MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 22 & 23, 1993

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 22 and 23, 1993. 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 Thursday, April 22, 1993 at the Federal Judiciary Building in Washington, D.C. The following persons were present for all or a part of the Committee's meeting.

Hon. Wm. Terrell Hodges, Chair

Hon. Sam A. Crow

Hon. W. Eugene Davis

Hon. John F. Keenan

Hon. George M. Marovich

Hon. Joseph H. Rodriguez

Hon. Harvey E. Schlesinger

Hon. D. Lowell Jensen

Prof. Stephen A. Saltzburg

Mr. John Doar, Esq.

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Edward Marek, Esq.

Mr. Roger Pauley, Jr., designate of Mr. John Keeney, Acting 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. Magistrate Judge Crigler was not able to attend.

I. INTRODUCTION AND COMMENTS

Judge Hodges welcomed the attendees and noted that Judges Keenan and Schlesinger were attending their last meeting and thanked them for their many years of faithful service to the Committee. He also introduced the new members of the Committee: Judges Davis, Marovich, and Rodriguez, and Ms. Klieman.

II. HEARING ON PROPOSED AMENDMENTS

The Chair also noted that a number of Criminal Rules had been published for public comment and that originally, a hearing on those proposed amendments had been set for March 29th in San Francisco and May 6, 1993 in Washington. Due to lack of witnesses, the San Francisco hearing had been cancelled. In order to consolidate travel, the May 6th hearing had been moved forward to coincide with the Committee's meeting. The Committee heard testimony from two witnesses: Mr. Thomas W. Hillier, Jr., a Federal Public Defender from Seattle, Washington and Hon. Frederick N. Smalkin,(1)

from the United States District Court in Baltimore, Maryland. Mr. Hillier addressed the proposed amendments to Rules 16 and 32 and Judge Smalkin addressed the proposed amendments to Rule 32.

III. SPECIAL ORDER OF BUSINESS

As a special order of business the Chair recognized four persons who had indicated an interest in testifying about proposed amendments to Rule 16: Hon. Donald E. O'Brien, Hon. William G. Young, Hon. John A. Jarvey, and Professor Charles W. Ehrhardt. Each presented testimony to the Committee on the need for an amendment to Rule 16 which would either require the government to identify written materials which directly name the defendant, or in the alternative, require the government to make available to the defendant any existing index or cross referencing system or program which would assist the defense in identifying materials relating to the defendant. The witnesses offered the two options in language drafted by Professor Ehrhardt. They pointed out that there is a compelling financial need to save defense counsel time in sorting through massive amounts of material in preparing for trial. In response to questions from the Committee they recognized that the government might have an interest in protecting its work product but that some system should be devised to expedite criminal discovery, where time and resources are becoming more scarce.

Judge Hodges thanked the witnesses for their insights and indicated that in the due course of discussing possible amendments to Rule 16, the proposal would again be considered.

IV. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's October 1992 meeting in Seattle be approved. Mr. Karas seconded the motion which carried unanimously.

V. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court

and Forwarded to Congress

The Reporter informed the Committee that the Supreme Court was in the process of approving a number of proposed amendments to the Criminal Rules and forwarding them to Congress for action under the Rules Enabling Act. The Rules amended by the Court are as follows:

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.

B. Rules Approved by the Standing Committee

and Circulated for Public Comment

on an Expedited Basis

The Reporter informed the Committee that at its December 1992 meeting the Standing Committee approved for public comment proposed amendments to Rules 32 and 40(d), two amendments approved by the Committee at its Seattle meeting in October 1992. In addition, the Standing Committee authorized publication and comment on two Rules it had earlier approved: Rules 16(a)(1)(discovery of experts) and Rule 29(b)(delayed rulings on motions for judgment of acquittal). All four rules were approved for expedited consideration; the comment period ended on April 15, 1993.

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

Judge Hodges provided a brief background on the proposed amendment to Rule 16 which would require the government to disclose to the defense certain statements by individuals associated with organizational defendants.

Mr. Karas moved that the proposed amendment be sent forward to the Standing Committee with the recommendation that it be approved. Mr. Marek seconded the motion.

Judge Hodges noted that several written comments had been received on the proposed change and that he thought that there was merit in recognizing in the rule and the accompanying note the fact that the parties may disagree as to whether a particular person was in a position to bind the organizational defendant. Following comments by Judge Marovich concerning that problem, Judge Keeton recommended that the rule be changed slightly to require the government to disclose the statements of persons "the government contends" were in a position to bind the organizational defendant. Judge Hodges in turn suggested appropriate language for the note which would recognize that the defense would not be required to stipulate or admit that a particular individual was in a position to bind the defendant.

Judge Keenan moved that the amending language be added to the rule. Judge Rodriguez seconded the motion which carried by a vote of 10 to 0 with one abstention. The main motion to forward the amendment to the Standing Committee carried by a vote of 10 to 0 with one abstention.

2. Rule 29(b), Delayed Ruling on

Judgment of Acquittal

The Reporter briefly reviewed the background of the proposed amendment to Rule 29(b) and noted that one commentator, Mr. Weinberg, had suggested that the rule or the note reflect that on appeal of a delayed ruling of a motion for judgment of acquittal the court is not free to consider any evidence submitted after the motion was made at trial. Following additional brief discussion during which several members indicated that that position was clear from the wording of the rule itself, Mr. Pauley moved that the rule be forwarded to the Standing Committee. Judge Crow seconded the motion which carried by vote of 10 to 0 with two abstentions.

3. Rule 32, Sentence and Judgment

The discussion of the amendments to Rule 32 began with Judge Hodges giving a brief overview of the amendments and listed ten issues the Committee should address in deciding what, if any, further changes should be made to Rule 32. Mr. Pauley, Mr. Marek, and the Reporter suggested several additional topics. Mr. Karas moved that the Committee discuss the amendments. Following a second by Judge Marovich, the Committee voted unanimously to discuss the proposed amendments.

Turning first to the issue of timing of sentencing, Judge Hodges noted that almost all of the approximately 30 individuals submitting written comments on the proposed amendments questioned the wisdom of imposing a 70-day deadline for sentencing. He indicated that one possible solution would be to retain the current language in Rule 32, "without unnecessary delay," but to also retain from the proposed, amended rule as published for comment specific incremental deadlines for submission of the presentence report, etc. Mr. Pauley indicated that he had informally polled United States Attorneys' offices and that some had suggested including a specific deadline of 84, 90, or 91 days. Judge Davis expressed general agreement with Judge Hodges' concerns about a specific deadline and Judge Crow questioned whether there was any need for a national rule governing the timing of sentencing proceedings. Mr. Karas ultimately moved that Rule 32(a)[(2)]

be revised to require sentencing to take place without "unnecessary delay" but that the participants would be required to comply with the internal time limits for preparation of the report, filing of objections, etc. Judge Davis seconded the motion which carried by a unanimous vote.

Turning to Rule 32(b)(4), Judge Hodges noted that several commentators had questioned the proposed language which indicated that the probation officer would "determine" the appropriate sentencing classification for the defendant. After brief discussion the Committee agreed that the Rule should require the probation officer to provide information concerning the classification which he or she "believes" to be applicable to the defendant.

Regarding Rule 32(b)(4)(E), Judge Hodges noted that several commentators had questioned whether any reference should be made in the presentence report to the availability of nonprison programs. The Committee generally agreed that the language should be changed and subsequently Judge Jensen recommended that the rule be amended to read: "in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant." The proposed language was approved by a unanimous vote.

Judge Hodges indicated that a number of commentators had focused on Rule 32(b)(6)(A) which addresses disclosure and objections to the presentence report. They were split on the issue of whether the probation officer's recommendation on sentence should be disclosed. As published, the rule created a presumption that the recommendation should be disclosed, unless a local rule provided otherwise. Mr. Marek briefly reviewed the debate on this particular issue and ultimately moved that the language as published should be retained. Mr. Pauley seconded the motion which carried unanimously.

The Committee next addressed Rule 32(b)(6)(B) and the question whether the probation officer should be granted the authority to "require" counsel and the defendant to meet with him or her. Judge Hodges noted that several commentators questioned the wisdom of granting that authority. Judge Marovich indicated that he believed the probation officer should have that authority. In response to a question from Ms. Klieman whether the Committee had considered the possibility of using some word other than require, Mr. Marek reviewed what he believed to be the role of the probation officer and that the Committee, in his view, had not intended to change drastically the role of the probation officer. Mr. Pauley expressed the view that perhaps local rules could address this point but Judge Marovich questioned whether that would accomplish the desired result of early resolution of the issues. He noted that the role of the probation officer has changed and that they have become in some cases one of the adversaries. Mr. Wilson expressed deep concern about the role of probation officers but that the rule

reflects the reality of that role.

Both Judges Hodges and Schlesinger indicated that the local rule in the Middle District of Florida includes language authorizing the probation officer to require meetings with the defense counsel and that it has worked well. Judge Davis indicated that the word "require" promotes the perception that the probation officer's role has expanded. Following additional comments, the Chair summarized the various options: leaving the rule as published; deleting the provision altogether, or amending the rule to provide that the probation could request counsel to meet. The Committee voted 8 to 2 to amend the rule to read: ""the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government, to discuss those objections."

With regard to Rule 32(b)(2), which entitles defense counsel to be present at any interview between the probation officer and the defendant, Judge Hodges informed the Committee that a number of commentators expressed concern about the ability of counsel to unreasonably delay preparation of the presentence report. After a brief discussion of the options available, the Committee voted unanimously to change the language to read: "On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation." Mr. Pauley expressed concern, however, about the definition of the word "interview" and suggested that the Committee Note indicate that the Committee did not intend for the rule to apply to every conversation between the probation officer and the defendant. Mr. Marek suggested that the issue should be left to the courts for resolution. Professor Saltzburg moved that the Note should read to the effect that the word interview extends to any communication initiated by the probation officer where he or she is seeking information to be used in the presentence investigation. He added that the burden should be on the defense counsel to respond promptly to notice of an intent to interview the defendant. Mr. Karas seconded the motion which carried by a 9 to 4 vote.

Following additional discussion about the respective roles of the probation officer, the defense counsel, and the court in insuring that counsel is given an opportunity to be present, without unduly delaying the process, Professor Saltzburg moved that the words "upon request" be deleted from the rule. Mr. Marek seconded the motion which failed by a vote of 3 to 9.

Turning to Rule 32(b)(6)(D), Judge Hodges noted that the word "presentencing" should read "sentencing."

Judge Hodges indicated that with regard to Rule 32(c)(1), at least one commentator questioned the choice of language dealing with controverted matters which would not be "taken into account or will not affect sentencing." He noted that that the phrase "will not affect" was not in the original Rule 32 and the commentator expressed concern that the new language would invite litigation. Judge Hodges explained that due to overlapping ranges in the in the sentencing guidelines, there might be situations in which a controverted matter would not alter the sentence even if the sentencing range is changed. Mr. Wilson commented that as published, a judge's statement that the controverted matter will not be considered in any way, will avoid the litigation. Mr. Adair agreed that there might be factual disputes about a matter which would affect the classification but not the sentence imposed.

Ultimately, a minor change was made in the wording of the provision to read "the controverted matter will not be taken into account in, or will not affect, sentencing." The Chair added that the Note should include some reference to the change in wording.

Judge Hodges noted that some commentators had suggested removing language in proposed Rule 32(c)(1) which indicates that the court has discretion to consider additional evidence or testimony, language which exists in the current rule. Mr. Marek noted that one commentator had indicated that the granting of discretion may be problematic. He noted that the caselaw is still developing and ultimately moved that the Committee Note be

amended to indicate that developing caselaw reflects the possibility that due process might require the court to consider additional evidence or testimony, and that it might be an abuse of discretion not to consider additional evidence. Judge Marovich seconded the motion which carried by a vote of 8 to 4 with one abstention.

Judge Keeton noted a potential ambiguity in the language which apparently distinguishes between testimony and evidence and that use of the word "testimony" could be problematic. He noted that counsel now argue that they have a right to present oral testimony. Judge Hodges observed that perhaps the Committee Note could be changed to indicate that use of the phrase "or other evidence" should indicate to the trial court that it had the discretion to determine the form of the evidence. He added that the current rule seems to have a broader sweep; under proposed (c)(1), the additional evidence would be considered to the extent that it affected unresolved objections.

The Reporter indicated that a number of the concerns raised in the discussion might be covered in the Committee Note, i.e., the fact that the Rules of Evidence do not apply, and that the trial court has the discretion to determine the form of the evidence to be received.

After some additional discussion on the point, Mr. Doar moved that the words "testimony or other" be deleted from subdivision (c)(1). Professor Saltzburg seconded the motion which carried by a unanimous vote.

With regard to Rule 32(b)(6)(B), Judge Hodges noted a suggestion raised in several written comments to the effect that the probation officer, or counsel, should provide copies of the original objections to the court. Mr. Marek moved, and Professor Saltzburg seconded, a motion to amend the Committee Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their original objections or have them included as a part of the addendum in the presentence report. The motion carried by a unanimous vote.

Mr. Marek recommended that the Committee reconsider the provisions in Rule 32(b)(5) regarding exclusion of certain information. In particular, he expressed concern that such information, although not included in the report, might nonetheless be relied upon by the court in assessing a sentence. Following some preliminary discussion of the issue, Mr. Marek moved that the language in Rule 32(c)(3)(A) be amended to require that any information excluded under (b)(5) be summarized in writing if the information will be relied upon in sentencing. Mr. Karas seconded the motion. Judge Keeton expressed opposition to the change to the extent that it would require the court to prepare a written summary and not have the option of doing so orally from the bench. He suggested that perhaps the language in subdivision (c)(3)(A) concerning a summary of excluded information should be moved into Rule 32(6)(A). Mr. Marek agreed, and changed his motion.

Judge Hodges suggested some language to accomplish the intent of the motion which generated additional discussion. Ms. Klieman expressed concern for even a summary of confidential information in the presentence report would be problematic. The Reporter then offered alternative language.

Professor Saltzburg expressed concern that the proposed changes would be considered a major revision to the Rule as it was published for comment and questioned whether the proposed language might encourage probation officers to err on the side of including more confidential information. Judge Keenan stated the current rule seems to work and that no changes were required. Judge Schlesinger indicated that even assuming confidential information were disclosed, it would normally not make a major difference in the sentence.

Additional discussion focused on the practical problems of transmission of the summary and appellate review of the information. Judge Jensen suggested that the real issue was whether the defense counsel would have enough time to review the summary. Mr. Marek agreed and believed that the best solution would rest in making provision

for counsel to respond to whatever confidential information was relied upon in sentencing. Mr. Marek restated his motion, with the consent of Mr. Karas, to amend (c)(3)(A) to require a written summary and to require the court to provide counsel with a reasonable opportunity to comment on the summary. That motion carried by a unanimous vote.

Mr. Pauley drew the Committee's attention to Rule 32(c)(5) concerning the court's advice to the defendant regarding the right to appeal In particular he pointed out earlier language in the 1974 Advisory Committee Notes which indicated that advising a defendant of the right to appeal after he had pleaded guilty might be confusing. He moved that the rule be amended to reflect the differences which exist in the defendant's right to appeal in a contested case and in a case where the defendant has entered a guilty plea. Judge Davis seconded the motion which passed with a unanimous vote.

Mr. Karas moved that Rule 32, as amended, be forwarded to the Standing Committee. Judge Keenan seconded the motion which passed unanimously.

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

Judge Hodges informed the Committee that no written comments had been received on the proposed amendment to Rule 40(d). Mr. Karas moved that the rule be forwarded to the Standing Committee and Judge Rodriguez seconded the motion. It passed with a unanimous vote.

C. Other Criminal Procedure Rules

Under Consideration by the Committee

1. Rule 5: Proposal to Exempt

UFAP Arrestees from Rule

The Chair briefed the Committee on the background of proposed amendments to Rule 5 and informed them that at the Seattle meeting in October 1993, he had appointed a subcommittee composed of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley to study the proposals. Judge Jensen indicated that his subcommittee had attempted to obtain as much information as possible concerning what actually happens when a person charged with the offense Unlawful Flight to Avoid Prosecution (UFAP) is arrested by federal authorities. Under Rule 5, such persons are to be presented to a magistrate even if prosecution for the offense is not contemplated.

Mr. Pauley moved that Rule 5 be amended to provide that persons arrested for violating 18 U.S.C. § 1073 (UFAP) may be turned over to appropriate state or local authorities provided that the Government promptly moves, in the district in which the warrant was issued, to dismiss the complaint. Professor Saltzburg seconded the motion.

Judge Jensen indicated that he favored the motion but Mr. Karas spoke against the proposal noting that a person charged with UFAP might be placed in custody indefinitely without the benefit of appearing before a magistrate.

Mr. Pauley expressed the view that the federal system should not provide a backstop for state criminal justice problems or procedures. And Mr. Marek responded that the federal system is involved if a UFAP charge has been filed. The Committee ultimately voted 11 to 2 to make the proposed changes and forward them to the Standing Committee with a recommendation to publish the amended rule for comment by the bench and bar.

2. Rules 10 and 43: In Absentia Appearances

Judge Hodges provided a brief background to the proposal to permit use of video technology to arraign defendants, not present in court. He noted that at the Committee's Seattle meeting he had appointed a subcommittee composed of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg to study the issue and report back to the Committee. Judge Keenan indicated that the subcommittee had studied the issue and believed that the Rules should be amended. He then moved that Rules 10 and 43 be changed to permit use of teleconferencing technology where the defendant waives the right to be physically present in court. Mr. Doar seconded the motion.

Mr. McCabe of the Administrative Office, informed the Committee that at its Spring 1993 meeting, the Judicial Conference had approved a pilot teleconferencing program in the Eastern District of North Carolina for competency hearings where the defendant is not present in court. Judge Davis questioned whether a defendant would really be waiving the right to be present and Judge Keenan indicated that the waiver provision was a major compromise within the subcommittee's consideration of the issue.

Mr. Karas opposed the rule changes, stating that he viewed the amendments as one more step down the slippery slope. He noted that the waivers will come from those defendants with appointed counsel and that Arizona had scrapped a similar program of video arraignments. Mr. Marek also opposed the amendments. He was concerned that there would be inevitable questions whether the defendant actually waived appearance in court, adding that defendants often do not fully grasp the significance of initial appearances. He joined Mr. Karas in questioning the wisdom of starting down the path of video teleconferencing.

Judge Marovich indicated that the amendment sends the message that arraignments are not that important and Mr. Wilson questioned the practical problems of defense counsel effectively communicating with a client who may not be present in court with counsel.

After some additional discussion the original motion was withdrawn and replaced with a motion to forward the proposed amendment without provision for waiver.

Mr. Marek expressed greater concern for the new proposal and Professor Saltzburg indicated that the proposal would squeeze the humanity out of the justice system. He noted that there was something fundamental about bringing defendants forward and putting them before a judge. Concerning the waiver provision, he stated that that issue could be addressed in the Committee Note. Additional comments by Judge Hodges, Mr. Marek, and Mr. Wilson focused on the problems of counsel being present with the defendant. Judge Crow commented that there might be a problem with the definition of arraignment, which is covered in Rule 10. But Rule 43 might not be as limited. Judge Marovich indicated that if teleconferencing were limited to only arraignments, it might not be as objectionable.

Judge Keenan indicated that perhaps the best way to proceed would be to treat Rule 10 separately and go forward with that rule alone. On a vote whether to amend Rule 10 without a waiver provision, the motion failed

by a vote of 6 to 7. Judge Keenan thereafter moved that Rule 10 be amended to permit video teleconferencing if the defendant waived personal appearance. Professor Saltzburg seconded the motion which carried by a vote of 10 to 3.

Turning to Rule 43, Judge Jensen noted that the issue of waiver would also be a key point in any change to the rule. Mr. Marek expressed concern that any counsel who recommended that a defendant waive personal appearance might be guilty of ineffective assistance of counsel.

Judge Keenan moved that Rule 43 be amended to permit teleconferencing of pretrial sessions if the defendant waives personal appearance. Judge Crow seconded the motion which carried by a vote of 9 to 3 with one abstention.

3. Appointment of Subcommittee to Consider Problems Associated with Proposals to Amend Rules

Judge Hodges noted the problems often associated with unsuccessful proposals to amend rules. He queried what response, if any, the Committee should give to individuals or groups who request permission to appear personally before the Committee to propose rule changes or to address the Committee before it votes on a particular amendment. He appointed a subcommittee consisting of Judge Crow (Chair), Judge Jensen, Mr. Marek, Ms. Klieman, and Mr. Pauley to consider the issue and whether the Committee should adopt any policies or standard procedures for dealing with those issues. Later in the meeting, at the suggestion of Mr. Pauley, Judge Hodges asked the subcommittee to consider the issue of whether a particular proposal should be considered indefinitely tabled if it is rejected by the Committee.

4. Rule 12: Proposal to Amend Rule to Require Defense

to Raise Entrapment Defense as Motion

Judge Hodges indicated that Judge M. Real had proposed that Rule 12 be amended to require defendants to raise the entrapment defense as a pretrial motion and drew the Committee's attention to materials in the agenda book supporting that proposal. No motion was made regarding the proposal.

5. Rule 16: Proposal to Require Government

Disclosure of Witnesses

The Chair indicated that at its October 1992 meeting the Committee had indicated an interest in revisiting possible amendments to Rule 16 which would require the government to disclose its witnesses to the defense. Mr. Wilson and Professor Saltzburg had agreed to draft a possible amendment, and had done so. But he added that Attorney General Reno had sent a letter to the Committee asking it to defer consideration of that amendment until she had a chance to review it.

Judge Schlesinger then moved to defer consideration of the amendment. Judge Keenan seconded the motion.

Judge Keenan indicated that it would be important to respect the request of the new Attorney General and give the Department of Justice an opportunity to consider more fully the proposed amendment. Judge Hodges indicated that there has been almost continuous consideration of amendments to Rule 16 and that the heart of that rule rested in the proposal from Mr. Wilson and Professor Saltzburg.

Mr. Wilson acknowledged the request of the Attorney General but was concerned about continued delays in addressing what is a vital issue in federal criminal discovery. Professor Saltzburg acknowledged that the issue raised political questions and that if the Committee did not defer it might be viewed as a snub to the Attorney General. He suggested a middle ground -- the Committee could defer the matter but continue to pursue the amendment. Mr. Pauley indicated that after reviewing the proposal, the Attorney General might be in a position to suggest an alternative solution or amendment.

Following additional brief discussion of possible solutions, the Committee vote unanimously to defer the proposed amendment to Rule 16 until its next meeting.

There was also a brief discussion about the proposal from Judge O'Brien that Rule 16 be amended to require the government to identify the materials implicating the defendant. Several members expressed concern about the process of reconsidering proposals which had already been rejected; this proposal in particular had been considered and rejected by the Committee at is October 1993 meeting. Judge Hodges recommended that the subcommittee on procedures consider the issue. Any further action on Judge O'Brien's proposal was deferred.

6. Rule 24(b): Proposal to Reduce Number

of Peremptory Challenges

The Chair pointed out a proposal from several individuals that the Committee consider amending Rule 24 to reduce or equalize peremptory challenges -- in an effort to reduce court costs. He provided background information on the Committee's past attempts to amend Rule 24(b) to equalize the number of peremptory challenges and observed that perhaps Congressional interest in the matter might spur the Committee to reconsider that issue. No motion was made to amend Rule 24.

7. Rule 43: Proposal to Permit

In Absentia Sentencing

The Reporter provided a brief introduction to the Department of Justice's proposal to amend Rule 43 to permit in absentia sentencing. Mr. Pauley moved that Rule 43 be so amended and Judge Davis seconded that motion.

Mr. Pauley provided additional background information and reasons for the amendment. He pointed out that caselaw recognizes that the government can be prejudiced by the absence of a defendant. Judge Hodges questioned what would happen to the right of appeal if the defendant was sentenced in absentia. Judge Marovich indicated that it is a matter of waiver. He noted that in Illinois there is considerable caselaw indicating that if the defendant leaves after being admonished about the consequences of doing so, he or she has waived whatever

right they had to be present or to appeal.

Professor Saltzburg opposed the motion noting that trial judges might wish to wait to hear the defendant's reasons for not being present. He added that there did not appear to be any real data or evidence suggesting that there is need for the changing the rule. Judge Hodges observed that a presentence report could be prepared even if the defendant were absent and thus preserve some of the evidence for later use. Judge Marovich stated that defendant's should not be permitted to create a gridlock on the system by not showing up for sentencing. Mr. Pauley added that there has been an increase of "fugitivity" and that it seems anomalous that the entire trial could proceed without the defendant being present but that sentencing could not take place in the same circumstances.

Judge Keeton expressed agreement with Judge Marovich's views and the problems of wasting judicial resources by having to wait for the defendant's return. Mr. Pauley indicated that amending the rule would not require the court to sentence in absentia; it would simply permit the court to do so. Professor Saltzburg questioned whether the percentage of "fugitivity" had actually decreased in light of the increase in the number of cases. Judge Keenan questioned the potential impact on Rule 35 motions. Mr. Marek stated that once sentence is imposed, there is no way to correct it and Judge Hodges indicated that if the defendant's absence was involuntary, the sentence would probably be void. He added that sentencing in absentia would permit orders of restitution for victims, a view shared by Judge Jensen.

Judge Hodges questioned whether a guilty plea would be considered part of the trial and Mr. Pauley indicated that it would be. Mr. Marek expressed concern with that view and stated that the rule should be limited to those trials where the defendant has entered a not guilty plea; he questioned the constitutionality of a rule permitting in absentia sentencing after a guilty plea. Judge Marovich suggested that perhaps the rule should include a provision requiring the defendant to be admonished of the risk of flight before

sentencing. Judge Hodges and Mr. Marek raised the question of whether the change would violate the Sixth Amendment and Mr. Pauley responded that the amendment assumed that counsel would be present. Only the defendant's presence would be waived.

Ultimately, the Committee voted in favor of the proposed amendment to Rule 43 by a margin of 7 to 5.

Later in the meeting, Mr. Pauley moved that the word "corporation" in Rule 43(c) should be changed to the word "organization" as defined in 18 U.S.C. § 18. Judge Davis seconded the motion which carried by a unanimous vote.

8. Rule 53: Permitting Cameras in the Courtroom

Judge Hodges provided a brief background on the proposal to permit the broadcasting of criminal trials. Mr. McCabe informed the Committee that the Judicial Conference had approved a pilot program for civil trials; five courts had been authorized to permit cameras in the courtroom where the trial judge felt that it was appropriate to do so. The program would eventually be evaluated by the Conference.

Judge Davis noted that there seemed to be an absence of "horror stories" coming from that test program and Ms. Klieman spoke in favor of amending Rule 53 to permit broadcasting. She indicated that in her experience cameras in the courtroom tended to keep everyone honest; the media tends not to come into the courtroom because they can watch the proceedings from another location. It also serves as an asset to the administration of justice. Mr. Marek observed that the proposed amendment defers to the Judicial Conference to set the appropriate guidelines.

Mr. Pauley moved that Rule 53 be amended by deleting the reference to "radio" in the current rule. Judge Davis seconded the motion which carried by a vote of 12 to 1. Judge Schlesinger then moved that Rule 53 be amended to permit broadcasting the judicial proceedings under guidelines determined by the Judicial Conference. Professor Saltzburg seconded the motion which carried.

D. Rules and Projects Pending Before the Standing

Committee and the Judicial Conference

1. Rule 57: Proposed Amendments Concerning

Local Rules

The Reporter indicated, as a matter of information, that the Standing Committee was currently considering standardized language for amending the various procedural rules concerning promulgation of local rules. In the case of the criminal rules, the amendment would be effective for Rule 57.

2. Rule 59: Proposed Amendments Concerning

Technical Amendments

The Reporter also informed the Committee of pending amendments to Rule 59 which would authorize the Judicial Conference to make technical changes to the rules without the necessity of going through the entire rule-making process.

3. Admission of United States Attorneys

Under Local Rules

Judge Hodges informed the Committee of a concern raised by then Attorney General Barr in a letter to Chief Justice Rehnquist concerning the question of whether the Courts of Appeals and the District Courts have the authority to require United States Attorneys to join their bars. Judge Keeton indicated that the Standing Committee was interested in hearing the views of the various advisory committees on that issue. He recognized that there is no "rule" in any of the procedural rules addressing the point; admission requirements are left to the local courts. Judge Hodges questioned whether, as Attorney General pointed out, the local admission requirements might conflict with statutory provisions governing the authority of the Attorney General to assign attorneys to represent the United States.

Judge Keeton added that it would be helpful to hear the views of the Department of Justice as to whether it believed the answer rested in promulgation of a rule, and if so, the extent of the rule. He noted that the present view is that the Judicial Conference does not have the authority to promulgate a rule governing bar admissions and he questioned who would have the authority. Mr. Pauley reminded that the Attorney General's letter noted that the problem of bar admissions existed in both the appellate and trial courts and disagreed that the best course

would be to send the issue back to the Department of Justice.

Judge Hodges indicated that he would be inclined to write a letter to the Standing Committee indicating that the Committee had considered the issue and determined that the issue of bar admission did not appear in the criminal rules and that although the Committee had doubts about the appropriateness of such a rule it would be receptive to specific proposals for addressing the problem.

4. Filing by Facsimile

Mr. Rabiej informed the Committee that the Judicial Conference was considering the issue of promulgating guidelines for implementation of facsimile filing of documents. He added that issue was still pending and that there appeared to be no urgency for the Committee to address possible amendments to the Criminal Rules.

5. Renumbering and Integration of Rules

As a point of information, the Reporter pointed out that the Standing Committee had been, and would be, considering proposals to integrate all of the appellate, civil, and criminal rules of procedure rules into one unified numbering system. He noted that to date, no specific action had been taken on that proposal other than to chart out how the new system might work.

VI. RULES OF EVIDENCE UNDER CONSIDERATION

The Reporter informed the Committee that the Chief Justice had appointed an Evidence Advisory Committee and that it would handling any amendments to Federal Rule of Evidence 412, which had been approved by the Committee at its October 1992 meeting and published for comment. He added that Professor Saltzburg had been designated as the Committee's liaison to the new Evidence Committee.

VII. MISCELLANEOUS AND DESIGNATION

OF TIME AND PLACE OF NEXT MEETING

After a brief discussion about possible meeting dates and places, the Committee voted unanimously to hold its next meeting in San Diego, California on October 11 and 12, 1993.

The meeting adjourned at 11:15 a.m. on Friday, April 23, 1993.

1. [2]. Due to scheduling conflicts, Judge Smalkin was not able to appear before the Committee until the afternoon session on April 22.

2. [3]. The references are to Rule 32 as it was published for public comment.