MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 27-28, 1998

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 27th and 28th 1998. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 27, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair

Hon. Edward E. Carnes

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. John M. Roll

Hon. Tommy E. Miller

Hon. Daniel E. Wathen

Prof. Kate Stith

Mr. Robert C. Josefsberg, Esq.

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division

Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William Wilson, member of the Standing Committee and liaison to the Advisory Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. James Eaglin from the Federal Judicial Center; Mr. David Pimentel, Judicial Fellow at the Administrative Office; Mr. Joseph Spaniol, Consultant to the Standing Committee; and Ms. Mary Harkenrider from the Department of Justice. The attendees were welcomed by the chair, Judge Davis

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

The Committee's regularly scheduled business meeting was preceded by a public comment hearing on proposed amendments to Rules 11 and 32.2, during which the Committee heard from four witnesses: Hon. Paul D. Borman (E.D. Mich.) who addressed the proposed amendments to Rule 11; Mr. Bo Edwards and Mr. David Smith, who spoke on behalf of the National Association of Defense Lawyers on proposed new rule 32.2; and Mr. Stephan Cassella who spoke on behalf of the Department of Justice on Rule 32.2.

III. APPROVAL OF MINUTES OF OCTOBER 1997 MEETING*

Judge Marovich moved that the Minutes of the Committee's October 1997 meeting in Monterey, California be approved. Following a second by Judge Roll, the motion carried by a unanimous vote.

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE AND PENDING BEFORE THE SUPREME COURT

The Reporter informed the Committee that at its January 1998 meeting, the Standing Committee had approved and forwarded to the Judicial Conference the amendments to the following rules, which were also approved by the Judicial Conference at its Spring 1998 meeting:

1. Rule 5.1 (Preliminary Examination; Production of Witness

Statements);

2. Rule 26.2 (Production of Witness Statements; Applicability to Rule

5.1 Proceedings);

3. Rule 31 (Verdict; Individual Polling of Jurors);

4. Rule 33 (New Trial; Time for Filing Motion);

5. Rule 35(b) (Correction or Reduction of Sentence; Changed

Circumstances); and

6. Rule 43 (Presence of Defendant; Presence at Reduction

or Correction of Sentence).

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* Although some items on the agenda were discussed out of sequence, these Minutes reflect the Committee's discussion in the order the items were listed on its Agenda.

V. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY ADVISORY COMMITTEE

The Reporter informed the Committee that it had received a total of 24 written comments on the Committee's proposed changes to the following rules: Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment); Rule 7. The Indictment and Information (Conforming Amendment); Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.); Rule 24(c). Alternate Jurors (Retention During Deliberations); Rule 30. Instructions (Submission of Requests for Instructions); Rule 31. Verdict (Conforming Amendment); Rule 32. Sentence and Judgment (Conforming Amendment); Rule 32.2. Forfeiture Procedures; Rule 38. Stay of Execution (Conforming Amendment); and Rule 54. Application and Exception.

A. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)

The Chair provided background information on the development of the amendments to Rule 6, in particular the provision in Rule 6(d) for providing for interpreters in the grand jury deliberations. While the Advisory Committee had originally proposed that only interpreters for hearing impaired grand jurors be permitted, the Standing Committee had amended the Rule for publication to include all interpreters, in order to obtain public comment on the issue. The Reporter informed the Committee that of the comments received on that proposal, several judges opposed the amendment on the ground that 28 U.S.C. § 1385(b) requires that all petit and grand jurors must speak English. Thus, to the extent that the proposed rule permits language interpreters to take part in the deliberations, it is inconsistent with that statute.

Following brief discussion about extending the provision only to hearing and speech impaired jurors, Judge Carnes moved that the Rule be amended to provided for only those interpreters. Judge Roll seconded the motion, which carried by a unanimous vote.

With regard to the proposed amendment to Rule 6(f), which permits the foreperson or deputy foreperson of the grand jury to return an indictment on behalf of the grand jury, the Reporter noted that two commentators were opposed to the amendment on the ground that it unnecessarily insulates the grand jury from the court. Judge Miller seconded that view. Several other members indicated that although it might insulate the jurors, the rule gives discretion to the judge to require the jurors to personally appear and that it can be an effective cost and time-saving measure because the grand jurors do not have to wait until a judge is free from a busy docket to take the indictment.

Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee as published. Judge Roll seconded the motion, which carried by a 9 to 2 vote.

B Rule 7. The Indictment and Information (Conforming Amendment).

The Reporter indicated that the Committee had received no written comments on the proposed conforming amendment to Rule 7 regarding forfeitures vis a vis the indictment. Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee as published. Judge Miller seconded the motion, which carried by a vote of 9 to 2.

C. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)

Following a brief discussion on the proposed amendment to Rule 11(a)(1), which is simply a technical change on the definition of an organizational defendant, Judge Dowd moved that the amendment be approved and forwarded as published. Following a second by Judge Roll, the Committee approved the amendment by a vote of 9 to 2.

The Reporter informed the Committee that of those commenting on the proposed change to Rule 11(c)(6)--which requires the judge to question an accused about any provision in a plea agreement which requires the accused to waive an appeal or collateral review of the sentence--a majority opposed the amendment, including several judges, the NADCL, and a committee of the American College of Trial Lawyers. The gist of the commentators' objections centers on opposition to the proposition that an accused could be required to waive an appeal of his her sentence and that by amending the Rule, the Committee is approving of that practice. The Chair indicated that the Committee could add a disclaimer to the Note and Judge Marovich stated that the purpose behind the proposal was to require a judicial inquiry into an existing practice in some districts, with or without the amendment. The discussion focused on the question of whether the practice was authorized and the role of the Committee, if any, in commenting on the legality of waiver provisions. Judge Carnes observed that some of the commentators had opposed the amendment to argue their substantive disagreement with the waiver provisions. He thereafter moved that the published amendment be approved and forwarded to the Standing Committee. Judge Marovich seconded the motion which carried by a vote of 9 to 2. The Committee also directed the Reporter to include removal of the final two sentences in the second paragraph of the Note and include language to reflect that the Committee did not intend to signal approval of wavier of appeal provisions.

With regard to the proposed amendment to Rule 11(e), the Reporter informed the Committee that only a few commentators had addressed the change, including the American Bar Association which believed the amendment would unduly bind the trial court to sentencing guidelines. Following a brief discussion, Mr. Martin moved, and Judge Miller seconded, to approve and forward the amendment as published. The motion carried by a vote of 11 to 0. Judge Dowd moved that language be added to the Committee Note which pointed out that the trial judge retains discretion to reject the plea agreement. Professor Stith seconded the motion which also carried by vote of 11 to 0.

D. Rule 24(c). Alternate Jurors (Retention During Deliberations)

The Committee was informed that only six commentators had provided comments on the proposed amendment to Rule 24(c) which would permit the judge to retain any alternate jurors after the jurors retire for deliberations. Of those, three supported the amendment while the NADCL and the ABA are opposed to the change because there is currently no explicit provision in the rule permitting the judge to make substitutions after the jury retires. Following brief discussion, Mr. Josefsberg moved, and Judge Dowd seconded, that the Committee approve that amendment as published and forward it to the Standing Committee. The motion carried unanimously. The Committee also suggested some changes to the Note regarding the interplay between Rules 23 and 24.

E. Rule 30. Instructions (Submission of Requests for Instructions)

The Reporter informed the Committee that of the eight comments received on the proposed amendment to Rule 30--which would permit the judge to require the parties to submit their requested instructions pretrial. The amendment is opposed by the NADCL but supported by the American College of Trial Lawyers. The Reporter also indicated that the Civil Rules Committee is currently working on amendments to Civil Rule 51, a counterpart to Criminal Rule 30. That Committee was also considering possible amendments to clarify the provisions in that rule concerning preservation of error vis a vis instructions. Following discussion by the Committee to the effect that it would be better to hold Rule 30 and continue consideration of additional amendments, Judge Marovich moved that the amendment be tabled discussion at the Committee's next meeting. Justice Wathen seconded the motion, which carried by a vote of 9 to 2.

F. Rule 31. Verdict (Conforming Amendment).

The proposed amendment to Rule 31(e), which conforms the rule to proposed new rule 32.2 regarding forfeitures had received no comments. Judge Dowd moved that the amendment be approved and forwarded as published. Judge Miller second the motion which carried by an 8 to 3 vote.

G. Rule 32. Sentence and Judgment (Conforming Amendment)

The Reporter informed the Committee that it had received no written comments on the amendment to Rule 32(d), which conforms that rule to new Rule 32.2 (forfeiture procedures). Judge Dowd moved, and Judge Miller seconded, that the amendment be approved and forwarded to the Standing Committee. That motion carried by a 9 to 2 vote.

H. Rule 32.2. Forfeiture Procedures.

Judge Dowd, chair of the Rule 32.2 Subcommittee, moved that the rule be approved and forwarded to the Standing Committee; Judge Miller seconded the motion. Judge Dowd informed the Committee that the members of the subcommittee had focused on several potential problem areas or questions regarding the proposed draft. He noted that one of the key points was resolution of the right to jury trial, which existed under the current practice under Rule 31(e), which requires the jury to return a special verdict on the issue of forfeiture. Several members responded by noting that the proposal was linked with the Supreme Court's decision in *Libretti v. United States*, 116 S.Ct. 356 (1995). Several members read that case to say that there is no constitutional right to a jury trial in deciding criminal forfeiture issues. Others questioned whether, even assuming that was the Court's holding, it was wise to abrogate the existing system of involving the jury in the decision.

Other members raised concerns about the language in proposed subdivision (b) which indicated that the defendant was not permitted to show that the property belonged to someone else and that if no third party files a claim to the property to be forfeited, the rule assumes that the defendant's interest in the property was exclusive and the court could forfeit the property in its entirety. Judge Dowd submitted additional language proposed by the subcommittee which would address that issue. The new language, to be inserted at subdivision (b) would require the court, if no third party filed a claim, to determine if the accused had an interest in the property and the extent of the defendant's interest. The Committee agreed with the proposed addition.

Mr. Martin indicated that he opposed the proposed rule. In his view, the rule unnecessarily abrogated the right to jury trial.

Judge Stotler raised questions about whether the Federal Rules of Evidence applied at the ancillary proceeding under (d)(1). Following brief discussion, the Committee voted to add (d)(5) which would explicitly state that the ancillary proceeding is not a part of sentencing. As such, the Rules of Evidence would apply. The Subcommittee later submitted to the Committee proposed language which would clarify subdivision (f) which spells out the procedures for forfeiting subsequently discovered property or substitute property.

The Committee voted 9 to 2 to approve new Rule 32.2, as amended, and forward it to the Standing Committee. The Reporter and the Subcommittee were asked to make the conforming changes to both the rule and the Note.

I. Rule 38. Stay of Execution (Conforming Amendment).

The amendment to Rule 38, which conforms the rule to proposed new Rule 32.2, received no written comments. Judge Dowd moved that the amendment be approved and forwarded to the Standing Committee. Ms. Harkenrider seconded the motion, which carried by a vote of 9 to 2.

J. Rule 54. Application and Exception.

Following a very brief discussion on the proposed amendment to Rule 54--a technical conforming amendment--Judge Dowd moved that the amendment to approved and forwarded to the Standing Committee. Judge Carnes seconded the motion which carried by a unanimous vote of the Committee.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 5(c). Initial Appearance Before the Magistrate Judge.

Proposed Amendment.

Judge Davis provided a brief overview of a proposed amendment to Rule 5(c) which would permit a magistrate judge to grant a continuance in a preliminary examination over a defendant's objection. He noted that the Committee had previously considered the matter at its April 1997 meeting and that because the amendment would have directly contradicted 18 U.S.C. § 3060, that it had been referred to the Standing Committee with a recommendation that the Committee take steps to initiate an amendment to the statute. The Standing Committee responded by referring the proposal back to the Advisory Committee and indicating that the most appropriate method of effecting a change would be to follow the procedures in the Rules Enabling Act. At its October 1997 meeting, the Advisory Committee defeated a motion to amend Rule 5(c). Although that position was reported to the Standing Committee, the Judicial Conference subsequently instructed the Advisory Committee to propose an amendment.

Following discussion on the proposed amendment, Mr. Martin moved that Rule 5(c) be amended to permit a magistrate judge to grant a continuance in a preliminary hearing, over the objection of the accused. Judge Miller seconded the motion, which carried by a unanimous vote.

A discussion ensued addressing the issue of whether any proposed amendments should be published for comment in light of the fact that the Standing Committee's Style Subcommittee is currently working on restyling all of the Criminal Rules. A consensus emerged that unless an amendment was essential, it should be deferred pending the restyling project rather than going through piecemeal publication and amendments.

B. Rule 10, Arraignment & Rule 43, Presence of Defendant.

The Reporter presented proposed amendments on Rules 10 and 43 which would permit a defendant to waive personal appearance. The draft amendment would require the accused to waive that appearance in writing and would require approval of the court. Mr. Josefsberg moved that the draft be adopted and forwarded to the Standing Committee with a recommendation that it be published for public comment. Mr. Martin seconded the motion. During the discussion which followed, several members suggested that this amendment should perhaps wait until the Committee could more fully consider a possible amendment which would permit an accused to waive personal appearance for certain pleas, e.g., no contest pleas or pleas to a superseding indictment. The Committee voted unanimously to table the proposal. Mr. Martin and Judge Miller will work with the Reporter to consider additional amendments to the Rules.

C. Rule 12.2, Notice of Insanity Defense or Expert Testimony of

Defendant's Mental Condition .

The Reporter submitted to the Committee a draft amendment to Rule 12.2 which reflected the Committee's discussions at its October 1997 meeting. Rule 12.2, would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice.

The Reporter indicated that following the October 1997 meeting, the Department of Justice had submitted suggested language which also included suggested procedures for releasing the results of the examination to an attorney for the government before a guilty verdict on a capital crime had been returned. any procedure short of sealing the results of the examination might be appropriate. The Reporter continued by noting that he had drafted some alternative language, which might better address the issue of disclosure of the results of the examination--assuming that the Committee decides to permit some form of early disclosure. He noted that the issue of disclosure raises several sub-issues: First, what dangers, if any, might be presented by releasing the results of the examination before the defendant has actually been convicted of at least one capital crime? Second, assuming that early disclosure is permitted, what standards should be used, if any, in deciding whether to release the results? Third, assuming early disclosure is permitted, should both sides be permitted to request such? And fourth, if the court is to consider the issue of whether the results of the examination will not tend to incriminate the defendant on the question of guilt or innocence, *see* Rule 12.2(c)(i), should the defendant be permitted to contest that averment. If so, wouldn't that require disclosure to the defendant beforehand?

Judge Carnes observed that currently, a court-ordered report is normally released when it is completed.

And Mr. Pauley noted that the draft rule conforms to the prevailing, albeit limited, practice in the courts. Ms. Harkenrider discussed the various policy issues underlying the proposal and the need for some clarification of the trial court's authority in this area. During the discussion, several members raised concerns about the impact of the proposed amendments on the accused's self-incrimination and due process rights. Following additional discussion, a consensus emerged that further discussion of the amendments should be deferred until the Committee's Fall 1998 meeting. The Reporter was asked to research those constitutional concerns.

D. Rule 24(b). Trial Jurors. Proposed Amendment to Equalize Number

of Peremptory Challenges.

Following a brief discussion about the background and history of various proposals concerning equalization of the number of peremptory challenges, the Reporter explained the proposed amendment to Rule 24(b) before the Committee. That draft reflected the vote of the Committee at its October 1997 meeting that each side should be entitled to 10 peremptory challenges in a felony case; that would increase the number of challenges available to the prosecution by four.

Judge Dowd moved that the proposed amendment to Rule 24(b) be approved and forwarded to the Standing Committee for publication. Judge Roll seconded the motion.

Judge Wilson indicated that he was opposed to the amendment; in his view, the amendment would give an advantage to the government and that the government does not always use all of its peremptory challenges. Judge Roll commented that in his experience, juries do not understand why the government has less challenges than the defense. Judge Dowd favored the proposal but Professor Stith observed that there might be potential problems. Mr. Josefsberg saw no problems with the current system and reminded the Committee that during the trial, the government has other advantages in the adversarial aspects of the trial; he did not see where the current allocation of peremptory challenges disadvantaged the government. Judge Miller observed that providing for extra challenges would probably increase the number of jurors required for the pool and that in turn could increase trial costs.

Following additional brief discussion, the Committee voted 6 to 5 to approve the amendment, with the understanding that it should be deferred for publication until the restyling changes were also published--absent any compelling need for doing so sooner.

E. Rule 26. Taking of Testimony. Proposed Amendment to Permit

Taking of Testimony from Remote Location.

The Reporter explained the draft amendments to Rule 26 which would permit the court to receive testimony from a remote location, via electronic video transmission. He noted that two drafts had been presented; the first favored deposition testimony over remote transmissions by requiring the court to first find "compelling circumstances" for using the remote transmission. An alternative draft, he noted, would

place the remote transmission method on the same plane as a deposition. That is, the court would only need to first find that the witness was unavailable to testify in the court. Under both drafts the court would be required to establish adequate safeguards for the transmission. Judge Carnes expressed concern about the definition of the term "compelling circumstances." And Judge Roll asked what sort of safeguards the court might reasonably impose; the Reporter responded that taking steps to secure the transmission only for courtroom use would be an example. Mr. Pauley suggested that it would be helpful to continue the discussion at the Fall 1998 meeting. The Committee agreed.

F. Rule 32. Sentence and Judgment. Proposal by Committee on

Criminal Law Regarding Disclosure of Presentence Reports.

Judge Davis pointed out that the Judicial Conference's Committee on Criminal Law is considering several options for dealing with disclosure of presentence reports to persons other the parties to the case. One of the options under consideration by that Committee is the adoption of a model local rule on the topic. The issue apparently arose from a question posed to the General Counsel's office. The question is whether any sort of rule or guideline should be promulgated which addresses the authority of the court to release the otherwise confidential report to someone other than the parties. The Reporter added that although the Committee has not been presented with any specific proposal for a local rule or a proposed change to Rule 32, the Committee might wish to at least take a position on whether it, at least in theory, supports such a change.

Judge Roll indicated that he frequently receives requests for the presentence reports; in those cases he redacts sensitive information from the report. Judge Davis indicated that he disfavored use of a local rule; Ms. Harkenrider echoed that sentiment. She stated that this sort of issue required a national rule which would insure greater uniformity. Justice Wathen observed that the Committee should consider the issue of the free flow of information from a federal court's file to a state court's file.

Following additional discussion, Judge Davis indicated that he would appoint a subcommittee to study the question and inform Judge Kazen, Chair of the Criminal Law Committee, of the Advisory Committee's discussion. He indicated that the matter would be on the agenda for the Fall 1998 meeting.

G. Rule 32.1. Revocation or Modification of Probation or Supervised

Release; Correction of Terminology re Magistrate Judge.

The Reporter pointed out to the Committee that the proposed amendment to Rule 32.1 was purely technical and could wait until the restyling project was underway. The Committee agreed.

H. Rule 41. Search and Seizure. Proposed Amendment Regarding

Warrant Based on Telephonic Statements by Affiant.

Judge Dowd suggested that the Committee consider a possible amendment to Rule 41(c)(2)(D). He informed the Committee that he had recently sat on a case at the Sixth Circuit in which there was no recording of the affiant's telephone call to the magistrate to request a warrant as provided under Rule

41(c). The majority concluded that although the requirements of that rule had been violated, that violation was not sufficient to suppress the evidence which was discovered during the subsequent search. Judge Dowd indicated that he had dissented in that case.

Judge Dowd noted that an amendment in 1977 originally included a requirement that a transcript be made of the sworn oral testimony setting out the grounds for the issuance of the warrant, that it be signed by the affiant in the presence of the magistrate, and filed with the court. That requirement was apparently removed by Congress when it reviewed the amendment under the Rules Enabling Act. He suggested that the Committee consider placing that requirement back into Rule 41.

In the ensuing discussion, several members of the Committee observed that the current rule provides for the issuing magistrate to certify the transcript of any telephonic transmissions used to obtain a warrant and that requiring the affiant to appear personally before the magistrate would impose another burden on affiants and magistrates. Following additional discussion, the Committee decided not to take any action to amend Rule 41 at this time.

I. Rule 43. Presence of Defendant.

The Committee briefly discussed the issue of an accused waiving his or her presence at entry of pleas, especially at those for superseding indictments. Mr. Martin and Judge Miller agreed to study the matter further, with a view toward possibly adding this matter to the Fall 1998 meeting agenda.

J. Rule 46. Release From Custody. Proposed Legislation

Regarding Forfeiture of Bond for Reasons Other Than Failure

to Appear.

Judge Davis informed the Committee that Representative Bill McCullum (Fla.) had introduced H.R. 2134, "Bail Bond Fairness Act," which would amend Rule 46(e) to limit the authority to revoke bonds to

those situations where a defendant has failed to appear. Under current practice a magistrate or judge may impose conditions which are not limited to failures to appear, e.g., to remain in particular location or to refrain from violating the law, etc. Judge Davis indicated that he had testified at hearings held by Representative McCullum on the issue and that Mr. McCullum had subsequently agreed to delay any further action on his proposal until the Advisory Committee had an opportunity to review the matter under the Rules Enabling Act and decide whether to propose and forward to the Standing Committee an amendment of its own.

Judge Miller stated that in response to a request from Judge Davis he had conducted a poll of magistrate judges to determine the extent to which this might be an issue. The results of that poll indicated that many do not use corporate sureties but instead release a defendant on personal recognizance or when a friend or family member posts personal property or signs an unsecured bond. Some do revoke bond for reasons other than nonappearance. He indicated that in those districts the magistrates believe strongly that holding a relative's or friend's assets insure compliance with release conditions.

Professor Stith expressed the view that the statute does not authorize such use of bonds but Judge Roll responded that his circuit has approved of the practice. Mr. Josefsberg indicated that forfeiting bonds on conditions other than nonappearance penalizes the accused and whomever has posted the bond, in some cases family members. Judge Miller opined that removing the option of forfeiting bonds for nonappearance would get a negative reaction from magistrate judges and the defense bar. He note that such procedures seem to be used in selected situations where the family of the accused is willing to take a risk and bear the burden on noncompliance with the conditions set by the magistrate.

Mr. Martin questioned whether a magistrate would realistically order forfeiture of a family home if an accused failed to meet the conditions of release. He recognized that the system tended to punish those friends and family members who have lost control over an accused. Judge Miller added that the practice had apparently been approved in some case law. Mr. Pauley indicated that if a forfeiture is later determined to be inappropriate there is a procedure for seeking remission. He added that the Department of Justice opposes the legislation and that permitting forfeiture for nonappearance can provide some protection for victims, from defendants who do not fear going to jail. Mr. Josefsberg expressed concern that there is a real risk that family members or friends who have posted bond will be harmed. He worried that some defense counsel might simply tell a surety to sign the bond without fully informing them of the problems that might follow if the defendant violates conditions of the bond.

Ms. Harkenrider expressed the view that threatening to forfeit a bond for having unauthorized contact with victims is beneficial; Judge Roll responded that he did not see witness intimidation as the real problem in these situations. Following additional brief discussion, Judge Marovich moved that the Committee adopt the language suggested by Congress--which would limit forfeiture of bonds to nonappearance only. Judge Roll seconded the motion. That motion failed by a vote of 5 to 6. In

additional discussion, it was agreed that the vote expressed the Committee's opposition (by a narrow margin) to attempts to limit the magistrate's ability to order forfeiture of bond for conditions other than nonappearance.

K Rule 49. Service and Filing of Papers. Proposed Amendment to

Provide for Facsimile Transmission of Notice.

The Reporter informed the Committee that it had received a recommendation that Rule 49(c) be amended to permit courts to provide notice by facsimile transmissions. Similar amendments would be made to Appellate Rule 3(d) and Civil Rule 77(d). Judge Stotler informed the Committee that this proposal would probably require coordination with the technology subcommittee of the Standing Committee and require uniformity of language. She recommended that the item remain on the Committee's continuing agenda.

L. Rules Governing Habeas Corpus Proceedings; Report of

Subcommittee.

Judge Carnes, chair of the habeas corpus rules subcommittee, reported that the subcommittee and conducted a preliminary review of the Rules Governing § 2254 Proceedings (State Custody) and § 2255 Proceedings (Federal Custody) and had prepared a written report with recommendations. He indicated that the subcommittee had focused not only on the potential inconsistencies in the time for filing responses, but also on the question of whether the rules should apply to § 2241 proceedings. Following additional discussion about other areas which might be studied, Judge Miller, a member of the subcommittee, indicated that he would poll magistrate judges on how they handle some of the issues raised in the discussion. The Reporter also suggested the possibility of merging all of the habeas rules into one set of rules. Judge Davis indicated that the matter would be on the agenda for the Committee's Fall 1998 meeting for further discussion.

VII. RULES AND PROJECTS PENDING BEFORE STANDING

A. Rules Governing Attorney Conduct; Possible Amendments to Rules

of Criminal Procedure.

Professor Coquillette, Reporter to the Standing Committee reported to the Committee that the Standing Committee was seeking the Advisory Committee's input on the adoption of a uniform set of rules to govern attorney conduct. That project had originated from Congress' general concerns in 1988 that there be a uniform set of rules governing local practice; that concern had led to what is referred to as the Local Rules Project. The focus was now on the issue of governing attorney conduct. He provided a brief overview of some of the problems that the federal courts and attorneys have faced in determining what particular rule of professional responsibility, might control in a particular instance. In particular he noted that the Department of Justice was interested in the issue of uniformity, given the fact that its attorneys may be subjected to inconsistent or conflicting rules of conduct.

He indicated that it appeared that there were basically three options for proceeding. The first option would be to adopt a single federal rule which would provide that the federal courts were bound by the state rules in which the court was located. That option had been labeled as the "Dynamic Conformity Rule." The second option would be to adopt a narrow set of core rules which would focus on particular federal court problems and leave the remainder of the issues to be resolved under state standards. In his view, this option would be narrower than what the federal courts currently have. The third option would be to adopt a complete set of Rules Governing Attorney Conduct for Federal Courts. So far, he said, there was not much support for this third option.

He suggested that the Committee consider several questions: First, which option would it tend to favor? Second, if a set of rules were to be adopted, how might they be incorporated, if at all, in the existing Rules of Procedure? And third, are there any technical suggestions which might inform the process of drafting and adopting new rules?

He added that he envisioned the formation of a special ad hoc committee composed of members from the Advisory Committees to consider the issues.

Several members recognized the problems that can arise at the trial court level and endorsed the general idea of resolving the problem. Following additional discussion, Judge Dowd moved that the Chair appoint two members to serve on an ad hoc committee. Judge Miller seconded the motion, which carried by a unanimous vote. The Committee took no position on whether to adopt a "dynamic conformity rule,"

a core set of rules, or a complete set of rules governing attorney conduct.

B. Local Rules Project; Effective Date for Rules.

The Reporter provided background information on a pending proposal before the Standing Committee that the respective rules of procedure be amended, in a uniform fashion, to provide that local rules be made effective on a set date each year and that a local rule not be effective until it had been received in the Administrative Office. Mr. Rabiej reported that the other Advisory Committees had not yet approved any particular language. It was decided to defer any further action on the matter pending the drafting of specific, uniform language.

C. Electronic Filing of Comments on Proposed Rules Changes.

Mr. Rabiej informed the Committee that the other Advisory Committees had approved a pilot program for receiving public comments on published rules via electronic mail services. Following a brief explanation of how the program would operate, the Committee approved the use of a two-year pilot program for receiving e-mail comments on the criminal rules.

D. Criminal Rule 27. Proof of Foreign Record.

Judge Stotler informed the Committee that the Federal Rules of Evidence Committee is considering an amendment to those Rules regarding proof of a foreign record--a topic currently covered at Civil Rule 44 and indirectly Criminal Rule 27. The Criminal Rule simply incorporates the civil rule regarding proof of such records. Following a brief discussion, it was the view of the Committee that the matter be continued on its docket pending any proposed amendments from either the Civil Rules or Evidence Rules Committee.

E. Status Report on Proposed Restyling of Criminal Rules.

The Reporter indicated that the Committee had been informed by Judge Parker, Chair of the Subcommittee on Style, that the subcommittee anticipated submitting its proposed changes to the Rules of Criminal Procedure on December 1, 1998. The restyled Appellate Rules are to go into effect on that same date, assuming that Congress makes no changes to the rules.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Chair reminded the Committee that its next meeting would be held on October 19th and 20th in Maine.

IX. ADJOURNMENT

The meeting was adjourned at 12:05 on Tuesday, April 28th, 1998.

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter