

MEMORANDUM

TO: Judge Sutton
FROM: Judge Graber
DATE: August 7, 2015
RE: Suggestions for potential Rule amendments

I recently noticed two provisions in the Federal Rules of Criminal Procedure that might benefit from amendment. If you agree, feel free to share this memo with others, as may be appropriate.

1. Rule 32 governs sentencing, and Rule 32.1 governs revocation of supervised release. We recently held that a "gap" exists in Rule 32.1, and we imported into the revocation context the requirement from Rule 32 that the district court solicit the government's view at sentencing. United States v. Urrutia-Contreras, 782 F.3d 1110, 1113–14 (9th Cir. 2015); see also United States v. Whitlock, 639 F.3d 935, 940 (9th Cir. 2011) (importing into the revocation context certain disclosure requirements from Rule 32). The Rules Committee might consider amending Rule 32.1 in response to Urrutia-Contreras and Whitlock to define more concisely the procedures applicable to revocation proceedings. See Whitlock, 639 F.3d at 939–40 (noting that Rule 32.1 was amended in response to a gap described in United States v. Carper, 24 F.3d 1157 (9th Cir. 1994), superseded in part by rule as stated in United States v. Reyes-Solosa, 761 F.3d 972, 975 n.2

(9th Cir. 2014)).

2. Rule 23 requires that a waiver of the right to a jury trial or a waiver of the 12-member aspect of jury trials be "in writing." Fed. R. Crim. P. 23(a)(1) & (b)(2). In many decisions, circuit courts have held that a defendant may meet the "in writing" requirement orally, so long as the waiver is knowing and intelligent. See, e.g., United States v. Fisher, 912 F.2d 728, 731–33 (4th Cir. 1990); United States v. Saadya, 750 F.2d 1419 (9th Cir. 1985); United States v. Lane, 479 F.2d 1134, 1136 (6th Cir. 1973) (per curiam); United States v. Ricks, 475 F.2d 1326, 1327–28 (D.C. Cir. 1973) (per curiam); see also United States v. Essex, 734 F.2d 832 (D.C. Cir. 1984) (holding that an oral waiver violated Rule 23(b) but that the error was harmless because the oral waiver was knowing and intelligent). The Rules Committee might consider amending Rule 23 either by emphasizing that non-written forms of waiver are insufficient or by replacing the "in writing" requirement with a "knowing and intelligent" requirement, in conformance with courts' actual practice.

Thank you for considering my suggestions.