MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 7, 1991
Tampa, Florida

The Advisory Committee on the Federal Rules of Criminal Procedure met in Tampa, Florida on November 7, 1991. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 7, 1991 at the United States Courthouse in Tampa, Florida. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. Sam A. Crow
Hon. James DeAnda
Hon. Robinson O. Everett
Hon. Daniel J. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. William Wilson, Standing Committee member acting as liaison to the Advisory Committee, Mr. David Adair, Ms. Ann Gardner, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. James Eaglin from the Federal Judicial Center. Judge D. Lowell Jensen, a newly appointed member of the Committee, was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted that all of the members were present with the exception of a new member, Judge D. Lowell Jensen, who had just been appointed to the Committee but was not able to attend due to previously scheduled commitments. Judge Hodges also noted

that Judges Everett and Huyett would be departing the Committee and on behalf of the Committee, thanked them for their diligent efforts and contributions.

II. PUBLIC HEARINGS ON PENDING AMENDMENTS

Judge Hodges gave a brief report on proposed amendments to various rules which had been approved by the Standing Committee at its July meeting: Rule 16(a)(Discovery of Expert), Rule 12.1(Production of Statements), Rule 23.3(Mistrial), Rule 26.2(Production of Statements), Rule 32(f)(Production of Statements), Rule 32.1(Production of Statements), Rule 40(a)(Appearance Before Federal Magistrate Judge), Rule 41(c)(2)(Warrant Upon Oral Testimony), Rule 46(Production of Statements), and Rule 8 of the Rules Governing § 2255 Hearings(Production of Statements at Evidentiary Hearing).

The proposed amendments had been published and distributed for comment by the public. Although a public hearing had been scheduled, which would immediately proceed the Committee's meeting, no persons had given the requisite notice of an intention to speak at the hearing. Therefore, the hearing was not held. Judge Hodges commented further on the fact that at least one person was scheduled to appear at the Committee's January 17, 1992 hearing in Los Angeles. Thus, that hearing would apparently be held.

III. APPROVAL OF MINUTES

The Committee reviewed the minutes of its May 1991 meeting in San Francisco and several corrections were noted. On page 6, the words, "sources of" were added at the end of the 11th line. And the reference to "Judge Keeton" on page 8, line 5, was amended to reflect Judge Keenan's name. Judge DeAnda moved that the minutes be approved as amended. Judge Crow seconded the motion which carried by a unanimous vote.

IV. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Pending Before Congress

The Reporter informed the Committee that the Supreme Court had approved amendments to Rules 16(a)(1)(A) (Disclosure of Evidence by the Government), Rule 35(b)(Reduction of Sentence) and Rule 35(c)(Correction of Sentence Errors). The Court had also approved minor

technical amendments in Rules 32, 32.1, 46, 54(a), and 58. All of these amendments were scheduled to take effect on December 1, 1991 unless Congress took affirmative action to amend or delay them.

B. Rules Approved by the Standing Committee and Circulated for Public Comment

[This matter was discussed in conjunction with the scheduled Public Hearings on the proposed amendments, as noted supra.]

C. Reports by Subcommittees on Rules of Criminal Procedure

1. Rules 3, 4, and 5, Oral Arrest Warrants and Time Limit for Hearing by Magistrate.

At the Committee's May 1991 meeting the Chair had appointed a subcommittee consisting of Judge Schlesinger (Chair), Mr. Marek and Mr. Pauley to draft amendments to Rules 3 and 4 to permit submission of complaints and requests for arrest warrants by facsimile transmission. Judge Schlesinger informed the Committee that in the process of considering such amendments, a suggestion had been made by Mr. Marek that perhaps Rule 5 should be amended to reflect the Supreme Court's recent decision in County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). He pointed out that the case indicated that normally a person who has been arrested without a warrant should have a probable cause determination made by a magistrate within 48 hours. Mr. Marek suggested that Rule 5 should be amended to require an appearance before a magistrate within 24 hours. If that limitation was added, he explained, then providing for expedited handling of arrest warrants by use of facsimile machines would assist law enforcement officers in meeting the time limits. He suggested that it would be better to first address the issue of Rule 5 and noted that Riverside recognized that judicial determination of probable cause can arise in wide variety of settings, from a more formal hearing to a very informal ex parte proceeding. He added that these hearings may take several days to conduct, depending on when the defendant was arrested and the schedule of the judicial officer.

Mr. Pauley urged that the Committee defer any action on Rule 5. He explained that United States Attorneys were working on procedural rules to implement Riverside and that it would be better to await application of those rules and further caselaw refinement of the rule announced in

Riverside. He added that Rule 41, as written, could support telephonic arrest warrants. Mr. Marek disagreed with that assessment and concluded that Rule 41 would be distorted if it applied to the typical arrests.

During an ensuing discussion on possible remedies or sanctions for violation of Rule 5, several members noted that potential civil liabilities would be implicated. Professor Saltzburg observed that the lack of any real sanctions made discussion of Rule 5 important. He agreed with Mr. Pauley that it would be better not to be too quick to amend Rule 5 because it apparently was more protective than the Constitution. He moved that the Subcommittee be continued and that it study the possible amendments of Rules 3, 4, and 5 and report to the Committee at its Spring 1992 meeting. The motion, which was seconded by Mr. Marek, carried by a unanimous vote.

2. Rule 6(e), Secrecy of Grand Jury Proceedings.

At its May 1991 meeting, the Committee had considered a letter from Judge Pratt raising concerns about whether Rule 6(e) should be amended to better protect grand jury secrecy. As a result of the discussion, Judge Hodges had appointed a subcommittee consisting of Judge Keenan (chair), Judge Crow, Mr. Doar, and Mr. Pauley. Judge Keenan reported that the subcommittee had conducted an exhaustive review of pertinent Department of Justice guidelines on grand jury secrecy and a report of the New York Bar Association on the same subject. It was the unanimous view of the subcommittee that no amendment to Rule 6(e) was required. It also believed that the current guidelines and directives were sufficient and that a court could rely upon its contempt powers if it learned that the Rule had been violated. Mr. Pauley added that the Department of Justice finds grand jury leaks to be abhorrent and that an office in the Department handles these matters. He also pointed out that the Department did have some other legitimate interests at stake in divulging certain grand jury information to other offices and noted that at some point the Department might suggest amendments to Rule 6. Judge Crow noted his concurrence in Judge Keenan's observations. Judge Hodges indicated that the report of the subcommittee would be treated as a motion which had been seconded. It was thereafter adopted by unanimous vote. Judge Hodges observed that it would be appropriate for the Administrative Office to inform Judge Pratt of the Committee's action.

3. Congressional Amendments to Rules of Criminal Procedure and Evidence.

A subcommittee consisting of Judge Huyett (Chair), Judge Everett, Mr. Karas, and Professor Saltzburg had been appointed at the Committee's May 1991 meeting to study and report on the status of Congressional attempts to amend both the Rules of Criminal Procedure and Evidence. Judge Huyett noted that Professor Saltzburg had provided the subcommittee with a detailed analysis of the various proposals, a number of which had appeared in more than one piece of pending legislation. Professor Saltzburg provided a brief overview of the proposed amendments and the subcommittee's recommendations. The subcommittee favored making Federal Rule of Evidence 412 applicable to all criminal and civil cases but was generally opposed to the other proposed amendments. Following some additional brief introductory comments, the Committee considered several of the proposed amendments in more detail.

a. Proposed Amendments to Federal Rule of Evidence 412 (The "Rape Shield" Rule):

Professor Saltzburg briefly noted that the proposed Congressional amendments contained three parts. First, reputation and opinion evidence of an alleged victim's past sexual behavior would be inadmissible in all criminal cases. Second, another amendment would apply the rule in civil as well as criminal cases. Another amendment would permit an interlocutory appeal by the government or the alleged victim.

Professor Saltzburg moved that the Committee amend Rule 412 to make it applicable in all criminal and civil cases but that the amendment not contain any provision for an interlocutory appeal. Mr. Pauley seconded the motion.

Professor Saltzburg noted that Rule 412 was a rule which had originated in Congress and that the Advisory Committee had never approved or rejected the language. Judge Keeton indicated that it was appropriate for the Committee to act on this rule but that he was concerned about the proliferation of specific provisions and possible problems of interrelating the character evidence rules. Professor Saltzburg pointed out that there was a strong case for making the rule applicable to all civil and criminal cases. Judge Everett noted that the military had adopted Federal Rule of Evidence 412 and that it would be appropriate to combine into one rule the civil and criminal provisions. He also expressed concern about constitutional challenges to the inability of a defendant to present opinion and reputation evidence of the alleged victim.

Mr. Marek expressed opposition to the concept of extending the rape shield protections any further. He noted that Rule 403 is generally adequate and that so few cases would be affected by the proposed amendment. Professor Saltzburg observed that although there may be few cases, the applicable rules of evidence have taken on great social significance.

In a discussion about what, if any, notice provisions should be included, Judge Schlesinger observed that it would beneficial to include in one rule of evidence all of the various notice provisions affecting the admissibility of evidence. Judge Keeton noted that although there seemed to be merit in such a suggestion, he believed that the various notice provisions are indeed different.

Judge Keenan indicated that he believed it would be important to act decisively in this area lest Congress enact an unworkable rule. Judge Keeton joined in that observation, noting that adoption of Professor Saltzburg's motion would do that and that it is important that any proposed amendments be processed through the Rules Enabling Act. Mr. Adair and Mr. Pauley provided a brief update on the status of the pending amendment in Congress and observed that there might be a chance that the rape shield amendments would not be considered until Spring 1992.

Judge Everett pointed out that in considering amendments to Rule 412, the Committee should give consideration to including a constitutional escape clause for opinion and reputation evidence. Mr. Wilson, however, questioned whether doing that would create an exception which would swallow the general rule of exclusion.

The motion to amend Rule 412 ultimately carried by an 8-1 vote and the Reporter was asked to give some priority to drafting appropriate language for the amendment.

b. Proposed Rules of Evidence 413, 414, and 415 (Women's Equal Opportunity Act).

Professor Saltzburg pointed out that Congress was considering adding several rules of evidence which would in effect create exceptions to Rule 404(b) by expressly permitting introduction of a person's prior sexual activity. Noting that the subcommittee was opposed to the proposed rules, he moved that the Committee oppose those amendments. Judge Keenan seconded the motion.

Mr. Pauley argued that the rules reflected studies

which show that sexual offenders and child molesters have a higher incidence of repeating their behavior and noted that this sort of evidence would probably be admissible under Rule 404(b). Judge Keeton observed that Rule 404(b) does not permit introduction of past incidents to show a defendant's propensity, whereas these proposed amendments would permit such evidence. Judge Keenan expressed concern that this type of evidence would apparently be admissible even if the defendant had been acquitted of those prior acts. Mr. Wilson also expressed concern that it appeared that the Rules would increase the likelihood that an innocent person would be convicted. But Mr. Pauley responded that the proposed rules would increase the likelihood of convicting a guilty person. Mr. Marek pointed out that the Rules would permit, or encourage, more litigation about the underlying prior acts and Judge Hodges questioned whether there was a real need for the proposed rules.

Judge Everett noted that this evidence is usually barred because it is dangerous. He noted the contrast of the proposed amendments to Rule 412, which would block the introduction of prior sexual acts of a victim, and these proposed amendments which would highlight the defendant's prior sexual acts. He also observed that although a limiting instruction may not always be effective does not mean that the rule should be effectively abandoned for certain sexual offenders.

Judge DeAnda observed that the proposed rules would not limit the prosecution to introducing this evidence in rebuttal; the defendant's past sexual acts could be introduced in the prosecution's case-in-chief.

Professor Saltzburg indicated that although this evidence would be relevant, on balance these rules should be rejected. He noted that codification of the rules of evidence makes it more difficult for counsel to argue that the courts should make common-law exceptions to the rules. Here, the proposed amendments were designed to accomplish that purpose. He added that there might be an argument that sexual offenders are different than other offenders and that the Committee should be open to considering information from the Department of Justice which indicates that indeed those offenders should be treated differently in the rules of evidence. But the information before the Committee was insufficient to support endorsement of the proposed amendments.

The Committee voted 8-1 to express opposition to the amendments.

c. Rule 413 (Clothing of Victim).

Professor Saltzburg informed the Committee that Congress was considering the addition of Rule of Evidence 413 which would bar any evidence of a victim's clothing to show that the victim incited or invited the offense. He opined that this amendment would go too far and that other existing rules of evidence, such as Rules 401 and 403 would cover this point. After citing several brief examples to show how this rule might be illogically applied, he moved that the Committee oppose this amendment. Judge Keenan seconded the motion, which carried by a unanimous vote.

d. Good Faith Exception; Foreign Business Records; Rule 501; and Criminal Voir Dire Demonstration Act.

Professor Saltzburg moved that the Committee adopt the remainder of the Subcommittee's report which addressed several additional items. The motion was seconded.

Professor Saltzburg pointed out that Congress was considering an amendment which would admit a foreign record of a regularly conducted activity under the business records exception if a foreign certification attested to the specified requirements. He noted that Rule 36 of the Civil Rules of Procedure made this amendment unnecessary and that the matter should be referred to the Civil Rules Committee.

Regarding a proposed "demonstration" in selected districts of counsel-conducted voir dire of potential jurors, the subcommittee recommended that the Advisory Committee take no position. Mr. Pauley indicated that the Department of Justice is opposed to the plan. Mr. Marek urged the Committee to affirmatively support the plan in light of increased importance of voir dire, especially in light of increased capital litigation in federal court.

Professor Saltzburg also recommended that the Committee defer taking action on a proposed good faith exception pending in Congress which would extend to warrantless searches. Deferral, he added, would be consistent with the position of the Judicial Conference which is that this matter is one for the courts to decide.

He also noted that Congress was considering an amendment to Rule of Evidence 501 which would create an accountant-lawyer-client privilege. Noting that there are no other codified privileges in the Rules of Evidence, he

urged the Committee to oppose this amendment.

The motion to adopt the remainder of the Subcommittee's report passed by a vote of 9-0, with one abstention by Mr. Pauley.

4. Rule 32, Allocution Rights of Victims.

Judge DeAnda noted that at the Committee's May 1991 meeting, Judge Hodges had asked him to chair a subcommittee consisting of Judge Everett, Professor Saltzburg, and Mr. Marek to review pending legislation which would amend Rule 32 by providing a victim's right of allocution in sentencing of violent crimes or sexual abuse. He informed the Committee that after considering the matter, the subcommittee had come to the conclusion that the amendment was not necessary. He explained that the subcommittee believed that the issue would rarely arise, the trial judge could give little effective weight to the victim's testimony under the sentencing guidelines, and there did not appear to be any good, non-political, reasons for supporting the amendment. Judge Hodges indicated that the report, expressing opposition to the amendments, would be treated as a motion which had been seconded.

Mr. Pauley pointed out that the proposal, which had been included in the President's Violent Crime Bill, was limited to a narrow class of offenses, that the amendment would not overburden the trial courts, and that there were significant symbolic and practical reasons for the amendment. He pointed out that the sentence within the applicable range could be affected by a victim's testimony. Additionally, it would be unfair to permit victim testimony in capital sentencing, as approved by the Supreme Court, and not permit other victims the same right.

Judge Hodges questioned whether there was not already a provision in the applicable legislation which requires that a victim be apprised of the status of a case. Mr. Pauley noted that the fact that the probation officer might interview the victim is not the same as permitting the victim to testify before the court. Discussion then turned to the issue of appropriate notice to the victim. Mr. Pauley expressed the view that notice could be easily given although Judge Hodges observed that there might be a problem with a victim simply showing up in court without anyone being aware of the victim's presence. Turning to the language of the proposed amendment, Judge Hodges queried whether it would be appropriate to permit release of in camera material to the victim. Mr. Wilson indicated that he agreed with the proposition that because of public

perceptions, victims should be heard.

Mr. Marek observed that there might be problems with notice and timing of a victim's testimony and that some consideration should be given to the potential relationship between the proposed amendment and the Supreme Court's decision in Burns v. United States, ____ U.S. ____ (June 13, 1991) which requires the judge to give reasonable notice before the sentencing hearing of an intent to depart from the sentencing guidelines.

Judge DeAnda observed that after listening to the views of the other members, he believed that the proposed amendment would present a symbolic effort which would not have much adverse impact on the sentencing proceedings. Judge Huyett agreed, noting that it is important that victims not feel as though they have been excluded from the judicial process. Although there would be potential mechanical problems with the amendment, the option of whether or not to testify should belong to the victim. Judge Hodges indicated that he generally agreed with that view and Professor Saltzburg noted that the amendment would not give the victim the right to testify, but only to be apprised of the ability to do so. Mr. Pauley indicated that the Department of Justice was not seeking the support of the Committee on the amendment to Rule 32 but urged it to support the concept underlying the amendment.

Judge DeAnda ultimately made a substitute motion that the Committee support the concept reflected in the Congressional amendment to Rule 32 and that the matter be resubmitted to the subcommittee to work on a draft amendment which would address the issues raised in the Committee's discussion.

In additional discussion of the motion, Judge Schlesinger suggested that any amendments to Rule 32 be short and to the point. On this point, Judge Keeton suggested that words such as "reasonable notice having been given..." could be used. Judge Hodges encouraged the subcommittee to give thought to the practical procedural problems associated with the issue.

The Committee thereafter unanimously approved the amended motion to resubmit the matter to the subcommittee for preparation and submission of a proposed amendment to Rule 32 for consideration at the Spring 1992 meeting.

Mr. Marek raised again the issue of potential notice problems presented by Burns v. United States, ____ U.S. ____ (June 13, 1991). He noted that that case makes it harder for a judge to sua sponte depart from the guidelines and

that a potential solution might be to amend Rule 32 to require the prosecution to give notice of an intent to request an upward departure from the guidelines. Judge Hodges indicated that the Committee had previously considered the problem of timing when it considered amendments to Rule 32 several years earlier. Mr. Pauley indicated that the Department of Justice would prefer a longer notice period and a requirement that notice be filed with both parties. He added that it would be better to await further caselaw developments. Judge Keeton indicated that any notice requirements should be simply stated so as not to create a trap for the unwary.

D. Other Rules Under Consideration by the Advisory Committee

1. Rule 11, Guilty Pleas before Magistrate Judges.

Judge Hodges explained that he had originally raised the issue of whether United States Magistrate Judges should be permitted to accept guilty pleas. He noted that the Supreme Court's decision in Peretz v. United States, 111 S.Ct. 2661 (1991) permitted magistrate judges to conduct voir dire in a felony case, if delegated to do so and if the parties consented. He observed, however, that in light of Peretz a magistrate judge could probably hear a guilty plea as long as the district court actually adjudicated guilt. Thus, there was probably no need to amend Rule 11 at this point.

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

The Reporter indicated that the Criminal Justice Section of the American Bar Association was seeking approval through the ABA House of Delegates for certain amendments to the Rules of Criminal Procedure. He noted that while the suggested amendments did not yet reflect official ABA policy, the Committee could, if it wished, treat the proposals as any other proposals which might be submitted by the public. The first proposed change was in Rule 16, which would provide for production of statements by organizational defendants.

Judge Hodges offered some additional general comments which noted some of the problems of interpreting Rule 16, as written, to apply to organizational defendants. Judge Schlesinger thereafter moved that an amendment to Rule 16 be drafted by the Reporter for the Committee's consideration at its Spring 1992 meeting. Mr. Doar seconded the motion.

Additional discussion focused on the fact that the amendment should generally place organizational defendants in the same position as individual defendants. Mr. Pauley indicated that the Solicitor General was apparently of the view that the current Rule 16 adequately covers organization defendants. He added that some consideration should be given to reconciling any amending language in Rule 16 with Title 18 which includes a definition of "organization." Professor Saltzburg expressed the view that the amendment should cover disclosure of "vicarious admissions," such as statements by co-conspirators. Judge Keeton agreed that Rule 16 was in need of some clarification with regard to organizational defendants and that they should be placed in the same position as other defendants.

The motion carried by a 6-3 vote.

3. Rule 16(a)(1)(D), Disclosure of Expert.

The Reporter indicated that the subject of the ABA proposed amendment to Rule 16, regarding disclosure of expert witnesses, had already been the subject of a proposed amendment which was currently out for public comment. No motion was made concerning this proposal.

4. Rule 16(a)(1)(E), Codification of Brady.

The Committee was informed by the Reporter that the ABA had also proposed a codification of Brady and that the Committee had previously considered and rejected a similar proposal a year earlier. Mr. Marek indicated that the ABA's final position on this proposal would be significant and although he was not moving adoption of the proposal at this time, he believed that the matter was important. Professor Saltzburg noted that some United States Attorneys have taken the position that Brady does not extend to sentencing; Mr. Pauley responded that he has assumed that it does extend to sentencing. No motion was made on this proposal.

5. Rule 17(c), Issuance of Subpoena.

The ABA proposals also included a provision for amending Rule 17 to permit expedited delivery of materials in discovery. After briefly reviewing the proposal, no motion was forthcoming.

6. Rule 29(b), Ruling on Motion for Acquittal.

Judge Schlesinger moved that the Committee adopt the Department of Justice's proposed amendment to Rule 29(b). The amendment would permit the court to delay ruling on the motion for judgment of acquittal until after the verdict. Mr. Pauley seconded the motion.

Mr. Pauley explained that the Department had originally submitted this amendment in 1983 and that it had been published for public comment. And although the Advisory Committee ultimately abandoned any amendment, several recent cases emphasized the need for permitting the trial court to defer ruling on motions for judgment of acquittal. He noted that although the rule does not currently permit deferral, several trial judges have done so. He also observed that in some cases, the motions require some deliberation and research. Rather than delaying the trial, the judge should be permitted to continue with the case while considering what action to take on the motion.

Judge Hodges queried whether there might be a self-incrimination problem with the defendant's need to know the judge's ruling before deciding whether to take the stand. Mr. Marek expressed concern that the proposed amendment had been abandoned in 1983 after fairly strenuous objections from the bar and that nothing had really changed in the interim to support the amendment. He pointed out that even assuming the amendment had merit, the trial judge should explicitly be limited to considering only the evidence as it existed at the close of the government's case. Professor Saltzburg voiced agreement with that position but suggested that judge should be limited to considering the evidence submitted at the time of the motion.

Thereafter, Judge Schlesinger amended his motion to read that the Committee should adopt the concepts reflected in the Department of Justice's proposal but that the amendment should be redrafted to reflect the Committee's views about the state of the evidence at the time of the motion. Mr. Pauley concurred in the amendment to the motion, which carried by a 4-3 vote with 2 members abstaining.

7. Proposals Concerning Handling of Megatrials.

Judge Hodges informed the Committee that the American Bar Association House of Delegates had passed a resolution in August 1991 which recommends that the Committee "encourage the United States District Courts to fashion remedies in appropriate individual cases..." regarding

handling of "megatrials." Noting that such trials do pose special problems, he observed that implementation of the ABA's position was beyond the jurisdiction of the Committee. Judge Keeton addressed the jurisdiction problem and indicated that the matter could be referred to the Standing Committee rather than attempting at this point to amend any particular rules of procedure. Judge Hodges indicated that his report to the Standing Committee would include a reference to this issue.

8. Rules Requiring Technical Amendments.

The Reporter indicated that a number of technical amendments had been noted by the law revision council of the House Judiciary Committee. Judge Keeton noted that although a number of the amendments are typographical errors, the Judicial Conference is concerned that too many errors will be considered "technical" and that the Rules Enabling Act will be diluted. He therefore recommended that the amendments be handled as any other amendments. Mr. Pauley moved approval of the technical amendments and Judge Crow seconded the motion which carried by a unanimous vote:

> Rule 32.1(a)(1): The word "probably" should be "probable." And the word "the" preceding the words, "authority pursuant to 28 U.S.C. § 636..." should be deleted.
>
> Rule 35: The word "government" should not be capitalized. The word "subsection" should be "subdivision."
>
> Rule 40(f): The word "therefore" should be changed to "therefor."
>
> Rule 54: The reference to "Canal Zone Code" should be deleted. And the word "Court" should be inserted before the words "of Guam."

V. EVIDENCE RULES UNDER CONSIDERATION

The Reporter indicated that Congress had taken no action on the Committee's proposed amendment to Rule 404(b) and that barring any last minute action, that amendment would go into effect on December 1, 1991. He also informed the Committee that the Civil Rules Committee would be handling the public comments on its proposed amendments to Rules of Evidence 702 and 705.

Noting the need for some systematic review of the Rules

of Evidence, the Reporter recommended that a subcommittee be formed to consider the possibility of amending the Rules of Evidence. He indicated that the subcommittee could determine what, if any, amendments were appropriate and present drafts to the Committee at its Spring 1992 meeting. Judge Keeton informed the Committee that although there had been some discussion about forming a separate Evidence Advisory Committee, no action had yet been taken in that direction and that there was merit to the Committee taking affirmative steps to reviewing the rules of evidence. Judge Hodges thereafter appointed the following members to serve on the evidence subcommittee: Professor Saltzburg (Chair), Judge Crow, Judge DeAnda, Judge Keenan, Mr. Doar, and Mr. Pauley.

VI. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee noted that this would be Mrs. Ann Gardner's last meeting in view of the fact that she is retiring from the Administrative Office. Her long and faithful years of service to the Committee were fondly recognized with a standing ovation and many expressions of thanks by the members.

Judge Hodges announced that the next meeting of the Committee will be held in Washington, D.C. on April 23 and 24, 1992.

The meeting adjourned at 4:30 p.m. on November 7th.