MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 17-18, 1988
New Orleans, LA

The Advisory Committee on the Federal Rules of Criminal Procedure met in New Orleans, Louisiana on November 17 and 18. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 AM on Thursday, November 17, 1988. The following members were present for all or part of the meeting:

Hon. Leland C. Nielsen, Chairman
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. William T. Hodges
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Mr. John Doar, Esq.
Mr. James F. Hewitt, Esq.
Mr. Tom Karas, Esq.
Mr. Edward F. Marek

David A. Schlueter, Interim Reporter

Also present were Judge Joseph Weis, Chairman of the Standing Committee on Practice and Procedure, and Professor Wayne LaFave, a member of the Standing Committee; Mr. David Adair and Mr. Tom Hnatowsi from the Administrative Office; Professor Saltzburg from the Department of Justice;[1] and Mr. William Eldridge from the Federal Judicial Center.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced and welcomed Judge Everett and Mr. Karas, new members of the committee, and then introduced the other members and visitors.

CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

Criminal Rules Approved by Standing Committee

Rule 12.3 had been previously approved by the Standing Committee for circulation, circulated for public comments,

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1. Professor Saltzburg had intended to attend as the Reporter on Leave, but in the absence of Mr. Pauley who was unable to attend, agreed to speak on behalf of the Department of Justice.

revised in light of those comments and forwarded to the Standing Committee, and then returned by the Standing Committee with the question of whether the proposed rule should be considered in conjunction with a broader inquiry of discovery in general. At its May meeting the Commitee voted to hold Rule 12.3 pending a further examination of discovery issues. The Committee learned, however, that the Justice Department recently obtained legislation enacting Rule 12.3. In a strongly worded statement, the Chairman expressed concern about the total lack of communication by the Justice Department to the Committee that it was seeking legislative enactment of the Rule and thus side-stepping the normal process. Professor Saltzburg observed that neither he nor Mr. Dennis were aware that Rule 12.3 was being added as an amendment to the Drug Bill and that the Criminal Division of the Department would support a resolution that in the future the Department of Justice should give notice to the Committee and the Adminstrative Office that it intends to seek legislative changes in the rules. Such a resolution was moved and seconded and passed unanimously. The Chairman indicated that he would communicate the resolution to the Department of Justice.

The Committee's agenda noted that amendments in four rules had been approved by the Standing Committee and circulated for public comment. The Deadline for public comments on these rules is December 31, 1988.

1. Amended Rule 11(c)(1), which addresses the requirement that the trial judge advise an accused during plea inquiries that the court is required to consider applicable sentencing guidelines, had received no comments.

2. Amended Rule 32, which addresses sentencing, had received a number of comments from both trial judges and probation officials. The comments raised a number of concerns about the advisability of informing the defendant of the final recommendation in the presentence investigation report. After extended discussion about the comments, Judge DeAnda moved that the Rule 32(c)(3) be amended by retaining the previously stricken words, "but not the final recommendation as to sentence." Judge Hodges seconded the motion. It carried by a 5 to 4 vote. The dissenters believed that complete disclosure of the report would insure a better informed decision by the defendant concerning appeal of a sentence.

Another comment received by the Committee noted that portions of Rule 32 should be "gender neutralized." The reporter circulated suggested amendments to Rule 32 which would accomplish that. Judge Hodges moved to adopt the suggested changes and Judge Keenan seconded the motion. The motion carried unanimously.

Professor Saltzburg suggested two minor changes to the Advisory Committee Note regarding access by the Solicitor General to the presentence investigation report in deciding whether to appeal a sentence and access by a defendant to the report before being sent to the institution where the sentence will be served. A copy of Rule 32, as amended, and the proposed Advisory Committee Notes are attached to these minutes.

3. Amended Rule 41(e), which addresses motions for return of seized property had received only one comment from a practioner who expressed strong support for the amendment. Judge Hodges moved that the amended rule be forwarded to the Standing Committee. The motion was seconded and carried unanimously. Mr. Hewitt also moved that the agenda for the next meeting include discussion of possible amendments to Rule 41 which would recognize some of the problems encountered in searching for, and seizing, computerized data. The motion was seconded and passed by a unanimous vote.

4. Amended Rule 45, which addresses computation of time for meeting the various filing deadlines had received a number of unfavorable comments from the public. Judge Weis, Chairman of the Standing Committee, stated that the amended rule was being withdrawn and that no further action would be required by the Committee. He asked that the Committee at some future meeting examine all of the rules which include time requirements.

New Criminal Rules
Approved by Committee in Principle

Proposed amendments to Rule 41(a), which deals with the authority to issue search warrants, had been forwarded to the Standing Committee for circulation and public comment. At the Standing Committee's July 1988 meeting, however, the proposed amendment was recalled by the Committee for further consideration on the issue of nationwide search authority of federal judges and magistrates. The Committee discussed and ultimately rejected a proposed amendment which would have provided for such authority. Magistrate Schlesinger moved that the Committee adopt a slightly modified version of the originally proposed amendment which would retain the requirement that the property to be searched have some nexus with the district in which the judge or magistrate was located. The motion was seconded by Judge Hodges and carried unanimously. The proposed amendment and suggested Advisory Committee Note are attached to these minutes.

New Criminal Rule Amendments Proposed

1. Proposed Amendments to Rules governing filing requirements. The Committee was informed that at the suggestion of Mr. Hewitt, a possible amendment to the civil, criminal, appellate, and bankruptcy rules, was being considered which would take into account the practice of using overnight or express courier services to file documents. Dean Carol Ann Mooney is responsible for preparing an agreed upon solution which will then be considered by the advisory committees.

2. Proposed Amendments to Rule 16 (Discovery). The Committee engaged in an extended discussion on whether to amend Rule 16 to include provisions for witness names, witness statements, reciprocal discovery, discovery for sentencing purposes, and disclosure by the prosecution of other acts of uncharged misconduct which might be introduced at trial under Fed. R. Evid. 404(b).[2] Professor Saltzburg, speaking on behalf of the Department of Justice, explained that any attempt to amend Rule 16 would be considered an interference with Congressional perogatives to amend the Jencks Act and that the Department would continue to reject strongly any attempts to require prosecutors to reveal in every case witness names and statements. The Department was not opposed, he indicated, to congressional hearings on the issue of whether any changes should be made in criminal discovery. There was additional discussion on the issue of whether the Committee was the most appropriate body to initiate changes in criminal discovery practice.

Ultimately, Mr. Hewitt moved to adopt a proposed revision to Rule 16 which would track with the American Bar Association Criminal Justice Standards, Discovery and Procedure Before Trial, Chapter 11, approved August 9, 1978. The motion was seconded by Mr. Karas and passed by a 5 to 4 vote. The majority believed that in light of developments in State discovery practices and the trend to avoid trial by ambush, more discovery of information in the hands of the prosecution was appropriate. The dissenters believed that disclosure of information such as the names of prosecution witnesses would present substantial danger to these individuals and the Congress was the appropriate body for proposing any changes in criminal discovery. Thereafter, Judge Everett moved that the Chairman send a letter

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2. The discussions on Rule 16 took place on the afternoon of November 17 and the morning of November 18. They are reflected here in their entirety for purposes of clarity.

to the appropriate committees within Congress notifying them of the Committee's intent to propose amendments to Rule 16. The motion was seconded by Mr. Karas, but after additional discussion on the issue of jurisdiction to consider changes in criminal discovery, the motion was withdrawn. Thereafter, Mr. Marek moved that the earlier vote on the proposed amendments to Rule 16 be reconsidered. Judge Hodges seconded the motion which carried by a narrow margin. Again, the Committee discussed the problem of addressing the sensitive topic of criminal discovery and Mr. Marek moved that proposed amendments be made regarding witness lists and disclosure of uncharged misconduct under Fed. R. Evid. 404(b). The motion was seconded by Magistrate Schlesinger who later withdrew his second. The motion failed for lack of a second. Following further discussion, Mr. Marek moved that the matter be placed on the agenda for the May 1989 meeting, and that at that time the Committee consider separately each of the possible changes to Rule 16 and also possible amendments to Fed. R. Evid. 404(b). The motion was seconded by Judge DeAnda and carried by a 7 to 2 vote. The dissenters expressed concern that delaying any action to the next meeting would effectively eliminate any real changes in the criminal discovery rules.

3. Proposed amendments to Rule 24(b) (Peremptory strikes of jurors). At the suggestion of Mr. Roger Pauley at its May 1988 meeting, the Committee considered the question of whether to proceed with proposing amendments to Rule 24(b) regarding the number of peremptory strikes available to the prosecution in a felony criminal trial. After a brief discussion Judge Hodges moved that the proposal of any amendments to Rule 24(b) be tabled. The motion was seconded by Judge Keenan. It carried unanimously.

4. Proposed amendments to Rule 25 (Unavailability of Judge). The Advisory Committee on Civil Rules has proposed changes to Fed. R. Civ. Pro. 63, the counterpart to Rule 25 to the effect that if for any reason a judge is unable to proceed with a trial, a successor judge may proceed with the trial and in the case of a bench trial, the judge may recall any witness. After some brief discussion, and at the suggestion of Judge Weis, the reporter was instructed to explore the possibility of using similar language in both Civil Rule 63 and Criminal Rule 25.

EVIDENCE RULE AMENDMENTS UNDER CONSIDERATION

Evidence Rules Approved by Standing Committee

Proposed Amendments to Federal Rule of Evidence 609(a) (Impeachment with Prior Conviction). The Committee reviewed

comments to the proposed amendments to Rule 609(a) which were approved by the Standing Committee at its July 1988 meeting and circulated for public comment. The Committee discussed the comments, which in general raised issues already discussed at length by the Committee at previous meetings. There was some discussion that any possible ambiguity in the language "a witness" in Rule 609(a)(2) could be clarified in the Advisory Committee Note to reflect that it includes an accused in a criminal case. Judge Keenan moved that the Rule be returned to the Standing Committee for referral to the Judicial Conference. Mr. Marek seconded the motion and it passed unanimously. The Rule, as approved by the Standing Committee and the revised Advisory Committee Note are attached to these minutes.

New Matters -- Evidence Rules

1. Proposed amendment to Federal Rule of Evidence 603 (Oath). Following a suggestion by a member of the public, the Committee briefly considered the possibility of amending the Rules of Evidence or the Rules of Criminal Procedure to require removal of any mention of the Diety in the oath and also require the judge to inform witnesses of their right to remain silent. It was pointed out that Rule 603 requires no particular form of oath and that in most cases, grand jury witnesses who are targets of the investigation are usually warned of their right to remain silent. Magistrate Schlesinger moved that no amendment be made to the Rules. The motion was seconded by Mr. Hewitt. It carried unanimously.

2. Proposed amendments to various Federal Rules of Evidence. The Evidence Committee of the Criminal Justice Section of the American Bar Association forwarded a copy of its report and recommendations to the Committee. The report suggests massive changes to a number of the Rules of Evidence. Judge Keenan moved that the matter be tabled and Judge Hodges seconded the motion. It passed by a unanimous vote.

3. Proposed amendment to Federal Rule of Evidence 608(b) (Specific instances of conduct). At the suggestion of a member of the public the Committee considered the need to amend Rule 608(b) by deleting the words, "attacking or supporting the witness' credibility," and substituting, "proving character for truthtelling or falsification." Judge Keenan moved to table the proposal. Mr. Hewitt seconded the motion which carried unanimously.

MAGISTRATES' RULES

Following the Committee's May 1988 meeting, Magistrate Schlesinger circulated proposed amendments which would replace the Misdemeanor Rules and would be included in the Rules of Criminal Procedure as a single rule. Magistrate Schlesinger presented the proposed rule and explained its scope and intended purrpose -- to place in one location, the necessary procedural guidelines for the trial of misdeameanors and other petty offenses. After some discussion concerning the possible problems of redundancy and ambiguity, Magistrate Schlesinger[3] made a number of minor amendments to the proposed rule. Magistrate Schlesinger thereafter moved to adopt the proposed rule as amended and forward it to the Standing Committee. Mr. Hewitt seconded the motion. It carried by a unanimous vote. The proposed Rule is attached to these minutes.

MISCELLANEOUS MATTERS

Judge Everett suggested that at some future time the Committee consider a review of the Uniform Rules of Criminal Procedure and the Military rules of procedure and determine if any suitable amendments should be made in the Federal Rules of Criminal Procedure.

DESIGNATION OF TIME AND PLACE FOR NEXT MEETING

The Chair announced that the next meeting would be in Washington, D.C. on May 18 and 19, 1989.

ADJOURNMENT

The meeting adjourned at 10:00 a.m. on November 18, 1988.

DAVID A. SCHLUETER, Reporter
November 21, 1988

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3. The discussion on the proposed Magistrates' Rules took place on the afternoon of November 17 and the morning of November 18. It is presented here in its entirely for purposes of clarity.

January 10, 1989

TO: Hon. Joseph F. Weiss, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Leland C. Nielsen, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: GAP REPORT: Explanation of Changes Made Subsequent to the Circulation for Public Comment of Federal Rules of Criminal Procedure 11, 32, 41(e), 45, and Federal Rule of Evidence 609.

At its July 1988 meeting, the Standing Committee approved the circulation for public comment of proposed amendments to Federal Rules of Criminal Procedure 11, 32, 41, and 45, and Federal Rule of Evidence 609. The Advisory Committee on the Federal Rules of Criminal Procedure has considered the written submissions from interested members of the public who responded to the request for comment. Summaries of the comments for each Rule are attached. The significant changes made by the Advisory Committee subsequent to the circulation for public comment are as follows:

Federal Rules of Criminal Procedure

Rule 11(c)(1). Advice to the Defendant.

No changes have been made to the Rule as originally circulated. The proposed amendments reflect that the trial judge is required to advise a defendant during the plea inquiry that the court is required to consider applicable sentencing guidelines.

Rule 32. Sentence and Judgment.

The proposed amendments would adjust the rule to the sentencing guidelines and would provide the defense with greater access to the presentence report. After receiving a considerable number of comments, the Committee replaced the deleted language in 32(a)(C)(3), "but not including any final recommendation as to sentence." Thus, the trial court would not be required to disclose the probation officer's final recommendation for an appropriate sentence.

The rule was also gender-neutralized. Several minor changes were made to the Committee Note regarding retention of the presentence report by the defendant while still in a local detention facility.

Rule 41(e). Motion for Return of Property.

No changes have been made in the rule as circulated for public comment.

A recent case citation has been added to the Committee Note which indicates that the exceptions to the exclusionary rule are applicable to Rule 41(e).

Rule 45. Time.

The Committee was informed that the proposed amendments to rule 45 have been withdrawn by the Standing Committee.

Federal Rules of Evidence

Rule 609. Impeachment with Prior Conviction.

The Committee made several minor changes to Rule 609(a). The term "criminal defendant" has been changed to "accused" to conform the Rule to the other Rules of Evidence. Rule 609(a)(2) has been changed to make it clear that it applies to any witness by changing the words "a witness" to "any witness." Minor conforming changes have been made to the Committee Note.

Encl.
Summary of Comments
List of Commentators
Comments
Rules and Committee Notes

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 11

I. SUMMARY OF COMMENTS: Rule 11

Only three written comments were received on Rule 11. One writer suggested that trial judges advise a defendant during the plea inquiry of the fact that a guilty plea is a conviction which means that the defendant cannot possess a firearm. The writer also suggested that a defendant who is not a citizen of the United States be advised of the possible adverse impact on the defendant's ability to become a citizen or remain within the United States. A second writer, on behalf of the National Association of Criminal Defense Lawyers suggested that a guilty plea under the sentencing guidelines should not be accepted until after disclosure of the Presentence Investigation and resolution of disputed facts or factors. And a third writer suggested including a reference to terms of supervised release.

II. LIST OF COMMENTATORS: Rule 11

1. Peter H. Arkison, Esq., Bellingham, WA, 11/28/88.

2. Carl B. Rubin, Judge, SD, Ohio, 12/12/88.

3. Benson B. Weintraub, Miami, Fla, 12/21/88.

III. COMMENTS: Rule 11

Peter H. Arkison, Esq.
Bellingham, WA
Nov. 28, 1988

Mr. Arkison has represented defendants and proposes that two additional important matters should be brought to attention of those pleading guilty. Defendants should be apprised of the fact that pleading guilty amounts to a conviction which will prevent them from bearing a firearm in the future; he notes that many felons later get into trouble for carrying firearms. Second, defendants who are aliens should be advised of the possible adverse impact on their status.

Carl B. Rubin
Chief Judge, SD Ohio
Cincinnati, OH

Judge Rubin believes that a reference should be included in Rule 11 to supervised release; he notes that there are cases where supervised release permits, or requires, the court to assess a term of release which exceeds the guideline maximum for incarceration.

Benson B. Weintraub, Esq.
Miami, Fla.
Dec. 21, 1986

Mr. Weintraub, on behalf of the National Association of Criminal Defense Lawyers, indicated that because of a serious risk of not discharging effective assistance of counsel, the NADCL takes the position that a guilty plea under the sentencing guidelines should be tendered but not accepted until after disclosure of the PSI.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 32

I. SUMMARY OF COMMENTS: Rule 32

The Committee received numerous letters on the proposed amendments to Rule 32. Most of the comments were from trial judges. Several comments were submitted by probation officers. All of the commentators who addressed the topic were in opposition to the proposed amendment in Rule 32(a)(C)(3) which would require disclosure of the probation officer's recommended sentence to the defendant. The main reasons for the opposition were the fact that disclosure would potentially place the defendant, court, and probation officer in adversarial positions, harm the rehabilition of the defendant, and possibly pose a threat to the safety of the probation officer. Other comments included concern about providing a copy of the PSI to the defendant, that the 10-day period for preparing the PSI is too short, and there are practical problems with providing the defense with a copy of the PSI. Several commented on the time-consuming aspects of the new sentencing guidelines and one commentator suggested removal of gender language from Rule 32.

II. LIST OF COMMENTATORS: Rule 32

1. Marvin E. Aspen, Judge, N.D. Ill., 10-26-88.

2. Sol Blatt, Jr., Judge, D.S.C., 11-29-88.

3. W. Earl Britt, Judge, E.D., N.C., 12-19-88.

4. Stanley S. Brotman, Judge, D.N.J., 11-22-88.

5. Albert V. Bryan, Judge, E.D. Va., 12-7-88.

6. Jerry Buchmeyer, Judge, N.D. Tx., 11-15-88.

7. J. Calvitt Clarke, Jr., Judge, E.D. Va., 12-1-88.

8. Brian Barnett Duff, Judge, N.D. Ill., 11-4-88.

9. Keith Findley, Law Prof., U of Wisc., Madison, 12-30-88.

10. William T. Foster, Chief Probation Officer, N.D. Ill., 11-3-88.

11. Elizabeth V. Hallanan, Judge, S.D. W.Va., 12-30-88.

12. Clyde H. Hamilton, Judge, D. S.C., 12-13-88.

13. Alexander Harvey II, Judge, D. MD., 12-22-88.

14. Jane E. Kirtley, Esq., Wash. D.C., 12-29-88.

15. Jackson L. Kiser, Judge, W.D. Va., 12-1-88.

16. Elden E. Mahon, Judge, N.D. Tx., 11-14-88.

17. Robert E. Maxwell, Judge, N.D. West Va., 11-17-88.

18. James H. Michael, Jr., Judge, W.D. Va., 12-6-88.

19. Carl B. Rubin, Judge, S.D. OH., 12-12-88.

20. Barefoot Sanders, Judge, N.D. Tx., 11-7-88.

21. John M. Shevlin, Supervising U.S. Probation Officer, S.D. Fla., 12-9-88.

22. James C. Turk, Judge, W.D. VA., 12-28-88.

23. Jack R. Verhagen, Chief U.S. Probation Officer, W.D. Wisc., 9-9-88.

24. Hiram H. Ward, Judge, M.D. N.C., 12-2-88.

25. Lloyd Weinreb, Professor of Law, Harvard Law School, Cambridge, Mass., 10-21-88.

26. Benesr E. Weintraub, Esq., Miami, FL., 12-21-88.

27. Richard L. Williams, Judge, E.D. VA., 12-1-88.

28. Halbert C. Woodward, Judge, N.D. Tex., 11-14-88.

29. Scott C. Wright, Jucge, Judge, W.D. MO., 12-15-88.

III. COMMENTS: Rule 32

Marvin E. Aspen
Judge, N.D. Ill.
10-28-88

He is opposed to the proposed amendment in Rule 32(a)(C)(3) which would require disclosure of the probation officer's recommended

sentence to the defendant. In his view, there is no sound reason for disturbing the traditional confidentiality that has existed. First, disclosure may create an adversarial relationship between the defendant and the probation officer. Second, if the trial judge does not follow the probation officer's recommendation, the judge and the probation officer may be in an adversarial position. Third, because of these potential adversarial positions, the probation officer may couch his or her recommendation in such broad terms that it would be of little help to the trial judge. Finally, disclosure of the recommendation may pose risks to the safety of the probation officer.

Sol Blatt, Jr.
Judge, D.S.C.
11-29-88

On behalf of all judges in District of South Carolina, he opposes disclosure of probation officer's recommended sentence in Rule 32(a)(C)(3). Disclosure would hurt the rehabilitative process and destroy defendant's confidence in probation officer

W. Earl Britt
Chief Judge, E.D. N.C.
12-19-88

On behalf of all the active judges in his district, Judge Britt, fully concurs in Judge Aspen's opposition to requiring disclosure of the probation officer's recommendation.

Stanley S. Brotman
Judge, D.N.J.
11-22-88

He notes that Judge Aspen's letter, supra, provides substantial support for rejecting amendment to Rule 32 which would require disclosure of probation officer's recommendation. Disclosure could chill relationship between judge and probation officer.

Albert V. Bryan
Judge, E.D. VA.
12-7-88

It is the unanimous view of the twelve active and senior judges of the E.D. Va. that the probation officer's recommendation not be disclosed to the defendant and that the defendant be required to return the presentence report, as is currently required.

Jerry Buchmeyer
Judge, N.D. Tex.
11-15-88

He completely agrees with Judge Aspen's opposition to the proposed amendment which would permit disclosure of the probation officer's recommendation, supra. Sentencing is difficult enough.

J. Calvert Clarke, Jr.
Judge, E.D. Va.
12-1-88

He is very opposed to disclosure of the probation officer's recommendation. It is not wise to adopt rules or changes until it is clear that the new sentencing guidelines are constitutional. Disclosure of the recommendation would send a signal that such recommendations are made for the use of the bar, not the court.

Brian Barnett Duff
Judge, N.D. Ill.
11-4-88

He strongly endorses Judge Aspen's opposition to the amendment to Rule 32(a)(C)(3) (disclosure of probation officer's recommendation. He believes that all of the judges in the Northern District of Illinois oppose the amendment.

Keith Findley
Professor of Law
Univ. of Wisc., Madison WI
12-22-88

Professor Findley, a professor with the University's clinical program supports the proposed amendments and suggests additional changes which would remove all exemptions from the disclosure requirement, establish a standard of proof for resolving factual disputes in the PSI, and create clearer procedures for correcting the PSI.

William T. Foster
Chief Probation Officer
N.D. Ill.
11-9-88

He is opposed to disclosing the probation officer's recommendation. He notes that in his district the probation officer

is not permitted to add any new factors into the sentencing recommendation. All sentencing information which an officer could compute is already disclosable. Disclosing the recommendation would add countless hours of in-court arguments in sentencing proceedings, especially multi-defendant cases. Disclosure would also place the probation officer and the court in an adversarial relationship.

Elizabeth V. Hallanan
Judge, S.D. W. VA.
12-20-88

She joins Judge Aspen, supra, in his vigorous opposition to the proposed amendment in Rule 32 (C)(3) which would require probation officers to disclose their recommendation. The proposed change potentially creates an adversarial relationship between the defendant and the probation officer.

Clyde H. Hamilton
Judge, D. SC.
12-13-88

For reasons stated in Judge Aspen's letter, supra, he opposes the amendment which would require disclosure of the probation officer's recommendation.

Alexander Harvey, II
Chief Judge, D. Md.
12-22-88

He states that the judges of his court are opposed to the proposal that the probation officer's recommendation be disclosed to the defendant. He notes the potential adversarial relationships which could develop between the probation officer, judge, and defendant.

Jane E. Kirtley, Esq.
Exec. Dir., Reporters Comm. for Freedom of the Press
Wash. D.C.
12-29-88

Ms. Kirtley filed a 22-page paper supporting greater public disclosure of the presentence report and requests that Rule 32 be amended to require that a copy of that report be filed with the clerk of the court when it is delivered to the defendant. Unless sealed by the court in accordance with First Amendment standards established by the Supreme Court, the report would be available to the public.

Jackson L. Kiser
Judge, W.D. Va.
12-1-88

He is opposed to requiring disclosure of the probation officer's recommendation. The recommendation cannot be challenged for its factual accuracy and its difficult to see how disclosure can do anything more than simply support the arguments for and against a particular sentence. He also believes that the amendment would probably require disclosure of any sentencing discussions between the court and the probation officer.

Eldon B. Mahon
Judge, N.D. Tex.
11-14-88

He agrees with Judge Aspen's opposition to the amendment to Rule 32 which would provide for disclosure of the probation officer's recommendation, supra.

Robert E. Maxwell
Judge, N.D. West Va.
11-17-88

He totally agrees with Judge Aspen's position, supra.

James H. Michael
Judge, W.D. Va.
12-6-88

He agrees with Judge Kiser's opposition to the requirement that the probation officer's recommendation be disclosed, supra, and adds that disclosure would have an adverse effect on the confidential relationship that exists between the officer and the court.

Carl B. Rubin
Chief Judge, S.D. OH.
12-12-88

He expresses the concerns felt by the judges in his court that disclosure of the presentence report to the defendant is generally not otherwise required for appellate review and that disclosure of the probation officer's recommendation is particularly fraught with problems, citing Justice Scalia's dissent in United States Dept of Justice v. Julian.

Barefoot Sanders
Judge, N.D. Tex.
11-7-88

He completely supports Judge Aspen's position, supra.

John M. Shevlin
Supervising Probation Officer
S.D. Fla.
12-9-88

He states that although the 10-day requirement in Rule 32 for preparing the presentence investigation matches the statutory requirement in 18 USC § 3552(d), under the new sentencing guidelines this is inadequate time; he understands that the Advisory Committee will revisit the issue of time in the future and that in the interim language suggested by the NADCL be incorporated: "each US District Court shall adopt local procedures to implement the disclosure requirements set forth in this subsection." Disclosure of the probation officer's recommendation would disrupt rehabilitation and pose threats to safety of the probation officer. The recommendation is not a "fact" which can be disputed. US v. Jones (11th Cir., Sep. 29, 1988)(probation officer's assessment is not a "fact"). He also notes practical problems with implementing the language which requires the court to "provide" a copy of PSI to the defendant. He suggests using the words "make available to."

James C. Turk
Chief Judge, W.D. VA.
12-28-88

He joins Judges Kiser and Michael, supra, in opposing the amendment which would require disclosure of the probation officer's proposal.

Jack R. Verhagen
Chief Probation Officer
W.D. Wisc.
9-9-88

He is opposed to disclosure of the probation officer's recommendation and is also opposed to providing a copy of the PSI to the defendant before he is transferred to prison. He recounts an incident where a pretrial service report was sent by the defendant to someone who had made adverse comments about the defendant and later caused problems for the probation officers.

Hiram H. Ward
Judge, M.D. N.C.
12-2-88

He is in total agreement with Judge Aspen's position, supra.

Lloyd Weinreb
Professor of Law
Harvard Law School
10-21-88 (Phone call)

He suggests that gender language be eliminated from Rule 32.

Benson E. Weintraub, Esq.
NACDL, Miami, FL.
12-21-88

He believes that an actual copy of the PSI should be given to the defendant within the period designated prior to sentencing. He also recommends that Rule 32 should be amended to reflect that the District Court would be required to adopt local rules to address the procedural implementation of the disclosure rules.

Richard L. Williams
Judge, E.D. VA.
12-1-88

He believes that if the purpose of guideline sentencing is to eliminate disparity, then all of the raw data which the judge considers should be available to all parties, including the public. He sees the concern over the "probation officer's popularity with the defendant as a makeweight argument." Further, he does not see how the probation officer's recommendation would affect that officer's relationship with the judge. He supports the amendment, unless the sentencing recommendation of the probation officers is abolished.

Halbert O. Woodward
Judge, N.D. Tex.
11-14-88

He concurs in Judge Aspen's opposition, supra, to disclosure of the probation officer's recommended sentence. Disclosure would injure the confidential relationship between the judge and the probation officer and would place the latter in an awkward position in many cases.

Scott O. Wright
Chief Judge, W.D. MO.
12-15-88

On behalf of the judges in his court, he opposes the proposal to disclose the probation officer's recommendation. He recalls that this proposal was made before but withdrawn. Although the probation officer's recommendation is a useful guide, it does not deserve the status that it would receive if it were disclosed. He notes that one of the judges feels so strongly against this proposal that if it were enacted he would not require a written recommendation from the probation officer.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 41(e)

I. SUMMARY OF COMMENTS: Rule 41(e)

The Committee received one written comment from a practioner who strongly supports the amendment.

II. LIST OF COMMENTATORS: Rule 41(e)

1. Fred M. Morelli, Jr., Esq., Aurora, Ill., 11-1-88

III. COMMENTS: Rule 41(e)

Fred M. Morelli, Jr., Esq.
Practioner Aurora, Ill.
11-1-88

Mr. Morelli expresses strong support for the amendment and indicates that currently there is no way to initiate any forfeiture proceedings to obtain property that has been seized by the government.

ADVISORY COMMITTEE ON
FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENT TO RULE 45

(WITHDRAWN)

I. SUMMARY OF COMMENTS: Rule 45

The Committee received copies of a number of letters objecting to amending Fed. R. Civ. P. 6(a), Fed. R. App. P. 26(a), Fed. R. Bank. P. 9006(a), and Fed. R. Crim. P. 45. Only one letter, however, spoke directly to the proposed amendment to Rule 45, and that writer was opposed to the change.

II. LIST OF COMMENTATORS: Rule 45

1. Mr. Salvador Antonetti, Esq., Hato Rey, Puerto Rico, 9-8-88.

2. Mr. Andrew C. Hecker, Jr., Esq., Philadelphia, PA, 12-30-88.

3. Ms. Margaret M. Morrow, Esq., Los Angeles, CA, 12-28-88.

4. Mr. Edward W. Mullinix, Esq., Philadelphia, PA, 12-16-88.

5. Mr. Lewis W. Page, Jr., Esq., Birmingham, AL, 12-21-88.

III. COMMENTS: Rule 45

Salvador Antonetti, Esq.
Practioner, Puerto Rico
9-8-88

He is opposed to changing the time requirements in Rule 45. He questions why 8 days are better than 11 days (as currently written) and that the three additional days have not created any undue delays. Instead, when federal and state holidays are followed or preceded by weekends, the three extra days are useful and often necessary.

Andrew C. Hecker, Jr., Esq.
Chair, Tort and Ins. Section, ABA
Philadelphia, PA
12-30-88

On behalf of the Tort and Insurance Section of the ABA, Mr. Hecker the proposed changes to the computation of time rules make no sense. If uniformity is desired, he states, simply change Appellate Rule 26 a to the other rules which currently allow 11 days.

Margaret M. Morrow, Esq.
President, Los Angeles Bar Assoc.
Los Angeles, CA
12-28-88

She indicates that the Civil Practice subcommittee of the Litigation Section, Los Angeles Bar Assoc., questioned whether the change in the rules was required but decided not to take a position in the absence of any substantive explanation on this issue.

Edward W. Mullinix, Esq.
Practioner
Philadelphia, PA
12-16-88

He questions the advisability of changing the time requirements but suggests that if uniformity is that important, Appellate Rule 26 should be changed to conform to the rest.

Lewis W. Page, Jr., Esq.
Practioner
Birmingham, AL
12-13-88

He notes that each of the Advisory Committees was apparently "conferring" to some other Committee's rule change and suggests that whichever Committee proposed the change, state so specifically. He believes that is a bad idea to continue to shorten time limits and that high-quality advocacy suffers if the period to prepare is shortened.