MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 15-16, 2003
Gleneden Beach, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Gleneden Beach, Oregon on October 15 and 16, 2003. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Wednesday, October 15, 2003. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Mr. Jonathan Wroblewski, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laural Hooper of the Federal Judicial Center; Judge John Roll and Magistrate Judge Tommy Miller, former members of Committee; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J. Prof. Nancy J. King participated by telephone.

Judge Carnes recognized Judges John M. Roll and Tommy E. Miller and thanked them for their six years of dedicated service on the Committee. He also noted that Judge Tashima's term on the Standing Committee had ended in September 2003, and welcomed

Judge Kravitz, of the Standing Committee, as the new liaison member to the Criminal Rules Committee.

Judge Carnes also welcomed the two new members of the Committee: Judges James Jones and Anthony Battaglia.

II. APPROVAL OF MINUTES

Mr. Goldberg moved that the minutes of the Committee's meeting in Santa Barbara, California, in April 2003 be approved. The motion was seconded by Judge Bucklew and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES

Judge Carnes, Professor Schlueter, and John Rabiej informed the Committee that the package of amendments submitted to the Standing Committee in June 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35) had been approved by the Judicial Conference and would be transmitted to the Supreme Court in the next month or so. They pointed out that at the request of the Department of Justice, the Standing Committee had decided not to forward at this time the Committee's proposed amendments to Rule 41 (tracking device warrants, etc.), so that the Department could again review the need, scope, and purpose of the proposed amendments.

Mr. Rabiej stated that the amendments proposed for public comment (Rules 12.2, 29, 32, 32.1 33, 34, 45, and 59) had been published and that a hearing on those amendments had been set for January 23, 2004, in Atlanta, Georgia.

IV. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Rule 29. Proposed Amendment Regarding Appeal of Judgments of Acquittal.

Judge Carnes noted that at the Committee's meeting in April 2003, the Department of Justice had asked the Committee to consider an amendment to Rule 29 that would require a judge to defer ruling on a motion for a judgment for acquittal until after the jury had returned a verdict. Following discussion at that meeting, the Committee had asked the Federal Judicial Center to conduct some additional research on the issue.

Mr. Wroblewski responded by stating that the Department had continued to address some of the questions raised at the Spring 2003 meeting. He continued by stating that the Department had been concerned about problems stemming from the inability to

appeal what it believed to be erroneous rulings on Rule 29 motions for a judgment of acquittal, and that about five years ago, it began to study the issue in more detail. He introduced Mr. George Leon, from the United States Attorney's office in New Jersey, who had conducted more extensive research on the point.

Mr. Leon provided an extensive background on Rule 29 and emphasized that it is the only rule that provides for a dispositive ruling that is not appealable, although the Supreme Court has indicated that a ruling may be appealable as long as it is consistent with the Double Jeopardy Clause. In contrast, he said, in the Civil Rules, all rulings are appealable. He recognized that in 1994 the Committee had amended Rule 29 to permit judges to defer ruling on the motion, but in those cases where the judge decided the motion before verdict, the Department was aware of cases where the judge had clearly abused his or her discretion in granting the motion. He cited several examples. He also noted that several appellate courts have encouraged trial judges to defer their rulings. Despite that, according to his statistics, approximately 71% of Rule 29 rulings are still made prior to the verdict. He recognized that the Department's data is largely anecdotal, but in post-verdict grants of the motion, there is reversal in approximately 50% of the cases. He continued by noting that it would thus be reasonable to conclude that a similar percentage of pre-verdict rulings would also be defective.

Mr. Leon highlighted what he thought were the advantages of the amendment. First, it would protect the government's right to appeal a district court's ruling on the motion. He cited the legislative history of the rule which showed an intent to remove all non-constitutional barriers to an appeal. The amendment would also promote accurate results, the very purpose of the criminal justice system. Second, he pointed out, the amendment would permit the appellate process to work. Third, it would avoid the necessity of a second trial, thus the government's and defendant's interests would be protected. Fourth, it would permit the jury to fulfill its function. Fifth, it would prevent the waste of time and resources. In short, he said, the benefits of the amendment would outweigh any disadvantages.

Ms. Laural Hooper, of the Federal Judicial Center, commented along the lines of the written report that she had provided to the Committee prior to the meeting, which included in part, a study of the rules and practices in the State courts.

Mr. Campbell observed that the central theme of the Department's proposal was the view that if a few judges are abusing their discretion, then all are abusing their discretion. He also emphasized that this was an important subject; even if the accused was not technically subjected to "double jeopardy," the defendant would be exposed to extended jeopardy. A defendant should not have to respond until the government has put on its case. The inability of the government to appeal some Rule 29 motions is not an anomaly, as suggested by the Department. He pointed out that all but three states use the procedure currently used in the Federal system and that there are other rulings that are practically dispositive, for example, rulings on arguments. In his view, the amendment would not fix the problems identified by the Department. If some judges have committed

acts amounting to misconduct, there are other avenues for dealing with those issues. He also pointed out that the biggest problems would arise in those cases involving multiple counts and multiple defendant cases and that it is important for the judge to be able to weed out weak allegations earlier, rather than later, in the case. Mr. Campbell pointed out that the premise supporting the amendment is that the system can trust the prosecutors, but not the judges.

Judge Bucklew questioned whether there were any statistics on those cases where some, but not all of the counts were dismissed. Mr. Rabiej responded that that data could probably be retrieved. Judge Bucklew observed that from a judge's standpoint, it is easier to grant the motion in a high-profile case at the end of the government's case, and before the jury retires to deliberate.

Mr. Fiske supported the proposed amendment and said that the statistical data supports the need for a change in the rule.

Judge Battaglia agreed with Mr. Campbell that the Rule was not an anomaly. Instead, the instances cited by the Department to support the amendment seemed to be an anomaly.

Judge Friedman stated that he agreed with Judge Bucklew that it is very difficult to grant a motion for a judgment of acquittal after the jury as returned a guilty verdict and that he does not have confidence in the statistics presented by the Department, considering the recent history of the Department presenting misleading statistics to Congress in support of the Feeney Amendment. Nonetheless, he could support some portions of the amendment, if certain revisions were adopted. For example, there must be an opportunity for a Rule 29 acquittal when the jury cannot reach a verdict. He also observed that recently he has perceived a lack of appropriate discretion and judgment in the prosecution of cases, and said that he has a conceptual problem with an amendment that would potentially limit the trial judge's role.

Judge Roll was skeptical about the amendment, but was impressed with the Department's statistics. He had continuing concerns about the problem of the case involving multiple counts, where it seems very clear that one or more of them should not be presented to the jury.

Professor King, participating by telephone, believed that the Rule did not need "fixing." In her view, the Department had not presented sufficient evidence to show that there was a problem that needed to be remedied. She also questioned a number of the statistical findings in the Department's memo. For example, the 50% reversal rate reflected only the number of cases handled by the appellate divisions. Second, she questioned whether the error rate would be the same for post-verdict rulings. She thought that the error rate might be higher in those cases going to verdict, because those would probably reflect cases involving "close calls." She expressed agreement with the

comments by Judges Bucklew, Friedman, and Roll and stated that in her view she did not believe that accuracy in results would be increased with the amendment.

Judge Kravitz expressed concern about the multi-count cases, especially where the judge believes that going to the jury with all of the counts may simply confuse the jury.

Judge Carnes recognized that there may be judges who clearly abuse their discretion in granting the motion, but it is not clear how many judges are actually involved. Mr. Leon noted that their records tended to show some repetition, perhaps 30 judges. In response, Judge Carnes wondered whether an amendment was required where it would only affect a small percentage of judges. He also expressed concern about the "big case" and the perception of the public and observed that there is a cost for government appeals of Rule 29 appeals — continued jeopardy for the defendant.

Judge Trager stated that on a philosophical level, the concept of double jeopardy is very different in some European countries where the criminal justice system is integrated. He said that the real problem seems to be that some judges are hostile to the prosecution and that the amendment would not solve the problem where the judge makes a "creative" evidentiary ruling that in effect ends the prosecution. Nonetheless, he strongly supported the amendment.

Judge Jones said that the amendment presented a close question but that he could be persuaded of the need for the amendment. He shared Judge Friedman's concern about the ability of the judge to grant a Rule 29 motion in those cases where the jury cannot reach a verdict. But, he also recognized the problems associated with multi-count cases.

Mr. Goldberg observed that the rules will never deter egregious behavior by judges and noted that the statistics show that less than one tenth of one percent of the cases are involved in this debate. He stated that he opposed the amendment, noting that the current practice works well in both the federal and state systems.

Judge Strubhar was concerned that the amendment would focus on only a few judges but that she was not opposed to publishing an amendment for public comment.

The Reporter noted that in 1994 the Committee had addressed the concerns raised by the Department and that at that time, the amendment, which gave the judge the discretion to defer the ruling, was viewed as a reasonable and balanced approach to the problem. He also pointed out that a good argument could be made that a rule should not be amended to affect only a few isolated cases.

Mr. Wroblewski responded to the observations of the Committee and pointed out that first, he believes that the current rule is still inconsistent with the spirit of the statutory view that the government should have a right to appeal. Second, it was not accurate to say that the amendment would remove the judge's discretion. The intent

behind the amendment, he said, is to have the jury hear the case. He recognized the problems of hung juries and multi-count cases, but was confident that those issues could be addressed in any amendment.

Mr. Leone noted that the proposed amendment was not an idea generated by the current administration and that the issue had been discussed within the Department for a number of years. He also stated that he believed the issues of hung juries and multi-count cases could be addressed although drafting suitable language to address multi-count cases might not be feasible. Mr. Leone added that there is no real constitutional impediment to the amendment and that the possibility of an appeal would keep trial judges from acting improperly. He also observed that it could be equally difficult for a judge to grant a pre-verdict motion in a high profile case and that the amendment is not just about a few number of judges, it is about obtaining accuracy in the outcome of a case.

Mr. Fiske urged the Committee not to let the experience of the Feeney Amendment to affect its decision to consider the amendment to Rule 29. In his view, the amendment would not dilute the judge's authority and the amendment would also address the problem of the well-intentioned judge who errs in ruling on the motion.

Judge Friedman again commented on the problem of the hung jury and that the problems associated with the jury's inability to reach a verdict did not fit into the model proposed by the Department.

Mr. Wroblewski moved that the Committee approve in concept the proposed amendment. Judge Trager seconded the motion, which carried by a vote of 7 to 4. Judge Carnes asked Mr. Wroblewski to work on the amendment and attempt to address the concerns raised in the discussion, in particular the multi-count case and cases involving hung juries.

B. Rule 32.1. Revoking Or Modifying Probation Or Supervised Release; Proposed Amendment To Remove Requirement For Production Of Certified Copies Of Judgment.

The Reporter noted that at its April 2003 meeting, the Committee had discussed a proposal from Magistrate Judge Sanderson, who had recommended that Rule 32.1 be amended to remove the requirement that the government provide certified copies of the judgment. At that meeting, he continued, Judge Miller had agreed to poll other magistrate judges to determine if there were other similar problems that needed to be addressed. Judge Miller reported that he had done so and that he had discovered other similar issues that probably deserved attention. For example, he noted, facsimile copies of documents were being used, not only for search warrants under Rule 41, but also for *Gerstein v. Pugh* probable cause decisions under Rules 3 and 4, and bail-jumping proceedings under Rule 40. Judge Battaglia informed the Committee that on a typical weekend, a magistrate judge in his district (San Diego, California) might consider 30 to 35 *Gerstein* facsimile proffers from law enforcement personnel.

Following additional discussion, Judge Carnes asked Judge Battaglia, Mr. Campbell, and Mr. Wroblewski to study the issue further, poll magistrate judges, if necessary, and prepare some draft language for the Committee to consider at its Spring 2004 meeting.

C. Rule 41. Amendment Regarding Tracking Device Warrants and Delayed Notification

1. Tracking-Device Warrants.

Judge Carnes provided some additional background information on the status of the proposed amendments to Rule 41 (noted above). At the Spring 2003 meeting the Committee had considered the public comments submitted on the proposed amendments to Rule 41 that would have addressed procedures to be used in issuing tracking-device warrants. The Committee had made several minor changes to the proposed language and had voted to send the amendment to the Standing Committee, with a recommendation to approve it and forward it to the Judicial Conference. At the Standing Committee meeting the Committee initially voted to approve the amendment. But after the meeting, the Deputy Attorney General, who had abstained on the vote, requested that the Standing Committee defer forwarding the amendment until the Department had had a chance to review the matter and present its concerns to the Committee. That request was granted. Judge Carnes continued by noting that from a jurisdictional viewpoint, the proposed amendment was still before the Standing Committee for its consideration and that the Criminal Rules Committee had not been asked to formally reconsider its proposal. Judge Kravitz agreed with that assessment.

Judge Miller expressed concern that the Department of Justice, which had originally proposed the amendments, had later requested the Standing Committee not to forward the amendment to the Judicial Conference. Mr. Wroblewski responded that subsequent to the Committee's approval of the amendments at the Spring 2003 meeting, the Deputy Attorney General had raised some significant concerns that the amendment might require a finding of probable cause before issuing a tracking-device warrant. Mr. Wroblewski indicated that various entities in the Department were being polled for additional information on the need for an amendment to Rule 41 and expressed hope that the matter would be soon resolved. Professor King pointed out that in response to the Department's earlier concerns about the probable cause requirement, the Committee had redrafted a portion of the Committee Note to make it clear that the amendment did not address the issue of whether probable cause was required, thus leaving that particular issue for the case law.

Mr. Rabiej added that apart from the proposed amendments to Rule 41, Congress was considering a possible change to the notice provision in 18 U.S.C. § 3103a(b). He said that he would continue to monitor those possible changes.

2. Proposed Amendment to Address Warrants for Electronic Files

The Reporter presented a proposal from Magistrate Judge B. Janice Ellington to amend Rule 41 to address explicitly the validity of issuing search warrants for out-of-state electronic files. In her proposal she noted that there seems to be a conflict between 18 U.S.C. § 2703(a), which requires a search warrant for certain electronic files, and Rule 41(b), which permits out-of-district search warrants only in terrorism cases. The Reporter pointed out that at its April 2002 meeting, the Committee had discussed the question of whether Rule 41 should be amended to incorporate some of the provisions in the USA Patriot Act, and in particular the question of whether the rule should contain guidance on search warrants for electronic files. Finally, he pointed out that upon recommendation of the Rule 41 subcommittee chaired by Judge Miller, the Committee decided not to include that provision. Judge Miller added that nothing since that meeting indicated a need to amend Rule 41 and that the language of § 2703 permitted such search warrants, although Rule 41 was silent. He also noted that that provision had a sunset provision.

Following additional discussion, Mr. Fiske moved that Rule 41 not be amended as requested. Judge Trager seconded the motion, which carried by a unanimous vote.

3. Rule 24(b). Discussion Regarding Number of Peremptory Challenges in Capital Case.

The Reporter informed the Committee that Judge Ellis, a member of the Appellate Rules Committee, had sent an inquiry to Mr. Rabiej concerning the language in restyled Rule 24(b). He had concluded that the amended Rule contained a substantive change that had not been identified as such in the accompanying Committee Note; he pointed out that the former rule provided that each side had 20 peremptory challenges "if the offense charged is punishable by death…" While the caption of the restyled rule refers to "Capital case," the text provides 20 peremptory challenges to the government when the death penalty actually is being sought.

During the discussion which followed, the members were of the view that the new language probably accurately reflected the case law and the amended rule did not reflect a substantive change in practice.

Judge Friedman moved that no action be taken on the matter. Mr. Fiske seconded the motion, which carried by a unanimous vote.

V. OTHER PROPOSED AMENDMENTS TO THE RULES — PENDING AND DEFERRED AS LISTED ON CRIMINAL RULES DOCKET

The Reporter stated that according to the Criminal Rules Docket, maintained by the Rules Committee Support Office, a significant number of proposed amendments to the Criminal Rules were listed either as pending or deferred, or as having been referred to the Chair and Reporter for possible action. He recommended that the Committee discuss the list with a view to disposing of those proposals.

A. Rule 4. Proposed Amendment From Magistrate Judge B. Zimmerman re Clarification of Ability of Judges to Issue Warrants via Facsimile Transmission

The Reporter stated that during the comment period on the restyled Criminal Rules, Judge Zimmerman had recommended that Rule 4 be amended to permit judges to issue warrants by facsimile. There was no record that that particular proposal had been voted on by the Committee. He pointed out that the issue had been raised in 1991, when a Subcommittee had considered, and rejected a similar proposal. Several members of the Committee believed that the issue was worthy of further consideration, given the recent interest in using electronic filings and communications throughout the judicial and law enforcement systems. Following additional discussion, Judge Carnes asked a subcommittee, consisting of Judge Battaglia (chair), Mr. Campbell, and Mr. Wroblewski to study the proposal in the context of other proposals concerning use of facsimile transmissions in connection with not only Rule 4, but with other rules as well.

B. Rule 6. Proposed Amendment from ABA to Permit Counsel to Accompany Witness to Grand Jury

The Reporter indicated that a proposed amendment to Rule 6 from the American Bar Association had been referred to the Chair and Reporter during the comment period on the restyling project. The amendment would permit counsel to accompany a witness to the grand jury proceeding. He noted that the issue had been discussed by the Committee on prior occasions but that this particular proposal was listed as pending.

Mr. Goldberg moved that the proposal be given further consideration. Mr. Campbell seconded the motion, which failed by a vote of 2 to 9. The Reporter indicated that the docket sheet would be changed to reflect that the proposal is "completed."

C. Rule 7(b). Proposed Amendment re Effect of Tardy Indictment, Proposed by Congressional Constituent

The Reporter informed the Committee that he and Judge Carnes had received a communication from a constituent for Congressman Jim Gibbons, in which the constituent raised concerns about the interplay between the statute of limitations and Rule 7. The communication did not contain any proposed changes to that Rule. Following a

brief discussion, Judge Carnes stated that it was clear that there was a consensus not to continue any consideration of the issue.

D. Rule 10. Proposal by Magistrate Judge W. Crigler re Guilty Plea at Arraignment

At its Fall 1994 meeting, the Reporter said, the Committee had briefly considered a proposal from Magistrate Judge Crigler (then a member of the Committee) regarding the ability of a magistrate judge to take guilty pleas at arraignments. Although there was apparently an agreement to place the item on a future agenda, it was not directly addressed as an agenda item at any later meeting. Several members pointed out, however, that the issue had been discussed, at least indirectly, in the context of other proposed amendments, including the pending addition of proposed new rule 59. Following brief discussion, Judge Bucklew moved that the proposal be removed from the docket. Judge Battaglia seconded the motion, which carried by a unanimous vote.

E. Rule 11. Proposal by Mr. Richard Douglas, Senate Foreign Relations Committee re Advising Defendant of Collateral Consequences (Immigration) of Guilty Plea

The Reporter indicated that in 2001, Mr. Richard Douglas, a staff member of the Senate Foreign Relations Committee, recommended that the Committee consider an amendment to Rule 11 that would require the judge to inform the defendant that a guilty plea might affect the defendant's immigration status. The Reporter stated that although his specific proposal had not been considered, the issue had been raised on prior occasions, and rejected, as recently as the April 2003 meeting. Judge Friedman spoke on behalf of the proposal and suggested that the Committee reconsider its opposition to the amendment. Following brief discussion, Judge Carnes concluded that a clear consensus had formed to reject the proposal and to change the docket sheet to reflect the fact that the issue had been "completed."

F. Rule 11. Proposal by Judge David Dowd re Determining Whether Plea Agreement was Communicated to Defendant

In 2002, the Reporter stated, Judge Dowd, a former member of the Committee, had written to Mr. Rabiej suggesting that Rule 11 be amended to require that the judge inquire as to whether the prosecution has made a plea offer and whether that offer was ever communicated to the defendant. The matter had been referred to the Chair and the Reporter but had not been discussed at any prior meetings. Mr. Campbell stated that he did not believe that this issue needed to be addressed in a rule; other members noted that similar problems might exist and that it would be difficult to cover all possible contingencies in the rule. Following additional discussion, Judge Carnes stated that there was a consensus to list the proposal as having been "completed," on the docket sheet.

G. Rule 16. Proposal from Judge W. Wilson re Disclosure of Government Witnesses to Defense

Judge Wilson, a former member of the Standing Committee, had written to Judge Davis, the former chair of the Committee, in 1999 asking the Committee to once again address the issue of government disclosure of the names of its witnesses to the defense. The Reporter provided a brief overview of a similar amendment which had been proposed by the Criminal Rules Committee, published for comment, and approved by the Standing Committee. Judge Wilson had been one of the chief supporters of that proposal. The amendment did not receive the support of the Judicial Conference and the issue had not been revisited since then. Judge Friedman noted that there was some merit to the idea and recommended that the Committee consider the issue again. That proposal failed by a vote of 3 to 8.

H. Rule 23. Proposal from Mr. Jeremy Bell re Issue of Whether Jury Trial is Authorized

The Reporter explained that in 2000, during the comment period of the restyling project, one of Judge Miller's students at William and Mary School of Law had proposed an amendment to Rule 23 that would specifically indicate when a defendant was entitled to a jury trial. He added that the item was being carried on the docket as pending further action. Following a brief discussion, Judge Friedman moved that the proposal be rejected. The motion was seconded by Mr. Goldberg and carried by a unanimous vote.

I. Rule 32(c)(5). Proposal from Mr. Gino Agnello, Clerk of 7th Circuit re Whether Clerk is Required to File Notice of Appeal

The Reporter stated that in 2000, Judge Davis (former Chair of the Committee) received a letter from the Clerk of the Seventh Circuit Court of Appeals requesting that the Committee consider a possible amendment to Rule 32 should address the possibility that the clerk of the court would fail to file a notice of appeal, when requested to do so by the defendant. The court, in *United States v. Hirsch*, had addressed the problem in a case where the defense counsel and defendant were under the mistaken impression that the clerk had complied with the defendant's request that a notice of appeal be filed. By the time the error was discovered, all of the permissible time limits for perfecting an appeal had expired; the only real remedy at that point, according to the court, was for the defendant to file a § 2255 motion. Mr. Wroblewski said that he had contacted various United States Attorneys and had concluded that this issue was not a problem requiring an amendment to the rules. Other members noted that the same issue could arise in any rule provision that required a party or court to take a particular action, and no action is taken. Judge Carnes noted that a clear consensus had formed to not address the issue in an amendment and asked that the Administrative Office relay that information to the Appellate Rules Committee.

J. Rule 32.1. Decision in October 1997 to Monitor Legislation re Victims' Rights.

The Reporter explained that in 1997, Congress had considered legislation concerning victim allocution and that in response to that development, Judge Davis had appointed a subcommittee to consider whether Rules 11, 32, and 32.1 should be amended to provide for victim allocution and to monitor pending legislation. At some point, not reflected in the Committee's records, the subcommittee was discontinued. Although the Committee has subsequently considered amendments to Rule 32 concerning victim allocution (including a pending amendment) no additional action had been taken with regard to Rules 11 and 32.1. The Criminal Rules docket indicates that the matter is still pending and the Reporter recommended that the issue be treated as "completed." Mr. Wroblewski stated that the Department was not opposed to that action but that there are other pending victim allocution issues that may require the Committee's attention in the future. Judge Trager moved that the item be listed as completed. Mr. Goldberg seconded the motion, which carried by a unanimous vote.

K. Rule 35. Proposal from ABA to Permit Defendant to Move for Reduction of Sentence

In 2001, as part of the public comment period on the restyled Rules of Criminal Procedure, the American Bar Association had recommended that Rule 35 be amended to permit the defendant to move for sentence reduction. The matter had not been specifically addressed since that time, although the proposal appears on the docket as pending. The Reporter indicated that the issue has been raised from time to time, without any formal vote. Following additional discussion, Judge Carnes provided the Committee with an opportunity to move to propose the amendment. When no motion was forthcoming, he stated that the proposal had been considered rejected, for lack of a motion and that the docket should be amended to reflect that the proposal had been "completed."

L. Rule 40. Proposal from Magistrate Judge Collings to Authorize Magistrate Judge to Set New Conditions on Release

The Reporter stated that in January 2003 Magistrate Judge Collings had written to the Committee recommending that Rule 40 be amended to address the authority of a magistrate judge to issue conditions of release if a defendant is arrested for some offense other than failing to appear. In his view, the proposed change would grant magistrate judges the same powers they now have in cases involving arrests for failure to comply with other conditions of release set in another district. Several members expressed the view that the proposal had merit. Judge Carnes asked the subcommittee, consisting of Judge Battaglia, Mr. Campbell, and Mr. Wroblewski, to study the problem and report to the Committee at its April 2004 meeting.

M. Rule 41. Proposal from Judge David Dowd re Recording of Oral Search Warrant

The Reporter stated that in 1998 Judge Dowd, a former member of the Committee, had recommended an amendment to Rule 41 that would require the court to prepare a written transcript of sworn testimony presented to the magistrate judge in requesting a search warrant. The matter had been discussed at the April 1998 meeting during which the Committee decided "not to take any action to amend Rule 41 at this time." Consequently, the proposal continued to be carried as "deferred indefinitely." He recommended that the Committee direct that the proposal be shown as being "completed" on the docket with no expectation that the Committee will need to address it any further. Following brief discussion, the Committee concurred in that proposal.

N. Rule 57. Proposal from Standing Committee (12/97) re Uniform Effective Date for Local Rules.

Finally, the Reporter stated that in June 1997, members of the Standing Committee had recommended that the Advisory Committees consider adoption of a uniform effective date for any amendments to local rules. He added, however, that the docket continued to carry the item as "pending" although he could not recall that the Committee had ever fully discussed the matter or voted on it. Mr. Rabiej stated that the matter was in effect "completed" because other developments in the area of local rules had disposed of the matter. Thus, the docket will be changed to reflect that fact.

VII. REPORT OF THE ADMINISTRATIVE OFFICE ON MATTERS PENDING BEFORE CONGRESS

Mr. Rabiej reported briefly on several matters pending before Congress, including a status report on the continuing attempts to amend Rule 46. He also noted that Congress was considering an amendment to Rule 32.2 to correct a problem in those cases where the forfeiture order is not included in the judgment.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in April or May 2004. Judge Carnes asked Mr. Rabiej to circulate a list of possible dates to the Committee and asked members to indicate if they could not attending any of those dates.

The meeting adjourned at 11:45 a.m. on Thursday, October 16, 2003

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee