed amendment be made to Rule 40(d), i.e., that the following language be added to Rule 40(d): "The person may be released under Rule 46(c)," and that the amendment be forwarded to the Standing Committee for publication. The motion was seconded by Mr. Marek.

Judge Jensen expressed concern that the proposed amendment did not include changes to Rule 46 and several other members discussed the possibility of making cross-references in Rule 46 to Rules 32.1 and 40(d). The Committee thereafter approved the motion by a vote of 5 to 3 with 2 abstentions.

8. Rule 43(b), Sentencing of Absent Defendant.

Mr. Pauley explained the Justice Department's proposal that Rule 43(b) be amended to provide that sentencing could proceed even where a defendant was absent. He noted that absent defendants could delay sentencing for years and that under guideline sentencing it is difficult to make findings of fact where the defendant is absent. He added that such delays can result in changes in counsel and the court and that the proposal simply places rule 43 on the same plane as other portions of the trial. In his view, a defendant can voluntarily relinquish the right to be present at sentencing. Judge Hodges observed that the combination of guideline sentencing and the finality of sentences under Rule 35, there may be a dilemma; once the defendant returns after a sentence is imposed, no changes could be made in the sentence.

Mr. Pauley moved that Rule 43 be amended to provide for in absentia sentencing and Professor Saltzburg seconded the motion.

Mr. Marek noted that there is pressure from prosecutors and probation officers to sentence absent defendants but that under current practice, the sentencing proceeding need not come to a complete halt. For example, the presentence report can be prepared, and it does not necessarily follow that evidence will be forever lost if the defendant absconds. He agreed with Judge

Hodges' observation that once a sentence has been imposed, it cannot be changed.

Mr. Pauley noted that there is an inconsistency in Rule 43; a trial may proceed even where the defendant is absent but sentencing may not. He observed that it was an historical accident that in absentia sentencing was not included in Rule 43. He added that the courts have some flexibility in deciding whether to proceed with an in absentia trial and that the same rules should apply to sentencing. In additional discussion on the issue, Professor Saltzburg noted that the Supreme Court is currently considering the issue of whether an absent defendant forfeits the right to appeal. Mr Pauley noted that the Court is also reviewing the issue of in absentia trials. He thereafter withdrew his motion and substituted a motion to table the proposal with the understanding that it would be considered at the first meeting following the Supreme Court's decisions on these cases. The Committee unanimously consented to that motion. At Mr. Pauley's request, Judge Hodges indicated that he would inform the Committee on Criminal Law and Probation of the proposal and seek its comments on the issue as well as urging that the Committee consider recommending to the Probation Service that presentence reports be prepared for absconding defendants.

9. Rule 53, Cameras in the Courtroom.

The Reporter informed the Committee that a coalition of news organizations was proposing that Rule 53 be amended to permit the Judicial Conference to decide whether to establish a pilot program for cameras in criminal trials. Professor Saltzburg provided some additional background information on the proposal. Judge Keeton observed that the Judicial Conference had already approved a pilot program for civil cases and would probably resist any further amendments at this point. Judge Hodges indicated that the proposal would appear on the agenda for the Committee's next meeting.

IV. EVIDENCE RULES UNDER CONSIDERATION

A. Proposal to Create Separate Rules

of Evidence Advisory Committee

Judge Keeton informed the Committee that at its June 1992 meeting, the Standing Committee had discussed extensively the problem of handling proposed amendments to the Federal Rules of Evidence and had finally voted to recommend to the Judicial Conference that the Chief Justice appoint a free-standing Evidence Advisory Committee which would include some cross-over members from both the Criminal and Civil Rules Advisory Committees; the Evidence Committee would have its own Reporter. Because of that action, a number of proposed amendments to the Rules of Evidence had been placed on hold, with the exception of Federal Rule of Evidence 412. Judge Keeton also reported that the Judicial Conference had approved that proposal at its meeting in September and that the Chief Justice had agreed that a Committee should be appointed.

B. Evidence Rules Under Consideration

by the Criminal Rules Committee[1]

1. Federal Rule of Evidence 412.

Judge Hodges noted that Congress had failed to act on Senator Biden's proposed Violence Against Women Act but that the bill would almost certainly be re-introduced in the next session of Congress. That bill included proposed amendments which would, inter alia, make Federal Rule of Evidence 412 applicable to both civil and criminal proceedings and would include a right of the victim to appeal the court's evidentiary ruling. Judge Hodges noted that a subcommittee, chaired by Professor Saltzburg, had prepared a draft amendment to Rule 412 which had been considered by the Committee at its April 1992 meeting. Based upon assurances by Judge Stanley Marcus (Chair of Judicial Conference's Ad Hoc Committee on Gender-Based Violence) to Senator Biden that Rule 412 would be given early and prompt consideration under the Rules Enabling Act, Judge Keeton suggested that any proposed amendments be forwarded to the Standing Committee for its consideration. He also envisioned that if the Standing Committee approved the amendments, they would be published on an abbreviated comment period.

Following a brief general discussion about the likelihood of Congress considering Senator Biden's proposed changes to the rules of evidence, Professor Saltzburg distributed copies of the subcommittee's most recent proposed amendments to Rule 412 and explained the two key issues raised in the amendment. First, he noted that the Committee would have to decide whether to make Rule 412 applicable to both civil and criminal trials. As amended, the Rule would essential treat all cases the same, for example in the balance to be struck between the offered evidence's probative value and prejudicial dangers. Second, there were some differences in the provision concerning admissibility of specific instances of sexual behavior on what is now currently referred to as "constitutional" grounds for admission in a criminal case. Professor Saltzburg noted that the proposed amendment would permit introduction of such acts in a

civil case if it would necessary to insure a "fair trial." In a criminal case, such evidence would be admitted if the constitution would require it.

Judge Hodges indicated that the subcommittee's report would be treated as a motion (and second) to amend Rule 412.

The Committee's discussion of the proposed amendment reflected concern that application of the rule to both civil and criminal cases could be accomplished. Judge Keenan noted the difficulty of translating the rule from criminal to civil practice and Judge Crigler expressed concern that the rule could be meaningfully applied. Mr. Pauley stated the Department of Justice's strong concern that the current constitutional standard in criminal cases not be diluted by the proposed "fair trial" test and that the latter would be necessarily subjective and lead to disparate results. Judge Jensen observed that the proposed amendment focused on sexual behavior and propensities of "victims." But in a civil case, the victim might be the plaintiff and the defendant might be a business. Professor Saltzburg responded that the solution might rest in referring the person alleged to be a victim. He also noted the potential interplay between Rule 412 and Rule 404 which generally prohibits propensity evidence. Several participants questioned the interplay between those rules and the possibility that separate rules would be required for civil and criminal rules. Professor Saltzburg noted that the subcommittee had decided not to include an appeal provision in its draft, primarily because it would unnecessarily delay the proceedings.

Later in the meeting, the subcommittee offered several changes in its draft, based upon the foregoing discussions. First, language concerning the catchall provision for admitting specific instances of sexual conduct (proposed

subdivision (b)(3)) was modified to reflect the differences in criminal and civil cases. Second, the rule recognizes the possible interplay of Rule 412 with other character evidence rules.

Judge Keenan moved that the Committee accept the subcommittee's proposed amendment and forward it to the Standing Committee for publication. Judge Schlesinger seconded the motion, which carried unanimously.

2. Federal Rule of Evidence 804.

The Reporter indicated that the Standing Committee had considered, and remanded, the Committee's proposed amendment to Federal Rule of Evidence 804(a) which would have added an "unavailability" provision for hearsay declarants of tender years. After a brief discussion on the proposed amendment and the issues raised by the Standing Committee, the chair observed that there was a clear consensus that the proposed amendment should be tabled pending consideration by the new evidence Advisory Committee.

3. Federal Rule of Evidence 1102.

The Reporter briefly indicated that the Reporter for the Standing Committee would be coordinating proposed amendments to the various procedure rules, and Federal Rule of Evidence 1102, concerning the authority of the Judicial Conference to make technical changes.

V. MISCELLANEOUS AND DESIGNATION

OF TIME AND PLACE OF NEXT MEETING

The Committee publicly expressed its compliments to Judge Hodges and personnel the Administrative Office for choice of the location and the hotel accommodations. Judge Hodges announced that the next meeting of the Committee would be held in Washington, D.C. on April 22 and 23, 1993.

1. [2]. The initial discussion on Rule 412 occurred on the morning of the first day of the meeting; final discussion and a vote on the proposed amendments occurred on the second day.