COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

AGENDA ITEM - 11
Tucson, Arizona
January 12-15, 1994

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report on Proposed and Pending Rules of Criminal Procedure**

DATE: **December 9, 1993**

I. INTRODUCTION.

At its meeting in October 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to several Rules of Criminal Procedure. The Committee also adopted two internal operating procedures for reconsidering previously rejected amendments and for entertaining oral comments on proposed amendments from members of the public. This report addresses those proposals and recommendations to the Standing Committee. A copy of the minutes of that meeting are attached along with a copy of the proposed rule amendments.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

Pursuant to action by the Standing Committee at its Summer 1993 meeting, proposed amendments in the following rules have been published for public comment: Rule 5. Initial Appearance Before the Magistrate Judge; Rule 10. Arraignment; Rule 43. Presence of the Defendant; Rule 53. Regulation of Conduct in the Court Room; Rule 57. Rules by District Courts; and finally Rule 59. Effective Date; Technical Amendments. A hearing on these amendments has been set for April 4, 1994 in Los Angeles; the deadline for comments is April 15, 1994.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

After years of debate, the Advisory Committee has approved a proposed amendment to Rule 16 which requires the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial. As discussed in the minutes and the Committee Note accompanying the proposed amendment, in 1974 Congress rejected a similar amendment proposed by the Supreme Court after a vigorous protest from the Department of Justice. In the intervening years, similar amendments have been proposed, debated, and rejected by the Advisory Committee. The attached amendment was approved by an overwhelming vote of the Committee members (9 to 1). The Committee believes that the amendment is appropriate and that it strikes the appropriate balance between assuring witness safety and the need for defense pretrial discovery. The Committee also believes that the amendment will result in more efficient operation of criminal trials.

In summary, the proposed amendment to Rule 16 creates a presumption that the defense is entitled to discovery of the government's witnesses, their addresses, and their statements. The rule recognizes, however, that the government may refuse to disclose that information, in whole, or in part, by filing a nonreviewable, *ex parte*, statement with the court stating why it believes, under the facts of the particular case, that disclosing the information will threaten the safety of a person or risk the obstruction of justice. The amendment also includes a provision for reciprocal pretrial witness disclosure by the defense.

The Committee anticipates that some may argue that the amendment is at odds with the Jencks Act, 18 U.S.C. § 3600 et seq., and therefore is in conflict with Congress' view that disclosure of a witness' statements should not be disclosed prior to that witness testifying at trial. As pointed out in the Committee's Note, over the years Congress has approved a number of amendments expanding federal criminal discovery -- including broadened pretrial discovery for the prosecutor. The Committee believes that the proposed amendment is in harmony with the rationale of the Jencks Act. At the same time, the Committee is sensitive to following the Rules Enabling Act process and recognizes that ultimately, Congress can accept or reject the amendment.

The Advisory Committee recommends that the Standing Committee approve the publication of the proposed amendment for public comment.

IV. REPORT ON PROPOSAL TO IMPLEMENT FACSIMILE GUIDELINES

The Advisory Committee also considered the Judicial Conference's proposed facsimile guidelines. The Committee concluded that no amendments to the Federal Rules of Criminal Procedure were needed at this time because Criminal Rule 49(d) incorporates by reference any such guidelines in the Civil Rules. Although the Committee determined that no further action on the guidelines was needed at this time, it did reach a consensus that the proposed guidelines should include authorization to restrict the hours during which facsimile transmissions might be received by the court, e.g., regular business hours.

V. CONSIDERATION OF INTERNAL OPERATING RULES.

In response to several earlier discussions, the Advisory Committee acted on the recommendations of a subcommittee which had been tasked with considering two issues, internal to committee operations: (1) Whether the Advisory Committee should permit interested persons to appear and speak on proposed amendments and (2) Whether any conditions should be imposed on reconsidering a proposed rule change which has been rejected.

With regard to the first issue, the Committee adopted the subcommittee's proposal that:

> All suggestions and proposals are to be submitted in writing by interested persons and oral testimony and statements are limited to public hearings only, and not business meetings. This does not preclude Committee members from asking questions of proponents or opponents who are attending the business meeting.

With regard to the second issue, the Committee adopted the following recommendation:

> The reporter, in preparing copies and summaries of all written suggestions or proposals, identify those that are similar to ones that have been rejected and to the extent practicable, provide a summary of the reasons for the rejection appearing in the Committee's minutes.

The consensus of the Committee was that as part of its task of continously reviewing the rules of criminal procedure, the same or similar proposal might be repeatedly offered over the course of several meetings or years and that changes in the law or Committee composition might result in a proposal finally being adopted. Rather than adopting a strict limit on resubmissions of proposed amendments, the reporter is tasked with providing a summary to the members indicating what, if any, reasons were given for prior rejections.

Attachments:

Proposed Amendments to Rule 16
Minutes of the October 1993 Meeting

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

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(F) NAMES, ADDRESSES AND STATEMENTS OF WITNESSES. At the defendant's request in a non-capital case, the government, no later than seven days before trial, must disclose to the defendant, the names and addresses of the witnesses the government intends to call during its case in chief, together with any statements of such witnesses as defined in Rule 26.2(f). Such disclosure need not be made if (i)

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1. New matter is underlined and matter to be omitted is lined through.

the attorney for the government has a good faith belief that pretrial disclosure of some or all of this information will threaten the safety of a person or lead to an obstruction of justice, and (ii) submits to the court, ex parte and under seal, an unreviewable statement setting forth the names of the witnesses and the reasons why the government believes that the information cannot safely be disclosed.

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(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), ~~and~~ (E)~~,~~ and (F) of subdivision (a)(1), this rule does not authorize the discovery of inspection of reports, memoranda,

or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case.

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(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

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(D) NAMES, ADDRESSES, AND STATEMENTS OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, and the government complies, the defendant, at the request of the government, must disclose to the government prior to trial the names,

addresses, and statements of witnesses -- as defined in Rule 26.2(f) -- the defense intends to call during its case in chief. The government may not make such a request if it has filed an ex parte statement under subdivision (a)(1)(F).

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COMMITTEE NOTE

No subject has engendered more controversy in the Rules Enabling Act process over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal

enterprises, and other crimes committed by criminal organizations.

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the practical hardships defendants face in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding disclosure of witnesses -- the rules now provide for defense disclosure of certain information. See, e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*,§ 10(4)(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and

statements). Similarly, pretrial disclosure of witnesses is provided for in most State criminal justice systems where the caseload and the number of witnesses is much greater than that in the federal system.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases and that trials in those cases will be fairer and more efficient.

The Advisory Committee regards the amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. In this regard it is noteworthy that the amendment rests on three assumptions which are as follows: First, the government will act in good faith, and there will be cases in which the evidence available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons

in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources.

Subdivision (a)(1)(F). The Committee considered several approaches to discovery of witness names and statements. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names and addresses of witnesses and their statements unless the attorney for the government submits, ex parte and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why some or all of this information cannot safely be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses and information when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or lead to an obstruction of justice.

The provision that the government provide the names, addresses, and statements no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital cases; currently, the government is required in such cases to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would

be greater in capital cases.

The amendment provides that the government's ex parte submission of reasons for not disclosing the requested information will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. While it is true that under the rule the government could refuse to disclose a witness' name, address, and statements even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

Perhaps the most critical aspect of the amendment is the requirement that the government is required to disclose the statements of its witnesses before trial, unless it files a statement indicating why it cannot do so. On its face, the amendment appears to create a potential conflict with the Jencks Act, 18 U.S.C. § 3500 which only requires the government to disclose its

witnesses' statements at trial, *after* they have testified. But in fact the amendment is entirely consistent with the Jencks Act which recognizes the value of discovery. It is also consistent with other amendments to other Federal Rules of Criminal Procedure, approved by Congress, which extend the spirit of the Jencks Act to defense discovery of statements at some pretrial proceedings. *See, e.g.*, 26.2(g) and pretrial discovery of expert witness testimony. In proposing the amendment to Rule 16 the Committee was fully cognizant of the respective roles of the Judicial, Legislative, and Executive branches in amending the rules of procedure and believed it appropriate to offer this important change in conformity with the Rules Enabling Act. 28 U.S.C. §§ 2072 and 2075.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders from the court under subdivision (d) of this rule.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, addresses, and statements, is triggered by full compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, it may not take advantage of the reciprocal discovery provision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.